European Law as Transnational Law – Europe Has to Be Conceived as an Heterarchical Network and Not as a Superstate!

By Karl-Heinz Ladeur[*]

A. The EU and the *Acquis Etatique*

Due to the Europeanisation of law, and the constitutionalisation of the European Union in particular, the Habermas argument seems to be quite appealing to many.[1] Globalisation is interpreted as having curbed the State's capability[2] to impose norms on the transnational process of expanding markets.[3] This evolution seems to have not only reduced the action potential of the State but, at the same time and even more importantly, it also has reduced the value of citizenship. Citizenship can no longer be the core element of the relationship between the individual and the State in the postmodern society. It cannot be constituted via a direct relationship with the State, which at the same time constitutes the realm of deliberation because the diffuse networks of transnational inter-relationships[4] beyond the State cannot be reflected by the process of public deliberation. The space of the State is, on the one hand, too small. On the other hand, it may appear to be too big. Against this background Europe cannot be regarded as the bearer of the European *acquis étatique* (the acquired state).

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[1] *See* Jürgen Habermas, *Der europäische Nationalstaat unter dem Druck der Globalisierung*, 48 BLÄTTER FÜR DEUTSCHE UND INTERNATIONALE POLITIK 425 (1999).

[2] *See* Michael Zürn, *Facing the 21st Century: Challenges to the State*, *in* THE ROLE OF THE STATE IN THE 21ST CENTURY 43, 48 (Hertie School of Governance ed., 2004).

[3] See *id.*

[4] The *network* concept is often used in a loose way; it should be specified with respect to "some combination of informality, equality, and commitment." Paul DiMaggio, *Conclusion: The Futures of Business Organization and Paradoxes of Change*, *in* THE 21ST CENTURY FIRM: CHANGING ECONOMIC ORGANIZATION IN INTERNATIONAL PERSPECTIVE 210, 212 (Paul DiMaggio ed., 2001). I would add its functionality for a mode of generation of knowledge and management of uncertainty, compared to the concept of the *disaggregated State*. *See* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004).

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B. The Emergence of the Network as a Structure Building Paradigm

The emergence of the new "transnational law" is not primarily due to limits of size. The transnational element of the globalization process is not only private law either. It is something in between national and international law. The size of the European Community clearly presents advantages for today's economic and legal systems. However, this advantage is different from the gains derived by the nation states from that size. Globalisation is not equivalent to more conformity, greater harmonisation, more standards, or, at least, the convergence of legal orders.[5]

Beyond the traditional forms of territorial separations, a new "sectoral principle of differentiation,"[6] which deploys its *eigen-rationality* (specific rationality), is emerging. The new legal system follows a logic of networking: more and more transnational legal regimes come to the forefront that generate, observe, and manage their own rules. The reflexive potential of private "regimes" for the management of rules differs from the normative systems of the past. This evolution corresponds to the above-mentioned rise of network-like hybrid organisations and inter-relationships ("flat hierarchies") in the economy.[7] This deep transformation is also important for the institutional design of the EU. The conception of *supranationality* has been functionally open and flexible in the past.[8] It is a paradox that in recent years this experimental open character of the European institutions has increasingly vanished and been supplanted by a State-centered perspective of a kind of "superstate" in spite of the fact that this runs counter to the new relational logic of societal self-organisation and its open dynamic of self-transformation. The postmodern legal discourse at the level of the Member States has been focused for quite some time on the value and productivity of divergence.[9] "The emergent system of governance is experimental and networked, not hierarchical."[10] However, increasingly the

[5] *See* ANDREAS FISCHER-LESCANO & GUNTHER TEUBNER, REGIME-KOLLISIONEN: ZUR FRAGMENTIERUNG DES GLOBALEN RECHTS 36 (2006).

[6] *See* Niklas Luhmann, *Die Weltgesellschaft*, *in* SOZIOLOGISCHE AUFKLÄRUNG 2, 71 (Niklas Luhmann ed., 1975) (for the general principles of differentiation in the "world society").

[7] *See* Raghuram G. Rajan & Luigi Zingales, *The Firm as a Dedicated Hierarchy: A Theory of the Origin and Growth of Firms* (Nat'l Bureau of Econ. Research, Working Paper No. 7546, 2000).

[8] *See* UDO DI FABIO, DAS RECHT OFFENER STAATEN (1998); UDO DI FABIO, DER VERFASSUNGSSTAAT IN DER WELTGESELLSCHAFT (2001).

