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

The Network of Networks: Karl-Heinz Ladeur's Theory of Law and Globalization[†]

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A. Introduction

The process which is commonly called "globalization"[1] in social sciences seems to shatter the very foundations of law and legal thinking. Yet while legal scholarship, for the most part, is still grappling with identifying the problem,[2] Karl-Heinz Ladeur is already offering a solution. He may therefore count among the avant-garde in the debate on law and globalization.

I. Globalization's Challenge

For roughly the last two hundred years, the concept of law and the problem of justice have been thought of in terms of the modern nation-state and its constitution: Law has been considered as a product of the democratic national political process, which, for its part, was bound by the constitution in both its major aspects of:

> (1) chartering a supposedly fair and broadly acceptable system for deliberate, collective decision of the major terms on which people are expected to cooperate in the conduct of social life; and (2) specifically securing people against certain kinds of grave maltreatment that they fear will not necessarily be prevented either by the general provisions of even an eminently fair and

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[1] Compare, for example, the contributions in THE GLOBAL TRANSFORMATIONS READER (David Held & Anthony McGrew eds., 2d ed. 2003).

[2] See, *e.g.,* Eric Hilgendorf, *Zur Lage der juristischen Grundlagenforschung in Deutschland heute*, *in* RECHTSPHILOSOPHIE IM 21. JAHRHUNDERT 111, 125 (Winfried Brugger et al. eds., 2008).

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> well-designed lawmaking system, or by the regimes of regulatory and framework law that from time to time issue from the system.[3]

This complex interrelation between law and politics, democracy and rights[4] has long been viewed as the final stage of socio-legal evolution. Indeed, Niklas Luhmann once noted that a radical change in the institutional and operative understanding of law and politics comparable to the emergence of the bourgeois constitutional state has never reoccurred.[5] Consequently, legal theory and philosophy lost significance.[6] Legal scholarship rather concentrated on "dogmatics,"[7] *i.e.* interpreting, analyzing, and systematically compiling positive law.[8] Due to this narrowed perspective, the impact of globalization on law had long been ignored and, until today, it has been discussed insufficiently.[9] So far, it is a commonly held opinion only to perceive of globalization as a "challenge" to the law.[10]

II. Ladeur's Response

Ladeur, by contrast, always engaged in dialogue with the social sciences,[11] has not only tackled the impact of globalization on law at an early stage.[12] He has also given the topic an

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[3] Frank I. Michelman, *W(h)ither the Constitution?*, 21 CARDOZO L. REV. 1063, 1065 (2000).

[4] *See* Jürgen Habermas, *On the Internal Relation between the Rule of Law and Democracy*, in THE INCLUSION OF THE OTHER 253 (Ciaran Cronin & Pablo De Greif eds., 1998).

[5] *See* Niklas Luhmann, *Politische Verfassungen im Kontext des Gesellschaftssystems*, 12 DER STAAT 1, 4 (1973).

[6] See Hilgendorf, *supra* note 2, at 120; Christoph Möllers, *Globalisierte Jurisprudenz*, in GLOBALISIERUNG ALS PROBLEM VON GERECHTIGKEIT UND STEUERUNGSFÄHIGKEIT DES RECHTS 41, 44 (Michael Anderheiden et al. eds., 2001).

[7] See for this genuinely German concept Hilgendorf, *supra* note 2, at 111.

[8] *See, e.g.,* Armin von Bogdandy, *Auswertung der rechtswissenschaftlichen Projekte*, 1 FORSCHUNGSBERICHTE AUS DEM MAX-PLANCK-INSTITUT FÜR GESELLSCHAFTSFORSCHUNG 19, 19 (2005); MATTHIAS RUFFERT, DIE GLOBALISIERUNG ALS HERAUSFORDERUNG AN DAS ÖFFENTLICHE RECHT 68 (2004).

[9] *See, e.g.,* von Bogdandy, *supra* note 8, at 20; RUFFERT, *supra* note 8, at 19-22 (giving an overview about discussion of globalization in German legal scholarship).

[10] See, for example, in American legal scholarship Robert Post, *The Challenge of Globalization to American Public Law Scholarship*, 2 THEORETICAL INQUIRIES IN L. 323 (2001); in German legal scholarship Georg Nolte, *Das Verfassungsrecht vor den Herausforderungen der Globalisierung*, 67 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 129 (2008); Ralf Poscher, *Das Verfassungsrecht vor den Herausforderungen der Globalisierung*, 67 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 160 (2008); RUFFERT, *supra* note 8; Peter-Tobias Stoll, *Das Verfassungsrecht vor den Herausforderungen der Globalisierung*, 122 DEUTSCHES VERWALTUNGSBLATT 1064 (2007); HERAUSFORDERUNGEN DER GLOBALISIERUNG (Klaus J. Hopt et al. eds., 2003).

[11] See Ladeur's self-assessment in KARL-HEINZ LADEUR, DER STAAT GEGEN DIE GESELLSCHAFT, at V (2006) [hereinafter LADEUR, STAAT].

[12] *See* KARL-HEINZ LADEUR, GLOBALIZATION AND THE CONVERSION OF DEMOCRACY TO POLYCENTRIC NETWORKS: CAN DEMOCRACY SURVIVE THE END OF THE NATION-STATE? (EUI Working Paper Law No. 4, 2003), *reprinted in* PUBLIC GOVERNANCE IN THE

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unexpected turn in so far as he does not regard its implications as something new. In his view, conventional analysis in political science and sociology does not adequately capture social change ensuing from globalization. This process, he asserts, does not result in the dissolution of public order. Nor is it equivalent to a take-over of political power by multinational enterprises corresponding with a tendency to distort state-based democracy.[13] Rather, "[t]he pressure for change under which the political and legal institutions of post-modern societies are emerging is not produced primarily by globalization processes, but is instead connected with the basic transformation of the economy into the 'knowledge society'," Ladeur claims.[14] In this sense, globalization "is just a repercussion of a development, which takes place within the domain of domestic law, as well."[15]

Consequently, Ladeur's theory of law and society, drawing on both systems theoretical and liberal ideas,[16] is not only able to reflect recent global transformations but, moreover, may display increased explanatory power under conditions of globalization. In a first part, this theory will be introduced (II.). In a second part, it will be exposed to criticism (III.). Finally, in a third part, possibilities for further development will be presented (IV.).

B. Conception

Ladeur rejects ideas of a political community self-enlightened and self-governed by means of public deliberation.[17] Borrowing from Eli M. Noam,[18] he rather recognizes an adequate

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AGE OF GLOBALIZATION 89 (id. ed., 2004) [hereinafter Ladeur, *Democracy*]. The paper was originally presented in a conference at the European University Institute in Florence in March 2001.

[13] *See* Karl-Heinz Ladeur, *Globalization and Public Governance – A Contradiction?*, in PUBLIC GOVERNANCE IN THE AGE OF GLOBALIZATION 1, 1 (id. ed., 2004) [hereinafter Ladeur, *Globalization*].

[14] Ladeur, *Democracy*, *supra* note 12, at 98.

[15] Ladeur, *Globalization*, *supra* note 13, at 6.

[16] *See* Karl-Heinz Ladeur, *Towards a Legal Theory of Supranationality – The Viability of the Network Concept*, 3 EUR. L.J. 33, 48 (1997) ("(unorthodox) interpretation of systems theory") [hereinafter Ladeur, *Supranationality*]; id., *Die rechtswissenschaftliche Methodendiskussion und die Bewältigung des gesellschaftlichen Wandels*, 64 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 60, 62 ("systems theoretical observation of liberal law") (my translation) [hereinafter Ladeur, *Methodendiskussion*]. Ladeur's theory is mainly inspired by Niklas Luhmann and Friedrich A. von Hayek.

