Embeddedness through Networks: A Critical Appraisal of the Network Concept in the *Oeuvre* of Karl-Heinz Ladeur

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A. Introduction

The concept of "network" has become the most central concept within the work of Karl-Heinz Ladeur (KHL). It is an omnibus concept which he uses to extrapolate insights at all levels: It is used to provide a general framework at the level of *Gesellschaftstheorie* (social theory) in the sense that it provides insights into the general structure of society and thereby into the context within which legal processes unfold. At the level of organizational theory it provides a basis for understanding the transformation of organizational structures as it unfolds through the breakdown of hierarchy and the boundaries between the private and the public, just as the network concept plays an important role in its attempt to formulate a legal theory which is adequate for a society which, according to KHL, has become postmodern.

This article seeks to critically examine the function and "added value" of KHL's network concept in relation to the European integration and constitutionalization process. It is argued that the concept provides a very useful overall framework, but that its usefulness might be enhanced when combined with more concrete studies of the actual function of networks in the EU context, just as the network concept should be more directly combined with an attempt to develop a conceptual framework for the juridification of networks.

B. The Myth of the Hierarchical State

The central *Prügelknabe* ("whipping boy") for KHL is Habermas[1] and his vision of modernity as an "incomplete" and therefore ongoing project.[2] Habermas' position is based on the

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[1] Habermas is described as the "Theorist of Double Standards" (my translation). See KARL-HEINZ LADEUR, DER STAAT GEGEN DIE GESELLSCHAFT. ZUR VERTEIDIGUNG DER RATIONALITÄT DER PRIVATRECHTSGESELLSCHAFT 311 (2006); see also Karl-Heinz Ladeur, *Discursive Ethics as Constitutional Theory. Neglecting the Creative Role of Economic Liberties?*, 13

assumption that the societal processes of the 21st century are a repetition, at a higher level, of the kind of societal processes that led to the creation of nation states. Based on this assumption, Habermas argues that Europe should deploy the logic of the circular creation of state and society that shaped the modern history of the European territorial states at the supranational level.[3] Habermas is thereby relying on the assumption that organizational and legal hierarchy within the framework of state-centered societies represents the historical "normality", a normality which he assumes will continue to serve as the central form of societal organization for the foreseeable future.

In contrast, KHL focuses on the massive increase in the complexity of contemporary society and the consequent increases in uncertainty and risk. In relation to the European integration process, which for KHL serves as an "avant-garde structure" for more far-reaching transformations,[4] applying the rationalizing principles of the nation state to a higher level will therefore not lead to the creation of a supranational legal and political order, since the context within which the European nation states were created is completely different to the context within which the processes of European integration and constitutionalisation are evolving.[5] KHL's distinct postmodern, as opposed to Habermas' distinct modernist perspective, is being concretized through careful analysis of the structural changes taking place in the economic system. The economy, one of the prime spheres of legal regulation, is rapidly being transformed from an industrial to a knowledge-based and more dynamic entity. This transformation, taking place through the increased temporalisation of society, not only increases the need for regulatory schemes which can operate in the context of increased uncertainty, but also the need for far more flexible rules aimed at regulating "micro-structures." The ideal of constructing general rules applicable to particular cases is therefore increasingly placed under pressure because the maintenance of the kind of *Weberian* administrative structures based upon a *Kelsenian* legal hierarchy, which is a pre-condition for the realization of Habermas' vision, is becoming less and less viable. Instead, far more fluid and flexible administrative structures are needed. The law must therefore adapt itself to the existence of a wide variety of

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RATIO JURIS , 95 (2000); for a critique of Habermas on the basis of the example of environmental law see KARL-HEINZ LADEUR, DAS UMWELT DER WISSENSGESELLSCHAFT: VON DER GEFAHRENABWEHR ZUM RISIKOMANAGEMENT 37 (1995).

[2] JÜRGEN HABERMAS, DIE MODERNE, EIN UNVOLLENDETES PROJEKT. PHILOSOPHISCH-POLITISCHE AUFSÄTZE 1977-1990 (1990).

[3] Jürgen Habermas, *Why Europe Needs A Constitution*, 11 NEW LEFT-REVIEW 17 (2001).

[4] Karl-Heinz Ladeur, *Towards a Legal Theory of Supranationality – The Viability of the Network Concept*, 3 EUROPEAN LAW JOURNAL 35 (1997).

[5] Karl-Heinz Ladeur, *"Deliberative Demokratie" und "Dritter Weg" – eine neue Sackgasse? Transformation des "alten " Sozialstaats in den "aktivierende" Staat?*, 41 DER STAAT 3 (2002). More generally see also KARL-HEINZ LADEUR, POSTMODERNE RECHTSTHEORIE – SELBSTREFERENZ – SELBSTORGANISATION – PROZEDURALISIERUNG (1995); and KARL-HEINZ LADEUR, NEGATIVE FREIHEITSRECHTE UND GESELLSCHAFTLICHE SELBSTORGANISATION. ZUR ERZEUGUNG VON SOZIALKAPITAL DURCH GESELLSCHAFTLICHE INSTITUTIONEN (2000).

overlapping and multi-level networks, which are not only profoundly a-hierarchical, but also encompass a wide variety of actors, both public and private. It is against the background of this transformation of the economy that KHL calls for the development of a legal concept of networks.[6]

