NETWORKS

In the last 20 years interest in network phenomena has grown immensely among anthropologists, psychologists, political scientists, economists and lawyers. Empirical observation shows that network arrangements can be found in many branches of business. This is often linked to rapid changes in today's markets and technologies, but it is not the only reason. Legal institutions have been at the centre of private law since the industrial revolution but today contracts and corporations cannot cope with the risks and opportunities posed by networks. Legal practice needs solutions which go beyond the classical traditions of thinking in the dichotomy of contract and corporation. This volume is the outcome of a conference held in Fribourg, Switzerland, which focused on the legal treatment of contractual networks, in particular questions of network expectations, the fragility of network institutions, and the question of how law can minimise network specific risks towards third parties. The contributors, among them many of the world's leading scholars in this field, include Roger Brownsword, Simon Deakin, Gunther Teubner, Hugh Collins and Marc Amstutz. The book will be of interest to scholars of contract, corporate law, and legal theory.

International Studies in the Theory of Private Law: Volume 6

International Studies in the Theory of Private Law

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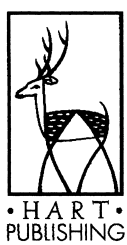
Networks

Legal Issues of Multilateral Co-operation

Edited by Marc Amstutz and
Gunther Teubner



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Preface

What is Legal Analysis of Contractual Networks?

In the past 20 years, interest in network analyses in the humanities and social sciences has grown immensely. Not only sociology, anthropology and psychology, but also political science, economics and—last but not least—the law have been directing their attention to network phenomena to an increasing extent. What are the reasons for this increasing interest in networks?

First, there is the empirical observation that numerous indications for a hitherto unknown spreading of network arrangements between organisations can be detected in many branches of business.[1] Often, this observation is linked to swift changes in today's markets and technologies: industry has responded with radical re-organisation which aims at more disaggregate and more flexible production arrangements. But perhaps the fascination which the network phenomenon causes must be explained on a more profound basis. It is not the empirical frequency of the network phenomenon, but rather the circumstance that this phenomenon goes beyond the scope of the forms of action established in both the economy and in society that should be considered as crucial: the network can neither be subsumed under the category of market, nor under the organisation category.[2]

This also indicates the difficulties with which the network phenomenon confronts the law. The legal institutions which have been at the centre of private law since the industrial revolution—contract and association—cannot cope with the risks and opportunities posed by networks. Numerous cases brought before the courts show that these institutions are not able to deal with the co-ordination and liability problems which are generated by networks. Legal practice needs solutions which go beyond the classical traditions of thinking in the dichotomy of contract and association—without being able to count on veritable support from legal doctrine in doing so. This provides the motive to invite legal scholarship to develop solutions that are held to be adequate for the network phenomenon.

This volume is the outcome of a conference held between 6 and 9 October 2005 in Fribourg, Switzerland. In this conference, an invitation

[1] See, generally, WW Powell, 'Neither Market nor Hierarchy: Network Forms of Organisation' (1990) 12 *Research in Organisational Behaviour* 295–336.

[2] See, generally, G Teubner, *Coincidentia Oppositorum*: Hybrid Networks beyond Contract and Organisation' (ch 1), in this volume.

was addressed to legal scholars with different legal and cultural backgrounds in order to engage in an international discussion on the legal treatment of contractual networks. The results of this discussion are presented here along the lines of three different questions, which are crucial for the legal treatment of contractual networks.

The first question concerns the issue of the emergence of contractual networks in law. We have already referred to the overstraining of law caused by the emergence of contractual networks, since the two modern institutions of law, contract and organisation, are ill-suited to deal with this new social phenomenon. Contractual networks defy a clear-cut subsumption under one of these institutions, thus bringing the law into confusion. So, what kind of cognitive and normative resources does the legal system have to mobilise in order to grasp this new phenomenon?

The second question refers to the internal network perspectives. Contractual networks are fragile institutions, which are always in danger of dissolving. People enter contractual networks because they rely on specific trust relations. But trust is always endangered by opportunism, which is subsequently the result of 'capture' of the network parties in a so-called 'double bind' situation. Due to certain economic developments, network parties are exposed to two different and, at the same time, contradictory demands. On the one hand, they are forced to co-operate with each other, and, on the other, they are forced to act competitively. How can law untangle such a paradoxical situation? What can law's institutional contribution to the stabilisation of these fragile institutions be?

The third question deals with the external network perspective. For all their flexibility and productivity, networks have acquired a bad reputation for their 'organised irresponsibility'. Contractual networks generate risks towards third parties because of their chameleon-like character. When it comes to issues of liability towards third parties, the parties of a contractual network are involved in another kind of opportunistic behaviour: this time, they point to the internal structure of the contractual network as a mere bundle of bilateral contracts, thus suppressing certain 'organisational' elements of the contractual network in order to avoid liability. This kind of opportunism has to be dealt with by law. Accordingly, the question is: How can law minimise these network-specific risks for third parties?

I. NETWORK EXPECTATIONS AND THEIR LEGAL EMBODIMENT: A MERE QUESTION OF LEGAL TRANSLATION?

'Network is not a legal concept'.[3] Although Richard Buxbaum is right on this, his statement can, nevertheless, only be the starting point for our enquiry into law's capacity to reflect upon the network phenomenon. This is, indeed, a question of an epistemological character, as it refers to law's capacity to quasi 'transcend' its own borders and 'reach' its own environment. In systems-theoretical terms, we can even argue that this is a question of justice, if we actually understand justice—as it has been defined by Niklas Luhmann—namely, as 'adequately complex internal consistency of legal decisions'.[4] But how can law do justice towards the network expectations that arise outside of its own '*forum proprium*'? To put it more clearly: How can law show responsiveness towards the network expectations that arise from bilateral contracts, linking a certain number of actors beyond the explicit contractual substance of these bilateral contracts? As we stated before, traditional contract law is blind to these kinds of expectations because of the dominance of the principle of privity, which forbids any reference to external expectations other than those of the parties of the bilateral contract. But the help that the law of organisations offers here also proves to be insufficient, as it is not sensitive enough towards such flexible arrangements as contractual networks that consist of a number of bilateral contracts. Quo vadis, then?

Gunther Teubner abandons, from the outset, the hope that empirical results or theoretical insights from the social sciences can guide law in a direct manner. As he points out in his introductory essay,

> the decisive legal irritations are not supplied by inter-disciplinary contact with social science disciplines *stricto sensu*, but with normatively-loaded reflexive practices in various social fields.

In other words, 'network expectations', as mapped by social scientists, cannot be translated directly into law. A transfer of reflexive social practices into legal doctrine is impossible. The only way out of this impasse of mutual exclusion of legal doctrine and social sciences is, instead, the irritation of legal doctrine towards the development of conceptual innovations by its own, internal, path-dependent evolutionary logic. Teubner also takes as his starting point Buxbaum's statement that 'network is not a legal concept', but he goes one step further, as his analysis tries to discover legal complements for what legal sociologists call a 'contractual network'. It is in the legal figure of the so-called

[3] RM Buxbaum, 'Is "Network" a Legal Concept?' (1993) 149 *Journal of Institutional and Theoretical Economics* 698 at 704.

[4] N Luhmann, *Das Recht der Gesellschaft* (Frankfurt aM, Suhrkamp, 1993) 214 *et seq*.

'connected contracts' ('*Vertragsverbund*') that Teubner identifies a potential doctrinal basis for developing a legal constitution of contractual networks from within the law.

Although he does not follow a systems-theoretical perspective in his essay, Jean Nicolas Druey still shares with Teubner the same opinion about law's exclusion of the world of facts, as he calls it. But he is, at the same time, quite sceptical about the law's ability to be irritated by network concepts; this scepticism is also shared by other contributors of this volume, such as Hugh Collins, to give one example. The reason for his concern lies mainly in the general 'hype' around the term 'network'. It is true that the term 'network' has been used and celebrated in the relevant literature in a rather hypertrophic way. For Druey, the discussions about this concept have not contributed to its further clarification; the network concept remains, instead, a very ambiguous one that is in need of further differentiation. For example, many characteristics which have been attributed to the network concept so far, such as—in the words of Druey—the *mixture formula,* which describes networks as a combination of market and hierarchy, are also typical in other contexts, such as that of an organisation. As long as the term 'network' remains so vague and undifferentiated, it can hardly be absorbed by law because of law's 'natural' resistance to such vagueness. Druey draws our attention here to the evolution of the concept of *societas*, which also had to wait a long time till it could be established as a well-defined legal concept. It only remains to be seen if the network concept will also have the same destiny.

