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**CORPORATE GOVERNANCE:
NEGOTIATED NETWORK CONNECTED CONTRACTS
AS THE CRITICAL COMPLEMENTARY INSTITUTION
WITHIN A POST-REGULATORY CORPORATIST ORDER**

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In comprehending the institutional evolution of the American corporation, Adolf A. Berle, Jr. would always recall Thomas Hobbes' reference to corporations as "worms in the body politic," or as Berle put it, "chips off the block of sovereignty." (Berle, 1950; Berle in Buchanan, 1958).

At the beginning of my undergraduate studies in 1963, I was intellectually provoked by Columbia professors Adolph Berle and Gardner Means' study of corporate governance (1932), as well as by Seymour Martin Lipset, Martin Trow, and James Coleman's study of union democracy (1956). At the close of my graduate studies, my Columbia doctoral father Robert K. Merton reminded me to periodically re-read Philip Selznick (one of his earlier 1930s students, as was Lipset) on the internal and reflexive orderings of associations. So in discovering Neil Mac Cormick in the middle (1980s (1986, 2008a, 2008b), like Monsieur Jordan I realized that I had been writing institutionalism all my life.

Indeed, beyond Columbia, at my other intellectual home the London School of Economics, I discovered how and why Michael Oakeshott had succeeded to Harold Laski's chair in the scholarly interest in private association governance – religious, educational, and industrial associations. Further, Laski had supervised the teacher of my teachers Franz Neumann in his second doctoral dissertation at LSE in 1936 on the autonomy of social law and "the governance of the rule of law." Like Berle and Neumann, Selznick addressed non-statist association governance in terms of the setting of standards and the making of rules, and within a theory of institutional evolution.

My drift away from the Oxbridge history of political theory tradition toward comparative political sociology was rooted like Neumann in a commitment to the "labor constitution" (Dukes, 2014) and in a sense of getting beyond the study of pure normativism – natural right, natural law, and positive law – to

the study of the normative regularities in associational problem-solving . More deeply, into comprehending the concrete ordering – internally and externally – of reflexive self-monitoring modifications on the part of associations themselves within an ever accelerating functional differentiation, which now has led us into a society of transnational networks, a patterned complexity of loops within loops.

I

At the turn of the 20th century, Max Weber observed that in contrast with the “hard law” of official state ordinances, what persisted and steadily increased was the creating of soft law by autonomous associations capacity as supervening norms outside of the State and sometimes structurally coupled or complementary with the State. Private governance codes increasingly are not the result of bargaining, but the ultimate discretionary actions of corporations, for example Corporate Codes of Social Responsibility. These corporate governance codes engender a set of *self-enforcing norms of reciprocity (norms de reciprocité auto-exécutoires)*.

The gravity shift to autonomous self-regulation of regional and increasingly transnational norms, standards, and protocols is rooted in “best practices” – as was the Uniform Commercial Code (UCC) in the United States which serves as the American contract law of fair trade usages. The UCC was itself established by the autonomous American Law Institute of jurists, lawyers and law professors. There has also been a shifting to a newly emerging UCC of transnational law –UNIDROIT: the Principles of International Commercial Conflicts. This started informally in the 1970s and became codified in 1994. Emerging alongside – as Philip Jessop predicted in his Storrs Lectures at the Yale Law School in 1956 – are transnational arbitration houses becoming substitutes for nation-state constitutional courts, with their arbitral practices and soft law coming to have some legal justification in domestic nation-state courts. In 1910 there were 10 such transnational courts, 100 in 1985, over 150 in 2005, and well over 200 by now in London, New York, Geneva and Zurich.

The institutionalist approach to law and economy used in this paper in studying corporate governance

derives from three decades of a critical systems theory of law presented by Günther Teubner, a Niklas Luhmann inspired Goethe Universität law professor who succeeded Otto Kahn-Freund and Lord Wedderburn in the chair of labor law at the London School of Economics. (See Wedderburn, Lewis & Clark 1983; Dukes, 2014). Teubner details a functional differentiation process towards a mutually-correcting transnational complexity of heterarchically interconnected networks:

- (1) as an iterable institutional facticity of non-state forms of responsive self-regulation Philip Selznick foretold in 1969; and
- (2) as a new form of mutual recognition within an ecology of mutual restraint and sensed mutual vulnerability which institutionally ghosts the future immanently.

