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## Hybrid Laws: Constitutionalizing Private Governance Networks

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“... une certaine nouvelle Logique”  
Gottfried Wilhelm Leibniz on the  
need for simultaneously  
heterarchical and overarching  
relations between the confessions.

### I. Blurring Boundaries

Does the new economy dismantle the dichotomy of contract and association? Are strange hybrids and networks forcing us to abandon this fundamental distinction of private governance regimes? Thirty years ago, Philip Selznick had stressed the institutional differences between contract and association in order to show how much the modern realities of economic organizations had moved away from traditional contract. Thus, he suggested, organizations of the private sector were in need of and simultaneously responsive to the transfer of governance principles of public law and the political constitution.<sup>1</sup> Today, with the massive emergence of virtual enterprises, strategic networks, organizational hybrids, outsourcing and other forms of vertical disaggregation, franchising and just-in-time arrangements, intranets and extranets, the distinction of hierarchies and markets is apparently breaking down. The boundaries of formal organizations are blurring. This holds true for the boundaries of administration (hierarchies), of finance (assets and self-financing), of integration (organizational goals and shared norms and values) and of social relations (members and outside partners).<sup>2</sup> In formal organizations, membership becomes ambiguous, geographical boundaries do not matter much any more, hierarchies are flattened, functional differentiation and product lines are dissolved.<sup>3</sup>

<sup>1</sup> Selznick 1969 p. 52 ff.; [Selznick 1992 ch. 11, 12.](#)

<sup>2</sup> Badaracco 1991 p. 4.

<sup>3</sup> Ashkenas et al. p. 11ff.; Hirschhorn and Gilmore 1992.

Not only sociological and economic analyses deal with the break-down of the borderline between hierarchies and markets, but also legal practice has great problems in maintaining the clear-cut distinction between the basic private law categories of contract and association.<sup>4</sup> Anti-trust law has been the first victim of the network revolution. Many forms of vertical and horizontal market cooperation that had been prohibited as anti-competitive practices, are now legalized in the name of organizational efficiency.<sup>5</sup> Contract law suffers likewise: It is ad odds with the newly emerging “controrgs”, i.e. hierarchies constituted by market contracts.<sup>6</sup> And corporation law has to deal with chameleon-like shifting identities of corporate actors. In Selznick’s terms, the constitutional question of private governance needs to be raised again because a “conceptual readiness of the legal system” is lacking which could cope with the “opportunity structures” of the new networks.

An “institutional analysis” in the spirit of *Law, Society and Industrial Justice* which would seek to re-establish this relation is confronted with two contradictory interpretations of the borderless organization.<sup>7</sup> Return to contract – that is how some economists interpret the development. The implicit message for a public law constitution of private enterprises is straightforward: De-constitutionalize the formal organization! They see (rigid) hierarchical organizations dissolving into (flexible) contracts. Networks are institutional arrangements half-way moving from hierarchies to markets. Economic theories of the firm react in a more indirect way by denying fundamental differences between contract and organization and reformulate the firm as a nexus of contracts. Organizations should be seen as contractual arrangements through which payment flows pass smoothly.<sup>8</sup> According to the extreme neoclassical version, organizations do not differ “in the slightest degree from ordinary market contracting between two people”.<sup>9</sup> According to the more moderate institutionalist version, they differ only in the governance structures which are intended essentially to control opportunistic behavior.<sup>10</sup> Still, networks are seen as just “intermediates” between contract and organization.<sup>11</sup> Hybrid arrangements are chosen at a point on this

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<sup>4</sup> [Esser 1996](#).

<sup>5</sup> Shapiro 1998 p. 285ff.; [Joerges 1991](#).

<sup>6</sup> On the law of „controrgs“ see Teubner 1991; 1993b; [Schanze 1991](#).

<sup>7</sup> For an illuminating discussion Tacke 2000.

<sup>8</sup> Grossman und Hart 1986.

<sup>9</sup> Alchian und Demsetz 1972 p. 777.

<sup>10</sup> Williamson 1985.

<sup>11</sup> Williamson 1991 p. 277ff., 281.

scale where on the one hand, market controls are weak because of the asset specificity of the transaction, and on the other the transaction costs of fully integrated organization are too high.<sup>12</sup>

The competing sociological interpretation makes an increasing “social embeddedness” of economic institutions responsible for the blurring of boundaries.<sup>13</sup> The implicit policy message is: Strengthen communal norms in economic transactions! In networks, economic transactions are strongly influenced by ongoing social relations, by concrete histories of personal interaction. Networks are “more dependent on relationships, mutual interests and reputation – as well as less guided by a formal structure of authority”.<sup>14</sup> They are characterized by fairness as opposed to opportunism, diffuse moral obligations as opposed to formal contractual rules, generalized reciprocity as opposed to short-term equivalence.