Marc Amstutz's concluding essay in this volume is positioned somewhere in between these two approaches. On the one hand, he shares Druey's reservations, on the other, he acknowledges Teubner's plea for a legal re-construction of network expectations mainly because of the risks that they generate. However, he does not share Teubner's optimism towards legal scholarship's ability to create a new constitution of the network on the basis of the concept of 'connected contracts'. He therefore argues for a (from a doctrinal perspective) different approach, which he calls a 'contract collision' approach. His suggestion is that, in cases of network conflicts, one has to use the rules applicable to the individual contracts of the network as quasi conflict-of-laws norms, and thus try to build the blocks of a legal constitution for the entire contractual network. The crucial question is, of course, under which rules of a contract out of the whole contractual nexus should a network conflict be subsumed? Inspired by the conflicts-of-law[?] scholarship, Amstutz formulates the following criterion: conflicts in a contractual network come under the contract whose rules in the specific case ensure the functionality of the network as such. He then illuminates his approach by analysing relevant decisions of the Swiss Supreme Court.

Amstutz's approach to the complete issue is, in this regard, in line with Roger Brownword's proposal, which encourages us to work with a 'general network principle', according to which the fact that bilateral contracts are part of a network should be taken into account in legal analysis. In his essay, Brownsword succeeds in demonstrating that contractual networks are not as exotic as many might think. Instead, they are—in numerous instances—typical paradigms of self-imposed governance structures, as in the case of bilateral contracts. Consequently, by importing the network argument into legal doctrine, we enable ourselves to solve doctrinal puzzles that have bothered the courts and academia for a long time now (because of our obsession with the privity of contract), such as, for example, the puzzle with the spill-over effects from one bilateral contract to another. In this context, Brownsword makes a very insightful distinction when it comes to contractual networks: he distinguishes between voluntary, versus imposed networks in contracts. In the case of the voluntary networks, we are actually dealing with 'true' contractual regimes, whose justification lies in the genuine will of the parties. In the case of the imposed networks (Brownsword speaks here of imposed governance structures), the justification for the imposition of the network concept is, instead, based upon substantive goals, such as fairness or efficiency. The network argument is, however, legally relevant in both cases, as the general principle always remains the same: in both cases, bipolar contracts are superseded by a unifying objective.

While Brownsword argues, for the above-mentioned reasons, against consigning networks to history, it is to history that Simon Deakin turns in order to assess the network phenomenon today. For Deakin, network forms are not a manifestation of the 'post-industrial society' of the late-twentieth century, but rather a very old phenomenon, successfully suppressed by the emergence of the industrial society. It is, concretely, the medieval guild, in which Deakin recognises a predecessor of the various network forms today. By studying how the medieval guild declined on the eve of the industrial society, thus paving the way for the emergence of the integrated business enterprise, we can—according to Deakin—learn a lot about the legal policies which we have to deploy if we do not want present-day network forms to share the same fate as their predecessors.

Poul Kjaer challenges this view of the network phenomenon as the return of the medieval guild. By deploying the systems-theoretical distinction between *stratificatory* and *functional differentiation*, he argues that the function of networks in late modernity, characterised by a radical functional differentiation, is fundamentally different from the function of the guilds in the medieval societies, namely, societies with 'a strong differentiation between the centre and the periphery as well as a high level of stratification'. While guilds in the medieval societies handled—

among other things—the exchange between centre and periphery, contemporary networks act instead 'as integrative measures under the condition of radical functional differentiation'. Accordingly, one has to be cautious when using old concepts in order to assess modern ones.

One of the main goals of this first theoretical section is not to reach an agreement, but to advance polyphony. Admittedly, this polyphony suits the nature of the network phenomenon best because of its multi-faceted character, but it also promotes a better understanding of the legal problems that arise with the emergence of contractual networks. As mentioned above, these problems mainly concern issues of solidarity among network participants, as well as issues of liability towards third parties. Thus, we come to the next section of the volume, in which the internal relationships among the network participants and the duties deriving from them will be closely explored.

II. INTERNAL PERSPECTIVES OF CONTRACTUAL NETWORKS: THE VIEW FROM WITHIN

One of the most interesting questions regarding contractual networks is that of whether network advantages are granted to the initiator of the network, for his or her organisational work, or to the network partners. This is a question which is frequently raised in franchise networks and one which has so far been dealt with by courts in a number of cases, especially in Germany.[5] Hence, the question is of great interest, since we can, at this micro-level, clearly observe the nature of contractual networks, as well as the legal doctrine's difficulties in dealing with the network phenomenon in general. In franchise-systems, the suppliers of the network are, indeed, entering into isolated bilateral contracts with the initiator of the network. The latter can, in turn, negotiate certain advantages with these suppliers, such as purchase rebates from a relative power position, from which he makes capital out of his bilateral contracts with the franchisees. Taking this picture as a starting point, one certainly misses the quasi-vertical integration of the franchise system if one only stresses the fact that the various actors are only related by isolated bilateral contracts. In such cases, the franchisor indeed seems to be free to decide as to whether he will pass on the network advantages or not. But is this, indeed, the case? Does not the multilateral interconnection in the franchise system produce network effects that would justify a duty to pass on network advantages? This is the topic of Reinhard Böhner's interesting essay. The author discusses the various cases that have been

[5] See R Böhner, 'Asset-sharing in Franchise Network. The Obligation to Pass on Network Benefits' (ch 9), in this volume.

decided by German courts, in which he was also personally involved as the attorney on the franchisee-side. The aforementioned question has been answered by the German Federal Court of Justice in the affirmative in three leading cases, but, as Böhner criticises, on shaky doctrinal grounds. The obligation to pass on network advantages in these cases was subject to standard contract clauses, which had to be interpreted, and thus the court decided the cases as a question of the correct interpretation of standard contract terms. But, as Böhner argues, for the future we have to decide this question upon more stable doctrinal grounds, as it is possible that, following this jurisprudence, the franchisors will delete from their contracts with the franchisees such provisions, thus leaving the issue open once more for adjudication. Thus, Böhner explores from a German *lex lata* perspective, with much detail, on which doctrinal grounds this question should be solved in the future. Even more interesting, though, is his analysis of law's contribution to the stabilisation of these fragile social institutions, as they are always inclined to self-destruction because of the opportunism of their actors.

Peter W Heermann deals in his essay not only with the problem of profit sharing, but also with issues such as the division of risk, piercing legal liability within the network and external network liability. At the same time, however, his inquiry seems to be narrowly framed, as he only explores so-called (mini-) networks, such as credit card transactions and bank transfers. The synallagmatic structure of this kind of network, which is analysed on the basis of his concept of the so-called trilateral (or rather multilateral) synallagma, might serve though as *landmarks* for legally assessing broader contractual networks. In a dogmatically elaborate essay, Heermann analyses the points at which his concept diverges from that of Teubner. These differences mainly pertain to the legal consequences that he draws out of his concept of the trilateral synallagma, as well as the general question of the legal constitution of connected contracts. By making the distinction between connected contracts *with* synallagmatic structures and connected contracts *without* synallagmatic structures, he argues that the legal consequences for the former primarily derive from the principles of the trilateral or multilateral synallagma—in other words, from the performance obligations stemming from the various bilateral connected contracts—whereas, in the case of the latter, the legal consequences have to be defined either on the basis of a further development of his concept of a trilateral (or rather multilateral) synallagma, or according to the law of contractual associations, depending on the degree of legal interdependence of the various bilateral connected contracts. In his analysis, Heermann shows reluctance towards Teubner's sociologically-charged concept, although he acknowledges many of the virtues of Teubner's sociological observations. He nevertheless seems to trust more in positive law and what it provides.

