

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

**The Relevance of Network Models within the Juridic Discourse.
Empirical, Sociological, and Epistemological Perspectives**

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A.

A spectre is haunting contemporary theoretical debates: the spectre of Network. Whether it is about techno-music¹ or football,² whether the focus is on the architecture of poststructuralist thinking,³ international terrorism or individual career-planning, there is one common feature of all debates: the network model. There seems to be hardly a cultural theory – in a wide sense – still able to go on operating without using (at the very least) its heuristic effects. Meanwhile, even the entertainment and the advertising industries have discovered the concept. We need not wonder, then, that it is *bull market* for the model on the specific juridic field too.⁴

However, the concept's ghostlike form does not merely result from its astonishingly frequent appearances on such unexpected stages. More importantly, what is spectral about the idea is that within all its reappearances the outlines of the model remain disturbingly blurred. There is a strange contrast between the frequency of the use and the opacity of the content of the network model. The precise significance of this metaphor – if

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¹ NORBERT BOLZ, BLINDFLUG MIT ZUSCHAUER 97 (2005).

² KLAUS THEWELEIT, TOR ZUR WELT. FUßBALL ALS REALITÄTSMODELL 146 (2004).

³ MARTIN STINGELIN, DAS NETZWERK VON DELEUZE. IMMANENZ IM INTERNET UND AUF VIDEO (2000).

⁴ HANS-HEINRICH TRUTE, DIE FORSCHUNG ZWISCHEN GRUNDRECHTLICHER FREIHEIT UND STAATLICHER INSTITUTIONALISIERUNG 349 (1994); Karl-Heinz Ladeur, *Towards a Legal Theory of Supranationality – The Viability of the Network Concept*, 3 EUROPEAN LAW JOURNAL 33 (1997); *id.*, *Towards a Legal Concept of the Network in European Standard-Setting*, in EU COMMITTEES: SOCIAL REGULATION, LAW AND POLITICS 151 (Christian Joerges & Ellen Vis eds., 1999); Thomas Vesting, *Die Staatsrechtslehre und die Veränderung ihres Gegenstandes*, 63 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 41, 56 (2004); from the international context see ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 36 (2004). From the perspective of private law Gunther Teubner, *Die vielköpfige Hydra: Netzwerke als kollektive Akteure höherer Ordnung*, in EMERGENZ: DIE ENTSTEHUNG VON ORDNUNG, ORGANISATION UND BEDEUTUNG 189 (Wolfgang Krohn & Günter Küppers eds., 1992); *id.*, NETWORK AS CONNECTED CONTRACTS (2008). For an overview on the discussion see Christoph Möllers, *Netzwerk als Kategorie des Organisationsrechts. Zur juristischen Beschreibung dezentraler Steuerung*. in NICHT-NORMATIVE STEUERUNG IN DEZENTRALEN SYSTEMEN 285 (Janbernd Oebbecke ed., 2005).

it is a metaphor, after all⁵ –, i.e. the specific relevance of the notion within each particular theoretical context, remains unclear. The phenomenon is insufficiently explained by merely pointing to the contemporary computer age and the internet. Certainly, it may be true that this dominant current medium for writing and calculation has become a super-metaphor for cognitive processes, too – thus the place of Aristotle’s wax-tablet⁶ is now occupied by the hard drive or rather the uncountable number of connected PCs.⁷ But what does this say about the relevance of the network model? The same applies to the idea that the “enormous appeal” of the concept is a result of its wideness and openness.⁸ For what remains unclear here, too, is the question whether the model has a merely aesthetic value or, to the contrary, does form a relevant scientific finding. Following a corresponding effort by Odo Marquard, who has tried to do something similar within the context of hermeneutics,⁹ we can therefore ask the question of the question to which a “thinking in networks” (the expression is taken from Karl-Heinz Ladeur¹⁰) is the answer. Which problem – within the legal sector, but also beyond its limits – is supposed to be solved or at least to be transformed in an operable way by using this concept?

B.

As we will see, there are two basic alternatives for such an answer to the question of the question:

1. Firstly, network could figure as a mere *chiffre* for any sort of cooperation between different actors, e.g., within the legal context, as partnerships between the public and the private sector. We could then call “network”, for instance, the process of integrating private expert knowledge in administrative tasks – a process which has become well known under the name of “regulated self-regulation”¹¹, the protection of minors by media

⁵ ALEIDA ASSMANN, ERINNERUNGSRÄUME. FORMEN UND WANDLUNGEN DES KULTURELLEN GEDÄCHTNISSES 178 (1999) describes the concept as a “desensualized, hollowed metaphor”: almost a *contradictio in adiecto*.