In the postmodern argumentation of KHL, it is possible to detect traces of his Marxist past in the sense that, to a large extent, he reduces the ongoing transformation processes to a transformation in the mode of economic production. Indirectly he thereby understands the state as nothing more than a superstructure whose structure is defined by the form of economic reproduction. But the state is a structure in its own right whose own metamorphoses follow a logic which cannot be directly deducted from the transformations in the modes of economic production.[7] This insight does not necessarily undermine the position of KHL vis-à-vis Habermas but merely provides a basis for widening the scope of analysis since it can be argued that Habermas, relies on questionable assumptions in relation to his understanding of the state. The reason is that the concept of the hierarchically organized and state-centered society, which found its first profound description in Hegel´s *Philosophy of Rights*,[8] is largely fiction. In historical perspective the state-centered society was only a reality between the 1870s and the 1970s in the northern hemisphere.[9] Until the late 19th century the obedience to local institutions and the dominance of local norms, which diverged markedly from the rationalized system of norms spread from the capitals of the emerging modern states through prefectures, legal codes and standardized schoolbooks, was the rule rather than the exception. Even as late as the 1960s large parts of Western Europe remained rural in character and successfully evaded the civilizing influence of the capitals. The same can be said about the American south. Moreover in areas such as southern Italy and eastern Turkey this remains the case.[10] At the peak of the state-centered society, the ongoing third globalization wave emerged,[11] thereby undermining its long term sustainability. Strong states only emerged in parts of Europe, as well as in North America and Japan. In contrast, the majority of the world has not even been close to experience the blessings of *Étatisme* (state-centeredness). Even in Latin America, which adopted the slogan "*Order and Progress*" when the emancipation

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[6] KARL-HEINZ LADEUR, DER STAAT GEGEN DIE GESELLSCHAFT. ZUR VERTEIDIGUNG DER RATIONALITÄT DER PRIVATSRECHTSGESELLSCHAFT 296 (2006).

[7] PETER B. EVANS, DIETRICH REUSCHEMEYER, THEDA SKOCPOL (EDS.), BRINGING THE STATE BACK IN (1985).

[8] GEORG W. F. HEGEL, GRUNDLINIEN DER PHILOSOPHIE DES RECHTS. ODER NATURRECHT UND STAATSWISSENSCHAFT IM GRUNDRISSE ([1821] 1976).

[9] EUGEN WEBER, PEASANTS INTO FRENCHMEN: THE MODERNIZATION OF RURAL FRANCE, 1880–1914 (1976).

[10] For the Italian "Mezzogiorno" see Niklas Luhmann, Kausalität im Süden**,** *Soziale Systeme*, 1 ZEITSCHRIFT FÜR SOZIOLOGISCHE THEORIE 7 (1995).

[11] RUDOLF STICHWEH, DIE WELTGESELLSCHAFT: SOZIOLOGISCHE ANALYSEN (2000).

process started some 200 years ago, the existing states did not come anywhere near the ideal state models developed by Hegel, Kelsen, Weber and others.[12]

Critical perspectives on the "strong state" are supported by the idea that the era of strong states was characterized by the emergence of totalitarian regimes, thereby highlighting the potential danger of state-centeredness. But the "darker legacies" of the state[13] is not just limited to the totalitarian period. The emergence of the territorial states, which later became nation states, was a direct result of fierce military competition and almost constant war. In the words of Charles Tilly: "states make war and war makes states".[14] As also described by Elias[15] and Foucault,[16] the emergence of territorial states and the disciplination and rationalization of territory and population through state means can be understood as a direct consequence of the continued effort to mobilize resources for continued warfare in a context where war rather than peace was the norm. Today, with military expenditure merely amounting to a small percentage of GDP in developed states and with peace rather than war representing the norm, the world looks very different in terms of current European and global developments and state-building processes of early-modern Europe.[17]

Hence, not only from the perspective of economic sociology but also from the perspective of historical sociology and state theory, it is unlikely that current developments in the European context can be understood as a way through which the state-building processes of early modernity can be "repeated". Moreover, from a normative perspective the darker legacies of the state make it questionable whether such a development is desirable in the first place. A similar skepticism of the state also provided the normative nucleus of the private law tradition of Von Savigny and onwards, which from its very beginning emphasized the existence of autonomous institutional structures operating outside the realm of the state, structures which interestingly enough have been understood as a reservoir of knowledge and a realm for the generation of social capital by postmodernists

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[12] Chile might be the only exception to the persistent tendency of weak states in Latin America. See also Maximiliano Figuroa/Manuel Vicuña (Cor.), EL CHILE DEL BICENTENARIO (2008).

[13] Christian Joerges, Introduction *to the Special Issue: Confronting Memories: European "Bitter Experiences" and the Constitutionalization Process*, 6, 2 GERMAN LAW JOURNAL (2005).

[14] *Charles Tilly*, *War Making and State Making as Organized Crime*, in BRINGING THE STATE BACK IN, 169 - 191 (Peter B. Evans, Dietrich Reuschemeyer & Theda Skocpol eds., 1985).

[15] NORBERT ELIAS, ÜBER DEN PROZEß DER ZIVILISATION, SOZIOGENETISCHE UND PSYCHOGENETISCHE UNTERSUCHUNGEN, BAND 2; WANDLUNGEN DER GESELLSCHAFT. ENTWURF ZU EINER THEORIE DER ZIVILISATION (1976)

[16] MICHEL FOUCAULT, *IL FAUT DÉFENDRE LA SOCIÉTÉ*. COURS AU COLLÈGE DE FRANCE 1975-1976 (*1994).

