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**THE EMERGENCE OF GLOBAL
ADMINISTRATIVE LAW AND
TRANSNATIONAL REGULATION**

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THE EMERGENCE OF GLOBAL ADMINISTRATIVE LAW AND TRANSNATIONAL REGULATION

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Abstract:

The discussion on the emergence of global administrative law is centered around the question: “Is it law?” and problems of accountability. This is a narrow perspective which ignores the autonomy of the administrative “internal law” generated by administrative agencies themselves. Domestic administrative law is only to a much lesser extent a product of courts or legislators than hitherto taken for granted. For global administrative law the entanglement of administrative practice and normativity is crucial. The creation of administrative law by the experimental network of decisions and public-private cooperation and as a consequence its permanent self-transformation should be considered as a necessity. This is why it should not come as a surprise that the instruments and forms of global administrative law are generated by transnational administrative networks of agencies. The evolution of both domestic and transnational administrative law will allow for new heterarchical forms of accountability and legitimation once the focus on a hierarchical concept of delegation is given up. Both for domestic and global administrative law the adoption of new approaches to ex post monitoring of administrative action and learning seems to be more promising than the traditional orientation on the binding force of legal rules ex ante.

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1. The evolution of postmodern domestic administrative law as the background for its globalisation

In the following, the hypothesis will be developed that the perspective on a homogeneous global society to which a kind of a global state with more or less the same attributes as the territorially limited state is beyond the point. It leads to the assumption of too much unity in the legal order – at least as an aim to be accomplished in the long run. At the same time, in the reverse perspective, it epitomises legitimacy¹ as the primary focus of a legal theory of global law.² As opposed to this conception, a theoretical perspective can be designed that takes the network like fragmented character³ of the law as it is, and epitomises - so to speak - the “internal side” of the self-organization of the legal system, and does not try to derive legitimacy from some higher order of law (constitution of the state or the world society).⁴ The reflection in legal theory would try to analyse the self-construction or the “auto-constitution” of a legal order of networks. In order to clarify what is meant by this approach, this idea could be tested in retrospect in the better known historical process of the evolution of modern administrative law in order to check whether an overarching evolutionary tendency inherent in the whole body of domestic, transnational and global law, in particular, which could also shed new light on the evolution of global administrative law might not be observed. This cannot be done in the context of this paper. However, the hypothesis may be ventured that domestic administrative law is to a much

¹ David Dyzenhaus, *Accountability and the Concept of (Global) Administrative Law*, 3, in: ACTA JURIDICA: GLOBAL ADMINISTRATIVE LAW (Hugh Colber, ed., 2009).

² Benedict Kingsbury, *The Concept of ‘Law’ in Global Administrative Law*, 20 EUROPEAN JOURNAL OF INTERNATIONAL LAW 23 (2009); id. & Stephan Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality, and the Emerging Global Administrative Law*, New York University Public Law and Legal Theory Working Papers, 2009-No 14; Jerry L. Mashaw, *Between Facts and Norms: Agency Statutory Interpretation as an Autonomous Enterprise*, 55 UNIVERSITY OF TORONTO LAW REVIEW 497, 520 (2005), 115, 154.

³ See for a further differentiation of the network concept which can easily end up as a fashionable rhetoric Michael Stohl & Cynthia Stohl, *Human Rights, Nation States, and NGOs: Structural Holes and the Emergence of Global Regimes*, 442, 72 COMMUNICATION MONOGRAPHS No. 4 (2005); a broader perspective on the role of private actors in the regulation of public interests (including “second order regulatory agreements” between private corporations and non-for – groups) can be found in Michael Vandenberg, *THE PRIVATE LIFE OF PUBLIC LAW*, 100 COLUMBIA LAW REVIEW 101 (2007).

⁴ David Held, *The Transformation of the Political Community. Rethinking Democracy in the Context of Globalization*, 84 in: DEMOCRACY’S EDGES (Ian Shapiro & Casiano Hacker-Cordón, eds., 1999); Jonathan Cohen & Charles F. Sabel, *Global Democracy?*, 37 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 763 (2005).

lesser extent a product of the legislator or the courts than administration itself. The paradigms of domestic administrative law have changed within the last decades from the construction and decision of individual “cases” to industry related “regulation”. We are now in the process of an emergent new model of administrative action that is characterized by a much more uncertainty and, as a consequence, by experimentation and learning. This constellation can be named “postmodern” inasmuch as it seems to be a consequence of a general transformation of culture. Both with regard to transnational and domestic law, governance has to be “retooled”, as Jody Freeman and Martha Minow have formulated the challenge of new forms of public-private co-operation.⁵

Against the background of this assumption of the self-transformation of the normative systems of society assumed here, a new perspective on the rise of the new “international” or “global administrative law” – leaving aside private law in the narrower sense - seems possible: on the one hand, it could appear to be productive to consider that the network-like character of the new transnational administrative law is not a completely new phenomenon. Instead, it can be described as a continuation of the fragmentation and, as a consequence, the increasingly loose coupling of the different layers of the normative system of postmodernity which can be observed at the domestic level, as well. Once the domestic legal system is challenged by the requirement to allow for more and more fragmentation and differentiation in the network of norms, the transnational expansion of its reproduction no longer seems as completely incompatible with the logic of the legal system which had to give up its “unity” as a paradigm of reference long before.⁶ Afterwards, the loose coupling and the network-like structure within domestic law had to be taken into consideration and a new set of meta-rules for the internal “management of rules” had to be developed. The expansion of this new hybridisation to the transnational level between states and the domestic legal systems could no longer be constructed as a breach of the continuity of postmodern law but as its consequent continuation. This analysis is confirmed by the observation of the deep transformation which public international law has undergone in the last decades: its focus on the state as the main actor has been supplemented by the inclusion of

⁵ See *Introduction: Reframing the Outsourcing Debate*, 1, 19, in: *GOVERNMENT BY CONTACT: OUTSOURCING AND AMERICAN DEMOCRACY* (ed., eds., 2009).

⁶ For European law See Marc Amstutz, *In-Between Worlds: Marleasing and the Emergence of Interlegality in Legal Reasoning*, 11 *EUROPEAN LAW JOURNAL* 766 (2005).

domestic affairs in the focus of international law, thus making the borders of sovereignty much more permeable for the observation and action of international law. The same is true for the function of public international organisations,⁷ which have developed much more autonomy and independence from the states as their “creators”.

2. “Constitutionalising” global administrative law or experimenting with a hybrid transnational legal order?

It may be a too far-reaching assumption that public international law is on the way towards “constitutionalisation”,⁸ a concept which finally assumes the evolution of a new meta layer of homogenisation of the law beyond the reach of the will of the sovereign state. As has been shown above, G. Teubner has ventured the hypothesis of a transnational “civil society” beyond both the state and traditional state-based public international law as the new “source” of a transnational autonomous law.⁹ This assumption even goes so far as to attribute the potential of self-constitutionalising¹⁰ to this transnational civil society. Teubner aligns the reflexive mechanisms of self-control and revision of this new layer of the normative order with the secondary norms that H.L.A. Hart defined as constitutive for the stabilisation of positive law in general.¹¹ This approach ignores the basic weakness of the broadened proof of variety of normative rules, patterns of co-ordination and their inter-relationships with both state and international law. It neglects the unavoidable paradox of a reference to a level of “secondary norms” as a “proof” for the existence of the “lawness” of “primary norms”: How about the unity

⁷ See for the evolution of an administrative law of an international organisation as opposed to the global administrative law in a stricter sense James Salzman, *Decentralised Administrative Law in the OECD*, 68 LAW AND CONTEMPORARY PROBLEMS 191 (2005).

