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Coincidentia oppositorum: Networks and the Law Beyond Contract and Organization

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First draft

I. The Need for / Impossibility of Sociological Jurisprudence

'Network is not a legal concept'.[1] If Richard Buxbaum's apodictic judgement is true, then lawyers have little to say about networks. Should they wish to make socially appropriate judgments when cases figuring business networks, franchising networks, just-in-time-systems, or virtual business networks do cross their paths in practice, then they must consult social scientists, such as economists, organizational theorists and sociologists. For better or for worse, they must engage in sociological jurisprudence. Yet, 'sociological jurisprudence' is a pipe dream. Logically-speaking, it is an oxymoron—example: a white raven. Practically-speaking, it necessarily falters in the face of the normative closure of the legal system. This is a lesson we are correctly taught, not only by traditional doctrine and by Max Weber's theory of formal

[1] Richard M. Buxbaum (1993), 'Is "Network" a Legal Concept?' *Journal of Institutional and Theoretical Economics* 149*,* 698ff., 704.

legal rationality, but also by highly evolved systems theory.[2]

It is not my aim to investigate the consistency of a form of jurisprudence that claims also to be sociology, by means of theory-filled discussion on the closure/openness of the legal system. Rather, I seek to undermine this claim through concrete example. My concrete observations concern the manner in which new forms of network phenomena within the economy or society irritate judicial case law and provoke the law into adventures undertaken without the safety harness of legal doctrine. I will raise the question of whether restrictions in the two usual modes in which the law observes its social environment—judicial and legislative reality reconstructions—systematically preclude an adequate treatment of such new social phenomena. Do we need a third mode of observing so-called 'social reality'? Business co-operation networks furnish me with exemplary material for the observation that this new approach cannot simply be secured through the social sciences, but is instead wholly dependent upon a unique combination of doctrinal and socially cognitive capacities. In an effort to irritate the legal system selectively with particular environmental demands, I still denominate this 'third way', sociological jurisprudence, although, and rather because, this is exactly that selfsame form of *necessary* pie-dream that is represented by a 'political

[2] *Pawlowski, Weber, Luhamnn.

methodology of law', or by 'an economic legal method'. I would like to try to take a couple of paces along this impossible but necessary third way of approaching the legal problems of network regulation by demonstrating how the legal demarcation of networks, in particular their factual characteristics and legal implications, can be tackled through confrontation with non-legal social models. At the same time, I would also like, through the identification of possible commonalties, to begin to sketch out a sociological jurisprudence.

Thesis 1: It is a scientific misconception to believe that empirical or theoretical social science insights can guide law to any significant degree. Decisive legal irritations are not supplied by means of interdisciplinary contact with individual scientific systems, but by proximity to the normatively loaded 'reflexive practices' of various social sectors. *My example*: the extension of liability throughout distribution systems is a doctrinally impossible, but a contextual and practically necessary judicial reaction to societal perceptions of the risks posed by economic networks.

Thesis 2: The 'translation' of socially reflexive practices into legal doctrine is not a result of a knowledge transfer from the social sciences to law. Private law doctrine can only be persuaded to develop conceptual innovations by its own, internal, path-dependent evolutionary logic. *My example*: Network is not a legal concept. It is a social science concept and its legal complement can only be

reconstructed within the law by evolving the concept of 'relational contract' into 'connected contracts' (*Vertragsverbund*).

Thesis 3: One of the most important achievements of sociological jurisprudence has been its ability to understand and support the contribution of law to the overcoming of paradoxes within social practice. *My example*: their environments confront Networks with paradoxical demands. Law reacts to such network paradoxes with a doctrine of 'double-attribution'.

II. Piercing the Contractual Veil in Distribution Networks: Three Levels of Legal Reality Construction

A Japanese car importer built up a dealer distribution system through the whole of the Federal Republic. The importer had only succeeded in gaining German market entry relatively late in the day and consequently had difficulties in finding responsible dealers. As a consequence, the importer's marketing efforts were reliant upon working relationships with dealers whose business credentials and solvency were not immediately apparent. The distribution contract stipulated that vehicles would remain the property of the importer up until full payment of the sales price. A customer took possession of a vehicle from a dealer, paying an initial installment on the sales price. The customer was given the vehicle, keys and road license, but not ownership papers since, according to the

importer's distribution contract, these remained in trust until the full payment of the sales price. Under pressure from the dealer and their incorrect claim that full payment was necessary for the internal process of sales completion, the customer paid the remainder of the sales price, without, however, receiving the vehicle's ownership papers. On the insolvency of the dealer, the importer demanded the return of the vehicle from the customer. The customer then claimed that the importer, as the central node within the distribution system, was liable for the failure of the direct dealer to fulfil its legal obligations.[3]

In a courageous judgment, the Karlsruhe Appeals Court (*Oberlandesgericht*), departed from the fundamental principles of German private law doctrine and directed the customer's indirect liability claim to the central distribution node. The grounds for this decision, however, are highly unconvincing. The Court first confirmed the importers' demand for the return of property under §985 of the German Civil Code (BGB) and then rejected the customers' claim to the receipt of property in good faith on the basis that the customers' naivete constituted gross negligence under §932(II) BGB and §366 of the Commercial Code (HGB). Employing a daring sleight of hand, however, they then allowed the customer room to lodge a compensation claim against the importer. The Court finally decided in favor of an

[3] *OLG Karlsruhe NZV 1989, 434.

indirect liability claim against the central distribution node, holding the importer responsible for the dealers' breach of legal obligations, notwithstanding the latter's independence.

The Judgment is an explosive mix of organizational culpability, the breach of legal obligations to maintain transport safety and tortious liability for the acts of assistants. The quality of the Judgment still does not improve, however, even if we make a clear distinction between the various grounds for liability. Either the Court should have fundamentally changed at least one of these principles of German liability law, explicitly distinguishing it from previous precedent, or, it should have rejected piercing liability. Currently, precedent would refute the Appeal Court's finding that the construction of a business network with dealers of a dubious character constitutes organizational liability under § 31 BGB. To date, organizational liability has only been applicable to authentic legal persons, is in any case anchored in corporation law, and has no application to simple multiple contractual relationships.[4] By the same token, the finding of a breach of directors' liability under §823(I) BGB might be precluded by the intrusion of independent contractual dealers into the business network. It is in any case excluded by the fact that this case does not entail damage to a legal position (*Rechtsgut)* in the sense demanded by §823(I). Equally, the escape hatch of

[4] Cf, *Heinrichs in Palandt (2003) § 31, 3.

respondeat superior of § 831 is closed since independent enterprises simply do not qualify as 'assistants to performance'.[5] In view of these problems, it is little wonder that the Appeal Court cooked up a mixture of these three liability forms and thus neatly evaded the question of whether it wished to overrule precedent introducing piercing liability within a business network based upon bipolar contracts.

Is this Judgment best summed up by the cruel phrase ' the soundest judgment with the dullest opinion'? Certainly, the result is plausible and the justification weak. However, it cannot simply be said that the judgment is wrong. Rather, the Court was called upon to tackle phenomena that cannot be addressed within the concepts of contract law and tort—the network phenomenon. By virtue of the massive increase in contractual networks, law has been confronted with the troublesome implications of an evolutionary trend, which it cannot as whole decode using its own analytical tools: independent businesses commit themselves to closely interconnected co-operation networks that undermine the distinction between market and hierarchy and the legal distinction between contract and corporation. Were distribution systems organized as unitary concerns under the law of corporations and labor law, we would still be confronted by the liability problem, but this would no longer be an issue of indirect liability, neither would it entail a breach in contractual privacy. The dealer's

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[5] See, *Thomas in Palandt (2003) § 831, 8.

behavior would be imputed to the manufacturer/primary dealer, under §278 BGB, on the basis of the contractual obligations of the unitary corporation. By contrast, where the marketing of goods is stratified, and distribution between independent levels organized competitively, then relationships with the external environment of the distribution system could not give rise to indirect liability. In conclusion then, the economic networking of independent concerns causes judicial irritation. The construction of an integrated distribution system which, on the one hand, entails more than simple market relationships, but, on the other, does not create any true organizational relationships, forces the judges to establish indirect liability, but at the same time, causes them huge difficulties when they attempt to justify this decision.