With respect to this, Marina Wellenhofer's approach is in line with Heermann's approach. To the fundamental question of whether the network phenomenon, the affirmation of the network purpose and the specific structure of interests within networks really necessitate new legal constructions, her answer is negative. Though she acknowledges the legal relevance of network effects, she is, at the same time, quite sceptical about the necessity of developing new legal concepts. In a critical assessment of various legal concepts developed for contractual networks, she tries to show the doctrinal deficiencies of all these concepts. She argues, instead, for a tort law approach to the legal problems that are posed by contractual networks. Her plea for a tort law approach is, indeed, very interesting. Tort law with its reference to *boni mores*, good manners, and customs of trade is closely linked to social practices, social norms and social institutions, and—as a legal concept—it might indeed show a greater responsiveness towards contractual networks, which are also social institutions. However, one has to consider that the nature of the *boni mores* rules is a transitory one and that the question is whether we should hence try to develop a more stable doctrinal basis for dealing with the network phenomenon and its effects, or rather learn to live with these anomalies and their situational interception by tort law?

Cordula Heldt definitely argues for the first alternative in her essay, in which she compares two prima facie entirely different contractual networks, namely, franchising and construction contracts. Her studies focus especially on the internal relationships within these networks. These are the legal relationships of the participants in a construction co-operation (networks of construction contracts) or in a franchise system, which are contractually unconnected. The interesting twist in Heldt's essay is that she is deploying Friedrich August von Hayek's theory of spontaneous orders in order to explore the structures of these contractual networks. According to her view, both types of contract network indicate a structure of semi-spontaneous orders, which is legally reproduced as a multilateral special relationship ('*Sonderverbindung*'). She then goes on to apply this theoretical concept in order to deduce concrete legal consequences concerning the internal relationships of the various participants of both network forms.

III. EXTERNAL PERSPECTIVES OF CONTRACTUAL NETWORKS

Patronage relations, clientelism, '*amici degli amici degli amici*', quasi-feudal trust relations, collusion, restraint of competition, and mafia-like structures are just some of the characteristics that have been attributed to modern networks and that have contributed to their reputation as new institutional forms of 'organised irresponsibility'. Consequently, the law has so far oscillated in its treatment of these new forms of action in

modern societies between two extreme positions, namely, between total indifference or strict forbiddance. It is, indeed, a fact that these designations are not ungrounded. In particular, the risks that networks generate towards third parties have certainly contributed a great deal to their bad reputation as quasi-parasitic social institutions. At the same time, these risks also constitute one of the most difficult problems that the law has to tackle today. Therefore, if the stabilisation of these fragile institutions is one of our main goals, then one also has to pose the difficult question of the legal organisation of their relationships within their environment. However, this does not preclude the issue of protection against interference by third parties. The following essays mainly deal with these issues, arguing, in many cases, also for alternatives to legal regulation.

Hugh Collins begins his essay with two stories, both concerning supply chains in the grocery market, in order to illustrate his argument. The first story refers to the imposition, on the part of the supermarkets, of retrospective price variations on suppliers in breach of contract. The second story considers the legal status of consumers in supply chains, as well as their legal rights deriving from it, especially in cases of stock-outs, ie, when the legitimate expectations of the consumers for supply have been frustrated. Collins asks, accordingly, how the network analysis might change our perception of these two cases? And, in broader terms, what is the value of the network argument for legal analysis? In this sense, the questions posed by Collins bring us back to the first section of this volume, where the issue of the legal embodiment of network expectations has been thoroughly analysed. Collins's analysis of the architecture of supply chains highlights many aspects of these contractual arrangements, which remain unseen by the traditional approach, which observes them mainly through the lenses of the private law of sales. The author, nevertheless, doubts if this conceptual analysis of the network architecture of modern supply chains can, indeed, help to develop a normative reorientation of private law, thus sharing the scepticism of many previous authors such as Druey and Wellenhofer. Although he ascertains the fact that the network architecture of supply chains constitutes a distinctive form of business organisation, he nevertheless believes that, instead of trying to develop new legal constructs in order to deal with the results of conflicts arising within the network or with issues of external liability of the network,

> non-legal sanctions may serve sufficiently to protect the network from the disintegrative pressures which arise from opportunism, without the need for the law to re-allocate liability risks.

In other words, Collins argues for a self-regulation of the various participants in such contractual arrangements—a self-regulation that might be more efficient than any legal intervention.

In his commentary of Collins's paper, Stefanos Mouzas offers a detailed empirical analysis of the networks analysed by Collins, as well as a well-founded critique of one of Collins's main assumptions, namely, the one regarding the need for a legal recognition of these networks. The main problem lies, according to Mouzas's view, not so much in the inadequacy of legal concepts for such kinds of contractual networks, as in the encounter of issues such as the external liability of networks. Here, he agrees with Collins that non-legal interventions might be proved to be more efficient than legal ones. However, his distrust towards legal interventions in such cases is based upon the assumption that such interventions might jeopardise the efficiency of one of the most important pillars of our private law system, namely, freedom of contract, which consists—in his words—in leaving parties free to negotiate their own contracts. He therefore argues in favour of a mixture of self-regulation and governmental intervention.

Not only are issues of external liability of contractual networks crucial and in need of legal solutions, but also issues concerning the problem of the protection of networks against interference by third parties. This is the subject of Manfred Wolf's interesting essay. By analysing two cases decided by German Federal Courts—the first, the so-called 'product test case', decided by the Federal Court of Justice (*Bundesgerichtshof* (*BGH*)) and the second, the so-called 'strike case', decided by the Federal Labour Court (*Bundesarbeitsgericht* (*BAG*))[6]—the author tries to develop a stable doctrinal base for encountering the damages that third parties may cause on networks. In a doctrinally elaborate analysis of the German *lex lata*, the author recognises such a legal basis in 'the right on established and ongoing business'. As he mentions in his concluding remarks,

> Network contract systems and, possibly, also—albeit to a lesser extent—chain contract systems should be protected against interference by third parties under the right of the established and ongoing business if they are organised as fixed-supply models, ie, their internal structure is organised in a way that the members of the system are constantly tied together by their contractual relationships and are therefore dependent upon each other.

Wolf's analysis is exemplary in this sense, because it clearly shows how old doctrinal institutions, such as the one analysed in his essay, can be further developed in a very productive way, in order to encounter new challenges posed by contractual networks.

In this sense, Gralf-Peter Calliess's analysis lies not far away from Wolf's productive re-examination of old doctrinal institutions. By using

[6] See M Wolf, 'The Protection of Contractual Networks against Interference by Third Parties' (ch 12), in this volume.

as a case study consumer contracts in fitness clubs, Calliess also highlights the need for thinking productively when dealing with novel issues. Accordingly, the author criticises the traditional view that defines the formal legal structure of fitness clubs as consisting out of a multitude of parallel, but separate, bilateral consumer contracts. This view is—according to the author—distorting, and even leads to inefficient results when it comes to issues of consumer protection in cases of breach of contract. The author argues instead for using the network concept as an argument in order to disclose the real nature of fitness clubs. According to his view,

> [t]he fitness club is specific in creating a club-like structure of mutual subsidies between its members, thus loosening the tight 'do ut des'-synallagma of the typical bilateral business-to-consumer contract.

In this regard, Calliess is in line with Brownsword's argument that we should work with a 'general network principle', as he also shares the belief that the deployment of the network principle will enable us to see the hitherto hidden dimensions of this bundle of bilateral and parallel contracts of which a fitness club consists, and thus regulate them in a more fair and efficient way.