⁸ David Dyzenhaus, Murray Hunt & Michael Taggart, *The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation*, 1 OXFORD UNIVERSITY COMMONWEALTH LAW JOURNAL 5 (2001).

⁹ Gunther Teubner, *Self-Constitutionalization of Transnational Corporations? On the Linkage of “Private” and “Public” Corporate Codes of Conduct*, 17 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 2011, to appear; id., *Constitutionalising Polycontextuality*, 19 SOCIAL AND LEGAL STUDIES 2010, to appear; id., *The Corporate Codes of Multinationals: Company Constitutions Beyond Corporate Governance and Co-Determination*, 203, in: CONFLICT OF LAWS AND LAWS OF CONFLICT IN EUROPE AND BEYOND (Rainer Nickel, ed., 2010); see also id., *supra* note 10, 3; see also Jean-Marie Guéhenno, *THE END OF THE NATION STATE* (1995), 100.

¹⁰ See for conceptual doubts Nico Krisch, *Postnational Constitutionalism?* Discussion Draft (2008), at: www.iilj.org/courses/documents/Krisch.IdeaofConstitutionalism.pdf.

¹¹ See also Kingsbury, *supra*, note 2.

of the plurality of levels? The unity of the legal system cannot itself be derived from a norm, and be it a meta-norm, it is an “eigenvalue” of the differentiated language of law as such. Jerry L. Mashaw¹² has convincingly argued that the doubts of the “lawness” of global administrative law stem from the same origin as the conventional ignorance of the generative power of administration that manifests itself in the emergence of the “internal administrative law” in the 19th century. With reference to administrative agencies that have to operate with an internal perspective of creating a layer of self-binding and self-reflexive rules on the one hand and with an outside view to other private and public actors, on the other hand, one can speak of a domain of “internal law”.

This discussion need not be taken up in detail here. What is relevant here is the assumption that, both at the domestic and the international level, the pre-conditions for the evolution of global administrative law do not need a “delegation” from a constitution or statute law. At both levels, the hierarchical construction of the state-based and the international public law have been supplemented by a tendency towards a heterarchical dimension of the reproduction of the legal system.¹³ Global administrative law, in particular, is confronted with the design of forms, instruments and procedures beyond the established rules of general administrative law and its inherent structuring function. “International” or “global administrative law” appears to be able to draw on components of both the more hybrid loosely coupled type of the law of networks, which emerges at the domestic level, and on components of the new public international law which shatters the hitherto established clear separation from the state-based law. As Daniel C. Esty has assumed, global administrative law can provide the necessary “connectedness” between different transnational arenas of decision-making.¹⁴

¹² Jerry L. Mashaw, *Federal Administration and Administrative Law of the Gilded Age*, 119 YALE LAW JOURNAL 1413, 1461 (2010); the concept goes back to Bruce Wyman, THE PRINCIPLES OF ADMINISTRATIVE LAW GOVERNING THE RELATIONS OF PUBLIC OFFICERS (1903). also Niklas Luhmann, *Die Paradoxien des Entscheidens*, 17, 43, in: PARADOXIEN DER ENTSCHEIDUNG: WAHL/SELEKTION IN KUNST, LITERATUR UND MEDIEN (Friedrich Balke, & Urs Stäheli, eds., 2003).

¹³ For a new approach to the state in postmodern societies François Moreau, *The Role of the State in Evolutionary Economics*, 28 CAMBRIDGE JOURNAL OF ECONOMICS 847 (2004) (the state as a “moderating” agency).

¹⁴ The role of procedure in administrative law should not be regarded as an illegitimate “ersatz” for appropriate democratic hierarchical empowerment, it is a necessary component of a procedural rationality of decision making which has to meet the challenge of uncertainty, see also Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE LAW JOURNAL 1490 (2006).

This perspective allows for a more differentiated look at the new layer of a network type of transnational law, and brings in new arguments for the conception of an adequate system of meta-rules which would help formulate new requirements for the co-ordination of different transnational networks as such,¹⁵ and, in a vertical sense, the relationing between transnational and domestic networks of regulation in particular.¹⁶ This development brings to the fore the dependence of public law on the activities of private firms, *etc.*¹⁷ As far as the effects of decision-making on third parties are concerned, the co-operative dimension between transnational and domestic administrative law has to be strengthened,¹⁸ because the new focus on the procedural elaboration of complex administrative decision-making (for example, on health standards¹⁹) including global co-ordination should not lead us to overlook the often ensuing implementation through direct interference with individual rights. As Alfred C. Aman jr. has argued - with good reason - administrative law can mitigate the democracy deficit of public-private co-operation both at the transnational and at the domestic level.²⁰ This approach might be a productive mode of managing the unavoidable indeterminacy of the permanent self-transformation of society by a shifting of institutional design more towards checks and balances.²¹

The description of the emergence of the “society of networks” should allow us to shed some doubts on Fischer-Lescano and Teubner’s assumption that the rise of the problems attributed to the globalisation process can be regarded as a consequence of the “maximisation of

¹⁵ Christian Tietje, *Internationalisiertes Verwaltungshandeln*, 39 RECHTSTHEORIE 255, 275 (2008); Anne Marie Slaughter, A NEW WORLD ORDER 40, 43 (2004) (“transgovernmental networks”).

¹⁶ This includes the possibility to apply domestic administrative law to transnational transactions, see or the relationships between global administrative law and traditional international law Sabino Cassese, B. Carotti, L. Casini, M. Macchia, E. Macdonald & M. Savino, GLOBAL ADMINISTRATIVE LAW. CASES, MATERIALS, ISSUES, 2nd ed., p. XXV www.iilj.org, 57; Christian Tietje, INTERNATIONALISIERTES VERWALTUNGSHANDELN 50 et seq. (2001).

¹⁷ Johannes M. Bauer, Complex Technical Systems, Institute of Technology Assessment, WPITA 04-03.

¹⁸ Eberhard Schmidt-Aßmann, The Internationalization of Administrative Relations as a Challenge for Administrative Law Scholarship, 9 GERMAN LAW JOURNAL 2061 (2008).

¹⁹ Harm Schepel, The Constitution of Private Governance. Product Standards in the Regulation of Integrating Markets (2005).

²⁰ Alfred C. Aman jr., *Privatization and Democracy: Resources in Administrative Law*, 264, 276, in: Freeman & Minow (eds.), GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY (Jody Freeman & Martha Minow eds., 2009) 264, 276.

²¹ Russell Hardin, INDETERMINACY AND SOCIETY 128 (2003).

the eigenrationality” of specialised societal functional systems, and the economy in particular.²² This assumption does not seem to be easily compatible with the hypothesis of the auto-constitutionalisation of the global civil society in its “own right” (beyond the state).²³ The instability between the functional systems (politics, law and economy, in particular) is a phenomenon which is characteristic of the acentric society and the permanent “unrest” which it creates. And the political problems that are attributed to globalisation both at the domestic and the global level cannot be reduced to a mere quantitative reduction of the impact of the political system and its co-ordination with the economic system in particular. It is also a consequence of a self-produced lack of learning capabilities, which attributes the permanent failures of public policies just to “neo-liberalism” and not to political slack. The focus on the evolution of the knowledge basis of society as the “pool of variety” whose distributed dynamic character puts each system under permanent stress and is open for evolutionary processes which proliferate across the borders of all functional systems allows for a more differentiated description of the network logic which transcends both territorial and functional borders. This is due to the fact that there is a close link between the knowledge system and societal institutions.²⁴ The hypothesis that legal fragmentation is a consequence of the maximisation of the “eigenrationalities” of functional systems appears doubtful.²⁵

The new relational “rationality of networks” can no longer be regarded as being “deposited” in a canonical (legal) text;²⁶ instead, legal meaning is to be generated from several

²² Gunther Teubner, *The Anonymous Matrix: Human Rights Violations by ‘Private’ Transnational Actors*, 69 MODERN LAW REVIEW 327 (2006); see also Niklas Luhmann, DIE GESELLSCHAFT DER GESELLSCHAFT 1088 (1997).