⁶ ARISTOTLE, DE ANIMA, 429b 31 – 430a 2.

⁷ For other metaphors of writing see GIORGIO AGAMBEN, BARTLEBY ODER DIE KONTINGENZ 9 (1998).

⁸ Jean Nicolas Druey, *Das Recht als Netz für Netzwerke. Eine Wegskizze*, KRITISCHE VIERTELJAHRESSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT 163 (2006).

⁹ Odo Marquard, *Frage nach der Frage, auf die die Hermeneutik die Antwort ist*. In *id.*, ABSCHIED VOM PRINZIPIELLEN 117 (1981).

¹⁰ KARL-HEINZ LADEUR, DAS UMWELTRECHT DER WISSENSGESELLSCHAFT. VON DER GEFAHRENABWEHR ZUM RISIKOMANAGEMENT 37 (1995). On Ladeur’s legal theory see more in detail INO AUGSBERG & TOBIAS GOSTOMZYK & LARS VIELLECHNER, DENKEN IN NETZWERKEN. ZUR RECHTS- UND GESELLSCHAFTSTHEORIE KARL-HEINZ LADEURS (2009).

¹¹ See further the contributions to GESELLSCHAFTLICHE SELBSTREGELUNG UND POLITISCHE STEUERUNG (Renate Mayntz & Fritz W. Scharpf eds., 1995), as well as those in DIE VERWALTUNG, BEIHEFT 4 (2001): REGULIERTE SELBSTREGULIERUNG ALS

law giving a concrete example of this technique.¹² The advantages of such processes are considerable. Not only do they relieve the state, but they secure an access to private expertise, i.e. a special knowledge which the state could not provide for with its own means. However, we have to take into account certain disadvantages too. The partial abandonment of direct state control endangers the democratic ideal of a close chain of legitimation leading from the *demos* to state decision. Hence the legal challenge can be seen in the development of rules of organisation and procedures which on the one hand enable the state to cope with its informational deficiencies by using private expertise, and on the other hand guarantee sufficient state control of and responsibility for the entire process.

Another example for an application of networks in this first, narrow sense are transnational procedures of law-enforcement.¹³ In such terms we can use the network model to describe the co-operation of different national administrations within the general framework of the European Community.¹⁴ Here, too, the primary task is to observe factual developments, and, by systematising these developments, to create a dogmatic foundation which helps us to make the situation more transparent and hence more controllable.

If we leave it at that, considering networks as a mere empirical phenomenon, the network model is nothing more than a substitute for already otherwise well-known and well-specified problems. Hence the concept, though maybe not entirely futile, appears to be largely unnecessary.

2. The alternative is then, secondly, that the network conception is the specific answer to a specific problem which it may not be able to solve completely, but that it could at least help to make it operable in a certain way. Once again, we can think of two variations of this type of answer:

a) For a rather sociologically oriented approach, the network model appears as the only adequate reaction scheme to an accelerated self-transformation process of modern

STEUERUNGSKONZEPT DES GEWÄHRLEISTUNGSSTAATES, especially Karl-Heinz Ladeur, *Die Regulierung der Selbstregulierung und die Herausbildung einer „Logik der Netzwerke“*, *ibid.*, 59; see also Udo Di Fabio, *Verwaltung und Verwaltungsrecht zwischen gesellschaftlicher Selbstregulierung und staatlicher Steuerung*, in 56 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 235 (1997).

¹² SYLVIA KUNZ, RECHTSFRAGEN DES AUSSCHLUSSES AUS INTERNETFOREN 181 (2005).

¹³ Möllers, *supra*, note 4, 290 with interesting examples from the legal regulation of finance markets and telecommunication; see also Eberhard Schmidt-Aßmann, *Die Herausforderung der Verwaltungsrechtswissenschaft durch die Internationalisierung der Verwaltungsbeziehungen*, 45 DER STAAT 315 (2006).

¹⁴ See the contributions in DER EUROPÄISCHE VERWALTUNGSVERBUND: FORMEN UND VERFAHREN DER VERWALTUNGSZUSAMMENARBEIT IN DER EU (Eberhard Schmidt-Aßmann & Bettina Schöndorf-Haubold eds., 2006).

