DEVELOPMENTS

Networks in Public Law

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A. Barriers to Entry

Why should public law be concerned with networks? What is the point of taking up a concept that does not originate from a legal context? What is the appeal of this topic? Perhaps the concept describes certain "basic structures of post-nation society",[1] thus questioning traditional central categories of public law; certainly, it has a certain modernistic charm. Public law, however, has thus far not succumbed to that charm. This is understandable. Dealing with networks is frequently based on an affect against hierarchical structures that favours spontaneous coordination solutions and their legitimacy through output.[2] In jurisprudence, this effect is met more often than not with suspicion. This suspicion stems from a number of objections.

I. Interdisciplinarity

The first objection concerns the interdisciplinary character of the project and points to the risk of overburdening the law through that interdisciplinarity.[3] The reception of the ever-spreading idea of networks cannot succeed en bloc. The transfer of

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[1] Dirk Messner, *Netzwerktheorien, in* VERNETZT UND VERSTRICKT 58 (Elmar Altvater et al. eds.,1997).

[2] FRITZ SCHARPF, DEMOKRATIETHEORIE ZWISCHEN UTOPIE UND ANPASSUNG (1970); s*ee also*, Fritz Scharpf, *Legitimationskonzepte jenseits des Nationalstaats*, *in* EUROPAWISSENSCHAFT 711 (Gunnar Folke Schuppert, Ingolf Pernice & Ulrich Haltern eds., 2005).

[3] NIKLAS LUHMANN, DAS RECHT DER GESELLSCHAFT 538 (1993); *see also*, NIKLAS LUHMANN, RECHTSSYSTEM UND RECHTSDOGMATIK 9 (1974).

perspectives and interpretative patterns from other disciplines into law is a creative process during which objects and notions transform, and must transform. Thus, what is needed is legal creativity. The methodical origin of the idea of networks can shape and inspire their usage as a legal concept; however, the usage must not be prejudiced.[4] Knowledge of reference problems in related disciplines allows their creative integration into the legal description, but prejudices little or nothing at all, thus generally causing neither an "overburdening" nor an "unburdening" of the law. Even if it was possible to make a dogmatic concept out of networks, dogmatic law concepts do not equal legal concepts. However, by helping to organise and systematise the legal material, they acquire their own normativity and make an important, although not unproblematic, contribution to lawmaking.

II. Presumptions

The second objection pertains to the normative presumptions that networks imply. Does reference to networks appeal to the normative power of facts? Sophisticated models such as the network compel us to adopt a more sophisticated legal approach to reality. Networks are not simply pieces of unfiltered facts. The description of models of legal and social action and modes of socialisation as networks is a complex construction of reality loaded with certain implications. Thus, the integration of networks into legal descriptive contexts must be conducted very carefully. The unreflected adoption of their implied presumptions will inevitably result in a clash with normative legal requirements. However: "Whatever has an existence in administrative reality is entitled to be noticed in the administrative sciences, to be penetrated systematically and to be set into context with previous findings!"[5]

III. Metaphors and Illustrations

The third objection is closely related to the second and concerns the value of visualisations and metaphors for the law.[6] The clearly unclear iconography of networks rather interferes with the development of "hard" concepts of organisation, liability, attribution, legal protection, and legitimacy.[7] Such doubts are

[4] On this question, *see* Jörn Lüdemann, *Netzwerke, Öffentliches Recht und Rezeptionstheorie*, *in* NETZWERKE 266 (Boysen *et al.* eds., 2007).

[5] Eberhard Schmidt-Aßmann, *Die Herausforderung des Verwaltungsrechtswissenschaft durch die Internationalisierung der Verwaltungsbeziehungen*, 45 DER STAAT 315 (2006).

[6] On this question, *see* WOLFGANG SCHMIDT, BILDER VON RECHT UND GERECHTIGKEIT (1995); *see also* HASSO HOFMANN, BILDER DES FRIEDENS ODER DIE VERGESSENE GERECHTIGKEIT (1997).

