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

# The Normative Knot 2.0: Metaphorological Explorations in the Net of Networks

*By Alexandra Kemmerer**

## A. Connections

Ever closer gets the net of networks, and so it does in law and legal scholarship. Finally in the law, one feels tempted to remark.[1] But there is a reason for the lawyer's patient scepticism, for her professional habit to await a certain academic consolidation of a concept before setting out on a transdisciplinary transfer. There is a reason – and it lies in the law's "necessity to decide" (*Entscheidungsnotwendigkeit*).[2] There is no shortage of fuzziness and uncertainty.[3] But have life and law ever been less paradoxical? Arguably, the

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[1] A short, yet seminal preliminary study laying the ground for a "history of nets and networks": SEBASTIAN GIEßMANN, NETZE UND NETZWERKE (2006); on recent literature in law and social sciences, see Anne-Marie Slaughter & David Zaring, *Networking Goes International: An Update*, 2 ANNU. REV. LAW SOC. SCI. 211 (2006); on ambivalence and value of the (meanwhile somewhat outworn) network concept in the social sciences see BRUNO LATOUR, REASSEMBLING THE SOCIAL 129 (2005).

[2] Christoph Möllers, *Netzwerk als Kategorie des Organisationsrechts*, in NICHT-NORMATIVE STEUERUNG IN DEZENTRALEN SYSTEMEN 285-302 (Janbernd Oebbecke ed. 2005). See also Stephan Kirste, *Recht als Transformation*, in RECHTSPHILOSOPHIE IM 21. JAHRHUNDERT, 134 (Winfried Brugger , id. & Ulfried Neumann eds., 2008).

[3] VOLKER BOEHME-NEßLER, UNSCHARFES RECHT (2008).

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problem is not new, yet it has only recently been made explicit.[4] And it seems that conceptual stabilizations in the neighboring disciplines have encouraged the law to engage in net and network talk.[5] Even in Public Law, networks are no longer exclusively referred to by an avantgarde, sceptically observed by the more conservative members of the discipline,[6] or an exciting extravaganza of a courageous borderliner, crossing the lines between law and politics.[7] Networks are the talk of the ivory tower, on all levels, in all fields, across neatly drawn interdisciplinary frontiers and diligently differentiated orders of a constitutional balance of powers. As a "key notion" (*Schlüsselbegriff*),[8] the network is a great inspiration – at a time which for lawyers, too, and as any time, can be characterized as "no-more of the past and not-yet of the future" (*Nicht-Mehr des Vergangenen und als Noch-Nicht des Kommenden*).[9] The typing which precedes the outset of each conceptualization has already begun.[10] The development of a sophisticated theoretical framework, however, is only slowly gaining an outline. Yet only the latter can prevent an arbitrary and superficial conceptualization of legal phenomena.[11]

Introducing the notion of the "normative knot", this article will attempt to cultivate an aspect of the network metaphor from a legal perspective, thereby approaching that aspect

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[4] Ino Augsberg, *Das Gespinst des Rechts. Zur Relevanz von Netzwerkmodellen im juristischen Diskurs,* RECHTSTHEORIE 38, 479 (2007).

[5] On terminological nuances of net and networks which cannot be further examined in this article, see SEBASTIAN GIEßMANN, NETZE UND NETZWERKE 16 (2006).

[6] See for example, Thomas Vesting, *Die Staatsrechtslehre und die Veränderung ihres Gegenstandes*, 63 VVDSTRL 41, 56 et seq. (2004); Karl-Heinz Ladeur*, Towards a Legal Concept of the Network in European Standard-Setting*, in EU COMMITTEES 151 (Christian Joerges & Ellen Vos, Hrsg., 1999); Christian Walter, *Constitutionalizing (Inter)national Governance*, 44 GYIL 170 (2001).

[7] ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004). The network structure sketched here was described, in an exclusively horizontal version, already in Anne-Marie Slaughter, *International Law in A World of Liberal States*, 6 EJIL 503 (1995). Problematic seems not only Slaughter's - then determined, meanwhile, in its turn neglected - neglect of the category of the state and the international institutions and legal regimes based on that category, but even more, and still, the narrow scope of her analysis which limits the world to a *kosmos* of liberal democracies. See the critique by José E. Alvarez*, Do Liberal States Behave Better?*, 12 EJIL 183 (2001).

[8] Andreas Voßkuhle*, Die neue Verwaltungsrechtswissenschaft*, in GRUNDLAGEN DES VERWALTUNGSRECHTS, VOL. 1 §1, SUBSECTION 40 (Wolfgang Hoffmann-Riem, Eberhard Schmidt-Aßmann & Andreas Voßkuhle, eds., 2006).

[9] JACOB TAUBES, ABENDLÄNDISCHE ESCHATOLOGIE, 192 (1991).

[10] Christoph Möllers*, Methoden*, in GRUNDLAGEN DES VERWALTUNGSRECHTS, VOL. 1, §3, SUBSECTION 39 (Wolfgang Hoffmann-Riem, Eberhard Schmidt-Aßmann & Andreas Voßkuhle eds., 2006); Rudolf Haller, *Begriff*, in HISTORISCHES WÖRTERBUCH DER PHILOSOPHIE, VOL. 1, 780, 784 (Joachim Ritter ed., 1971).

[11] Seminal and often cited, but out with still little impact outside of the francophone world: FRANÇOIS OST & MICHEL VAN DE KERCHOVE, DE LA PYRAMIDE AU RESEAU (2002). For an instructive approach, aiming at synthesis and structured pluralism, see MIREILLE DELMAS-MARTY*,* LE RELATIF ET L'UNIVERSEL (2004); see also, MIREILLE DELMAS-MARTY, LE PLURALISME ORDONNÉ (2006).

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as a legal concept, enabling us to escape from the de-differentiating maelstrom of the network, and allowing for a precise determination of the limits and connections between law and politics.

At the outset, however, we need to analyze some of the recent descriptive achievements of the multifaceted network concept in legal contexts (B.). Facing the complexity of phenomena – and the diversity of descriptions - each public law theory of networks risks its immediate failure. The hybridity of the network metaphor mirrors the hybridity of the reality it sets out to describe.[12] Anne-Marie Slaughter's network is different from the one woven by Karl-Heinz Ladeur, and reading François Ost and Michel van de Kerchove, we will see again other networks. And throughout the presentations at the Meeting of German-Speaking Public Law Assistants 2007, where the reflections further elaborated in this article were first presented, dense networks were followed by more lofty ones, heterarchical networks were followed by hierarchically structured ones.

There are, it seems, reasons to take concepts not only at face-value as words, but also to take them as metaphors at their "pictorial value"[13] (C.). By adopting a concept and metaphor of the network from the social sciences, the law also adopts an entire pictorial reservoir. Being smoother than the system concept, more historical than structure and more empirical than complexity,[14] the network carries a metaphorical kaleidoscope on its back. The images stored in that kaleidoscope are to be taken seriously, as their contribution is a decisive one in the process of theory-building.[15] Yet: Mind the metaphors! For metaphorical engagement is not only a subsidiary, second-class methodological backyard of *Begriffsgeschichte*. Metaphors not only constitute conceptuality, they bind theory back to life worlds.[16] The plurality of the network metaphor becomes visible in

[12] Möllers*, Transnationale Behördenkooperation*, 65 ZAÖRV/HJIL 351, 381 (2005).

[13] Christoph Möllers*, Netzwerk als Kategorie des Organisationsrechts*, in NICHT-NORMATIVE STEUERUNG IN DEZENTRALEN SYSTEMEN 285 S. 302 (Janbernd Oebbecke ed. 2005); the relation between metaphor and category remains, however, somewhat fuzzy, 286. For a plea to seek inspiration in cultural studies when analyzing legal images see *supra* note 8 at subsection 42; also, inspiring is MICHAEL STOLLEIS, DAS AUGE DES GESETZES (2004); on images of the state, see HORST BREDEKAMP, THOMAS HOBBES, 2ND ED. (2003). There were, however, well-reasoned warnings from neighbouring discipline - rather explicitly: PHILIPP STOELLGER, METAPHER UND LEBENSWELT, V (2000): "On metaphorical detours, reflection needs patience and equanimity, in the face of the narrowly limited time for life and reading." (A.K. trans.)

[14] BRUNO LATOUR, WE HAVE NEVER BEEN MODERN, 10 (1993).

[15] JULIA VOSS, DARWINS BILDER, 329 (2007): "Images educate (…) observation, facilitate knowledge, develop theories und make possible their transfer to others. Time and again they live their own lives" (A.K. trans.). The side glance into the history of science has its transdisciplinary parallels in the sociology of law, where Luhmann borrowed from Darwin's concept of evolution: NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM, 230-273 (Klaus A. Ziegert trans., Fatima Kastner, Richard Nobles & David Schiff eds., 2004).

[16] Hans Blumenberg, *Ausblick auf eine Theorie der Unbegrifflichkeit, in Schiffbruch mit Zuschauer*, 75 (HANS BLUMENBERG ED. 1979).