society and the increase of complexity caused and enabled hereby. In order to demonstrate current tendencies of pluralisation and fragmentation, which the legal system had to learn to cope with, the protagonists of this sociological view point at phenomena of the so-called globalisation.¹⁵ In this context, "thinking in networks" is understood as a contrast to a former (yet still prevalent "thinking in states"¹⁶ within public international law, which – iconographically expressed in the famous frontispiece to the "Leviathan" – in its concepts of attribution and centralisation forms a mere macro-version of the general idea of subjectivity. Hybrid non-state organisation units, operating within their transnational activities not only on contract basis and also constructing their own law regimes (as a sort of "secondary rules"),¹⁷ are supposed to question the classical legal model of a hierarchical pyramid of state statutes. This phenomenon, entitled "network as connected contracts"¹⁸ and discussed primarily with regard to the prominent example of the ICANN,¹⁹ is said to lead to new emergent regimes of law as "interconnection constitutions".²⁰ At the same time, this international perspective is the background for a corresponding discussion within the national context. Here, too, the network model is explained as the adequate form of reacting to certain socio-historical tendencies. "The communicative paradoxes commercial enterprises are fighting with," Gunther Teubner states, "are, in a manner of speaking, society's reaction to the boosted autonomisation of economic acts. The inconsistent environmental demands can be traced back to economic developments increasingly asking too much of individual enterprises and forcing them to

¹⁵ On the concept in a philosophical perspective see JEAN-LUC NANCY, *THE CREATION OF THE WORLD OR GLOBALIZATION* (2007); PETER SLOTERDIJK, *IM WELTINNENRAUM DES KAPITALS. FÜR EINE PHILOSOPHISCHE THEORIE DER GLOBALISIERUNG* (2005); from the point of view of social sciences ULRICH BECK, *WAS IST GLOBALISIERUNG?* (1997). For the legal perspective see Gunther Teubner, *Globale Zivilverfassungen: Alternativen zur staatszentrierten Verfassungstheorie*, 63 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* 1 (2003); Marc Amstutz & Vaios Karavas, *Rechtsmutation. Zu Genese und Evolution des Rechts im transnationalen Raum*, 8 *RECHTSGESCHICHTE* 14 (2006).

¹⁶ CARL SCHMITT, *DER NOMOS DER ERDE IM VÖLKERRECHT DES JUS PUBLICUM EUROPAEUM* 134 (third ed. 1988), with regard mainly to discussions in the 17th and 18th century. For Schmitt's notion of the problem see *id.*, *DER BEGRIFF DES POLITISCHEN. TEXT VON 1932 MIT EINEM VORWORT UND DREI COROLLARIEN* 10 (2002): "The epoch of statehood is now coming to an end. There is no more word to lose on this."

¹⁷ Teubner, *supra*, note 15, 14.

¹⁸ Teubner, *supra* note 4; *id.*, *Paradoxien der Netzwerke in der Sicht der Rechtssoziologie und der Rechtsdogmatik*, in: *HABEN WIR WIRKLICH RECHT? ZUM VERHÄLTNISS VON RECHT UND WIRKLICHKEIT - BEITRÄGE ZUM KOLLOQUIUM ANLÄSSLICH DES 60. GEBURTSTAGS VON BRUN-OTTO BRYDE* 9 (Michael Bäuerle et al. eds., 2004).

¹⁹ Lars Viellechner, *Können Netzwerke die Demokratie ersetzen? Zur Legitimation der Regelbildung im Globalisierungsprozess*, in *NETZWERKE* 36 (Sigrid Boysen et al. eds., 2007); JULIA VOEGELI, *DIE REGULIERUNG DES DOMAINNAMENSYSTEMS DURCH DIE INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (ICANN)* (2006); on the history of the organisation see Michael Hutter, *Global Regulation of the Internet Domain Name System: Five Lessons from the ICANN Case*, in *INNOVATIONSOFFENE REGULIERUNG DES INTERNET. NEUES RECHT FÜR KOMMUNIKATIONSNETZWERKE* 39 (Karl-Heinz Ladeur ed., 2003).

²⁰ Marc Amstutz, *Die Verfassung von Vertragsverbindungen*, *KRITISCHE VIERTELJAHRESSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT* 105 (2006).

networking.²¹ Hence the task of networks is "to deal adequately with these new societal phenomena."²²

Furthermore, this description of an increasing complexity in our ever more differentiated and yet interrelated society and its contradictory demands also applies to the judicial process of coping with factual uncertainties. Such processes can, for instance, be observed as risk assessment in environmental law. In a surrounding of continuous changes, the classical model of causality proves to be insufficient. A certain risk-prognosis, which was traditionally built on solid ideas of causation, can no longer be accomplished.²³ This situation produces a structural knowledge-deficit that can no longer be handled piecewise, departing from trusted experiences. Instead, what is needed within this situation is a rather experimental approach and a more intense and systematic connecting of different perspectives.²⁴ Therewith, a certain "sector of horizontal interlinkings of possibilities and constraints generates by a distributed a-central process a non-hierarchical knowledge that via a historical dynamic of selectivity preserves a 'process of falling into place' of decisions creating its own criteria of righteousness."²⁵