²³ Gunther Teubner, *Fragmented Foundations: Societal Constitutionalism Beyond the Nation State*, 327, in: THE TWILIGHT OF CONSTITUTIONALISM? (Martin Loughlin & Petra Dobner, eds., 2010)..

²⁴ Joel Mokyr, THE GIFTS OF ATHENA. HISTORICAL ORIGINS OF THE KNOWLEDGE ECONOMY 103 (2002).

²⁵ The second example of a one sided maximisation of a functional rationality is even less convincing: the Christian opposition to birth control (maximisation of the “eigenrationality” of the religion) is blamed for the growth of population in many parts of the world: Apparently this is in the present primarily a problem for non-christian societies; in the past the catholic opposition to birth control has not prevented believers to circumvent this doctrine quite successfully.

²⁶ See in a sociological perspective Albert Ogien, *Le double sens de l’interprétation*, 26 REVUE SUISSE DE SOCIOLOGIE 485, 498 (2000).

overlapping texts and contexts of practices in an experimental approach that comprises both the domestic and the transnational realms.²⁷

3. The new logic of cooperation – domestic and transnational

The emergent heterarchical normative “network of networks”²⁸ is functioning upon the basis of structured and focused project-like co-operation,²⁹ and mutual observation within communities of limited scope. It follows a relational rationality,³⁰ in the sense that it makes use of a

²⁷ See for the consequences for fragmented regulation Julia Black, *Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes*, 2 REGULATION AND GOVERNANCE, 137, 145 (2008).

²⁸ See also Jean-Marie Guéhenno, L’AVENIR DE LA LIBERTÉ, 56 (1999) (“aggregates of networks”); this is why more traditional approaches which tend to look at global law through the lens of the well-ordered legal system of the nation state and which hope for a cooperative venture of a plurality of states to restructure the emerging legal pluralism miss the point; cf. Mireille Delmas-Marty, ORDERING PLURALISM: A CONCEPTUAL FRAMEWORK FOR UNDERSTANDING THE TRANSNATIONAL LEGAL WORLD (2009).

²⁹ The cooperation of courts is much more difficult and mutual citations tend to be overestimated; for a different version of cooperation and network-formation in the globalised jurisprudence of courts can be found in the very variously marked readiness to refer in their reasoning of courts in other countries, see, Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AMERICAN JOURNAL OF INTERNATIONAL LAW 241, 263 (2008); for the coordination of different regimes of protection of constitutional liberties see Anne Peters, *Die Anwendbarkeit der EMRK in Zeiten komplexer Hoheitsgewalt und das Prinzip der Grundrechtstoleranz*, 48 ARCHIV DES VÖLKERRECHTS 1 (2010); Anne Marie Slaughter, *A Global Community of Courts*, 44 HARVARD JOURNAL OF INTERNATIONAL LAW 191 (2003); ead. & David T. Zaring, D., *The Use of Foreign Decisions by Federal Courts. A Comparative Analysis*, 3 JOURNAL OF EMPIRICAL LEGAL STUDIES 297 (2006) (the impact of this version of judicial cooperation is overtaxed by the authors; it has only marginal importance in the bigger states); ead. & William Burke-White, *The Future of International Law is Domestic*, 47 HARVARD INTERNATIONAL LAW JOURNAL 1 (2006); A EUROPE OF RIGHTS. THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS (Helen Keller & Alec Stone Sweet, eds., 2009); for a critique See Eric Posner & John Yoo, *Judicial Independence in International Tribunals*” 93 CALIFORNIA LAW REVIEW 1 (2005); see also Miguel Poiaras Maduro, *Courts and Pluralism. Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism*, 377, in: RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE (Jeffrey L. Dunoff & Joel P. Trachtman, eds., 2009); “cooperation” can also mean mutual correction beyond traditional rules of international law in cases where “interlegal” or “interadministrative” cooperation is not explicitly supported by coordination of judicial protection, see *Conseil d’Etat*, 9 June 1999, No. 198344, Mme Hamssaoui: an illegal German administrative act binds a French administrative decision maker (asylum case): as a consequence judicial protection against the French decision has in one way or other to include the competency of the French court to control the German administrative act; on the basis of administrative acts this permeability of sovereignty is established by mutual recognition of administrative decisions, Kalypso Nicolaidis & Gregory Shaffer, *Managed Mutual Recognition Regimes: Governance Without Global Government*, 68 LAW AND CONTEMPORARY PROBLEMS 253 (2005); Matthias Ruffert, *The Transformation of Administrative Law as a Transnational Methodological Project*, in: id. (ed.) THE TRANSFORMATION OF ADMINISTRATIVE LAW IN EUROPE – A TRANSNATIONAL METHODOLOGICAL PERSPECTIVE OF REFORM/LA MUTATION DU DROIT ADMINISTRATIF EN EUROPE – UNE PERSPECTIVE TRANSNATIONALE ET MÉTHODOLOGIQUE DE RÉFORME 3 (2007).

³⁰ See in a theoretical perspective Rudolf Stichweh, *Das Konzept der Weltgesellschaft. Genese und Strukturbildung eines globalen Gesellschaftssystems*, 39 RECHTSTHEORIE 329, 340 (2008).

multiplicity of perspectives and of the modelling of a multi-layered complex spatial and contextual order.³¹

In this respect, the comparison of old and new *Lex Mercatoria* is quite plausible, though the trust generated by co-operation is no longer based upon personal acquaintance and confidence but upon a functional web of inter-relationships among strangers. In this sense, the new network-based relational rationality is itself a product of the rationale of the legal system and its function to process and support impersonal relationships. At the same time, public law cannot be discarded as a “*quantité négligeable*”³² because the state, administrative agencies in particular, and international organisations are major players in the transnational legal process.³³ As mentioned above, the problem with the new “net based” law is to be seen in the fact that the consideration of outsiders both within networks and outside is far from being guaranteed by the new logic of networks. In this respect, the role of state-based traditional law, constitutional in particular, cannot be completely superseded. The same is true for domestic administrative law:³⁴ the new forms of transnational co-operation both among state agencies,³⁵ and among the latter

³¹ See Carole Lypsey, Construction de la perspective, construction du sens, COMMUNICATIONS No. 85, 37, 41 (2009); Sophie Lavaud-Forest, Perspectives numériques, variabilités, interactions, univers distribués. À la découverte de perspectives renouvelées, *ibid.*, 55, 62.

³² Christoph Möllers, *Transnational Constitutionalism Without a Public Law?*, 329, in: TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM (Christian Joerges, Inger-Johanne Sand & Gunther Teubner, eds., 2004).

³³ See Benedict Kingsbury & Lorenzo Casini, *Global Administrative Law Dimensions of International Organizations Law*, 6 INTERNATIONAL ORGANIZATIONS LAW REVIEW 319 (2009), for the rationality potential of an “inter-public” approach to the emerging “global administrative law”; in the same vein see Eyal Benvenisti, *The Interplay Between Actors as a Determinant of the Evolution of Administrative Law in International Organizations*, 68 LAW AND CONTEMPORARY PROBLEMS 319 (2005); Richard B. Stewart & Michelle Rattón Sanchez Badin, *The WTO and Global Administrative Law*, NYU Public Law and Legal Theory Working Paper No. 166, 25 (2009).