[9] *See generally* Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004).

[10] Charles F. Sabel & Jonathan Zeitlin, *Active Welfare, Experimental Governance, Pragmatic Constitutionalism: The New Transformation of Europe*, Draft of Presentation for the International Conference of the Hellenic Presidency

EU is associated with more centralisation, more hierarchy, and more harmonisation.[11] The principle of subsidiarity[12] is a good example: in the ECJ's practice the application of the principle in the assessment of legislative acts, respect for the autonomy of Member States bears no weight; it is only focused on the efficiency of problem-solving strategies.[13] The potential of transnational mutual adjustment, coordination, procedures of coordination, and learning processes is not accepted as an alternative mode of legal order.

C. The Spatial Heterogeneity of Europe

Of course, space as a frame of reference of the State in particular has been transformed, yet this is not a one-dimensional process. It is also mirrored by internal processes of restructuring the role of space.[14] Technology has also deeply changed the role of territory within the nation state.[15] If one takes the transformation process of society in European countries seriously, the reconstruction of EU institutions should follow the new relational rationality that emerges in the differentiated social systems. A postmodern approach to institution-building (and not nation-building) should adapt itself to the logic of plural legal regimes and try to establish "rules of collision" for the management of different legal

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of the EU, "The Modernisation of the European Social Model and EU Policies and Instruments" 19 (May 21–22, 2003).

[11] This is also the approach which prevails in the white book of the EC Commission and can also be compared to the critique by the European University Institute. In this respect the role of the ECJ has changed, too. Whereas in the past some bold decisions (direct effect, etc.) have contributed to the permeability of Member States, in regard to the EC it increasingly tends to overstretch its role by blindly opting for more harmonization of the legal systems without bearing in mind that what was productive yesterday may be destructive today once a certain level of harmonization is established. The deep intervention of ECJ jurisprudence into even the more fundamental principles of Member States' law creates more and more perverse effects because the ECJ cannot manage the complexity of decisions whose effect within the infrastructure, such as civil law or general administrative law, it cannot observe in a meaningful way. *See* Christoph Schmid, *The ECJ as a Constitutional and a Private Law Court: A Methodological Comparison*, Zentrum für Europäische Rechtspolitik (ZERP) Discussion Paper 24 (2006), rightly complaining about the ECJ's negligence of the general national legal context into which a European directive is necessarily embedded. The ECJ behaves like a super court which imposes the uniform logic of hierarchy in a legal environment whose complexity asks for a cooperative legal approach. *Cf.* Karl-Heinz Ladeur, *Methodology and European Law – Can Methodology Change so as to Cope with the Multiplicity of the Law? in* EPISTEMOLOGY & METHODOLOGY OF COMP. L. 91 (Mark Van Hoecke ed., 2004).

[12] *See* Mattias Kumm, *Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union*, 12 EUR. L.J. 503 (2006).

[13] *See* Gareth Davies, *Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time*, 43 COMMON MKT. L. REV. 63, 76 (2006).

[14] For the fundamental transformation and flexibilisation of "space," *see* SASKIA SASSEN, TERRITORY, AUTHORITY, RIGHTS. FROM MEDIEVAL TO GLOBAL ASSEMBLAGES (2008).

[15] *See* KENICHI OHMAE, THE END OF THE NATION STATE: THE RISE OF REGIONAL ECONOMIES (1995).

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regimes.[16] It should endeavour to design strategies for the irritation of the self-organisation processes in social networks[17] and try to break up lock-in effects by the introduction of new flexibility into the distributed "pools of variety" for which no privileged position of observation can be found.[18] All this runs counter to the search for a stable hierarchical position that could be used for a strategy of "steering" society by the democratic state.[19] The search for a European realm of public deliberation misses the rationality of the ongoing pluralisation processes. Even at the level of the nation state, the traditional conception of a homogeneous collective order that can be described and governed from the hierarchical level of State power has come under pressure.[20] But this effect is not due to lack of space for democratic order in the nation state. Even without going into detail, one can assume that the smaller Member States are nowadays much better prepared for the challenge of networked societies.[21] This may be due to the fact that Finland, Denmark, Sweden,[22] and the Netherlands cannot really be affected by the illusion of State sovereignty. The smaller Member States are also much more in favour of transparency and new procedural methods.[23] In these countries, nobody believes that the State can "steer" society. In the bigger States, however, many people take this view, and according to the protagonists of a "democratic" EU, this view should also be expanded to its institutions, its welfare role in particular.[24] This view tends to ignore the complex presuppositions of a functioning welfare state in countries such as Denmark,[25] Sweden, or

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[16] 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 (2004).