In my view, none of the two interpretations can claim supremacy, nor is an easy synthesis between them possible. Before sending normative messages, the point is to disentangle closely intertwined institutional developments and to introduce a clear distinction between two configurations that are often equivocated - networks and hybrids. These are different social institutions with distinct characteristics, but each tends to develop its own potential only via a close symbiosis.<sup>15</sup> My argument which distinguishes hybrids and networks and recombines them has five steps:

1. Network is a third type of private coordination, alongside contract and association.
2. Hybrids are not simply mixtures of network, contract and organization, rather social arrangements in their own right. They are based on the institutionalized re-entry of a distinction into the positive side of the distinction.
3. Once the institutional differences between networks and hybrids are established, a parasitic relation between the two becomes viable.
4. Hybrid networks emerge as deparadoxifiers in a double bind situation.

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<sup>12</sup> Williamson 1985; Thorelli 1986.

<sup>13</sup> For a general sociological analysis of network organization, Nohria und Eccles 1992; Grabher 1993; [Mahnkopf 1994](#).

<sup>14</sup> Powell 1990 p. 300; Powell and Smith-Doerr 1996.

<sup>15</sup> In my earlier writings on this subject I have not distinguished clearly enough between networks and hybrids and used the two terms, like many writers do, more or less interchangeably. See Teubner 1991; 1993a; 1993b. For a critique, see Tacke 2000.

5. Private law needs to develop constitutional rules for a third private regime, beyond contract and association. Hybrid networks are new legal actants which are legally constituted
  - a. by intensified duties of cooperation within the network,
  - b. by multiple attribution and distributed responsibility between network and nodes, and
  - c. by constitutional guarantees of the nodes' reflexive autonomy.

## II. Legalizing Networks

### 1. Dangerous Supplements

Patronage relations, clientelism, *amici degli amici degli amici*, quasi-feudal loyalty relations, old-boy networks, mafia-like structures are greatly at odds with the two modern rational institutions, contract and organization. Networks are in themselves effective forms of private coordination, but they are built neither on contractual consent nor on organizational membership. They create likewise strong and binding expectations. It would be misleading to subsume them under the category of relational contracting<sup>16</sup> since they are not based on the self-referential dynamic of constitutive legal acts: neither on concluding an agreement of reciprocal exchange nor on a foundational act of associational membership or pooling of resources, not to speak of something "in between". Their rule producing devices are hetero-referential: networks rely on conditional trust relations. The concept of network is defined neither by formal membership nor by reciprocal exchange but by a specific presumption of trust which is based on recognizable interests, on repeated interaction and on observation by third parties.<sup>17</sup> The sources of those network expectations are manifold and exterior to them: personal relations, family, kinship, friendship, neighborhood, profession, power, influence and various other forms of social interdependence.

Recognizing networks – this has been a perennial problem for the law in the double sense of recognition. Behind the dominating presence of modern contract and organization, they were difficult to identify as institutions in their own right; and if so

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<sup>16</sup> Macneil 1980; Williamson 1985; Gordon 1987; Eisenberg 1994.

they appeared as pre-modern ones, alienating, subverting or even corrupting modern purposive rationality.

Thus, the reaction of contemporary law to personal networks has oscillated between outright hostility, cool indifference and cautious recognition. Insofar as networks of personal relations are seen as directly compromising the integrity of modern institutions, legal rules have constantly tried to suppress these dangerous supplements of modernity as illegal forms of corruption, bribery, sabotage of hierarchical authority, transgression of institutional boundaries, collusion, cartellization and other anti-competitive practices. Other network phenomena, especially the famous informal group relations within hierarchical organizations, have not been penalized by the law but instead covered with the benign veil of legal ignorance. Only very few networks actually received a cautious and conditional legal recognition. But they were not recognized as social institutions in their own right. They appeared in law only under disguise. Networks were dressed up either as contractual expectations, as associational obligations, or as tort duties. For some networks, private law has indeed supported their trust based expectations and effectively sanctioned the breach of trust relations, but it did so with rather inadequate conceptual means.<sup>18</sup> They are usually couched in terms of good faith in contract law, duties of relational contracting, rules of reliance liability, special tort obligations, or legal duties of organizational loyalty. However, these doctrinal constructs can barely hide their foreign origin. And to call them judge-made law only conceals their character as interaction based obligations. Altogether, it remains a cautious and precarious legal recognition. They move in a grey area, always under the suspicion of being corrupt practices. The distrust, especially in the Anglo-American legal and economic culture, against juridifying phenomena like good faith, relational contract, and organizational loyalty, the feeling that strange corporatist, institutionalist, collectivist or paternalistic elements are creeping into modern purpose rationality, is indicative of their character as alien to contractual and organizational origins.

## 2. Productive Supplements?

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<sup>17</sup> Luhmann 2000 ch.1 III; Kramer 1999; [Lorenz 1993](#).

<sup>18</sup> For a profound analysis, see Köndgen 1981.