³⁴ See for the coupling of global and domestic administrative law Stewart & Badin, *ibid.*, 10.

³⁵ From the perspective of German administrative law see Christoph Möllers, *Transnationale Behördenkooperation. Verfassungs- und völkerrechtliche Probleme transnationaler administrativer Standardsetzung*, 65 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 351 (2005); *id.*, *Die Governance-Konstellation: Transnationale Beobachtung durch öffentliches Recht*, 238, in: GOVERNANCE IN EINER SICH WANDELNDEN WELT, POLITISCHE VIERTELJAHRESSCHRIFT, SPECIAL ISSUE NO. 41 (Gunnar Folke Schuppert & Michael Zürn, eds., 2008); Claudio Franzius, *Warum Governance?*, 42 KRITISCHE JUSTIZ 25, 30 (2009).

and private actors,³⁶ are legitimate as long as they remain limited to the impact on the networks as such.

Once they have an impact on the rights of outsiders (consumers, smaller firms, *etc.*), in some way or another, a link between the transnational law³⁷ and the domestic public or private law can find its basis in domestic law.³⁸ The same is true for public accountability in a democratic sense:³⁹ a narrow understanding of reducing any kind of impact on the rights of others to a quasi-public interference which needs a delegation of regulatory power⁴⁰ misses the point, *i. e.*, the autonomy of the civil society which includes a “power” to generate norms in the sense described above, which has always been an essential element of societal self-organisation. At the same time, the state based-legal system has always fulfilled the function of oversight of

³⁶ See for exchange of information as a focus of transnational cooperation of public agencies Anne-Marie Slaughter, A NEW WORLD ORDER, 14 (2004); ead., The Accountability of Government Networks, 8 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 347 (2001); Karl-Heinz Ladeur, *Toward a Legal Concept of a Network in European Standard-Setting*, 155, in: EU-COMMITTEES. SOCIAL REGULATION, LAW AND POLITICS (Christian Joerges & Ellen Vos, eds., 1999); See also Peter M. Haas, *Introduction: Epistemic Communities and International Policy*, 46 INTERNATIONAL ORGANIZATION 1 (1992); for standard-setting see Walter Mattli, *Public and Private Governance in Setting International Standards*, 199, in: GOVERNANCE IN A GLOBAL ECONOMY (Miles Kahler & David A. Lake, eds., 2003); James A. Caporaso, *Democracy, Accountability, and Rights in Supranational Governance*, *ibid.*, p. 361; Robert O. Keohane & Joseph S. Nye jr., *Redefining Accountability for Global Governance*, *ibid.*, 386; for investment treaties see Rudolf Dolzer, *The Impact of International Investment Treaties on Domestic Administrative Law*, 37 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 953 (2006).

³⁷ For the development of this concept see Philip C. Jessup, TRANSNATIONAL LAW (1956); for a (positive) valuation in retrospect See Christian Tietje, Alan Brouder, Karsten Nowrot (eds.), *Philip C. Jessup's Transnational Law Revisited on the Occasion of the 50th Anniversary of Its Publication*, Essays in Transnational Economic Law 50/2006, University of Halle-Wittenberg.

³⁸ For the relationship between global and domestic administrative law see Ming-Sung Kuo, *Between Fragmentation and Unity: The Uneasy relationship Between Global Administrative Law and Global Constitutionalism*, 10 SAN DIEGO INTERNATIONAL LAW JOURNAL 439 (2009); for an approach to the description and analysis of a kind of „meta-networking” between different types of actors institutionalized at different hierarchical levels see Christoph Möllers, *Globalisierte Verwaltungen zwischen Verselbständigung und Übervernetzung*, 39 RECHTSTHEORIE 217, 228 (2008).

³⁹ Richard B. Stewart, *Accountability and the Discontents of Globalization: US and EU Models for Regulatory Governance*, draft paper presented at New York University Law School Hauser Colloquium on Globalization and its Discontents (Sept. 2006), available at: http://www.law.nyu.edu/kingsburyb/fall06/globalization/speakers_papers.html; John Ferejohn, *Accountability in a Global Context*, IILJ Working Paper 2007/5: Global Administrative Law Series (2007); Slaughter, *supra* note 252)(„horizontal democracy“); David Held, *The Transformation of the Political Community. Rethinking Democracy in the Context of Globalization*, 84 in: DEMOCRACY'S EDGES *supra* note 4; Cohen & Sabel, *supra*, note 4, 763; Ruth W. Grant & Robert Keohane, *Accountability and Abuses of Power in World Politics*, 99 AMERICAN POLITICAL SCIENCE REVIEW 1, 14 (2005).

⁴⁰ For a critique See Kristina Daugirdas, *International Delegations and Administrative Law*, 66 MARYLAND LAW REVIEW 707 (2007).

both the functionality of the knowledge base as such, and the role of a universal core function of positive law which consisted in the preservation of openness, diversity (competition,⁴¹ plurality of opinions, *etc.*) and a coupling between the different versions of social norms upon the basis of the rationality of the impersonal legal system of inter-relationships as such.⁴²

4. How democratic is global administrative law?

The democratic function of the law should not be overtaxed.⁴³ The problem comes to the fore whenever the state interferes directly with the individual rights, as this function cannot be extended without limitation to the indirect participation of the state in the generation of the vast amount of norms of all types in which the state is involved under conditions of increasing complexity of the preservation of social order. The emergence of the new globalised administrative law strengthens - by necessity - the autonomy of the administrative function.⁴⁴

On a more abstract layer, the function of accountability⁴⁵ and of transparency of public action is also to be borne in mind.⁴⁶ The state is a public function and is, as such, a “common sake”; this is the reason why the state has to be held responsible and accountable for all public action. However, this is not equivalent to a requirement of formal delegation of power by parliamentary statutes.⁴⁷ The accountability of administration (as opposed to the legislator)

⁴¹ Competition can also be used in a reflexive way for the control of public regulation: Errol Meidinger, *Beyond Westphalia: Competitive Legalization in Emerging Transnational Regulatory Systems*, 121 in: LAW AND LEGALIZATION IN TRANSNATIONAL RELATIONS (Christian Brüttsch & Dirk Lehmkuhl, eds., 2007).

⁴² See for the role of the judiciary within the whole range of mechanisms of controlling accountability Edwin L. Felter jr., *Accountability in the Administrative Judiciary: The Right and the Wrong Kind*, 86 DENVER UNIVERSITY LAW REVIEW 1 (2008).

⁴³ However, see for a critique of the tendency to “put democracy in brackets” when it comes to globalized law Marks, Susan Marks, *Naming Global Administrative Law*, 37 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 995 (2006).

⁴⁴ See Tietje, *supra* note 15, 275.

⁴⁵ For the permeability of the sovereignty see Anne Marie Slaughter & William Burke-White, *The Future of International Law is Domestic*, 47 HARVARD INTERNATIONAL LAW JOURNAL 1 (2006); ead. & Zaring, *Networking Goes International: An Update*, 2 ANNUAL REVIEW OF LAW & SOCIAL SCIENCE 211, 215, 223 (2006).

⁴⁶ Bhupinder S. Chimni, *Two Forms of Global Administrative Law*, 37 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 799, 802 (2005); Kingsbury, *supra*, note 9; id. & Schill, *supra*, note 307; William D. Coleman & Tony Porter, *International Institutions, Globalization and Democracy. Assessing the Challenge*, 14 GLOBAL SOCIETY 377 (2000).