To sum up, this sociological version of the network model can be understood as a mere adaptation to a rapidly changing societal environment. Seen from an epistemological point of view, the relation between the object of cognition and its process, though modified, remains fundamentally based on the classical model of adequacy, reproducing the traditional concept of truth as adequacy between object and cognition on a higher level of complexity. In this perspective, the particular relevance of the network model is formed by its "value of description". The undeniable ambiguities of the model are interpreted as adequate reproductions of parallel procedures within the societal surrounding. What at first glance appeared to be a mere metaphor is therewith ennobled to a concept.²⁶ The origin of these ambiguities and the corresponding question whether these ambiguities merely indicate a deplorable, yet principally solvable problem or are but an epiphenomenon of a more fundamental conflict, is then no longer disturbing. A certain

²¹ Teubner, *supra* note 19, 13.

²² Gunther Teubner, *Coincidentia oppositorum: Das Recht der Netzwerke jenseits von Vertrag und Organisation*, in *DIE VERNETZTE WIRTSCHAFT: NETZWERKE ALS RECHTSPROBLEM 11* (Marc Amstutz ed., 2004).

²³ Ladeur, *supra* note 10, 22.

²⁴ See, *supra*, note 10, 51.

²⁵ See, *supra*, note 10, 35.

²⁶ Möllers, *supra* note 4, 300.

“ontology of everyday’s life” supposing that “there is a world outside, to which the law takes its turn”²⁷, is, despite being discredited as “naive”, not entirely overcome.

b) Contrary to this sociological perspective is a rather philosophical approach. From this point of view the societal processes of rapid changes and the reactions to these processes are nothing that is merging *ex nihilo*, but only make explicit a hitherto hidden epistemological problem, which deconstructs the traditional relationship between mind and world as form of adequacy. Therewith the particularity of the current situation is not ignored in an a-historical way, but, on the contrary, accepted and analysed profoundly by explaining the situation in a more general epistemological context. According to this view, every process of cognition and every pattern of behaviour within this world is not just nowadays, but in all possible circumstances irritated by unavoidable paradoxes. One cannot evade these paradoxes, but only learn to live with them. The introduction of the network model is, from this perspective, an attempt to at least reduce possible negative effects of the paradoxes by introducing certain differentiations. The traditional model of rationality strongly focussed on the dominant idea of unity is supposed to be substituted by a new form of poly-perspectivism. “The stable synthesis of connections centred around the relationship of subject, object, and reason is transforming itself to a conflict-relationship of multiple orders whose internal rationalities no longer indicate to the subject as centre, but coordinate anonymous relations.”²⁸

C.

This double alternative for an adequate response to the question of the question to which thinking in networks could be the answer indicates the methodically required proceeding. If the first variant of the first alternative were shown to be correct, then the other two variants could be seen as, in a certain sense, unnecessary, since the first variant had already demonstrated a concrete, albeit not terminologically compelling application area for the notion. In order to affirm this idea of the notion being a mere *chiffre* for an otherwise already well-known phenomenon we have, though, to reject the two variants of the other alternative. Consequently, since this rejection is implicitly included within the affirmation of the first statement, it has for systematic reasons to be given preferential treatment. On the other hand the affirmation of the third confirms at the same time the second variant. For according to this view what is now visibly emerging is nothing else than a subcutaneously already existing, yet suppressed phenomenon. That does not mean to

²⁷ Christoph Möllers, *Philosophie – Recht – Kultur: Zur kulturwissenschaftlichen Perspektiverweiterung einer Philosophie des Rechts*, in *SYMBOLISCHE WELTEN. PHILOSOPHIE UND KULTURWISSENSCHAFTEN* 109, 128 (Dirk Rustemeyer ed., 2002).

²⁸ KARL-HEINZ LADEUR, *POSTMODERNE RECHTSTHEORIE. SELBSTREFERENZ – SELBSTORGANISATION – PROZEDURALISIERUNG* 39 (1995).

say that this process of becoming explicit has no independent and decisive meaning of its own or that there is no need for its separate examination. It only means that the epistemological dimension of the problem is primary. The answer to the question of the question, to which thinking in networks is the answer, hence has to be: Is there an epistemological necessity forcing us to a mode of thought that no longer operates in a deductive-rational, but transversal-interrelating²⁹ way? Only by answering this primary question we can go on undertaking a closer examination of the response given in form of the network model.

D.

