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Author(s): Maciej Konrad Borowicz
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REVIEW

of Gunther Teubner, "Networks as Connected Contracts" (Hart Publishing 2011)

BEYOND CONTRACTS AND ORGANIZATIONS

By MACIEJ KONRAD BOROWICZ*

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 books 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

* Ph.D. Researcher, Department of Law, European University Institute (Florence).

endeavor systems theory. When a book about networks begins with the assertion that our legal language may be not be complex enough to account for some of their properties and it also so happens that the book attempts to circumvent those alleged limitation of our legal language 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.

Networks, business networks

Networks have been studied in social sciences for many years now. The notion is a 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 co-ordination, 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

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

[2] Ibid.

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.

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 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]

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 organzations or typical exchange

[3] Ibid.

[4] Ibid., 94

[5] Ibid., 96

[6] Ibid., 75

[7] Ibid.

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 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 interorgniaztional 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

[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.

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 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

[11] Ibid.,158.

[12] Ibid.,162.

[13] Ibid., 163.

[14] Ibid., 164.

[15] Ibid., 164-165.

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.

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 exchange and multilateral connectivity. In his analysis Teubner invokes a case, in which a retailer of optical goods distributes some of its products through its fully own subsidiaries and some of them through franchise outlets. The firm bundles the purchasing of both channels in order to gain higher discounts from suppliers. Suppliers guarantee – without any differentiation – discounts to the firm of up to 52%. The firm however supplies its franchisees with an 'official' production discount list. The list only details production discount of up to 38%. Should there be an obligation on the firm to pass on its advantages also the franchisees? Teubner response is, yes. He conceptualizes several duties of loyalty that, in his opinion, arise in the virtue of the connectivity of those contracts as described above. This is justified by the "network purpose" of these contracts, that is, in virtue of the function that these contracts perform.

But the notion of 'network purpose' entails more than that. As he notes, the network purpose – as distinct from the contractual exchange purpose and the common purpose in corporate law – is not only relevant for duties of loyalty, but also plays its part in the judicial review of standard form contracts applicable to networks. For example, if in the above case, all risk would be transferred from the firm to the franchisees, this – in Teubner's view – would not be justified by the network purpose. "Exactly the opposite: the real aim of networking is the establishment of an unusually close degree of co-operation between suppliers and manufacturers in the transition from a typical business operation through exchange contract to just-in-time systems."[16] He makes it explicit however that "the issue is not one of the precedence of supplier interests." Rather, "the legal policy is to secure demanding technological coordination between different stages in the market through legal protection of

[16] Ibid.,. 200.

autonomy and legal support for co-operation within complex contractual relations."[17]

Networks and the limits of comparative sociological jurisprudence

In the past there have been complaints, including those articulated by Teubner himself, concerning poor reception of systems theory in the English speaking world. One American law professor famously commented on Luhman's *The Unity of the Legal System* by saying that it reminds him of Jabberwocky the famous nonsense verse poem written by Lewis Caroll (you know: "Twas bryllyg, and ye slythy toves" etc.). Bad translations played a role Teubner acknowledged on one occasion. And national and cultural context play a role too. "However, the core of the problem lies elsewhere. It is a question of whether the language is complex enough to match the complexity of the subject matter."[18] In his book he argues that the notion of connected contracts, if manipulated skillfully, will suffice to account for many properties of networks. But, of course, the notion of 'connected contracts' is one that can be found in the BGB. Common law, for example, has no equivalent notion. Thus, it is perhaps no coincidence that Hugh Collins starts his preface to the book with a question that can easily appeal to the common law audience "Does the common law need a new legal concept"?

Hugh Collins is a professor at London School of Economics and a close acquaintance of Teubner. One of the few legal scholars in the common law world who use systems theory (he did that rather well in his book *Regulating contracts*). It is thus, no coincidence that he wrote the Introduction to *Networks*, especially given that both Collins and Teubner are the editors of Hart's International Studies in the Theory of Private Law series. Collins' Introduction, excellent even if unusually long, is an essay in its own right worth of a review. In that essay professor Collins tests the feasibility of applying Teubner's notion of 'connected contracts' in the English common law. His essay is meant as an introduction to Teubner's book, but one may want as well read it as an afterword to it and it may turn out to be even more valuable then.

One central premise of Collins' argument will be relevant here. "A difference in legal methods creates a[n] . . . obstacle of a shared multi-jurisdictional concept

[17] Ibid., 201.

[18] Gunther Teubner, "How Law Thinks: Toward a Constructivist Epistemology of Law" (1989) 23 (5) Law and Society Review 728.

of network"[19] he observes. It is hardly surprising that Teubner ties his analysis to a concept that can be found in the BGB. It can be envisaged that other continental scholars could do the same thing. But "the common law lacks the disciplines of the need to find a root in a particular text, and the statutory texts themselves are not perceived generally as a source of principle that can be developed."[20] Moreover, differences in substantive law can also provide to be an obstacle. "For instance, whereas a German legal scholar can manipulate such doctrines as good faith in contracts etc., these handy tools are not readily available to the common lawyer."[21]

A legal concept of a network suitable for a variety of legal systems may thus be difficult to find. As professor Collins soberly notes: "a sophisticated doctrinal mode that might seem plausible for networks in one legal systems may make little sense within the doctrinal framework of another."[22] The notion of 'connected contracts' is a case in point. At the same time, this is not to say that a comparison may not be fruitful, but it is just to say that it has limits. "What the German doctrinal debates may teach common lawyers . . . is that extending traditional solutions to the problems posed by networks will probably not work satisfactorily in the end."[23]

The limits of comparative sociological jurisprudence are thus, the same as those of the comparative law method. Comparative law can provide us with important insights into how different legal systems operate. In the same vein comparative sociological jurisprudence can tell us, also in a prescriptive way, how the features of these networks differ in different legal contexts. But what about transnational networks? Comparative sociological jurisprudence hardly provides a framework for the analysis of transnational legal phenomena. Just as comparative law is not international law, comparative sociological jurisprudence is not the law of transnational private regulation. And yet there can be little doubt that, at the transnational level, many networks perform important regulatory functions. This is evident for example when these networks internalize certain environmental, health and safety, labor or human rights standards. If Collins is right saying that we have to take Teubner's analysis with a grain of comparative salt, what about the utility of that analysis for transnational networks, such as global value chains? *Networks as Connected*

[19] Teubner (n 1) 26.

[20] Ibid.

[21] Ibid.

[22] Ibid., 27.

[23] Ibid., 72.

Contracts provides fruitful ground to think about this and other questions, but the answers to them — whether drawing on or distinguishing themselves from Teuber's analysis — are only to arrive in the future.

Conclusion

Professor Teubner's analysis is rich and impressive. Network legal scholarship is only emerging, and Teubner's book in an important contribution to that strand of literature. Legal networks' scholars will most certainly read his recently published volume widely. But many of them will question his method. They will do that because Teuber's method is problematic, to say the least. Collins points out to the limits of comparative sociological jurisprudence, but sociological jurisprudence is problematic in its own right, in particular because it offers little analytical clarity. It claims to use insights from economics, sociology, political science etc. but it does it in a rather obscure way. Moreover, Teubner's relaince on systems theory largely removes the question of power from the analysis. In other words, Teuber's method may not be the only way of thinking about networks; it may, perhaps, not even be the most useful one.