[7] Alexandra Kemmerer, *Der normative Knoten, in* NETZWERKE 195 (Boysen *et al.* eds., 2007).

warranted; however, they do not change the fact that visualisations are generally hard to avoid – which is also true for the law: "pyramids", "machines", "the organism", "head and limbs" have been influential visual strategies[8] for the organisational model of traditional administrative statehood.[9] Whether the losses entailed in the visualisation as networks can result in an increased precision of description is not so much a question of the reliability of network visualisation, but rather a question of their genuine reflection.[10]

B. Organisational Law or Types of Legal Action?

I. The Problem of Forming the Concept

The barriers to entry mentioned above do not exclude a priori a dogmatic approach to the network phenomenon and the application of traditional conceptual instruments. Rather, it is necessary to test this approach against network structures. These can be identified through characteristics such as:

- a polycentric basic structure, the interaction between state and non-state actors or an open participation structure,
- the overlap between public law and private law, between cooperation and hierarchy, and between sovereign and private conduct or the mix of formal and informal types of legal action,
- lack of prejudice with regard to the question, whether networks are an expression of intentional control or evolutionary development.[11]

Focusing on the idea of self-organisation of networks, the concept can describe the avoidance of hierarchies. In this sense, networks can complement or replace existing centralizing structures. Conversely, it is possible that networks describe the

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[8] On such visual strategies, *see* HORST BREDEKAMP, THOMAS HOBBES VISUELLE STRATEGIEN (1999); *see also* HORST BREDEKAMP, THOMAS HOBBES, DER LEVIATHAN (2003); more in depth, *see also* HORST DREIER, HIERARCHISCHE VERWALTUNG IM DEMOKRATISCHEN STAAT, 37, 67 (1991).

[9] On this question, *see* Gunnar Folke Schuppert, *Verwaltungsorganisation und Verwaltungsorganisationsrecht als Steuerungsfaktoren, in* 1 GRUNDLAGEN DES VERWALTUNGSRECHTS § 16, paragraph 38 (Wolfgang Hoffmann-Riem, Eberhard Schmidt-Aßmann &Andreas Vosskuhle eds., 2006).

[10] As hoped by Christoph Möllers, *Netzwerk als Kategorie des Organisationsrechts, in* NICHT-NORMATIVE STEUERUNG IM DEZENTRALEN SYSTEM 285, 295 (Janbernd Oebbecke ed., 2005).

[11] *Id*. at 298.

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preparatory stage of legal regulation aimed at creating a responsible authority with overlapping coordination functions.[12] Thus, the integration of the network concept into jurisprudence will necessarily change its structures.

Both methods avoid categorising the network concept as a legal concept. Still, if such a categorisation is preferred, two approaches are conceivable.

II. Networks as a Category of Organisational Law

First, it is possible to perceive networks in the context of organisational law. One example for a legally prescribed network is § 50a GWB (*Gesetz gegen Wettbewerbsbeschraenkungen*), which regulates "cooperation in the network of European Competition Authorities". If this selective regulation might serve as a starting point for generalisation is doubtful:[13] The way this network is set up, the European Commission is accorded a position resembling a "spider in the web".[14] The networks of European regulation authorities might be a better illustration, particularly the European Regulators Groups created by telecommunication law. Here, the Commission is competent to be involved in the informal coordination between national regulatory authorities and to institutionalise such cooperation. In this way, the network coordinates decisions of the regulatory authorities that have to accommodate recommendations and positions issued not only by the Commission along vertical lines, but also by other member states along horizontal lines. Numerous other examples can be found, for instance, the state minister conferences in federal arrangements or the diverse, sometimes transnational forms of cooperation between security agencies.[15] These examples indicate an array of informal or "spontaneous" networks within the administration that have to be tested against fundamental rights and the principle that sovereign action must be based on a formal statute and be within the limits of statutory powers. However, they also require a sophisticated design of issues of attribution, legal protection and liability.

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[12] Bettina Schöndorf-Haubold, *Netzwerke in der deutschen und europäischen Sicherheitsarchitektur*, in NETZWERKE 149 (Boysen *et al.* eds., 2007).

[13] *See* Eike Michael Frenzel, *Vom Verbund zum Netzwerk*, *in* NETZWERKE 247 (Boysen *et al.* eds., 2007).

[14] ANDREAS FUCHS, KONTROLLIERTE DEZENTRALISIERUNG DER EUROPÄISCHEN WETTBEWERBSAUFSICHT, EUROPARECHT (Beiheft 2) 77, 108 (2005).

[15] Christoph Gusy, *Die Vernetzung innerer und äußerer Sicherheitsinstitutionen in der Bundesrepublik Deutschland, in* HERAUSFORDERUNG TERRORISMUS 197 (Werner Weidenfeld ed., 2004).