Within the given setting here we can merely give a rough outline of this epistemological problem. A more detailed examination of the problem would require a close reading of all those classical attempts to provide a solid foundation for the process of cognition. However, the concept of network itself gives us a hint on this classical situation for it indicates, in the very sense of the word, a fundamental uncertainty. The necessity of networks indicates the absence of a solid foundation: the *ratio*. However, whereas the sociological perspective conceives of the herewith implied uncertainty as a specifically modern phenomenon within contemporary society – a phenomenon so complex that it forbids its own intelligibility – this discrepancy between knowledge and capacity for action is, from a philosopho-historical point of view, no *novum* at all. The classical cartesian attempt of reconstituting the *certitudo* not only demonstrates that certainty is all self-evident, but that it has to be (re-)constructed laboriously. Moreover, the process of a general, methodical doubt leading to certainty in form of the pure *res cogitans* – which, however, in the sense of *Brentano's* and *Husserl's* "intentional difference", always includes its corresponding *cogitatum* – proves to be paradoxical in itself. For "wherever thinking tries to reflect its own achievement of assurance it resets itself on the unsecured ground of the content of mere imagination. Yet denying itself this reflexion it cannot become assured of this ground, either. Within the process of its self-foundation the ego remains an uncontrollable and unstable other which cannot be fixed as a positive figure, but can only be shown negatively, as the decomposition of empirical certainty."³⁰ Like all paradoxes, this paradox of self-foundation cannot be dissolved entirely. It can, though, be transformed in a way enabling us to go on operating within its restraints: by introducing new forms of differentiation.³¹ A famous example can serve as a role-model for this particular technique.

²⁹ On the concept of transversal reason see (with reference mainly to Deleuze and Guattari) WOLFGANG WELSCH, VERNUNFT. DIE ZEITGENÖSSISCHE VERNUNFTKRITIK UND DAS KONZEPT DER TRANSVERSALEN VERNUNFT 367, 761 (1995): What is attempted therewith is a "connexion of the heterogeneous" (*ibid.*, at 369). To the parallel concept of a "'lateral' reason" see Ladeur, *supra* note 28, 49.

³⁰ Werner Hamacher, *Das Beben der Darstellung. Kleists Erdbeben in Chile*, in *id.*, ENTFERNTES VERSTEHEN. STUDIEN ZU PHILOSOPHIE UND LITERATUR VON KANT BIS CELAN 235, 238 (1998).

³¹ NIKLAS LUHMANN, DAS RECHT DER GESELLSCHAFT 72 (1993).

Kant's epoch-making attempt to refute scepticism fulfills its intent only at the costs of a splitting of *phainomenon* and *noumenon*: at the latest from then on the thinking ego is an Other, unknown figure. "The turn to oneself is appearing no sooner than with the discrepancy of consciousness and reality. From the outset, the difference, the non-identical, is inscribed into the subject of reflection."³² Likewise, even Husserl's alleged clear evidence of the self-giveness of consciousness can be shown as already disrupted by a temporal difference.³³ Hence what is apostrophised as a postmodern or deconstructivist thinking is only the open explication of what previously was deliberately kept hidden.³⁴ The methodological consequence from this situation is the explicit abandoning of a rationality ideal in the sense of complete justifiability for the sake of momentary entanglements of fragmentary pieces of knowledge whose inconsistency is well appreciated. Consequently, "collective reason" is then possible only as a "distributed side-effect of a differentiated order that has no unity, no centre, and no beginning, being no more than the provisional result of an experimenting with self-created constraints."³⁵

Within the juristic context, we can take a closer look on this problem regarding the process of decision-making: In order to be something different from a mere mechanical, entirely pre-determined program, every decision has to be based on a final inability to decide.³⁶ We can only talk of decisions, Niklas Luhmann declares, „if there is something principally undecidable (not only: undecided!). For otherwise the decision were already decided and merely had to be 'detected'."³⁷ Hence the "correct" decision is no problem of cognition. Every process of decision-making reaches the point where the supposedly complete chain of justifications collapses. It is precisely this character of the decision exceeding its own pre-conditions – within the classical vocabulary: the synthetic, not merely analytical form of the judgment – which marks the difference between the decision and the machine and forecloses its cybernetical reconstruction. Interestingly, legal informatics has not missed

³² Ladeur, *supra* note 28, 17, with reference to HANS BLUMENBERG, SÄKULARISIERUNG UND SELBSTBEHAUPTUNG 159 (1974).

³³ EDMUND HUSSERL, VORLESUNGEN ZUR PHÄNOMENOLOGIE DES INNEREN ZEITBEWUßTSEINS (1980).

³⁴ See with reference to Husserl, JACQUES DERRIDA, SPEECH AND PHENOMENA: AND OTHER ESSAY'S ON HUSSERL'S THEORY OF SIGNS (1973).