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images used by lawyers as a means to visualize the network concept – or enforced by those lawyers upon their readers indirectly. These images are the very "reference area" (*Referenzgebiet*[17]) of the current article. They can show us if and how the law can, at nodal points within the presumably hierarchy-free zone of the networks, create new coherences, loyalities, structures and orders – knots of normativity (D.). My analysis of the relation between law and politics, description and normativity, examines the relation between horizontal and vertical structures, of hierarchy and heterarchy, of pyramid and network (E.). To decide whether those relations are to be seen as dialectical or synthetical, to be characterized as *complexio* or *coincidentia oppositorum* - that decision in itself determines the possibilities and limits of a public law approach to the network concept (F.).

## B. Entanglements: Between Description and Normativity

Networks - private networks and networks constituted within civil society, in particular - are "units" that generate new knowledge.[18] But what do we know about them? Is it clear whether and to what extent their structure can be determined by intentional actions?[19] Preceding all images, the view on descriptions offers a promise of clarification – on the descriptions currently circulating within legal literature which shall be examined along the lines of a functionally (yet necessarily never sufficiently) differentiated balance of powers.[20]

### *I. Descriptions: The Legibility of the World*

In the midst of the new – or maybe not really so new – "plurality of courts" (*Vielfalt der Gerichte*)[21] in the context of multiple "regime-collisions,"[22] and at the intersection of

[17] EBERHARD SCHMIDT-AßMANN, DAS ALLGEMEINE VERWALTUNGSRECHT ALS ORDNUNGSIDEE, 2ND ED., 8 et seq. (2006); *supra* note 8, subsections 43 et seq.

[18] KARL-HEINZ LADEUR, DER STAAT GEGEN DIE GESELLSCHAFT, 91, 296 et seq. (2006); STEPHEN GOLDSMITH & WILLIAM D. EGGERS, GOVERNING BY NETWORK, 107-115 (2004); CASS R. SUNSTEIN, INFOTOPIA (2006). In the process of coordinating judicial networks, networked knowledge can soften sharp political conflicts: Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STANFORD LREV 13 (2006), Eric A. Posner & Cass R. Sunstein, *On Learning from Others*, 59 STANFORD LREV 1309 (2007); see also Angelika Nußberger*, Wer zitiert wen?*, 61 JZ 763 (2006).

[19] Möllers*, Netzwerk* (n. 2), 286. Precise lines are drawn in Bettina Schöndorf-Haubold*, Netzwerke in der deutschen und europäischen Sicherheitsarchitektur*, in NETZWERKE 149 (Sigrid Boysen et al., eds., 2007).

[20] CHRISTOPH MÖLLERS, GEWALTENGLIEDERUNG (2005).

[21] Stefan Oeter, *Vielfalt der Gerichte* – Einheit des Prozessrechts?, 42 BERICHTE DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT 149 (2007). Oeter emphasizes that the "pluralitiy of judicial institutions" is not a novum *per* se, but a "fundamental constant of the history of international law", see op. cit., at 152. An accelerating proliferation of judicial institutions can, however, not be neglected, see ANDREAS FISCHER-LESCANO & GUNTHER TEUBNER, REGIME-KOLLISIONEN, 8 (2006) [the authors' argument had previously been developed in Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Unity in the Fragmentation of Global Law,* 25 Mich. J.

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national constitutional courts (the European Court of Justice and the European Court for Human Rights) the European *Rechtsprechungsverbund*[23] (association of jurisdictions) takes shape as "more network-like than hierarchical organization, directed towards respective self-coordination."[24] International law appears as a network of incrementally evolved structures, "more the product of respectively interconnected processes of self-organization as the result of homogenous planning and steering from above."[25] Within the "Global Community of Courts,"[26] judges of national, supranational, international, internationalized and transnational courts find themselves interwoven into what are sometimes formalized, sometimes very informal "judicial networks."[27] For their coordination, legal forms and structures need still to be developed[28] given that the care for the "unity of the legal order" is not a task incumbent upon the judges.[29] But I will get back to this.

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Int'l. L. 999 (2004)]. See also INTERNATIONAL LAW COMMISSION, REPORT OF THE STUDY GROUP ON THE FRAGMENTATION OF INTERNATIONAL LAW, U. N. Doc. A/CN.4/L.682, paras. 5-13 (finalized by Martti Koskenniemi, 4 April 2006). But note that the ILC focusses here exclusively on material legal questions, see ibid., para. 13. For a contextualization of the fragmentation debate in a historical perspective, see now Anne-Charlotte Martineau, *The Rhetoric of Fragmentation: Fear and Faith in International Law*, 22 LJIL 1 (2009).

[22] ANDREAS FISCHER-LESCANO & GUNTHER TEUBNER, REGIME-KOLLISIONEN, 8 (2006). On "planetary" systems of particular regimes in international law and their place in the "universe" of international law, see Bruno Simma & Dirk Pulkowski*, On Planets and the Universe: Self-contained Regimes in International Law*, 17 EJIL 483 (2006).

[23] Stefan Oeter, *Rechtsprechungskonkurrenz zwischen nationalen Verfassungsgerichten, Europäischem Gerichtshof und Europäischem Gerichtshof für Menschenrechte*, 66 VVDSTRL 361, 362 et seq. (2007). The structure of interwoven interrelations sketched here reminds of the concept of "multilevel constitutionalism", see Ingolf Pernice*, Multilevel Constitutionalism in the European Union*, 27 European Law Review 511 (2002). For a similar conceptualization see the "transnational learning community of high-level judges" (*länderübergreifender höchstrichterlicher Lernverbund*), Franz Merli*, Rechtsprechungskonkurrenz zwischen nationalen Verfassungsgerichten, Europäischem Gerichtshof und Europäischem Gerichtshof für Menschenrechte*, 66 VVDSTRL 392, 418 (2007).

[24] Stefan Oeter, *Rechtsprechungskonkurrenz zwischen nationalen Verfassungsgerichten, Europäischem Gerichtshof und Europäischem Gerichtshof für Menschenrechte*, 66 VVDStRL 361, 388 (2007).

[25] Stefan Oeter, *Vielfalt der Gerichte – Einheit des Prozessrechts?*, 42 BERICHTE DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT 149, 169 (2007) [Translation by A.K.].

[26] Anne-Marie Slaughter, *A Global Community of Courts*, 44 HILJ 191 (2003).

[27] ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 65 and, in particular 100-103 (2004); see also Olga Arnst*, Instrumente der Rechtsprechungskoordination als judikative Netzwerke?*, in NETZWERKE 58 (Sigrid Boysen et al. eds., 2007). For individual actors, see DANIEL TERRIS, CESARE P.R. ROMANO & LEIGH SWIGART EDS., THE INTERNATIONAL JUDGE. AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES ( 2007).

[28] So the plea in Teubner & Fischer-Lescano *supra* note 21, 64.

[29] Similarly Rosalyn Higgins*, A Babel of Judicial Voices?*, 55 ICLQ 791, 804 (2006). On the "unity of the legal order": Pierre-Marie Dupuy*, L'unité de l'ordre juridique international*, 297 RDC 1 (2002); MIREILLE DELMAS-MARTY*,* LE RELATIF ET L'UNIVERSEL 395 (2004); MANFRED BALDUS, DIE EINHEIT DER RECHTSORDNUNG (1995); DAGMAR FELIX, EINHEIT DER RECHTSORDNUNG (1998).

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First of all, we may speak of "legislative networks" in at least a thin form of institutionalization: in the form of Parliamentary Assemblies, which are, according to a political scientist's definition, "transnational-multilateral corporative actors, constituted by groups of parlamentarians of national parliaments."[30] Apart from stable organizational forms of transnational parliamentary representation, *e.g.* in the Council of Europe, in NATO or OSCE, there are also loosely connected, independent legislative networks such as the "Parliamentarians for Global Action."[31] Otherwise, for multilevel legal orders such as the German or European, one can clearly observe an "interweaving" (*Verflechtung*) of levels in the legislative process.[32] But that is obviously more than a loosely connected net.[33]

The network concept is widely in use as a label for civil society's participation in processes of transnational law-making,[34] loosely coupled with non-governmental organizations (NGOs), whose influence can be decisive, even where their participation is only an indirect and mediated involvement.[35]

Are interrelations of national citizenship and European Union citizenship rightly to be described as "networks of belonging"? Questions remain, at least where and whenever a preponderance of national citizenship is highlighted and the "only additional character" is attributed to Union citizenship stressed, alongside the European citizen's integration into a "complementary system of belonging" (*komplementäres Angehörigkeitsverhältnis*).[36] However, if one is to understand European citizenship, in a more prospective perspective,

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[30] STEFAN MARSCHALL, TRANSNATIONALE REPRÄSENTATION IN PARLAMENTARISCHEN VERSAMMLUNGEN, 22 (2005) [Translation by A.K.]. See also *Slaughter,* New World Order (n. 5), 108.

[31] ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 112 (2004).

[32] Stefan Kadelbach*, Autonomie und Bindung der Rechtssetzung in gestuften Rechtsordnungen*, 66 VVDStRL 8, 31,38 (2007).

[33] On differences between lattice, texture and net, see SEBASTIAN GIEßMANN, NETZE UND NETZWERKE, 71 et. seq. (2006).

