Malebolge

Carolene in Reverse

Contractual Interpretation for Dismantling the Dictatorship of 'Discrete and Insular Minorities' in Transnational Private Ordering Regimes*

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> *'Nor need we enquire whether similar considerations enter into the review of* ***statutes***[a] *directed at particular religious,* Pierce v. Society of Sisters, *268 U.S. 510, or national,* Meyer v. Nebraska, *262 U.S. 390;* Bartels v. Iowa, *262 U.S. 404;* Farrington v. Tokushige, *273 U.S. 284, or racial* ***minorities***[b]*,* Nixon v. Herndon, supra; Nixon v. Condon, supra: *whether prejudice* ***against***[c] *discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect* ***minorities***[d]*, and which may call for a correspondingly more searching judicial inquiry.* Compare McCulloch v. Maryland, *4 Wheat. 316, 428;* South Carolina v. Barnwell Bros., *303 U.S. 177, 184, n 2, and cases cited'.*
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> *United States* v *Carolene Products Co.* (No. 640), 304 U.S. 144, fn 4 (Argued: April 6, 1938; Decided: April 25, 1938; 7 F. Supp. 500, reversed)
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> [a] [what if we read: 'private ordering'?]
> [b] [what if we add: 'and every other weak community'?]
> [c] [what if we read: 'caused by'?]
> [d] [what if we read: 'diffuse and unorganized majorities'?]

I. In his profound and brilliant analysis, Dan Wielsch leads us to a turning point in the theory of contractual interpretation. Neither text nor context, neither textualism nor contextualism represent the core question but the fine acknowledgment and construction of the adequate institutional structures in which the 'interaction system', mediated by contractual *semiosis,* occurs. The methodological imperative of an institutionalized interpretation rings out

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'follow the institution!'. Thus, if in the classical model 'text replaces context', in the ongoing process of bargaining (the premise of every institutional theory) 'augmented context is reintroduced into text'.[1]

According to the threefold levels' contract theory elaborated by Gunther Teubner,[2] Dan Wielsch highlights that

> 'The words of the contract are not just afforded meaning by the parties. They also constitute a communication within the legal system, eventually being subject to the interpretative acts of a nation state's legal organs. In fact, this simultaneity of relevance for a plurality of systems of meaning production lays the ground for the social function of contracts. It provides the concrete personal relation – that forms a social interaction system – with the capacity of the law as a highly differentiated calculus of justice determinations'.[3]

Within this interlaced scriptural design, we are now invited to distinguish between established and rising institutions; the former needs an 'institution-preserving interpretation', the latter an 'institution-creating' one. In the author's words, when

> 'institutional context for certain types of transactions is well-established and its main normative features are known, then courts should apply an institution-preserving interpretation'.

When, on the contrary,

> 'the institutional context required for a specific transaction or project may still have to evolve and its normative requirements may still have to be elucidated',
>
> 'an institution-creating interpretation would instead have to acknowledge the primarily societal character of institutional development and would have to facilitate innovative contractual practice in shaping a socially responsible institutional arrangement for novel types of

[1] D. Wielsch, 'Interpretation Regimes', unpublished manuscript on file with the author, respectively at 1 and 3.

[2] G. Teubner, 'In the Blind Spot. The Hybridization of Contracting' 7 *Theoretical Inquires in Law*, 51-71, 52 (2006): 'Today's individual contract today typically breaks down into several operations within different contexts: (1) an economic transaction which, recursively intermeshed in accordance with the intrinsic logic of the economy, changes the market situation, (2) a productive act which, in accordance with the intrinsic logic of the relevant social context (e.g. medicine, media, science, art, technology, and other social areas where goods and services are produced) changes the productive situation, and (3) a legal act which, recursively intermeshed with other legal acts in accordance with the intrinsic logic of the law, changes the legal situation'.

[3] D. Wielsch, n 1 above, 2.

cooperation'.[4]

Here, interpretation is a way of constructing (or almost strengthening) a rising institution.

Private autonomy – traditionally focusing on State law conceptual assessment – is an established institution; we must preserve it through an interpretation principally oriented to restoring the regulative ruptures grounded in the inequality of bargaining power. From this basically State-centered point of view, the private transaction, standard contract[5] and even collective agreements all flow in the same direction, that of institution-preserving interpretation. The other side of this institution – the most uncertain, that of the still not (completely) emerged institution – is transnational private ordering. Here 'interpretation through state legal organs is thus forced to respect the institutional imperatives of the transnational creative community'.[6]

II. Dan Wielsch's shift from *text/context* to *preserving/creating institution* is the way forward for contractual theory. It involves deep theoretical developments and raises some radical questions. Interpretation rules are rightly conceived as a way of preserving the autonomy of societal subsystems and as a necessary means by which to regulate the bargaining process (one gamer in a multiple player contract-writing game).

Here is the first question in this process:

Observations. How can we observe each institution's movements? Institutions are being observed during their shaping and reshaping of themselves and we preserve (or construct) them somewhat through our observations. Therefore, Wielsch's analysis clearly demonstrates that when they refer to contract interpretation, epistemic and institutional moments are held in pragmatic unity. Knowledge and policy go together.