III. Networks as a Category of Legal Action Doctrine

Second, networks might be constructed as types of legal action. While scholarly interest for types of legal action in domestic law has decreased,[16] thinking in these terms in supranational law has increased.[17] For example, it has been suggested that networks can be grasped as a legal concept by leaving legal sources aside and instead, resorting to the concept of types of action. One example is provided by the efficient OECD Guidelines,[18] but also by the new consultations prescribed by the EnWG (*Energiewirtschaftsgesetz*).[19]

IV. Relativity of Perspectives

How can we organise these different perspectives? From an organisational law perspective, the network can be developed further into an autonomous category, just like traditional forms of legal bodies. Approaches focusing on actors can cope with new types of legal action. In both cases, one piece of the real world can be captured and be translated into legal terms. When capturing networks dogmatically it has to be borne in mind that the approach through organisational law or types of legal action only addresses one part of the structure and that the attempt to pigeonhole it as a whole could result in losing a great part of its value in terms of flexibility.

C. Lawmaking in Regulatory Networks

There is a reason the network concept plays a prominent role in multi-level systems. It is here that institutional, organisational, and theoretical patterns of order, initially developed in and with the state in mind, are under pressure. This also casts doubt on the allocation of legality and legitimacy within the arrangement of the modern state. When the legislator fades, the question of the possibility of legitimacy through legality can be raised anew.[20]

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[16] On this question, *see* Christian Bumke, *Die Entwicklung der verwaltungsrechtswissenschaftlichen Methodik in der Bundesrepublik Deutschland, in* METHODEN DER VERWALTUNGSRECHTSWISSENSCHAFT 73, 96, 102 (Eberhard Schmidt-Aßmann & Wolfgang Hoffmann-Riem eds., 2004).

[17] *See* FLORIAN VON ALEMANN, DIE HANDLUNGSFORM DER INTERINSTITUTIONELLEN VEREINBARUNG (2006); *see also* JÜRGEN BAST, GRUNDBEGRIFFE DER HANDLUNGSFORMEN DER EU (2006).

[18] Matthias Goldmann, *Der Widerspenstigen Zähmung, oder: Netzwerke dogmatisch gedacht, in* NETZWERKE 225, 241 (Boysen *et al*. eds., 2007).

[19] Karsten Herzmann, *Konsultationen als Instrument der Regulierung des Energiesektors, in* NETZWERKE 172 (Boysen *et al*. eds., 2007).

[20] HASSO HOFMANN, LEGITIMITÄT UND RECHTSGELTUNG 78 (1977).

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I. Turning Away from Rigid Formulas

European law in particular struggles to tie lawmaking to categories of legitimacy developed for the modern state. European constitutional law is therefore based on a different perspective. In the European Union, legal orders are complementary and refer to each other. This principle applies not only to lawmaking, but also to the horizontal relationship between member states applying the law.[21]

However, it is conceivable that the theoretical substance of the network metaphor goes deeper. For instance, it has been suggested to use it to conceptualise the incremental processes of entanglement and mutual penetration of different legal orders – beyond the European law models. The assumption of this experiment is, according to Thomas Vesting,[22] that

> in a global network of legal communication there can be no top and no bottom, no centre and no periphery, no origin and no last reason. The development of the new phenomena of public law would not be possible if the state was the starting point, could not be illustrated through layer models and, for instance, could not be described as a multi-level system. Rather, it would be about networks, about generally equal legal systems with their own traditions and infrastructures intertwined with each other like the Olympic rings and partially overlapping.

The use of the network concept does not necessarily imply a total rejection of the state or of (semi-) hierarchical structures. One benefit of the concept may be found in the fact that it does not depend on a certain model of legitimacy. Much of its appeal for its application to transnational lawmaking contexts seems to stem from this fact.[23]

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[21] Examples, *see* Claudio Franzius, *Horizontalisierung als Governance-Struktur, in* GOVERNANCE ALS PROZESS 3 (Sebastian Botzem *et al.* eds., forthcoming 2008).

[22] Thomas Vesting, *Die Staatsrechtslehre und die Veränderung ihres Gegenstandes*, 63 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER (VVDStRL) 41, 64 (2004).

[23] Recently, *see* ANNE-MARIE SLAUGHTER & DAVID ZARING, NETWORKING GOES INTERNATIONAL, ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE 211 (2006). On the necessity for theory in this context, *see* Olga Arnst, *Instrumente der Rechtsprechungskoordination als judikative Netzwerke, in* NETZWERKE 58 (Boysen *et al.* eds., 2007).