The situation changes drastically with the recent network revolution. Today, these apparently pre-modern, non-rational, quasi-corrupt practices are becoming the driving force in hypermodern arrangements.<sup>19</sup> Suddenly, the highly suspicious networks are no longer seen as dangerous supplements but as productive supplements of modern rational institutions, opening for them new channels into the environment. One main reason for their massive re-emergence seems to be the knowledge-based character of new modes of production which relies less on traditional resources. The intangible assets of firms,

“knowledge (intellectual capital), reputation and trust (social capital) as well as personal networks (relational capital) are of a paradoxical character: On the one side they are highly volatile, on the other side they are deeply embedded in social systems (embedded knowledge)”<sup>20</sup>

Since non-marketable knowledge is embedded in interpersonal relations and cannot be transferred via separable transactions of sharp contracting, economic organizations are driven toward network-like arrangements in which ongoing relations of personal trust are the basis of day-to-day discussions, constant exchange of information, recursive reinterpretation of events and common development of knowledge. While this would suggest their integration into a membership based formal organization, the required knowledge which is widely dispersed on the market cannot be created and cultivated within a long-term organization. This necessitates more flexible decentered arrangements searching the market for the knowledge sources. And due to the new information technology the costs of extra-organizational information processing are decreasing so that hierarchical arrangements become less and less feasible.<sup>21</sup>

Large technical systems are the other main reason why social networks gain new prominence. They are likewise based on conditional trust relations, however, of quite a different character. Personal trust is not at all present in these large and anonymous networks but an impersonal reliance on the regular course of technological processes. Technology based networks produce permanently not only

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<sup>19</sup> Hedberg et al 1997; Nohria and Eccles 1992.

<sup>20</sup> Littmann und Jansen 2000; Badaracco 1991.

<sup>21</sup> Kirchner 1993.

their standard technical procedures but at the same time they create - via informal coordination or formal decisions - standardized social expectations that result in trust presumptions of a different quality. It is no longer intimate knowledge of situations and persons but technology induced action chains that render the traditional market competition and exchange inadequate and require cooperation. The traditional solution for technical networks in transport, energy, communication, had been the “natural” monopoly of an integrated organization. In the breakup of these monopolies it is not the competitive market that replaces them but trust based networks of cooperation. Altogether it is the complexity of technical products, the pressure on storage costs, the introduction of direct client relation into the production chain, the problems of information asymmetries that make for an astonishing return of trust based networks into modern institutions which a realistic economic anthropology once asserted to be driven by opportunism with guile.<sup>22</sup>

In legal doctrine the most ambitious reaction to these developments is to construct a “network contract” as a full-fledged multilateral agreement.<sup>23</sup> A client who is dealing with a technical network is supposed to conclude a contract not only with his immediate partner but with an indefinite multiplicity of network participants who *a priori* have given their (implicit) mandate to conclude for them this contract as their authorized representative. From this moment on, contractual performance obligations and duties of care between the client and all network participants are supposed to emerge. Legal liability then is not derivative *respondeat superior*, but originary *action directe* against any network participant.

The whole thing is an obvious fiction and a monstrous one. Mutual multilateral representation and a large number of implicit mandates in relation to potential clients do not reflect at all the transactional reality of large technical systems. Moreover, the contractual bond is stretched too far, when it comes to networks. There is no synallagmatic relation, no *do ut des*, between the network parties, bilateral or multilateral. Networks do display reciprocity but of a different kind. The whole point of a network as opposed to a multilateral contract in the strict technical sense of *do us des ut det* is an overarching, generalized reciprocity which expects returns not from the immediate transaction, rather from substantively indeterminate, socially diffuse

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<sup>22</sup> Williamson 1985.

and long-term relations.<sup>24</sup> This may sound like a good basis for the category of relational contract. And Macneil himself seems to agree when he defines the new world economy of turbo-capitalism as a huge relational contract.<sup>25</sup> However, relational contracts need as a basis for their obligations a constitutive legal act of contract conclusion, at least an implicit one, between the partners. And just this is not existent in networks of *amici degli amici* whose expectations are based on entry by contact to just one node which creates the connection to the whole network, personal knowledge, repeated interaction and generalized reciprocity.

If contract law fails to grasp the peculiarity of networks, the law of association and tort law do not fare much better. Indeed, tort lawyers tend to qualify networks as special tort relations which, compared with the anonymous relations among strangers typical for tort law, display different and higher standards of due care.<sup>26</sup> But there is a categorical error involved: tort law is concerned with integrity interest, the protection of positions and rights, and not with performance interest in the movement of goods, services, and information which are the daily bread of network transactions.

Some lawyers qualify networks as corporate law relations, as loose cooperation among autonomous actors toward a common end which makes them legally into associations, partnerships or even corporate groups.<sup>27</sup> But here is another categorical error involved: While in associative relations resources and interests are pooled toward the achievement of a common purpose, the pooling aspect is virtually absent in networks. *Amici degli amici* are notorious individualists, they do not pool anything; they cooperate on the basis of an absent common purpose; there is no collectivity involved. It is trust on the performance of autonomous individual positions with diverging interests upon which they take their risk of individual performance without protection by an overarching organization.

Result of our considerations so far is that private law needs a concept different from contract, tort, association which reflects the inner rationality and normativity of

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<sup>23</sup> Möschel 1987; Rohe 1998 p. 168ff.

<sup>24</sup> Semlinger 1993.

<sup>25</sup> Macneil 2000.