[17] ULRICH BECK, DIE FEINDLOSE DEMOKRATIE (1995).

such as KHL,[18] idealist system theorists,[19] classical liberalists,[20] and by progressive[21] and more traditionalist[22] left-wingers. Thus, forms of societal self-organization outside the realm of the state have always existed, just as more or less partisan-like counter movements against the hegemony of the state and the idea that political rationality is superior to private forms of communication have always been in play.

C. The Rise of Networks

When mirrored in the state-critical perspective outlined above, the merits of KHL's network concept becomes evident. A network is, according to KHL, more "than a variously densified grouping of negotiated relations among stable subjects."[23] This does not mean that subjects are irrelevant, only that a network cannot be reduced to a mere expression of cooperation and bargaining between subjects. Subject relations are therefore only one of many components of a network in which the multiplicity of interdependent and complementary components provides a basis for continued re-combination. This creates synergy effects and produces new options for decisions-making that are only accessible through the network in question. Synergy effects are therefore conditioned by an acceptance of the logic regulating the evolution and functioning of the network itself. This is also the case for the results of bargaining, deliberation or cooperation between subjects within a given network. Their results can only be externalized through the network structure and not by the subjects themselves. Another central feature of networks is their "fluid" character. This fluidity makes the outcome of network operations radically open-ended, as the number of possible re-combinations among the elements of a given network is almost infinite. A network cannot therefore be seen as a unified entity, even though it

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[18] KARL-HEINZ LADEUR, DER STAAT GEGEN DIE GESELLSCHAFT. ZUR VERTEIDIGUNG DER RATIONALITÄT DER PRIVATSRECHTSGESELLSCHAFT (2006).

[19] For example, see ANDREAS FISCHER-LESCANO & GUNTHER TEUBNER, REGIME-KOLLISIONEN. ZUR FRAGMENTIERUNG DES GLOBALEN RECHTS (2006).

[20] For example, see Gralf-Peter Callies, *Transnationales Handelsvertragsrecht: Private Ordnung und staatlicher Rahmen*, in VERRECHTLICHGUNG – BAUSTEIN FÜR GLOBAL GOVERNANCE?, 160 (Michael Zürn & Bernhard Zangl eds., 2004).

[21] See *Claire Methven O'Brien,* Reframing *RECON: Perspectives on Transnationalisation and Post-national Democracy from Labor Law*, in TRANSNATIONAL STANDARDS OF SOCIAL PROTECTION. CONTRASTING EUROPEAN AND INTERNATIONAL GOVERNANCE, ARENA REPORT, NO. 5, 97 (Christian Joerges & Poul F. Kjaer eds., 2008).

[22] See Florian Rödel, *Constitutional integration of Labour Constitutions*, in LAW, DEMOCRACY AND SOLIDARITY IN A POST-NATIONAL UNION. THE UNSETTLED POLITICAL ORDER OF EUROPE, 152 (Erik Oddvar Eriksen, Christian Joerges & Florian Rödl eds., 2008).

[23] Karl-Heinz Ladeur, *Towards a Legal Theory of Supranationality – the Viability of the Network Concept*, 3 EUROPEAN LAW JOURNAL, 33, 47 (1997).

can briefly become denser and easier to distinguish in the case of collisions with other decisional structures.[24]

The rise of networks is taking place at all levels – locally, nationally, regionally, and globally; the result is the emergence of a system of multi-level networks.[25] The evolution of networks at the EU level is, however, far more advanced than at other levels, which is why KHL characterizes the EU as an "avant-garde structure"[26] with respect to the development of polycentric and heterarchical legal structures. Another important feature of networks is that they tend to break down the distinction between the public and private spheres. The function of many networks is indeed to combine public and private elements, thereby stabilizing relations between the political and administrative systems and those to which they relate, such as the economic system. The main objective of networks acting between the private and public spheres is therefore to ensure correspondence between private and public policy objectives. In practice, such networks are typically aimed at ensuring a high level of self-regulation by the private parties, while the public authorities that participate in the network tend to assume a supervisory role.[27] In relation to the EU, KHL therefore proposes that the Commission should restrain its activities and focus on its supervisory function, as well as on the production and sharing of information, thereby contributing to the creation of discursive contexts within which networks can evolve.[28]

Information gathering is also becoming more crucial due to the increased complexity of society. Legislators find themselves increasingly taking decisions under conditions of uncertainty, which in turn means that they must be systematically modified in light of new knowledge and on the basis of trial and error. Consequently, an *ex-ante* formulation of the "public interest" is becoming more and more difficult. Instead, political and administrative systems will have to *ex-post* re-formulate the public interest based on processes of continued learning and evaluation.[29] In practice, network structures therefore tend to evolve without any clear legal basis. Instead, *ex-post* legitimization of network structures is ensured through a mutual adaptation of law to the network and of the network to law on the basis of new information.

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[24] *Id.*, 46.

[25] For an overview of the evolution of networks and their *Funktionswandel* see; Poul F. Kjaer, *Post-Hegelian Networks* in Networks: Legal Issues of Multilateral Cooperation (Marc Amstutz & Gunther Teubner eds., 2008).

[26] *Infra,* note 23 at 35.

[27] For a number of instructive examples of network regulation within the areas of information technology law and environmental law see Karl-Heinz Ladeur, *Regulierte Selbstregulierung als Steuerungskonzept des Gewährleistungsstaates*, 4 Die Verwaltung, Beiheft 59 (2001).

[28] Karl-Heinz Ladeur, *The Changing Role of the Private in Public Governance - The Erosion of Hierarchy and the Rise of a New Administrative Law of Cooperation. A Comparative Approach*, 9 EUI Working Papers Law , 1-36 (2002).