[17] Thus Ladeur explicitly opposes JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1996). *See* Karl-Heinz Ladeur, *Discursive Ethics as Constitutional Theory: Neglecting the Creative Role of Economic Liberties?*, 13 RATIO JURIS 95 (2000); ID., CAN HABERMAS' DISCURSIVE ETHICS SUPPORT A THEORY OF THE CONSTITUTION? (EUI Working Paper Law No. 4, 1999).

[18] *See* ELI M. NOAM, INTERCONNECTING THE NETWORK OF NETWORKS (2001).

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pattern of social organization for a radically fragmented and globalized society in a "network of networks"[19] of heterarchical social relationships generating collective order as a secondary transsubjective effect of individual cooperation and coordination under conditions of uncertainty.

I. Law and the Nation-State

1. Ladeur departs from the assumption that modern society, as it has lost its transcendental foundation, no longer disposes of a universally shared and centrally stored stock of knowledge.[20] From this cognitivist perspective, he concludes that intentional creation of order through collective public deliberation is impossible. Rather, he asserts, "a-centric"[21] generation of order through the "relational rationality"[22] of practical networks among individuals has to be accepted.[23] Self-reproduction of society under conditions of uncertainty in the sense of incomplete information about the behavior of others[24] will only succeed through a social practice of trial and error, observation of others, and the acceptance of path dependencies. This practice does not privilege an egoistic individual, but instead generates collective order as an unintentional side effect of the competition and the spontaneous cooperation within heterarchical social relationships:

[19] Ladeur, *Democracy*, *supra* note 12, at 99, 113. On the value of the network concept see id., *Supranationality*, *supra* note 16, at 47-48 ("The interest in using the concept lies in the complementarity and interdependence of the components and a synergy effect which produces new options which are accessible through the network as such, and are not the mere product of actors bargaining with each other. The network is constructed by a process which is based not on a pre-determined construction plan, but one which 'writes' itself through application by continually recombining the individual 'nodes' and their relationships. At the same time, the 'nodes' take part (as stabilisers) in the construction of the overall network, transforming it into a product of emergent new properties not attributable to the individual contributions, but only through them taking shape as a unit.") (footnotes omitted). *See* also *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).

[20] *See* 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); ID., DAS UMWELTRECHT DER WISSENSGESELLSCHAFT 22-68 (1995) [hereinafter LADEUR, UMWELTRECHT]; KARL-HEINZ LADEUR, POSTMODERNE RECHTSTHEORIE 191-200 (2d ed. 1995) [hereinafter LADEUR, RECHTSTHEORIE].

[21] Ladeur, *Supranationality*, *supra* note 16, at 49. This is a reminiscence of NIKLAS LUHMANN, POLITICAL THEORY IN THE WELFARE STATE 31 (John Bednarz trans., 1990) ("a society without an apex or center").

[22] Ladeur, *Globalization*, *supra* note 13, at 5. The term is borrowed from EDWARD F. MCCLENNEN, RATIONALITY AND DYNAMIC CHOICE (1990).

[23] *See* KARL-HEINZ LADEUR, NEGATIVE FREIHEITSRECHTE UND GESELLSCHAFTLICHE SELBSTORGANISATION 171-250 (2000) [hereinafter LADEUR, FREIHEITSRECHTE].

[24] *See* Karl-Heinz Ladeur, *Das selbstreferenzielle Kamel: Die Emergenz des modernen autonomen Rechts*, 21 ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE 177, 182 (2000) [hereinafter Ladeur, *Emergenz*].

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> [I]t can – through the indirect collective effects of the formation of flexible practical networks of relations, the production of experience within a universally acceptable 'pool of variety' and the possibility of developing trust – secure an enormously more important organizational ordering effect than is conceivable through public debate and politically institutionalized decisions.[25]

As long as a distributed "society of inquirers"[26] develops sufficient variety and dynamism, it will allegedly produce knowledge and possibilities of action beneficial to all.[27]

Under these circumstances, the function of law is to distribute rights of decision-making and to create and to stabilize institutions which allow for absorbing the diffuse knowledge distributed among the heterarchical networks of relationships as the most important "social capital"[28] and thereby serve to bind uncertainty.[29] This understanding of law has two important implications. First, it emphasizes the significance of conventions for the legal system. It underlines that an infrastructure of implicit social rules has evolved in the shadow of the official legal order which is indispensable for the continued existence of the system as a whole. Different forms of societal self-regulation are building the center of the legal system whereas statutes, judgements, and dogmatics are, rather, serving a supportive purpose.[30] Ladeur regards politically enacted law including the constitution as "a sort of superstructure"[31] of law only whose actual infrastructure develops in an incremental process of coordination and cooperation between individuals and social organizations, but not as "a blueprint of judges and legislators."[32] Therefore Ladeur's theory also recognizes forms of transnational law[33] beyond the state such as the new *lex*

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[25] Ladeur, *Democracy*, *supra* note 12, at 106 (footnote omitted).

[26] *Id.* The concept goes back to JOHN DEWEY, DEMOCRACY AND EDUCATION (1916).

[27] *See* LADEUR, STAAT, *supra* note 11, at 4.

[28] Ladeur, *Der "Eigenwert" des Rechts – die Selbstorganisationsfähigkeit der Gesellschaft und die relationale Rationalität des Rechts*, *in* DIE ZUKUNFT DES RECHTS 31, 40 (Christian J. Meier-Schatz ed., 1999) [hereinafter Ladeur, *Eigenwert*]. The concept regained popularity in the 1990s through Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, 6 J. DEMOCRACY 65 (1995).

[29] *See* Ladeur, *Emergenz*, *supra* note 24, at 186; id., *Eigenwert*, *supra* note 28, at 45.

[30] *See* Ladeur, *Eigenwert*, *supra* note 28, at 43. Moreover this understanding of law emphasizes the blurring between norms and their application. *See* ID., RECHTSTHEORIE, *supra* note 20, at 195; id., *Methodendiskussion*, *supra* note 16, at 85; id., *Supranationality*, *supra* note 16, at 45.

[31] KARL-HEINZ LADEUR, KRITIK DER ABWÄGUNG IN DER GRUNDRECHTSDOGMATIK 33 (2004) (my translation) [hereinafter LADEUR, ABWÄGUNG].

[32] *Id.* (my translation).

[33] For Ladeur's concept of "transnational" law see Ladeur, *Globalization*, *supra* note 13, at 2 ("'Transnational', in this sense, means processes which develop beyond the impact of the well known international government-based treaties."). For an affirmation of its legal quality see id., *Democracy*, *supra* note 12, at 92-93 ("Whether the self-

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mercatoria,[34] *i.e.* the commercial law of a globalized economy based on contract, custom, and arbitration:

> [T]he rise of global forms of co-ordination beyond public international law can no longer be regarded as anomalous deviation from the right way of state-based law, but as the expression of an evolutionary step towards new forms of the self-organization of societal norms which go beyond the official legal system.[35]

Second, this approach emphasizes the autonomy of law. It stresses that modern law, by cutting off its link to religion and morality, has lost its transcendental foundation. Therefore, it also rejects claims for law's legitimacy. Not only could those claims exclusively be directed at statutory law but, as Ladeur points out, they disregard law's independency from morality when regarding it as a deficiency which needs to be compensated for by its foundation in ethic-discursive argumentation procedures, for example.[36] In Ladeur's view, liberal law facilitates productive operation with uncertainty resulting in collective effects which cannot be deduced from principles but which are "legitimated" by a discovery procedure of practice neither accessible to the state nor the individual.[37] Consequently, law cannot deliver justice. It may only create institutions which, from their experience, generate "a sort of justice"[38] in the long run, however inconceivable as a product of public lawmaking. Law in this sense is not even able to contrafactually stabilizing expectations.[39] It may only ensure favorable conditions for coordination of expectations to stay

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organized production of binding effects is to be seen as 'law' in the traditional sense, or as mere *de facto* coercion, is a question of mainly theoretical importance. The functional equivalent compels an affirmative answer (particularly because it is only then that productive questions about co-operation and relations between self-created … law and national law may be asked).") (footnote omitted).

