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# The State in International Law

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The State in International Law

Karl-Heinz Ladeur

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**Karl-Heinz Ladeur**

## **The State in International Law**

**Abstract:** The analysis of processes of the globalisation of law needs new paradigms beyond the reference to traditional state-based law – including international law. Global administrative law, in particular, should not be conceived as a phenomenon that is no longer state-based law and not yet the law of a coming world state. It is a new heterarchical order in its own right. The theoretical and practical challenges of its network structure can only be met by approaches that are focused on a new relational rationality of meta-rules for the management of conflicts of heterogeneous norms. This goes for administrative law as well as for the transnational cooperation of courts.

**Keywords:** global administrative law, transnational networks of courts, state in transnational law

**JEL Classification:** K 10, K 33

Karl-Heinz Ladeur  
Professor, University of Hamburg,  
Law Faculty, Schlüterstr. 28, D 20146 Hamburg, Germany,  
Email: [karl-heinz.ladeur@uni-hamburg.de](mailto:karl-heinz.ladeur@uni-hamburg.de)

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## The State in International Law<sup>\*</sup>

Karl-Heinz Ladeur<sup>\*\*</sup>

### I. INTRODUCTION

Jürgen Habermas seems to regard the European nation state as the privileged frame of reference for democracy and its constitutional and legal structure.<sup>1</sup> According to his assumption the state supports the idea of the “unity of the legal order” and of deliberative reflection in a public realm accessible to all arguments. It allows for the emergence of alternative versions of politics via political parties which can finally be the object of parliamentary decision-making. Can Europe be the successor of the nation state under conditions of globalisation? In the context of the discussion of the Europeanisation of law, and the constitutionalisation of the European Union in particular, this argument seems to be quite appealing to many.

Globalisation is interpreted as having curbed the State’s capability<sup>2</sup> to impose norms on the transnational process of expanding markets.<sup>3</sup> This evolution seems not only to have 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<sup>4</sup> beyond the State cannot be reflected by the process of public deliberation in the traditional understanding. The space of the State is, on the one hand, too small. On the other hand, it might appear too big. Against this background Europe cannot be regarded as the bearer of the European “*acquis étatique*” (“state *acquis*”).

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<sup>\*</sup> Translation by Rory S. Brown

<sup>\*\*</sup> Professor, University of Hamburg, Law Faculty, Schlüterstr. 28, D 20146 Hamburg, Germany, karl-heinz.ladeur@uni-hamburg.de

<sup>1</sup> J. Habermas, *Der europäische Nationalstaat unter dem Druck der Globalisierung*, 48 *Blätter für deutsche und internationale Politik* 1999, p. 425.

<sup>2</sup> M. Zürn, *Facing the 21<sup>st</sup> Century. Challenge to the State*, in: Hertie School of Governance (ed.), *The Role of the State in the 21<sup>st</sup> Century*, April 22/23 2004, p. 48.

<sup>3</sup> Zürn, *ibid.*, p. 48.

<sup>4</sup> The “network” concept is often used in a loose way; it should be specified with respect to „some combination of informality, equality, and commitment” P. DiMaggio, *Conclusion: The Futures of Business Organization and Paradoxes of Change*, in: *idem* (ed.), *The 21<sup>st</sup> Century Firm: Changing Economic Organization in International Perspective*, Princeton: Princeton UP 2001, 212—I would add its functionality for a mode of generation of knowledge and management of uncertainty, cf. for the concept of the “disaggregated State” A.M. Slaughter, *A New World Order*, Princeton: Princeton UP 2004

The emergence of the new “transnational law” beyond the state is not primarily due to issues of scale. Neither is the transnational element of the globalization process only private law. It is something 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 and higher standards, or even the convergence of legal orders.<sup>5</sup>

Beyond the traditional forms of territorial separations a new “sectoral principle of differentiation”,<sup>6</sup> which deploys its “*eigen*-rationality” (specific rationality) is emerging. The new legal system follows a logic of networking: ever 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.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> “The emergent system of governance is experimental and networked, not hierarchical.”<sup>10</sup>

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

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<sup>5</sup> A. Fischer-Lescano & Teubner, *Regime-Kollisionen*, Frankfurt: Suhrkamp, 2006, p. 36.

<sup>6</sup> For the general principles of differentiation in the „world society” cf. N. Luhmann, *Die Weltgesellschaft*, in: idem, *Soziologische Aufklärung 2*, Opladen: Westdeutscher Verlag 1975, p. 71.

<sup>7</sup> See R. G. Rajan & L. Zingales, *The Firm as a Dedicated Hierarchy: A Theory of the Origin and Growth of Firms*, NBER 7546, February 2000.

<sup>8</sup> U. Di Fabio, *Das Recht offener Staaten*, Tübingen: Mohr 1998; idem, *Der Verfassungsstaat in der Weltgesellschaft*, Tübingen: Mohr 2001.

<sup>9</sup> O. Lobel, *The Renew Deal: ‘The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought’*, 89 *Michigan Law Review* 2004, p. 262, 305.

<sup>10</sup> C.F. Sabel & J. Zeitlin, *Active Welfare, Experimental Governance, Pragmatic Constitutionalism: The NEW Transformation of Europe*, Draft for the International Conference of the Hellenic Presidency of the EU: *The Modernisation of the European Social Model and EU Policies and Instruments*, May 21/22 2003, p. 19.

the role of space.<sup>11</sup> Technology has also deeply changed the role of territory within the nation state.<sup>12</sup> 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 regimes.<sup>13</sup> It should endeavour to design strategies for the irritation of the self-organisational potential processed in social networks<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup>

In what follows, both the evolution of the EU and of global governance shall be observed as the expression of a new logic of networks which can be regarded neither from a state-centred perspective as undermining democratic authority nor as something completely new “beyond the state”. The acentric logic of the networks transforms both state-based and international law (including supranational European law) and opens a new perspective on a plurality of hybrid legal orders which might be governed by an emerging logic of experimental meta-rules of “collision norms”. The EU, the collisions of jurisdictions (administrative and judicial), and the emergence of a global law (including its relationship with the traditional international law) shall be analysed with reference to the new logic of networks.

## II. THE EC AS AN ASSOCIATION OF STATES AND THE NEED FOR A LAW OF COLLISIONS OF A NEW TYPE

The singularity of the construct of an association of states<sup>17</sup>, the EC, is marked by manifestly different types of collisions between national and supranational laws and the absence of a general harmonising formula, such as the recourse to the unity of a legal order, or the integrating function of a constitution as in a federation of states. This constellation is thrown

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<sup>11</sup> For the fundamental transformation and flexibilisation of „space” cf. S. Sassen, *Territory, Authority, Rights. From Medieval to Global Assemblages*, Princeton: Princeton UP 2008.

<sup>12</sup> K. Ohmae, *The End of the Nation State: The Rise of Regional Economies*, New York: Simon and Schuster 1995.

<sup>13</sup> A. Fischer-Lescano & G. Teubner, *Regime Collision The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 *Michigan Journal of International Law* 2004, p. 999.

<sup>14</sup> N. Luhmann, *Politische Theorie im Wohlfahrtsstaat*, Olzog: Munich & Vienna 1981; K.H. Ladeur, *Postmoderne Rechtstheorie*, 2nd ed., Berlin: Duncker & Humblot 1995, p. 159 et seq.

<sup>15</sup> Cf. generally N. Luhmann, *Erkenntnis als Konstruktion*, Bern: Benteli 1988.

<sup>16</sup> Cf. for a critique O. Lepsius, *Steuerungsdiskussion, Systemtheorie und Parlamentarismuskritik*, Mohr: Tübingen 1999.