Contractual networks are not the prerogative of private actors alone. In the last decade, we have instead experienced the emergence of such arrangements both among public and private actors, not only at the supra-national level of the European Union, but also within the various nation states. These intensified forms of 'co-operationism' between public and private actors have plunged the law into deep crisis, as Andreas Abegg argues in his essay. This crisis is the product of two explosive implications of these new 'constellations' for the legal system, first, the freeing of the public administration from the rule of the bindingness of statute, and, secondly, the transfer of the duty to provide public goods to the hands of private actors—a duty that has so far been the only prerogative of public actors. Well-defined legal distinctions, such as the one between private and public law, have subsequently been criticised for being totally inadequate to capture the nature of these new arrangements; hence, the term 'hybrid networks' in the relevant literature. But, under these circumstances, what is most feared is the loss of the ability to bring these hybrid networks under legal and democratic control. Abegg develops his argument on the basis of an illustrative case decided by the Swiss Federal Court regarding the third-party effects of an agreement on a code of conduct between the Swiss National Bank and the Swiss Banks. It can be summarised as follows: by using evolutionary systems theory, he suggests viewing this kind of arrangement as effective structural couplings between the political and economic systems, and accordingly, tries to propose appropriate legal rules to protect and reinforce such

couplings, and thereby provide the conditions for a process of co-evolution of the relevant systems, so that public interest demands can be satisfactorily harmonised with the demands of the economy. This may involve—according to the author—using the kinds of contractual networks which are the main concern of this volume in order to frame these relationships and provide these couplings.

In his thoughtful comments on Abegg's paper, Terence Daintith challenges this view. As he states,

> [w]hat, for him [Abegg], is a contractual network with a high capacity for structurally-coupling different social systems (politics and economics) with positive results, looks to me like an ingenious, though essentially artificial, use of contract as a formal vehicle for command-and-control regulation, under a scheme whose lack of legitimacy could not be cured without depriving the structure of the very advantages which Abegg attributes to it.

Subsequently, the author criticises the deployment of such a concept for achieving certain regulatory purposes.

The exploration of all these aspects of the network phenomenon forces us at the same time, though, to realise the limits of legal analysis. As one of the authors of this volume put it, the world of facts is far more complex than the law, which relies on a rather simplifying function when it is confronted with the former. This condemns legal analysis not to paralysis, but to an eternal struggle to understand the world outside and to try to develop legal rules that are socially adequate. And this, again, is an issue of 'justice' which cannot be dismissed light-heartedly.

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Part I.

The Emergence of Networks in the Law

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Coincidentia Oppositorum: *Hybrid Networks Beyond Contract and Organisation*

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I. THE IMPOSSIBLE NECESSITY OF SOCIOLOGICAL JURISPRUDENCE

'NETWORK IS NOT a legal concept'.[1] If Richard Buxbaum's apodictic judgement is true, then lawyers can have little to say about networks. Should they wish to make appropriate judgements when business networks, franchising arrangements, just-in-time-systems, or virtual enterprises do cross their paths, then they must consult social scientists, such as economists, organisational theorists and sociologists. For better or for worse, they must engage in sociological jurisprudence. Yet, 'sociological jurisprudence' is a pipe-dream. After a heated debate for almost a century, lawyers know that, logically speaking, it is an oxymoron—like a white raven. Practically speaking, it necessarily falters in the face of the normative closure of the legal system. This is a lesson that we are correctly taught, not only by traditional doctrine and by Max Weber's theory of formal legal rationality, but also by advanced systems theory.[2]

I seek to support—and simultaneously to undermine—this claim through concrete examples. My concrete observations are about new network phenomena, how they irritate the courts and provoke the judges to juridical adventures. I will raise the question of whether restrictions in

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

[2] For legal doctrine, for example, H-M Pawlowski, *Methodenlehre für Juristen: Theorie der Norm und des Gesetzes. Ein Lehrbuch* (Heidelberg, CF Müller, 1999) 74 *et seq*; for formal legal rationality, M Weber (1978) *Economy and Society* (Berkeley CA, University of California Press, 1978) 85 *et seq*; for contemporary systems theory, see N Luhmann, *Law as a Social System* (Oxford, Oxford University Press, 2004) ch 2.

the two common ways in which the law observes its social environment—judicial and legislative reality reconstructions—systematically preclude an adequate treatment of such new social phenomena. Does the law actually need a third mode of observing the so-called 'social reality'? Business co-operation networks provide an example for the observation that this third approach cannot simply be secured through the social sciences, but is instead wholly dependent upon a unique combination of legal doctrine and reflexive social practices. I describe this 'third way' as an effort to irritate the legal system selectively with particular demands from its social environment. I still call it sociological jurisprudence, although, and even because, this is the same form of necessary pipe-dream that 'legal policy analysis' or 'legal economics' represent. Attempting to take a couple of steps along this impossible, but necessary, third way, I shall demonstrate how the legal qualification of networks, and in particular, their legal conditions and their legal consequences, can be tackled through confrontation with non-legal social reality constructs.

***Thesis 1*:** It is a scientistic misconception of the law to believe that empirical results or theoretical insights from the social sciences can guide law to any significant degree. The decisive legal irritations are not supplied by interdisciplinary contact with social science disciplines *stricto sensu*, but with normatively-loaded 'reflexive practices' in various social fields. My example, the dramatic extension of liability throughout network systems, is a judicial reaction to social perceptions of the risks posed by economic networks.

***Thesis 2*:** The 'translation' of reflexive social practices into legal doctrine is not a direct knowledge transfer from the social to the legal field. Private law doctrine can only be persuaded to develop conceptual innovations by its own, internal, path-dependent evolutionary logic. My example is that 'network' is not a legal concept. It is a social construct and its legal complement can only be reconstructed within the law, possibly by developing 'relational contracts' into 'connected contracts' (*Vertragsverbund*).

***Thesis 3*:** One of the most important achievements of sociological jurisprudence is that it has been able to support law's contribution to the problem of how to deal with the paradoxes within social practice. My example is that networks emerge when actors are confronted by paradoxical demands in their environment. The law reacts to such network paradoxes with a new legal concept 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 in Germany. The importer had only succeeded in gaining German market entry relatively late in the day and 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 contracts stipulated that the vehicles would remain the property of the importer until full payment of the sales price had taken place. A customer took possession of a vehicle from a dealer, paying an initial instalment on the sales price. The customer was given the vehicle, the keys and a road licence, but not the ownership papers since, according to the distribution contracts, these remained in trust until the full payment of the sales price. Under pressure from the dealer and his incorrect claim that full payment was necessary for the internal sales completion, the customer paid the remainder of the sales price, without, however, receiving the ownership papers of the vehicle. 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 actor within the distribution system, was liable for the failure of the direct dealer to fulfill his legal obligations.

In a courageous judgment, the Karlsruhe Court of Appeal (*Oberlandesgericht*), departed radically from contractual privity, a fundamental principle of German private law.[3] By 'piercing the contractual veil', the Court made the network centre directly liable, although there was no contractual link between the customer and the centre whatsoever. The Court first confirmed the importer's demand for the return of his property[4] and then rejected the customer's claim to having received the property in good faith on the basis that the customer's naïveté constituted gross negligence.[5] Employing a daring sleight of hand, however, they then allowed a compensation claim against the importer. The Court finally decided in favour of direct liability of the central distribution node, and held the importer responsible for the dealer's breach of legal obligations, notwithstanding the independence of the latter.

The grounds for this decision, however, are extremely unconvincing. The judgment is an explosive mixture of German law's principles of organisational responsibility, of directors' liability and of *respondeat superior* for the acts of individual agents. However, the quality of the judgment still fails to improve, even if we make a clear distinction

[3] OLG Karlsruhe (1989) 2 *Neue Zeitschrift für Verkehrsrecht* 434.
[4] § 985 of the German Civil Code (*Bürgerliches Gesetzbuch* (*BGB*)).
[5] § 932(II) BGB and § 366 of the German Commercial Code (*Handelsgesetzbuch* (*HGB*)).

between the various grounds for liability. Either the Court should have fundamentally changed at least one of these principles, explicitly distinguishing it from the previous precedent, or it should have refused to pierce the contractual veil. Currently, precedent in German law would refute the Court's finding that the construction of a business network with dealers of a dubious character gives rise to an organisational liability.[6] To date, organisational liability has only been applicable to authentic legal persons. Its extension to other group phenomena remains in any case anchored in the law of associations, and thus organisational liability has no application to simple contractual relationships.[7] By the same token, the breach of directors' liability, in such a case, is precluded by the conditions of the delictual general clause.[8] Equally, the escape hatch of *respondeat superior* is closed, since independent enterprises simply do not qualify as 'agents' in tort law.[9] In view of these problems, it is little wonder that the Court of Appeal cooked up a strange mixture of these three liability forms and thus neatly avoided the question of whether and, if so, how it wished to overrule the precedent by piercing the contractual veil of a business network which is made up by bipolar contracts.