In any case, thinking in terms of networks enables us to do away with rigid formula, questioning the state as the final foundation of legitimacy and seeking to attribute the law to a global superstate or the international community. The network concept allows us to picture global society with all its functional differentiations while disconnecting the law from the dogma of sovereignty and from collective macro-subjects such as people or state. This does not imply the rejection of the state. But its territorial logic is complemented through a functional logic.[24]

II. Alternative Theories of Legitimacy

Still, the question of legitimacy of lawmaking remains. In the context of regulatory networks, several theories of legitimacy are conceivable. One possibility involves locating structures that lend legitimacy to state lawmaking also. Thus, federalisation and parliamentarisation, in particular, can have their control function found on a global level beyond the nation state.[25] Another theory views lawmaking in private, non-state law regimes as a permissible substitute for state-centric democracy, if the participating private actors are sufficiently protected through fundamental rights having horizontal effect against horizontal threats against their freedoms.[26]

One could ask generally whether traditional collective theories of legitimacy could be replaced by the argument of opportunities for individual self-determination. From this perspective, the possibility of participation replaces representation and political inclusion (as sources of legitimacy). This brings into focus the inclusion of individuals and a "novel" horizontal effect of fundamental rights in transnational regulatory structures.[27]

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[24] MICHAEL STOLLEIS, *Was kommt nach dem souveränen Nationalstaat?, in* EUROPEAN AND INTERNATIONAL REGULATION AFTER THE NATION STATE: DIFFERENT SCOPES AND MULTIPLE LEVELS 17 (Adrienne Hèritier and Fritz Scharpf eds., 2004). On the deontologisation of the state, *see* Alexander Somek, *Staatenloses Recht: Kelsens Konzeption und ihre Grenzen*, 91 ARSP 61 (2005).

[25] Karsten Nowrot, *Föderalisierungs- und Parlamentarisierungstendenzen in Netzwerkstrukturen, in* NETZWERKE 15 (Boysen *et al.* eds., 2007).

[26] Lars Viellechner, *Können Netzwerke die Demokratie ersetzen?, in* NETZWERKE 36 (Boysen *et al.* eds., 2007).

[27] On the preservation of politics that includes non-state actors in the law, *see* Andreas Fischer-Lescano & Philip Liste, *Völkerrechtspolitik*, 12 ZEITSCHRIFT FÜR INTERNATIONALE BEZIEHUNGEN (ZIB) 209 (2005).

III. Law Under Threat?

Engaging with such alternatives unfolds a critical potential vis-à-vis traditional theory and the concept of public law. From this critical perspective, the network concept is intended to expose selective perceptions in law and to caution against the blurring of lines. This means that it has a primarily deconstructivist tendency. Where transnationalisation and fragmentation of the law result in the breaking down of the distinctions between sovereign and private, national and international, evolution and control, the paradoxes of the network concept reflect the transformation of a highly complex global society.[28]

Networks, therefore, can erode parts of the concept of public law but do not need to be understood or perceived as a threat to law in general. Quite the contrary; it is the very fact that networks are growing in regulatory structures that makes it logical to remember the stabilising capacity of patterns of order. Such networks, then, appear not just as a result of surrendering the law to the facts of social practice, but as a legally induced stabilization of new or changed structures.[29]

D. Diversity of Linkages

Upon closer inspection of networks the individual comes into focus, less in his or her social embeddedness but rather with his or her linkages. In this picture, the knots in the net might be described as actors and the edges as the links between these actors.

The description of these linkages as "attachments" is not without problems, as it inevitably gives rise to the assumption that these linkages constitute a legal, rather than a factual bond. For example, it is not clear whether networks are to be understood as organisational entities whose elements are connected with each other by law or "merely" by discourse.[30]

Even if it is, at this stage, "merely" about stabilised relations of communication,[31] relations that come with legally binding regulatory structures are not excluded. Whether the cognitive interest is the description of the actually existing relations or

[28] Kemmerer, *supra* note 7, at 205.

[29] Kemmerer, *supra* note 7, at 218. (Describes the law's function in such structures a "normative knot")

[30] Schuppert, *supra* note 9, at paragraph 155; for a different conclusion, *see* Goldmann, *supra* note 18, at 236.