[29] *Id.*, 32.

D. The Function of Networks

KHL's network concept as described above contains many merits. To a certain extent, however, it seems to go a step too far in the sense that, when reading KHL, one tends to get the impression that the network is the most central building block of society[30] and that the continued existence of hierarchical structures are being somewhat ignored. One reason why this impression arises is that his network concept remains very general in the sense that it mainly serves as a formula which captures essential elements of the self-description of a society which, according to KHL, is characterized by a radical transformation of its *Tiefenstrukturen* ("deeper structures")[31] Thus, the network formula helps to accentuate his central argument concerning the structure of society, namely that it is radically de-centralized and heterarchical and therefore beyond the reach of direct control or centralized steering. Accordingly, he is only scarcely using the network concept as a tool for empirical examinations or detailed mappings of the functioning of specific institutional forms, just as it remains somewhat unclear what networks actually "do". In accordance with his post-structuralist position, his continued reference to "intra- and inter-organizational networks"[32] remains a merely metaphorical concept which is used to provide an overall frame within which processes of mutual adaptation under conditions of a radical de-centeredness of society can be described. KHL's concept of network seems, in other words, to act as a substitute for a concept of societal heterarchy.

In attempt to develop a more concrete approach, one alternative would be to simply understand networks as a specific institutional form which operates alongside a range of other institutional forms and which fulfils quite specific societal functions. In relation to the EU, networks mainly function as inter-hierarchical networks in the sense that governance structures such as Comitology serve as heterarchical structures which links hierarchically organized organizations such as the Commission and member state administrations. A central element of such networks is that they are characterized by "political administration" in the sense that the distinction between the political and the bureaucratic dimensions of the political-bureaucratic system is largely absent.[33]

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[30] E.g. KARL-HEINZ LADEUR, DER STAAT GEGEN DIE GESELLSCHAFT. ZUR VERTEIDIGUNG DER RATIONALITÄT DER PRIVATSRECHTSGESELLSCHAFT 296 (2006).

[31] For example see *Id.*, 5.

[32] See especially KARL-HEINZ LADEUR, DER STAAT GEGEN DIE GESELLSCHAFT. ZUR VERTEIDIGUNG DER RATIONALITÄT DER PRIVATSRECHTSGESELLSCHAFT 296 (2006).

[33] Andreas Bücker & Sabine Schlacke, *Die Entstehung einer politischen Verwaltung durch EG-Ausschüsse - Rechtstatsachen und Rechtsentwicklungen* in DAS AUSSCHUßWESEN DER EUROPÄISCHEN UNION. DIE PRAXIS DER RISIKOREGULIERUNG IM BINNENMARKT UND IHRE RECHTLICHE VERFASSUNG, 161 (Josef Falke & Christian Joerges eds., 2000).

Another central distinction is the extent to which networks act as inter- or intra-systemic networks. Within Comitology and "networked-agencies" the vast majority of the committee networks only include representatives of the Commission and national administrations and can in this sense be seen as a part of the political system which does not include other functional systems such as the economic system in the sense that even if economic issues are processed, this tends to happen on the basis of a subordination of economic rationality to the form of political rationality dominating the networks in question.

In other cases, networks are inter-systemic in the sense that they are specifically oriented towards establishing mutual fixation of organizations which operate within different functional systems, such as, on the one hand, public administrations and, on the other hand, private firms. In such cases, networks combine multiple forms of rationality and typically serve as channels through which meaning components are transferred from one system to another. Such a transfer, however, implies a re-contextualization of the components, which means that they are likely to be attributed a quite different meaning and purpose within the different systems.[34] Moreover, the networks themselves are the structures within which meaning components (*Sinn-Komponente*) are being transformed in order to make them compatible with other systems. Thus, the networks are not just channels but are themselves autonomous structures that leave an independent mark on the components in question. Inter-systemic networks can thus be understood as being directly oriented towards achieving compatibility of different perspectives. They are 'hubs' where the information that emerges within different functionally differentiated spheres of society is selectively gathered, organized and re-distributed. The attempt to increase convergence between the scientific system and the economic system through the deployment of "open method of coordination" (OMC) instruments is a good example. The OMC process of R & D is directly oriented towards increasing the ability of the economic system to rely on the scientific system and vice versa.[35] For the economic system this attempt is justified under the slogan of 'increasing competitiveness'. Within the scientific system the same process is seen as a push towards 'furthering innovation', thereby indicating that the network makes a "doubling" of the process possible in the sense that at the same time it is integrated into both systems. Risk regulation is another and particularly clear example, since risk-regulating structures are aimed at linking scientific, economic, legal and political perspectives within a specific frame and a specific practice in order to

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[34] Rudolf Stichweh, *Transfer in Sozialsystemen: Theoretische Überlegungen*, available at http://www.unilu.ch/files/6stwtransfer.pdf, last accessed 14 February 2009.

[35] Poul F. Kjaer, *De-Formalization or Formalization through Governance?* in CONFLICT OF LAWS AND LAWS OF CONFLICT IN EUROPE AND BEYOND - PATTERNS OF SUPRANATIONAL AND TRANSNATIONAL JURIDIFICATION, ARENA REPORT SERIES (Rainer Nickel ed., 2009, forthcoming).

reduce negative externalities.[36] Common to both examples is that the political system plays the role of *primus inter pares* in the sense that it remains dominant, at the same time as the distinction between the public and the private is broken down through the deliberate merger of components from different systems. In contrast to Luhmann's overly formalistic attempt to establish clear-cut borders of the political through his distinction between power, relying on negative sanctions, and influence,[37] it is thus necessary to work with a gradualized or concentric concept of the political, where the subordination under the asymmetry-producing code between superiority and inferiority (*Machtüberlegenheit/Machtunterlegenheit*)[38] becomes less forceful the further away you are from the nucleus of political system.