'Judicial irritation'—the concept has a double significance: judges are irritated by network phenomena and are provoked to respond to anomalies with a finding of indirect liability that contradicts the logic of their own system. In turn, precedent on indirect liability irritates doctrine, which regards such seemingly equity-oriented *ad hoc* exceptions to privacy of contract as a challenge to the workability of doctrinal concepts.[6] Is traditional

[6] For comprehensive discussion of the relationship between indirect liability and doctrine, see, Eckhard Rehbinder (1969), *Konzernaußenrecht und allgemeines Privatrecht: Eine rechtsvergleichende Untersuchung nach deutschem und amerikanischem Recht*. Bad Homburg: Gehlen, 69ff; *idem*., (1997) 'Neues zum Durchgriff unter besonderer Berücksichtigung der höchstrichterlichen Rechtsprechung', *Festschrift für Friedrich Kübler,* Heidelberg: Müller, 493ff, 496ff.

doctrine in a position to characterize network phenomena such that simple equitable exceptions can be transformed into conceptually precise legal network regulation? Or, is the only source of help here sociological jurisprudence?

Approach 1: Casuistry

Even the most detailed doctrinal characterization has little if any help to offer case law. The blinkered reality perspectives of courtroom proceedings prevent an appropriate recognition of the historically significant trend to networking in marketing and distribution systems, as well as in other forms of multi-lateral co-operation. A construction of reality founded in 'two-party proceedings' necessarily dissects the complex relationships that multilateral networking establishes into bilateral claims and counter-claims. Working from the viewpoint of plaintiff or defendant, this reality construct can only take limited note of the overarching conflicts and risks that the networking of market relationships entails through the imposition of indirect liability. In this respect, any doctrinal approach seeking to characterize network phenomena within general concepts can only but reproduce the classical claim and counterclaim culture and inevitably conclude by balancing out the interests of the two parties.

As a consequence then, doctrine should decisively free itself from systematically limited judicial social models that can only react to the irritations of network creation

with individual equitable corrections. These models are not to be criticized for the manner in which they demarcate conflict: 'rather, the reality characterization entails the recognition of only two contrasting spheres of influence, represented either by the plaintiff or by the defendant. In this manner, courtroom proceedings are projected into the social order such that points of [legal] decisional reference can in turn be identified within the social order'.[7] Such proceedings are fatal with regard to network phenomena precisely because the latter are distinguished by their extra-positional effects.

Approach 2: Political Law-Making

Similarly, following the new policy-oriented trend within legal doctrine, it is not enough simply to adopt the specific social models that emerge from the legislative process. A so-called 'economic perspective', entails too ready an acceptance of the world views of the preparatory lawyers, or other interested practitioners, who prepare and pre-structure legislation. This can only implicate law within the uncontrolled balancing of interests that takes place in opportunistic reaction to transient political preferences. Similarly, it is not enough to adopt a determined 'legislative policies' perspective since this is commensurate with the adoption of the reality constructs of participating economic interest groups, political parties and national and European political institutions, who likewise alienate 'real' social

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[7] Niklas Luhmann (1965) *Grundrechte als Institution: Ein Beitrag zur politischen Soziologie*, Berlin: Duncker & Humblot, 206.

conflicts through the filtering processes of power politics and consensual politics.[8] Legislative interventions in network matters are paradigmatic examples of political tunnel vision. European initiatives to free franchising from the strictures of competition law must be understood as selective responses to the highly effective lobbying activities of interest groups.[9] Similarly, in Germany, so-called 'small-scale networks', or financed acquisition groups, have been regulated, both in consumer protection law and now within the reform of the law of obligations, from the exclusive perspective of consumer protection, even though they also raise comparable regulatory problems in other contexts.[10] Were doctrine only to conceive of itself as the systematic reproduction of legislative policies, then it would only intensify existing inadequacies within the political modeling of social reality.

Approach 3: Socially-Reflexive Practices

Legal doctrine will only make a genuine contribution to the law of networks, if and when it establishes, as opposed to case law and legislation, a 'third way' of approaching the reality of change in the organization of economic interchange. It is my thesis that this is no longer possible through the 'silent power' of a mode of legal conceptualization, which understands itself to be

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[8] In such a case, one is drawn into the dilemma of the dogmatization of 'legislative policies', see, Ernst Steindorff (1973), 'Politik des Gesetzes als Auslegungsmasstab im Wirtschaftsrecht', *Festschrift für Karl Larenz*. München: Beck, 217ff.

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autonomous. Instead, this is only possible through a 'structural coupling' of law with the reflexive practices of other partial social spheres that, all intensive co-operation notwithstanding, also ensures the autonomy of law.[11] At all costs, however, we must also avoid, the scientific misconception, current within the formulations of sociological jurisprudence or legal economics, that the law simply adopts social science conclusions. This misconception is fed by the notion that the social sciences first supply the facts, together with theoretical generalizations, upon which the law then constructs its normative perspectives. Notwithstanding the significant role that scientific structural analysis plays in identifying the workings of networks, law is far more concerned with those normative orientations that neutral sciences are simply not in a position to provide. Such orientations can only be found in the normatively-loaded dogmas of social interchange; that is, in discourses in which social practitioners reflect upon their own self-perceptions. Legal doctrine itself, as well as the mother of all dogmas, theology, are organized as academic disciplines, but are not science in the strictest sense and instead act as classrooms in which systematic reflection on the social practices of law and religion can take place. The same holds true for other areas, such as business management, economics and political science, which do not as such form a part of the neutral scientific search for truth, and which are instead the theoretical manifestation

[11] Cf., on the structural coupling of legal and social sciences, Luhmann *(1993b) 543f.

of the reflexive practices of such social sectors. They make part of David Sciulli's "collegial formations", that is, the specific organisational forms of the professions and other norm-producing and deliberative institutions[12] Social practices within business, the economy and politics each create their own reflexive practices, which in turn share and inform the particular underlying normative orientation of each selfsame set of social practices. However, an internal differentiation must be made in each discipline between scientific and practical discourses. In the case of law, a stark distinction must be drawn between legal theory as reflexive counterpart to legal practice, and legal sociology as a scientific observation of law.[13] Similarly, differentiation must be made in partner disciplines between discourses born out of social practices, and discourses deriving from the scientific knowledge-creation system.