[17] *See* NIKLAS LUHMANN, POLITISCHE THEORIE IM WOHLFAHRTSSTAAT (1981); KARL-HEINZ LADEUR, POSTMODERNE RECHTSTHEORIE 159 (2d ed. 1995).

[18] *See* NIKLAS LUHMANN, ERKENNTNIS ALS KONSTRUKTION (1988).

[19] For a critique, *cf.* OLIVER LEPSIUS, STEUERUNGSDISKUSSION, SYSTEMTHEORIE UND PARLAMENTARISMUSKRITIK (1999).

[20] *See* Karl-Heinz Ladeur, *Der Staat der "Gesellschaft der Netzwerke": Zur Notwendigkeit der Fortentwicklung des Paradigmas des "Gewährleistungsstaates",* 48 DER STAAT 163 (2009).

[21] *See* Jean-Jacques Rosa, *Politiques sociales: pour le respect de la diversité et de la concurrence en Europe*, 115 REVUE D'ECONOMIE POLITIQUE 727 (2005).

[22] The ambivalence of the Swedish welfare state is very underestimated in other European Countries. *See* Magnus Henrekson, *Entrepreneurship: A Weak Link in the Welfare state*, 14 INDUS. & CORP. CHANGE 437 (2005); *The Swedish Model: Admire the best, forget the rest*, THE ECONOMIST, Sep. 9th, 2006, at 24.

[23] *See* Sabel, *supra* note 10, at 27.

[24] For a critique, *see* Andrew Moravcsik, *What Can We Learn from the Collapse of the European Constitutional Project?*, 47 POLITISCHE VIERTELJAHRESSCHRIFT 219, 228–231 (2006).

[25] For the Danish welfare system, *see* Jacob Torfing, *Towards a Schumpeterian Workfare Postnational Regime: Path-Shaping and Path-Dependency in Danish Welfare State Reform*, 28 ECON. & SOC'Y 369 (1999).

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Finland, which can still claim to conform to such a role. The welfare state, in the traditional sense, is a continuation of the nation-state with its strong relationship of "citizenship."[26] Once this relationship can no longer be presupposed,[27] the welfare state tends to get into an ideological crisis that is difficult to manage—this is particularly the case in countries with a high number of immigrants[28] who are accused of exploiting the system. However, this problem can only be tackled at the level of the Member States, and it will be exacerbated by a transfer of social competencies to the EU level. It would also re-invigorate right wing parties in the richer countries.[29] Although the main problem is that "the European social model" does not exist,[30] there is a strong version that works in the smaller Member States (of the EU 15) and the United Kingdom, and there is the weak version that brings the bigger countries into a downward circle.[31] The integrated labour market is fictitious,[32] and this divergence cannot be abolished by a European "superstate." In this respect, it is not so much the fluidity of transnational networks that is at stake as much as the functioning of social institutions at the national level, which cannot be permeated easily particularly because the options are completely unclear. And in addition to this, it is far from obvious that a homogeneous solution—even a most promising one—can be implemented from the level of a "superstate."

In this and in many other respects the EU can use only the "strength of weak ties"[33] and play a "bridging role" [34] between the transnational networks which evolve within Europe. The EU cannot be a "superstate" and be a "super welfare state" at the same time.

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[26] *See* SASSEN, *supra* note 14, at 79.

[27] In the Scandinavian countries, the reluctance to claim social assistance eventually also without meeting legal requirements is considerably higher (Denmark 90%) than in other European countries (Germany 60%, France 40%). Yann Algan & Pierre Cahu, *Civic Attitudes and the Design of Labor Market Institutions: Which Countries Can Implement the Danish Flexicurity Model?* 14 (Ctr. Econ. Policy Research, Discussion Paper 5489, 2005).

[28] Both Sweden and Denmark have strong neo-nazi, *viz.* xenophobic, movements in spite of their rather well-ordered welfare system. The same is true for Norway, which has also the strongest xenophobic party in Europe. Only Finland is different, but it has almost no non-European immigrants.

[29] The paradoxical phenomenon of anti-EU parties in the European Parliament is becoming increasingly important. TIMES ONLINE, September 6, 2009.

