

BEYOND CONTRACTS AND ORGANIZATIONS

**'NETWORKS AS CONNECTED CONTRACTS'
BY GUNTHER TEUBNER**

**(EDITED WITH AN INTRODUCTION BY
HUGH COLLINS, TRANSLATED BY MICHELLE EVERSON)**

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Professor Gunther Teubner's (Goethe University, Frankfurt am Main) book *Netzwerk als Vertragsverbund* (2004) is now considered in Germany to be a classic. It was therefore only appropriate to make it available to a wider audience. Hart just published it in English, bringing us yet another in a series of brilliant books in the theory of private law – Teubner's *Networks as Connected Contracts* (translated by Michelle Everson), with an excellent introduction by Hugh Collins.

Books that appear in Hart's International Studies in the Theory of Private Law series aim at exploring the potential of self- and co-regulatory strategies that promote the use of private law techniques of ordering in social and economic interactions. Networks – as Teubner argues in his book – can be devised as one such strategy. The book begins with the discussion of two German cases that – in his view – demonstrate the need to recognize a novel institution of private law, one that goes beyond the familiar notions of contracts and organizations (Chapter 1). Networks, the socio-economic argument unveils in Chapter 2, unlike contracts or organizations display certain features that uniquely predispose them to accommodate important regulatory functions. But if that function is to be socially beneficial, rather than one benefiting private actors themselves, law has to step in (Chapter 3). The three last chapters of the book discuss three hypothetical ways in which law can help achieve that result.

Professor's Teubner argument is persuasive, even if somewhat convoluted. It might strike the reader as convoluted because of the method he is using in his endeavor – systems theory. When a book about networks begins with the assertion that our legal language may not be complex enough to account for some of their properties and it also so happens that the book attempts to circumvent those alleged limitations of our legal language

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by embracing a paradox (in a “something simultaneously is and is not” fashion), it likely promise a tough and uncompromising read. And yet even if one is skeptical of the method (the second part of the review discusses why one may want to be), *Networks as Connected Contracts* still provides us with some truly illuminating insights into what are the different ways of thinking about them.

I. NETWORKS, BUSINESS NETWORKS

Networks have been studied in social sciences for many years now. The notion is based on a straightforward recognition that relationships among things (people, organizations) have a number of different dimensions and are complicated. The notion of networks has been devised as a conceptual framework within which the patterns can be described and measured in a meaningful manner. A network describes a collection of nodes and the links between them. This notion has useful explanatory application in personal and professional contexts. Workers find jobs through personal acquaintances, academics develop their work through conversations with colleagues etc. But the notion of networks has also obvious applications in the business context. Business opportunities and choices, just like those personal and professional, are shaped by business connections and relationships. And it is business networks (in a broad sense, including virtual enterprises, just-in-time systems and franchise chains) that Teubner is interested in.

A business network, as such, is thus hardly a legal concept. This is where professor Teubner’s inquiry begins. How can the legal system account for and accommodate the network-like properties of arrangements such those - “normally concluded in the form of bilateral contracts, but at the same time give rise to multilateral (legal effects)”¹ As he himself notes “[s]uch networks are extraordinarily confusing phenomena of private coordination, since they fit neither within the market category nor within the concept of organization.”² They “cut across the conceptual framework of private law doctrine. In legal terms, networks can take the form either of partnerships, corporate groups, relational contracts or of special tort/contractual relationships. For this reasons alone, the autonomy of legal doctrine precludes the immediate adoption of the social science concept of ‘network’ as a legal category.”³ And so the struggle begins.

¹ Gunther Teubner, *Networks as Connected Contracts* (Hart Publishing, 2011) (edited with an Introduction by Hugh Collins. Translated by Michelle Everson), 73.

² Ibid.

³ Ibid.

The struggle that Teubner's book is concerned with is a struggle within German legal academia, one that has been ongoing for quite some time. But despite its doctrinal outlook, the argument's relevance could not have been greater and timelier for a non-German audience. In the last two or three decades we have indeed witnessed a 'network revolution', which – as Teubner points out – has dramatically altered the strategic position of networks within the economy and that is now forcing law to recognize them in their own right. Empirical studies from many industrial sectors – to which Teubner also refers – have provided comprehensive proof of the exponential expansion in business networking.⁴ Volatile market conditions and an ever-increasing market pressure for greater efficiency necessitates the search for novel and more flexible modes of commercial interactions between economic actors. "As a direct consequence, business have been forced to restructure themselves as network-type arrangements, within which trust-based co-operation forms the basis for enduring informational relations, recursive reinterpretation of events, and for the collective construction of knowledge."⁵ From that point of view they can be beneficial, because they generate efficiency. But Teubner is of course not a law and economics scholar. This is why he insists that when trying to conceptualize networks in law "at no time should the efficiency principle used by economists to characterize networks as a market/hierarchy hybrid be permitted to serve as a legal norm for networks."⁶ Rather "social science analyses should explore the logic of action within network, should reveal the opportunities and risks posed by operations of networks and should reveal perspective of alternative solutions beyond our traditional categories of market and hierarchy."⁷