What we are looking for then, are autonomous legal reconstructions of normative social orientations; orientations that law can glean in reflexive interchange with economic and social practices within the network revolution and with its implications. This gives us two advantages above the common scientific misconception. The focus on socially-reflexive practice, as opposed to scientific analysis in its narrowest sense, provides us with a mass of normative perspectives—the guiding philosophies of social institutions and the normative

[12] Sciulli

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expectations, social demands, political rights and utopian hopes of participants within them, as well as insights gained on the ground into their overall social function and functionality—which science could never understand, much less legal doctrine create from within itself. At the same time, however, the law, which must, in the service of the 'legal regulation' of partial social rationalities, enforce its own particularist-universal orientation above the particularist-universal orientations of other forms of reflexive practice, is offered opportunities to distance itself. Sociological jurisprudence, currently cloaked in the mantel of scientific study, should thus in fact be identified as a specifically legal mode of dealing with the collision between different social rationalities.[14]

1) Business Management

It is noteworthy that legal science studies have now developed a heightened sensitivity for business management, or for the reflexive theory of a business practice that formulates the normative preconditions for business success in its choice decisionional reference points, in relation to exactly those forms of contract, such as franchising and other marketing systems, as well as just-in-time-contracts, virtual business and other co-operation relationships, that display such new characteristics. These legal forays across the borders of socially-reflexive practice have, without exception,

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[14] Cf, for further details, Gunther Teubner, 'Altera pars audiatur: Das Recht in der Kollision unterschiedlicher Universalitätsansprüche,' *Archiv für Rechts- und Sozialphilosophie*, 1996, 199-220.

proved successful, since they have discovered the opportunities and risks posed by networking for the existence and success of concerns, and have allowed this material to guide their legal solutions. Pioneering analyses of franchising made early detailed reference to business management debates and established their legal constructions in close proximity to the organizational demands of franchising systems.[15] One influential typology divides interest conflicts into different types of franchising system (subordination, co-ordination, coalition and federation), subjecting each to its own regulatory regime (interest protection contracts, corporation and company law). Risk analyses of new forms of 'systemic' dependence in 'just-in-time' systems base themselves upon detailed organizational science reflections that have unveiled, in particular, the importance of computer based integration as opposed to contractual or social independence, and, by applying the analogy of the law of corporations, have drawn legal consequences in the form of 'business constitutions'.[16]

2) Economic Analysis of Law

It is true that co-operation with the reflexive business management practices has been fruitful, especially

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[15] Michael Martinek (1987) *Franchising: Grundlagen der zivil- und wettbewerbsrechtichen Behandlung der vertraglichen Gruppenkooperation beim Absatz von Waren und Dienstleistungen.* Heidelberg: Decker & Schenck, 231ff.

[16] Bernhard Nagel, Birgit Riess und Gisela Theis (1989) 'Der faktische Just-in-Time-Konzern: Unternehmensübergreifende Rationalisierungskonzepte und Konzernrecht am Beispiel der Automobilindustrie' *Der Betrieb* 42, 1505ff., 1506ff.; *idem.* (1990) *Just-in-Time-Strategien: Arbeitsbeziehungen, Gestaltungspotentiale, Mitbestimmung*. Düsseldorf: Hans-Böckler-Stiftung.

where the issue is one of the legal demarcation of conflicts within new forms of network phenomena with reference to the motivations of those involved in business, to concrete organizational structures and to decision-making guidelines. Nonetheless, if the task is one of rising above the networking implications for individual firms to legally reconstruct the network revolution in a manner that is relevant for the economy and for society as a whole, then the business management perspective is far too narrow, focusing only upon the economic networking of individual firms and either wholly or partially failing to recognize general economic and social trends. Its normative viewpoint is similarly limited since it concentrates upon the efficiency, effectiveness and (occasionally) legitimacy of individually networked firms. This is far too restricted a basis for a legal appraisal of network opportunities and risks.

Legal doctrine can make a huge leap forward here by establishing proximity to the reflexive theories of economic practice and, above all, to transaction-cost theory, property rights theory and economic institutionalism. Certainly, such theories may conceive of themselves as a part of the scientific-knowledge system. 'Pure' scientific theorems, however, devoid of all analytical preconceptions, would never handicap themselves with normatively loaded concepts and orientations, such as the *homo economicus* or 'economic

efficiency'.[17] Taking these normative orientations, particularly, efficiency-oriented concerns, as their starting point, legal studies of banking Gironets and other networks are seeking to analyze and come to terms with the innovative yet highly controversial category of the 'networked contract'.[18] Other studies on symbiotic contracts, inspired by institutional economics, have successfully demonstrated the efficiency gains of networking and consequently advocate their legal institutionalization.[19] Economic studies on network effects and their various legal implications are similarly profitable.[20]

3) Sociological Theories

However, if law is to be true to its aim of embedding business networks within their political and social context, it must also engage in a legal reconstruction of sociological network theories.[21] Where law is obliged to develop 'socially-appropriate' legal concepts, market/network relationships established within reflexive economic theory, must be broadened to encompass relationships with the reflexive practices of other social

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[18] Wernhard Möschel (1986) 'Dogmatische Strukturen des bargeldlosen Zahlungsverkehrs' *Archiv für die civilistische Praxis* 186, 211ff.; *Rohe (1998) 66ff., 81ff. And passim.

[19] *Kulms (2000) 55ff., 240ff.

[20] Mark A. Lemley und David McGowan (1998) 'Legal Implications of Network Economic Effects' *California Law Review* 86, 479ff.

[21] The social embedding of economic interchange is the working aim of economic sociology, which has a closer empathy with the analytical interests of legal science than do purely economically orientated analyses. Representative, Neil J. Smelser und Richard Swedberg (Hg.) (1994) *The Handbook of Economic Sociology*. Princeton: Princeton University Press.

environments. We are also concerned here, all cognitive hurdles notwithstanding, with legal reconstruction of the normativity inherent to social practice. In this case, social theory informed legal forays into status-based and contractual relationships within franchising are particularly noteworthy, since they unveil the semi-autonomous status of network participants and attempt to give them legal security.[22] Studies of standard term contract regulation for just-in-time contracts, reveal the role which case law can play in the promotion of productive networks and in limiting institutional misuse of law.[23]

III. Translation Problems: Networks as Relational Contracts

However: '"Network" is not a legal concept'. All joyous legal contact with socially-reflexive practices notwithstanding: legal arguments only begin where other reflexive theories end. Within the debate on the appropriate form of regulation for business networks, virtual business, just-in-time systems, franchising chains and other co-operative contracts generally established through bilateral contracts yet giving rise to multilateral (legal) effects, networks make their appearance as remarkably disruptive social phenomena. They can

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[22] *Joerges (1991) 17ff.

[23] Steve Casper (1995) 'How Public Law Influences Decentralized Supplier Network Organization: The Case of BMW and Audi' *WZB-Discussion Paper FS I 95-314*; *idem*, (2001) 'The Legal Framework for Corporate Governance: Explaining the Development of Contract Law in Germany and the United States' in: Peter A. Hall und David Soskice (Hg.) *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*. Oxford: Oxford University Press 387ff., 397ff.

neither be subsumed under the category of market, nor under the category of organization. Following long indecision, sociologists and economists have responded to this confusion with theories characterizing networks as autonomous institutions that contrast with the usual forms of economic co-ordination.[24] How is law to respond, however? Should it, as innovation-friendly lawyers suggest, declare networks or symbiotic contract to be *sui generis* legal institutions trying to survive in the Bermuda-triangle between contracts, torts and corporations?[25]

In my opionion 'network' is not suited to play the role of a technical legal concept. Networks traverse private law concepts. Legally-speaking, they can take the form of corporate, contractual or tortious special relationships. For this reason alone, legal doctrine cannot simply adopt the term 'network' as a legal concept. Yet, the disciplinary barriers are even higher. Current ideas bout knowledge transfer are misleading. Law cannot simply accept social networking conditions at face value; for example, the social preconditions for intensive co-operation. Neither can it simply adopt particular elements within social science definitions, such as the economic formula 'hybrid between market and hierarchy', or the

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[24] For an informative discussion of these theories, see, Johannes Weyer (Hg.) (2000) *Soziale Netzwerke: Konzepte und Methoden der sozialwissenschaftlichen Netzwerkforschung*. München: Oldenbourg; Arnold Windeler (2001) *Unternehmungsnetzwerke: Konstitution und Strukturation*. Wiesbaden: Westdeutscher Verlag.