⁴⁷ See Linda Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, Vanderbilt Public Law Research Paper 02-06 (arguing that the focus on democratic legitimation is misleading and

cannot be constructed in a simplistic way: Instead, it should be conceived with a view to the consistency in fulfilling its eigenrationality by following its rule-based type of decision-making.⁴⁸ In this respect, the increasing fragmentation of the state and the normative order is a problem, if only its intransparency and the risk of the emergence of a completely disentangled “network of networks” which is no longer mutually penetrable for the consideration of external interests, or does not meet the requirement that they develop themselves as part of a productive environment of other networks or of the social systems at large. Following the conception described in this article, one should not lose sight of the concomitant phenomena of the rise of the issue of accountability in private organisations:⁴⁹ the interest in accountability in private organisations is also due to the fact of the decreasing transparency and the increasing fragmentation of the private (economic) organisation. Information and knowledge are no longer present and collected in a commonly distributed experience. This transformation of the environment of firms has its repercussion in multi-faceted approaches to “count the invisible”.⁵⁰ The fragmented character of global administrative law finds its repercussion in the fact that the constituencies to which administration might be accountable are fragmented, as well: many of the targets to be tackled at the transnational level emerge beyond the state and cannot be dissolved into fragments of competencies which escape from democratic state control;⁵¹ this is true, for example, for many environmental problems⁵² (climate change,⁵³ in particular). The same

should be shifted to control of arbitrariness).

⁴⁸ Edward L. Rubin, *The Myth of Accountability and the Antiadministrative Impulse*, 103 MICHIGAN LAW REVIEW 2073, 2119 (2003).

⁴⁹ Generally Michael Power, ORGANIZED UNCERTAINTY. DESIGNING A WORLD OF RISK MANAGEMENT (2007) (focusing on the trend to regulate more and internal relationships of corporations); ORGANIZATIONAL ENCOUNTERS WITH RISK (Bridget Hutter & Michael Power, eds., 2005).

⁵⁰ Yong Suk Jang, *Transparent Accounting as a World Societal Rule*, 167, 179, in: GLOBALIZATION AND ORGANIZATION: WORLD SOCIETY AND ORGANIZATIONAL CHANGE (Gili S. Drori, John W. Meyer & Hoky Hwang, eds., 2006).

⁵¹ See Nico Krisch, *The Pluralism of Global Administrative Law*, 17 EUROPEAN JOURNAL OF INTERNATIONAL LAW 247 (2006) (this problem can according to the author only be solved by new transnational instruments of accountability).

⁵² See the overview in Wolfgang Durner, *Internationales Umweltverwaltungsrecht*, 121, 123, in: INTERNATIONALES VERWALTUNGSRECHT (Christoph Möllers, Andreas Voßkuhle & Christian Walter, eds., 2007), in particular for the interrelationship between domestic and international law.

⁵³ See Hari M. Osofsky, *Is Climate Change “international”? Litigation’s Diagonal Role*, 9 VIRGINIA JOURNAL OF INTERNATIONAL LAW 585, 641 (2009), where the intertwinement of factual and decisional networks of the management of climate change are discussed.

goes for the regulation of the internet, a challenge that has a new transnational global dimension, as well. This “network of networks” is a new phenomenon that has never been a “domestic” issue at all.

The network-like character of transnational administration finds its reverse side in the fact that the distributed power of decision-making implies a self-limitation that might be used for a re-formulation of the public “control project” itself: it allows for experimentation with new heterarchical forms of “irritation” by the introduction of more variety, by bench-marking, instead of “steering”, by comparative observation of different networks, by the search for the emergence of new patterns of co-ordination and the generation of knowledge in procedure.⁵⁴ In domestic administration, accountability cannot be reduced to the control of “compliance” with rules, either.⁵⁵ The inter-relationship between law and its cognitive infrastructure, which has always had a fundamental importance for the evolution of the legal system, undergoes a considerable transformation in postmodernity, which finds its repercussion also in the new regimes of accountability in “entangled hierarchies”: there is no longer a clear separation between rules and their application.⁵⁶ As a consequence, one might also talk about new versions of “spontaneous accountability”,⁵⁷ in the sense that the “hybrid accountability regimes”,⁵⁸ in particular those generated by networks, are no longer to be defined in advance – as is the case with administrative decision-making as well. As a consequence, the “control project”, which is derived from the requirement of accountability, needs to be re-configured and to be re-formulated in a perspective centred on a broader concept of “systemic intervention” and not on compliance with stable rules.⁵⁹ This evolution appears to be, at the very least, much more compatible with a postmodern understanding of democracy than a supranational (European)

⁵⁴ See Karl-Heinz Ladeur, *Kritik der Abwägung in der Grundrechtsdogmatik* (2004).

⁵⁵ Jerry L. Mashaw, *Accountability and Intellectual Design: Some Thoughts on the Grammar of Governance*, 115, 154 et seq., in: *PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS, EXPERIENCES* (Michael Dowdle, ed., 2006).; Charles F. Sabel, *Learning by Monitoring: The Institutions of Economic Development*, 137: in: *HANDBOOK OF ECONOMIC SOCIOLOGY* (Neil Smelser & Richard Swedberg, eds., 1994).

⁵⁶ In complex processes of learning by deciding a “continuous reconsideration” of norms is unavoidable, Kathleen Noonan, Charles F. Sabel & William H. Simon, *Legal Accountability in the Service-Based Welfare State: Lessons from Child Welfare Reform*, 34 *LAW & SOCIAL INQUIRY* 523, 524 (2006).

⁵⁷ Colin Scott, *Spontaneous Accountability*, in: Dowdle (ed.), *supra* note 12, 174, 175.

⁵⁸ Mashaw, *supra*, note 55, 118.

⁵⁹ Noonan, Sabel & Simon, *supra*, note 56, 559.

development toward the establishment of expertocratic agencies which are only in a very loose sense legitimised by democratic delegation.⁶⁰ Against this background, the above-mentioned debate on “constitutionalism” looks like a projection of the lost unity and sovereignty of the nation state onto a future “international community”.⁶¹ The lost ability of the state to direct and control the social reality will be re-established on an international scale on which the “discourse on what is right or wrong must be crystal clear”.⁶² But how should this be possible if one takes into consideration the fragmentation of both private and public spheres within the nation state? It should be more promising to find new ways of managing the complexity of different regimes⁶³ and their stabilisation by the emergent global administrative law instead of dreaming of a re-composition of sovereignty in a future world state.⁶⁴ To reduce these high hopes to the expectation of a fruitful co-operation of democracies⁶⁵ does not fare much better, as it does not take the transformation of the legal system and the fragmentation of statehood,⁶⁶ both of which touch also on democracy, seriously.⁶⁷

For similar reasons, the requirement of meeting certain criteria of “publicness”⁶⁸ as a precondition for the recognition of a norm as “law” appears to be misleading, as well. The increasing complexity and fragmentation of the cognitive base of society has shattered the whole

⁶⁰ Klaus Ferdinand Gärditz, *Europäisches Regulierungsverwaltungsrecht auf Abwegen*, 135 ARCHIV DES ÖFFENTLICHEN RECHTS 251, 287 (2010).

⁶¹ See in particular Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century*, *General Course on Public International Law*, 9, in: 281 RECUEIL DES COURS (1999); and the mild criticism by Armin von Bogdandy, *Constitutionalism in Public International Law: Comment on a Proposal from Germany*, 47 HARVARD INTERNATIONAL LAW JOURNAL 223 (2006).

⁶² Tomuschat, *ibid.*, 28.

⁶³ See Ino Augsberg, Tobias Gostomzyk & Lars Viellechner, DENKEN IN NETZWERKEN (2009).