³⁵ KARL-HEINZ LADEUR, NEGATIVE FREIHEITSRECHTE UND GESELLSCHAFTLICHE SELBSTORGANISATION. ZUR ERZEUGUNG VON SOZIALKAPITAL DURCH INSTITUTIONEN 167 (2000).

³⁶ Heinz von Foerster, *Ethics and Second-Order Cybernetics*, in I CYBERNETICS AND HUMAN KNOWING 9, 14 (1992); JACQUES DERRIDA, GESETZESKRAFT. DER „MYSTISCHE GRUND DER AUTORITÄT“ 50 (1991), and hereunto the contributions in URTEILEN/ENTSCHEIDEN (Cornelia Vismann & Thomas Weitin eds., 2006); PARADOXIEN DER ENTSCHEIDUNG. WAHL/SELEKTION IN KUNST, LITERATUR UND MEDIEN (Friedrich Balke & Gregor Schwering & Urs Stäheli eds., 2004).

³⁷ Luhmann, *supra* note 31, 308.

this point.³⁸ Furthermore, the situation has certain consequences for the traditional model of democratic legitimation. A democratic deficit in the sense of an insufficient reconnection to the determining people's will is no phenomenon existing only within the inter- or supranational sphere.³⁹ Rather, it can be observed within the intrastate area, too. The model of representative democracy with the free mandate of the member of parliament openly concedes this. The idea of the parliament directly representing the people is, as Kelsen has emphasised correctly, a mere fiction.⁴⁰ The concept of a "chain of legitimation without gaps" so much adored within German constitutional law is no more than wishful thinking. On closer observation, already the first link in the chain cracks. The democratic method of solving problems relying on the idea majority-decision cannot help acknowledging that therewith it is establishing a criterion for the correctness of decisions which is basically off-topic.⁴¹ A thinking in networks, i.e. a stronger entanglement of decisions, is the intra-legal answer to this problem. Where there is no safe ground, the lack of certainty has to be substituted by reciprocal reinforcements. Hence only the idea of a network organising itself via manifold interlacings offers a sufficiently complex methodological model in order to adequately explain law as an auto-authoritative procedure⁴² which receives its legitimacy less from direct couplings with the political system⁴³ but rather from emergent structures constituted by feedbacks and self-constraints. Therewith, the perspective shifts from the observation and explanation of particular legal phenomena to a reconstruction of the functioning of the legal system as such.

E.

The imagery of the net is, however, still suggesting that we can confront the fundamental uncertainty with a homogeneous, symmetrically organised texture. This perspective still presses the irreducible plurality of the given circumstances into a predetermined scheme, attempts to control it. The same applies to the idea to reconstruct "from the perspective of

³⁸ Adalbert Podlech, *Vorwort*, in RECHNEN UND ENTSCHEIDEN. MATHEMATISCHE MODELLE JURISTISCHEN ARGUMENTIERENS 5 (Adalbert Podlech ed., 1977).

³⁹ On this see the discussion by Viellechner, *supra* note 19.

⁴⁰ HANS KELSEN, VOM WESEN UND WERT DER DEMOKRATIE 30 (1929); *Id.*, ALLGEMEINE STAATSLHRE 312 (1925).

⁴¹ Cornelia Vismann, *Das Drama des Entscheidens*, in: Vismann & Weitin (note 37), 91, 98. Against this background it may come as no surprise that for some authors the traditional democratic election procedure should better be substituted by randomized lottery-like processes. For such conceptions see Manfred Schneider, *Was heißt „Die Mehrheit entscheidet“?*, in Vismann & Weitin (note 37), 154, 171.

⁴² Derrida, *supra* note 36, 31.

⁴³ For a critique see Niklas Luhmann, *Quod omnes tangit... Anmerkungen zur Rechtstheorie von Jürgen Habermas*, 12 RECHTSHISTORISCHES JOURNAL 36, 48 (1993).