However, another example of inter-systemic networks, namely the corporate lobbying networks surrounding the EU institutions, shows that perfectly symmetrical relations between the political and non-political dimensions are rare. These networks are also inter-hierarchical to the extent that their function is to link firms with the EU institutions. But these structures are so far away from the nucleus of the political system that the asymmetric relations are turned upside down in the sense that the political, although still present, are subordinated to the rationality of the economic system. The role of corporate lobbying networks is nonetheless two-fold, in the sense that they transfer meaning components from the economic system to the political system in the EU form, and at the same time serve as channels for the transfer of information and other meaning components from the EU institutions towards the firms in question. Hence, such networks are directly oriented towards increasing the level of mutual observation and thereby serve as forms through which expectations between functional systems are being stabilized.

Generalizing the insight that the real *existierende Netzwerke* (actual networks) in the EU context are inter-hierarchical networks makes it possible to conceive of networks as a *specific form* of structural couplings between organizational systems.[39] Structural couplings can be defined as institutionalized forms which reproduce and stabilize generalized expectations between social systems, be these functional, organizational or interaction systems. The stabilization of relations between organizational systems through structural couplings in the form of networks therefore enables organization A to assume that organization B is conducting operations which are necessary for the continued functioning

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[36] Poul F. Kjaer, *Rationality within Reach? On Functional Differentiation as the Structural Condition of Legitimacy in European Chemicals Regulation*, 18 EUROPEAN UNIVERSITY INSTITUTE WORKING PAPER, 1-26(2007).

[37] Christian Borch, *Systemic Power. Luhmann, Foucault and Analytics of Power*, 48 ACTA SOCIOLOGICA 155 (2005).

[38] NIKLAS LUHMANN, POLITIK DER GESELLSCHAFT 88, 97 (2000).

[39] Eckard Kämper & *Johannes F. K.* Schmidt, *Netzwerke als strukturelle Kopplung. Systemtheoretische Überlegungen zum Netzwerkbegriff* in SOZIALE NETZWERKE – KONZEPTE UND METHODEN DER. SOZIALWISSENSCHAFTLICHEN NERTZWERKFORSCHUNG, 211 (Weyer, J. Hrsg.,2000).

of organization A. Accordingly, networks can be conceived of as a specific form through which organizations observe the environment within which they operate, leading to a reduction of complexity in the sense that the institutionalization of expectations partly enables a substitution of cognition with trust. Engagement in the network form therefore reduces the level of cognitive capacities that an organization needs to deploy in order to continue operating because structural coupling enables organizations to synchronize their operations. A further characteristic of structural couplings is indeterminacy in that they cannot be ascribed to only one of the organizations involved. Instead, the organizations involved tend to operate under the assumption that they control the coupling in question, thereby indicating a certain tendency toward "pretentiousness"; or as Weiler puts it when commenting on Comitology and making a reference to John Le Carré: "One gets the impression, by the cozy convenience between Commission and Council that each think *Comitology* is their own Smiley or Karla."[40]

A more general reason why the network has prevailed in relation to the mutual observations between the economic system and the political system in the EU form is probably that the central task of the EU is to perform regulatory functions and only to a very limited extent the kind of re-distributive functions that characterize modern welfare states. The triangular relations between employers, employees and the state characterizing hierarchical corporatist structures within the nationally based welfare states is thus of limited relevance in the EU context. Transnational network governance can in this sense be understood as a functional equivalent to nation-state corporatism.[41]

Another and even more general reason why networks play such a strong role in relation to the EU when compared to the nation-state context is that the political system in the nation-state form is part of larger national configurations. They are therefore embedded in society in a manner which is fundamentally different to the way in which the EU is embedded. Even though the nation states have undergone a massive opening since the last half of the 20th century, they remain embedded in economic constitutions and corporatist systems just as "national universes" in terms of relatively homogenized spaces which have been purposefully constructed through the reiteration processes which lead to the establishment of the territorial states. As argued above, these states are more fragile than most scholars assume. Nonetheless, the concrete manifestation of such universes is the existence of different political and legal cultures. These cultures are an expression of the substantially different political and legal practices and self-descriptions which characterize the different nation-states. These universes serve as frames or "internal environments" which, by their very existence, lead to enormous reductions in complexity

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[40] Joseph H. H. Weiler, *Epilogue: "Comitology" as Revolution – Infranationalism, Constitutionalism and Democracy*, in EU COMMITTEES: SOCIAL REGULATION, LAW AND POLITICS, 339, 342 (Christian Joerges & Ellen Vos eds., 1999).

[41] André Brodocz, *Strukturelle Kopplung durch Verbände*, 2 SOZIALE SYSTEME. ZEITSCHRIFT FÜR SYSTEMTHEORIE 361 (1996).

while also ensuring the stabilization of expectations.[42] In contrast, the EU operates only within a very embryonic universe and hence lacks the "symbolic-aesthetical dimension"[43] and societal anchoring which characterize national legal and political systems. Hence, as a phenomenon which is much less embedded than national political and legal systems, the EU has been forced to develop strategies enabling it to compensate for the absence of this kind of framework. The strategic promotion of governance structures in the network form fulfils precisely this function in that they act as structural couplings which not only facilitate a systematic increase in the reflexivity of EU institutions but also serve as channels through which the EU can ensure convergence between its operations and the operations of other social structures, thereby ensuring it is, itself, embedded.