<sup>26</sup> E.g. in a comparative perspective, Brüggemeier 1999 p. 122f.

<sup>27</sup> Martinek 1987; Oechsler 1997.



networks. The corporate lawyer Richard Buxbaum concludes the question of legal qualification:

"The complexity of the network, as distinguished from the dual/horizontal nature of the contract and the unitary/vertical nature of the firm, itself is a mechanism for this interactive form of communication. It is the multiple channels, their criss-crossing, their multi-directionality, that generate their interactive rather than top-down, or left-to-right communication."<sup>28</sup>

And it is probably the time-honored categories of trust, confidence or reliance which will guide the further juridification of networks. Indeed, trust, reliance, confidence, and of course good faith have been respectable categories of law which are however used, as we said above, only as derivatives of larger legal institutions. In the case of networks they need to be developed as a legal institution in their own right. Without a necessary coincidence with contract, tort or association these relations come into a legally relevant existence according to specific conditions, create rights and duties, produce external liabilities of a special kind, and develop their own rules for termination.

### **III. Constitutionalizing Hybrids**

#### **1. Hybrids and Networks**

There is however one complication involved which makes it so difficult to disentangle the logic of networks from contract and association. If one looks into concrete arrangements of virtual enterprises, just-in-time, franchising, outsourcing, money transfer, strategic alliances, and other networks, one will frequently if not always find a considerable number of formal contracts and formal organizations connected to the wider network configuration. Does this not justify at the end to qualify those arrangements as contractual or associational in kind or as something intermediate, even though the boundaries of the single contracts and organizations involved do not coincide with the (usually larger) boundaries of the network?

There are two reasons why this suggestion goes wrong. In the simplest case of personal networks (old boy networks, informal neighbor relations etc.) networks are sheer trust based interactions among individual or collective actors without any contractual or corporate, arrangements involved. But in the course of an institutionalization à la Philipp Selznick<sup>29</sup> many informal networks develop into full-fledged autopoietic social systems, once their operations become recursive, once they develop a history of their own, once they acquire a distinct social identity, and particularly once they act in different environments.<sup>30</sup> Then they tend to be institutionalized in law as a relational contract or as a formal association, partnership, corporation or corporate group which may give them more stability and duration than a merely trust base would. And the networks themselves may even evolve into full fledged collective actors with a social identity of their own. Franchising systems are a case in point. They are, if the *contradictio in adjectu* is allowed, contractual corporate actors.<sup>31</sup> But one should clearly see this as a overlaying of two different logics of obligation which does not put into question neither their analytical nor their empirical distinctness. Informal trust expectations which are typical for networks are overlayed by a formal contractual agreement and/or associational membership. And in these situations it may be for practical reasons sufficient to qualify them legally as obligations of contractual good faith, relational contracting or associational loyalty. But still the law would have to realize that the intensity and the quality of those *bona fide* obligations are of heteroreferential origin and not the result of self-referential recursivity in formal legal institutions.

The other reason for the obvious confusion lies in the typically parasitic character of the new networks. The case in point are interorganizational networks and groups of contracts in industrial production where networks create informal horizontal relations between these institutions on several hierarchical levels.<sup>32</sup> Here from the very beginning, networks do not exist on their own like many of the traditional interpersonal networks do, but come into existence only when they are able to find exploitable institutions. They function as parasites, living on institutions and growing

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<sup>28</sup> Buxbaum 1993.

<sup>29</sup> [Selznick 1992 ch. 9.](#)

<sup>30</sup> Luhmann 2000 ch. 13 II.

<sup>31</sup> Teubner 1993a p. 226ff.

<sup>32</sup> [Kämper and Schmidt 1999.](#)

with them, but at the same time resisting any attempt of control through them.<sup>33</sup>

Compared with the institutions which nourish them, they have their own distinct rules of inclusion/exclusion, they gain their influence exclusively from the institutions and tend to be their permanent supplements – productive or dangerous ones.

Thus, it is the frequent coincidence of networks with formal contracts and organizations and their parasitic relation to them that makes it necessary simultaneously to separate the logic of networks from the logic of contract and organization, and to take their intimate symbiosis into account. In the economically relevant cases, networks do not appear in pure form just in and for themselves. Typically, networks appear as hybrids, in a tight combination with contractual arrangements or with formal organizations.

## **2.The Underlying Dynamics**

But why hybrids? Why this massive emergence of parasitic networks that exploit modern social institutions. The answer is - double bind. Hybrid networks – this is my second thesis - are the result of contradictory or even paradoxical demands on formal contracts and formal organizations.<sup>34</sup> Hybrid arrangements then serve as de-paradoxifiers. They emerge in situations of paradoxical communication where actors are exposed to contradictory messages (A = non-A), even to paradoxical messages (A because non-A). There are two ways out of these contradictions, one is repressive, to prohibit the paradox and to admit only one of the contradictory messages. But there is also a second way out, a productive use of the paradox, a way to make the contradiction as such fruitful by creating a more complex representation of the world. We are advised to follow the directions of "morphogenesis", a conceptual construct which has been proposed by Krippendorff in the context of paradoxes:

'Unless one is able to escape a paradoxical situation which is what Whitehead and Russell achieved with the theory of logical types, paradoxes paralyze an observer and may lead either to a collapse of the construction of his or her world, or to a growth in complexity in his or her

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<sup>33</sup> Hutter and Teubner 1993; Luhmann 2000, ch. 13 II.