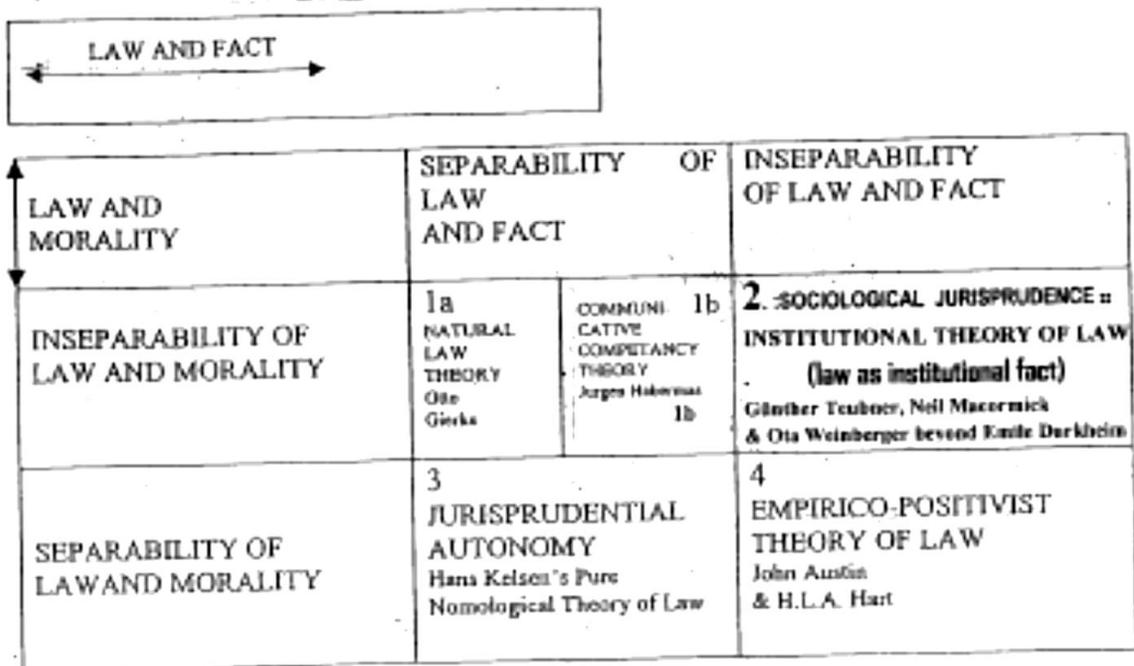
Teubner's is an institutional theory of law approach that challenges the legal positivism of either a John Austin or a Hans Kelsen ("law's empire"). It recalls Carl Schmitt's expressed angst in his 1942 novel *Land and Sea* where he asks: "Are we still confronting the Hobbesian problematic of how do we prevent the worms of the social from eating away the entrails of our sovereignty?" But unlike Schmitt, Teubner does not set norms against institutions, but derives them from iterable institutional facticity. Unlike the mystical homogeneous substance of Schmitt's institutionalism or Hans Kelsen's *Grundnorm* foundationalist system, Teubner poses a 21st century society characterized by a multiplicity of social norm systems, a society of transnational networks.

Teubner starts with institutional facticity (the term is from John Searle and G. E. M. Anscombe). In the mode of Neil MacCormick's institutionalist theory of law, Teubner counters both Jürgen Habermas's counterfactual thought experiments of procedural normativism, and H. L. A. Hart's "brute facticity" of empirical analysis. Legal reasoning as a practice is not just a form of argumentation, it must be sensitive to normative context. (See Figure 1 just below.)

Institutional facticity denotes the nature of our participation in what Teubner (2012) refers to as the *self-bindingness* of the promising game/obligation game inherent in trust-sustained legitimated practices. This self-bindingness regulates concrete factual relationships of living beings and successive generations. MacCormick engages in a form of *rational reconstruction*, not of the Habermas

universalizing approach. What is retrieved and reconstructed is the sequence of practical reasoning involved in the crystallization into institutions. This mode of rational reconstruction is understood in terms of *an internalist interpellation of the commitments to bonds* in the performance of regulating norms in practices.

FIGURE 1



This involves *a committedness* to master coordination rules which

- set the criteria of governance rationales;
- validates the normativeness of what Teubner (2012, 2013; cf. Sciulli, 1992 ; and Thornhill 2011) refers to as the normativeness within specific societal subconstitutions ; and
- sets the terms for rule-enforcement for those obliged to perform governance practices.

This is an institutionalist approach in its focus on the workable arrangements of internal discipline and coordination in associational governance. Often, according to Karl Polanyi (1944), there are disparate practical measures of mutual protection and regulation provoked in non-statist associations by disruptive market forces.