The second question concerns *power structures* (courts, governments, non-governmental_organizations, strong and organized or weak and diffuse communities). If 'institutional context' is the sub-system in which the private norm emerges (the specific area of private ordering), we must consider the complexity of regulatory powers that factually adjudicate every semantic contractual battle between the parties as a fragment of the whole. The design of this empowerment produces the semantic space, the event of signification.

[4] Ibid 16-17.

[5] Here 'the fairness test emulates the missing discourse as if it had happened: the counterparty is only subject to the standard terms if they stipulate rights and duties that would at minimum result from actual discourse. A fairness test for standard contract terms thus operates as a public rule of recognition for a special type of private regulation that is prone to neglect environmental reference': Ibid 7.

[6] Ibid 16.

Institutions result in a multiple set of practices and semiotic codes, mutually connected in an ongoing process.

But this is the point; the process selects its outputs because the process itself takes the form of an institution. No content arises spontaneously but always in a specific institutional space. Therefore, no institution is neutral and defining the structure of possibility for human events is its proper function.

The confluence of an epistemic question ('how much should I know before judging?') and of a political one ('how should I see the future of the interaction process that this contract shapes and by which this contract is mutually reshaped?') reveals the great paradoxical status of interpretation; it occurs in the *is/ought* divide but locates itself in the blind spot of this divide, in which its inner structure requires its self-crossing or almost its suspension. Echoing Giorgio Agamben,[7] we could say that interpretation introduces a permanent state of exception in the 'jurisgenesis' (in Robert Cover's sense).[8] Nevertheless, it seems clear that it is better to locate the interpretation theory at the same level as the complex multiple game named *contractual semiosis*.

Both standard contracts and for instance, transnational contracts under master agreements by private institutions such as the ISDA (International Swaps and Derivatives Association) are 'polyphonic':[9] their terms derive from multiple writers (legal firms, boards of experts, courts). Every contract is a fragment of a complex architecture. Here is the hard work; regulating contracts by contractual tools (master agreements simulate and regulate future contracts and consequently private regulatory institutions are also contracts). The difference between old and new contractual spaces exists in their scale and vagueness.[10]

Hence, we come to the (perhaps surprisingly) third question; *contractual*

[7] G. Agamben, *State of Exception*, translated by K. Attell (Chicago: Chicago University Press, 2005), 7 (state of exception as 'paradigm of government').

[8] R. Cover, 'Nomos and Narrative' 97 (4) *Harvard Law Review*, 4-68, 50, fn 137 (1983): 'Jurisgenesis is a process that takes place in communities that already have an identity'.

[9] In the sense mediated by M. Bakhtin, *Problems of Dostoevsky's Poetics*, edited and translated by C. Emerson (Minneapolis: University of Minnesota Press, 1984), 9 (author's emphasis): 'A plurality of independent and unmerged voices and consciousnesses, a genuine polyphony of fully valid voices is in fact the chief characteristic of Dostoevsky's novels'. What unfolds in his works is not a multitude of characters and fates in a single objective world, illuminated by a single authorial consciousness; '*rather a plurality of consciousnesses, with equal rights and each with its own world*, combine but are not merged in the unity of the event'; so 'The essence of polyphony lies precisely in the fact that the voices remain independent and, as such, are combined in a unity of a higher order than in homophony' (Ibid 21).

[10] Perhaps in their degree of the five requirements for a generative system, according to Jonathan Zittrain's argument: leverage, adaptability, ease of mastery, accessibility, transferability. However, the problem has common roots. J. Zittrain, *The Future of Internet and How to Stop It* (New Haven and London: Yale University Press & Penguin UK, 2008), 71-73; Id, 'The Generative Internet' 119 *Harvard Law Review*, 1974, 1980-1982 (2006).

structural violence against weak majorities. The generation of any institutional context (either old or new but especially if it is a developing one) is not a one-way street to a unique solution. By virtue of their power, mediated as it is by contracts, few masters of (contractual) writing can manage this process in their own best interest. As a societal autonomous phenomenon, private ordering at an institutional transnational level is a matter of complexification of power, the next stage of the normative process constructed by standard contractual terms.[11]

III. We are confronted with a position, which is the reverse of the doctrine expressed in the celebrated *footnote 4* in the United States Supreme Court's *Carolene Products* case.[12] There the objective was to protect 'discrete and insular minorities' from a legislative process that had neglected their interest despite democracy. Now the question is about protecting unorganized and weak majorities (of actual or potential contractual parties) from the scriptural power of an organized minority of private regulators. The method is based on an ambivalent conviction; not only is private ordering the key to regulate complex contracting ('in private ordering we *trust*'), but is also a permanent factor of hegemonic disruption ('in private ordering we *distrust*').[13]

Dan Wielsch first noticed the reverse polarity of private ordering in his essay *Global Law's Toolbox*.[14] In search of a criterion for 'developing public rules of recognition', he warns that 'recognition of private normative orders requires some form of representation of the interests affected';[15] he insists on the necessity of a 'right to opt out' of the private legal order and advocates a

[11] Every social space mediated by exchange (therefore, by money) is a contractual space of mutual action. Every semiotic in a contractual space is a structure for a granted endless exchange. 'As has been stated, the greater the number of traders engaged in the same kind of a transaction, the more likely the contracting infrastructure will be provided jointly as a club or industry-specific public good by a trade association alone or in collaboration with public authorities': D. Wielsch, 'Interpretation Regimes' n 1 above, 13. 'Public' is not the same as 'common'. Interpretation distances the common dimension of contract from its public dimension.