[34] For recent accounts see, for example, Filip De Ly, *Lex Mercatoria (New Law Merchant): Globalisation and International Self-Regulation*, *in* RULES AND NETWORKS 159 (Richard P. Appelbaum et al. eds., 2001); Alec Stone Sweet, *The New Lex Mercatoria and Transnational Governance*, 13 J. EUR. PUB. POL'Y 627 (2006); Peer Zumbansen, *Lex mercatoria: Zum Geltungsanspruch transnationalen Rechts*, 67 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 637 (2003).

[35] Ladeur, *Globalization*, *supra* note 13, at 7.

[36] *See* Ladeur, *Emergenz*, *supra* note 24, at 178.

[37] *See* Ladeur, *Methodendiskussion*, *supra* note 16, at 82. *See also* Christian Joerges, *Constitutionalism and Transnational Governance: Exploring a Magic Triangle*, *in* TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM 339, 374 (id. et al. eds., 2004) ("Legitimacy can, therefore, be understood as resulting from a 'discovery procedure of practice' in which claims to legitimacy are raised and substantiated, tried out and contrasted with practical experience, discussed and eventually revised in that light.")

[38] LADEUR, ABWÄGUNG, *supra* note 31, at 76 (my translation).

[39] This is the function of law according to Luhmann. *See* NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM 142-72 (Fatima Kastner et al. eds., Klaus A. Ziegert trans., 2004).

productive, *i.e.* geared to innovation, thus preventing that creation of social capital will be distorted.[40] Hence, law would be oriented towards "learning"[41] in a double way. On the one hand, it would enable social actors to adapt to changing circumstances, and on the other hand, it would develop capacities for learning itself. Accordingly, Luhmann predicted that, in an emerging world society, cognitive mechanisms of mutual adaptation will supersede the current predominance of normative patterns of orientation, which, however, will not bring about the "end of law"[42] but a transformation of law[43] in both its structure and its function: Cognitive mechanisms will be inserted into the law, while the law, at the same time, will support the capacities for learning of all social subsystems.[44]

2. This understanding of law requires a reformulation of the interrelation between democracy and constitutional rights.[45] Ladeur's theory culminates in a conception of fundamental rights as "negative liberties"[46] understood as mechanisms enabling the self-reproduction of society under conditions of uncertainty by distributing decisional rights. Dispensing individuals from liability for remote consequences of their action, at least as long as they do not infringe on competing rights, negative liberties allow for seizing the implicit knowledge dispersed in society which can then be used for decision-making, for example by contracts, and thereby generate indirectly but, as suggested, in the only possible way collective order oriented to self-transcendence through permanent innovation. Spontaneous cooperation and coordination between individuals, moreover, constantly produce new patterns of orientation and resources of knowledge which could also be beneficial to third parties: "Trenchantly formulated, from a sociological perspective, the function of 'negative' liberties actually consists in multiplying possibilities of action for others."[47]

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[40] *See* Ladeur, *Eigenwert*, *supra* note 28, at 40-41.

[41] *See* Karl-Heinz Ladeur, *Lernfähigkeit des Rechts und Lernfähigkeit durch Recht*, *in* POSTINTERVENTIONISTISCHES RECHT 141 (Axel Görlitz & Rüdiger Voigt eds., 1990).

[42] Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U. L. REV. 1 (2004).

[43] *See also* Marc Amstutz & Vaios Karavas, *Rechtsmutation: Zu Genese und Evolution des Rechts im transnationalen Raum*, 8 RECHTSGESCHICHTE 14 (2006).

[44] *See* Niklas Luhmann, *Die Weltgesellschaft*, 57 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 1, 26 (1971).

[45] For an opposing view see Habermas, *supra* note 4.

[46] LADEUR, FREIHEITSRECHTE, *supra* note 23. *See also* Thomas Vesting, *Subjektive Freiheitsrechte als Elemente von Selbstorganisations- und Selbstregulierungsprozessen in der liberalen Gesellschaft*, *in* REGULIERTE SELBSTREGULIERUNG ALS STEUERUNGSKONZEPT DES GEWÄHRLEISTUNGSSTAATES 21 (Wilfried Berg et al. eds., 2001).

[47] Ladeur, *Eigenwert*, *supra* note 28, at 37 (my translation). This is emphasized especially regarding the right of property. *See* LADEUR, ABWÄGUNG, *supra* note 31, at 24 (alleging that the right of property, even more than other liberties, is characterized by a reflexive form geared to producing new property which is also beneficial to others as employees, buyers, founders of new businesses, *etc.*)

This view accentuates the "impersonal"[48] character of constitutional liberties which neither refers to an individual stock of rights nor to a quasi-spatial sphere of individual freedom but postulates the requirement of a dynamic exercise of freedom. Hence, in their impersonal quality, constitutional liberties protect a process of societal self-organization which is also deemed capable of reflecting its own regularity. The protection is impersonal as it is granted not to processes of individual self-definition, but to a distributed process generating collective order.[49] Such an understanding of constitutional liberties corresponds with systems theoretical conceptions of "constitutional rights as institution"[50] originally developed by Niklas Luhmann and further advanced by Gunther Teubner to a conception of "discourse rights"[51] serving to maintain social differentiation in different sub-systems,[52] or to guarantee a plurality of societal discourses[53] by protecting them against totalizing tendencies of other societal discourses.[54]

In Ladeur's theory of law and society, this conception of constitutional rights is combined with a peculiar systems theoretical interpretation of democracy deemphasizing the importance of consent in political decision-making and instead recognizing the general will in dynamic societal processes of self-binding, self-observation, and observation of others through a heterarchical model of mutually overlapping social systems:

> [T]he concept of democracy can … be reformulated more to the effect not of consenting to a basic stock of rules and principles. It is instead the practical, heterarchical, distributed social network of networks among citizens producing 'overlapping consensus', in the sense that citizens are in practice

[48] Karl-Heinz Ladeur, *Helmut Ridders Konzeption der Meinungs- und Pressefreiheit in der Demokratie*, 32 KRITISCHE JUSTIZ 281, 290 (1999) [hereinafter Ladeur, *Meinungsfreiheit*]. Ladeur adopts the concept of HELMUT RIDDER, DIE SOZIALE ORDNUNG DES GRUNDGESETZES 85-93 (1975).

[49] *See id.*

[50] NIKLAS LUHMANN, GRUNDRECHTE ALS INSTITUTION (1965). *See also* HELMUT WILLKE, STAND UND KRITIK DER NEUEREN GRUNDRECHTSTHEORIE: SCHRITTE ZU EINER NORMATIVEN SYSTEMTHEORIE (1975).