[25] *Schanze, Möschel, Rohe.

sociological formula 'trust-based exchange system'. Instead, it must itself re-construct anew the constitutive contours of the correlating legal definition out of its own path-dependent evolutionary logic.[26]

However, any attempt to subsume networks simply under traditional private legal concepts is, making a long story short, doomed to failure. First: company law qualifications of networks are inappropriate, since pooling of resources and joint decision-making do not suit the decentralized network structure.[27] Secondly: given the radical individualism of single nodes in networks, contract law, rather than the law of corporations, is the correct systematic arena but needs to be considerably transformed for 'market networking' opportunities and risks. Thirdly: an independent legal category of a 'network contract', which is based on traditional agency law, does not convince. It follows that doctrinal qualifications of networks need be based upon the development of an 'organizational contract law', - the law of 'controrgs' if you like - which recognizes their hybrid nature through the inclusion of 'organizational', i.e., not only relational but as well multi-lateral, elements within the contract.[28] Here, one needs to exploit the

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[26] See Amstutz (2003) 164ff, for a particularly clear distinction between social system and legal system.

[27] Comprehensively, Teubner (2004) m.w.N

[28] For the endeavor to develop an 'organizational contract law' for networks that builds on long-term contracts, social relations and contractual relationships, see Teubner (1990c) 319; (1993) 386ff.; (2001) 562ff. For further development, see Larenz und M. Wolf (1997) 120f., who not only emphasize the close connection between networks and contractual relationships, but also accept the implications of

developmental logic of a rudimentary, but already established form of organizational contract law. German legal doctrine with its notions of *Dauerschuldverhältnis* ('relational contracts'), and *Vertragsverbund* ('connected contracts'), has developed an actor that is ripe for further evolution in the network sphere.

To quote a doctrinal authority from Germany:

> "The notion of connected contracts is used to describe any plurality of contracts which refer to each other within either bilateral or multilateral relationships, whose interconnection gives rise to direct legal effects (of a genetic, functional or conditional nature), whether these simply result in an effect of one contract to the other (or others), or whether one can also observe mutual effects."[29]

The 'economic unity' of individual contracts is determinative for the connected contracts. However, this concept also entails a strange paradox that time and again gives rise to harsh critique of the entire construction: multiple contracts are directed to a single economic goal, which can only be achieved if all contracts are performed, but is again also entirely dependent upon the legal independence of each of the

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internal and external liability within the network. Similarly, Amstutz und Schluep (2003) 890ff.; Schluep (2003) 290ff. For positive receptions for this endeavor, albeit with some skepticism about individual consequences, especially the external liability of networks, see, Heermann (1998) 75ff., Lange (2001a) 179f.; 184f.; Zwecker (1999) 163; Schimansky (2003) 112ff.

[29] Gernhuber (1989) 710. Similar, Larenz und M. Wolf (1997) 469f.; Josef Esser und Eike Schmidt (1995) *Schuldrecht: Ein Lehrbuch. Allgemeiner Teil I 1*. 8th Edition Heidelberg: Müller, 214.

contracts. Legally-speaking, this results in the strained formula that each and every contract is legally distinct but also builds an economic unity upon which the law can focus.

However, the critique that this is all quite arbitrary,[30] goes wrong. Instead, in order to understand the mystery of connected contract, we must make productive use of this 'unbearable contradiction'. The undeniable contradiction found within the notion of the 'economic unity of distinct contracts' is not simply to be regarded as a 'yet to be corrected' logical mistake within doctrinal reasoning, but is instead itself the exact juridical correlate of the social reality of hybrids, the bedrock for their productivity, and the source of those risks to which the law must find appropriate responses.[31]

IV. The Role of Law in Social De-Paradoxisation Processes

This contradiction is absolutely central to networks. Private law must respond with sensitivity to the

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[30] Ernst Wolf (1978) *Lehrbuch des Schuldrechts. Zweiter Band: Besonderer Teil.* Köln: Heymanns, 62f.

[31] The relationship of network construction to the contradictory social-environmental demands made of business is the focus for many social science analysis, albeit dealing with different aspects of the problem.: Kim S. Cameron und Robert E. Quinn (1988) 'Organizational Paradox and Transformation' in: Robert E. Quinn und Kim S. Cameron (Hg.) *Paradox and Transformation: Towards a Theory of Change in Organization and Management*. Cambridge, Mass.: Ballinger, 1ff.; Buxbaum (1993) 701; Messner (1994) 564; Michael Reiß (1998) 'Mythos Netzwerkorganisation' *Zeitschrift Führung und Organisation* 4, 224ff.; Maria Funder (1999) *Paradoxien der Reorganisation*. München: Hampp; Holm-Detlev Köhler (1999) 'Auf dem Weg zum Netzwerkunternehmen? Anmerkungen zu einem problematischen Konzept am Beispiel der deutschen Automobilkonzerne' *Industrielle Beziehungen* 6, 36ff.; Sauer und Lang (1999); Ortmann (1999) 253ff.; Luhmann (2000) 407ff.; Hirsch-Kreinsen (2002) 107.

coincidentia oppositorum manifest within networks. The thesis is as follows: certain economic developments expose businesses to a 'double-bind' situation, which they react to with the aid of an internally contradictory network structure. The double-bind situation typical for networks arises where: (1) The social environment makes ambivalent, contradictory or paradoxical demands of business entities which they must respond to; (2) such demands are so central to business survival that they cannot be simply ignored, and (3), their explicit thematisization is problematical.[32] The institutional answer to these problems is neither contract nor organization, but hybrid network, since this construct allows for the transformation of external incompatibilities into internally-manageable contradictions. In turn, private law needs to respond in two ways: on the one hand, it normalizes and stabilizes network-typical contradictions; on the other, it combats various consequences of these contradictions.

Hybrid constructions within the contract, organization and network triangle, can facilitate escape from the double-bind situation. They constitute institutional arrangements that make network logic, as opposed to simple contractual or organizational logic, resistant to

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[32] On the paradoxical double-bind situation, see the classic text by Gregory Bateson (1994) *Ökologie des Geistes*. Frankfurt: Suhrkamp; building on that, Paul Watzlawick, Janet H. Beavin and Don D. Jackson (2000) *Menschliche Kommunikation: Formen, Störungen, Paradoxien*. Bern: Huber. To the application of the double-bind to organizations, see Fritz B. Simon (1997) *Die Kunst, nicht zu lernen: Und andere Paradoxien in Psychotherapie, Management, Politik*. Heidelberg: Carl-Auer-Systeme.

contradictory social environmental demands. More precisely, hybrids react to paradoxical situations (in their broadest sense) that threaten the operational capacities of actors through their ambivalence (A is or is not A), their contradictory nature (A is not A) or their paradoxical character (A because not A).[33] Generally-speaking, there are two modes of escape from such imbroglios. The one is repressive, suppressing contradictions by admitting only one of the contradictory instructions and dismissing the other. The other is constructive, seeking to make paradoxes fruitful, to the degree that it establishes a more complex representation of the world. This is what is meant by 'morphogenesis', which Krippendorff suggested for dealing with paradox:

> 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 representation of this world. It

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[33] 'Paradoxes', in their narrow sense, denote situations such as 'A because not A'. In a wider rhetorical sense, 'paradoxes' include ambivalence and contradictions that inhibit thinking within a given framework. Social science and legal thinking is best served by the wider definition that encompasses inhibition effects, as well as the potential to overcome them. For a general pragmatic perspective on contradictions and paradoxes, see Hans Ulrich Gumbrecht und Ludwig K. Pfeiffer (Hg.) (1991) *Paradoxien, Dissonanzen, Zusammenbrüche: Situationen offener Epistemologie*. Frankfurt: Suhrkamp; Watzlawick, Beavin und Jackson (2000) 171 ff. On paradoxical situations within economic enterprises, see, Neuberger (2000) 187ff. On the legal treatment of paradoxes, see, George P. Fletcher (1985) 'Paradoxes in Legal Thought' *Columbia Law Review* 85, 1263ff.; Peter Suber (1990) *The Paradox of Self-Amendment: A Study of Logic, Law, Omnipotence and Change*. New York: Lang und http://www.earlham.edu/~peters/writing/psa/index.htm.

is the latter case which could be characterized as morphogenesis'[34]

In the particular context of hybrid networks, the double-bind derives from the imposition upon actors of social environmental demands that they simultaneously obey different and contradictory operational imperatives. Various of these problematical social environmental demands derive directly from contradictory economic pressures. Others result from a collision between economic operations on the one hand, with scientific, cultural, medical and political operations, on the other.