the complete system“ a “comprehensive context“ by using different elements from within the network figure.⁴⁴ Though this may be practically useful for the concrete dogmatic handling of problems, e.g. within a civil law context, such an understanding does not exhaust the theoretical topic. Hence thinking in networks which intends to be post-metaphysical not only with regard to its chronological index, but also in regards to content, should rather be transformed to a rhizomatic conception⁴⁵ in the sense of Gilles Deleuze and Félix Guattari.⁴⁶ According to their concept, rhizome means – as a sort of “generative network“⁴⁷ – a sprawling ramification no longer able to be reduced to a unitary master-pattern. Within rhizomorph formations, the entanglements are programming themselves. Internal mechanisms of control in the form of binary codes whose task it is to monitor their own proceedings with respect to continuous connectivity are not bindingly given in advance, but “only the product of an active and temporary selection, which must be renewed.“⁴⁸ The spectre (*Gespinst*) of networks is a texture (*Gespinst*).⁴⁹ Such a texture of self-dependent sprawlings, engraftings, re-codifications, modifying repetitions specifies law in its *textuality*: as an ongoing process.⁵⁰ “The text” – and that is to say first and foremost: the legal statute – “which is constituted by unambiguous“ – seemingly unambiguous, we have to add, without devaluating the intended contrasting – „signs enables – *and enforces* – in the repeated reading an always new reception, an always new understanding“. And therewith the hermeneutical business begins, dedicating itself to the endless and circular search for and explication of meaning. The text gives birth to texts which give birth to texts.⁵¹ Law is text: “Everything that judges and other juridic decision maker can do is reading, listening, speaking, writing, signing: always linguistic and written operations; always text, text, and text“⁵². Therewith a more general insight is re-specified for the particular juridic context: “There is no more frame, no margin, no certain border

⁴⁴ Teubner, *supra* note 18, 23.

⁴⁵ Differing from this Möllers, *supra* note 4, 287, who directly interrelates “network“ and “rhizome“.

⁴⁶ GILLES DELEUZE & FÉLIX GUATTARI, KAPITALISMUS UND SCHIZOPHRENIE. TAUSEND PLATEAUS, 11, 16 (1992).

⁴⁷ The notion in Ladeur, *supra* note 35, 69.

⁴⁸ Deleuze & Guattari, *supra* note 46, 20.

⁴⁹ On the use of this concept with reference to hand puppets, see ERNST JÜNGER, ANNÄHERUNGEN. DROGEN UND RAUSCH § 218 (1970): „Die Fäden oder auch die Drähte, mit denen die Figuren bewegt werden. Wir wollen sie Gespinst nennen. [...] Eingewandt könnte werden, daß *seine Mannigfaltigkeit* im Schauspieler wohne und von ihm projiziert werde. Gut, aber dessen Nervenfasern sind auch Gespinst. Und das führt über die graue Masse, den Raster, ins Ungesonderte zurück [...] Das Spiel [...] nähert sich dem bloßen Weben, wie es die Mythen den Parzen und Nornen zuschreiben.“ (quoted in Deleuze & Guattari, *supra* note 46, 18).

⁵⁰ On this see more in detail INO AUGSBERG, DIE LESBARKEIT DES RECHTS (2009).

⁵¹ MARIE THERES FÖGEN, RÖMISCHE RECHTSGESCHICHTEN. ÜBER URSPRUNG UND EVOLUTION EINES SOZIALEN SYSTEMS 83 (2002).

⁵² FRIEDRICH MÜLLER, DEMOKRATIE IN DER DEFENSIVE. FUNKTIONELLE ABNUTZUNG - SOZIALE EXKLUSION - GLOBALISIERUNG. ELEMENTE EINER VERFASSUNGSTHEORIE VII 26 (2001).

between a text and its exterior, between the end and the breaking off of a text, between the unity of a *corpus*, the title, the margins etc. Only a differential net, a texture of traces endlessly referring to something different, relating to other differential traces.⁵³ Hence the production of texts can no longer to be described as a simple linear output-process; rather, the application of the norm appears as a recursive figure slurring rule and its application with each other.⁵⁴ Thus the classical model of a stepped scale of text forms, in the sense of the traditional legal sources doctrine, is relativised.⁵⁵ At the same time this insight implies an abandoning of the traditional concept of the legal author as a managing subject. The subject is expropriated from its prerogative of interpretation over the text. "What the 'author' *wants*, as well as what he 'does not want', does not belong to him, but is inscribed as an integral part in the writing-machine."⁵⁶ Roman law has known it long before: *Pater semper incertus*.

F.

The criticism tied up to this conception of law is clear: a legal system conceived of in this way apparently loses every ability to manage and control a community. It thus can no longer have a pragmatic function, but, at the most, an aesthetic one. It can, as Walter Benjamin would have put it,⁵⁷ no longer be practiced but only studied, and therewith survive only as an object of a certain observer's interest that just as well could focus on „rhombus-like forms on butterfly-wings“⁵⁸. This legitimatises a certain scepticism towards the juridic relevance of the network model: "'Network' is not a legal concept."⁵⁹ We can, however, raise the reverse question, too: Why should it not be of some practical use for

⁵³ SARAH KOFMAN, DERRIDA LESEN 156 (1987).