The functional need to ensure that the EU is embedded is expressed in several ways. For example, OMC processes act as a specific form of structural coupling mainly oriented towards compensating for a lack of cognitive resources. OMC networks in effect link member state administrations within specific policy areas, thereby enabling these administrations to mutually observe each other. Hence, OMC processes increase reflexivity and potentially facilitate mutual adaptation and learning.[44] Ideally, then, OMC processes are oriented towards "transplanting" experiences from one setting to another. Since these processes are "intergovernmental" in nature they are mainly oriented towards increasing the reflexivity of member state administrations through an increase in the intensity of their mutual observations. The role of the Commission is therefore mainly to provide the necessary infrastructure for these processes and to act as a container within which their institutional memory can "reside". The Commission does, however, also play a more active role in OMC processes since it acts as a broker and actively engages in "persuasive policymaking". The role of broker provides the basis for instrumentalization of the processes involved by transforming the OMC activities into tools of increased integration. From the perspective of the Commission, OMC processes therefore provide a means of pushing the Europeanization processes forward within the policy areas where the method is applied. The barriers erected by the member states through their refusal to transfer formal legal competencies to the Commission are thereby circumvented.[45] The Commission is supported in this endeavor by the very nature of social processes as the

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[42] Poul F. Kjaer, *The Societal Function of European Integration in the Context of World Society*, 13 SOZIALE SYSTEME. ZEITSCHRIFT FÜR SOZIOLOGISCHE THEORIE 367 (2007).

[43] Ulrich Haltern, *Internationales Verfassungsrecht? Anmerkungen zu einer Kopernikanischen Wende*, 128 ARCHIV DES ÖFFENTLICHEN RECHTS 511, 512 (2003) (my translation).

[44] For the problematic use of the concept of learning in relation to the OMC see Sandra Kröger, *When learning hits politics or: Social policy coordination left to the administrations and the NGOs?* 3 EUROPEAN INTEGRATION ONLINE PAPERS (EIOP) (2006).

[45] See also Poul F. Kjaer, *Three Forms of governance and three forms of power*, pp. 23 – 43 in LAW, DEMOCRACY AND SOLIDARITY IN A POST-NATIONAL UNION. THE UNSETTLED POLITICAL ORDER OF EUROPE, 23, 31 (Erik Oddvar Eriksen, Christian Joerges & Florian Rödel, 2008).

central lesson arising from those of the OMC is that opening the contexts in question is a necessary but insufficient condition for the successful "transplantation" of knowledge from one context to another. Instead, successful transplantation remains conditioned by the establishment of shared frames.[46] The proactive creation of "common spaces" through an increased substitution of "national universes" with common "European universes" is, however, only achievable through far more fundamental and intrusive processes of "social engineering" which reach far beyond the kind of increased mutual observation initiated through the OMC processes. The failure of the OMC to "deliver" has therefore provided the Commission with arguments supporting its continued push towards increased harmonization and detailed regulation.[47]

Comitology structures also serve as instruments that increase reflexivity insofar as they institutionalize forms of mutual observation and information sharing between member states. Partly due to the legal framing of Comitology, these structures tend to be more stable and dense compared to the OMC processes. In addition, many Committees have operated for several decades and have increasingly turned into "epistemic communities". The majority of Comitology committees deal with highly complex and technical matters. Hence, the committees tend to be characterized by practices related to specific professions, thereby providing a certain common ground. From the perspective of the Commission, Comitology committees also serve as 'reservoirs of knowledge' and hence as a way of mobilizing expertise which the Commission itself does not possess. Apart from offsetting structural deficits in terms of cognitive capacities, Comitology also serves as a way to ensure implementation. One of the major differences between member state administrations and the Commission is the latter's profound lack of implementation tools. The emergence of Comitology can indeed be seen as a direct response to this deficit insofar as the Comitology structures enable the Commission to rely on the resources of member state administrations to ensure implementation. However, it is not just a simple question of resources. Rather, Comitology gives member state administrations a stake in the implementation of EC legislation and hence provides the Commission with the possibility of ensuring their commitment. Comitology is therefore heavily based on persuasive policymaking and 'soft power' which, in the absence of the necessary competences and resources, serve as functional equivalents to traditional demand and control mechanisms. The Comitology machinery is thereby directly oriented towards the generation of norms that underpin the Commission's efforts to ensure compliance with EC legislation, thus reducing the structural deficit of the EU with respect to implementation and compliance mechanisms.

Agencies represent another and somewhat special variant. Several kinds of agencies have emerged over the last decade. The common feature is that they are "networked agencies".

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[46] ERVING GOFFMAN, *FRAME ANALYSIS*: ESSAYS ON THE *ORGANIZATION OF EXPERIENCE* (1974).

[47] *Infra*, note 34.

Thus, agencies can also be characterized as hybrids that combine hierarchical organization and networks.[48] Agencies tend to be established within policy areas that have gained a high level of complexity thereby making it increasingly difficult for the Commission to exercise its role as network secretariat and ensure the necessary stability of the networks in question. Hence, the secretarial tasks and role as network co-coordinators have been outsourced to agencies which assume the role of 'mini-Commissions' in relation to these specific tasks. Their intrinsic lack of discretionary competencies, however, largely limits their role to the generation of information and to network coordination. The role as initiator and developer of policy has largely remained with the Commission. Networks therefore seem to fulfill the same function in policy areas with agencies as in the areas dominated only by Comitology as they link hierarchical organizations - Commission, agencies and member state administrations - thereby ensuring that these organizations are embedded within the broader social realm.