Contradictory social environmental demands can be traced to economic trends that have increasingly overburdened individual firms and have forced them to engage in networking. 'Mention should be made here of trends such as increased technological complexity, increased pressure on productivity and costs, as well as simultaneous market demands for a high degree of flexibility'.[35] Empirical studies on intra-company co-operation have systematically researched the particular

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[34] Klaus Krippendorff (1984) 'Paradox and Information', in, Brenda Dervin und Melvin J. Voigt (eds) *Progress in Communication Sciences 5*. Norwood: Ablex, 45ff., 51f. On morphogenesis in social systems, see Niklas Luhmann (1991) 'Sthenographie und Euryalistik', in Hans Ulrich Gumbrecht and K. Ludwig Pfeiffer (eds) *Paradoxien, Dissonanzen, Zusammenbrüche: Situationen offener Epistemologie*. Frankfurt: Suhrkamp, 58ff., 71ff.; *idem*. (1997) 57f. On exemplary reactions to the paradoxical demands of just-in-time systems, Kathleen Eisenhardt und Brian Westcott (1988) 'Paradoxical Demands and the Creation of Excellence: The Case of Just-in-Time Manufacturing', in, Robert E. Quinn und Kim S. Cameron (eds) *Paradox and Transformation: Towards a Theory of Change in Organization and Management.* Cambridge, Mass.: Ballinger, 169ff., 191.

[35] Hirsch-Kreinsen (2002) 107.

contradictions with which we are concerned here.[36] Increasingly, the market demands 'flexible specialization'. Following the demise of standardized mass production, the market buzz word is 'client-specific mass production'. This goal gives rise to a barely surmountable contradiction between the flexibility and the efficiency of business. The trend in production is towards 'systematic rationalization'. This optimization standard cloaks a contradiction between complexity and reliability. Similarly, business organization is required to follow the goal of 'decentralized self-direction', laying itself open to a contradiction between the autonomy of and oversight over decentralized business units. Business organization is then left with the question of whether they can choose only one organizational structure, or whether they must, even this early stage of organizational formation, seek out the far harder path of combination, fusion and contradiction trade-offs.[37]

Networks are confronted with the problem of how to translate contradictory demands into internal structures, such that operational burdens are sustainable.[38] The determinative innovation of networks is that they transform external contradictions into a tense, but sustainable, 'double-orientation' within the operational system. One and the same operation is exposed, both to individual network node orientations and to the collective

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[36] Semlinger (1993) 313ff.

[37] Semlinger (1993) 332.

[38] Semlinger (1993) 332; Hirsch-Kreinsen (2002) 120.

orientation of the network, and is simultaneously burdened and freed by the demand that it must find a balance in each context.[39]

In contrast to contracts or organizations, which either exhibit a simple individual orientation or a collective orientation, networks have evolved as a new form of operational system, creating a double social orientation for individual operations. Each operation within the hybrid must simultaneously meet both the normative demands that educe from bilateral relations between individual actors, as well as those that stem from the network.[40] The consequence of this is a remarkable degree of self-regulation within networks that are founded within the double orientation of individual

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[39] On the pivotal concept of 'double-attribution' through analysis of the relevant social science literature on networks, see Teubner (1990c) 309f. The comprehensive systems theory justification for the relationship between external contradiction and internal double attribution is found in, Teubner (1992) 197ff.; (2001) 562ff. For a further examination of the concept of double-attribution from the social science perspective, see Scharpf (1991) 621ff.; Rölle und Blättel-Mink (1998) 74ff., 84, 265ff.; Littmann und Jansen (2000) 69f.; Windeler (2001) 194f., 224. From the legal point of view, network-typical double-attribution is adapted for project contracts by Collins (1999) 248ff.; für Vertragsverbindungen Schluep (2003) 306; on the labor law questions raised by networks, see Thomas Kreuder (2000) 'Netzwerkbeziehungen und Arbeitsrecht: Individualarbeits- und betriebsverfassungsrechtliche Aspekte bei Franchisesystemen' *Festschrift für Spiros Simitis.* Baden-Baden: Nomos, 171ff., 203ff.; Alain Supiot (2000) 'Les nouveaux visages de la subordination' *Droit Social* 63, 131ff., 135; for symbiotic contracts, see Zwecker (1999) 163; for virtual business, see Ensthaler und Gesmann-Nuissl (2000) 2268; Lange (2001a) 179f.; 185; Mendes (2002) 13f.; for franchising, Pasderski (1998) 4. For critique of double-attribution, see Bräutigam (1994) 47ff.; Oechsler (1997b) 382f.; Rohe (1998) 417f.; Bayreuther (2001) 399. Generally, however, such critiques are based upon a misunderstanding of what collective attribution within the network entails.

[40] Windeler (2001) 195. Informatively on the double-orientation of networks in other contexts, Scharpf (1991) 621ff.

operations. This furnishes the key explanation for the conclusion of economists that networks and nodes engage in a specific form of profit-sharing, distinguishable from forms of profit-sharing found within other social contexts.[41] Whilst the provisions of the law of corporations first attribute profit to the corporation and then oversee its distribution to corporation' members, networks play host to simultaneous distribution to the net and its nodes. In an economic formulation: all transactions profit both the network and individual actors.[42] This double character acts as a constraint, since all transactions must pass the double test. At the same time, however, it acts as an incentive, since all network gains are always related to individual gain.[43]

V. Legal Facts: The Dual Constitution of Connected Contracts

How is the law to respond to this transformation of external contradictions into an internal and concurrently individual and collective orientation? The answer in terms of legal facts: *by means of the dual constitution of connected contracts,* and in terms of legal consequence: *through a selective double attribution to individual contractual partners and to the network as a whole.*

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[41] James A. Brickley und Frederick H. Dark (1987), 'The Choice of the Organizational Form: The Case of Franchising' *Journal of Financial Economics* 18, 401ff., 411 ff.; Dnes (1991) 136ff. For an especially interesting study founded in empirical observation, see Norton (1988) 202ff.

[42] Dnes (1991) 136ff.

[43] Norton (1988) 202ff.; see also, Benjamin Klein und Lester F. Saft (1985) 'The Law and Economics of Franchise Tying Contracts', *Journal of Law and Economics* 28, 345ff., 349ff.