[51] Gunther Teubner, *Contracting Worlds: The Many Autonomies of Private Law*, 9 SOC. & LEGAL STUD. 399, 412-14 (2000) [hereinafter Teubner, *Contracting Worlds*]; id., *Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?*, *in* TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM 3, 24-27 (Christian Joerges et al. eds., 2004) [hereinafter Teubner, *Societal Constitutionalism*]; id., *The Anonymous Matrix: Human Rights Violations by "Private" Transnational Actors*, 69 MOD. L. REV. 327 (2006). *See also* Christoph Beat Graber & Gunther Teubner, *Art and Money: Constitutional Rights in the Private Sphere?*, 18 OXFORD J. LEGAL STUD. 61 (1998).

[52] *See* LUHMANN, *supra* note 50, at 23.

[53] *See* Teubner, *Contracting Worlds*, *supra* note 51, at 410.

[54] Ladeur explicitly points at this resembling conception of constitutional rights. *See* Ladeur, *Meinungsfreiheit*, *supra* note 48, at 290-91 n.47.

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> involved in differing networks in differing roles, and a heterarchical organized stock of linkages and co-ordinations arises from their overlapping permeability to each other, that enables a 'polycontexturally' distributed self-observation and observation of others by the various patterns of actions produced, continually feeding the associated 'pool of knowledge' with novelty.[55]

Similarly to Luhmann who perceived the function of democracy as to maintaining societal complexity,[56] Ladeur regards democracy as a mechanism to allow for the constant self-reproduction of society under conditions of uncertainty. The mutual overlapping of self-observation and observation of others by different social systems is regarded as a form of communication which allows adopting the perspectives of others as an experimental irritation through which novelty can emerge.[57] Thus, the deliberative component of democracy is pushed back to second rank. If society does not dispose of a solid stock of knowledge and if generation of collective order may only be imagined as an unintended side effect of flexible practical networks of relations, public debate and institutionalized political decision-making have to be restrained to distributing public and private rights of disposal.[58]

The central problem of this model is how to cut off "self-induced inertia," "self-blocking effects," and "monopolistic tendencies" within social networks of relations.[59] To solve the problem, Ladeur ascribes a "supplementary und supportive dimension" to the "transsubjective dimension" of constitutional rights protecting societal self-regulation because of its implicit ordering effects.[60] This additional dimension of constitutional rights serves to avoid and limit the self-destruction of freedom and thereby emphasizes the general interest in maintaining the practical networks of social relations constantly creating new knowledge and possibilities from which third parties may benefit as well.[61] It has an inherently "procedural"[62] character which, if necessary, explicitly calls for judicial

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[55] Ladeur, *Democracy*, *supra* note 12, at 107 (footnote omitted). *See also* id., *Eigenwert*, *supra* note 28, at 40.

[56] *See* Niklas Luhmann, *Komplexität und Demokratie*, 10 POLITISCHE VIERTELJAHRESSCHRIFT 314, 319-20 (1969).

[57] *See* Ladeur, *Democracy*, *supra* note 12, at 104.

[58] *See* Ladeur, *Eigenwert*, *supra* note 28, at 47; id., *Democracy*, *supra* note 12, at 105.

[59] LADEUR, ABWÄGUNG, *supra* note 31, at 60.

[60] For the "transsubjective," or "impersonal," dimension of constitutional rights see *supra*, text accompanying notes 46-54.

[61] *See* Karl-Heinz Ladeur, *Die objektiv-rechtliche Dimension der wirtschaftlichen Grundrechte*, 61 DIE ÖFFENTLICHE VERWALTUNG 1, 9 (2007). *See also* ID., ABWÄGUNG, *supra* note 31, at 58-70.

[62] For the concept of "proceduralization" see generally KARL-HEINZ LADEUR, PROCEDURALIZATION AND ITS USE IN POST-MODERN LEGAL THEORY (EUI Working Paper Law No. 5, 1996); Rudolf Wiethölter, *Materialization and*

intervention but, at the same time, implicitly restricts it: The courts may only take precautions for facilitating and maintaining societal self-regulation but not directly aim at guaranteeing just outcomes or protecting the weak. Metaphorically speaking, judicial decisions would then be regarded as a sort of "vaccination"[63] stimulating the actors' capacity for self-organization by opening up new perspectives and supplying new possibilities of action instead of opposing a public rationality.[64] In this sense, constitutional rights would be reconstructed as "collision rules,"[65] *i.e.* a sort of "conflict of laws," that permit outside intervention only when and as far as there is a risk of self-destruction in processes of societal self-organization or freedom may only be enjoyed by establishing a public framework for organizing plurality.

II. Law and Globalization

1. From this perspective, globalization does not fundamentally challenge the legal system.[66] Rather, it is part of a larger process of societal self-transformation in which the borders between the national and the international,[67] the public and the private,[68] as well as market and organization[69] are becoming permeable.[70] Under these circumstances, non-

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Proceduralization in Modern Law, *in* DILEMMAS OF LAW IN THE WELFARE STATE 221 (Gunther Teubner ed., 1986); GRALF-PETER CALLIESS, PROZEDURALES RECHT (1999).

[63] Ladeur, *Supranationality*, *supra* note 16, at 50.

[64] *See* Ladeur, *Methodendiskussion*, *supra* note 16, at 89-90. *See also* id., *Eigenwert*, *supra* note 28, at 44 ("setting indirect incentives"); id. at 51 ("supplying new options, installing mechanisms of self-reflexion"); ID., ABWÄGUNG, *supra* note 31, at 65 ("productive irritations") (my translations).

[65] Ladeur, *Meinungsfreiheit*, *supra* note 48, at 290. For the concept of "collision rules" see generally GUNTHER TEUBNER, LAW AS AN AUTOPOIETIC SYSTEM 100-22 (Zenon Bankowski ed., Anne Bankowska & Ruth Adler trans., 1993); Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999, 1021-23 (2004); Rudolf Wiethölter, *Begriffs- oder Interessenjurisprudenz – falsche Fronten im IPR und Wirtschaftsverfassungsrecht: Bemerkungen zur selbstgerechten Kollisionsnorm*, *in* INTERNATIONALES PRIVATRECHT UND RECHTSVERGLEICHUNG IM AUSGANG DES 20. JAHRHUNDERTS 213 (Alexander Lüderitz & Jochen Schröder eds., 1977); Christian Joerges, *Europarecht als ein Kollisionsrecht neuen Typs*, *in* UMWELTRECHT UND UMWELTWISSENSCHAFT 719 (Martin Führ et al. eds., 2007).

[66] *See* Ladeur, *Democracy*, *supra* note 12 at 116 ("Globalization is only one phenomenon of transformation of the state, and it is hitherto not very important.")

[67] *See generally* Philip Alston, *The Myopia of Handmaidens: International Lawyers and Globalization*, 8 EUR. J. INT'L L. 435 (1997); Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT'L L. 485 (2005); Peer Zumbansen, *Die vergangene Zukunft des Völkerrechts*, 34 KRITISCHE JUSTIZ 46 (2001).

[68] *See generally* Laura A. Dickinson, *Public Law Values in a Privatized World*, 32 YALE J. INT'L L. 384 (2006); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000); id., *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285 (2003).