<sup>34</sup> This argument is building on Karl E. Weicks ideas on the role of ambivalences in organizations, [Weick 1979](#).

representation of this world. It is the latter case which could be characterized as morphogenesis'.<sup>35</sup>

If in a double bind situation people choose contractual arrangements they tend to repress one of the two contradictory messages. If they choose integrated hierarchical organizations they do the same thing for the other message. Under certain conditions, however, hybrid arrangements provide for an institutional environment where paradoxical communication is not repressed, not only tolerated, but invited, institutionally facilitated and, sometimes, turned productive. Hybrids as a highly ambiguous combination of networks with contracts and organizations seem to me the result of a subtle interplay between different and mutually contradicting logics of action. They are an institutional response to paradoxical communication in their environment. And while some of these paradoxes are lurking in their direct economic environment we should be aware of the fact that the paradoxes stem increasingly from contradictions between economic action on the one side, technological, scientific, cultural, medical and political action on the other side. In a sense, the communicative paradoxes are society's revenge for the autonomization of economic action. There are three typical constellations in which hybrids are the morphogenetical products of paradoxical economic communication. These constellations reveal the underlying requirements for the networks' constitutionalization.

#### (1) Co-opetition

There is a first - should I say the standard - constellation of hybrid networks in which they appear as the result of contradictory demands from the market. Economic transactions, especially when they deal with knowledge based products, are simultaneously exposed to the contradictory demands of competition/exchange and cooperation/hierarchy. The paradoxical message is "Cooperate!" while at the same time the order is: "Compete!" The traditional reaction is to make a forced decision of the either-or-type. Result is the well-known rigid separation between market and hierarchies supported by similarly rigid rules of anti-trust law, contract law and corporation law. Each institutional answer, market or hierarchy, contract or organization, represses the paradox. Each favors predominantly one of the contradictory orientations while pushing

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<sup>35</sup> Krippendorff 1984 p. 51f.; [Luhmann 1995 p. 352, 355f.](#)

the other into the darkness of informality where it is sometimes discovered by subversive sociologists interested in the dark side of formal institutions.

Recent analyses of business firms have described the emergence of hybrid networks as a more sophisticated, a more productive response to the contradictory demands of competition and cooperation.<sup>36</sup> "Co-opetition" is the new somewhat trendy magic formula which is supposed to be an intermingling of cooperation and competition in arrangements that blend organizations, contracts and network elements.<sup>37</sup> By contrast, in the perspective of de-paradoxification, I would stress the aspect of "re-entry" as against a mere mix of cooperation and competition. A mere blending of competitive and cooperative aspects would not be a way out of the oscillations of the paradox. Re-entry in its technical sense, as defined by Spencer Brown, however, is not blending the two sides of a distinction.<sup>38</sup> The distinction is not blurred, but strictly maintained and firmly institutionalized. At the same time the same distinction is drawn a second time, but re-immersed and in its turn institutionalized within one of the two sides of the first distinction. Thus, we have two fundamental types of hybrids, not just one. Organizational networks remain firmly institutionalized as formal organizations, but they re-introduce internally market elements via network structures. Contractual networks in their turn retain their contractual character but they create on this basis internally cooperative and even hierarchical structures.<sup>39</sup> In this way hybrid networks are atypical institutions. They do not combine on an equal basis network elements with contractual and organizational ones. Rather, they create a primary relation of contractual or organizational character and reconstruct within it a secondary relation. Thus, the internal logic of the primary relation as a frame dominates and forces the secondary one to adapt.

How does the law react to such a confusing arrangement? Obviously, this intermingling of competition and cooperation is greatly at odds with the policies of anti-trust law which draws a bright line between competitive markets where cooperation is outlawed as anti-competitive and collusive behavior on the one side, and corporate arrangements where cooperation between members is legitimate on the other.<sup>40</sup> Indeed, European

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<sup>36</sup> See especially Jarillo 1993.

<sup>37</sup> Littmann und Jansen 2000.

<sup>38</sup> Spencer Brown 1972 p. 56ff; 69ff.

<sup>39</sup> Teubner 1993b p. 226ff.

<sup>40</sup> Kirchner, 1996; 2000.

competition law had great difficulties in recognizing franchising networks. After long legal and political battles, exceptional permissions were granted on the ground that trademarks and other efficiencies deserve to be protected. EU-competition law retreated to disclosure requirements and to the delegation of rule making power to private associations. Indeed the rulemaking power of private associations is indicative for the precarious blend between competition and cooperation which in order to avoid a "race to the bottom" excludes individual adjustment and requires general rules. However, at the same time the formulation, supervision and implementation of the rules is not left to regulatory bodies, governmental agencies, or the courts but to private governance regimes.