[30] *See* Thomas Blanke & Jürgen Hoffmann, *Auf dem Weg zu einem Europäischen Sozialmodell*, 40 KRITISCHE JUSTIZ 134 (2006).

[31] *See EU Debates European Social Model*, EURACTIV, October 24, 2005, http://www.euractiv.com/en/socialeurope/eu-debates-european-social-model/article-146338.

[32] *See* Stephen J. Nickell, *A Picture of European Unemployment: Success and Failure* (Ctr. for Econ. Performance, Discussion Paper 0577, 2003).

[33] Mark Granovetter, *The Strength of Weak Ties: A Network Theory Revisited*, 1 SOC. THEORY 201, 224 (1983).

D. The Internal Process of Opening of States *vis-à-vis* Each Other

Transnationalization of the law is a multi-faceted process based on a tendency to undermine all previously accepted stable borders. Some of these aspects are neglected whereas the role of the supranational level of decision making in Europe is often overstated.[35] Much more important is the tendency of national political and legal systems to become more permeable to the views and interests of other Member States, and, at the same time, to mesh the networks of practice that are generated at the national and transnational level. However, this process has to accept the fact that it does not have direct unmediated access to the complex legal infrastructure of Europe. The European Court of Justice's tendency to regard European law, without even a formal constitution, as "constitutional" calls into question the reservations, presumptions, canons, and usages that were implied in international law[36] with regard to the legal infrastructure that was reproduced at Member State level. The (failed) Constitutional Treaty, in contrast, might have induced a completely new role for the ECJ and might have broadened its role more or less explicitly to that of constitutional court of a "superstate" that lacks an adequate theoretical and methodological underpinning, and that might be disruptive for the multi-level legal order of the EU.[37] This is not necessarily the case, but it is possible if one bears in mind the phenomena of judicial activism that one has already been able to observe in the past.[38] It may also act in a contradictory and incalculable way, being active with a view to a European "superstate" in some fields and being more flexible in other areas. We simply do not know.

Instead, the ECJ should have taken a definite cooperative approach towards the laws and courts of the Member States in the past, and should be much more hesitant to intervene in national law. It should use a much more comparative approach towards court practice in the Member States and try to become more sensible to the transnational effects of their judgments. This could lead to a more flexible network-oriented legal practice that is aware of the transboundary proliferation of the consequences of court decisions within the EU. Despite this, the ECJ can never be an EU Supreme Court.

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[34] For the role of the state as a moderator, *see* François Moreau, *The Role of the State in Evolutionary Economics*, 28 CAMBRIDGE J. ECON. 847 (2004).

[35] This is the case particularly in the practice of the ECJ. *See* Schmid, *supra* note 11.

[36] *See* MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 609 (2005).

[37] *See* Karl-Heinz Ladeur, *'We, the European People . . . '—Relâche?*, 14 EUR. L.J. 147 (2008).

[38] *See* Schmid, *supra* note 11.

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E. Europe as a "Network of Networks"

The network-like elements of Europeanisation should be stressed as an advantage and not as a drawback of the European paradigm of political order formation. Below the level of intergovernmental institutions (such as the European Council) and supranational components, a dense, multi-level "network of networks" that consists of state officials, experts, representatives of industry, interest groups, etc., is already emerging.[39] That the cooperative components of European decision-making are equivalent to unaccountable public power[40] is doubtful because the overlapping heterarchical inter-relationships and the coupling of networks may allow for more efficient accountability and transparency than the fictitious power of a central hierarchy that is not adapted to decision-making under conditions of complexity. The risk of the emergence of political fields that escape from control and accountability as a consequence of the fragmentation of political issues is not to be denied, but it is limited by the high requirements of consensus and reciprocal transnational interdependencies that block the preponderance of national special interests. The overlapping networks, for example, in the different committees and their regulatory functions, and the necessity of their links with the legal order of the Member States,[41] can to a certain extent work as a functional equivalent to the conception of democratic political control of administration at the national level that in fact legitimises hierarchy. This aspect confirms the assumption that, in the end, reform of institutions both at the EC and at the state level are closely related. Many problems only emerge at the EC level because the Member States block the inevitable reforms that are required by the rapid self-transformation of society.[42] Conceptual approaches to EC and state problems still tend to be kept apart.