[34] Christoph Möllers*, Netzwerk als Kategorie des Organisationsrechts*, in NICHT-NORMATIVE STEUERUNG IN DEZENTRALEN SYSTEMEN 293 et seq. (Janbernd Oebbecke ed. 2005); Jochen von Bernstorff*, The Structural Limitations of Network Governance*, in TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM 257 (Christian Joerges, Inger-Johanne Sand & Gunther Teubner eds., 2004); Lars Viellechner, *Können Netzwerke die Demokratie ersetzen?*, in NETZWERKE 36 (Sigrid Boysen et al. eds.,) 2007.

[35] In detail: ANDREAS FISCHER-LESCANO*,* GLOBALVERFASSUNG (2005); MICHAEL HARDT & ANTONIO NEGRI, MULTITUDE 286 ET SEQ. (2004). On the role of NGOs at the Conference of Rome on the International Criminal Court and the subsequent negotiations on its rules of procedure and evidence: : NICOLE DEITELHOFF*,* ÜBERZEUGUNG IN DER POLITIK, 238 et seq. (2006); critically: Alexandra Kemmerer*, Like Ancient Beacons: The European Union and the International Criminal Court – Reflections from Afar on a Chapter of European Foreign Policy*, 5 GLJ 1449, 1461 (2004).

[36] See Ferdinand Wollenschläger*, Netzwerk der Angehörigkeiten*, in NETZWERKE 104 (Sigrid Boysen et al. eds.,2007).

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as a dialectical process of respective absorptions and transformations of Union citizenship and national citizenship, then it seems appropriate to speak about "respective interweavings" and even to characterize Union citizenship plainly as a "network good."[37]

The network category is widely used in the law of administrative organization. Here, "cooperations between certain specialized branches of various countries' administrations" can be described as "transnational administrative networks" as they transcend individual assistance in single cases and "form informal, legally non-binding organizational structures."[38] Within the EU's multilevel system of administration, such forms of administrative cooperation[39] have established themselves as "relatively permanent and stable,"[40] *e.g.* the network between the EU Commission and national competition administrations in the framework of the application of EU competition law,[41] the networks of European security architecture,[42] or the European regulation system in the field of telecommunications.[43] Phenomena of institutionalized cooperation are, partly, characterized as network structures,[44] while other authors prefer the category of the "Administrative Association" (*Verwaltungsverbund*), to mirror the association of horizontal and vertical elements.[45] In the framework set by the notion "Administrative Association,"

[37] See Samantha Besson & André Utzinger, *Future Challenges of European Citizenship*, in FUTURE CHALLENGES OF EUROPEAN CITIZENSHIP (Samantha Besson & André Utzinger eds.), 13 ELJ No. 5 (2007), see therein on Union citizenship as "network good": DORA KOSTAKOPOLOU, EUROPEAN UNION CITIZENSHIP: WRITING THE FUTURE.

[38] Christoph Möllers*, Netzwerk als Kategorie des Organisationsrechts*, in NICHT-NORMATIVE STEUERUNG IN DEZENTRALEN SYSTEMEN 290 (Janbernd Oebbecke ed. 2005).

[39] Dieter H. Scheuing*, Europarechtliche Impulse für innovative Ansätze im deutschen Verwaltungsrecht*, in INNOVATION UND FLEXIBILITÄT DES VERWALTUNGSHANDELNS 289 (Wolfgang Hoffmann-Riem & Eberhard Schmidt-Aßmann eds., 1994).

[40] Eckhard Pache*, Verantwortung und Effizienz in der Mehrebenenverwaltung*, 66 VVDSTRL 106, 132 (2007). On the network concept as an analytical tool to describe "fields of legal problems" (*juristische Problemfelder*) Eberhard Schmidt-Aßmann*, Verfassungsprinzipien für den Europäischen Verwaltungsverbund*, in GDVWR, VOL. I, §5, subsection 27. (Wolfgang Hoffmann-Riem, Eberhard Schmidt-Aßmann & Andreas Voßkuhle eds. 2006)

[41] E.g. PETER THYRI, KARTELLRECHTSVOLLZUG IN ÖSTERREICH (2007).

[42] Bettina Schöndorf-Haubold*, Netzwerke in der deutschen und europäischen Sicherheitsarchitektur*, in NETZWERKE 149-171 (Sigrid Boysen et al., eds., 2007).

[43] Karl-Heinz Ladeur & Christoph Möllers, *Der europäische Regulierungsverbund der Telekommunikation im deutschen Verwaltungsrecht*, 110 DVBL. 525 (2005).

[44] *Pache* (n. 40), 132 et. sequ. ; PAUL CRAIG, EU ADMINISTRATIVE LAW, 50,51 (2006). See also Maurizio Bach*, Europa als bürokratische Herrschaft*, in EUROPAWISSENSCHAFT 575 et seq. (Gunnar Folke Schuppert, Ingolf Pernice & Ulrich Haltern eds., 2005); on the concept of cooperation (*Kooperationsbegriff*): Helmuth Schulze-Fielitz*, Grundmodi der Aufgabenwahrnehmung*, in GDVWR VOL. 1, §12, subsections 64 et seq. (Wolfgang Hoffmann-Riem, Eberhard Schmidt-Aßmann & Andreas Voßkuhle eds., 2006).

[45] Thomas Groß*, Verantwortung und Effizienz in der Mehrebenenverwaltung*, 66 VVDSTRL 152, 155 (2007); EBERHARD SCHMIDT-AßMANN & BETTINA SCHÖNDORF-HAUBOLD eds.*,* DER EUROPÄISCHE VERWALTUNGSVERBUND (2005).

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networks can be understood as typical and typed construction elements of the law of administrative organization.[46] Beyond Europeanization, the observer comes across a variety of internationalized administrative relations.[47] She comes across examples of transnational administrative cooperation which can be, in view of their hybrid nature,[48] described as bureaucratic networks – as parts of a multifaceted field of global regulation and administration that is currently often conceptualized as "Global Administrative Law."[49]

For the legal observer, the boundaries between the national and the international, between politics and the law, are blurring. From a political science perspective, however, such phenomena are only rarely still understood and described as networks. For the political scientist, the focus lies on public-private networks, shaped by non-hierarchical relations. Network structures of such a distinctly heterarchical nature are, however, hard to find in the EU's multi-level system.[50]

Yet, wherever such structures can be found, they are described as similar to each other, respectively, on the local level as well as on supranational, transnational or international levels.[51] State actors stand side by side with private actors, new public-private partnerships form network structures.[52] But are problems and challenges truly the same and hence comparable? Can we theorize about private military companies in Iraq or Afghanistan in

[46] Bettina Schöndorf-Haubold*, Netzwerke in der deutschen und europäischen Sicherheitsarchitektur*, in NETZWERKE 149-171 (Sigrid Boysen et al., eds., 2007).

[47] For typological examples, see Eberhard Schmidt-Aßmann*, The Internationalization of Administrative Relations as a Challenge for Administrative Law Scholarship*, 9 GLJ 2061 (2008).

[48] Christoph Möllers*, Transnationale Behördenkooperation*, 65 ZaöRV/HJIL 351, 380 (2005).

[49] Nico Krisch/Benedict Kingsbury*, Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 EJIL 1,2 (2006), on the attribute "global": id., at 5. Critical: Eberhard Schmidt-Aßmann*, The Internationalization of Administrative Relations as a Challenge for Administrative Law Scholarship*, 9 GERMAN LAW JOURNAL 2061, 2064 (2008): "However, the (over)extension into the global sphere shifts the focus too quickly away from the (relatively speaking) more readily comprehensible factual constellations; therewith, certain experiences and potential solutions remain unutilized, although they are certainly already available in the practice-related material of comprehensible, relatively small-scale situations of administrative cooperation, both bilaterally and between adjacent countries". For a comparative methodological approach to administrative law, starting out from the realm of the national, argues also Peer Zumbansen*, Law after the Welfare State or, The Ironic Turn of Reflexive Law*, 55 AJCL (2007). It is, however, to be questioned whether (and, if so, to what extent) principles and experiences developed in (bi-) national contexts could and/or should be translated into transnational constellations. Sceptical, Carol Harlow*, Global Administrative Law*, 17 EJIL 187 (2006).

[50] Tanja A. Börzel*, European Governance*, in EUROPAWISSENSCHAFT, 613, 618 (Gunnar Folke Schuppert, Ingolf Pernice & Ulrich Haltern eds. 2005).

[51] As *Augsberg* notes with pointed scepticism, see *id.,* (n. 4), 482-485.

[52] Winfried Bausback*, Public Private Partnerships im deutschen Öffentlichen Recht und im Europarecht*, 59 DÖV 901 (2006).

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the same conceptual language which has been developed by public lawyers some years ago, to discuss the outsourcing of police and security tasks on the local or regional levels of public administration?[53] We should give it a second thought.[54]

*II. Guidelines: Kosmos and Chaos*

After all, the use and disadvantage of a network concept in public law can hardly be described in a definite way. Scepticism is all around, reluctance is omnipresent.[55] Whilst, on the one hand, legal network talk inspires hopes for a re-assemblage and normative re-configuration of drifting fragments of an ever more differentiating world law, there is, on the other hand, a manifest fear to too easily bid farewell to established legal concepts, a fear of blurring the sharp contours of accountability and political impact.