It is still an unresolved legal question under which condition networks violate the rules of competition law. In this policy-conflict between restraints of competition and efficiency of governance arrangements, the law is beginning to use the distinction between efficient and non-efficient networks. Centralized networks with a unitary organization which is centrally managed do not display the typical efficiency advantages, but only networks with an intelligent mixture of central and decentral management. A workable criterion for an "authentic" network is profit sharing between the nodes and the centre of the network so that residual risk and residual profits remain with the decentral nodes. A centralized price policy of the whole network means that the efficiency advantages do not exist any more. Then an exception of the anti-trust rules is no longer feasible.<sup>41</sup>

## (2) Unitas multiplex

Things get more complicated if one looks in a second constellation to hybrid networks through the lenses of attribution theory which asks the question to whom economic action is attributed, to individual or to collective actors. The paradox involved here is the famous "unitas multiplex", the confusing multiplicity of independent actors within the unity of a collective actor.<sup>42</sup> Is the network just a nexus of trust based relations between self-interested actors or a collective actor in its own right which emerges as a new player and to which participants in the net owe loyalty? The contradiction of the simultaneous messages to act rationally looks quite different in this context. On the one side "Obey! You are part of a larger common enterprise", and on the other side "Be

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<sup>41</sup> Kirchner 1993; BGH BB 1999, 860.

autonomous! You are a self-responsible actor". Again, the rigid choice between contract and organization which was the traditional approach in both economic theory and legal doctrine leads only to repressive solutions of the paradox. Hybrid networks in their turn find a creative de-paradoxifying solution - "double attribution". This innovative attribution technique is one of the most important characteristics of hybrid networks distinguishing them from simple attribution to individual actors in contract and to collective actors in organizations. One and the same economic transaction is attributed twice, to the individual actor as the node in the network and to the overarching network itself.<sup>43</sup>

What hybrid networks gain through double attribution is a drastic improvement of their relation to the environment. One and the same network can appear in one environment as a multitude of individual actors connected by single contracts, and in a different environment as one collective actor, as an autonomous player with a distinct identity in a different game. This chameleon-like quality of hybrid networks gives them access to new environments which would not be accessible to them if they were exclusively either a mere nexus or a mere collective unit.

With these new forms of action attribution new risks emerge that require a legal responsibility of networks which is different from both individual liability and collective liability of organizations. Elsewhere I have argued at length for a special network liability.<sup>44</sup> In continuation of this argument I would like to concentrate now on two points: distributed vs. centralized liability and interface liability in networks. While "piercing the contractual veil" is the general formula for a network liability, a distinction is needed for two typical situations, i.e. centralized and decentralized networks. Some hybrid networks are so highly centralized and the autonomy of their nodes is reduced to such a degree that they are nothing but hierarchical organizations in contractual disguise. These networks are used as strategic instruments to evade mandatory rules of law. Empirical evidence supports the claim that firms use indeed disaggregation strategies in order to circumvent tort liability<sup>45</sup> and employment protection laws.<sup>46</sup> What economists

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<sup>42</sup> Sugarman and Teubner 1990.

<sup>43</sup> Teubner 1993b p. 227f.

<sup>44</sup> Teubner 1991; 1993a p. 57ff.

<sup>45</sup> Hansmann and Kraakman 1991, p. 1881, 1913ff.

<sup>46</sup> Collins 1990b p. 360ff.; cf. also Felstead 1991 p. 53f.; Schanze 1991 p. 100; Hirte 1992 p. 193f.

euphemistically call "flexibility" then turns out, in the sober language of the law, to be an evasion of mandatory rules.<sup>47</sup>

In cases where the economic reality of contractual networks is a tightly coordinated organization which is highly integrated in their information, production, distribution and hierarchical command structure,<sup>48</sup> legal policy cannot tolerate such an evasion of mandatory duties by the mere choice of legal form. And it need not since due to their centralization these quasi-hybrids which are in reality integrated organizations do not display any more the efficiency advantages which consists in the autonomy of the network nodes. The law must treat these arrangement as what they are in economic reality: as fully-fledged organizations to which mandatory rules have to be directly applied. Since highly centralized hybrids are integrated functional economic units they must also be liability units. This is the solution of the new labor law in Spain.<sup>49</sup> This is the reason why in the banking sector, several lawyers plead for the full responsibility of the customer bank for the whole transfer process in the money transfer chain.<sup>50</sup> Similarly, when franchising nets are highly centralized they need to be treated explicitly as full-fledged corporate arrangements and exposed to the mandatory rules of the law of economic enterprises. Other lawyers propose treating centralized bundles of franchise contracts according to corporate law. In Germany, they even go so far as to argue that highly centralized forms of franchising should be subject to the German law of groups on companies. Result is a far-reaching collective liability of the whole network.<sup>51</sup> Organizational liability rules would be especially suited to those cases in which franchising committees as quasi-corporate bodies make collective decisions for the whole network.<sup>52</sup>

The liability situation is different in decentralized networks. While external liability of the network itself, and not only of the individual units, should be provided by the law, such a piercing of the contractual veil should result not in the unified collective liability of corporation law. Instead, a decentralized, multiple, and selectively combined liability of the network and the concretely involved nodes is the adequate form of liability. As

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<sup>47</sup> Collins 1990a p. 744.