⁶⁴ See also the critique by Richard Collins, *Constitutionalism as Liberal-Juridical Consciousness: Echoes from International Law's Past*, 22 LEIDEN JOURNAL OF INTERNATIONAL LAW 251, 269 (2009).

⁶⁵ Armin von Bogdandy, *Constitutionalism in Public International Law: Comment on a Proposal from Germany*, 47 HARVARD INTERNATIONAL LAW JOURNAL 223 (2006).

⁶⁶ See the works of the Bremen Research Center on “Transformations of the State”, in particular the contributions in: TRANSFORMATIONS OF THE STATE? (Stefan Leibfried & Michael Zürn, eds., 2005).

⁶⁷ This finds a similar repercussion in the ambivalent tendency to neglect the crisis of the state and the ensuing fragmentation of networks of decision making for the construction of Europe, See Karl-Heinz Ladeur, *We, the European People ...Relâche?*, 14 EUROPEAN LAW JOURNAL 147 (2008).

⁶⁸ Kingsbury, *supra*, note 2.; Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AMERICAN POLITICAL SCIENCE REVIEW 29 (2005).

architecture of the differentiated normative system and has challenged its consistency, which has provoked the emergence of a new set of procedural and internal meta-rules on the “management of rules” within the legal system.⁶⁹ In the liberal society of individuals, this problem of the co-ordination of law and societal norms had existed as well,⁷⁰ but its internal rules had been relatively stable and could remain almost invisible. As shown above, this was already no longer the case in the society of organisations as a secondary modelling of the institutional structure of liberal society. Increasingly explicit re-formulations and re-modelisations of the whole architecture of the normative system became unavoidable.⁷¹ The setting of new internal rules of self-observation, co-ordination or separations for more differentiated niches and regimes within the normative system of society became much more complex than in liberal society. The consistency of the system could only be preserved at the expense of its doctrinal and methodological clarity and unity. Against the background of this evolution, the recourse to a rather simple distinction between more or less “publicness” of norm-generation does not look promising, either, because it cannot do justice to the whole range of extremely differentiated norms which demonstrate all imaginable versions of creation and public participation.⁷² In global administrative law, the reference to global interests in a stronger sense is limited. In many cases, global administrative law, as well as international public law in the stricter sense, serve mutual or efficiency interests, and the degree of “globalisation” has to be differentiated.⁷³ At the same time, the complex and – what is most important – the only loosely-coupled nature of the inter-relationships between different types of norms within the whole network of rules renders at least some forms of, for example, rule-making or convention-building among private actors or public

⁶⁹ Karl-Heinz Ladeur & Ino Augsberg, *Auslegungsparadoxien*, 36 RECHTSTHEORIE 143 (2005).

⁷⁰ See only Milos Več, *Recht und Normierung in der industriellen Revolution* 272, 367 (2006).

⁷¹ Noonan, Sabel & Simon, *supra*, note 56, 537; for the development in Germany see Anna-Bettina Kaiser, *Die Kommunikation der Verwaltung. Diskurse zu den Kommunikationsbeziehungen zwischen Verwaltung und Privaten in der Bundesrepublik Deutschland* 138 (2009).

⁷² Slaughter & Zaring, *supra* note, 29.

⁷³ Jean d’Aspremont, *Contemporary International Rulemaking and the Public Character of International Law*, New York University Law School, IILJ, Working Paper 2006/12, 4 et seq., 14, 16 et seq.

norm-setting mutually inter-exchangeable.⁷⁴ The “public” character of global administrative law is as problematical as is postmodern domestic law.

From the point of view taken in this article, it should be more preferable not to try to set up clear limits and separations between different types of norms, but to think more about the construction of the internal meta-rules of co-ordination within the network of networks of the postmodern fragmented normative system and its unavoidable hybridisations.⁷⁵ As a frame of reference for this search, the idea should be accepted that an evolutionary process of the implicit shaping and re-shaping of administrative paradigms has to be distinguished from an explicit layer of administrative law that is made by the legislator. That “deep structure” of administrative law that underlies a historical evolutionary development is closely linked to the transformation of the knowledge and the (social) rule basis of society. Administrative law undergoes considerable transformations once the knowledge basis of society changes – as has been shown in this article. This is why the concept of administrative law cannot be stable, either. As a consequence, the question “is global administrative law ‘law’?” cannot be answered upon the basis of the more traditional conceptualisation. It has to take into account that the frame of reference for the construction of domestic law has changed considerably. The conceptualisation should, instead, follow the change of the historical paradigms of law. If this is accepted, a striking similarity between both domestic and transnational postmodern administrative law comes to the fore and opens a new perspective on global administrative law.

5. The search for new meta-rules of managing “entangled” inter-relationships

In the following, it should be demonstrated, first of all, that one cannot talk about a transnational “civil society” to which the new layer of the legal system might be attributed. Instead, it can be shown that the new rules and patterns of co-ordination do not emerge completely “beyond the state”, at least no more than the new versions of the rules in the “society of networks” at the level of the nation state do. In fact, new “entangled” inter-relationships between state agencies and social actors (both of different “national origin”) emerge,⁷⁶ and demand, in a normative sense, a

⁷⁴ Jean-Marie Guéhenno, *L’AVENIR DE LA LIBERTÉ*, 82 et seq., 90 (1999).

⁷⁵ For a theory of hybridisations in law See Gunther Teubner, *Hybrid Laws: Constitutionalizing Private Governance*, 311, in: *LEGALITY AND COMMUNITY* (Robert Kagan & Kenneth Winston, eds., 2002).

⁷⁶ Against the reduction of transnational law to private law, *lex mercatoria* in particular, also Karsten Nowrot,

new conceptualisation and a new construction for the unavoidable “management of rules” under conditions of complexity which are at stake. This complexity is due to the fact that the new postmodern society creates more heterogeneity within its infrastructure of legal and social norms, and, as a consequence, more tensions and “collisions” between the different sets of rules can be observed.⁷⁷ This is a challenge for the search for a new type of meta-rules that can bring about a kind of “moderation”, a type of proceduralised co-ordination of different rules but not a situative “balancing” of interests. In this respect, domestic administrative law and its postmodern challenge do not differ much from transnational administrative ventures. This is also valid for the increasing importance of public-private co-operation, which is due to the fact that stable co-ordination between (private) social rules and public administrative norms can no longer be brought about. The state does not lose its relevance; its role changes, but does not vanish because, as in the past, the polycentric practices of experimentation in the private realm cannot avoid lock-ins or perverse effects that are difficult to combat without a player who has a responsibility for the rules of the game or – in postmodernity – the meta-rules of the self-transformation of the heterarchical networks of inter-relationships.

The state does not disappear at the transnational level, either, nor does domestic law lose its relevance. One can even think about a new role for state-based public law in the transnational realm (ICANN⁷⁸), in the sense that it can be used to irritate transnational processes of norm-building, for example, by using the more elaborated domestic civil rights as criteria for the recognition of the legality of decisions of private transnational organisations that have an impact on constitutional rights of individuals.⁷⁹ This is an example for the new types of conflict that have not yet emerged at the domestic level and that cannot be tackled successfully at this level, either (for example, climate change).

NORMATIVE ORDNUNGSSTRUKTUR UND PRIVATE WIRKUNGSMACHT 656 (2006); Christian Tietje & id., *Forming the Center of Transnational Economic Legal Order? Thoughts on the Current and Future Position of Non-State Actors in WTO Law*, 5 JOURNAL OF BUSINESS ORGANIZATION LAW 321 (2004).