[12] *United States* v *Carolene Products Co.* (No. 640), 304 U.S. 144, fn 4. See J.M. Balkin, 'The Footnote' 83 *Northwestern University Law Review*, 275-320 (1989); B. Ackerman, 'Beyond Carolene Products' 98 *Harvard Law Review*, 713-746 (1985); L. Weinberg, 'Unlikely Beginnings of Modern Constitutional Thought' 15 *Journal of Constitutional Law*, 291-330 (2012); D.A. Strauss, 'Is Carolene Products Obsolete?' 4 *University of Illinois Law Review*, 1251-1269 (2010).

[13] We see the classic Ely model, according to which the purpose of constitutional law 'has been and remains that of devising a way or ways of protecting minorities from majority tyranny that is not a flagrant contradiction of the principle of the majority rule' (J. Hart Ely, *Democracy and Distrust. A Theory of Judicial Review* (Cambridge MA: Harvard University Press, 1981), 8) as part of a more complex model, that regulates the danger of tyranny on each side (majority and minority) of social systems.

[14] D. Wielsch, 'Global Law's Toolbox: Private Regulation by Standards' 60 *The American Journal of Comparative Law*, 1075-1104 (2012).

[15] Ibid 1096.

reflexive 'compliance with *ordre public*'.[16] The public rules of recognition show us all, therefore, the many faces of private ordering. Wielsch's critical approach lends itself to wide critical analysis. The mutual transformation of State law and private ordering in this struggle for recognition occurs in the shadow of structural violence and structural empowerment.

This time, the *Carolene*'s salvation by distrust finds itself at the segmented system, that of interaction between the parties, whose content is repeatedly at risk of being hegemonized by a dominant internal group. Interpretation becomes here the least dangerous branch (in a paradoxical version of Alexander Bickel's formula)[17] for diffuse and unorganized weak majorities as contractual parties to restore the balance of power.

The only strategy is: Beware of powerful minorities! Private ordering lives always in dark times; the institutions of private regulation are permanently in danger of falling under the dictatorship of discrete and insular transnational minorities.[18]

With a '*Carolene* in reverse' approach like that, we can hope to reach democracy (or constitutionalization) by distrust.

[16] Ibid 1096-1100.

[17] A. Bickel, *The Least Dangerous Branch* (New Haven: Yale University Press, 1962). With Bickel's formula things also go backwards. His 'countermajoritarian difficulty' becomes a 'contermajoritarian remedy'.

[18] See (but exclusively with reference to racial questions) G.J. Chin and R. Wagner, 'The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty' 43 *Harvard Civil Rights-Civil Liberties Law Review*, 65-125 (2008).

Appendix: A Tribonian's Game

***Carolene* Footnote 4**	***Carolene* reframed (interpolated) for a global contracting world**
Nor need we enquire whether similar considerations enter into the review of **statutes** directed at particular religious, *Pierce v. Society of Sisters,* 268 U.S. 510, or national, *Meyer v. Nebraska,* 262 U.S. 390; *Bartels v. Iowa,* 262 U.S. 404; *Farrington v. Tokushige,* 273 U.S. 284, or racial **minorities**, *Nixon v. Herndon, supra; Nixon v. Condon, supra:* whether prejudice **against** discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect **minorities**, and which may call for a correspondingly more searching judicial inquiry. *Compare McCulloch v. Maryland,* 4 Wheat. 316, 428; *South Carolina v. Barnwell Bros.,* 303 U.S. 177, 184, n 2, and cases cited. *United States* v *Carolene Products Co.* (No. 640), 304 U.S. 144, footnote 4 (Argued: April 6, 1938; Decided: April 25, 1938; 7 F. Supp. 500, reversed)	Nor need we enquire whether similar considerations enter into the review of **private ordering** directed at particular religious, *Pierce v. Society of Sisters,* 268 U.S. 510, or national, *Meyer v. Nebraska,* 262 U.S. 390; *Bartels v. Iowa,* 262 U.S. 404; *Farrington v. Tokushige,* 273 U.S. 284, or racial minorities ***and every other weak community***, *Nixon v. Herndon, supra; Nixon v. Condon, supra:* whether prejudice ***caused by*** discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect ***diffuse and unorganized majorities***, and which may call for a correspondingly more searching judicial inquiry. *Compare McCulloch v. Maryland,* 4 Wheat. 316, 428; *South Carolina v. Barnwell Bros.,* 303 U.S. 177, 184, n 2, and cases cited.