"Network is not a legal concept!",[56] eminent voices from the neighboring camp of private law theory tell us. However, even they encourage a legal reconstruction of network theories developed in sociological contexts.[57] Through such a legal reconstruction, hybrid social realities could be visualized, thereby enabling the law to respond adequately to their specific risks and challenges, by - on the one hand - normalizing and stabilizing the networks' typical paradoxes and – on the other hand – responding to and dealing with certain consequences of the said paradoxes.[58] Sure, the respective legal discourses in private law and public law are distinctly different,[59] but the network ultimately urges a "dialectical synthesis of both approaches,"[60] being a phenomenon which can probably only be adequately understood through the instructive-subversive lens of "transnational law,"[61]

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[53] An example for numerous contributions: Christoph Gusy, *Polizei und private Sicherheitsdienste im öffentlichen Raum,* VERWALTUNGSARCHIV 344 et seq. (2001).

[54] But see also, Georg Nolte's comment of 25 June 2005, at the Hamburg conference "THE DE-INSTITUTIONALIZATION OF WAR: LEGALITY AND LEGITIMACY OF POLITICAL VIOLENCE AND THE USE OF FORCE"; ALEXANDRA KEMMERER, ES WAR ALLES GANZ LEGITIM, F.A.Z. of 8 July 2005 (Nr. 156), 36.

[55] Illuminating the discussions following the presentations at the *Staatsrechtslehrertagung* 2006, 66 VVDSTRL 81 et seq., 335 et seq., 423 et seq. (2007).

[56] Richard M. Buxbaum, *Is "Network" a Legal Concept?,* 149 JITE 698, 704 (1993).

[57] GUNTHER TEUBNER, NETZWERK ALS VERTRAGSVERBUND, 2004. On the differentiation between (open) network and (closed) system: SEBASTIAN GIEßMANN, NETZE UND NETZWERKE, 21 (2006).

[58] Gunther Teubner, *Coincidentia Oppositorum*, in DIE VERNETZTE WIRTSCHAFT, 11, 24 (Marc Amstutz ed., 2004).

[59] Jörn Lüdemann, *Öffentliches Recht und Rezeptionstheorie*, in NETZWERKE 266 (Sigrid Boysen et al. eds. 2007).

[60] Christoph Möllers, *Transnational Governance without a Public Law?* in TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM, 329, 337 (Christian Joerges, Inger-Johanne Sand & Gunther Teubner eds., 2004).

[61] PHILIP JESSUP, TRANSNATIONAL LAW (1956); on origins and evolution of the concept, see also Peer Zumbansen, *Transnational Law*, in ENCYCLOPEDIA OF COMPARATIVE LAW, 738-754 (Jan Smits ed. 2006).

conceptualized so lucidly by Philip Jessup. Thus, references to questions and answers developed in a private law framework are to be explicitly encouraged – even though the present article examines networks from a public law-perspective.

### C. Interwoven: Between Concept and Metaphor

Other than the non-pictorial and fuzzy governance concept,[62] the network opens access to a rich and multi-faceted reservoir of descriptions and interpretations. The attractiveness of the network metaphor's conceptual reception lies in the ambivalence of underlying images. Its glittering theoretical ambiguity corresponds to a wide variety of real phenomena.

In the net of global differentiation and proliferation of norm systems and jurisdictions, institutions become regimes, rules become regulations, and government becomes governance.[63] Boundaries blur. Accountability is not the lawyer's concern, but compliance.[64] Law is not sought after, but legitimacy.[65] The vague openness of the network metaphor allows for the helpless lawyer to step back behind the differentiated descriptive offers of her discipline by transcending the latter.[66] Where traditional differentiations between public and private, national and international, evolution and steering disappear in the wake of a – supposedly – unprecedented transnationalisation and fragmentation of the law,[67] the paradoxes[68] of the network metaphor mirror processes of transformation of a highly complex world society.

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[62] By now, there are piles of literature. Critical access is provided by Christoph Möllers, *European Governance*, 32 CMLR 313 (2006). On deliberation and the moment of decision, see also CHANTAL MOUFFE, ÜBER DAS POLITISCHE, 138 (2007). For a more constructive approach, see Claudio Franzius, *Governance und Regelungsstrukturen*, 97 VERWARCH 186 (2006).

[63] ANDREAS FISCHER-LESCANO & GUNTHER TEUBNER, REGIME-KOLLISIONEN, 8 (2006).

[64] CHRISTIAN JOERGES & MICHAEL ZÜRN eds., LAW AND GOVERNANCE IN POSTNATIONAL EUROPE (2005).

[65] Hauke Brunkhorst ed., *Demokratie in der Weltgesellschaft, Sonderband* 59 SOZW (2009).

[66] Christoph Möllers, *Netzwerk als Kategorie des Organisationsrechts*, in NICHT-NORMATIVE STEUERUNG IN DEZENTRALEN SYSTEMEN 285, 295 (Janbernd Oebbecke ed. 2005); Gunnar Folke Schuppert, *Verwaltungsorganisation und Verwaltungsorganisationsrecht als Steuerungsfaktoren*, in GRUNDLAGEN DES VERWALTUNGSRECHTS, VOL. 1, §16, n. 155 et seq. (Wolfgang Hoffmann-Riem, Eberhard Schmidt-Aßmann & Andreas Voßkuhle eds. 2006).

[67] On the precendents, see Anne-Charlotte Martineau, *The Rhetoric of Fragmentation: Fear and Faith in International Law*, 22 LJIL 1 (2009).

[68] PAUL RICŒUR, DIE LEBENDIGE METAPHER, 2ND ED. (1991).

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Observers agree that the network metaphor is closely connected to an image of decentralized structures. But how about organizational structures and hierarchies? How about steering, connections and collision? Knots and nodal points? The network metaphor – it is many. Therefore it seems appropriate, prior to any further thought about legal conceptualizations, to examine the network against the backdrop of some metaphorological reflections.

*I. Coming Closer: Before Theory, Behind Theory*

In the beginning, there is a paradox. Ever. Something cannot be expressed in words. And even, if: There remains a feeling of inadequacy, as all concepts are insufficient. "It is the distrust in language that makes the metaphor, simultaneously, indispensable and suspect."[69] As "abridged comparison, referring to extra-lingual similarities"[70] as a form of "saying it differently", based on similarity[71], the metaphor itself is always inadequately defined.[72] Hans Blumenberg developed a positive understanding of the metaphor's ambivalent vagueness: for him, metaphorology seeks „to access the substructure of thinking, to access the underground, the saturated solution where systematic crystallizations can happen", but seeks also to highlight the mind's courage to be, in its images and imaginations, ahead of itself, daring speculation and thereby sketching its history.[73]

Metaphorology is not simply a subsidiary methodical tool of *Begriffsgeschichte*, but refers to "underlying interconnections with *Lebenswelt* (Life World), being the permanent – albeit not always visible – background providing the motivation for and of all theory."[74] In the

[69] HANS BLUMENBERG, THEORIE DER UNBEGRIFFLICHKEIT, 90 (2007) [A.K. transl.].

[70] Anselm Haverkamp*, Einleitung*, in THEORIE DER METAPHER, 2ND, REV. ED., 1, 19 (Anselm Haverkamp ed., 1996), ("*verkürzter Vergleich, der auf aussersprachliche Ähnlichkeit rekurriert*", Transl. into English by A.K.)

[71] Ekkehard Eggs*, Metapher*, in, HISTORISCHES WÖRTERBUCH DER RHETORIK, VOL. 5: L – MUSI, 2001, col. 1099, 1115 (Gert Ueding ed., 2001).

[72] Anselm Haverkamp*, Nach der Metapher*, in THEORIE DER METAPHER, 2ND, REV. ED. 499, 500 (Anselm Haverkamp ed., 1996): "*Es gehört zu den Paradoxien dieses Begriffs schon im Ansatz, daß die Metapher den Begriff ihrer selbst nicht begrifflich, sondern selbst nur metaphorisch fassen kann.*" See also ibid,. col. 1099 et seq.

[73] HANS BLUMENBERG, PARADIGMEN ZU EINER METAPHOROLOGIE, 2ND ED. 13 (1999): [Metaphorologie sucht] *"an die Substruktur des Denkens heranzukommen, an den Untergrund, die Nährlösung der systematischen Kristallisationen, aber sie will auch fassbar machen, mit welchem ‚Mut' sich der Geist in seinen Bildern selbst voraus ist und wie sich im Mut zur Vermutung seine Geschichte entwirft*" (Translation into English by A.K.).

[74] Hans Blumenberg, *Ausblick auf eine Theorie der Unbegrifflichkeit, in Schiffbruch mit Zuschauer*, 75 (HANS BLUMENBERG ED. 1979) (Translation A.K.). On the Re-metaphorisation of concepts that have already crystallized, see PHILIPP STOELLGER, METAPHER UND LEBENSWELT, V, 165 (2000).

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context of a defined scientific theory, the metaphor becomes a concept.[75] And yet, both are "metaphorical in the precise sense that they shape our understanding of things through the combination of contexts (…). Hence, also concepts must be understood as *metaphors of experience,* not as images of the real."[76] The translatory achievement, literally inscribed into the metaphor (Greek: μεταφορά, Latin: metaphora, translatio), is, as a contextually bound process of communication, always reactive and reflexive.[77] The way from metaphor to concept is not a one-way-road, but metaphorology keeps the door permanently open leading towards an imaginatory reservoir behind words, to a world before and behind theory.