<sup>17</sup> Reports of the German Federal Constitutional Court (BVerfGE) Vol. 89, p. 155 – Maastricht.

into relief, where European competition law clashes with national radio licensing laws.<sup>18</sup> This conflict can arise internally within the nation state, but the national division of competences in Germany for instance, proceeds from the demarcation of subjects of jurisdictional conduct, whereas, in the EC respective authority is determined by the aims of the internal market, raising the questions of whether the organisation and conduct of radio stations can be considered economic activity and hence be regulated.

Christian Joerges<sup>19</sup> and Christoph Schmid<sup>20</sup> have suggested that this type of collision should be characterised as „diagonal“ - a notion which fittingly expresses a peculiar collection of collisions between laws. Here, neither the classic international private law nor the collisions order of administrative law for territorially determined „horizontal“ collisions and therewith a logic of referentiality stand a chance, nor for that matter do the rules of precedence which pertain to German constitutional law (pursuant to Art. 31 Basic Law) and to the EC itself where laws collide vertically. Rather, needed here are more novel rules, though still conceptually collisions rules, of reciprocal agreement and cooperation which must be determined by the dynamics of individual problems and not by stable boundaries.<sup>21</sup> This ordering of the afore-mentioned conflict type as „diagonal“ collisions acquits itself as compatible also for the dogmatic contouring of the borders of the efficacy of administrative acts in Europeanised public law: here too we are concerned with a limited overlap of general national and particular European administrative

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<sup>18</sup> K. H. Ladeur, „Die Kooperation von europäischem Kartellrecht und mitgliedstaatlichem Rundfunkrecht“, 50 *Wirtschaft und Wettbewerb* 2000, p. 965.

<sup>19</sup> C. Joerges, „The Impact of European Integration on Private Law: Reductionist Perceptions“, 3 *European Law Journal* 1997, p. 374; id., „Europarecht als Kollisionsrecht neuen Typs“, *Festschrift Rehbinders*, Berlin: Erich Schmidt 2007, p. 717; id. & F. Rödl, „Zum Funktionswandel des Kollisionsrechts II: Die kollisionsrechtliche Form einer legitimen Verfassung der postnationalen Konstellation“, in: *Festschrift Teubner*, Berlin: de Gruyter 2009, p. 775; id., „Constitutionalism in Postnational Constellations: Contrasting Social Regulation in the EU and in the WTO“, id. & E.-U. Petersmann (eds.), *Constitutionalism, Multilevel Trade Governance and Social Regulation*, Oxford: Hart 2006, p. 491; id., „Rethinking European Law's Supremacy: A Plea for a Supranational Conflict of Laws“, in: Beate Kohler Koch & Berthold Rittberger (eds.), *Debating the Democratic Legitimacy of the European Union*, Lanham, MD: Rowman & Littlefield, 2007, p. 311; id., „Conflict of Laws as Constitutional Form: Reflections on International Trade Law and the Biotech Panel Project“, RECON WP 2007/03.

<sup>20</sup> C. Schmid, „Diagonal Competence Conflicts between European Competition Law and National Regulation: A Conflict of Laws Construction of the Dispute of Book Price-Fixing“, 8 *European Review of Private Law* 2000, p. 155.

<sup>21</sup> Traditional rules on conflict of laws, as well as public and private law certainly has that orientation, cf. C. Ohler, *Die Kollisionsordnung des allgemeinen Verwaltungsrechts. Strukturen des deutschen internationalen Verwaltungsrecht*, Tübingen: Mohr 2005; on private law, see R. Michaels, „EU-Law as Private International Law? Reconceptualizing the Country of Origin-Principle as Vested-Rights-Theory“, 2 *Journal of Private International Law* 2006, p. 195, 211; R. Wai, Transnational Private Law and Private Ordering in a Contested Global Society, 46 *Harvard International Law Journal* 2005, p. 471, 472; Joerges *supra*, note 19.

law, where the conflict cannot be resolved with a simple rule of supremacy. The duty to vouchsafe the '*effet utile*' is, correctly, derived from the principle of cooperation (Art. 10 ECT).<sup>22</sup>

It has as its object not a purely instrumental duty of effective translation of the dictates of the particular European administrative law, assisted by the national general administrative law, its forms and processes; rather it aims, properly understood, to render permeable the general forms of civil and administrative law (possibly also criminal law in the future) for the realisation of the peculiarities of a multipolar legal order, which, through the application and development of instances of general administrative law, may not ignore the interests of the EC, other member states, or citizens in its interpretation of the public interest. This notwithstanding, an expectation of cooperation obtains reciprocally, by virtue of the „diagonal“ character of the collision, which admits of no precedence between the one and the other legal order.<sup>23</sup> The expectation of cooperation is not therefore to be understood as unilateral; thusly '*effet utile*' cannot aim towards the total setting aside, for instance, of rules on the basis of the enforcement of administrative acts. The principle of '*effet utile*' cannot be allowed to circumvent the higher principle of delimited isolated empowerment.

Legitimate expectations are a valid foundation of general public law, which falls within the competence of the member states. The harmonising expectations for European public law must be correspondingly curtailed. In this area of cooperative agreement of legitimate expectations of European law and equally legitimate conserving considerations as to the retention of the „ordering idea“ of the prevailing national general administrative law<sup>24</sup>, it must be said that the ECJ has been of little assistance through its role in the case-by-case development of decisional, evidential and balancing rules.<sup>25</sup> This finds its expression many times over in the EU law literature, in the three schematic categories of general administrative law in the European multilevel regulatory system: general administrative law of the EC's own administration, general national administrative law of the member states and Europeanised national administrative law that serves the implementation of particular European administrative laws.<sup>26</sup>

This leaning towards a schematic differentiation sits together with an initially productive but more recently increasingly disruptive indiscriminating option for the implementation of the

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<sup>22</sup> Th. Oppermann, *Europarecht*, 3rd ed., Munich: Beck 2005, No. 243.

<sup>23</sup> Ladeur, *supra*, note 18.

<sup>24</sup> E. Schmidt-Aßmann, *Das allgemeine Verwaltungsrecht als Ordnungs idee*, 2nd ed., Berlin: Springer 2004.

<sup>25</sup> Cf. on the meaning of learning of general administrative law in jurisprudence, C. Harlow, „Changing the Mindset: The Place of Theory in English Administrative Law“, 14 *Oxford Journal of Legal Studies*, p. 419; on learning through the development of „ordering ideas“, in the exchange between general and particular administrative law, E. Schmidt-Aßmann & S. Dagron, „Deutsches und französisches Verwaltungsrecht im Vergleich ihrer Ordnungs ideen“, 45 *Zeitschrift für ausländisches öffentliches und Völkerrecht* 2007, p. 395.

<sup>26</sup> St. Kadelbach, „European Administrative Law and the Law of the Europeanized Administration“, in: C. Joerges & R. Dehousse (eds.), *Good Governance in Europe's Integrated Markets*, Oxford: OUP 2002, p. 167.



supremacy of European law with the assistance of a systematic penetration into national law.<sup>27</sup> In any event the increasing depth of penetration of Europeanised administrative law (which, similarly, applies to civil law) in the general legal structures of the member states wreaks evermore problematic collateral damage. An example from civil law is provided by the expanding interpretation of the product liability directive as a comprehensive regulation of all claims due to damage within the remit of the directive<sup>28</sup>; by dint of this the application of all possible national laws fulfilling or extending liability in scenarios touched by European law is excluded<sup>29</sup>, whilst they contemporaneously still have application to purely internal situations. This is accepted even though this possibility of an expansive understanding of the directive was not foretold at the time of its issuance.<sup>30</sup>

In civil and in public law, the ECJ ought to be more careful when scrutinising and developing the productive aspect of the multipolar European legal order, which will likely result in it having even more input into the substantive and procedural cooperation of the legal orders and the courts of the member states. In that vein, it should, above all, be considered that the *Europeanisation* of law by its very interference with national legal orders, interrupts the process of their embedding (by way of dogmatic self-restraint) in a varied practice, in particular with respect to decisions about a multiplicity of cases and the experiences therefrom gained, without for its part being able to dispose of a corresponding structure of case knowledge, patterns of conduct and expectations, normative priority and cognitive experiential, evidential and assumptive rules. The EC can, on the basis of its size and the plurality of its experience, political, cultural and legal traditions never meaningfully strive to become a European 'superstate'.<sup>31</sup> The ECJ seems to ignore this in its overestimation of the meaning of the unity of law as an interpretive tool<sup>32</sup>, threatening the boundaries of the division of competences.