- The institutional approach subverts the notion of the rational subject isolated from historical influence.
- Ontologically, it studies how collective practices become enduring and crystallize beyond organization into institutions as part of further social evolution appreciated as systematic functional adaptation and differentiation.
- Epistemologically, institutionalism studies the experience of practical knowledge rooted in institutional facts which yield principles of regulation of ongoing practices. Institutional facts are understandable in terms of the normative ordering of human interaction in time, our collective modes of problem-solving in time, and our evolving practical judgments in social learning.

Neil MacCormick completes H. L. A. Hart's legal positivism (1961) with institutional facts reflecting increasing complexity within functionally differentiating social structures. Mac Cormick's method of rational reconstruction makes inductive generalizations of what Hart calls "rules of recognition":

- (1) understanding these as *master coordination rules* as governance rationales used in path-shaping practices;
- (2) comprehending these governance rationales as an enduring self-reproducing pattern with historically contingent development; and

(3) connecting rules of recognition with principles of reflexive law.

II

The paper presents an institutionalist approach to law and economics that is intended to be suggestive, rather than definitive, ruminating over *negotiated network connected contracts* as the new protective form provoked by disruptive market forces in increasingly globally networked commerce which requires harmonious coordination of transactions. (See Backer, 2007.)

Corporate governance can be understood in terms of an understanding of new contractual practices. Contracting corporate partners are confronted with the complexity of a multiplicity of nodes and inter-connexions. The ultimate issue is how functionally differentiated subsystems develop specific subconstitutions that provide stabilization functions and which guide the internal processes of more than one subsystem. This societal constitution and subconstitution issue is being resolved in the constituting of *a specific form of hybrid framework of relational binary contracts*. This is a hybrid form of transnational corporate governance sustaining the trust relations with sanctions necessary to assist the making of effective transactions in the increasingly global commerce.

According to Günther Teubner and Hugh Collins (2011:15-18), corporate partners turn to *negotiated network connected contracts* such as those in the "just-in-time" agreements of e-business and franchise arrangements typify our transnational capitalism and the transformation it brings in contract law. "(T)he network (in e-business and franchise arrangements), like a business association, is owed a duty of loyalty by its participants, to the effect that self-interested contractual behavior may amount to a breach of this duty or good faith that is owed to other participants in the network." The "connected contract" is an emergent assemblage, a constellation of related independent bilateral contracts.

Within the spokes of horizontal relations within a network, franchisees have limited contractual liability. Franchisees are third parties a contract between franchisor and some delinquent franchisee. Should external liability risks in franchise operations be distributed across what is a common business enterprise?

"It is here," argues Collins (Teubner & Collins, 2011:18) "that the idea of a network may prove useful in the sense that it could provide a framework both for justifying a direct claim by a consumer against the franchisor and an explanation of why the costs of a successful claim should be shared throughout the operation onto the shoulders of franchisees as well as franchisors." In this way, Teubner and Collins respond affirmatively to the institutional economics query raised by Richard Buxbaum in 1993: "Is 'network' a legal concept?"

In a franchise contract, the franchisor owns the trademarks(s)/ brand(s) as well as the operating system for the franchise. The franchise is effectively a license to use both the trademark/brand as well as the operating system according to the terms and conditions set forth in the franchise contractual agreements. Franchisor and franchisee must fulfill mutual obligations under what amounts to a network connected contract.

This a legal form Teubner finds in German Civil Code BGB §358 as well as to the "connected institutions"/ "complementary institutions" (*Konnexion-institut*) in the tradition of German law discussed by the likes of Carl Schmitt and Franz Neumann (1932) in assessing the transcendence of laissez-faire capitalism by a more organized/ monopoly capitalism during the years of Weimar Republic turmoil. These are complementary institutions dealing with network-specific risks in corporatist hybrids where the networked connected corporate firms reciprocally compensate each other for each others' deficiencies, as well as the distribution of risks through structural coupling. Bonding/ binding connexion with complementary institutional responsibility to mutually respect each other's institutional autonomy. These are practices of co-regulation and re-regulation in the form of internally related standards, codes, and protocols.

The focus is on decentered ensembles of discrete agreements—what Robert Boyer (2002) labels *règlementations* / discrete agreements -- created in complementary institutions. These discrete contractual agreements. The *règlementations* anticipate, represent and are more internally related to more depth-level changes in the underlying organizational principles (*Règulations*) which order the global economy as a whole, generating rules for the rationalities

of associational life and their intermediation.