Even before a decision has been made regarding the public-law character of the network concept, it can be stated that the said concept is, as all key concepts of modern *Staatslehre* (Law of the State), a secularized theological concept,[78] glittering and multi-faceted already in its biblical connotations.[79]

*II. Looking Through: Translating Images*

At the outset, a methodological note seems appropriate: The following paragraph describes and interprets images that have been provided, directly or indirectly, and used by legal scholars themselves to visualize the network concept. Sometimes the visualization is a direct and straightforward one, sometimes it is forced upon the reader with subtle pressure. The latter, for example, when international lawyers describe the relation between particular regimes and the universal order of international law as relation between "planets and the universe."[80]

The pictures which are under consideration here visualize dynamic processes of theory-building. Centers of gravity and perspectives are constantly changing, and could be seen in their full dynamic only by way of a simultaneous perception of text and image. Such a simultaneous perception of image and language, of metaphor and interpretation, of

[75] Christoph Möllers*, Netzwerk als Kategorie des Organisationsrechts*, in NICHT-NORMATIVE STEUERUNG IN DEZENTRALEN SYSTEMEN 285, 287 (Janbernd Oebbecke ed. 2005).

[76] SUSANNE LÜDEMANN, METAPHERN DER GESELLSCHAFT, 36 (A.K. trans. 2004) (emphasis in the original); see also FRANÇOIS OST & MICHEL VAN DE KERCHOVE, DE LA PYRAMIDE AU RESEAU, 21 (2002); BRUNO LATOUR, REASSEMBLING THE SOCIAL 131 (2005).

[77] GEORGE STEINER, AFTER BABEL. ASPECTS OF LANGUAGE AND TRANSLATION. THIRD EDITION, (1998).

[78] CARL SCHMITT, POLITISCHE THEOLOGIE, 1922 7TH ED., 43 (1996).

[79] SEBASTIAN GIEßMANN, NETZE UND NETZWERKE, 10 (2006).

[80] Bruno Simma & Dirk Pulkowski*, On Planets and the Universe: Self-contained Regimes in International Law*, 17 EJIL 483 (2006).

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concept and comment would allow for the observer's participation in the dynamic processes of legal conceptualizations of the network metaphor.

Sometimes, when dealing with very small or very large network structures, it needs a bit of an effort to reach the bottom of the metaphorical. Sure, networks can always be reduced to their elementary forms: the spider's web and the fisherman's net.[81] But one should not fall prey to the surface of simplicity. One should cast a cold eye on the kaleidoscope of blurring images and get the metaphorical chaos straight. Is the spider's web a web at all? "After all, nets are not woven, they are knit. There is no up and down of threads, but a structure of knots. As long as we are no spiders, the techniques of weaving and knitting differ fundamentally."[82] But for now, at first glance, an imprecise observation may be granted. We will get back to the knots and nodes, anyway. According to the virtual encyclopedia "Wikipedia", knots and nodes are indispensable when it comes to the visualization of abstract network systems."[83] Knots, however, can appear in many a *gestalt*, only think of such eccentric examples as M.C. Escher's autistic "Knot"of 1965, entirely unsuited for any kind of networking. Moreover, two-dimensional mathematical models should not make us forget that networks can not only be imagined and constructed as hierarchical structures. Think of Deleuze's and Guatteri's classical rhizome,[84] but also, for an example from political economy, of Saskia Sassen's "Hierarchies of Dominance Among World Cities."[85]

In Anne-Marie Slaughter's manifesto of a networked world order, we encounter pictorial imginations of the network structures described by the author twice. Firstly, there is the sculpture "Atlas" by Lee Lawrie (1937*),* placed on Rockefeller Plaza in New York.[86] The globe carried and held by a muscular Atlas – here we see the world as imagined by Anne-Marie Slaughter. Only that her networked universe is not a spherical model, but a more and more dense net of networks:[87] "A disaggregated world order would be a world latticed

[81] SEBASTIAN GIEßMANN, NETZE UND NETZWERKE, 18 (2006).

[82] Id., 80 (A.K. trans).

[83] www.wikipedia.de, Stichwort "Netzwerk" (last accessed 1 March 2009). On the potentially endless network structure of the pythagorean *tetraktýs* and its symbolic meaning, see UMBERTO ECO, DIE GESCHICHTE DER SCHÖNHEIT, 64-65 (2004).

[84] GILLES DELEUZE & FÉLIX GUATTARI, A THOUSAND PLATEAUS. CAPITALISM AND SCHIZOPHRENIA (1987).

[85] David Smith & Michael Timberlake, *Hierarchies of Dominance among World Cities: A Network Approach,* in GLOBAL NETWORKS, LINKED CITIES 117, 126-129 (Saskia Sassen Hrsg., 2002). See the image in Alexandra Kemmerer, *Der normative Knoten. Über Recht und Politik im Netz der Netzwerke*, in NETZWERKE, 195 (Sigrid Boysen et al. eds., 2007) at 209.

[86] ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER, 7 (2004). Reprinted in Alexandra Kemmerer, *Der normative Knoten. Über Recht und Politik im Netz der Netzwerke*, in NETZWERKE, 195 (Sigrid Boysen et al. eds., 2007) at 210.

[87] ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER, 6 (2004).

by countless government networks. These would include horizontal networks and vertical networks; networks for collecting and sharing information of all kinds, for policy coordination, for enforcement cooperation, for technical assistance and training, perhaps ultimately for rule making. They would be bilateral, plurilateral, regional, or global. Taken together, they would provide the skeleton or infrastructure for global governance."[88] Such an infrastructure is also shown on the cover and flyleaf of Slaughter's book.[89] Here, however, the orbits are interwoven and connected in a more randomly, less structured form as in the spherical model we find on the shoulders of the Rockefeller Atlas. Quite remarkable is that there are no knots in Slaugher's network images. Orbits and circular paths touch each other and they overlap; they are interlaced and interwoven, but not firmly knotted. And, most importantly, at least on her book's cover and flyleaf, Slaughter's networked *kosmos* is not the only world: Behind the circular paths, there is a broken, fragmented globe.[90] For the international lawyer, that globe reminds not only of the current debates on the "fragmentation of international law," but also of Arnaldo Pomodoro's sculpture "sfera con sfera" at the UN headquarters in New York.[91] Long before commissions of jurists and law journals began to struggle with phenomena of disaggregation and fragmentation,[92] the artist here imagined a fragmented globe. Pomodoro's globe allows us a glimpse behind its breaking shell, making visible a host of new cracks and breaks. But models of cosmological order remain at sight.

Only remember Simma's and Pulkowski's cosmological talk about "planets and the universe."[93] It reminds us of an astronomic instrument to measure stellar coordinates and depict the movements of planets and stars in the universe – an instrument that has become somewhat outdated after the invention of the telescope: the armillarsphere depicted in Diderot's and D'Alemberts 1751 Encyclopédie (if you do not have a copy on your desk, just remember Umberto Eco's historical whodunnit "The name of the rose," and the 1986 Jean-Jacques Annaud film based on it - and think of the impressive mechanical instrument the mysterious murder uses to kill the herbalist…).[94] The armillarsphere represents the geocentric system. Hence, the intended outside observer finds herself

[88] ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER, 15-16 (2004).

[89] Reprinted in Alexandra Kemmerer, *Der normative Knoten. Über Recht und Politik im Netz der Netzwerke*, in NETZWERKE, 195 (Sigrid Boysen et al. eds., 2007) at 211.

[90] On "globe vs. network", see now SUSANNE VON FALKENHAUSEN, KUGELBAUVISIONEN, 161-177 (2008).

[91] Reprinted in Alexandra Kemmerer, *Der normative Knoten. Über Recht und Politik im Netz der Netzwerke*, in NETZWERKE, 195 (Sigrid Boysen et al. eds., 2007) at 212.

[92] See the references in footnote 21.

[93] Bruno Simma & Dirk Pulkowski*, On Planets and the Universe*, 17 EJIL 483 (2006).

[94] To be seen also in Alexandra Kemmerer, *Der normative Knoten. Über Recht und Politik im Netz der Netzwerke*, in NETZWERKE, 195 (Sigrid Boysen et al. eds., 2007) at 213.

simultaneously at the center of the globe, precisely as the lawyer whose perspective always connects internal and external observations, "inside" and "outside" of the law (*Innen- und Außenansichten des Rechts*).[95] At least, as long as the lawyer does not confine himself to a "cultural" perspective.[96] We should, however, not easily do away with such a cultural perspective either. It allows us a glimpse into an early modern world of global networks whose nodes were the sites of observation and calculation, where the projection of good political order into the skies was a central tool to create and uphold legitimacy:[97] "A culture projects into the skies its model of social perfection. Councils, courts, diets and assemblies are supposed, somehow, to bring something of this celestial structure down to earth."[98]

A political order that mirrors itself in images of political iconology, that creates and reflects, simultaneously, such images, reminds of a picture, a painting which is in its turn a model – or, more precisely, the model of a model: Giovanni Battista Tiepolo's draft sketch for the ceiling paintings over the staircase in the Würzburg Residenz (1752), "Allegory of the Planets and Continents", today on display in the New York Metropolitan Museum of Art.[99] Yet, how does Tiepolo relate to our network explorations? To find out, it might be worthwile to switch from a global perspective to a position firmly based on the rocks of franconian localism. Already in his draft, Tiepolo shows an acute awareness of site and function of the projected ceiling fresco. The Würzburg Residenz, as the great Italian artist obviously knew very well, was not only an expression of a prince bishop's passion for grandeur, pomp and circumstance, but a monument representing the idea of the Holy Roman Empire that was held in such high esteem by the princely House of Schönborn, the most powerful family in the German provincial nobility of the eighteenth century's second half, influential leaders and representatives of the *Germania Sacra* and the Empire's

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[95] Peer Zumbansen*, International Law as Glass Palace: Towards a Methodology of Legal Concepts in World Society*, in "LAW AFTER LUHMANN": CRITICAL REFLECTIONS ON NIKLAS LUHMANN'S CONTRIBUTION TO LEGAL DOCTRINE AND THEORY (Oren Perez ed., forthcoming).