As a preliminary hypothesis it might be held, based on the interpretations of the force of administrative acts in European administrative law, that a European general administrative law cannot be conceptualised pursuant to the unity-building pattern of the systematising and reflexive functions of the traditional national general public law. It must be conceived of as collisions law in the sense of an opening of the national general administrative law for

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<sup>27</sup> K. H. Ladeur, „Richterrecht und Dogmatik – eine verfehlte Konfrontation?“, 79 *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 1996, p. 77.

<sup>28</sup> ECJ, Rep. 2002, I-3901 - González-Sánchez; C. Schmid, C., The ECJ as a Constitutional and a Private Law Court, ZERP-DP 4/2006.

<sup>29</sup> Joerges, *supra*, note 18 at 736.

<sup>30</sup> Joerges, *supra* note (2007).

<sup>31</sup> J. J. Rosa, „L'erreur européenne“, Paris: Grasset 1998; id., „Le second XXe siècle“, Paris: Grasset 2000.

<sup>32</sup> Schmid, *supra*, note 27.

heterarchical legal relationships in a European multipolar legal system.<sup>33</sup> In this sense, a general European administrative law must follow principle derived from the law of collisions and must direct itself, cooperatively, to the porosity of national law for the realisation of law or the interests of the supranational level just as the laws of other member states. Such a law of collisions no longer hearkens to the classic but not peerless rules of relegation, but is instead oriented towards the permeability of other legal orders and also towards cooperation with those legal orders.<sup>34</sup> In this sense also the paradoxical assumption of Anne Marie Slaughter and William Burke-White that “the future of international law is domestic”<sup>35</sup> is plausible.

With a view to the aporia of the collisions norms of a new type, reference to a possible ambivalence to the concept of a law of collisions is required: in the realm of the European multilevel system, or rather, the European network of overlapping legal orders – we are concerned on the national level with starkly differentiated sets of rules, which jostle with European law with its principles of harmonization and priority. This new type of collisions law (which runs counter to thinking in a hierarchical way) ought to be constructed differently to the conflicts rules that once governed the agreement of varied, but only partially crystallised and distinct international or transnational „regimes“ (e.g., WTO and environmental regimes) and which also – according to the interpretation of Fischer-Lescano and Teubner<sup>36</sup> spontaneously developed through civil socialising.

How a law of collisions is to be understood that is agreed upon requires further interpretations which would necessitate further interdisciplinary study. A law of collisions that is geared up to this type of regime, must distinguish itself from the type that would be thinkable for European law. How are incomplete trans- and international regimes and their rules to be incorporated into thinking about a law of collisions? Are we concerned here *per* Fischer-Lescano and Teubner with the law at all? How can such regimes be distinguished?<sup>37</sup> To what extent can we truly

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<sup>33</sup> In particular Joerges, *supra*, note 19; Th. Vesting, „Die Staatsrechtslehre und die Veränderung ihres Gegenstandes: Konsequenzen von Europäisierung und Internationalisierung, 63 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 2004, p. 41 ; K. H. Ladeur, K. H., “Methodology and European Law – Can Methodology Change so as to Cope With the Multiplicity of Law?”, in: M. Van Hoecke (ed.), *Epistemology and Methodology of Comparative Law*, Oxford: Hart 2004, p. 92.

<sup>34</sup> Michaels, *supra*, note 21., p. 232; P. Legrand, „European Legal Systems are not Converging”, 45 *International and Comparative Law Quarterly* 1996, p. 45.; id., „Against a European Civil Code”, 60 *Modern Law Review* 1997, S. 40; K. P. Sommermann, „Konvergenzen im Verwaltungsverfahren- und Verwaltungsprozessrecht der europäischen Staaten”, 55 *Die Öffentliche Verwaltung* 2002, p. 133; J. Schwarze, „The Convergence of the Administrative Laws of the EU Member States”, 4 *European Public Law* 1998, p. 191.

<sup>35</sup> This is the title of an article by A. M. Slaughter & W. Burke-White which appeared in A. Nollkaemper & J. E. Nijman (eds.), *New Perspectives on the Divide between National and International Law*, Oxford: OUP 2007, p. 110.

<sup>36</sup> A. Fischer-Lescano & G. Teubner, G., *Regimekollisionen. Zur Fragmentierung des globalen Rechts*, Frankfurt: Suhrkamp 2006.

<sup>37</sup> The example given for the territorial state of the delimitation of the expansive logic of science (GMOs R. C. Christensen & A. Fischer-Lescano, *Das Ganze im Recht*, Berlin: Duncker & Humblot 2008, p. 317 *et seq.*) through public law is not terribly plausible, since here, there is a supposition in favour of the free confirmation of basic

observe the autopoietic solemnization of law in international law (for an affirmative take on world law from a political scientific perspective).<sup>38</sup>

It is worth noting that the judgment of the German Constitutional Court on the Lisbon Treaty<sup>39</sup> might well seem antiquated in its abstraction, where it seems to defend a form of substantial statehood against the assault of the association of states, namely the EC. Yet, this corresponds exactly to the tendency of supranational organs of the EC (Commission, ECJ), to build up the European superstate without showing any understanding that the era of statehood is perhaps not behind us, but that its traditional territorial juridical form, based on homogeneity, unity and hierarchy cannot thereby be reanimated; that the dimensions of territoriality are being extended.<sup>40</sup> Markets have always been 'embedded', i. e. constituted by politics and society, as Karl Polanyi has put it.<sup>41</sup> The forms of embeddedness have changed over time from the 'society of individuals' *via* the 'society of organisations' (and the insurance limiting the risks of the dynamism of economic change<sup>42</sup>) to the contemporary 'society of networks'.<sup>43</sup> Against this background the most recent evolution of the economic system which is driven by a deep transformation of the technological infrastructure of society demands a new institutional

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rights (legal reservations for new technologies); also: R. Wahl & J. Masing, „Schutz durch Eingriff“, 45 *Juristenzeitung* 1990, p. 553).

<sup>38</sup> M. Albert, M. & R. Schmalz-Bruns, „Antinomien der Weltgesellschaft. Mehr Weltstaatlichkeit, weniger Demokratie?“, in: H. Brunkhorst (ed.), *Demokratie in der Weltgesellschaft* (Special Volume of the review „Soziale Welt“) 2009, p. 57, and distinctly A. Fischer-Lescano & Ph. Liste, „Völkerrechtspolitik. Zur Trennung und Verknüpfung von Politik und Recht der Weltgesellschaft“, 12 *Zeitschrift für Internationale Beziehungen* 2005, p. 209.

<sup>39</sup> Federal Constitutional Court (BVerfG), Decision of 30 June 2009, published in German in: 62 *Neue Juristische Wochenschrift (NJW)* 2009, p. 2267, and available online at: <http://www.bverfg.de/entscheidungen/es20090630>; English translation available at: [http://www.bverfg.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html). Cf. the commentaries in: *German Law Journal* 2009, August 2009, pp. 1201-1308, available at: <http://www.germanlawjournal.com/index.php?pageID=2&vol=10&no=8>, and the critique in C. Franzius, *Europäisches Verfassungsrechtsdenken*, Tübingen: Mohr 2010.

<sup>40</sup> S. Sassen, *Territory, Authority, Rights. From Medieval to Global Assemblages*, Princeton: PUP 2008.