Any endeavor to reconstruct the legal conditions for a business network must pay due regard to the internal developmental logic of doctrine. It is exactly for this reason that the legal concepts of 'connected contracts', which has now, following the reform of the law of obligations, been given concrete form in §358 (II) 2 BGB (*Vetragverbundes*), is so attractive with regard to networks: its independence from other legal concepts notwithstanding, its particular characteristics derive from its close association with the legal logic developed in relation to synallagmatic contracts.[44] The interconnectedness of obligations within the synallagma of the reciprocal contract serves as a model for the interconnectedness of obligations within the association. {It is well know that the synallagma does not merely entail agreement upon obligations. Instead, their reciprocal interconnectedness becomes an additional part of the material contract. Explaining this dual trigger for legal factual reconstruction more precisely: the dispositive and imperative provisions of objective contract law apply both to contractual obligations and to the final 'nexus' of exchange, such that the individual legal consequences of interconnected obligations can be ascertained without reference to the contractual will of the parties, or even in contradiction of it. In an exact parallel, the 'relational contractual association' does not simply entail agreement upon contractual obligations. Rather, the interconnectedness of obligations with other

[44] Gernhuber (1973) 470ff.; (1989) 710ff.

contracts should also form a part of the material contract. In turn, this dual trigger for legal factual reconstruction (once again in a direct parallel to the synallagma) will determine that the dispositive and imperative norms of the objective law of relational contracts will apply both to contractual obligations and to the final relational nexus, even without reference to the contractual will of the parties, or even in contradiction of it.[45]{

Moving away from the peculiarities of financed property acquisition, which has to date been the major object of the law of connected contracts, to attempt to develop a more general legal concept of connected contracts that also encompasses our business networks, both case law and recent legislative advance furnish us with three hooks upon which to hang our legal reconstructions of fact. Together, these three characteristics constitute the surplus value of the dual constitution of the connected contracts above a simple mass of disconnected independent contracts within a market.

1) reciprocal references of bilateral contracts to one another, either found within the performance program and/or distilled from contractual practice ('multi-laterality'),
2) a contractual reference to the overall project of the connnected contracts ('relational purpose'),

[45] In all their admirable clarity, the efforts of Gernhuber (1989) 731, undertaken despite the constant endeavors of financial institutions to enforce the legal separation of economically interconnected contract.

3) a close and legally-significant cooperation relationship between the participants within the multi-lateral relation ('economic unity').

Does this mean that business networks are simply made up of a multitude of bilateral contracts? {Is their only distinguishing characteristic the fact that an relational agreement, or 'coupling agreement', should be added to more commonplace agreements on obligations?}[46] No: rather, what lurks beneath the three legal characteristics is the social specificity of a process of contractual networking, which cannot as such be captured within legal categories. As stated: sociological jurisprudence is an oxymoron. Network is not a legal concept. There is good reason why lawyers work with mysterious formulations in this area: 'final nexus', 'unity despite division', 'accessory acts', '*causa consumendi*'.[47] Skulking behind such treacherous assaults upon clear legal language, we can identify the character of sociological jurisprudence.[48]

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[46] As suggested by von Schluep (2003) 285, 304.

[47] In this order, Gernhuber*, **, Heermnn*, Micklitz*, Reifner*

[48] It is here that Gernhuber's endeavors to ease notions of relational contracts into doctrine meet their nemesis. This is made doubly clear within his own construction: (1) in relation to the suggestive 'final nexus', formulation which can only be understood as a simple agreement between parties at the most superficial level, and (2) with regard to the 'special relationship' (*Sonderverbindung*) which he imputes to participants within the relational association who are not contractually bound to one another, Gernhuber (1989) 728, 741. Similar difficulties arise in relation to Schluep's concept of an 'independent coupling agreement', Schluep (2003), 285ff.

Seen from the comfortable distance of systems theory, the entire matter can be understood as a structural coupling between autonomous law and autonomous social practice. From the sociological standpoint, the network's specificity as a social phenomena relates to the fact that a contractual relation observes its environment in a specific manner. Usually, operational systems observe markets and market conditions, in particular market prices, and adapt their decisions and internal structures to them. Luhmann distinguished the network situation from this 'normality': where simple market observation no longer suffices, the system redirects its observation away from the market to other contractual or organizational systems, and orients itself in line with changes here rather than changes within the market.[49] Systems thus use networking to attempt to establish a symbiotic relationship with other systems, such that they can capture environments in a form that they can understand. As I have explained elsewhere, fusion within such hybrid networking does not make a 'unity' out of individual contracts—a unity which defines a single social function and contribution to its environment—rather each contract remains autonomous in relation to its own function and environmental constitution.[50] Amstutz takes this further, conceiving in this sense of 'relation' between contracts as a reflexive relationship between two contracts, each of which autonomously pursue their own project, but adapt

[49] Luhmann (2000) 407ff.

[50] Castells (200)) 187; Teubner (2001) 572.

themselves to one another through reciprocal observation, thus giving rise to specific contractual collisions.[51] It is simply not possible, however, to paint the sociologist's preferred picture of this association as a reciprocally reflexive relationship upon the canvas of law. Instead, making their appearance here, we find the three named legal recognition characteristics of the 'mutual referencing' of contracts, the 'relational purpose' and the 'co-operative relationship' that establish the legal interconnectedness of the contracts.

[The allusion of one contract to another entails, as hinted above, legal congress with other private orders; yet, it concurrently also entails the inclusive acceptance by the contractual partners of a contractual stranger, a foreign order. The entirety of contracts must submit to a coherent overall system that is respected by each individual contract. In practice, contractual conclusion is often reduced to a simple decision to enter into a homogeneous private order. Reference to other contracts, however, is similar in nature to regard for standard contract terms, the highway code, or for social and technical norms. The bilateral agreements between business co-operation partners contain references to the autonomous institutional logic of the network; entry as a bilateral accession to trust-based interaction, decentral co-ordination, the orientation of individual operations to the network purpose.}

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[51] Amstutz (2003) 164ff.

All three legal recognition characteristics are distinguished by the fact that they build a spontaneous process of non-contractual ordering from the legal material of individual contracts. This is the *proprium* of the relational association. In contrast to Hayek's spontaneous and discovery process-led, competitive order, networking and co-operation, rather than market and competition, are the sources of spontaneous order.[52] Within such spontaneous orders, 'the stability of the relationship between (legally independent, "unitarily" governing of their economic affairs) businesses is deduced from "beyond" bipolar provisions'.[53] 'Beyond' bipolar provisions—this is the core of our current analysis. Various social co-ordination mechanisms of a non-contractual nature—reciprocal observation, anticipatory observation, co-operation, trust, self-binding, responsibility, negotiation, stable relationships[54]—constitute the overarching order of networking and stamp

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[52] On spontaneous ordering in competitive markets and its relationship with legal evolution, see, Friedrich A. Hayek (1973) *Law, Legislation and Liberty. Volume 1: Rules and Order*. London: Routledge & Paul, 72ff.; Viktor Vanberg (1986) 'Spontaneous Market Order and Social Rules: A Critical Examination of F.A. Hayek's Theory of Cultural Evolution' *Economics and Philosophy* 2, 75ff., 79ff.; Robert D. Cooter (1994) 'Decentralized Law for a Complex Economy' *International Review of Law and Economics* 23, 443ff., 447f. On the important distinctions between different types of spontaneous order, especially between markets and relational obligations, see Robert Gordon (1994) 'Hayek and Cooter on Custom and Reason' *Southwestern University Law Review* 23, 453ff.

[53] Windeler (2001) 240.

[54] For discussion on the mechanisms and effects of such non-market spontaneous orders, see Gordon (1994) 459; Jörg Sydow und Arnold Windeler (2000) 'Steuerung von und in Netzwerken' in, Jörg Sydow und Arnold Windeler (eds) *Steuerung von Netzwerken: Konzepte und Praktiken*. Opladen: Westdeutscher Verlag, 1ff., 12ff.; Windeler (2001) 240ff.

the network's character upon each bilateral contractual relationship.