[96] PAUL KAHN, THE CULTURAL STUDY OF LAW (1999); ULRICH HALTERN, EUROPARECHT UND DAS POLITISCHE, 10-25 (2005). However, the "double perspective" (*Doppelperspektive*) acquired in the process of a long and rather generalistic formation encompassing praxis and theory is the precious dowry the German lawyer brings into the field of an emerging transnational public law, see Martti Koskenniemi*, Georg Friedrich von Martens (1756 – 1821) and the Origins of Modern International Law*, 2 IILJ Working Paper 1 (2006).

[97] Simon Schaffer*, Sky, Heaven and the Seat of Power*, in MAKING THINGS PUBLIC, 120-125 (Bruno Latour & Peter Weibel eds., 2005). The transformation of a "natural metaphor" into a "concept of the philosophy of history" describes also Reinhard Koselleck*, Revolution als Begriff und Metapher*, in BEGRIFFSGESCHICHTEN, S. 240-251 (Reinhard Koselleck ed., 2006); and see HANNAH ARENDT, ON REVOLUTION, 34-40 (1963).

[98] Simon Schaffer*, Sky, Heaven and the Seat of Power*, in MAKING THINGS PUBLIC, 120 (Bruno Latour & Peter Weibel eds., 2005).

[99] Reproduced in Alexandra Kemmerer, *Der normative Knoten. Über Recht und Politik im Netz der Netzwerke*, in NETZWERKE, 195 (Sigrid Boysen et al. eds., 2007) at 214.

Catholic nobility.[100] The Würzburg Residenz is, in short, early modern constitutional theory turned into stone, stucco and frescoes.[101] The Holy Roman Empire of the German Nation which it propagates with such masterful emphasis is nowadays again an often cited point of reference in European constitutional discourse, whenever we talk about the heterarchical constitutional plurality of the European multilevel system with its interweavings, interrelations, overlaps and moments of constitutional imbalance and tolerance. The Holy Roman Empire, *monstro simile* as Samuel Pufendorf once put it so pointedly, is here again, even if only as a supposedly familiar *lieu de mémoire* on new transnational sites of constitutionalism, challenging classical constitutional theory.[102] Tiepolo's sketch is also a *lieu de mémoire*, supporting the artist's imagination in the subsequent difficult process of fresco painting. Over the grandiose staircase designed by the German architect Balthasar Neuman, Tiepolo painted a vast ceiling showing Apollo[103] and the continents. In this fresco, the ceiling opens onto a light-filled sky inhabited by the Olympian gods, while around the periphery are shown picturesque vignettes symbolizing the four (then known) continents, with figures shown as though standing on the cornice. Standing in the great Würzburg staircase, we see realized what Tiepolo imagined in his 1752 sketch now on display in the Met.

And yet, there is an important difference. When realizing his painting *in situ*, Tiepolo employed multiple viewpoints, determined by the ceremonial progress of visitors climbing the stairs for an audience with the prince-bishop, thus showing his acute awareness of site and function.[104] Of the political site, one may add, as well as of the architectural site. In Balthasar Neumann's audacious construction of the entrance staircase, the immense ceiling of 7287 square feet (677 $m^2$) cannot be seen in its entirety from one single point of observation. The viewer has to cross the room and change his perspective – and Tiepolo responded in his painting to these outside requirements. He masterfully adjusted his sketch to the particularities of site and function. The viewer's eye follows, other than in the

[100] PETER STEPHAN, "IM GLANZ DER MAJESTÄT DES REICHES". TIEPOLO UND DIE WÜRZBURGER RESIDENZ, TEXTBAND, 332 (2002).

[101] PETER STEPHAN, "IM GLANZ DER MAJESTÄT DES REICHES". TIEPOLO UND DIE WÜRZBURGER RESIDENZ, TEXTBAND (2002). Many thanks to Fabian Steinhauer for guiding me to that excellent book about the Schönborn's *Reichsidee* and the political iconology of the 18th century. See also: MICHAEL STOLLEIS, GESCHICHTE DES ÖFFENTLICHEN RECHTS IN DEUTSCHLAND, VOL. 1: REICHSPUBLIZISTIK UND POLICEYWISSENSCHAFT 1600-1800, 248-250, 298-320 (1988); NOTKER HAMMERSTEIN, JUS UND HISTORIE (1972); NOTKER HAMMERSTEIN, AUFKLÄRUNG UND KATHOLISCHES REICH (1977).

[102] Nico Krisch, *Europe's Constitutional Monstrosity*, 25 OJLS 321 (2005); Stefan Griller, *Die Europäische Union: Ein staatsrechtliches Monstrum?*, in EUROPAWISSENSCHAFT, 201 (Gunnar Folke Schuppert, Ingolf Pernice & Ulrich Haltern eds., 2005).

[103] As a metaphor, the depiction of Apollo alludes to the emperor as head of the *Sacrum Imperium Romanum*, see extensively PETER STEPHAN, "IM GLANZ DER MAJESTÄT DES REICHES". TIEPOLO UND DIE WÜRZBURGER RESIDENZ, TEXTBAND, 171-203 (2002).

[104] See the picture in Alexandra Kemmerer, *Der normative Knoten. Über Recht und Politik im Netz der Netzwerke*, in NETZWERKE, 195 (Sigrid Boysen et al. eds., 2007) at 216.

sketch, not structures of artistic composition that are "internal" to the painting, but it follows the route prescribed by the stairs, influenced by "external" factors.[105] Tiepolo's portrait of the Würzburg prince-bishop brings together the universal and the particular; in his fresco, the entire world of heaven and earth has found its territorial focal point at the center of a princely residence in the south of Germany. The horizontal dimension meets the vertical.[106] Today's observer may feel tempted to yet another interpretation: Where the image of our world has become confusing in its complexity, even "flat," [107] we can get a grip on the whole probably only in a process of constantly changing perspectives.

Precisely that conclusion drew François Ost and Michel van de Kerchove. Their studies towards a legal theory of the networked world (*un monde en reseau*) opens with a picture: M.C. Eschers lithography "Relativité" (1953).[108] Eschers chaotic picture, disturbingly irritating at first glance, is introduced to the reader as a counterpoint to the classical frontispiece in the first edition of Hobbes' "Leviathan". Hobbes' frontispiece depicts, with its allegorical personification of a sovereign formed by many bodies, "a pyramidal universe of order and hierarchy."[109] At first glance, in Escher's picture everything seems to fall apart, to dissolve straight into chaos: there is no up and down, neither top nor bottom; doors and windows open to various directions, stairs lead into all directions, men are moving without any recognizable direction. Yet, on a second glance, "three worlds" become visible, "each of them entirely logical in its own respective perspective, but absurd in their combination. "Within these "three worlds," which Ost and van de Kerchove describe as "three co-existing pyramides," each world is itself structured hierarchically, and has a meaning in itself. At second glance, even each human figure in the picture displays a stringent logic. The secret is very simple: "Escher uses here simultaneously three vanishing points, thereby bringing together three different worlds in one picture." The result seems only illogical as long as one tries to understand the picture as one single world, as an "absolute" world of monologic and pyramidal order. "As soon as one takes a pluralist and relativist perspective, each of the worlds regains its inherent logic. "There needs a world to be constructed, Ost and van de Kerchove emphasize, where the Escherian phenomena can exist: "Worlds where political sovereignty is relative, where citizenship is shared, where rationalities are multiple, values plural…a networked world. Our world?"[110] Not the only possible solution,

[105] PETER STEPHAN, "IM GLANZ DER MAJESTÄT DES REICHES". TIEPOLO UND DIE WÜRZBURGER RESIDENZ, TEXTBAND, 159 (2002).

[106] PETER STEPHAN, "IM GLANZ DER MAJESTÄT DES REICHES". TIEPOLO UND DIE WÜRZBURGER RESIDENZ, TEXTBAND, 161 (2002).

[107] THOMAS L. FRIEDMAN, THE WORLD IS FLAT (2006).

[108] FRANÇOIS OST & MICHEL VAN DE KERCHOVE, DE LA PYRAMIDE AU RESEAU, 6 (2002). Also in Alexandra Kemmerer, *Der normative Knoten. Über Recht und Politik im Netz der Netzwerke*, in NETZWERKE, 195 (Sigrid Boysen et al. eds., 2007) at 217.

