

SPECIAL ISSUE: THE LAW OF THE NETWORK SOCIETY
A TRIBUTE TO KARL-HEINZ LADEUR

Introduction to the Special Issue: The Law of the Network Society. A Tribute to Karl-Heinz Ladeur

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A.

Karl-Heinz Ladeur – undoubtedly one of the most original and inspiring minds in contemporary legal scholarship – characterizes his “postmodern legal theory”¹ further developing Niklas Luhmann’s systems theory of law² as resulting from “thinking in networks.”³ This reference to the network concept implies at least two different meanings.⁴

First, from a sociological perspective, the expression may be understood to describe a process of observation and operation within empirically detectable network structures in the real world. In this sense, it denotes a way of thinking that reconstructs certain developments of modern society ascertained from a social science perspective – most importantly the basic transformation of society from a “society of individuals” via a

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¹ KARL-HEINZ LADEUR, POSTMODERNE RECHTSTHEORIE. SELBSTREFERENZ – SELBSTORGANISATION – PROZEDURALISIERUNG (2nd ed. 1995); id., *Perspectives on a Post-Modern Theory of Law: A Critique of Niklas Luhmann, “The Unity of the Legal System”*, in AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY 242 (Gunther Teubner ed., 1987); id., *Post-Modern Constitutional Theory: A Prospect for the Self-Organising Society*, 60 MODERN LAW REVIEW 617 (1997).

² See NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM (Fatima Kastner et al. eds., Klaus A. Ziegert trans., 2004); ID., A SOCIOLOGICAL THEORY OF LAW (Elizabeth King-Utz & Martin Albrow trans., 1985).

³ KARL-HEINZ LADEUR, DAS UMWELTRECHT DER WISSENSGESELLSCHAFT. VON DER GEFAHRENABWEHR ZUM RISIKOMANAGEMENT 37 (1995). See also INO AUGSBERG & TOBIAS GOSTOMZYK & LARS VIELLECHNER, DENKEN IN NETZWERKEN: ZUR RECHTS- UND GESELLSCHAFTSTHEORIE KARL-HEINZ LADEURS (2009).

⁴ For other uses of the network concept in the social sciences compare the overview in GUNNAR FOLKE SCHUPPERT, VERWALTUNGSWISSENSCHAFT. VERWALTUNG, VERWALTUNGSRECHT, VERWALTUNGSLEHRE 384-391 (2000).

“society of organizations” to a “society of networks”⁵ – within the legal system. Ladeur initially pursued such an approach on the level of general jurisprudence. Here, he prominently intervened in the debates on the impasse of constitutional “balancing”⁶ and the crisis of the “regulatory state,”⁷ advocating an idea of “procedural law”⁸ that doubts a direct steering capacity of state and law. Later, Ladeur more specifically concentrated on the areas of media law⁹ and environmental law.¹⁰ Here again, his work follows the same approach. In a first step, it points at specific socio-historic givens and their evolution – especially the rise of knowledge as the most important social capital and the growing importance of risk assessment¹¹ – before, in a second step, submitting proposals for solving the ensuing legal problems, especially by readjusting constitutional doctrine toward the formulation of “collision rules”¹² that allow for reconciling conflicting social rationalities. Recently, Ladeur analyzed the evolution of European, international and transnational law in a similar vein. Again, he first undertook an effort to grasp the social developments that are all too simply

⁵ See Karl-Heinz Ladeur, *Postmoderne Verfassungstheorie*, in ZUM BEGRIFF DER VERFASSUNG. DIE ORDNUNG DES POLITISCHEN 304 (Ulrich K. Preuß ed., 1994); id., *Der Staat der „Gesellschaft der Netzwerke“*. Zur Fortentwicklung des Paradigmas des Gewährleistungsstaats, 48 DER STAAT _ (2009) (forthcoming).