VI. Legal Implications: Selective Double-Attribution to Contractual Partners and to the Networl

What holds good in relation to the preconditions for the legal qualification of the network as connected contracts, also holds good for its legal consequences. In this case too, the social double orientation of network operation must find its resonance within the law.[55] This is true both for internal relations between participants within the relational association, as well as for its external relations. The appropriate legal response a selective (!) double-attribution of network acts to the contract and to the association, varying according to the different structural contradictions within the network

First Structural Contradiction: Bilateral Exchange versus Multilateral Association

In a first constellation, in which the internal structure of hybrid networks seems to be the appropriate answer to contradictory market demands, network decisions are simultaneously exposed to the contradictory demands of bilateral exchange and multilateral relations.[56] An

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[55] 'Resonance' is not deployed here as a simple metaphor, but instead forms an important element within the theory of structural coupling. For the resonance of social problem constellations within the law, see Luhmann (1993b) 440ff., for particular economic problems, 452ff.

[56] On contradictory environmental demands as a network building impetus, see, Cameron und Quinn (1988) 1ff.; Buxbaum (1993) 701; Messner (1995); Reiß (1998) 224ff; Funder (1999); Köhler (1999) 36ff.; Sauer und Lang (1999); Luhmann (2000) 375, 407ff.; Sydow und Windeler (2000) 6ff.; Hirsch-Kreinsen (2002) 107.

important explanation for the contradictory nature of behavioral expectations is the uncertainty of economic actors about future market development. Despite their antagonistic interests, this uncertainty forces the parties to stable exchange contracts to develop closely coordinated behavioral patterns, be they constructed along hierarchical or heterarchical-cooperative lines.[57]

The traditional solution to such a collision between operational logics was a simple 'either-or' decision. The suggestion made in the literature that we should qualify networks either as exchange contracts or as a 'corporation' derives from this tradition. The result of this is the famously rigid distinction made between market and organization, which is similarly reinforced by the rigid provisions of contract and corporation law. However, the enforced dichotomy between market/organization, or between contract/corporation censors an effective solution. It forces us to opt for one of the contradictory orientations, bundling the other into the twilight obscurity of 'informality'. The various routes out of these conflicts, which we characterized above as 'morphogenesis', converge within the specific operational logic of networks.

The determinative concept within organizational theory is 'detotalisation'. In order to react to external paradoxes, the network must 'recreate external diversity within its

[57] Kulms (2000) 227ff.

own institutions and functions'. This notion makes it clear that 'antagonistic relationships (in this case, bilateral exchange and multilateral cooperation) are nurtured with one and the same foreign order—which cannot but prove to be a paradox should sectoral and temporal differentiations be ignored or '"totalized"'.[58] Empirical studies might be able to demonstrate that this form of internal division and recombining of exchange and cooperation logics is in fact possible on the ground. Within successful business networks, actors might be able simultaneously to maintain the formal logic of exchange within 'exchange' sectors, such as logistics, quality, quantity and pricing, and combine it with trust-based cooperation within 'relational' sectors such as R&D and joint planning and construction.[59] Detotalisation strategies thus aim to instutionlize new internal differentiations within a business 'totality' that is indelibly marked by contradictions. The notion of networking as detotalisation, thus entails the internalization of external contradictions, their legitimation as simple tensions, and a contribution to their contextual resolution through internal differentiations.

In stark contrast to the 'contractual purpose' found within exchange contracts or the private legal concept of 'articles of association' (or 'corporation purpose'), the legal category that is best suited to the capture of this network operational logic, that can best give it

[58] Nueberger (2000) 207ff.

[59] Bieber (1997), especially 124f.

institutional support, and which is most able to ameliorate its negative implications, is surely that of the 'relational purpose', or the 'network purpose'. The relational purpose is distinguished from the corporation purpose by virtue of its double orientation within one purposive formula to both association and contract. The relational purpose is a legal category that explicitly adopts the contradiction between the individual and collective elements within the network.

The primary achievement of the relational purpose is the network internal translation of this business-externally imposed and insoluble contradiction into manageable conflict between different levels and subsystems, between network nodes, network relations, the central network node and the process of networking in its entirety.[60] A more exact detailing of the relational purpose must therefore fulfill the following task: *use internal differentiations between temporal, social and functional operational sectors, in order to translate initially contradictory demands into clear, contextually-determined, behavioral expectations.*

The legal formula is thus as follows: the contextual concretization of the relational purpose allows us to distinguish situations in which the relational association must display a heightened duty of 'good faith' ('relational duty of good faith'), from situations in which only simple

[60] Semlinger (1993) 332.

exchange duty contract of good faith will apply, albeit that each notion of good faith must be modified with reference to the other. The legal task is one of distinguishing between contractual good faith and heightened good faith within the remit of the relational association. At the same time, however, care must be taken to ensure that the relational duty of good faith is not simply equated with good faith within corporation law, but is rather, for its part, given a decentralized bias. Such differences clearly educe from the repeatedly discussed distinction between a network and a collective: the pervasive combination of autonomy and association. This combination is better served by a contractual, legislative and judicial apportionment of relationally-derived duties—in contrast to resource-pooling within a single hand or a legal person—which takes over the task of the context-dependent fine tuning of autonomy and relational association. Relational duties secure the network, facilitate judicial contractual correction and open up further development possibilities.[61]

Second Structural Contradiction: Competition versus Cooperation

Here we are concerned with a second typical constellation in which hybrid networks evolve as an answer to contradictory market-led demands. Especially in the case of knowledge-based products, economic decisions are not merely subject to the contradictory

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[61] See Kulms (2000) 231, 261, for an argument in favor of a similar compensatory equivalence within good faith duties in relation to the organizational regulation of genuine collectives.

demands of bilateral exchange and multilateral organization, but are also exposed to the conflict between competition and co-operation.[62] Paradoxical commands given to network participant are 'cooperate with one another!' and, concurrently, 'compete against one another!' Knowledge-oriented production gives rise to a contradiction between two fundamental forms of social experience and two different models of the external world. Within the competition model, individual goals can only be achieved at the cost of another. In the cooperation model, individual goals are wholly compatible with those of others. This justifies the usual practice of institutionalizing a strict distinction between the two behavioral modes: market or organization.

Recent business studies nevertheless suggest that it is not only possible to conceive of alternatives to the rigid institutional separation of competition and cooperation, but that that such alternatives are also possible in practice. The increased incidence of hybrid networks is presented as a refined reaction to the simultaneous and contradictory demands of cooperation and competition.[63] 'Cooperation' is the new magic formula that promises that competitive advantages will flow out of the combination of cooperation and competition, that

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[62] For comprehensive treatment of the cooperation/competition conflict, see the studies by von Sydow (1992) 98ff.; (1999) 299ff.; Jansen (2000) 13ff.; Littmann und Jansen (2000) 64ff.; Klaus Semlinger (2000) 'Kooperation und Konkurrenz in japanischen Netzwerkbeziehungen' in, Jörg Sydow und Arnold Windeler (ed) *Steuerung von Netzwerken* Opladen: Westdeutscher Verlag, 130ff., 141ff.

[63] See, in particular, (1993); Neuberger (2000) 207ff.

manages to combine organization and contract with network elements.[64] Cooperation would then constitute a social model that would allow, no, even demand, that competitors would be congruent with cooperation partners.

One should with one eye to the need to overcome paradox, nonetheless maintain a certain distance from such purely combinatory approaches and emphasize 're-entry' effects in this context. A simple mixture of competitive and cooperative behavioral patterns does not provide easy exit out of paradoxical oscillation. In the technical sense defined by Spencer Brown, re-entry has nothing to do with ending the division between the two sides of an either-or decision.[65] On the contrary, the distinction between competition and cooperation must not be ended, and must, instead, be strictly maintained and institutionalized in a legal form. At the same time, this same distinction makes a second appearance. Now, however, it is re-introduced to one side of the institutional divide, and once again strictly institutionalized within it.