<sup>41</sup> K. Polanyi, *The Great Transformation. The Political and Economic Origin of our Time* (1944), Boston: Beacon Press, 2001; J. A. Caporaso/S. Tarrow, „Polanyi in Brussels: Supranational Institutions and the Transnational Embedding of Markets“, 63 *I.O.* 2009, p. 593, 598; J. G. Ruggie, „International Regimes, Transactions, and Change: Embedded Liberalism in the Post-War Economic Order“, 36 *I. O.* 1982, p. 379.

<sup>42</sup> For the transformation brought about by the New Deal (not only) in the US cf. D. Kennedy, „What the New Deal Did“, 124 *PSQ* 2009, p. 251, 254.

<sup>43</sup> Cf. Vesting, *supra*, note 33; at 66; id., *Rechtstheorie*, Munich: Beck 2007, p. 57 et seq.; generally K. H. Ladeur, *Der Staat gegen die Gesellschaft*, Tübingen: Mohr 2006.

framework which has to be network-like as well as the governance structure in society.<sup>44</sup> Being aware of the 'embeddedness' of markets also means respecting the diversity of institutions, rules, norms which have been the product of the different processes of 'embedding' in the different countries, and this means that diversity is not a situation which has to be overcome but has to be managed according to new meta-rules to be derived from the paradigm of „conflict of norms“. The EC can only be conceived of according to the new paradigm of a heterarchical network – otherwise the crisis of traditional statehood will only reproduce itself in an amplified form.

In this respect, the contention that the EC's so-called democracy deficit should (or could) be eliminated also falls short of the mark.<sup>45</sup> The EC labours rather under a network deficit, it lacks a productive, collisions-juridical concept of the processes of plurality, heterogeneity and heterarchy. That the crisis of the state has nothing to do with its size<sup>46</sup>, also reveals that the smaller states can adjust themselves better to globalisation than the larger states.

### III. NATIONAL AND EUROPEAN BASIC RIGHTS

Problems of coordination of plural legal orders reveal themselves in the agreements between international, European and national protection of fundamental rights. Here too, it is clear that hierarchichal thinking is, with view to the globalisation of rights, no longer adequate.<sup>47</sup> Colliding and overlapping protection of fundamental rights is the rule not the exception.<sup>48</sup>

Finally, this is incoherent with the idea that the unity of law can no longer be the primary realising principle of construction in the national or the transnational arena.<sup>49</sup> Law takes on such plural forms that unity can no longer be paradigmatic. That does not of course exclude that there are areas in which unity can be an ordering tool (for definite market-related rules which should facilitate a unified market). The European Human Rights Convention expressly recognises this difference with respect to infringements of human rights, but in a mistakenly

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<sup>44</sup> Cf. R. Mayntz, *Über Governance. Institutionen und Prozesse politischer Regulierung*, Frankfurt/New York: Campus 2009.

<sup>45</sup> K. H. Ladeur, „We, the people... Relâche?“, 15 *European Law Journal* 2008, p. 147.

<sup>46</sup> Rosa, *supra*, note 31.

<sup>47</sup> N. Krisch, „The Pluralism of Global Administrative Law“, 17 *European Journal of International Law* 2006, p. 247; P. Schiff Berman, P., „From International Law to Globalization and Law“, 43 *Columbia Journal of Transnational Law* 2005, p. 485.

<sup>48</sup> N. Krisch, „The Open Architecture of European Human Rights Law“, 71 *Modern Law Review* 2008, p. 183.

<sup>49</sup> A. Fischer-Lescano & G. Teubner, „Fragmentierung des Weltrechts statt etatistischer Rechtseinheit“, in: M. Albert & R. Stichweh (eds.), *Weltstaat und Weltstaatlichkeit. Beobachtungen globaler politischer Strukturbildung*, Wiesbaden: VS Verlag 2007, p. 37.

state-fixated form, when it grants the convention states a 'margin of appreciation'.<sup>50</sup> This is an erroneous platform for construction since, in central questions, the issue is not the relationship between state and society but rather the social generation of conventions that concern, for instance, the meaning of rights to freedom of information and their relationship to competing rights (right to freedom of conscience).<sup>51</sup>

Why in Europe, where the mediumistic public phenomena are to a large extent separated, should there not also be diverse regimes for the agreement between the conflicting fundamental rights? The approach based on the statal 'margin of appreciation' is a red herring. It concerns diverse social stocks of knowledge, rules and values, which originate in various funds of normative development.<sup>52</sup> The impression of unity in a legal order is misleading here. This is not a matter of recognising the independence of the national legal orders *per se* but rather of societal trajectories – this is *a fortiori* the case as the differences are not exactly primarily determined by national traditions but by various transnational legal circles, which historically have facilitated and structured learning between societies.

In this way, with respect to the social/welfare state and also, for instance, with respect to freedom of information, multiple European models have developed, which compete with one another, reciprocally observe one another, but need not be unified. The same is true for the status of religion: Why do we need common standards for the role of religion in public, in public schools in particular? Whether or not, for example, a crucifix may be displayed in classrooms in Europe should not be a common European issue: This has been ignored in the Italian crucifix case.<sup>53</sup> Even more symptomatic is the ECtHR's decision on the acceptability of a „state religion“ (Norway)<sup>54</sup>: A judgment brought about by a 9:8 vote on a cultural issue can only be wrong irrespective of the outcome: The respect for pluralism and diversity in Europe is at stake and not a standard for Europe.

Interestingly, the European Court of Human Rights (ECtHR) recognises differences in the protection of fundamental rights where the concern is the diverse financial potential of the

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<sup>50</sup> L. Favoreu, „Cours constitutionnelles nationales et Cour Européenne des droits de l'Homme“, in: *Mélanges Cohen-Jonathan*, Brussels: Bruylant 2004, S. 789

<sup>51</sup> K. H. Ladeur, „Verfassungsrechtliche Grundlagen“, in: H. P. Götting, et al (eds.), *Handbuch des Persönlichkeitsrechtsschutzes*, Munich: Beck 2008, § 22.

<sup>52</sup> S. Oeter, „Rechtsprechungskonkurrenz zwischen nationalen Verfassungsgerichten Europäischem Gerichtshof und Europäischem Gerichtshof für Menschenrechte“, in: 66 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 2007, p. 361.

<sup>53</sup> ECtHR No. 30814/06, 3 November 2009.

<sup>54</sup> ECtHR No. 15472/02, 26 June 2007.

member states, and in reference to the fitting out of prisons.<sup>55</sup> This seems to be thoroughly plausible as an isolated case, but the accentuation of the differences in performance shows that plurality is seen more as an emergency solution under financial pressure, whilst *mutatis mutandis*, the insight that plurality, rather than posing a problem for the protection of fundamental rights, is key to weaving together the tapestry of societies, values, regimes and developmental trajectories.<sup>56</sup> European oversight of fundamental rights could then be a procedural mechanism for reflection on diverse standards and if necessary for the facilitation of interventions with the purpose of unstopping unpleasant blockages, which could impede the development of the relevant society or could disseminate negative effects to other societies.<sup>57</sup> An example of the diverse standards for the determination of the relationship of media freedom and privacy is found in the *Caroline* judgment of the ECtHR<sup>58</sup>: Why should this relationship not be differently calibrated in different societies?<sup>59</sup> On this point, the ECtHR declared the French variant in comparison to the English<sup>60</sup> and the German model a *via media*, and generally binding.<sup>61</sup> This might be diversely evaluated by different societies but who is to say that such diverse evaluation is not salutary? This might be diversely evaluated by different societies but who is to say that such diverse evaluation is not salutary? Divergence and heterogeneity are, on the one hand, elements of the new types of embeddedness of the markets in postmodern times, on the other hand, the internal legal rules inherent in legal systems, such as rules of interpretation, argumentation, preservation of consistency are difficult to sustain in transnational and multilevel legal systems<sup>62</sup>, if only for lack of a sufficient number of cases which allow for developing experience and meta-rules on methodology. This is also a reason why horizontal transformation among tribunals of different national legal systems should not be overestimated. The legal system of the postmodern nation state is much more loosely coupled than it used to be in the past: it is much less integrated by laws but by a complex management of networks of cases: the media law of a country is governed by a whole 'hub' of cases which are interrelated in a differentiated way. And the supreme tribunals have to keep this network of cases and decisions over which patterns, rules of argumentation, of proof and presumption in cases of factual uncertainty are processed. Judgements delivered by

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<sup>55</sup> See critically, Favoreu, *supra*, note 50; cf. on the case-law Th. Schilling, *Internationaler Menschenrechtsschutz*, Tübingen: Mohr 2004, No. 109et seq.