'The soundest judgment with the dullest opinion'—is the judgment best summed up by this cruel phrase? Certainly, the result is plausible and the justification weak. However, the judgment is not just wrong. This is because the Court was called upon to tackle a phenomenon that cannot be addressed within the concepts of contract and tort—the network phenomenon. In the last few decades, a massive increase in contractual networks has confronted the law with the troublesome implications of an evolutionary trend, which it cannot—in its entirety—decode using its own analytical tools. Independent business units commit themselves to closely interconnected co-operation networks and thus undermine both the distinction between market and hierarchy, and the distinction between contract, torts and corporation. If distribution systems were organised under the law of corporations and labour law, we would still be confronted by the problem of liability, but this would no longer be an issue of 'veil-piercing' liability, nor would it violate the principle of

[6] § 31 *BGB*. See H Heinrichs in O Palandt, *Bürgerliches Gesetzbuch*, 62nd edn (Munich, CH Beck, 2003) § 31, at 3.

[7] H Roth, 'Anmerkung zu OLG Karlsruhe' (1998) 2 *Neue Zeitschrift für Verkehrsrecht* 435–6.

[8] § 823(I) *BGB*.

[9] § 831 *BGB*. See Thomas in O Palandt, *Bürgerliches Gesetzbuch* (n 6 above) § 831, at 8. Several authors urge the courts to overrule this old principle, Roth, 'Anmerkung zu OLG Karlsruhe' (n 7 above); P Bräutigam, *Deliktische Außenhaftung im Franchising* (Baden-Baden, Nomos, 1994) 130 *et seqet seq*; E Pasderski, *Die Außenhaftung des Franchisegebers* (Aachen, Mainz, 1998) 174.

contractual privity. The dealer's behaviour would simply be imputed to the manufacturer/primary dealer, according to established rules of principal/agent law,[10] on the basis of the contractual obligations of the corporation. In contrast, if the distribution were organised between independent business units in a competitive market, then relationships with the external partners of the distribution system could not give rise to 'veil-piercing' liability. Thus, in conclusion, establishing a network between independent enterprises causes judicial irritation. An integrated distribution system which, on the one hand, entails more than simple market relationships, but, on the other, does not create any true organisational relationships, forces the judges to pierce the contractual veil, but, at the same time, causes them huge difficulties when they attempt to justify this decision.

'Judicial irritation' has a double significance.[11] Judges are irritated by networks, and are provoked to respond to anomalies with piercing techniques that contradict the logic of their own system. In turn, judicial precedent on piercing irritates doctrine, which regards such seemingly equity-oriented, ad hoc exceptions to privity of contract as a challenge to the workability of doctrinal concepts.[12] Is traditional doctrine in a position to qualify network phenomena to the extent that simple equitable exceptions can be transformed into conceptually precise legal network rules? Or, is the only source of help here 'sociological jurisprudence'?

II.1 Approach 1: Casuistry

Even the most detailed case law analysis has little, if any, help to offer. The blinkered reality perspectives of courtroom proceedings prevent an appropriate recognition of the trend toward networking. Since the courts' reality construction is founded in two-party proceedings, it 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 construction can only take limited note of the overarching conflicts and risks that networks entail. In this perspective, any doctrinal approach seeking to generalise from case

[10] § 278 *BGB*.

[11] For a concise analysis of judicial irritation in franchise law, C Joerges, 'Status and Contract in Franchising Law' in H Joerges (ed), *Franchising and the Law: Theoretical and Comparative Approaches in Europe and the United States* (Baden-Baden, Nomos, 1991) 11 *et seq*, and 21 *et seq*.

[12] For comprehensive discussion of piercing the corporate veil, see E Rehbinder, *Konzernaußenrecht und allgemeines Privatrecht: Eine rechtsvergleichende Untersuchung nach deutschem und amerikanischem Recht* (Bad Homburg, Gehlen, 1969) 69 *et seq*; E Rehbinder, 'Neues zum Durchgriff unter besonderer Berücksichtigung der höchstrichterlichen Rechtsprechung' in *Festschrift für Friedrich Kübler* (Heidelberg, Müller, 1997) 493 *et seq*, and 496 *et seq*.

law can only reproduce the claim and counterclaim culture and conclude by just balancing out the interests of the two parties.

As a consequence, then, doctrine should decisively free itself from systematically limited judicial models that can only react to the irritations of networks with individual equitable corrections. These models are not to be criticised for the manner in which they demarcate conflict:

> instead, the reality construction 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 reference are in turn identified within the social order.[13]

With regard to networks, such proceedings are fatal precisely because the networks are distinguished by their extra-positional effects.

II.2 Approach 2: Political Law-Making

Similarly, following policy-oriented trends within legal doctrine, it is not enough simply to adopt the reality constructs that emerge from the legislative process. Such a perspective entails too ready an acceptance of the world-views of 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 social pressures and political preferences. Similarly, it is not enough to adopt a perspective of 'legislative policies', since this means accepting the reality constructs of political parties and national and European political institutions, which, likewise, alienate 'real' social conflicts through the filtering processes of power and consensus politics.[14] In network matters, legislative interventions are paradigmatic examples of political tunnel-vision. European initiatives to free franchising from the strictures of competition law were selective responses to the highly effective lobbying activities of interest groups.[15] Similarly, in Germany, purchase money loans have been regulated, from the exclusive perspective of consumer protection, even though they also raise comparable regulatory problems in other contexts.[16] Were doctrine nothing but a systematic reproduction of the

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

[14] Here, one is drawn into the dilemmatic juridification of 'legislative policies'; see E Steindorff, 'Politik des Gesetzes als Auslegungsmasstab im Wirtschaftsrecht', in *Festschrift für Karl Larenz* (Munich, CH Beck, 1973) 217 *et seq*.

[15] M Shapiro 'Globalization and Freedom of Contract' in HN Scheiber (ed), *The State and Freedom of Contract* (Stanford: Stanford University Press, 1998) 269 at 285 *et seq*.

[16] For an extensive analysis, see PW Heermann, *Drittfinanzierte Erwerbsgeschäfte: Entwicklung der Rechtsfigur des trilateralen Synallagmas auf der Grundlage deutscher und U.S.-amerikanischer Rechtsentwicklungen* (Tübingen: Mohr & Siebeck, 1998) 92 *et seq*.

policies of interest groups and legislators, then, it would only intensify the existing inadequacies within the political reality constructs.

II.3 Approach 3: Reflexive Social 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 economic organisation. Today, this is no longer possible through the 'silent power' of autonomous legal conceptualisation. Instead, what is needed is an explicit 'structural coupling' of law with reflexive practices in different fields of society. All intensive co-operation notwithstanding, structural coupling does not merge social and legal practices: it ensures the autonomy of law.[17] At all costs, however, one must avoid the scientistic misconception, current within sociological jurisprudence and legal economics, that the law simply adopts the conclusions of social sciences.[18] This misconception is fed by the notion that the social sciences supply the empirical facts and the theoretical generalisations from which follow the law's normative perspectives. Notwithstanding the significant role that scientific analysis may play in identifying the workings of networks, law needs to be far more concerned with the normative orientations in society that neutral sciences are simply not in a position to provide. Such orientations can only be found in the normatively-loaded dogma within society; in other words, in discourses in which social practices reflect upon their own self-perceptions. Legal doctrine itself, and the mother of all dogmas, theology, are both organised as academic disciplines, but are, of course, not social sciences in the strictest sense. They represent social practices of law and religion which reflect upon themselves. The same holds true for other academic disciplines, such as business management, economics and political science (or, at least, for some of their sub-disciplines), which do not, as such, form a part of the disinterested, value-neutral social-scientific search for truth. Instead, they are the manifestation of the reflexive practices that take place in different social sectors. They make part of what David Sciulli calls 'collegial formations', that is, the specific organisational forms of the professions and other norm-producing and deliberative institutions within society.[19] It is social practices in the worlds of business, economy and politics that each create

[17] See, on the structural coupling of legal theory and social sciences, Luhmann, *Law as a Social System* (n 2 above) chs II and VII.