[69] *See generally* Marc Amstutz, *Die Verfassung von Vertragsverbindungen*, *in* DIE VERNETZTE WIRTSCHAFT: NETZWERKE ALS RECHTSPROBLEM 45 (id. ed., 2004); Gunther Teubner, *Coincidentia Oppositorum: Hybrid Networks Beyond*

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state, de-territorialized, self-organized networks beyond public decision-making about generally binding norms need to be strengthened and combined with various public forms of guaranteeing learning capacity and the enabling and enhancing of self-observation and observation of others within a global "network of networks."[71] This proposal for a new form of public governance adapted to network-like organizational patterns and the rise of the knowledge society and based on cooperation, proceduralization, and flexible adaptation to uncertainty, according to Ladeur, "is valid for all levels of public order, from the nation state to global order."[72]

Democracy, Ladeur asserts, is conceivable even in these conditions if it is detached from hierarchical concepts of the state and popular sovereignty:

> A non-hierarchical variant of democracy would focus less on common decision through sovereign organized unity of will than on producing a distributed self-observation and observation of others made possible by a 'network of networks' and the associated productive association possibilities and constraints, which are so openly dimensioned that far-reaching inclusion of citizens is guaranteed.[73]

On this basis, the concept of participation rights could also be productively reformulated. It would not be a manifestation of direct democracy "but an adjust variant of the linkage among various networks taking on the inclusion of all citizens in altered shape."[74] This would also open up perspectives for a model of "control through transparency" and "learning through mutual observation" which could systematically be improved through procedures and adapted to new challenges through linkage rules.[75]

Contract and Organization, *in* ESSAYS IN HONOR OF LAWRENCE FRIEDMAN (Robert Gordon & Morton Horwitz eds., forthcoming).

[70] *See* Ladeur, *Globalization*, *supra* note 13, at 17.

[71] Ladeur, *Democracy*, *supra* note 12, at 99, 113. *See also* Jochen von Bernstorff, *The Structural Limitations of Network Governance: ICANN as a Case in Point*, *in* TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM 257, 277 (Christian Joerges et al. eds., 2004) ("The network concept is based on the liberal assumption of the autonomy of actors. Communal goals are to be achieved by the network through the simple informal linkage between actors from diverse sub-systems of society. The emerging plurality of social rationalities – ensured by a decentralised connection of autonomous private actors – is supposed to entrench a more sensitive form of regulation. Since a general and substantive 'common good' is difficult to identify in a post-modern globalised world, the network approach seeks to replace it by specific regulatory decisions that encapsulate the various 'relevant' rationalities of societal sub-systems.")

[72] Ladeur, *Democracy*, *supra* note 12, at 117.

[73] *Id.* at 113.

[74] *Id.* at 114.

[75] *Id.*

However, this does not imply that the state will become futile. Rather, the state would then have a decentralized function: the maintenance of the productivity and innovative capacity of the networks and supplying them with diversity and observing results. Against this background, participation and transparency would have more the function of enabling the mutual irritation of the networks of relations, than of aggregating a general will in a unitary fashion.[76]

Linking up and mutual openness of different networks may be achieved by introducing accountancy rules and provisions of openness for transnational governance similar to those existing for European integration into national constitutions.[77] On a transnational level, Ladeur imagines "establishing agencies that are largely screened off from political influences and that could create the necessary knowledge basis for decisions."[78] As regards the Internet, for example, he thinks of a "cyber court."[79] In sum, the relationship between public and private governance would be characterized by subsidiarity and mutual support:

> Public governance is to be distinguished from private governance in as much as it focuses, above all systematically, on external effects produced as the unintended consequences of private actions, though not, primarily, taking responsibility in compensation for privately produced detrimental effects. Instead, it tries to stimulate more responsive strategies by private networks of interactions bringing in incentives to develop longterm horizons of decision-making. In this respect, it exercises indirect influence although it does not directly intend to change societal networks.[80]

2. This perspective also sheds new light on the European Union. In Ladeur's view, the European Union should not be conceptualized as a super-state based on the model of the nation-state, but constructed as a new form of governance following the idea of exploratory learning – "a post-modern project of de-centered order beyond the state."[81] In the European Union, Ladeur asserts, the network concept has already proven its viability and may therefore allow conclusions to be drawn about the necessary adaptation of the

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[76] *Id.*

[77] *See id.* at 114, 117.

[78] *Id.* at 114.

[79] *See* 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).

[80] Ladeur, *Globalization*, *supra* note 13, at 19 (footnote omitted).

[81] Karl-Heinz Ladeur, *"We, the European People …" – Relâche?*, 14 EUR. L.J. 147, 167 (2008) [hereinafter Ladeur, *European People*].

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nation-state: "[T]he EU should be regarded as an avant-garde body which, through its experiments with self-organised and flexible public-private decision-making networks, might function as a testing ground for the much needed modernisation of the 'state' in the light of rapidly changing social and economic conditions."[82] The specificity and strength of the European Union, according to Ladeur, are the openness of its processes and the vagueness of its institutional perspectives. These features allow responding to the heterarchical relational logic of fragmentation which characterizes post-modernity and globalization and of which the European Union is a part.[83]

Referring to his non-hierarchical conception of democracy, Ladeur also counters the wide-spread assumption of a "democracy deficit" within the European Union: "[T]he heterarchical overlapping inter-relationships and the coupling of networks may allow for more efficient accountability and transparency than the fictitious power of a central hierarchy which is not adapted to decision making under conditions of complexity," he claims.[84] For example, the overlapping networks of the different committees and their regulatory functions as well as the necessity of their links with the legal orders of the Member States could be regarded as a functional equivalent to democratic political control of administration at national level.[85] More generally, Ladeur asserts that, as decision-making has become far more a process of negotiation on the basis of testing and evaluation of uncertain scientific knowledge, it requires new procedural forms coupling self-regulation with sensitive models of self-oversight and independent control.[86] This approach requires a style of rule- and decision-making systematically reformulated with a view to *ex post* monitoring and the selection of common standards of accounting and control while strategies developed *ex ante* are doomed to fail.[87] The new type of problems emerging from fragmentation and globalization, according to Ladeur, demands an experimental approach of trial and error. It may only be tackled by tentative search processes and experimentation with heterogeneous regimes from which the public interest can only be generated in an indirect mode.[88] In this light, the permeability of networks to reciprocal influences creates "democratic social capital"[89] which enables decisions to be viable in the longer term.

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[82] Ladeur, *Supranationality*, *supra* note 16, at 35.

[83] *See* Ladeur, *Supranationality*, *supra* note 16, at 43-54; id., *European People*, *supra* note 81, at 163-67.

[84] Ladeur, *European People*, *supra* note 81, at 165.

[85] *See id*.

[86] *See* Ladeur, *Supranationality*, *supra* note 16, at 46.

[87] *See* Ladeur, *European People*, *supra* note 81, at 166.

[88] *See id.* at 167.

[89] Ladeur, *Democracy*, *supra* note 12, at 106.

So, in conclusion, Ladeur conceives of both nation-state and European Union as part of a larger network of overlapping regulatory networks operating on the basis of an "open method of coordination" implying mutual observation, benchmarking, and control: "[I]t is the fine-tuning and co-ordination of different components of national, transnational, international/intergovernmental and supra-national origin which is at issue. We should venture to design a new network-related model which links different public and private actors beyond and within the state in a productive way."[90] Consequently, both nation-state and European Union are assumed to being able to contribute only indirectly to the establishment of a satisfying collective order. Therefore they are advised to accept a secondary role: "Responsibility will, at the end of the day, reside neither at European nor at national level, but will have to be managed by transnational networks of private and public actors within which the EU could play the role of a mediator, rather than that of a sovereign decision maker."[91]

C. Critique

Ladeur's legal and sociological theory of a "network of networks," radically breaking with traditional ideas of hierarchy and unity, meets both approval and ardent disapproval.