<sup>48</sup> Martinek 1987 p. 123ff., 214ff.; Dnes 1991 p. 133ff.; Felstead 1991 p. 52.

<sup>49</sup> Art. 42 Labor law statute. See Supiot 1999 p. 51.

<sup>50</sup> Köndgen 1987 p. 143ff.

<sup>51</sup> Martinek 1987 p. 23ff., 633ff.

<sup>52</sup> Teubner 1991; for outsourcing cf. Hirte 1992 p. 197f.



against fully collectivized liability of the formal organization this results in a relative re-individualization of collective liability in networks. In analogy to the well-known market share liability one could speak of a “network share liability” which is especially important in situations where causation of damage cannot be traced back to individual nodes, but only to the network itself.<sup>53</sup> In this situation no traditional collective actor is involved whose assets could serve as a liability basis. But the network does serve as the focal point of attribution of liability and as the starting point for re-individualizing liability for the nodes. Especially in situations where the individual contribution of singular nodes is no longer traceable, such a re-individualization is urgently needed. A joint and several liability would be excessive, however, and should be replaced by a pro-rata-liability of the nodes involved, according to their share in the whole network.

Interface-liability is the second conspicuous aspect of an enlarged responsibility of networks. The change from hierarchy to network creates new interfaces between nodes that once upon a time had been covered by intra-organizational coordination. On the other side, in a competitive market situation with firms offering partial elements it is the risk of the customer to control the interfaces of the separate products. Networks again are different. They offer the complex product while due their decentralized structure, the risk of interface problems is increased. Indeed, empirical research in product safety suggests that in highly decentralized constellations where decision-making power lies with satellite firms there emerge "especially subtle hazards caused by the interaction of subsystems in a technologically complex product". The high division of labor and the highly decentralized controls which we typically find in hybrids for the risks that arise for "...there is a temptation to believe that the product as a whole is safe if each subsystem is safe".<sup>54</sup> Thus, the very character of the hybrid network with all its efficiencies creates external risks due to a lack of coordination among the nodes.

French law has developed a decentralized solution. In special situations in the health and social security sector, the law imposes a duty of coordination on each network node involved and sanctions a breach of these duties with *responsabilité solidaire*.<sup>55</sup> In a different situation of *chantiers temporaires et mobiles*, a directive of the European Union orders the network nodes to install a central coordinator with contractually

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<sup>53</sup> Teubner 1994 p. 19ff.

<sup>54</sup> Eads and Reuter 1983 p. 95.

<sup>55</sup> Art.L. 324-10, L.324-13, art.L. 125-2. See Supiot 1999 p. 50.

defined responsibilities and to establish a *collège interentreprise* with employee participation.<sup>56</sup> These are still particularistic but quite innovative expressions for an emerging interface responsibility for networks. According to the concrete network structure they are in need of either a more centralized or a more decentralized legal procedure of coordination with subsequent collective legal liabilities.

### (3) Private-public networks

The conflict between different logics of action within economic arrangements becomes fully apparent when we look at a third constellation of hybrids. To illustrate this, let me briefly refer to a case study.<sup>57</sup> In order to induce technological change, a governmental agency granted massive subsidies for common research between a branch of industry and independent research institutions. Result was a loosely organized network of long-term-contracts bringing together a technological community with close ties to the relevant industries, the scientific institutions involved and the interested governmental agencies. The study found out that the network came up indeed with successful innovations, but in terms of transaction costs it behaved as irrational and extravagant as a series of United Nations conferences.

In this and in other cases of private-public cooperative arrangements which are very fashionable in the current wave of privatization we can again identify an underlying paradox. Again its origin is a conflict of different logics of action. But this time it seems to lie not only in the conflict between competition and cooperation, nor in the conflict between collective and individual action. Rather it is the conflict of different rationalities in society which drives the private-public arrangements into confusion. This time the request on the actors is to behave according to several contradictory logics of action. The double bind turns into a multiple bind. In our case of a public-private research network, rational actors are to obey simultaneously three mutually exclusive categorical imperatives. Imperative One: "Act so that the maxims of your will can always at the same time serve as a model for general political legislation!" Imperative Two: "Act so that the maxims of your will can always at the same time serve to minimize transaction costs!" Imperative Three: "Act so that the maxims of your will can always at the same

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<sup>56</sup> Dir. Nr. 92/57 24 June 1992.

<sup>57</sup> Lütz 1993 p. 192ff.

time serve to expand in a disinterested way knowledge on the basis of scientific truth!". Immanuel Kant would turn around in his grave.