⁶ See KARL-HEINZ LADEUR, ABWÄGUNG. EIN NEUES PARADIGMA DES VERWALTUNGSRECHTS. VON DER EINHEIT DER RECHTSORDNUNG ZUM RECHTSPLURALISMUS (1984); id., “Abwägung” – ein neues Rechtsparadigma? Von der Einheit der Rechtsordnung zur Pluralität der Rechtsdiskurse, in 69 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 463 (1983); id., KRITIK DER ABWÄGUNG IN DER GRUNDRECHTSDOGMATIK. PLÄDOYER FÜR EINE ERNEUERUNG DER LIBERALEN GRUNDRECHTSTHEORIE (2004).

⁷ See generally DILEMMAS OF LAW IN THE WELFARE STATE (Gunther Teubner ed., 1986).

⁸ See Karl-Heinz Ladeur, “Prozedurale Rationalität” – Steigerung der Legitimationsfähigkeit oder der Leistungsfähigkeit des Rechtssystems?, in 7 ZEITSCHRIFT FÜR RECHTSZOLOGIE 265 (1986); id., Selbstorganisation sozialer Systeme und Prozeduralisierung des Rechts. Von der Schrankenziehung zur Steuerung von Beziehungsnetzwerken, in WACHSENDE STAATSAUFGABEN – SINKENDE STEUERUNGSFÄHIGKEIT DES RECHTS 187 (Dieter Grimm ed., 1990); id., PROCEDURALIZATION AND ITS USE IN POST-MODERN LEGAL THINKING (EUI Working Paper LAW No. 1996/5).

⁹ See KARL-HEINZ LADEUR, DAS MEDIENRECHT UND DIE ÖKONOMIE DER AUFMERKSAMKEIT. IN SACHEN DIETER BOHLEN, MAXIM BILLER, CAROLINE VON MONACO U.A. (2007).

¹⁰ See LADEUR, *supra* note 2; id., *Coping with Uncertainty: Ecological Risks and the Proceduralization of Environmental Law*, in ENVIRONMENTAL LAW AND ECOLOGICAL RESPONSIBILITY. THE CONCEPT AND PRACTICE OF ECOLOGICAL SELF-ORGANIZATION 299 (Gunther Teubner et al. eds., 1994).

¹¹ See Karl-Heinz Ladeur, *Risikowissen und Risikoentscheidung*, 74 KRITISCHE VIERTELJAHRESSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT 241 (1991); id., *Risiko und Recht. Von der Rezeption der Erfahrung zum Prozess der Modellierung*, in RISIKO UND GESELLSCHAFT. GRUNDLAGEN UND ERGEBNISSE INTERDISZIPLINÄRER RISIKOFORSCHUNG 209 (Gotthard Bechmann ed., 1993); id., *Risikooffenheit und Zurechnung – insbesondere im Umweltrecht*, in INNOVATION UND FLEXIBILITÄT DES VERWALTUNGSHANDELNS 111 (Wolfgang Hoffmann-Riem & Eberhard Schmidt-Aßmann eds., 1994).

¹² Karl-Heinz Ladeur, *Helmut Ridders Konzeption der Meinungs- und Pressefreiheit in der Demokratie*, 32 KRITISCHE JUSTIZ 281 (1999).

expressed in catchphrases such as “globalization”¹³ and “global governance”¹⁴ as its political counterpart, before offering responses for the emerging legal challenges which can no longer be coped with by traditional institutions. Thus he strongly influenced the discussion of “European administrative law”¹⁵ and, more generally, the finality of European¹⁶ and global integration¹⁷ which he recognizes in a “network of networks” of heterarchical private relationships and public institutions observing, influencing and reflecting each other. In the future, this approach will be further elaborated in the context of an evolving “global administrative law.”¹⁸