I. Approval

1. Under conditions of globalization, a legal and sociological theory that emphasizes the potential of societal self-organization in a networked logic seems to be pointing the way. Indeed, as the example of the regulation of the Internet domain name system by the Internet Corporation of Assigned Names and Numbers (ICANN) – a private, not-for-profit, Californian corporation – demonstrates[92] new innovative forms of societal self-organization appear as the only possibility of generating collective order on a global level for lack of a world legislator and failure of public international lawmaking. "On a global

[90] Ladeur, *Globalization*, *supra* note 13, at 16.

[91] Ladeur, *European People*, *supra* note 81, at 164 (footnote omitted). *See also* id., *Democracy*, *supra* note 12, at 118 ("In the long term, responsibility will be concentrated neither at the level of domestic governments, nor at the supra-national level of international organization alone; it will instead rest with public-private networks of decision-makers and groups that overlap at national, transnational and international levels.") (footnote omitted).

[92] *See generally* A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17 (2000); Jeanette Hofmann, *(Trans-)Formations of Civil Society in Global Governance Contexts – Two Case Studies on the Problem of Self-Organization*, *in* GLOBAL GOVERNANCE AND THE ROLE OF NON-STATE ACTORS 179 (Gunnar Folke Schuppert ed., 2006); Michael Hutter, *Global Regulation of the Internet Domain Name System: Five Lessons from the ICANN Case*, *in* INNOVATIONSOFFENE REGULIERUNG DES INTERNET 39 (Karl-Heinz Ladeur ed., 2003). *But see* von Bernstorff, *supra* note 71, at 277 (arguing that ICANN serves as an example of the limits of societal self-regulation and deformalized governance structures).

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level, party autonomy turns the hierarchical relationship between the state and the individual upside down," other authors accordingly remark in the same context:

> In the traditional view, the individual is subordinated to the state, even in the realm of private law. By contrast, [under conditions of globalization] party autonomy subordinates the state and its private law to private parties and their choices. Parties are not confined to using the autonomy granted to them by the legal order; rather, they have the autonomy to choose the very legal order that grants this autonomy.[93]

Operation in a networked logic, moreover, offers many advantages compared to hierarchical organization. Not only does it allow seizing dispersed societal knowledge.[94] But it also permits consolidating resources, broadening capacities, and acting in a more flexible way.[95] Even in terms of legitimacy, networks do no seem to fall behind common standards. Not only do they dissipate power and foster decentralized decision-making, thereby institutionalizing a kind of "vertical separation of powers."[96] But they also allow actors to mutually observe, influence and internally reflect each other, thereby bringing about a sort of "quasi-democracy."[97] Admittedly, this means that accessibility and transparency will replace deliberation and participation.[98]

2. In a less favorable assessment, these features might be considered as mere "compensations for legitimacy."[99] This view correlates with a fear that ideas of pure effectiveness and societal acceptance will catch on.[100] More pointedly, the network model

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[93] Ralf Michaels & Nils Jansen, *Private Law Beyond the State? Europeanization, Globalization, Privatization*, 54 AM. J. COMP. L. 843, 867 (2006).

[94] *See* Gunther Teubner, *The Two Faces of Janus: Rethinking Legal Pluralism*, 13 CARDOZO L. REV. 1443, 1461 (1992); ANDREAS FISCHER-LESCANO & GUNTHER TEUBNER, REGIME-KOLLISIONEN 64 (2006).

[95] *See* FISCHER-LESCANO & TEUBNER, *supra* note 94, at 63.

[96] Anne Peters, *The Globalization of State Constitutions*, *in* NEW PERSPECTIVES ON THE DIVIDE BETWEEN NATIONAL AND INTERNATIONAL LAW 251, 273 (Janne Nijman & André Nollkaemper eds., 2007). *See also* FISCHER LESCANO & TEUBNER, *supra* note 94, at 64.

[97] Klaus Günther, *Rechtspluralismus und universaler Code der Legalität: Globalisierung als rechtstheoretisches Problem*, *in* DIE ÖFFENTLICHKEIT DER VERNUNFT UND DIE VERNUNFT DER ÖFFENTLICHKEIT 539, 565 (Lutz Wingert & id. eds., 2001). *See also* FISCHER LESCANO & TEUBNER, *supra* note 94, at 64.

[98] *See* Anne Peters, *Privatisierung, Globalisierung und die Resistenz des Verfassungsstaates*, *in* STAATS- UND VERFASSUNGSTHEORIE IM SPANNUNGSFELD DER DISZIPLINEN 100, 135 (Philippe Mastronardi & Denis Taubert eds., 2006).

[99] OLIVER LEPSIUS, STEUERUNGSDISKUSSION, SYSTEMTHEORIE UND PARLAMENTARISMUSKRITIK 23 (1999) (my translation).

[100] *Id.* at 27.

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might be equated with a "neo-liberal blunting of the problem of legitimacy" that "takes the air out of supposedly misleading claims for legitimation."[101]

But this view leaves out of consideration that the network model "can neither be described as the abolition of all forms of public power, nor as a non-political reign of technocracy."[102] A more positive evaluation of Ladeur's theory therefore starts by acknowledging that the transnational networks of relationships which emerge beyond both the individual and the group-based legal relationships may allow for the creation of a more adaptive and productive model of public governance:

> Such an approach would not just regard transnational processes of networks as a threat to government and democracy, but, on the contrary, as an incentive for the development of responsive forms of heterarchical decentered forms of governance which might develop their own reflexive potential *vis-à-vis* the evolution of a 'society of networks'.[103]

This would open up perspectives for a more viable paradigm which accepts the emergence of a global society whose dynamics and fluidity do not fit into a reconstruction of the state at world level and therefore gives up the ideal of democratic legitimacy:

> A more realistic and pragmatic approach might come to the conclusion that giving up this ideal might even help find more finely-tuned productive forms of governance, even if they do not conform to the more or less fictitious chain of delegation of power from the single decision made by a civil servant whose accountability is, in practice, rather doubtful.[104]

Perhaps it is turning away from framing the problem of justice as a question of legitimacy that makes "justice" reconceivable.[105]

II. Disapproval

1. Still, the model of a "network of networks" may be attacked from at least two different vantage points. First, from a cognitivist perspective, parliamentarianism may appear to be

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[101] Jürgen Habermas, *A Political Constitution for the Pluralist World Society?*, 34 J. CHINESE PHIL. 331 (2007).

[102] Ladeur, *Globalization*, *supra* note 13, at 11.

[103] *Id.*

[104] *Id.* at 12.