Iain MacNeil (1987) and Hugh Collins (1999) see in this trajectory in contracting a challenge to lawyers' traditional premise that contracts are mere transaction, what they refer to as relational contracting governance. This involves: first, constituting a constellation of bilateral contracts coordinated to serve a common purpose; second, cooperating intensively while remaining, respectively, responsible for each other's actions; and, third, developing baseline protocols for negotiation rules in multi-layered/multi-scaled space. This tendency is often referred to as multi-level reflexive governance (Bache and Flinders, 2004; Voss and Kemp, 2006) among obliging parties around what we will specify as *frame agreements*. Rather than some comprehensive code of substantive norms, there emerges multiple nodes of social ordering; each with its own socio-logic; each with its own capability of reflexive feedback (DeSchutter and Deakin, 2006).

Relational contractual governance is a meshwork – in the shadow of state hierarchy, but without the reintroduction of state sovereignty. This amounts to a decentered global meshwork (DeLanda, 2010) of self-regulating relational contracts –interlaced hybrid networks of supply-side oriented connecting protocols with benchmarking, triggered threshold sanctions, and triggered rolling rule updating. A meshwork (DeLanda, 2010) of quasi-binding commitments with sanctions for alternative dispute regulation and reciprocity-based monitoring. In Teubner's perspective (2012), this is a recursive system of associational pacts constituting subsystems with autonomous substitutions outside formal government, supplementing and structurally coupling with formal common law and substantive administrative law. Hence, it is also a development of the sociological jurisprudence -- of Karl Renner (1949) as well as Roscoe Pound -- employed in an institutional fact and outcomes analysis characterizing the legal realism approach to contracting by Karl Llewellyn at Columbia Law School from 1924 through the New Deal.

What is signified here is a resultant of globalized capitalism as a multitude of corporate firms enter into coordinated constellations of inter-related bilateral contracts, designed to

confer *heterarchically* on the contracting parties many of the benefits of coordination – achieved in a seeming vertical integration in a single firm, without in fact creating a single unified business entity. TransNational Corporations (TNCs) need to manage global supply chain and global value chain operations : *internally*, to stabilize complex arrangements of subsidiaries; and *externally*, to reflexively coordinate the *polycontextuality* (McCollough, 1945; Gunther, 1973; Maturana and Verela, 1980; Teubner, 1997) of myriad other regimes “out there” of rule-making and standard-setting.

Modes of negotiated contractual governance of rule-making, distinct from the statist and tripartite macro-regulatory public administrative law have been the subject of institutionalist law and economics since John R. Commons down to Adolf Berle and Gardner Means. Here in the US, we have used the term “non-statist associational law.” In the German tradition from Otto Gierke and Rudolf Ihering – introduced to the English speaking scholarly world by F. W. Maitland and Harold Laski –as well as Max Weber down to the Weimar labor lawyers’ critical sociology of law (Hugo Sinzheimer, Franz Neumann, Otto Kahn-Freund) there is reference to “autonomous social law.” (See Wedderburn 1983; 1994; Dyzenhaus, 1997.)

A **re-regulation** is afoot that is not public administration, and is not either the 19th century prerogative contract between individuals; or the 20th century contract of protocolism in the collective bargaining of trade associations and trade unions.

Emergent practices of stakeholder participation in negotiated rule-making points to a new form of universalizing consciousness – that of shared global risks, such as vulnerabilities across borders understood as global environmental goods. This practice is enacted as imbricated sectoral loops of increasingly accredited reflexive governance partners rather than as an imposed governmentality wherein socio-economic forces use the State to reduce the idea of social protection and re-frame practices toward individual competitive entrepreneurship. For Teubner, the starting point in this realignment is the negotiated network connected contract

(NNCC). It serves as a heuristic prism with which to understand the multi-layered and multi-scaled re-regulation regimes operating within more looped and iterative (less linear) path dependency...operating as loops within loops.

For Poul Kjaer (2010, 2014), following along the Teubner path, this new form of associational life should not be studied as an "in between" intermediary variable form, but as an independent variable form in its own right. We need to study it as a variable form which is reproduced upon the basis of its own independent logic amidst imbrications within the operationally interwoven meshwork of logics.

Each emergent transnational policy regime (TPR) is an autonomous system involving an internal coding and developing a bounded rationality of selectivity, no longer dependent on some external overarching authority. Coding is the practice with which an autonomous system/subsystem distinguishes itself as a collective identity with time-sequencing and a bounded rationality which organizes its own operative closure. Each autonomous system/subsystem develops there own *règlementations*.

Thus we can re-work and align Boyer's *Règulationist* Analysis with Institutional Approaches to Law and Economics.