<sup>56</sup> M. Rosenfeld, Rethinking Constitutional Ordering in an Era of Legal and Ideological Pluralism, Cardozo School of Law. Jacob Burns Institute for Advanced Legal Studies, No. 242 (2008).

<sup>57</sup> This is the case in financial markets regulation in particular, cf. D. Zaring, „Informal Procedure, Hard and Soft”, 5 *Chicago Journal of International Law* 2005, p. 545, 595.

<sup>58</sup> 57 NJW 2004, p. 2647.

<sup>59</sup> Cf. also for a differentiation of the need for legal homogeneity L. R. Helfer & A. M. Slaughter, „Toward a Theory of Effective Supranational Adjudication”, 97 *Yale Law Review* 1997, p. 273.

<sup>60</sup> However, this is not true for libel in the narrow sense, cf. *The Economist* 2nd Jan. 2010, p. 29.

<sup>61</sup> Cf. *Cour d'Appel de Versailles*, 24.11.2005, No. 05/05739 – Albert II of Monaco.

<sup>62</sup> W. Peter, J. Q. de Kuyper & B. de Candolle, *Arbitration and Renegotiation of International Investment Agreements*, The Hague/Boston: Kluwer 1995, p. 152 et seq.

European courts that do not pay tribute to this network structure of „judicial governance“ provoke a lot of uncertainty within this network as is the case for media law in Germany since the *Caroline* judgement of the ECtHR which can only be regarded as a complete failure.

In any event, the coordination of protection of fundamental law in a multilevel system must begin firstly by way of the individual rights and the ever more specific question of the necessary scope of integration of interpretation and ought not to originate in a „duty of cooperation“<sup>63</sup> (a duty to consider not to achieve a certain result) procedurally binding between courts (and distinctly for authorities<sup>64</sup>) of difficult doctrinal construction.<sup>65</sup> Judicial cooperation is apparently a huge challenge to legal systems which have hitherto been based on knowledge basis which has been generated within nation states in a complex process of trial and error that have find a repercussion in long standing path dependencies. Even in private law the reluctance to refer to and accept court decisions originating from different countries which have signed the UN Convention for Contracts on the International Sale of Goods (CISG) seems to be considerable notwithstanding the innovative inclusion of a methodological principle which obliges courts to orient their interpretation of CISG towards the aim of creating common standards (Art. 7 par. 1).<sup>66</sup>

The European courts pay too little attention to the fact that purportedly independent regimes of rights have for decades grown out of cooperation in societal practice, between courts and in legal science, whereas the courts themselves can only intervene in these networks of law generation in isolated instances and are therefore likely to produce confusion rather than

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<sup>63</sup> Sauer 2008: 374ff., 504, constructed a duty of fidelity between organs within a multi-level system, which nevertheless (roughly) separates different levels of bonding (material law/procedural bonding). The procedural dimension could unfold in an analogy (*mutatis mutandis*) to § 31 BVerfGG.

<sup>64</sup> K. H. Ladeur & C. Möllers, „Der europäische Regulierungsverbund der Telekommunikation im deutschen Verwaltungsrecht“, 120 *Deutsches Verwaltungsblatt* 2005, p. 525; A. M. Slaughter & D. Zaring, Networking Goes International: An Update, 2 *Annual Review of Law and Social Studies* 2006, p. 211.

<sup>65</sup> Cf. BVerfGE 111, p. 307 – Görgülü; 120, p.180 – Caroline of Monaco/Hannover; relatedly S. Graf Kielmannsegg, „Jenseits von Karlsruhe. Das deutsche Familienrecht in der Straßburger Rechtsprechung“, 46 *Archiv des Völkerrechts* 2008, p. 273, 300f. A different version of cooperation and network-formation in the globalised jurisprudence of courts can be found in the very variously marked readiness to refer in their reasoning of courts in other countries, cf. A. M. Slaughter, „A Global Community of Courts“, 44 *Harvard Journal of International Law* 2003, p. 191; ead. & D. Zaring, D., „The Use of Foreign Decisions by Federal Courts. A Comparative Analysis“, 3 *Journal of Empirical Legal Studies* 2006, p. 297 (the impact of this version of judicial cooperation is overtaken by the authors); ead. & W. Burke-White, „The Future of International Law is Domestic“, 47 *Harvard International Law Journal* 2006, p. 1; H. Keller & A. Sweet Stone (eds.), *A Europe of Rights. The Impact of the ECHR on National Legal Systems*, Oxford: OUP 2009; for a critique cf. E. Posner & J. Yoo, „Judicial Independence in International Tribunals“, 93 *California Law Review* 2005, p. 1.

<sup>66</sup> M. Kilian, „CISG and the Problem with Common Law Jurisdictions“, 10 *Journal of Transnational Law and Policy* 2001, p. 216, 226.

coherence where they so do. Something similar applies also to the decisions of the ECJ on the indirect effect of market freedom in private law.<sup>67</sup> Here we are rather concerned with the collision of diverse socio-legal regimes – where, in this instance, social state is to be understood as ‘societal state’<sup>68</sup>, - that comprise a wealth of social conventions, decisions, state norms, in which the court intervenes.<sup>69</sup> This might well occur in the development of a European legal space, but it is necessary<sup>70</sup> to see the complexity of the problem and not as a question of the implementation of European basic laws and norms – especially when compared to the private law that has as its touchstone self-organisation.

#### IV. GLOBAL ADMINISTRATIVE LAW

Beyond the classic nation state and on the nearside of the forms of classic international law (and the „particular administrative law“ of international organisations), transnational, public administrative, global law has developed<sup>71</sup>, which can no longer be described in the classic sense as „public law“ but stands in a corresponding relationship to transnational private law („*lex mercatoria*“ of a new sort and other forms of neo-spontaneous law).<sup>72</sup> It is hardly surprising that also this law, similar to postmodern national law has demonstrated clear forms of plurality and heterogeneity of law-making processes.<sup>73</sup>

Transnational administrative law has no easily identifiable “legal sources”; its institutions and procedures are underdeveloped; the relationship between public and private is often opaque.

<sup>67</sup> ECJ C-438/05, Rep. 2007, I-1077 - Viking; C-341/05, Rep.. 2007, I-11767 – Laval.

<sup>68</sup> H. K. J. Ridder, *Zur verfassungsrechtlichen Stellung der Gewerkschaften im Sozialstaat nach dem Grundgesetz für die Bundesrepublik Deutschland*, Stuttgart: Fischer 1960; F. Hase, Helmut Ridders Überlegungen zum Sozialstaatsgebot, 32 *Kritische Justiz* 1999, p. 295.

<sup>69</sup> Similar can be said of the *Mangold* case, ECJ, NJW 2005, p. 3695.

<sup>70</sup> Joerges & Rödl, *supra*, note 19.

<sup>71</sup> B. Kingsbury, N. Krisch & R. B. Stewart, „The Emergence of Global Administrative Law“, 68 *Law and Contemporary Problems* 2005 p. 15; C. Harlow, „Global Administrative Law: The Quest for Principles and Values“, 17 *EJIL* 2006, p. 187; J. B. Auby, J. B., *La globalisation. Le droit et l'Etat*, Paris: Montchrestien 2003.