[105] *See* Peer Zumbansen, Book Review, 68 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 404, 414 (2004) (reviewing KARL-HEINZ LADEUR, NEGATIVE FREIHEITSRECHTE UND GESELLSCHAFTLICHE SELBSTORGANISATION (2000)).

an "epistemological necessity."[106] This view concludes from apriority of human subjectivity and human incapacity to make objective statements that reducing uncertainty may only succeed by formation of concepts, *i.e.* legislation. Indeed, parliamentary legislation would be largely futile in the network model.[107]

Second, from a normativist perspective, the question is how to institutionalize networks "in such a way that power inequalities are neutralised, that rights to equal participation are granted, that third party interests are adequately represented, and that procedures are transparent."[108] In this view, the network model raises Hobbes's old problem in a new guise. It leaves open the question of who decides according to which criteria about the external standards to determine societal learning processes and therefore calls for a final arbiter, a neutral third.[109]

2. In a global context, however, insisting on the "epistemological necessity of parliamentarianism"[110] is no way out.[111] Here, there seems to be no alternative to societal self-organization, though admittedly Ladeur's trust in the networks' reliance on trust[112] and their capacity to indirectly generating collective order[113] is precarious. But here again, it must be emphasized that the network approach neither does away with the state and nor excludes public intervention, albeit it imposes limits on such intervention: "In this respect, it follows the example of classical liberal states, which also developed indirect norm-based responsibility, but tried to avoid broadening the domain of state responsibility because of fear of perverse effects in blocking private initiative." In other words, it "does not define public tasks in a positive way, but, in its 'negative' focus on imposing limits to

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[106] Oliver Lepsius, *Die erkenntnistheoretische Notwendigkeit des Parlamentarismus*, *in* DEMOKRATIE UND FREIHEIT 123 (Martin Bertschi et al. eds., 1999).

[107] *Id.* at 146-64. *See also* LEPSIUS, *supra* note 99, at 21-34.

[108] Klaus Günther, *Legal Pluralism or Uniform Concept of Law? Globalisation as a Problem of Legal Theory*, 5 NO FOUNDATIONS 5, 19 (2008).

[109] *See* Klaus Günther, *(Zivil-)Recht: Kann das Zivilrecht im Zuge der Globalisierung das öffentliche Recht ersetzen?*, *in* RECHTSVERFASSUNGSRECHT 295, 310 (Christian Joerges & Gunther Teubner eds., 2003). *See also* von Bernstorff, *supra* note 71, at 277 ("However, this ideal of an 'a-centric' realisation of the common good … cannot escape the fundamental decision about who is a 'relevant' actor, or which are the 'relevant' societal rationalities in a certain field of regulatory policy, and about how these diverging societal interests should be balanced.")

[110] Lepsius, *supra* note 106.

[111] *But see* Richard Falk & Andrew Strauss, *Toward Global Parliament*, 80 FOREIGN AFF. 212 (2001).

[112] *See generally* FRANCIS FUKUYAMA, TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY (1995); Niklas Luhmann, VERTRAUEN: EIN MECHANISMUS DER REDUKTION SOZIALER KOMPLEXITÄT (4th ed. 2000); Alain Peyrefitte, LA SOCIÉTÉ DE CONFIANCE (1995).

[113] *See supra* text accompanying notes 21-27.

private action, presupposes the creativity of the self-organizing potential of liberal society."[114]

On a global level, such limits to private action could also follow from a "supplementary und supportive dimension" of constitutional rights as spelled out by Ladeur for nation-state law.[115] This understanding of constitutional rights would then need a "transnational expansion."[116] Its implementation, moreover, would require a networked cooperation among national and international courts. Yet this idea fits neatly in the larger picture of the "network of networks."

D. Prospect

The contours of a transnational understanding of constitutional rights, further developing Ladeur's theory of law and society, shall be outlined in turn.[117]

I. Foundation

The envisaged constitutional rights, imposing limits on private action in the transnational sphere, would have to be derived from national constitutions by way of interpretation. In Germany, for example, the doctrine of a so-called "objective dimension" or "horizontal effect"[118] of fundamental rights could be expanded so as to encompass protection against infringements by transnational networks. Reflecting the transformation of the constitutional state to what has been called the "open constitutional state,"[119] the objective dimension of constitutional rights would once again prove to be a "dynamic

[114] Ladeur, *Globalization*, *supra* note 13, at 19.

[115] *See supra* text accompanying notes 60-65. For a similar project, though based on republican and discourse theoretical premises, see Oliver Gerstenberg, *Private Law, Constitutionalism and the Limits of the Judicial Role*, *in* TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION 687, 702 (Craig Scott ed., 2001) ("radical horizontalisation" of constitutional rights).

[116] Karl-Heinz Ladeur & Lars Viellechner, *Die transnationale Expansion staatlicher Grundrechte*, 46 ARCHIV DES VÖLKERRECHTS 42 (2008).

[117] For further elaboration see Lars Viellechner, *Können Netzwerke die Demokratie ersetzen?*, *in* NETZWERKE 36, 48-56 (Sigrid Boysen et al. eds., 2007); Ladeur & Viellechner, *supra* note 116, at 62-72.

[118] The seminal case is Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 7, 198 (1958) (Lüth). *See also* Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 39, 1 (1975) (Abortion I). For a comparative perspective see Rainer Wahl, *Die objektiv-rechtliche Dimension der Grundrechte im internationalen Vergleich*, *in* 1 HANDBUCH DER GRUNDRECHTE IN DEUTSCHLAND UND EUROPA 745 (Detlef Merten & Hans-Jürgen Papier eds., 2004).

[119] UDO DI FABIO, DAS RECHT OFFENER STAATEN (1998); STEPHAN HOBE, DER OFFENE VERFASSUNGSSTAAT ZWISCHEN SOUVERÄNITÄT UND INTERDEPENDENZ (1998).

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principle"[120] built into the legal system that makes law responsive to social change and requires adaptation in order to ensure consistent protection of freedom even under changing circumstances.

Certainly, worldwide harmonization is out of sight here while the arbitrariness of applying a single national standard is equally clear. Yet if it is true that the western model of constitutionalism has spread all over the world in the wake of globalization, especially after the end of the Cold War,[121] it is possible to conceive of a conception of transnational constitutional rights that occurs in different shapes though it has universal scope. In a world of "liberal states"[122] which is characterized by mutual openness, the "core rights" of individuals would be "assumed to be constitutionally protected in every potential forum."[123] However, the different national legal orders would be allowed to spell out "their own grammars for their version of a global *ius non dispositivum*."[124] In this light, it would be no obstacle that the idea of horizontal effect of constitutional rights is more familiar to some legal systems, such as the German, than to others, such as the American. Either transnational conflicts will be resolved by comparable mechanisms in national private law preserving the integrity of the national legal order.[125] Or national constitutional law will evolve in reaction to the emergence of transnational networks. Accordingly, even in U.S. American constitutional theory, "a broader view of the Constitution's scope" is envisaged that "would reach the private standard-setting bodies – which now function so powerfully (yet so invisibly) to establish the code that regulates cyberspace – and subject them to constitutional norms of fair process and judicial review."[126] In line with this idea of

[120] Dieter Grimm, *Rückkehr zum liberalen Grundrechtsverständnis?*, *in* DIE ZUKUNFT DER VERFASSUNG 221, 240 (3d. ed. 2002) (my translation). *See also* WILLKE, *supra* note 50, at 235 ("fundamental rights as dynamic and innovative system") (my translation); Oliver Gerstenberg, *What Constitutions Can Do (but Courts Sometimes Don't): Property, Speech, and the Influence of Constitutional Norms on Private Law*, 17 CAN. J. L. & JURISPRUDENCE 61, 78 n.71 (2004) ("constitutional and human rights norms as context-sensitive pacemakers of reform").

[121] *See, e.g.,* Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771 (1997).

[122] Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503 (1995) [hereinafter Slaughter, *Liberal States*]; id., *A Liberal Theory of International Law*, 94 AM. SOC'Y INT'L L. PROC. 240 (2000); Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513 (1997).

[123] Slaughter, *Liberal States*, *supra* note 122, at 520.

[124] Fischer-Lescano & Gunther Teubner, *supra* note 65, at 1034.