Mixed competition-cooperation forms only cease to be simply regressive or ideological, in the sense that they simply pursue one only one orientation under the semantic cloak of 'combination', if and when they are subject to re-entry conditions. By the same token, neither do they simply squander the gains of each social model

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[64] Littmann und Jansen (2000) 64ff.

[65] Spencer Brown (1972) 56ff.; 69ff.

that only become apparent by virtue of their institutional separation. Instead, and insofar as re-entry secures the stable identity of the distinction, they can maximize such advantages. This, however, is only possible under three conditions:

1) Sustainable institutionalization of market competition through the conclusion of parallel and distinct bilateral contracts (i.e., exactly *not* by the creation of a unitary organization)
2) Institutionalization of the re-entry of the cooperation/competition distinction within the system of contracts, such that market competition is overlain by a sphere of operational cooperation.
3) Situationally-defined internal demarcation between operational spheres.

Any attempt to institutionalize hybrids legally, must pay due regard to such complications: it is exactly this complex of questions which German private law has yet to find a response to. We are faced here with the difficult question of whether a legal connection can be made at all between network participants who are not contractually bound to one another. The question is one of whether legal sanctions exists between network participants who are not bound to one another by a bilateral contract, for ‘the incorrect behavior of a participant within a performance chain or a system of networked contracts. These [sanctions] attach to performance disturbances within performance relations,

which are directed to the goal of one single joint enterprise'.[66] The legal postulate of the mutual contractual liability of non-contractual partners within the network is becoming increasingly entrenched as a result of heightened networking within the provision of goods and services: positive legal provisions notwithstanding, the 'justice' of spontaneous equitable feelings, as well as, and increasingly so, sober preventative arguments, demand restitutionary liability in such cases. The liability of strangers to the contract within the network for property damages is the consequence.

Third Structural Contradiction: Unitas multiplex, 'Piercing the Contractual Veil' in Highly Centralized and Decentralized Networks

In a third constellation hybrid networks appear as a response to communicative contradictions within the attribution of social operations: who, in the positive sense, benefits from success and profit, who, in the negative sense, suffers loss and liability—individual or collective actors? Is the social relations' networks simply a trust-based relationship between individual actors, or, an independent collective, making its appearance as a new actor to whom network participants owe loyalty? In this case too, the traditional approach of a strict division between contract and organization found both in sociological theory and in legal doctrine supplies inappropriate solutions. Social practice within hybrid

[66] Picker (1987) 1057; the same question is asked by von Möschel (1986), 187 ff.; Rohe (1998) 98.

networks has, however, identified its own solution: ‘double-attribution’. This attribution technique is one of the most important characteristics of hybrid networks, facilitating the distinction between simple attribution to individual actors in the case of the contract, and attribution to collective actors in the case of the organization. One and the same economic transaction is doubly attributed; to individual actors as network nodes and to the overall network.

This new form of operational attribution, however, gives rise to new risks that in turn demand a new legal form of network responsibility that is distinguishable both from individual liability and from the collective liability of organizations. Although, the ‘piercing of the collective veil’ proves its worth as a general formulation to establish network liability, a distinction must be made between two typical situations, i.e., between centralized and decentralized networks. Various hybrid networks are so centralized and the autonomy of their nodes so limited that they are little more than hierarchical organizations in contractual clothing. Such networks are little more than a strategic effort to evade the imperative provision of law. Empirical data confirms the suspicion that companies deploy disaggregation strategies in order to avoid the application of tort and labor law.

In the case of decentralized networks, however, we should make a return to our example of the marketing of private automobiles. Although the external liability of the

network, and not just that of its individual nodes, should be legally guaranteed, the piercing of the contractual veil should not result in unitary collective liability. Rather, the appropriate form of liability is a decentralized, multiple and collective combination of network liability and the liability of nodes who have in fact participated within the operation under scrutiny. In contrast to comprehensive collective liability in the case of formal organizations, this leads to a re-indivualization of collective liability within networks. Analogous to the well-known concept of ‘market share liability’, one might make use of the notion ‘network share liability’; a form of liability that is particularly significant in situations where the root cause of damage cannot be traced back to individual nodes, but only to the network itself. Such cases do not involve a traditional collective actor whose property might serve srve as the object liability claims. Nonetheless, the network does serve as a point of reference for the attribution of liability and as the springboard for the re-individualization of liability amongst individual nodes. Such a re-individualization is particularly to be promoted in cases where the individual contribution of nodes to damage can no longer be clearly distinguished, but comprehensive liability would seem to be an exaggeration. In such a situation, liability could be met through the pro-hafta liability of participating nodes, calculated in accordance within their degree of participation within the network.

4. Intersystemic Networks: Network Interest as a Legal Category?

A final conflict between different operational logics becomes apparent within a third constellation of hybrids. In the effort to promote technological transformation, the state provides extensive grants to joint research projects between particular industrial branches and independent research institutions. This results in a loosely organized network establishing close relationships between the relevant industries, participating research institutions and public authorities that have an interest in such co-operation. The network is charged with the pursuit of successful innovation. Its attitude to transaction costs, however, is as irrational and extravagant as a series of UN conferences.

This is a conflict between different social rationalities that again disturbs institutional arrangements. Participating actors demand to be allowed to behave in accordance with different and contradictory behavioral logics. The case of public-private research networks would require rational actors to observe three mutually incompatible categorical imperatives. Hybrid networks, in this case, appear as manna from heaven, being exactly tailored to bridge multiple contradictory rationalities. They facilitate mutual interference between rationalities without the imposition of hierarchical order.

Can a legal concept of network respond to such demands? In the case of mixed network regimes, the

simple evolution of legal norms to support the transaction costs advantages and efficiency gains of networks, as opposed to contractual or corporate arrangements, is clearly not enough. In reality, such networks only offend against the imperatives of transaction cost minimization and allocative efficiency. Nonetheless they are successful innovators. The role of legal concepts of the network is therefore, in this case of mixed public-private regimes, far more one of developing principles of institutional autonomy, of establishing fundamental rights, of securing procedural fairness, of ensuring the rule of law and of fostering political responsibility.

This points to one of the central tasks of a law of hybrid networks. In contrast to traditional legal concepts, such as 'contractual purposes' or 'business interest', this involves the evolution of a legally applicable concept of 'network interest'. As a counterpoint to instrumental autonomy, I call this the legally secured 'reflexive autonomy' of individual sub-units within the network. Within integrated organizations, be they private concerns, public corporations or mixed form, rules on organizational procedure are always oriented in line with the common purpose. The character of this common goal is determinative in the case of a decentralization or delegation of functions. Decentralized units are afforded the freedom to use their local knowledge in order to chose the appropriate concrete means of pursuing the common aims of the entire organization, or, legally-speaking, the 'business interest'.

This is entirely different within intersystemic networks. Legal norms must not merely afford network nodes a heightened degree of protection for their autonomy. Instead, they must supply a different form of protection in that, despite centralization, they must guarantee reflexive capacities, i.e., the capacity of nodes to balance out (of network relations) their own independent concept of their social function and contribution to their environment. Within intersystemic networks of scientific knowledge, politics and the economy, this leads us in the direction of a quasi-constitutional guarantee for scientific freedom in the face of political and economic inter-references within the borders of a mixed network. This idea is in fact generalizable. In contrast to the case of companies, in which legal guarantees of the autonomy of subsidiaries protect the profit interests of the parts against the whole and vice versa, we are required, in the case of intersystemic networks, to respect the institutional integrity of health, education, journalism, technology and art, not only within a decentral (not simply decentralized) structure of autonomous nodes, but also within the inclusive network. Although it still makes sense to conceive of a common company interest in the form of procedural and material legal norms within corporation law, the ‘network interest’ can only be created out of the depths of the compatibility of autonomous network participants.