<sup>72</sup> G. Teubner, „Privatrechtsregimes. Neospontanes Recht und duale Sozialverfassungen in der Weltgesellschaft“, *Festschrift Spiros Simitis*, Baden-Baden: NOMOS 2000, p. 437; id., „Breaking Frames: Economic Globalisation and the Emergence of *lex mercatoria*“, 5 *European Journal of Social Theory* 2002, p. 199.

<sup>73</sup> P. Zumbansen, „Piercing the Legal Veil: Commercial Arbitration and Transnational Law“, 8 *European Law Journal* 2002, p. 400; C. P. Calliess & P. Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (Oxford: Hart Publishing, 2010), ch. 1; G. P. Calliess & M. Renner, „From Soft Law to Hard Code: The juridification of Global Governance“, 22 *Ratio Iuris* 2009, p. 260; A. Fischer-Lescano, 63 *Transnationales Verwaltungsrecht, Juristenzeitung* 2008, p. 373; cf. also C. Möllers/A. Voßkuhle/C. Walter (eds.), *Internationales Verwaltungsrecht*, Tübingen: Mohr 2007.



Whether or not it is “law” at all is a contentious issue.<sup>74</sup> The line of demarcation between public and private law begins to blur. Conversely, the question is posed, whether and to what extent and in what forms „secondary rules“ (H. L. A. Hart) are necessary so law can be distinguished from other norms. The proposition that we must be concerned with formal rules about the making and altering of (primary) norms seems, in the context of a „world law“ marked by plurality to lose its urgency. It is apparent that also private transnational environmental standards could protect public interests.<sup>75</sup> In retrospect one has to bear in mind that the evolution of general administrative law was both in countries like France and Germany primarily a process driven by the administration itself which has developed and experimented with new forms of decision-making drawing on the knowledge of civil society (instead of the state centred ‘*polizeywissenschaft*’).<sup>76</sup> It is only in 1976 that basic rules of general administrative law have been (partly) codified in Germany. The new network based forms of the emerging global administrative law will in the long run also allow for new forms of public control and accountability on the basis of a new logic of cooperative law making at the transnational level but the development cannot follow a top-down model of a centralised legitimation by a democratic legislator. A more transparent mode of administrative transborder networking may even contribute to a new and improved version of accountability, which leaves aside the illusions of attributing a privileged position for the observation of society to the legislator. Democratic ‘legitimation’<sup>77</sup> alone may not be a sufficient basis for a new role of legislation. The problems of the adequate description for the new administrative law beyond the nation state can already be judged by the terminological differences in the process of its conceptualisation.<sup>78</sup>

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<sup>74</sup> B. Kingsbury, B., *The Concept of ‘Law’ in Global Administrative Law*, International Law and Justice Working Papers, Global Administrative Law Series, New York University, 2009/1; D. Dyzenhaus, ‘The Concept of (Global) Administrative Law’, IILJ Working Paper 2008/7, [www.iilj.org](http://www.iilj.org)

<sup>75</sup> G. Winter (ed.), *Multilevel Governance of Global Environmental Change*, Cambridge: CUP 2006; M. Herberg, *Globalisierung und private Selbstregulierung: Umweltschutz in multinationalen Unternehmen*, Frankfurt/New York: Campus 2007; O. Dilling, M. Herberg & G. Winter, *Responsible Business. Self-Governance and Law in Transnational Economic Transactions*, Oxford: Hart 2008.

<sup>76</sup> M. Bohlender, „Metamorphosen des Gemeinwohls – von der Herrschaft guter polizey zur Regierung durch Freiheit und Eigentum“, in: *Gemeinwohl und Gemeinsinn – Historische Semantiken politischer Leitbegriffe*, ed. by H. Münkler/H. Bluhm, Berlin: Akademie Verlag 2001, p. 247; for the US cf. T. R. Powell, „Administrative Exercise of the Police Power“, 24 *Harvard Law Review* 1911, p. 268; for France M. Senellart, *Les arts de gouverner. Du régime médiéval au concept de gouvernement*, Paris: Seuil 1995.

<sup>77</sup> D. Dyzenhaus, „Accountability and the Concept of (Global) Administrative law“, in: *Acta Juridica: Global Administrative Law*, ed. by Hugh Colber, Capetown: Faculty of Law 2009, p. 3.

<sup>78</sup> For a conceptual clarification cf. M.-S. Kuo, „Between Fragmentation and Unity: The Uneasy Relationship between Global Administrative Law and Constitutionalism“, 10 *San Diego Law International Law Journal* 2009, p. 437.

The conceptual accentuation of international as opposed to global administrative law is down to close guidance from national public law and its state orientation, from which perspective definite materials of administrative law – be they national or international – can be distinguished, whilst the question of „global public law“ neglects this starting premise and as a result pays more attention to the ascent of private actors in the global arena. The state is thusly in the era of globalisation „fragmented“ from the offset into a multiplicity of offices and agencies who maintain their orientation towards transnational ‘networks’<sup>79</sup>, which are generated together with other public and private actors in particular arenas.

Global administrative law can therefore, against this backdrop, be associated with the concept of the ‘disaggregated state’<sup>80</sup>, which does not disintegrate but transforms itself through regulatory tasks into related ‘networks’<sup>81</sup>, in which the issue is less selective decision-making than the achievement of relatively broadly conceived goals.<sup>82</sup> Surely, this constitutes a substantial feature of ‘international administrative law’, nevertheless, it will become apparent that the context of the ‘disaggregated state’ can be retained on an abstract level and must be called forth, only because state administration is still the subject of definite organisational principles and legitimating requirements, which are tied fastly to the centrality of the state. This is, above all, the case when it comes to legitimation and accountability for state conduct.<sup>83</sup> The ‘global networks’ cannot avoid the questions raised by this dynamic. The problem is recognised in the debate about ‘global administrative law’ and is discussed in the context of ‘accountability’ of globalised public and private conduct.<sup>84</sup> ‘International administrative law’ emphasizes rather what is left over from the unity of the state and the principles that derive therefrom.<sup>85</sup>

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<sup>79</sup> On the responsibility of transnational governance networks, see A. M. Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, Harvard Law School, Public Law WP No. 18/2004; for the permeability of the sovereignty cf. ead. & W. Burke-White, *supra*, note 35, p. 117; ead./Zaring, *supra*, note 64, p. 211.

<sup>80</sup> A. M. Slaughter, “Sovereignty and Power in a Networked World”, 40 *Stanford Journal of International Law* 2004, p. 283; generally ead., *A New World Order*, Princeton: PUP 2004; D. F. Kettl, *The Transformation of Governance. Public Administration for Twenty-First Century America*, Baltimore: Johns Hopkins UP 2002.

<sup>81</sup> Ladeur & Möllers, *supra*, note 63; generally I. Augsberg/L. Viellechner/T. Gostomzyk, *Denken in Netzwerken*, Tübingen: Mohr 2009.

<sup>82</sup> On the informational aspect of administrative conduct, see Th. Vesting, „Nachbarwissenschaftlich informierte und reflektierte Verwaltungsrechtswissenschaft – ‚Verkehrsregeln‘ und ‚Verkehrsströme‘“, in: W. Hoffmann-Riem & E. Schmidt-Aßmann (eds.), *Methoden der Verwaltungsrechtswissenschaft*, Baden-Baden: NOMOS 2004, p. 253.

<sup>83</sup> D. Held, “The Transformation of the Political Community. Rethinking Democracy in the Context of Globalization”, in: I. Shapiro & Hacker-Cordón (eds.), *Democracy’s Edges*, Cambridge: CUP 1999, p. 84; J. Cohen & C. F. Sabel, “Global Democracy?”, 37 *New York University Journal of International Law and Politics* 2004 p. 763.

<sup>84</sup> K. Raustiala & A. M. Slaughter, *International Law, International Relations and Compliance*, Princeton Law & Public Affairs Paper 2002-2.