Both Ladeur’s sociological diagnosis and legal cure generally assume an increase of social “complexity” combined with an ubiquitous loss of “certainty.”¹⁹ In this view, (post-)modern society no longer disposes of any central point of reference. Allegedly, there is no superior authority substituting for religion or political ideologies of the past, such as Marxism, that offered a unitary interpretation of society as whole. Rather, since a multitude of incompatible perspectives are concurring, society may only be described negatively, as the product of a process of disintegration. Society differentiates into various different social subsystems that follow their own rationalities and cannot be reduced to a single common basis. This process of societal pluralization and fragmentation is further reinforced by its own dynamics. Ladeur does

¹³ See, e.g., JAN AART SCHOLTE, *GLOBALIZATION. A CRITICAL INTRODUCTION* (2000); ULRICH BECK, *WAS IST GLOBALISIERUNG?* (1997).

¹⁴ See, e.g., *GOVERNING GLOBALIZATION. POWER, AUTHORITY AND GLOBAL GOVERNANCE* (David Held & Anthony McGrew eds., 2002); *GLOBAL GOVERNANCE. ALTERNATIVE ZUR NEOLIBERALEN GLOBALISIERUNG* (Ulrich Brand et al. eds., 2000).

¹⁵ See *THE EUROPEANISATION OF ADMINISTRATIVE LAW: TRANSFORMING NATIONAL DECISION-MAKING PROCEDURES* (Karl-Heinz Ladeur ed., 2002); Karl-Heinz Ladeur, *Supra- und transnationale Tendenzen in der Europäisierung des Verwaltungsrechts – eine Skizze*, 30 *EUROPARECHT* 227 (1995).

¹⁶ See Karl-Heinz Ladeur, *Towards a Legal Theory of Supranationality – The Viability of the Network Concept*, 3 *EUROPEAN LAW JOURNAL* 32 (1997); id., *Towards a Legal Concept of the Network in European Standard-Setting*, in *EU COMMITTEES: SOCIAL REGULATION, LAW AND POLITICS* 151 (Christian Joerges & Ellen Vos eds., 1999); id., *“We, the European People...” – Relâche?*, in 14 *EUROPEAN LAW JOURNAL* 147 (2008).

¹⁷ See Karl-Heinz Ladeur, *Globalization and the Conversion of Democracy to Polycentric Networks: Can Democracy Survive the End of the Nation-State?*, in *PUBLIC GOVERNANCE IN THE AGE OF GLOBALIZATION* 89 (Karl-Heinz Ladeur ed., 2004).

¹⁸ See Karl-Heinz Ladeur, *Die Internationalisierung des Verwaltungsrechts: Versuch einer Synthese*, in *INTERNATIONALES VERWALTUNGSRECHT. EINE ANALYSE ANHAND VON REFERENZGEBIETEN* 375 (Christoph Möllers et al. eds., 2007).

¹⁹ See Karl-Heinz Ladeur, *From Universalistic Law to the Law of Uncertainty: On the Decay of the Legal Order’s “Totalizing Teleology” as Treated in the Methodological Discussion and its Critique from the Left*, in *CRITICAL LEGAL THOUGHT: AN AMERICAN-GERMAN DEBATE* 567 (Christian Joerges & David Trubek eds., 1989).

not bemoan it, but accepts it as an irreversible fact that needs to be addressed productively.²⁰

But Ladeur's "thinking in networks" implies yet another, theoretically enhanced, component that transcends the sociological perspective. In this second sense, the expression describes the mode of thinking itself and thus constitutes an epistemological concept. The network concept as mindset relinquishes any sort of theoretical design grounded in a rationality of last resort. In contrast to blueprints of society which, but for their "post" prefix,²¹ may still be classified as metaphysical both in their claim and content, Ladeur employs a concept of "relational rationality"²² that can no longer be vertically traced back to last principles, not even of transcendental-pragmatical provenance, but that is self-stabilizing through multiple horizontal relationships. However, Ladeur does not isolate this cognitivist perspective from the sociological approach in unfolding his legal theory. Rather, he blends both perspectives by referring to a "social epistemology,"²³ i.e. an epistemological process that becomes manifest within and among various social relations. Both perspectives converge in a common aim: They paradoxically strive at "accepting uncertainty" by developing an "ecological" concept of law²⁴ that makes law responsive to its social environment by "injecting" difference to the seemingly identical system. In this sense, the identity of the legal system may only be perceived through its difference from its social environment. This process is generated by practice. What is decisive is the operative character of the emergent networks that can be observed.²⁵

B.