[125] *See* Mark Tushnet, *The Relationship between Judicial Review of Legislation and the Interpretation of Non-Constitutional Law, with Reference to Third Party Effect*, *in* THE CONSTITUTION IN PRIVATE RELATIONS: EXPANDING CONSTITUTIONALISM 167, 169 (András Sajó & Renáta Uitz eds., 2005).

[126] Paul Schiff Berman, *Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to "Private Regulation"*, 71 U. COLO. L. REV. 1263, 1307 (2000). *See also* Jennifer Arnette-Mitchell, *State Action Debate Reborn Again: Why the Constitution Should Act as a Checking Mechanism for ICANN's Uniform Dispute Resolution Policy*, 27 HAMLINE J. PUBL. L. & POL'Y 307 (2006); Dawn C. Nunziato, *Freedom of Expression, Democratic Norms, and Internet Governance*, 52 EMORY L.J. 187 (2003).

"constitutive constitutionalism,"[127] U.S. American Courts recently referred to freedom of speech protected by the First Amendment of the U.S. Constitution when deciding about the enforceability of a French judgement ordering the California-based Internet provider Yahoo! to block French Internet users' access to Nazi memorabilia presented and offered for sale on Yahoo!'s web site.[128]

II. Elaboration

As regards implementation of transnational constitutional rights, another insight of network theory might lead further. According to Anne-Marie Slaughter, in the process of globalization, the state is disaggregating into its separate, functionally distinct parts which increasingly cooperate with their foreign equivalents as "global government networks."[129] Apparently this thesis, which has to be understood both as an empirical observation and as a normative precept,[130] is most accurate for the judicial branch which is about to form a "global community of courts"[131] characterized by "a respect for foreign courts qua courts, rather than simply as the face of a foreign government, and hence for their ability to resolve disputes and interpret and apply the law honestly and competently."[132] It is also in line with recent developments in private international law scholarship promoting a "cosmopolitan pluralist" approach to conflict of laws according to which judges in an interconnected world "owe their allegiance to a transnational and international system of norms and not simply to their own domestic law."[133] Recently, even the U.S. Supreme Court, which had long refused to consider international and comparative law when interpreting the U.S. Constitution due to the dominant tradition of democratic self-

[127] Berman, *supra* note 126, at 1269, 1290.

[128] *Yahoo!, Inc. v. La Ligue Contre le Racisme et l'Antisemitisme*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001); 433 F.3d 1199 (9th Cir. 2006).

[129] Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, 24 MICH. J. INT'L L. 1041 (2003); id., *Governing the Global Economy through Government Networks*, *in* THE ROLE OF LAW IN INTERNATIONAL POLITICS 177 (Michael Byers ed., 2000).

[130] *See* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 11, 17 (2004) ("I outline what is, in part, and what could be.").

[131] Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003); id., *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000); id., *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99 (1994). *See also* Brun-Otto Bryde, *The Constitutional Judge and the International Constitutionalist Dialogue*, 80 TUL. L. REV. 203 (2005); Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819 (1999); William Burke-White, *A Community of Courts*, 24 MICH. J. INT'L L. 1 (2002); Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429 (2003).

[132] SLAUGHTER, *supra* note 130, at 87 (footnote omitted).

[133] Paul Schiff Berman, *Conflict of Laws, Globalization, and Cosmopolitan Pluralism*, 51 WAYNE L. REV. 1105, 1118 (2005). *See also* id., *Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era*, 153 U. PA. L. REV. 1819 (2005); id., *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311 (2002).

government,[134] showed sympathy with this approach. In two spectacular cases concerning the ban of homosexual sodomy[135] and death penalty for juvenile delinquents,[136] the majority speaking for the court expressly cited foreign law and public international law to back up their opinion.[137] Little clairvoyance is needed to predict that this trend will meet even less resistance when the issue is not to strike down democratically enacted laws of the national legislator but the self-given rules of transnational networks.

The implementation of transnational constitutional rights would thus follow the logic which Harold Koh once called "transnational legal process"[138] with regard to international human rights, *i.e.* a process of "institutional interaction, interpretation of legal norms, and attempts to internalize those norms into domestic legal systems."[139] This process would have two methodological implications. As regards the substantive extent of adjudication, it would only allow courts to set outer limits beyond which the parties are requested to formulate solutions to their conflicts themselves. For lack of a superior judicial knowledge there is a presumption for the priority of societal self-organization.[140] Consequently, the judiciary would combine activism and self-restraint in a peculiar way:

> The judicial role is, on the one hand, an activist one, to the degree that it ensures the continuity of the project of constitutional renewal within society. Judges confront private actors with visions of abstract normative goals which are, on the judges' part the outcome of successful – though not finite – learning processes. On the other hand, however, the judicial role also

[134] For recent pointed statements see Paul W. Kahn, *Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order*, 1 CHI. J. INT'L L. 1 (2000); Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971 (2004). For a comparative assessment of this claim see Lars Viellechner, *Amerikanischer Unilateralismus als Verfassungsfrage?*, 45 DER STAAT 1 (2006).

[135] *Lawrence v. Texas,* 539 U.S. 558 (2003).

[136] *Roper v. Simmons,* 543 U.S. 551 (2005).

[137] These decisions have prompted many comments in American legal scholarship. *See, e.g.,* Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743 (2005); Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1 (2006); Vicky Jackson, *Constitutional Comparisons: Convergence, Resistence, Engagement*, 119 HARV. L. REV. 109 (2005); Gary Jeffrey Jacobsohn, *The Permeability of Constitutional Borders*, 82 TEX. L. REV. 1763 (2004); Sanford Levinson, *Looking Abroad When Interpreting the U.S. Constitution: Some Reflections*, 39 TEX. INT'L L.J. 353 (2004); Mark Tushnet, *When is Knowing Less Better Than Knowing More? Unpacking the Controversy over Supreme Court Reference to Non-U.S. Law*, 90 MINN. L. REV. 1275 (2006); Jeremy Waldron, *Foreign Law and Modern Ius Gentium*, 119 HARV. L. REV. 129 (2005).

[138] Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996).

[139] Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1399 (1999) (emphasis omitted).

[140] *See* Ladeur, *Methodendiskussion*, *supra* note 16, at 89. *See also supra* text accompanying notes 62-65.

> encompasses self-restraint, in that the private actors themselves are institutionally called upon to pursue such normative visions through experimental forms of innovative self-organisation.[141]

As regards the procedural mode of adjudication, the process of implementing transnational constitutional rights would require a mechanism that could be called "default deference."[142] On the hand, default deference is weaker than "stare decisis" since decisions by other courts are not formally binding. On the other hand, it is stronger than mere "persuasive authority" since deviation is allowed only when adequately justified. Hence, judicial networks would adopt a mechanism of absorbing uncertainty known from other networks: the acceptance of previous decisions with a continuing potential for variation.[143] The result would be a conception of law and globalization "beyond large-scale theory"[144] that drew on "thinking in networks"[145] in the broadest sense.

[141] Gerstenberg, *supra* note 115, at 700 (emphasis omitted).

[142] Fischer-Lescano & Teubner, *supra* note 65, at 1039.

[143] *See id.* at 1044.

[144] LADEUR, ABWÄGUNG, *supra* note 31, at 42 (my translation).

[145] LADEUR, UMWELTRECHT, *supra* note 20, at 37 (my translation). For further discussion of this leitmotif in Ladeur's research agenda see AUGSBERG & GOSTOMZYK & VIELLECHNER, *supra* note †.

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