To sum up: network based governance structures (agencies, comitology and the OMC) can be defined as institutional formations relying on the network form and characterized by organizational and legal heterarchy, which act as structural couplings between hierarchically organized organizations, increasing the reflexive capacities of the organizations in question, and thereby offsetting the structural deficits of one or more of those organizations.[49]

E. The Juridification of Networks

As already indicated, the substantial function of networks is often to act as buffers between different spheres of society, thereby reducing negative externalities and crowding-out effects between such spheres. Thus, networks are double-edged structures which potentially can represent a tendency to de-differentiation at the same time as they fulfill a positive role in relation to ensuring the integration of society. Whereas other scholars understand networks as regimes which themselves are functionally differentiated,[50] the perspective here is the exact opposite in that networks are understood as formations which stand transverse to the functionally differentiated structures of society and serve as buffers between these spheres. Hence, networks are Zwischenwelten *("in-between worlds")*, and tend to lack the purity of many other social

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[48] Gunther Teubner, Das Recht hybrider Netzwerke, 165 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT 550 (2001).

[49] Poul F. Kjaer, *Between Governing and Governance. On the Emergence, Function and Form of Europe's Post-national Constellation*, EUROPEAN UNIVERSITY INSTITUTE 141 (2008), available at http://hdl.handle.net/1814/9067, last accessed 14 February 2009.

[50] Andreas Fischer-Lescano & Gunther Teubner, REGIME-KOLLISIONEN: ZUR FRAGMENTIERUNG DES GLOBALEN RECHTS (2006).

structures. Not surprisingly, the example of the OMC therefore illustrates that networks operating without a formal legal framing are structurally inclined to produce de-differentiation.[51]

The increased reliance on networks therefore increases rather than decreases the functional demand for juridification. Increased juridification is, however, only useful if it respects the autonomy and "fluidity" of the networks in question. KHL therefore seems to be relatively skeptical concerning the degree to which law can contribute to a stabilization of the networks themselves. As already indicated, he merely envisages that the legal system *ex-post* reformulates the law in order to make it fit the outcomes of network processes. Hence, the legitimacy of the network processes themselves is not a major concern to KHL.

It is, however, possible to upgrade the focus on juridification if it is merely understood as a legal undertaking which is aimed at establishing a basis for societal learning processes on the basis of a continued re-structuring of expectations.[52] Thus, network operations can be proceduralized in the sense that they, as is the case within Comitology, can be combined with a specific method for binding decision making which is substantially open-ended but based on specific values which can be deployed to evaluate unknown future developments.[53] Within Comitology the legitimizing function of procedures is derived from a double-edged differentiation of roles between participants. On the one hand, the variety of roles represented is developed according to the specific function which the Committee in question is handling. Thus the number of relevant roles is limited and the possible themes which can be dealt with are indirectly reduced. Moreover, each role has a certain perspective attached to it. Therefore, only issues which are of relevance to the particular role assigned can be raised and all other issues excluded. All in all, negative limitation through a legally defined role differentiation leads to a reduction in complexity. Such limitations can moreover be seen as a requirement for the successful handling of a certain function. Hence, the limitation of roles can be seen as a tool aimed at achieving output legitimacy. On the other hand, the differentiation of roles is also intended to ensure representation of all the relevant perspectives. In this way each role also has a positive obligation assigned to it, since the representative of the role is obliged to promote a specific interest or to develop an opinion based upon a specific type of professional knowledge. Thus a positive obligation to ensure the inclusion in the decision process of all relevant perspectives is thereby emerging. Potentially, this will guarantee that the

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[51] *Infra*, note 48.

[52] NIKLAS LUHMANN, LEGITIMATION DURCH VERFAHREN 34 (1969); Thomas Würtenberger, *Legitimität, Legalität*, inGESCHICHTLICHE GRUNDBEGRIEFFE, BD. 3, 677, 737 (O Brunner, W. Conze & R. Koselleck hrsg., 1983).

[53] NIKLAS LUHMANN, POLITIK DER GESELLSCHAFT 124 (2000).

outcome is in accordance with the interests of all the parties concerned. The positive obligation therefore serves as a specific form of input legitimacy.[54]

A view equivalent to the above has also – although unwillingly - been adopted by Habermas, in the sense that the late Habermas makes a shift away from a discourse ethics and towards a discourse theory where morality no longer takes up a superior position vis-à-vis the law.[55] Within the framework of the theory of deliberative supra-nationalism developed by Joerges and Neyer, this perspective has been applied directly to Comitology;[56] an application, however, which includes two major changes that indirectly (and probably unintentionally) amount to a severe critique of Habermas' deliberative theory.