<sup>85</sup> Cf. the contributions in Möllers/Voßkuhle/Walter (eds.), *supra*, note 72.

We might ask what vantage point can be won on general 'international administrative law' in the specific fields of 'international administrative law' (conceived of as reference areas). Here, we face a methodological problem, which has not yet been sufficiently resolved within the European Community. In Europeanised administrative law, rigid and simplified distinction is drawn between three parts<sup>86</sup>: The law of the European administration, that of the national administration and the general national administrative law that has as its purpose the realisation of the particular European administrative law. Equally, on the international plane, a functional equivalent to this problem obtains: 'global administrative law' is the law of 'self-administration', standing relatively independently to supervising *regulatory networks*, whereas 'international administrative law' does not necessarily neglect this relation, but focuses on the cooperative link with the ordering ideas of the national, and thereby national general administrative law in so far as this is concerned with the participation of the state in the transnational interactions and networks.<sup>87</sup> WTO law is established as a self-sufficient subject of study<sup>88</sup> and, as enabled by international delegation, increasingly takes on the characteristics of a 'self-administration', which distinguishes itself from legal materials, from which the institutional differentiation of international cooperation has won no comparable institutional elaboration.<sup>89</sup>

This fragmentation of global administrative law and the consequent variable permeability of the surviving territorial components of the new, plural legal order finds procedural expression in the necessity, through judicial decisions contrary to the former principle of law, *par in parem non habet iurisdictionem* - which proceeds from the sovereignty of states - of ensuring for reasons deriving from the rule of law, that administrative cooperation of states cannot regress into isolated procedural spheres of state regulators. This has the consequence that a citizen, affected by a measure in a procedure in the administrative association (visa grants to third state citizens, who wish to remain in the EC and travel between member states), for example against an externally addressed administrative decision of one state as well as against internal approval or warnings and so forth of another state, would have to take into account judicial protection of

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<sup>86</sup> Kadelbach, *supra*, note 26.

<sup>87</sup> Cf. for a vision of globalisation as a form of extension of state trade, D. W. Drezner, *All Politics is Global. Explaining International Regulatory Regimes*, Princeton: PUP 2007: in particular, p. 32 et seq.

<sup>88</sup> Cf on the development of new context- and efficacy-related interpretive rules in WTO-law, I. Van Damme, *Treaty Interpretation by the WTO Appellate Body*, Oxford: OUP 2009, especially, p. 213 et seq., 287 et seq..

<sup>89</sup> B. Zangl, *Die Internationalisierung der Rechtsstaatlichkeit. Streitbeilegung in Gatt und WTO*, Frankfurt/New York: Campus 2007; id. (ed.), *Auf dem Weg zu internationaler Rechtsherrschaft? Streitbeilegung zwischen Politik und Recht*, Frankfurt/New York: Campus 2009.

their rights (see the justifiably distinct decision by the French *Conseil d'Etat* of 9 June 1999, No. 198344, *Mme Hamssaoui*.<sup>90</sup>

## V. INTERNATIONAL LAW IN A GLOBAL LEGAL ORDER

In the international law context, Koskeniemi<sup>91</sup> has complained of the dominance of expert knowledge in fragmented 'regimes', which could not be integrated by a hierarchical system of law, as being a variant of legal decay. Indeed, we can observe a parallel between internal domestic and international external disbandment of traditional statehood and its dissolution through non-territorial regimes, nevertheless merely to criticize the predominance of expert knowledge is not to go far enough, as such a criticism loses sight of the change in the cognitive infrastructure of law in the transformation from society of individuals to society of organisations to society of networks. It cannot be ruled out, on the domestic or on the international level, that the plurality of regimes cannot, through new procedural rules of reflection and evaluation of developed expert knowledge<sup>92</sup>, generate a functional equivalent of the classic forms of legal integration through internal system formation of the second order (through stability monitoring metanorms) in the form of metarules of a new „law of collisions“.

The plea in favour of a new formalism of inclusion of the excluded<sup>93</sup> would have the corresponding need for support, mediated by observation of the fundamental self-transformation of national and international law, in particular through the rise of organisations as actors and the decentring of law in the context of the societal knowledge- and rule-base. Therefore it seems hard to accept that pluralisation of „regimes“ in recourse to a new formalism can be compensated<sup>94</sup>, rather taking on the character of a quasi-religious belief ('faith', inclusion of the excluded), which questions the *de facto* rules of common practice.

International law finds itself confronted here with a new form of discontemporaneity, which is determined, above all, in that the perviousness of national and international law externalises the effects of the failure of internal tessellation of a plurality of rules and rule systems into developing countries and erects almost insurmountable barriers to the formulation of new collisions laws for various legal orders.<sup>95</sup> In any event these problems cannot be overcome with

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<sup>90</sup> See the justifiably distinct, *Conseil d'Etat*, 9 June 1999, No. 198344, *Mme Hamssaoui*; cf. also for the relationship of European Courts to UN decisions *Behrami and Behrami v France*, ECHR (Grand Chamber), application number 71412/01, (2007) 45 EHRR SE 10; approvingly Kingsbury, *supra* note 74, p. 25 et seq..

<sup>91</sup> M. Koskeniemi, „The Fate of Public International Law“, 70 *Modern Law Review* 2007, p. 1; cf. also id., *International Law Between Fragmentation and Constitutionalism*, Canberra, 27.11.2006; and generally id., *From Apology to Utopia. The Structure of International Legal Argument*, Cambridge: CUP 2006.

<sup>92</sup> B. Wollenschläger, *Wissensgenerierung im Verfahren*, Tübingen: Mohr 2009.

<sup>93</sup> Koskeniemi, *supra*, note 90.

<sup>94</sup> Koskeniemi, *supra*, note 90; J. Beckett, „A Rebel Without a Cause? Martti Koskeniemi and the Critical Legal Project“, 7 *German Law Journal* 2006, p. 1045.

<sup>95</sup> Joerges, *supra*, note 19; id./Rödl, *supra*, note 19.

redistributive demands or general demands for inclusion, which, in the light of increasing pluralisation of governance processes could be applied neither to individuals nor states. The shortcomings of the internal governance structure of the developing countries translates itself, needs must, to their participation in transnational legal regimes; abstract appeals for the charging of an international formalism with substantial equalising rights to participation and the reflection of western „self-centredness“<sup>96</sup> can do nothing to change this. The more precise observation of partial legal regimes would however invite the temptation towards ever more specific collisions norms, which, could partially compensate the disproportionate support afforded to the legal position of transnational undertakings in developing countries, through a weak state, neglectful in protecting the interests of its citizens, in favour of the transnational expansion of the protection afforded by national fundamental rights to the benefit of (indigenous) third parties.<sup>97</sup>

Above all, the fundamental right to human dignity (in Art. 1 of Germany's basic law and in functionally equivalent provisions in other western countries) also obliges private undertakings, to avoid violating the elementary rights of other private parties (employees, neighbours etc.). This duty is primarily implemented by means of private law; adjacent to this stands the protection of rights from state interference itself as well as the legal triangular relation of 'concern – state - third party', which compliments the protective duties of the state towards its citizens with positive obligations, in respect of new risks or those which cannot be subsumed in the private law emanating from private parties.<sup>98</sup> A heterarchical, plural understanding of law cannot transfer *en masse* this coordination of various legal norms, which prop up a productive network of relationships, e.g., between private companies, without reference to altered functional conditions, with the result that private foreign concerns must fulfil their private law duties (for instance with respect to inconsistent provisions of foreign law and 'journeying' domestic law) but could ignore unconstitutional acts or omissions of the state.<sup>99</sup>

Conversely, this cannot be permitted to lead to a state of affairs whereby the functional separation between state and markets is ignored. More importantly, the aforesaid triangular relationship must be so calibrated that private undertakings are encumbered by dint of the fundamental right to human dignity with a compensatory obligation for violations of human dignity that occur within the private-public networks in which the undertaking is active with the goal of unburdening, so far as is possible, the state. This would be an example that the

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<sup>96</sup> Koskeniemi, *supra*, note 90( 2006).