[18] RA Posner, 'The Decline of Law as an Autonomous Discipline: 1982–1987' (1987) 100 *Harvard Law Review* 761–80.

[19] D Sciulli, *Theory of Societal Constitutionalism* (Cambridge, Cambridge University Press, 1992); D Sciulli, *Corporate Power in Civil Society: An Application of Societal Constitutionalism* (New York, New York University Press, 2001).

their own self-descriptions, which, in turn, inform and guide the underlying social practices. In each discipline, an internal distinction must be made, at least, between scientific discourse and reflexive social practice. In the case of law, legal theory as a reflexive counterpart to legal practice needs to be distinguished from legal sociology as a social-scientific observation of law.[20] Similarly, in the other social sciences, we need to distinguish between discourses taking part in social practices, and discourses taking part in the scientific observation of these social practices.

What we are looking for, then, is an autonomous legal reconstruction of normative social orientations; orientations that law can glean in its interchange with reflexive social practices. How do they perceive the opportunities and risks of the network revolution? This gives us two advantages above the common misconception of the scientist. Reflexive social practice, in enjoyable contrast to the normative poverty of scientific analysis in its narrow sense, provides us with a plethora of normative perspectives—the famous *idées directrices* of social institutions, the normative expectations, social demands, political rights and utopian hopes of the individual participants within them, as well as the principles gained in political conflicts on the ground, and principles that concern their overall social purposes and their contributions to different constituencies.[21] This is what social science in the strictest sense could never produce, much less legal doctrine create from within itself. At the same time, however, the law will, in juridifiying partial social rationalities, enforce its own particularist-universal orientation above the particularist-universal orientations of other forms of reflexive practice. For example, when it comes to structural corruption, law needs to distance itself from the results of social practices. Sociological jurisprudence, currently cloaked in the mantel of scientific study, should thus, in fact, be identified as a specific legal mode of dealing with the collision between different social rationalities.[22]

[20] Luhmann, *Law as a Social System* (n 2 above) chs 1 and 11.

[21] These are phenomena that normative sociology focuses on, particularly, L Fuller, *The Morality of Law* (New Haven, Yale University Press, 1969); P Selznick, *Law, Society and Industrial Justice* (New York, Russell Sage, 1969); P Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* (Berkeley, University of California Press, 1992); F Ewald, *L'État providence* (Paris, Grasset, 1986); R Friedland and R Alford, 'Bringing Society Back In: Symbols, Practices, and Institutional Contradictions' in P DiMaggio and W Powell (eds), *The New Institutionalism* (Chicago: Chicago University Press, 1992) 232–63.

[22] For an elaboration, G Teubner, 'Altera Pars Audiatur: Law in the Collision of Discourses' in R Rawlings (ed), *Law, Society and Economy* (Oxford, Clarendon Press, 1997) 149–76.

II.3 (a) Business Studies

It is noteworthy that several legal studies on hybrid networks have now developed a heightened sensitivity for business studies—in our words, for a reflexive social practice that formulates the normative preconditions for business success. These legal forays across the borders have proved successful, since they have discovered the opportunities and risks posed by hybrid networks, and have allowed this material to inform their legal solutions. The pioneering analyses of franchising made early detailed reference to business studies and established their legal concepts in close proximity to the organisational demands of franchising systems.[23] The resulting legal typology maps interest-conflicts into different types of franchising (subordination, co-ordination, coalition and federation), subjecting each type to a specific regulatory regime (relational contract, partnership and corporate groups). Risk analyses of new forms of 'systemic' dependence in just-in-time arrangements base themselves upon detailed organisational studies that have unveiled, in particular, the importance of computer-based integration as compared to merely contractual or corporate dependence, and, via analogy of the law of corporate groups, have drawn legal conclusions.[24]

II.3 (b) Legal Economics

Indeed, reference to reflexive social practices in business management has been fruitful, especially where legal concepts of network phenomena need to be developed according to the motivation of actors. Nonetheless, if the task is one of reconstructing the network revolution in its relevance for economy and society as a whole, then the business perspective is far too narrow. Empirical business studies tend to focus only upon network effects on individual firms and fail to recognise general economic and social implications. Their normative viewpoint is similarly limited, since they concentrate upon the efficiency, effectiveness and (occasionally) legitimacy of the individual network. This is far too restricted a basis for a legal appraisal of network opportunities and risks.

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

[24] B Nagel, B Riess and G Theis, 'Der faktische Just-in-Time-Konzern: Unternehmensübergreifende Rationalisierungskonzepte und Konzernrecht am Beispiel der Automobilindustrie' (1989) 42 *Der Betrieb* at 1505 and 1506 *et seq*; B Nagel, B Riess and G Theis, *Just-in-Time-Strategien: Arbeitsbeziehungen, Gestaltungspotentiale, Mitbestimmung* (Düsseldorf, Hans-Böckler-Stiftung, 1990).

A step forward can be made here by taking into account the reflexive theories of economic practice and, above all, ideas from transaction-cost theory, property rights theory and economic institutionalism. Certainly, such theories conceive of themselves not as reflexive social practices, but as integral parts of the scientific-knowledge system. 'Pure' scientific theorems, however, devoid of all preconceptions, would never handicap themselves with normatively-loaded concepts and orientations, such as the *homo economicus* or 'economic efficiency'. Taking normative orientations, particularly efficiency concerns, as their starting point, legal studies of money transfer systems and other networks in the private sector are seeking to analyse and come to terms with the innovative, yet highly controversial category of a 'network contract'.[25] Other studies on symbiotic contracts, inspired by institutional economics, have successfully demonstrated the efficiency gains of networking and consequently advocate their legal institutionalisation.[26] Economic studies on network effects and their various legal implications are similarly profitable.[27]

II.3 (c) Social Theory

However, if law is concerned with embedding business networks within their broader political and social contexts, it must engage in a legal reconstruction of sociological network theories.[28] If law is to develop 'socially-appropriate' legal concepts, the analysis of market-networks

[25] W Möschel, 'Dogmatische Strukturen des bargeldlosen Zahlungsverkehrs' (1986) 186 *Archiv für die civilistische Praxis* 211–36; M Rohe, *Netzverträge: Rechtsprobleme komplexer Vertragsverbindungen* (Tübingen, Mohr & Siebeck, 1998) 66 *et seq* and 81 *et seq*, and *passim*.

[26] E Schanze, 'Symbiotic Contracts: Exploring Long-Term Agency Structures Between Contract and Corporation' in C Joerges (ed), *Franchising and the Law: Theoretical and Comparative Approaches in Europe and the United States* (Baden-Baden, Nomos, 1991) 67 *et seq* and 89 *et seq*; E Schanze, 'Symbiotic Arrangements' (1993) 149 *Journal of Institutional and Theoretical Economics* 691 *et seq*; C Kirchner, 'Unternehmensorganisation und Vertragsnetz: Überlegungen zu den rechtlichen Bedingungen zwischen Unternehmensorganisation und Vertragsnetz' in C Ott and H-B Schäfer (eds), *Ökonomische Analyse des Unternehmensrechts* (Heidelberg, Physica, 1993) 196 *et seq*, and 202 *et seq*; C Kirchner, 'Symbiotic Arrangements as a Challenge to Antitrust' (1996) 152 *Journal of Institutional and Theoretical Economics* 226 *et seq*; C Kirchner, 'Horizontale japanische Unternehmensgruppen (keiretsu) im deutschen Konzernrecht' in T Baums, KJ Hopt and N Horn (eds), *Corporations, Capital Markets and Business in the Law: Liber Amicorum Richard M. Buxbaum* (London, Kluwer Law International, 2000) 339 *et seq*, and 351 *et seq*; for a fruitful legal-economic analysis of cooperation contracts, see R Kulms, *Schuldrechtliche Organisationsverträge in der Unternehmenskooperation* (Baden-Baden, Nomos, 2000) 55 *et seq*, and 240 *et seq*.