II. EMBRACING PARADOXES: SYSTEMS THEORY

Professor Teubner is a prolific man, but he is not a man of easy answers. In chapters two and three of the book he outrightly rejects the legal characterization of networks as either organizations or typical exchange contracts. He tells us that we have to accept the contractual construction of networks, but also the corporate elements thereof. Moreover, we have to accept the two as contradictions and embrace the contradiction as something meaningful, productive and, in fact, a necessity. Law – he says – itself has not answer to this, because it can only respond to networks' contradictions by reference to the parties' will. There is however a different response which can be distilled out of sociological and economic

⁴ *Ibid.*, 94

⁵ *Ibid.*, 96

⁶ *Ibid.*, 75

⁷ *Ibid.*

analyses of networking paradoxes.

Networks can be, in his view, understood as paradoxes because “[h]ybrid networks result from the fragile co-existence of different and contradictory logics of action . . . [t]his gives rise to ‘paradoxical structure’ of interorganizational interpretation, since it is founded on ‘contradictory demands’ that are simultaneously functional”.⁸

In of the most problematic passages of his book he provides for a prescriptive solution of how can the legal system respond to that ‘paradoxical’ situation: “[i]n contrast to the treasured legal ability to furnish turbulent life with sufficient clarity, reliability and precision, legal doctrine in this context needs to produce ambiguous concepts that not only encompass contradiction, but that even cultivate and intensify them.”⁹

Several legal concepts have been proposed in Germany earlier that were supposed to account for network-like properties of certain business arrangements. Teubner outrightly rejects all of them. He rejects Jhering and Gierke’s notion of networks as communities, Amschutz’s concept of ‘mixed contracts’, the idea of networks as corporate groups or Rohe’s notion of network contracts. He introduces the reader into these theories but rejects them as, for one reason, deficient and/or insufficient (perhaps, one is tempted to add, he does not find them sufficiently ambiguous). Also the notion of relational contracts, which will be familiar to English reader from the writings of Ian Macneil, “furnishes us with a relatively narrow box of normative tools with which to tackle the particularly interesting issue of multilateralism in networks.”¹⁰ Instead Teubner undertakes to make use of a notion of ‘connected contracts’, which has been introduced into the German Civil Code (BGB §358), after a long and heated discussion, in the context of credit agreements. But as a concept doctrinally tailored to these sorts of agreements it is not well suited to serve as a more general doctrinal vehicle suitable for networks. Therefore Teuber attempts to generalize it.

In his conceptualization a genuine connected contract emerges when, in addition to the usual characteristic that create a bilateral contract, mutual references within the bilateral contracts to one another; a substantive relationship with the connected contract’s common project and; a legally effective and close co-operative relationship between

⁸ Ibid.,123.

⁹ Ibid.,127.

¹⁰ Relational contracts however, in Teubner’s view provide us with a more promising starting point, at least to the extent that they can be “infused with a network logic”. Ibid., 145.

associated members are present.¹¹

As such connected contracts are not just a subset of the normal range of legally effective relations – contracts and organizations. They are sui generis category.¹² What makes them so special? Back to systems theory: “The specificity of network lies in the fact that a contract observes its environment in a particular manner. Under normal conditions, contracts observe prevailing market conditions, in particular pricing, and adapt their internal structures accordingly.”¹³ Rather - Teubner draws on Luhman here – “the contractual systems observe another contractual system rather than the market, adapting its internal norms accordingly . . . all preconditions thus establish a *legal relationship between the individual contract and a spontaneous and extra-contractual private ordering* [emphasis in original].”¹⁴ This has nothing to do however, as Teubner is quick to disclaim – with a Hayekian conception of spontaneous order, whereby a discovery process gives rise to a competitive order. “Neither the market nor competition has a role to play. Instead, networking and co-operation are the purveyors of a spontaneous order. Generalized reciprocity is the fundamental motor of spontaneous order within the network.”¹⁵

Networks are thus constituted by internal conflicts that derive from the simultaneous challenges posed by external contradictions. These, in turn, take different structural forms: contradictions between bilateral exchange and multilateral connectivity, contradictions between competition and co-operation and contradictions between collective and individual orientation. What is not immediately apparent from this analysis is that it is a highly normative project. This only becomes evident in the last three chapters of the book, in which Teubner persuades us that if these contradictions are successfully internalized by the network – thereby also endangering internal network co-ordination, as well as trustworthiness and responsibility displayed by the network - a need for regulation arises.

III. TEUBNER’S LAW OF NETWORKS

How should networks be regulated? Consider Teubner’s example of the legal response that should be given to the first structural contradiction that occurs in networks – that between bilateral exchange contracts and multilateral connectivity. Internal decision making in networks is simultaneously subordinated to the contradictory demands of bilateral

¹¹ Ibid., 158.

¹² Ibid., 162.

¹³ Ibid., 163.

¹⁴ Ibid., 164.

¹⁵ Ibid., 164-165.