[109] FRANÇOIS OST & MICHEL VAN DE KERCHOVE, DE LA PYRAMIDE AU RESEAU, 7 (2002); the paragraphs quoted here and below are translated by the author.

[110] *Id.* 8.

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it seems, at least not for Ost and van de Kerchove. With their dialectical theory of law, they try to establish, in a synchronic movement of changing perspectives and oscillation, a balance between the floating horizontal world of networks and the particular, spatially fixed worlds of the pyramids.

## D. The Normative Knot

On our *tour d'horizon* across the pictorial worlds of the network, we have reached a nodal point. The point and very place of the knot that determines perspectives. Here, perspectives can be determined, directions chosen, actions steered. To speak conceptually of the "normative knot" is an attempt to conceptualize that very nodal point which forms part of the network metaphor in and for a legal context – and to conceptualize it as a legal concept. To speak the truth, this article can, at most, provide some loose connections in that regard, and possible starting points for future research programs. With its focus on metaphorological observations, the article aims at laying the ground for further empirical explorations and theoretical endeavors.

### *I. Law and Politics*

Networks, as such, constantly challenge the law of institutions and organizations.[111] They are, however, not suited to be comprehensively transformed into legal structures and instruments. After all, it is precisely the deformalized flexibility so often deplored by steadfast institutionalists that makes networks so attractive as governance phenomena.[112] After the loss of the central perspective,[113] knots and nodal points allow for the possibility of a normative and multi-perspective approach to legal construction. It should be kept in mind that indeed, for the masterminds and propagandists of a constitutionalization of international law[114] the alternative to a unified, hierarchically structured legal order is not an unlimited primacy of politics or the devaluation of law by its transformation into a "vernacular of political judgement."[115] Beyond a comprehensive framework of legal

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

[112] STEPHEN GOLDSMITH & WILLIAM D. EGGERS, GOVERNING BY NETWORK, 123 (2004).

[113] KARL-HEINZ LADEUR, DAS UMWELTRECHT DER WISSENSGESELLSCHAFT, 134 (1995).

[114] Stefan Kadelbach & Thomas Kleinlein, *International Law - A Constitution for Mankind? An Attempt at a Re-appraisal with an Analysis of Constitutional Principles*, 50 GYIL 303 (2007); Erika de Wet*, The International Constitutional Order*, 55 ICLQ 51 (2006).

[115] DAVID KENNEDY, OF LAW AND WAR, 46 (2006).

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structures, there is still much room and reason to trust in "the law's formative power."[116] Even Anne-Marie Slaughter, who could reasonably be blamed for subordinating the law to postmodern political networks,[117] now calls for a transmigration from pure description to a normative conceptualization of network phenomena.[118]

Such normativity can come in small change, as evolution of law through respective irritations, through observation and reflexive moves of autonomous partial legal orders. It can be established in the form of decentralized resolution of conflicts of norms – and such decentralized handling of regime collisions may then become a legal method in its own right.[119] In the process, we can build upon a Kelsenian tradition of radical critique, laying bare all ideologies and political motives behind the law. A Kelsenian approach that constantly re-determines the spaces and places of law and politics, securing the law's autonomy by making visible the political drives of positive law and thereby pointing to the powers that be.[120] The delimitations between cooperation and hierarchy, having become almost invisible behind the fuzzy veil of the network metaphor, can again be made visible. Transparency and accountability[121] can be not only invoked, but realized. Spheres of deliberation and decision can be opened which the network's autopoietic and evolutionary powers neither could nor should fill.[122]

*II. Acting and Observing*

Knots are, metaphorically, not actors. But they can be more as standpoints of reflexive self-reflection: they can be connecting points of intended action and accountability, intersections of decision-making. Knots are sites of action, where conscious and self-reflexive subjects govern the activities within the net and decide determinately about the

[116] EBERHARD SCHMIDT-AßMANN, DAS ALLGEMEINE VERWALTUNGSRECHT ALS ORDNUNGSIDEE, 2ND ED., 325 (2006); Schmidt-Aßmann, however, highlights the law's function as an "ordering force".

[117] ANDREAS FISCHER-LESCANO & GUNTHER TEUBNER, REGIME-KOLLISIONEN, 20 (2006).

[118] Anne-Marie Slaughter & David Zaring, *Networking Goes International: An Update*, 2 ANNU. REV. LAW SOC. SCI. 211, 226 (2006).

[119] ANDREAS FISCHER-LESCANO & GUNTHER TEUBNER, REGIME-KOLLISIONEN, 62 (2006).

[120] HANS KELSEN, REINE RECHTSLEHRE, 2ND ED. (1960). At first glance, one might argue that Kelsen develops a concept of weak, subject-less normativity, see Alexander Somek, *Ermächtigung und Verpflichtung*, in HANS KELSEN, 58 (64 et sequ.) (Stanley L. Paulson & Michael Stolleis, eds., 2005). However, it is precisely his formalism which opens space for political action, vgl. JOCHEN VON BERNSTORFF, DER GLAUBE AN DAS UNIVERSALE RECHT. DIE VÖLKERRECHTSTHEORIE HANS KELSENS UND SEINER SCHÜLER (2001, now forthcoming in English with CUP, Cambridge 2009).

[121] EBERHARD SCHMIDT-AßMANN, DAS ALLGEMEINE VERWALTUNGSRECHT ALS ORDNUNGSIDEE, 2ND ED., 399-402 (2006).

[122] LAWRENCE LESSIG, CODE 2.0, 338-339 (2006).

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direction all inter-nodal communication takes.[123] Such an understanding, however, runs counter the network metaphor's often stated "claim to de-subjectivication," and it also encompasses hierarchically structured processes.[124] Yet, as the network pictures presented in this article show clearly, the inclusive openness of the category in the context of its reception into legal scholarship also entails such an actor-centred interpretation.

In the space of communication that the network is, it needs a "connector" linking actors of various levels and spheres, and to interact with them, respectively.[125] An actor, however, is never all alone, but connected to and woven into a professional discursive context. This holds true, in particular, for the judge at the center of today's plurality of courts and concurring jurisdictions.[126] Neither is he, as in models of strict hierarchical order, part of a fixed structure, nor does he decide in complete situational flexibility, only guided by collision norms

At the nodal point, principles of action and questions of accountability can be shaped and decided by law.[127] Here is the starting point for a "normative re-calibration"[128] of the network, doing justice to the "particularities of the law."[129] Yet, it is to be doubted that the complexity of the network can be "resolved" by new measures for the exercise of public authority.[130] Indeed, regarding decisions about forms and measures of action, each formal consolidation contradicts the flexible character of the network.

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[123] An actor-centred perspective in that sense develops BRUNO LATOUR, REASSEMBLING THE SOCIAL (2005). See also MIREILLE DELMAS-MARTY, LE PLURALISME ORDONNÉ, 281 (2006). For a supposedly outdated "steering" perspective, see *Claudio Franzius, Modalitäten und Wirkungsfaktoren der Steuerung durch Recht*, in GDVWR, BAND 1, §4 (Wolfgang Hoffmann-Riem, Eberhard Schmidt-Aßmann & Andreas Voßkuhle eds., 2006). On "nodal governance": Peter Drahos*, Intellectual Property and Pharmaceutical Markets*, 77 TLR 401 (2004).

[124] Christoph Möllers*, Netzwerk als Kategorie des Organisationsrechts*, in NICHT-NORMATIVE STEUERUNG IN DEZENTRALEN SYSTEMEN 285, 287.

[125] STEPHEN GOLDSMITH & WILLIAM D. EGGERS, GOVERNING BY NETWORK, 157-159 (2004).

[126] Stefan Oeter, *Rechtsprechungskonkurrenz zwischen nationalen Verfassungsgerichten, Europäischem Gerichtshof und Europäischem Gerichtshof für Menschenrechte*, 66 VVDSTRL 361, 386 (2007); Rosalyn Higgins*, A Babel of Judicial Voices?*, 55 ICLQ 791, 804 (2006). On the professional habitus of the European lawyer interpreting supranational constitutional law, see Philipp Dann*, Überlegungen zu einer Methodik des europäischen Verfassungsrechts*, in DIE EUROPÄISCHE VERFASSUNG – VERFASSUNGEN IN EUROPA, 161 (185) (Yvonne Becker u.a. eds., 2005).

[127] Eckhard Pache*, Verantwortung und Effizienz in der Mehrebenenverwaltung*, 66 VVDSTRL 106 (2007).

[128] That expression is inspired by Daniel Halberstam*, The Bride of Messina*, 30 ELR 775 (2005).

[129] ANDREAS FISCHER-LESCANO & GUNTHER TEUBNER, REGIME-KOLLISIONEN, 23 (2006).

[130] Matthias Goldmann*, Neue Handlungsformen zur Strukturierung transnationaler Netzwerke*, in NETZWERKE 225 (Boysen et al. eds., 2007).

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*III. Asking Questions, Translating Concepts*

Public law scholars, being a distinct sub-community within the legal discipline, do not need to invent the normative knot. Taking a legal grip on network constellations, we ought to translate traditional principles for the exercise of public authority and accountability norms[131] in the context of an emerging translevel "Common Constitutional Law" (*Gemeinverfassungsrecht*).[132] Thereby real as well as semantic contexts need to be respected.[133] The approach can, as Philipp Dann has shown so strikingly for the key notion of "accountability," be a circular one, problematizing the concept from its task and function before approaching it in various exemplary constellations and finally setting out to a substantial concretion.[134] In the Community of Law (*Rechtsgemeinschaft)* of what is today the EU, principles of executive action were and still are often implanted from any or all Member States and then further developed.[135] Also here one needs to ask for criteria of an adequate translation from national constellations into a supranational setting.