⁵⁴ Karl-Heinz Ladeur, *Methodology and European Law – Can Methodology Change so as to Cope with the Multiplicity of the Law?*, in: EPISTEMOLOGY AND METHODOLOGY OF COMPARATIVE LAW 91, 96 (Mark van Hoecke ed., 2004); id., *Die rechtswissenschaftliche Methodendiskussion und die Bewältigung des gesellschaftlichen Wandels. Zugleich ein Beitrag zur Bedeutung der ökonomischen Analyse des Rechts*, 64 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 60, 67 (2000).

⁵⁵ Classical: ALF ROSS, *THEORIE DER RECHTSQUELLEN: EIN BEITRAG ZUR THEORIE DES POSITIVEN RECHTS* (1929); for a more modern, more complex perspective see Niklas Luhmann, *Die juristische Rechtsquellenlehre aus soziologischer Sicht*, in id., *AUSDIFFERENZIERUNG DES RECHTS. BEITRÄGE ZUR RECHTSZOLOGIE UND RECHTSTHEORIE* 308 (1981).

⁵⁶ Kofman, *supra* note 53, 116.

⁵⁷ Walter Benjamin, *Franz Kafka*, in id., *GESAMMELTE SCHRIFTEN* Bd. II/2 409, 437 (Tiedemann ed., 1977).

⁵⁸ This is the example of a totally self-referential science beyond any practical utility which Ernst Bloch gives (*Karl Marx heute. Vortrag in Trier zum 150. Geburtstag von Marx am 5. Mai 1968*, quoted from ERNST BLOCH, *ÜBER DIE HOFFNUNG. REDEN UND GESPRÄCHE*, Der Hörverlag 1999).

⁵⁹ Richard M. Buxbaum, *Is Network a Legal Concept?*, JOURNAL OF INSTITUTIONAL AND THEORETICAL ECONOMICS 149 (1993), 698, 704; hereunto see Druey, *supra* note 8.

the legal system to overcome its apparently inadequate traditional self-description in the context of hierarchically organised categories, i.e. as an architectural figure, a cascaded formation of norms with a highest, supreme (or lowest, most fundamental, as you like it) central norm?⁶⁰ As far as we can, following Niklas Luhmann, demonstrate this traditional form of self-perception as nothing else than a temporarily delayed semantical transformation of the classical stratified society structure having within contemporary society long been replaced by functional differentiation, the legal system would prove to be an ideal affirmation of Luhmann's general thesis that the language of a society always stays one step behind the social development.⁶¹ From this perspective, the network model is no longer used to guarantee truth in the classical sense of *adaequatio rei et intellectus*, rather, it serves to the herewith non-identical formation of a congruence regarding the difference between intern and extern observation of a social field being well aware of its own constructedness and the blind spots of observation that go along with it.⁶² In this context, Luhmann has pointed out to the important, still not sufficiently recognised and received studies of Karl-Heinz Ladeur's postmodern legal theory which reconstructs classical legal operations within a network model.⁶³ A turn of perspective instructed by this theoretical approach would then not mean a turn towards a more realistic model – for which reality should this be? –, but towards a more constructive, more productive model that reflects and operates with its own fictionality and the paradoxes resulting from this situation.⁶⁴

⁶⁰ See Adolf Merkl, *Prolegomena einer Theorie des rechtlichen Stufenbaus*, in DIE WIENER RECHTSTHEORETISCHE SCHULE. SCHRIFTEN VON HANS KELSEN, ADOLF MERKL, ALFRED VERDROSS, Bd. 2 1311, 1344 (Hans Klecatyky et al. eds., 1968); HANS KELSEN, REINE RECHTSLEHRE 228 (1960).

⁶¹ Niklas Luhmann, *Gesellschaftliche Struktur und semantische Tradition*, in *id.*, GESELLSCHAFTSSTRUKTUR UND SEMANTIK. STUDIEN ZUR WISSENSSOZIOLOGIE DER MODERNEN GESELLSCHAFT, Bd. 1 9 (1980); Luhmann, *supra* note 31, 496.

⁶² For an adequately complex discussion elaborating the immanent problems of the notion of the blind spot within systems theory see Urs Stäheli, SINNZUSAMMENBRÜCHE. EINE DEKONSTRUKTIVE LEKTÜRE VON NIKLAS LUHMANN'S SYSTEMTHEORIE 77 (2000).

⁶³ NIKLAS LUHMANN, DIE GESELLSCHAFT DER GESELLSCHAFT 846 (1997), with reference to Ladeur, *supra* note 29, 176. On Ladeur's theory see Augsberg & Gostomzyk & Viellechner, *supra* note 10.

⁶⁴ See more in detail Augsberg & Gostomzyk & Viellechner, *supra* note 10; Augsberg, *supra* note 50.