<sup>97</sup> K. H. Ladeur & L. Viellechner, „Die transnationale Expansion staatlicher Grundrechte“, 46 *Archiv des Völkerrechts* 2008, p. 42

<sup>98</sup> G. Teubner, „Die anonyme Matrix. Zu Menschenrechtsverletzungen durch 'private' transnationale Akteure“, 45 *Der Staat* 2006, p. 161

<sup>99</sup> See for exmple the case: Shell/Ken Saro Wiwa in Nigeria, [www.FAZ.net](http://www.FAZ.net), June 9, 2009.

independent rationality of the emerging heterarchical, plural legal order can vouchsafe new laws of collisions, based on duties of cooperation beyond the classic forms grounded in the separation of national legal orders.<sup>100</sup> These obligations to cooperate are not to be thought of as restricted to the law-making institutions in the classic sense (state, international organisations); rather they extend to subjectless, spontaneous or privately aggregated transnational norms.<sup>101</sup> Such constructions sit more comfortably with the self-standing rationality of law better than the abstract new formalism which Koskenniemi postulates in a thoroughly ambivalent wise according to a quasi-religious precept.

Other conceptions of the postmodern international law, which could, again, lead to a productive cooperation between legal studies and social sciences relate to the observation of different ways of reading „constitutionalising processes“. <sup>102</sup> One way of interpreting them considers the increasing density of international legal phenomena as the expression of a nascent „world statehood“ which attributes to a „world society“ a new organisational legal form beyond that of the international law deriving from the will of the state.<sup>103</sup> From another perspective, a new „logic of the community“ of citizens has developed, which has utilises a „process of juridification“ forcing states – so the formulation goes, to apply the state-centred public interest from the offset to an open community, understood as an emergent citizenry of the world.

Nuancing it slightly differently, Ch. Chwascza<sup>104</sup> liberates statehood from its bondage in pre-legal societies and delivers it to a new form of institutionalisation of democratic will-formation which permits of various references. Even the concept of a ‘global constitution’, with human rights at its fundament, searches for its reference point not in a (developing) ‘world sovereignty’ but in a row of function-specific ‘regimes’, which harmonise and coordinate through collisions rules.<sup>105</sup>

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<sup>100</sup> Ohler, *supra*, note 21.

<sup>101</sup> G. Teubner & P. Korth, „Zwei Arten des Rechtspluralismus: Normkollisionen in der doppelten Fragmentierung der Weltgesellschaft“, in: M. Kötter & G. F. Schuppert, (eds.), *Normative Pluralität ordnen*, in print (2009). English version: <http://ssrn.com/abstract=1416041>

<sup>102</sup> On that term see R. Wahl, *Herausforderungen und Antworten: Das Öffentliche Recht der letzten fünf Jahrzehnte*, Berlin/New York: De Gruyter 2006, p. 97 et seq.

<sup>103</sup> B. Faßbender, „The United Nations Charter as Constitution of the International Community“, 35 *Columbia Journal of Transnational Law* 1998, p. 529; J. A. Frowein, „Konstitutionalisierung des Völkerrechts“. Bericht der Deutschen Gesellschaft für Völkerrecht, 2000, p. 427; C. Möllers, *Der vermisste Leviathan. Staatstheorie in der Bundesrepublik*, Frankfurt: Suhrkamp 2008, p. 92; skeptically as to social scientific observation S. Leibfried & M. Zürn, „Von der nationalen zur postnationalen Konstellation“, in: dies. (eds.), *Transformationen des Staates?*, Frankfurt: Suhrkamp 2006, p. 19, 32 et seq.

<sup>104</sup> C. Chwascza, *Moral Responsibility and Global Justice*, Baden-Baden: Nomos 2007.

<sup>105</sup> A. Fischer-Lescano, *Globalverfassung. Die Geltungsbegründung der Menschenrechte*, Weilerswist: Velbrück 2005; cf. also id./Teubner, *supra*, note 5 (2006); G. Teubner, „Globale Zivilverfassungen: Alternativen zur staatszentrierten Verfassungstheorie“, 2003 *ZaöR* 63 2003, p. 1 – English version: <http://ssrn.com/abstract=876941> skeptically, due to a lack of shared values, Koskenniemi, *supra* note 90 (2006); for

The concept of constitutionalisation too needs a disciplinary approach through legal studies and social sciences. Many forms of the concept proceed from a simple interpretation of the hierarchy of international norms. Constitutionalisation in the sense given to it by legal studies cannot be reduced to the hierarchy of laws (and the transfer of these state-based principles to international and transnational law). Even if a ranking of rules could be subordinated, it does not follow therefrom that a corresponding constitutionalising process arises, which (at least in Germany) can be observed on the state level. Constitutionalisation need not always mean the same in the domestic legal sphere. Constitutionalisation refers always to an institutional construct, which leads to a more or less far reaching 'densification of legal material'<sup>106</sup>, and by this means, corresponding to the acceptance of juridificational processes, withdrawing political (decision-making) processes from political controversy through a constitutional court and a law-centred public.<sup>107</sup>

A collisions-legal interpretation of the relationship between legal materials in a heterarchical trans- and international network can and must, through different institutions and interrelations, reflect the determinate self-limitation of the constitutionalisation process. Besides, juridification is not necessarily synonymous with constitutionalisation.<sup>108</sup> Another variant of the fortification of the internal connection within a fragmented network of international and transnational norms is the settling of guidelines for administrative procedure on the basis of international covenants. This leads to the challenge of an 'international administrative law'<sup>109</sup>, which, given its orientation towards classic statehood, can be distinguished from the more pronouncedly detached variant of global administrative law. Next to this, there is a further variant of „hybridisation“ in the linkage of material bonds with (difficult to implement) obligations of financial and technical assistance.<sup>110</sup> Here too, the ground is fertile for the internal and external observation of law-constituting processes in legal studies and social sciences.

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a critique see also C. Möllers, „Transnational Governance Without a Public Law?“, in: C. Joerges/I. J. Sand/G. Teubner (eds.), *Transnational Governance and Constitutionalism*, Oxford: Hart 2004, p. 329.

<sup>106</sup> C. Möllers, C., „Verfassunggebende Gewalt – Verfassung – Konstitutionalisierung“, in A. v. Bogdandy (ed.), *Europäisches Verfassungsrecht: Theoretische und dogmatische Grundzüge*, Berlin/New York: Springer 2003, p. 1, 48.

<sup>107</sup> Cf. on the dependence of constitutional interpretation from the self-understanding and empathy of political institutions, A. Vermeule, *Judging under Uncertainty. An Institutional Theory of Interpretation*, Cambridge (MA): HUP 2006; id., *Law and the Limits of Reason*, Oxford: OUP 2008.

<sup>108</sup> Möllers, *supra*, note 102, p. 92et seq.

<sup>109</sup> Möllers, *ibid.*, p. 94.

<sup>110</sup> V. Heyvaert, *Hybrid Norms in International Law*, London School of Economics, Law, Society and Economy WP 6/2009.

## VI. OUTLOOK

The new phenomena of globalisation lead not to the generation of a further 'legal plane' beyond the state but they are the expression of a fundamental change in law, which grasps all its forms and sets out a differential logic of hybridisation, which permits of the transcending of competences and perceived boundaries (public/private), the linkage of irreconcilable rationalities and the coordination of hitherto separated functions. This does not entail the dissolution of a legal order based on unity and hierarchy but the emergence of another that operates with collisions laws in settling plural law, one which alters the role of the state and „intra-statal“ law in that it marries a permeability for the observation of 'extra-statal' interests with the expansion of its external validity and efficacy.