⁷⁷ See with reference to the concepts of regime and “regime collision” Fischer-Lescano & Teubner, *supra* note 16.

⁷⁸ Jochen von Bernstorff, *The Structural Limitations of Network Governance: ICANN as a Case in Point*, 257, in: TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM (Christian Joerges, Inger-Johanne Sand & Gunther Teubner, eds., 2004) 257; Calliess & Zumbansen, *supra* note 24, 135 et seq.

⁷⁹ Karl-Heinz Ladeur & Lars Viellechner, *Die transnationale Expansion staatlicher Grundrechte: Zur Konstitutionalisierung globaler Privaterchtsregimes*, 46 ARCHIV DES VÖLKERRECHTS 42 (2008).

The new hybridisation which is a characteristic element of the emerging transnational law can also be observed from the point of view of the public international law among (sovereign states) when, in co-ordinated administrative procedures (asylum), the decision of one state has an impact on the legal status of an individual in a different state:⁸⁰ according to traditional rules of international law, the court of the second state could not be allowed to call the decision of the first into question (“*par in parem not habet iurisdictionem*”). In the new domain of a transnationalised law, the “internal affairs” of a state cannot be exempt from oversight at all costs because the co-ordinated administrative procedure has to find a repercussion at the level of court decisions, otherwise court protection would become next to impossible.

In the following part, the differentiated role of the state in different fields of action will be described with a view to its impact on the different legal networks which emerge in transnational law.⁸¹ The conceptual polarisation and the closer parallel between traditional national and postmodern international administrative law should not be overstated because, from the outset, the state as a global or international actor was confronted with different dimensions of a pluralisation of actors, a plurality of states, a plurality of divergent arenas of decision-making with heterogeneous participants, national or international agencies, private actors (groups, firms, associations, NGOs), which can only find their orientation via an involvement in transnational “networks” of public and private actors.⁸²

6. Distinguishing different versions of transnational administration

“Global administrative law”, in particular, can, against this background, be linked to the idea of a “disaggregated state”⁸³ which is not a state in dissolution, but a state which transforms itself into a loosely-coupled “network” of public and private actors, who are held together by a fragmented

⁸⁰ Hélène Lambert, *Transnational Judicial Dialogue: Harmonisation and the Common European Asylum System*, 58 *INTERNATIONAL AND COMPARATIVE LAW QUARTERLY* 519 (2009).

⁸¹ See Karsten Nowrot, *Netzwerke im transnationalen Wirtschaftsrecht und Rechtsdogmatik*, *Beiträge zum transnationalen Wirtschaftsrecht*, ed. by Christian Tietje, Gerhard Kraft & Rolf Sethe, May 2007, N° 66, 33 et seq.

⁸² For the legal pluralism in postmodernity see Peer Zumbansen, *Transnational Legal Pluralism*, 1 *TRANSNATIONAL LEGAL THEORY* 141, 144, 159 (2010); Oren Perez, *Normative Creativity and Global Legal Pluralism: Reflections on the Democratic Critique of Transnational Law*, 10 *INDIANA JOURNAL OF GLOBAL LEGAL STUDIES* 25 (2003).

⁸³ Anne Marie Slaughter, *A NEW WORLD ORDER* (2004) 14 et seq. and passim.

set of regulatory tasks of “moderation”.⁸⁴ These tasks are integrated less by a chain of singular decisions (*Verwaltungsakt*) but by a focus on broadly-defined “webs” of reflexive strategic project-like ventures which follow the track of knowledge and rule management that has been brought about at the domestic level by the emergence of the “society of networks”. The permeability of the classical borderlines between public and private, market and organisation,⁸⁵ cognitive and normative rule-making finds its repercussion finds at the global level.

From a perspective which is characterised by a focus on global administrative law, one would stress the necessity to bind together the components of the disaggregated state at a more abstract level if only to re-couple the internationalised and national components of decision-making.⁸⁶ In this transnational dimension, the territorial state, its organisational structures and legal rules providing legitimacy are re-considered and the role of the state, if only in a heterarchical and not in the central position of the sovereign of decision-making, is brought back in.⁸⁷

If one has a clear look at the different types of networks within the “network of networks”, the multi-faceted character of this new hybrid version of administrative decision-making is demonstrated quite openly. One has to distinguish limited networks of targeted territorial boundaries spanning co-operation from among the agencies that are built up in the typical perspective of a management of public neighbour law problems.⁸⁸ They address issues of information exchange concerning, for example, the social insurance claims of workers who have, so to speak, a double territorial attribution of legal status.⁸⁹ This relationship has been and is still often asymmetrical, in the sense that the influx of the workers at stake is often not reciprocal. This fact may limit the co-operative activity of the country of origin.

⁸⁴ Moreau, *supra*, note 13.

⁸⁵ Power, *supra* note 89.

⁸⁶ See Möllers, *supra*, note 25, 351.

⁸⁷ David Held, *The Transformation of the Political Community. Rethinking Democracy in the Context of Globalization*, in: Shapiro & Hacker-Cordón (eds.), *supra*, note 4, 84; Cohen & Sabel, *supra*, note 4, 763.

⁸⁸ This may be a case of “mutualised” interests in the sense of Jean d’Aspremont, *supra*, note 73, 14.

⁸⁹ Marcus Glaser, *Internationales Sozialverwaltungsrecht*, in: Möllers, Voßkuhle & Walter (eds.), *supra*, note 52, 73.

However, this does not call into question the exchange perspective that is characteristic of this type of relationship. This rather stable co-ordination does not challenge the territorial character of the activities of the participating agencies. There is a different version to be observed in the international migration law:⁹⁰ this is a field that has a strong global dimension with regard to the number of countries that are concerned. However, this global character of the network of agencies does not find a repercussion in the administrative domain as such. The interest of the countries of origin of migrant workers will often be very different from the host countries. The interest in the formulation of common standards will be low, and this goes also for the transparency of procedures. This is a restriction for the development of a new type of global law that pre-supposes the dominance of a focus on co-operation.⁹¹

An interesting variant of this type of exchange perspective might be seen in the co-operative relationships between states in international tax law. The co-operation in this domain is still limited,⁹² although, recently, the pressure of high tax countries on low tax countries with the intent of reducing tax evasion has increased considerably. The traditional focus is predominantly on avoiding double taxation.⁹³

The factual elements of co-operation may be complicated because it is difficult to define and keep separate the financial “substance” that is to be taxed. As the common interest of the states in this field is strong, it comes as no surprise that the problems which have to be solved in this field are managed in a satisfactory way: the OECD, or rather, a limited number of OECD tax experts, function as a kind of neutral mediators, and this body of experts has succeeded in generating trust. The creation of some kind of trust can be described as an emergent effect of this type of network.

⁹⁰ Jürgen Bast, *Internationalisierung und De-Internationalisierung der Migrationsverwaltung*, *ibid.*, 279; See also the case study in Marc R. Rosenblum, *The United States and Mexico: Prospects for a Bilateral Migration Policy*, www.borderbattles.ssrc.org/8.3.2007

⁹¹ For the inevitable requirements of coordination among uptaking countries see Benvenisti, *supra* note 29, 262.

⁹² This is probably also the reason why the development of “paradigmatic discourse” allowing for a comparative approach to international tax law is regarded as unsatisfactory, See Omri Y. Marian, *The Discursive Failure of Comparative Tax Law*, 58 THE AMERICAN JOURNAL OF COMPARATIVE LAW 415 (2010).

⁹³ See Eckhart Reimer, *Transnationales Steuerrecht*, 121, in: Möllers, Voßkuhle & Walter (eds.) *supra* note 52; this may be a case of an “efficiency interest” in the sense of d’Aspremont, *supra*, note 73, 17.