[27] MA Lemley and D McGowan, 'Legal Implications of Network Economic Effects' (1998) 86 *California Law Review* 479 *et seq*.

[28] The social embedding of economic interchange is the objective of economic sociology, which has a closer empathy with the analytical interests of legal scholarship than do purely economic analyses. Representative, NJ Smelser and R Swedberg (eds), *The Handbook of Economic Sociology* (Princeton, Princeton University Press, 1994).

must be broadened to take the reflexive practices of other social environments into account. We are concerned here—all cognitive hurdles notwithstanding—with a legal reconstruction of the normativity inherent to social practice. As for networks, '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.[29] 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.[30]

III. TRANSLATION PROBLEMS: NETWORKS AS CONNECTED CONTRACTS

However, I repeat: '"Network" is not a legal concept'. All joyous legal contact with reflexive social practices notwithstanding, legal arguments only begin where other reflexive theories end. The debate is on the appropriate form of regulation for business networks, virtual business, just-in-time systems, franchising chains and other co-operative contracts. They are generally established through bilateral contracts, and yet give rise to multilateral (legal) effects. Hybrid networks are remarkably disruptive social phenomena. They can neither be subsumed under the category of market, nor under the category of organisation. Following long indecision, sociologists and economists have responded to this confusion with theories that characterise networks as autonomous institutions, which are very different from the usual forms of economic co-ordination.[31] How is law to respond, however? Should it, as

[29] C Joerges, 'Status and Contract in Franchising Law' (n 11 above) 17 *et seq*.

[30] S Casper, 'How Public Law Influences Decentralized Supplier Network Organization: The Case of BMW and Audi', WZB-Discussion Paper FS I 95–314 (1995); S Casper, 'The Legal Framework for Corporate Governance: Explaining the Development of Contract Law in Germany and the United States' in PA Hall and D Soskice (eds), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford, Oxford University Press, 2001) 387 at 397 *et seq*.

[31] For an economic theory of networks most prominent, see O Williamson, *The Economic Institutions of Capitalism: Firms, Markets, Relational Contracting* (New York, Free Press, 1985); O Williamson, 'Comparative Economic Organization: The Analysis of Discrete Structural Alternatives' (1991) 36 *Administrative Science Quarterly* 269–96; O Williamson, *The Mechanisms of Governance* (Oxford, Oxford University Press, 1996). For a sociological theory of networks most prominent, see WW Powell, 'Neither Market nor Hierarchy: Network Forms of Organization' (1990) 12 *Research in Organisational Behaviour* 295–336.

innovation-friendly lawyers suggest, declare networks or symbiotic contracts to be *sui generis* legal institutions sailing in the Bermuda-triangle between contracts, torts and corporations?[32]

In my opinion, '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. The current ideas about knowledge transfer are misleading. Law cannot simply accept the social structures of networks at face value; the social preconditions for intensive co-operation are an example of this. Nor can it simply adopt particular elements within social science definitions, such as the economic formula 'hybrid between market and hierarchy', or the sociological formula 'trust-based exchange system'. Instead, it must itself reconstruct anew the constitutive contours of the correlating legal definition out of its own path-dependent evolutionary logic.[33]

However, any attempt to subsume networks simply under traditional private law concepts is, to cut a long story short, doomed to failure.[34] First, company law is inappropriate for market networks, since the pooling of resources and joint decision-making do not suit the decentralised network structures. Secondly, given the radical individualism of the single nodes in networks, contract law is, indeed, the correct systematic arena, but needs to be considerably transformed for the opportunities and risks of market networks. Thirdly, an independent legal category of a 'network contract', based on the traditional law of agency, is not appropriate for the decision structure of business networks. It follows that doctrinal qualifications of networks need be based upon the development of an 'organisational contract law'—the law of 'controrgs', if you like—which recognises their hybrid nature through the inclusion of 'organisational', ie, not only the relational, but also the multi-lateral, elements within the contract.[35] Here,

[32] For symbiotic contracts as a third institution between contract and organisation, see Schanze, 'Symbiotic Contracts' and 'Symbiotic Arrangements' (n 26 above); Kirchner, 'Unternehmensorganisation und Vertragsnetz', 'Symbiotic Arrangements as a Challenge to Antitrust', and 'Horizontale japanische Unternehmensgruppen (keiretsu) im deutschen Konzernrecht' (n 26 above). For network contracts as an institution *sui generis*, see Möschel, 'Dogmatische Strukturen des bargeldlosen Zahlungsverkehrs' (n 25 above); Rohe, *Netzverträge: Rechtsprobleme komplexer Vertragsverbindungen* (n 25 above).

[33] See M Amstutz, 'Vertragskollisionen: Fragmente für eine Lehre von der Vertragsverbindung' in M Amstutz (ed), *Festschrift für Heinz Rey* (Zürich, Schulthess, 2003) 161 at 164 *et seq*, for a particularly clear distinction between social system and legal system.

[34] For more details, see G Teubner, *Netzwerk als Vertragsverbund: Virtuelle Unternehmen, Franchising, Just in Time in sozialwissenschaftlicher und juristischer Sicht* (Baden-Baden, Nomos, 2004) ch 2.

[35] For a special law of 'controrgs', ie, an 'organisational contract law' for networks, see G Teubner, 'Beyond Contract and Organization? The External Liability of Franchising Systems in German Law' in C Joerges (ed), *Franchising and the Law: Theoretical and Comparative*

one needs to exploit the developmental logic of a rudimentary, but already established, form of organisational contract law. In German law, the notion of *Vertragsverbund* ('connected contracts') has been developed—a doctrine that is ripe for further evolution in the network sphere.

To quote a doctrinal authority from Germany,

> [t]he 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 the effect of one contract to the other (or others), or whether one can also observe mutual effects.[36]

It is the 'economic unity' of several bipolar contracts which is determinant for the connected contracts. However, this concept also entails a strange paradox which, time and time again, gives rise to a 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 which is, again, also entirely dependent upon the legal independence of each of the 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[37] leads us astray. Instead, in order to understand the mystery of connected contracts, 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.[38]

Approaches in Europe and the United States (Baden-Baden, Nomos, 1991) 105 at 129 *et seq*; G Teubner, 'Piercing the Contractual Veil: The Social Responsibility of Contractual Networks' in T Wilhelmson (ed), *Perspectives of Critical Contract Law* (Dartmouth, Aldershot, 1993) 211 at 231 *et seq*; G Teubner, 'Hybrid Laws: Constitutionalising Private Governance Networks' in RA Kagan, M Krygier and K Winston (eds), *Legality and Community: On the Intellectual Legacy of Philip Selznick* (Berkeley, Berkeley Public Policy Press, 2002) 311 at 320 *et seq*; Teubner, *Netzwerk als Vertragsverbund* (n 34 above) ch 3.

[36] J Gernhuber, *Das Schuldverhältnis: Begründung und Änderung, Pflichten und Strukturen, Drittwirkungen* (Tübingen: Mohr & Siebeck, 1989) 710. Similarly, K Larenz and M Wolf, *Allgemeiner Teil des Bürgerlichen Rechts*, 8th edn (Munich, CH Beck, 1997) 469 *et seq*; J Esser and E Schmidt, *Schuldrecht: Ein Lehrbuch. Allgemeiner Teil I 1*, 8th edn (Heidelberg, Müller, 1995) 214.

[37] E Wolf, *Lehrbuch des Schuldrechts. Zweiter Band: Besonderer Teil* (Cologne, Heymanns, 1978) 62 *et seq*.