[31] Möllers, *supra* note 10, at 288.

in the legal relations depends on the phenomenon in question and the applicable legal regime.[32]

I. Transnational Networks of Cooperation

Public international law is, as a legal order, coordinating equal subjects, less dependent on hierarchies and centralised structures than domestic law. However, the legal added value of the use of the network concept cannot be found by the mere act of re-labelling; the simple fact that states are subject to numerous legal obligations owed to numerous other states does not render multilateral agreements or international organisations networks. Anne-Marie Slaughter, however, pointed out situations that can be described as multiple commitments in international law networks, because these situations represent an array of functionally differentiated relations between subjects of international law.[33] In the context of functionally disaggregated states, the number of transnational networks of regulatory agencies as inter-state relations is on the rise.[34] In that sense, the subjects of international law can get entangled in the net of transnational multiple commitments. The network presents itself as a condensed system of relations between subjects of international law. Even if relations thus created are not always legal relations, for international law scholarship the analysis of the connections is valuable for the purpose of describing rules and legal reality and of uncovering regulatory gaps.[35]

II. Administrative Networks

The network concept can be used to describe not only international relations, but also multiple legal relations in administrative law. For instance, planning decisions are determined not only by individual rights, but also by contradictory public interests frequently represented by different public authorities.[36]

Decisions seeking to strike a balance between those interests necessitate constructive cooperation between all parties. In such a context, networks can be an

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[32] Similar, *see* Sebastian Graf Kielmansegg, *Netzwerke im Völkerrecht, in* NETZWERKE 83 (Boysen *et al.* eds., 2007).

[33] ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004).

[34] Möllers, *supra* note 10, at 290.

[35] Kielmansegg, *supra* note 32, at 102.

[36] Examples for such administrative decisions shaped by multiple interests and requirements, *see* Angelika Siehr, *Europäische Raumentwicklung als netzbasierte Integrationspolitik, in* NETZWERKE 124 (Boysen *et al.* eds., 2007); *see also* Herzmann, *supra* note 19, at 19.

important tool for the coordination of all interests necessary to balance them. Thus, networks can serve the communicative resolution of conflicts of interest within the limits of administrative discretion. The network concept does not constitute new criteria, neither for the content of such decisions nor for the decision-making process, but it offers a category to describe in institutional terms complex administrative decisions.[37] In that sense, a network does not replace rules on participatory obligations, nor does it absolve the decision-maker from the obligation to consider interests and balance them. Likewise, it does not make any statement on the legality of the decision. But it can help to optimise the decision-making processes.

III. Rules of Collision

Located on a different level – which is exciting in terms of theory – is the situation where not the actors, but rather the overlapping legal orders lead to multiple commitments. This is the case, if the law to which the actors are subject is created on different levels. Problems are increasingly arising with regard to securing different standards of individual rights protection on the federal, state, supranational, and international levels.[38] As long as the different levels of binding laws are arranged hierarchically, the conflict will be solved in favour of the highest level: "federal law supersedes state law" (Art. 31 Grundgesetz) is a conflict rule favouring the higher level that is equally simple and clear; less clear is, for example, the primacy of application of European Community law.

More complex is the scenario with several systems of order whose self-conceptions do not permit subordination to other orders and that are only loosely connected.[39] Valid law can, in this case, not be perceived hierarchically as a pyramid; instead, regulatory networks are created. In such cases, a system responds with opening clauses to conflicting systems of order. For instance, as provided for in Art. 17 I (2) TEU, European Union law restrains itself vis-à-vis some member states' NATO obligations.[40] However, there are also situations where the clash is not resolved

[37] Thomas Groß, *Grundzüge der organisationswissenschaftlichen Diskussion, in* VERWALTUNGSORGANISATIONSRECHT ALS STEUERUNGSRESSOURCE 139, 149 (Wolfgang Hoffmann-Riem & Eberhard Schmidt-Aßmann eds., 1997).

[38] Recently on this question, *see* Stefan Oeter and Franz Merli, *Rechtsprechungskonkurrenz zwischen nationalen Verfassungsgerichten, Europäischem Gerichtshof und Europäischem Gerichtshof für Menschenrechte*, 66 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER (VVDStRL) 361, 392 (2007).

[39] On mechanisms to prevent and solve conflict, *see id*. at 381.

[40] Kielmansegg, *supra* note 32, at 101.

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through law because each order insists on its own sovereignty. The legal subject is thus exposed to contradictory demands. This conflict can only be solved within the system of order if there is no opening of one system for the other.

Similar conflicts between obligations can emerge through several loyalties if decision-makers are bound equally by local, state, federal, and European common welfare. In part, conflicts are resolved legally through rules of incompatibility, or they remain individual conflicts of loyalty. In the latter case, the focus is shifted to the political dimension of membership. Memberships are not only legal relations, but also create collective identities.

In regulatory networks, in which claims of validity of relatively autonomous legal orders compete, relenting collision rules are necessary for making competition controllable. But competition also has benefits that must not be obscured by hypertrophied concepts of unity. Divergences in law will persist; their solution can only be political. Apart from illustrating the diverse relationships, the network concept points to legal approaches that might lead to an intended transfer of the problem to the political realm.