This theoretical and practical deficit could be compensated by a procedure of monitoring that would keep Member States reciprocal and, *vis-à-vis* the Commission, more permeable.[43] Paradoxically, in many complex fields of decision-making, democracy produces the perverse effect of keeping the functional deficits of administration invisible by the hierarchical closure of decision-making procedures. This is true in particular for the

[39] *See* JOSEPH H. H. WEILER, THE CONSTITUTION OF EUROPE 98 (1999).

[40] *See* STEFAN BREUER, DER STAAT 289 (1998).

[41] *See* EU COMMITTEES: SOCIAL REGULATION, LAW AND POLITICS (Christian Joerges & Ellen Vos eds., 1999).

[42] *See* STAAT OHNE VERANTWORTUNG?: ZUM WANDEL DER AUFGABEN VON STAAT UND POLITIK (Ludger Heidbrink & Alfred Hirsch eds., 2007).

[43] This could also be the role of the open method of coordination. However, to regard it as a mode of "new governance" within post-national constitutionalism which in the long run leads to participation of "social partners," civil society, etc., is a proposal to reestablish a supranational corporatism at the European level.

welfare state, whose effects and failures are systematically exempt from evaluation[44] because of the risk that publicity might undermine its legitimacy. As a countervailing procedure, a model of "open states"[45] based on competition of rules and institutions[46] that would operate on the basis of mutual observation and benchmarking could be put in place.[47] Such an approach could also be extended to regions, and could include the observation and comparison of their specific potentials and problems.

One of the examples of the new phenomena of open network-like institutions is the position of the ECJ or the European Court of Human Rights *vis-à-vis* their national counterparts. The former seems to be unwilling to make any contribution to a European legal methodology.[48] It prefers vague new concepts like the "principle of proportionality", the use of which in practice (not unlike the principle of subsidiarity) mostly ends up with the reinforcement of the supranational element of European law.[49]

The European Court of Human Rights in the *Caroline of Monaco/Hanover* case[50] starts from the unreflected assumption that, not only at the level of State actions in particular but also in horizontal relationships among private citizens, the direct effect of constitutional law upon private law in Europe needs common homogeneous standards for the legal relationship between the media and the protection of privacy. To put it simply, we have three major rule systems for the coordination of the interest of the media and privacy: the British system (with a bias towards freedom of the press), the French system (with a bias towards privacy), and the German system (which lies somewhat in between).[51] However, we do not have a homogeneous European public forum, so why do we need common legal standards for the fragmented setting of different systems of media

[44] *See* NATHAN GLAZER, THE LIMITS OF SOCIAL POLICY (1990); Henrekson, *supra* note 22, at 442.

[45] *See* DI FABIO, DAS RECHT OFFENER STAATEN, *supra* note 8; DI FABIO, DER VERFASSUNGSSTAAT IN DER WELTGESELLSCHAFT, *supra* note 8.

[46] *See* Simon Deakin, *Legal Diversity and Regulatory Competition: Which Model for Europe*, 12 EUR L.J. 455 (2006); Peer Zumbansen, *Spaces and Places: A Systems Theory Approach to Regulatory Competition in European Company Law*, 12 EUR. L.J. 534 (2006).

[47] *See* Sabel, *supra* note 10, at 2. For an analysis of the search for "best practices," *cf.* David Zaring, *Best Practices*, 81 N.Y.U. L. REV. 294, 298 (2006).

[48] *See* Ladeur, *supra* note 11.

[49] *See* Davies, *supra* note 13.

[50] Von Hannover v. Germany, 2004-VI Eur. Ct. H.R. 294.

[51] *See* Dieter Grimm, *Discussion*, 62 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 85 (2003).

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and the public interest? The recognition of a margin of appreciation for States is not a sufficient basis for the reflection of a sufficient element of pluralism in the European legal system.

F. Conclusion

The Nation-state is the product of a specific evolution in European history which has been transferred to the whole world with varying effects. It is time dependent. This is why the form of the State is in a deep crisis at its traditional level. It is linked to the dominance of unity and homogeneity over plurality and fragmentation. It cannot be renewed by broadening its territorial dimension in a European (or even a global) "superstate" alone, whereas the subsidiarity principle is nothing but a fake. Europe tends definitely towards such a solution. Many Eurocrats want to make the public believe that the problem of the EU can only be solved by more of the same: more democracy and more social policy. However, the EU must be distinctive and it can only follow the new global rationality of difference, plurality, and acentric networks.

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