[38] The relationship of network building to contradictory external demands made on business is the focus for many social science analyses, albeit dealing with different aspects of the problem: KS Cameron and RE Quinn, 'Organisational Paradox and Transformation' in Quinn and Cameron (eds), *Paradox and Transformation: Towards a Theory of Change in*

IV. THE ROLE OF LAW IN SOCIAL DE-PARADOXIFICATION PROCESSES

This contradiction is absolutely central to networks. Private law must respond with sensitivity to the *coincidentia oppositorum* manifest within networks. The main thesis is as follows: certain economic developments expose actors 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 the business entities to which they must respond; (2) such demands are so central to business survival that they cannot be simply ignored; and (3) their explicit thematisation is highly problematical.[39] The institutional answer to these problems is neither contract nor organisation, but the 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, with innovative doctrinal concepts: on the one hand, it normalises and stabilises network-specific contradictions; on the other, it combats the various consequences of these contradictions.

In more detail, hybrid constructions within the triangle of contract, organisation and network, facilitate escape from the double-bind situation. They constitute institutional arrangements that make network-logic—as opposed to simple contractual or organisational logic—resistant to contradictory social environmental demands. More precisely, hybrids react to paradoxical situations (in their broadest sense) that threaten the operational capacities of the actors. They do so through their ambivalence (*A* is or is not *A*), their contradictory nature (*A* is not *A*) or their paradoxical character (*A* because not *A*).[40] Generally speaking, there

Organisation and Management (Cambridge MA, Ballinger, 1988) 1 *et seq*; Buxbaum, 'Is "Network" a Legal Concept?' (n 1 above) 701; M Funder, *Paradoxien der Reorganisation* (Munich, Hampp, 1999); D Sauer and C Lang (eds), *Paradoxien der Innovation: Perspektiven sozialwissenschaftlicher Innovationsforschung* (Frankfurt, Campus, 1999); N Luhmann, *Organisation und Entscheidung* (Opladen, Westdeutscher Verlag, 2000) 407 *et seq*; H Hirsch-Kreinsen, 'Unternehmensnetzwerke—revisited' (2002) 31 *Zeitschrift für Soziologie* 106 at 107.

[39] On the paradoxical double-bind situation, see the classic text by G Bateson, *Steps to an Ecology of Mind* (New York, Ballantine, 1972); P Watzlawick, JH Beavin and DD Jackson, *Pragmatics of Human Communication: A Study of Interactional Patterns, Pathologies, and Paradoxes* (New York, Norton, 1967). For the application of the double-bind to organisations, see FB Simon, *Die Kunst, nicht zu lernen: Und andere Paradoxien in Psychotherapie, Management, Politik* (Heidelberg, Carl-Auer-Systeme, 1997).

[40] 'Paradoxes' in their narrowest 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 law are 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 HU Gumbrecht

are two modes of escape from such imbroglios. The first is repressive, suppressing contradictions by admitting only one of the contradictory instructions, and dismissing the other. The second 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 paralyse 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 is the latter case which could be characterised as morphogenesis.[41]

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 organisations, they do the same thing for the other message. Under certain conditions, however, hybrid arrangements provide for an institutional environment in which paradoxical communication is not repressed; not only is it tolerated, it is also invited, institutionally facilitated and, sometimes, rendered productive. Hybrids, as a highly ambiguous combination of networks with contracts and organisations, seem to be the result of a subtle interplay between different and mutually-contradicting logics of action.

In the particular context of hybrid networks, the double-bind stems from the imposition of environmental demands upon actors to obey different and contradictory operational imperatives simultaneously. Some of these demands derive directly from contradictory economic pressures. Others result from a collision of economic requirements, on the one hand, with scientific, cultural, medical and political principles, on the other.

and LK Pfeiffer (eds), *Paradoxien, Dissonanzen, Zusammenbrüche: Situationen offener Epistemologie* (Frankfurt aM, Suhrkamp, 1991); Watzlawick, Beavin and Jackson, *Pragmatics of Human Communication* (n 39 above) ch 6. On paradoxical situations within economic enterprises, see O Neuberger, 'Dilemmata und Paradoxa im Managementprozess' in G Schreyögg (ed), *Funktionswandel im Management: Wege jenseits der Ordnung* (Berlin, Duncker & Humblot, 2000) 173 at 187 *et seq*. On the legal treatment of paradoxes, see GP Fletcher 'Paradoxes in Legal Thought' (1985) 85 *Columbia Law Review* 1263–92; P Suber, *The Paradox of Self-Amendment: A Study of Logic, Law, Omnipotence and Change* (New York, Lang, 1990) and http://www.earlham.edu/~peters/writing/psa/index.htm.

[41] K Krippendorff, 'Paradox and Information' in B Dervin and MJ Voigt (eds), *Progress in Communication Sciences* Vol 5 (Norwood, Ablex, 1984) 45 at 51 *et seq*. On paradox and morphogenesis in social systems, see N Luhmann, 'Sthenography' (1990) 7 *Stanford Literature Review* 133–7; N Luhmann, *Die Gesellschaft der Gesellschaft* (Frankfurt aM, Suhrkamp, 1997) 57 *et seq*. On exemplary reactions to the paradoxical demands of just-in-time systems, K Eisenhardt and B Westcott, 'Paradoxical Demands and the Creation of Excellence: The Case of Just-in-Time Manufacturing' in RE Quinn and KS Cameron (eds), *Paradox and Transformation: Towards a Theory of Change in Organisation and Management* (Cambridge MA, Ballinger, 1988) 169 at 191.

Contradictory demands can be traced to economic trends that have increasingly overburdened individual firms and have forced them to engage in networking:

> trends such as increased technological complexity, increased pressure on productivity and costs, as well as simultaneous market demands for a high degree of flexibility.[42]

Empirical studies on intra-company co-operation have systematically researched the particular contradictions to which firms are exposed. Increasingly, the market demands 'flexible specialisation'. Following the demise of standardised mass production, the demand is for 'client-specific mass production'. This goal gives rise to a barely surmountable contradiction between flexibility and efficiency. The trend in production is towards 'systemic rationalisation'. This optimisation standard cloaks a contradiction between complexity and reliability. Similarly, business organisation is required to follow the goal of 'decentralised self-direction', which lays itself open to a contradiction between the autonomy of, and oversight over, de-centralised business units. Business organisation is then left with the question of whether they can choose only one organisational structure, or whether they must set off on the far harder path of combination, fusion and trade-offs.[43]

Networks are confronted with the problem of how to translate contradictory demands into internal structures, so that operational burdens are sustainable.[44] 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 orientation of the network, and is simultaneously both constrained *and* liberated by the demand that it must find a balance in each context.[45]

[42] Hirsch-Kreinsen, 'Unternehmensnetzwerke—revisited' (n 38 above) 107.

[43] K Semlinger, 'Effizienz und Autonomie in Zulieferungsnetzwerken: Zum strategischen Gehalt von Kooperation' in WH Staehle and J Sydow (eds), *Managementforschung 3* (Berlin, de Gruyter, 1993) 309 at 313 *et seq*.

[44] Semlinger, 'Effizienz und Autonomie in Zulieferungsnetzwerken: Zum strategischen Gehalt von Kooperation' (n 43 above) 332; Hirsch-Kreinsen, 'Unternehmensnetzwerke—revisited' (n 38 above) 120.

[45] On the key concept of 'double-attribution', see Teubner, 'Beyond Contract and Organization?' (n 35 above) 119 *et seq*; Teubner, 'Piercing the Contractual Veil' (n 35 above) 226 *et seq*; Teubner, 'Hybrid Laws: Constitutionalising Private Governance Networks' (n 35 above) 324 *et seq*. For double-attribution from a social science perspective, see FW Scharpf, 'Die Handlungsfähigkeit des Staates am Ende des Zwanzigsten Jahrhunderts' (1991) 32 *Politische Vierteljahresschrift* 621 at 621 *et seq*; P Littmann and S Jansen, *Oszillodox: Virtualisierung—die permanente Neuerfindung der Organisation* (Stuttgart, Klett, 2000) 69 *et seq*; A Windeler, *Unternehmungsnetzwerke: Konstitution und Strukturation* (Wiesbaden, Westdeutscher Verlag, 2001) 194 *et seq*, and 224. For double attribution in the law of networks, H