Firstly, the theory of deliberative supranationalism expands the reach of the deliberative theory in order to make it encompass not only genuine political but also bureaucratic structures. The problem with the Habermasian version of the theory is that it remains too close to Arendt's concept of the political. Arendt conceptualizes the political sphere and the social sphere as standing in opposition to each other. Due to a nostalgic attachment to this kind of thinking, Habermas continues to regard bureaucratic and economic structures as inherently problematic rather than as potential spaces for deliberation in their own right. This view is not only expressed in Habermas' legal and political philosophy, but also provides the basis for his distinction between system and lifeworld in his theory of communicative action, where the lifeworld is understood as the context of culturally and linguistically organized patterns of interpretation within which subjects find themselves.[57] This common ground consists of "*implicit and unimpaired beliefs*",[58] which make it possible for two or more subjects to form a common understanding of the world on the basis of an already existing shared interpretation. Negatively reserving the concept of lifeworld as a source supporting the political sphere of society, Habermas however reveals a very simplified understanding of the function and self-understanding of bureaucrats as well as

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[54] Niklas Luhmann, Rechtssoziologie, Band 2 259 (1972); Niklas Luhmann, Ausdifferenzierung des Rechts, Beiträge zur Rechtssoziologie und Rechtstheorie 132 (1981).

[55] Jürgen Habermas, Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats 135 (1992). For further elaboration see Poul Kjaer, *Systems in Context: On the Outcome of the Habermas/Luhmann-debate*, Ancilla Iuris 66, 75 (2006).

[56] Christian Joerges & Jürgen Neyer, *From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology*, 3 European Law Journal 273 (1997); Christian Joerges & Jürgen Neyer, *Transforming strategic interaction into deliberative problem-solving: European comitology in the foodstuffs sector*, 4 Journal of European Public Policy 609 (1997).

[57] Jürgen Habermas, Theorie des kommunikativen Handelns, Band 1 Handlungsrationalität und gesellschaftliche Rationalisierung 386 (1981).

[58] Jürgen Habermas, Theorie des kommunikativen Handelns, Band 2: Zur Kritik der funktionalistischen Vernunft 189 (1981) (my translation, PFK).

of private sector actors, and a very limited view of social practices occurring within non-political structures.

For example, in developing his concept of trust as a substitute for the Habermasian concept of lifeworld, Luhmann focuses on the concept of reiteration. Every social operation which is repeated is a condensing operation which increases the "pre-knowledge" available for future social operations.[59] Given the strong role of procedures in bureaucratic organizations, a consequence of Luhmann's position is that he can argue that the lifeworld actually becomes a strong feature of the social operations of such organizations.[60] In turn, Luhmann can therefore claim that the potential basis for evolution of the social dimension of rationality is in fact relatively stronger within the realm of bureaucracy than elsewhere. This allows Luhmann to argue that social norms, and not only the kind of 'pre-knowledge' which Habermas focuses on, play a substantial role within bureaucratic structures. From this Luhmannian perspective, which also could be extended to economic structures, Joerges and Neyer's attempt to expand the empirical validity and normative reach of Habermas' theory so as to encompass bureaucratic structures can be seen as an improvement.[61] Habermas has, however, rejected the concept of deliberative supranationalism due to a perceived lack of input-legitimacy within regulatory structures such as Comitology,[62] and instead continues to maintain that bureaucratic structures need to be kept under "permanent siege" by the public sphere if the normative ideal of achieving legitimacy through deliberation is to have any chance of realization. [63] This perspective is also supported by Habermas' followers, such as Schmalz-Bruns, who has argued that deliberative supranationalism favors technocratic regulation at the cost of "true politics".[64]

Secondly, and again in contrast to Habermas, the theory of deliberative supranationalism departs from the insight that the EU is not a state in the nation-state sense and that it will

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[59] Niklas Luhmann, *Die Lebenswelt – nach Rücksprache mit Phänomenologen*, 72 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE, 176, 177 (1986); Niklas Luhmann, *Familiarity, Confidence, Trust: Problems and Alternatives*, TRUST: MAKING AND BREAKING COOPERATIVE RELATIONS, 94 (Diego Gambetta ed., 1988).

[60] Niklas Luhmann, *Lob der Routine*, 55 VERWALTUNGSARCHIV 1 (1964).

[61] For further elaboration see Poul Kjaer, *Systems in Context: On the Outcome of the Habermas/Luhmann-debate*, ANCILLA IURIS 66 (2006).

[62] *Infra*, note 3.

[63] Jürgen Habermas, *Further Reflections on the Public Sphere*, in HABERMAS AND THE PUBLIC SPHERE, 452 (Craig Calhoun ed., 1992). Also quoted in Joshua Cohen & Charles Sabel, *Directly-Deliberative Polyarchy*, 3 EUROPEAN LAW JOURNAL 313, 339 (1997).

[64] Rainer Schmalz-Bruns, *Grenzerfahrungen und Grenzüberschreitungen: Demokratie in integrierten Europa?*, in REGIEREN IN ENTGRENZTEN RÄUMEN, 369 (Beate Kohler-Koch eds., 1998); Rainer Schmalz-Bruns: *Deliberativer Supranationalismus*, 6, 2 ZEITSCHRIFT FÜR INTERNATIONALE BEZIEHUNGEN185 (1999).

not achieve a structure similar to the nation-state form in the foreseeable future. From a normative perspective, the proponents of the theory argue that the desirability of state-hood is – at best - questionable. Thus the theory is directly constructed in a manner that seeks to maintain the normative objectives of modernity at the same time as it is recognized that the structural conditions within which such objectives will have to be realized are substantially different and that the institutional form therefore will have to be different. In other words: The theory of deliberative supranationalism potentially opens up for a "third way" between the naive *Étatisme* of Habermas and the radical post-modern approach of KHL.[65]

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[65] The theory of deliberative supranationalism, however, remains a normative theory and will have to be combined with and underpinned by a genuine descriptive theory capable of explaining how the European post-national constellation emerged in the first place. For preliminary reflections see *infra*, note 48.