The following contributions pay tribute to the network concept in Ladeur's oeuvre and in legal theory more generally. From different perspectives, they elucidate both the epistemological background of the conception and empirical phenomena that may only be adequately captured by employing a network terminology.

²⁰ See Karl-Heinz Ladeur, *Rechtliche Ordnungsbildung unter Ungewissheitsbedingungen und intersubjektive Rationalität*, 27 RECHTSTHEORIE 385 (1996).

²¹ See JÜRGEN HABERMAS, NACHMETAPHYSISCHES DENKEN. PHILOSOPHISCHE AUFSÄTZE, (1988); RUDOLF LANGTHALER, NACHMETAPHYSISCHES DENKEN? KRITISCHE ANFRAGEN AN JÜRGEN HABERMAS (1997).

²² Karl-Heinz Ladeur, *Der "Eigenwert" des Rechts – die Selbstorganisationsfähigkeit der Gesellschaft und die relationale Rationalität des Rechts*, in DIE ZUKUNFT DES RECHTS 31 (Christian J. Meier-Schatz ed., 1999).

²³ See Karl-Heinz Ladeur, DER STAAT GEGEN DIE GESELLSCHAFT (2006), 3-5.

²⁴ Karl-Heinz Ladeur, *Die Akzeptanz von Ungewissheit – Ein Schritt auf dem Weg zu einem "ökologischen" Rechtskonzept*, in RECHT ALS INSTRUMENT DER POLITIK 60 (Rüdiger Voigt ed., 1986).

²⁵ See also NIKLAS LUHMANN, SOCIAL SYSTEMS (John Bednarz & Dirk Baecker trans., 1996).

We are happy for the opportunity to bring together a group of such interesting contributions dedicated to the exploration, commenting and celebration of one of Germany's most interesting public law scholars who has contributed to the German Law Journal's transnational legal discourse on more than one occasion.²⁶ True to Ladeur's untiring engagement with arising challenges in legal doctrine and theory, the contributors to the Special Issue in his name eagerly confront the questions that any attempt at defining and conceiving of legal regulation is raising today. A striking feature of Ladeur's and the contributing authors' scholarship is the thematic and linguistic open-mindedness and receptiveness with which work published in neighbouring fields and languages is assessed and incorporated. Those writing to celebrate Ladeur follow in his footsteps at bringing diverse literatures to the table for a series of thorough and insightful discussion of themes central to Ladeur's work. We are particularly pleased to be able to distribute these articles through the German Law Journal, trusting in its transnational readership's interest in sharing with us our fondness, respect and admiration of Ladeur's work and the appreciation of those writing to celebrate his contribution to legal and regulatory theory, administrative, environmental and EU law.

²⁶ Karl-Heinz Ladeur, *Legal Questions of Excluding Participants from Internet Discussion Groups: On the Guaranteeing of Freedom of Communication through 'Network-Adapted' Private Law*, 9 GERMAN L. J. 965 (2008); id. & Ino Augsberg, *The Myth of the Neutral State: The relationship between state and religion in the face of new challenges*, 8 GERMAN L. J. 143 (2007); id., *Guaranteeing the Programming Mandate of Public Broadcasters and Restraints on Private Broadcasters' Programmes in Multimedia Conditions*, 5 GERMAN L. J. 907 (2004); id., *The German Proposal of an "Anti-Discrimination"-Law: Anticonstitutional and Anti-Common Sense. A Response to Nicola Vennemann*, 3 GERMAN L. J. No. 5 (2002).