If in this situation, one had chosen bilateral contractual exchanges between scientific institutes, profit-driven firms, and governmental agencies, one would have indeed successfully suppressed the paradox. Each collective actor would have obeyed one and only one of the three logics of action involved and then entered into an exchange relation. But the price would have been that no close encounter between the different ways to construct knowledge could have happened. Vice versa, if one had chosen an organizational integration of the whole enterprise, one would have found a way to unite successfully the three requirements, as is known from the model of R&D departments in economic organizations. But the prize would have been that one action logic would have dominated the other two with the consequence that scientific and political processes and results would have been economically instrumentalized. In contrast to both solutions, the loosely coupled network that emerged in this case apparently allowed for a strange squaring of the circle. Indeed, in their hybrid character, networks seem to be tailored to the bridging of different contradictory rationalities. They allow for their mutual interference without a hierarchical ranking among them.

In the case of mixed network regimes, the law of private governance cannot rely exclusively on an economic interpretation of its internal dynamics. It is clearly not sufficient to develop legal rules which concentrate on supporting the transaction costs advantages or the efficiency gains of networks as opposed to contractual or organizational arrangements. Indeed, these networks do violate the imperatives of transaction cost minimization and allocative efficiency and are successful nevertheless in innovation. In the spirit of *Law, Society and Industrial Justice*, a broader public law concept of a network constitution is required which would indeed transfer principles of institutional autonomy, constitutional rights, due process, rule of law, public accountability to these mixed private-public configurations.<sup>58</sup>

But there is one element in the mixed networks that drives them beyond the dichotomy of private and public. We found it in the multiple bind of intersystemic networks. The private-public distinction is not rich enough to understand multiple bind. In order to

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<sup>58</sup> Selznick 1969.

regulate the hybrid networks adequately, the law would have to develop an understanding of the network logic that relies on multiple constructs which would come from different origins: economics, political theory, legal theory, sociology of science, technology and other social sectors involved. Each of them can be understood as reflecting a sectorial rationality which the network must bring together without blending them. Law's attention would have to focus on the bewildering situation that such networks are driven by contradictory imperatives which come from a plurality of social systems, and that there is no comprehensive meta-discourse that has the capacity to unite them. And from the beginning it is excluded that law take over the role of a meta-discourse.

And here is the most important task for a legal constitutionalization of hybrid networks. As opposed to instrumental autonomy, I call it the legal guarantee of "reflexive autonomy" to the individual nodes of the network. In integrated organizations, whether private enterprises or public organizations or mixed regimes, the legal rules of organizational procedures are geared toward a common purpose orientation. And when it comes to decentralization and delegation of functions, the character of these is necessarily instrumental. Decentralized units have the freedom to choose in the light of their superior local knowledge the concrete means that are adequate to reach the collective purpose of the comprehensive organization. But even in highly decentralized organizations the precarious balance between what the organization perceives as its general function and its concrete contribution to the environment is a matter of collective reflexion, to be sure, not necessarily at the top, but necessarily as a common enterprise. And public law as well as corporation law in their constitutional, procedural and substantive elements are geared toward this collective reflexion of the organization's role.

This is different in inter-systemic networks. Legal rules need to support the autonomy of the nodes of the network not only to a higher degree but also of a different quality so that they maintain - against all tendencies of centralization - the capacity of reflexion, i.e. the capacity to balance on their own the relation between what they perceive as their social function and their contribution to the environment.<sup>59</sup> In our example this amounts to a quasi-constitutional guarantee of freedom of research as against political and

economic interferences within the confines of a mixed network. And indeed, this idea needs to be generalized. Unlike the situation of a corporate group where legal guarantees of the autonomy of the subsidiaries protect the profit interests of the parts against those of the whole and vice versa, in the situation of inter-systemic networks it is the institutional integrity of research, health, education, journalism, technology, art which needs to be respected in the (not only decentralized but) decentred structure of autonomous nodes and overarching network. While in the law of corporate groups it makes still sense to formulate a comprehensive “group interest” in terms of procedural and substantive legal rules, a “network interest” exists only as compatibility of autonomous network participants.

Is there an implicit message for legal policies as opposed to “De-constitutionalize formal organizations!” or “Strengthen communal norms!”? If any, it is: “Strengthen the networks’ polycontexturality!” This is a neologism for an old idea. Gottfried Wilhelm Leibniz had developed the idea in the connection between theodicy and the reform of the church.<sup>60</sup> Collisions between incompatible norms require new institutional forms. He requested “... une certaine nouvelle Logique” according to which unity becomes thinkable as multiplicity in such a way that individual manifestations of one principle are coordinated without at the same time being dissolved into a higher generality. Leibniz searched for harmony not by homogenization but by constructive interweaving of diversities and contradictions. This is network logic. If God’s word is expressed as a double bind to the believers, if they are exposed simultaneously to *bona opera* and to *solo gratia*, if the contradictory command is “Obey the hierarchy!” and “Obey your conscience!”, then the alternative between interconfessional war or submission to the repressive church hierarchy seems inevitable. Polycontexturality which combines heterarchy with an overarching unity would represent the new institutional logic in *ecclesia semper reformanda*.

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<sup>59</sup> For the trias of contribution (relation to others), function (relation to society) and reflexion (relation to oneself), see Luhmann 1997 p. 757ff.

<sup>60</sup> Sparr 1999.

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