**E. Dialectic and Synthesis: *complexio* or *coincidentia oppositorum*?**

Whenever we examine the relation between law and politics, description and normativity, we also ask for the relation between horizontal and vertical structures, of hierarchy and heterarchy, of pyramid and network. Whether we opt for a dialectical or synthetic

[131] Neil Walker*, Postnational Constitutionalism and the Problem of Translation*, in CONSTITUTIONALISM BEYOND THE STATE 27, 35-37 (Joseph H. H. Weiler & Marlene Wind eds., 2004). See also FRANÇOIS OST & MICHEL VAN DE KERCHOVE, DE LA PYRAMIDE AU RESEAU 539-540 (2002).

[132] CHRISTOPH MÖLLERS, GEWALTENGLIEDERUNG, 425-426 (2005).

[133] MARÍA CALZADA PÉREZ, TRANSITIVITY IN TRANSLATING (2007); UMBERTO ECO, DIRE QUASI LA STESSA COSA. ESPERIENZE DI TRADUZIONE (2003); GEORGE STEINER, AFTER BABEL. ASPECTS OF LANGUAGE AND TRANSLATION. THIRD EDITION, (1998).

[134] Philipp Dann*, Accountability in Development Aid Law*, 44 AVR 381 (2006). On the reconstruction of a public law concept of accountability in the European multi-level system: Eckhard Pache*, Verantwortung und Effizienz in der Mehrebenenverwaltung*, 66 VVDStRL 106, 112-114 (2007); Carol Harlow & Richard Rawlings*, Accountability and law enforcement: the centralized EU infringement procedure*, 31 ELR 447 (2006).

[135] Dieter H. Scheuing*, Rechtsstaatlichkeit*, in EUROPARECHT. HANDBUCH FÜR DIE DEUTSCHE RECHTSPRAXIS, 138 et sequ., in particular paras. 25 et seq. (Reiner Schulze & Manfred Zuleeg eds., 2006); see also the contributions in GEMEINSCHAFTSGERICHTSBARKEIT UND RECHTSSTAATLICHKEIT (Peter-Christian Müller-Graff & Dieter H. Scheuing, eds.), EUROPARECHT 43 (2008), Beiheft 3. On the development of fundamental rights guarantees within the European Union builds the idea of "constitutional absorption" as outlined in Daniel Halberstam & Eric Stein, *The United Nations, The European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order*, 46 CMLR (2009), 13: "constitutional absorption of fundamental rights is the incorporation of fundamental rights principles from Member systems as well as international law into the constitutional law of the UN. The application of fundamental rights principles via constitutional absorption may lead to the distinctive development of these principles in the UN context." (at 24).

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(dis)solution of the interrelation, whether we characterize it as *complexio*[136] or *coincidentia oppositorum,*[137] strongly determines the possibilities and limits of public law-connections to the network concept. There is an immense temptation to strive for a comprehensive hierarchization of heterarchical network structures, and not only in the field of judicial networks. Lawyers like clear situations,[138] and do so for good reason. However, there is often a better reason to be skeptical. There are good reasons to refuse the empathic postulate for a dissolution of all contradictions in the process of a harmonizing synthesis,[139] and there are good reasons to meet the euphoria for a new autonomy of horizontal system structures[140] with skeptical reluctance. Our world is a world of pyramid and network, and will remain so for some time to come. The contradictions between heterarchies and hierarchies are hence to be negotiated and balanced dialectically, in a permanent process of changing perspectives and oscillations, continuously seeking a balance between the universality of the horizontal world of the networks and the particular, spatially fixed worlds of the pyramids.[141] A transparent process of rational deliberation could allow for compromises that could successfully de-escalate collisions.[142]

The dialectics between pyramid and network[143] can open spaces for a dialogue which legal scholarship has to maintain as retrospective and prospective, simultaneously. These are

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[136] Carl Schmitt applied the concept of *complexio oppositorum* (complex of opposites) to the Catholic Church: "*Es scheint keinen Gegensatz zu geben, den sie nicht umfaßt*": CARL SCHMITT, RÖMISCHER KATHOLIZISMUS UND POLITISCHE FORM (TEXT DER MÜNCHNER AUSGABE VON 1925), 2ND. ED., 11-12 (2002).

[137] The notion of *coincidentia oppositorum* (coincidence of opposites), coined by Nicolaus Cusanus and describing the mutual neutralization of opposites, was introduced into the network discourse by Gunther Teubner: Gunther Teubner, *Coincidentia Oppositorum*, in DIE VERNETZTE WIRTSCHAFT, 11, 25-29 (Marc Amstutz ed., 2004).

[138] Franz Merli, *Rechtsprechungskonkurrenz zwischen nationalen Verfassungsgerichten, Europäischem Gerichtshof und Europäischem Gerichtshof für Menschenrechte*, 66 VVDSTRL 392 (2007); See also Dieter H. Scheuing, *Justice constitutionelle, justice ordinaire, justice supranationale – à qui revient la protection des droits fondamentaux en Europe?*, in EUROPÄISCHES ÖFFENTLICHES RECHT. AUSGEWÄHLTE BEITRÄGE VON DIETER H. SCHEUING 88-116 (Peter-Christian Müller-Graff & Christoph Ritzer eds., 2006).

[139] MIREILLE DELMAS-MARTY, LE RELATIF ET L'UNIVERSEL 14-18, 412-413 (2004).

[140] Claudio Franzius, *Horizontalisierung als Governance-Struktur*, in GOVERNANCE ALS PROZESS (Sebastian Botzem ed., forthcoming).

[141] FRANÇOIS OST & MICHEL VAN DE KERCHOVE, DE LA PYRAMIDE AU RESEAU, 526 (2002). Such a discursive model, regarding international constitutional principles, is also to be found in Stefan Kadelbach & Thomas Kleinlein, *International Law - A Constitution for Mankind? An Attempt at a Re-appraisal with an Analysis of Constitutional Principles*, 50 GYIL 303 (2007). See also Daniel Halberstam & Eric Stein, *The United Nations, The European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order*, 46 CMLR 13 (2009).

[142] FRANÇOIS OST & MICHEL VAN DE KERCHOVE, DE LA PYRAMIDE AU RESEAU, 527 (2002). But see also: Möllers, *Transnationale Behördenkooperation*, 65 ZAÖRV/HJIL 351, 382 (2005).

[143] On the dialectics between globe and network, see SUSANNE VON FALKENHAUSEN, KUGELBAUVISIONEN, 161-177 (2008).

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spaces of communication and intellectual exchange for the two so markedly typed legal actors that Philip Jessup introduced to us (and to each other) in his Storrs Lectures as "Mr. Orthodox" und "Mr. Iconoclast."[144] It is only through the dialectics of opposing, even contradictory worlds that the observer is enabled to resist the de-differentiating pull of the network and to set out on a precise analysis and delimitation of boundaries and connections.

**F. Connections**

The distances between the knots get smaller. The texture of the text slowly starts to fray. Given the substance of the matter, however, no real conclusion can be provided to the reader. Too great is the danger to rudely cut off delicate connections, to constrict meanings. Is the author to blame? Honestly: she did her best to avoid inadequate de-differentiations. Is it her fault that networks are, simultaneously, real as nature, collective as society - and yet literal as discursive narratives are? [145] The kaleidoscopic plurality of image and concept of the network mirrors the complexity of a fragmented world, a world of difference and interrelation, of complementarities and structural couplings. The kaleidoscope of the networked world allows for new perspectives and insights, and yet remains a challenge and a risk.

Still, a reconstruction of reliable structures of accountability is urgently needed.[146] The vagueness of the network concept does not liberate legal scholarship from the necessity of a differentiation between regulation and evolution. *Au contraire*: network discourse gives the normative and legitimatory dilemmata of our (post-) modern world society a sharper edge.[147] Therefore, we need to look closely. And our diligent observation and analysis of the plurality of the network metaphor is indispensable to sharpen our eye for an exact delimitation of the chances and risks of a legal conceptualization of the network. As we have seen, transdisciplinary translations of network concepts into the language of law carry the yoke of a semiotic gravitas that should not be underestimated. Hence, only careful metaphorological and conceptual analysis allows for a genuinely legal grip on various network structures – a normative grip that turns out to be a nodal one, always centered around and focused on the knots within the net of networks.

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[144] PHILIP JESSUP, TRANSNATIONAL LAW, 22-25 (1956).

[145] BRUNO LATOUR, WE HAVE NEVER BEEN MODERN, 14 (1993).

[146] Christoph Möllers, *Netzwerk als Kategorie des Organisationsrechts*, in NICHT-NORMATIVE STEUERUNG IN DEZENTRALEN SYSTEMEN 285, 301 (Janbernd Oebbecke ed. 2005).

[147] Joseph H. H. Weiler, *The Geology of International Law – Governance, Democracy and Legitimacy*, 64 ZAÖRV/HJIL 547, 560 (2004).

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