Further pulling our threads together, we can apply the network metaphor to a pattern of inter-related bilateral contracts designed heterarchically to confer on the parties many of the benefits of coordination without ever creating a single entity. In network business relationships corporations, as Collins notes, "deal at arms length with a view of maximizing their own interests and the common interest." Top-down command and control decisionism is replaced by a secured and sustained normative order of reciprocity – what Teubner and Kjaer refer to as subconstitutions. Teubner argues we can detect normative categorials emerging within a transnational predicate logic of an institutional imaginary, what he dubs "sectoral constitutionalism." Specifically in his book *Constitutional Fragments* (2012:52) he describes how "in the sea of globality, only islands of the constitutional will emerge."

Affected stakeholders are brought together as a subconstitutional regime. (See Sciulli, 1992; Thornhill, 2011.) Hybrid networks of relational contracting create a non-territorial, inter-contextual, and inter-scalar space – a *Zwischenwelt* of decentered autonomous normative orders (Kjaer, 2013) embedded as loops within loops within interlaced global meshwork. They are characterized (Orts 1995, 2011; Sabel and Simon, 2006; Dedeurwaerdere (2006, 2010) by repositories of well-integrated common resource and information pooling; performance audits; and engaging in recursive feedback reflection to re-set goals for the improvement or modification of standards and protocols, as well as the ever-improved buffering of mutual risks.

The model for the “negotiated network connected contract” (NNCC) is the *Frame Agreement*. The term “frame” comes from the video compression technique wherein an image is established as a base, and subsequent images are stored only as changes from the base. The Frame Agreement establishes a common protocol of standard terms on which a succession of task agreements may be based. Each task agreement *reasons* from the standard terms in light of local circumstances to reach an agreement specific to the purposes of the task.

In this way, the Frame Agreement provides a common/express basis for negotiation and further negotiated rule-making from the outset. This is not a master agreement in the conventional legal sense. The aim of the base agreement is not to secure all terms entirely acceptable to the parties, but rather to construct a foundation for negotiating some common task, suspending the completion of the formal agreement until the purpose and local conditions of a given task are available.

Teubner’s *polycontexturality approach* (2002, 2004, 2010) is a response to the fragmentation of our modern society into a *society of networks*. Teubner’s approach enables overburdened private law subsystems to respond to the mutual recognition of the *blindspot* that comes from limiting regime understanding to one’s own contexture alone. Teubner combines heterarchical yet interconnected network approach with a need for coordinating the resolution of colliding autonomous subsystemic regime logics in the necessary recognition of each organizational node

of a network of autonomous associational regimes. In the end, Teubner -- in a nod to the conceptualizing of Neil MacCormick -- helps us to understand how just corporate institutions must generate their own support, and how corporate governance rationales are used in practice.

III

Corporate governance can be understood as contractual governance and monitoring. (See Zumbansen 2007, 2010.) Relational contracts -- which include now negotiated network connected contracts (NNCC) -- provide context and connection, encoding, and reflexive mutual self-limiting *vis à vis* the accelerating nature of exchanges within a continually functionally differentiating society of transnational networks. Within such contractual governance and monitoring, the benefits of coordinating bilateral contracts are achieved within the rules of exchange of horizontal and heterarchical integration (Teubner, 2015). This is done in fact without creating a single integrated business entity -- operating without central direction.

Following Teubner and Zumbansen, we can comprehend emerging practices constituting a meshwork (DeLanda, 2010) of such relational contracts within interlaced networks of supply-side protocols. Such corporate governance moves beyond corporate codes of social responsibility (Zumbansen, 2006); and comes to constitute contractually based autonomous constitutions for the mutual regulation of global supply chain relationships in transnational corporatist assemblages.

Contracting transnational corporate partners are confronted with an intensity marked by a complex multitude of nodes and interconnexions constituted by framework and "just-in-time" agreements. They cope with institutional and institutionalizing practices within self-referential networks of connections. Here institutional and institutionalizing practices react subsystemically to each other in a self-modifying manner -- in an *autopoietic* rather than dialogical manner -- to de network, each capable of processing exchanges and change itself. (See Luhmann, 1982; 1997a; 1997b.)

Thus, complexity is understood reflexively in terms of the processing of large number of self-referring modes of conflict regulation (Willke, 1985).

Following Luhmann's concept of "world society" (1997a, 1997b) as a society of transnational networks, we confront private law regimes way beyond the collective bargaining protocols described by John R. Commons and Louis Brandeis at dawn of the 20th century, and the mid-20th century corporate liberalism of Adolf Berle.

Further, this is a re-regulation of mutual self-bindingness not just between transnational corporations, but also between them and international organizations, global labor unions, and transnational advocacy groups and NGOs with which they have relationships – business, social and ecological. Their focus is building practices of sustainability, resiliency and , hopefully solidarity, in confronting the ecology of ever accelerating complex relations of the society of networks.

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