The relationship between a developed country or an international organisation dominated by developed states, on the one hand, and assistance or protection of investment in developing countries, on the other,⁹⁴ is also asymmetrical, although a common interest cannot be discarded in this type of inter-relationships. In the field of technical or general assistance it is the necessity to design a “control project” which does justice to both sides at stake. A new transnational layer of legal order that depends on the permeability of domestic administrative laws in both directions needs to be conceived. In the field of investment protection below the layer of traditional public international law, a new practice of global administrative law has emerged (although still not settled in a new satisfactory institutional frame) that relates to domestic public and international private law and demonstrates a typical hybrid character. It is, however, quite characteristic that, in this field, an extensive practice of transnational hybrid legal mediation has evolved.⁹⁵ The development of rules and practices, procedural in particular, which are created in this domain, could be a productive example of the new experimental mode of global administrative decision-making.

Environmental law is particularly interesting with regard to the conceptualisation of global challenges because it demonstrates the necessity to develop new collective instruments of an internationalised or globalised administrative law which transcend the problems of a delimitation of competencies among states or the recognition of licenses,⁹⁶ *etc.*: it definitely makes national law permeable to the recognition of public interests of other states – and, in this way, relativises the law of the nation state.⁹⁷ This phenomenon can also be observed in European law though it is hidden by the tendency towards a separation between the europeanised parts of administrative law of Member States (which is pushed with reference to the famous “*effet utile*”⁹⁸), the administrative law of the EC agencies and the national administrative Law of

⁹⁴ See Philipp Dann, Grundfragen eines Entwicklungsverwaltungsrechts, *ibid.*, 7.

⁹⁵ See Alvarez & Kathryn Khamsi, *The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime*, 1 YEARBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY 379 (2009).

⁹⁶ See only Stefan Kadelbach, *European Administrative Law and the Law of a Europeanized Administration*, 167, in: GOOD GOVERNANCE IN EUROPE’S INTEGRATED MARKET, COLLECTED COURSES OF THE EUROPEAN ACADEMY OF LAW, EUROPEAN UNIVERSITY INSTITUTE (Christian Joerges & Renaud Dehousse, eds., 2002).

⁹⁷ This is one of the phenomena of a „deterritorialisation” of administrative law, Schmidt-Aßmann., *supra*, note 78.

⁹⁸ See ECJ-Reports 1990, I-2433 (Factortame), 1990, I-2879 (Wine).

Member States. In fact, it could be much more productive to focus, instead, on the permeability of Member State administrative law for certain interests of the EC and other Member States and to search for meta-rules for the management of “regime-collisions” (different sets of legal rules of the multi-layered legal system of the EC), instead of favouring a homogeneous European legal system.⁹⁹

In the third group of practices of global administrative law (standard-setting,¹⁰⁰ environmental protection,¹⁰¹ the control of financial markets, *etc.*), we find a type of co-ordination that demonstrates the new hybridisation of social and legal rule-making in a particular form: different types of domestic “knowledge bases” and legal standards have to be co-ordinated or meshed in a way that transcends the domestic level of all involved legal administrative orders and lead to a new global frame of reference for decision-making.¹⁰² It is quite characteristic that there is still a link to domestic administrative law when concrete cases have to be decided. Both of the two other aforementioned fields are characterised by the fact that they include, from the outset, on the factual level, an emergent element that goes beyond state-controlled co-operation to a much more dramatic extent. The increasing importance of standards is again a phenomenon that cannot be reduced to the territorial element of globalisation alone:¹⁰³ it is also, if not primarily, due to the weight of the scientisation of production and organisations. Globalisation is only one of the concomitant dimensions of the dynamic of self-transcendence of the knowledge base of societies which rids itself of the traditional links to the institutions of the stable

⁹⁹ For a critique of the court practice in private law see Christoph Schmid, *The ECJ as a Constitutional and a Private Law Court: A Methodological Comparison*, Zentrum für Europäische Rechtspolitik, DP 4/2006; Jan M. Smits, *The Europeanisation of National Legal Systems: Some Consequences for Legal Thinking in Civil Law Countries*, 229, 237, in: EPISTEMOLOGY AND METHODOLOGY OF COMPARATIVE LAW (Mark Van Hoecke, ed., 2004).

¹⁰⁰ Hans Christian Röhl, *Internationale Standardsetzung*, 319, in: Möllers, Voßkuhle & Walter (eds.), *supra* note 52.

¹⁰¹ Wolfgang Durner, *Internationales Umweltverwaltungsrecht*, in: Möllers, Voßkuhle & Walter, *ibid.*, 121.

¹⁰² Nico Krisch, *Global Administrative Law and the Constitutional Ambition*, LSE Law, Society and Economy Working Papers 10/2009, 3, has pointed out with good reasons that delegation is “thin” and cannot be regarded as a sufficient basis of legitimacy alone.

¹⁰³ Naomi Roht-Arriaza, *Shifting the Point of Regulation: The International Organization for Standardization and Global Law Making on Trade and the Environment*, 22 *ECOLOGY LAW QUARTERLY* 479 (1995).

organisation – public and private.¹⁰⁴ This is also the basis for scepticism *vis-à-vis* the new global constitutionalism.¹⁰⁵

At least a major part of the issues which are at stake and which demand co-operation and co-ordination are “global” in a stronger sense: they concern complex problems which are completely beyond the reach of a nation state and which do not find a solution based upon patterns formulated at that level. The peak of this development is reached in financial market regulation,¹⁰⁶ where we are confronted with a type of rapidly self-transcending, overlapping, disruptive market that processes risk information and demand risk management to a hitherto unknown extent. New global problems that do not just change the level of abstraction or the territorial dimension are at stake here, but undermine the territoriality of the legal order in a much more complex and demanding way than in the past of the nation state.

7. The future forms of co-ordination between global and domestic administrative law

At this point, a reflection on the future of domestic and global administrative law¹⁰⁷ may be helpful: in both fields, a new generative dynamic momentum comes to the fore, which is due to the rise of networks emerging beyond both classical liberal administrative law (“the society of individuals”) and its focus on the abstract person.¹⁰⁸ This evolution demonstrates that administrative law can no longer be constructed with reference to classical patterns and their stabilisation by statute law. Meaning is no longer deposited in slowly evolving rules of experience nor in the legal text. It presupposes a dynamic modelling of a distributed domain of options and relations invoking a multiplicity of perspectives in “real time” in an open context. Co-operation will not only occur in public-private networks alone, but also in “inter-public”

¹⁰⁴ Gili S. Drori & John W. Meyer, *Global Scientization. An Environment for Expanded Organization*, in: ed., id. & Hwang (eds.), *supra*, note 50, 50, 57.

¹⁰⁵ Krisch, *supra* note 102, 23.

¹⁰⁶ See Anne van Aaken, *Transnationales Kooperationsrecht nationaler Aufsichtsbehörden als Antwort auf die Herausforderung globalisierter Finanzmärkte*, 219, in: Möllers, Voßkuhle & Walter (eds.), *supra* note 52; David T. Zaring, *Informal Procedure, Hard and Soft*, in *International Administration*, 5 THE UNIVERSITY OF CHICAGO INTERNATIONAL LAW JOURNAL 547 (2005) for the “lightly institutionalized” cooperation among agencies in the field of financial markets regulation.

¹⁰⁷ Richard B. Stewart, *The Global Regulatory Challenge to US Administrative Law*, 37 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 695, 705 (2006).

¹⁰⁸ Irène Théry, *LA DISTINCTION DE SEXE: UNE NOUVELLE APPROCHE DE L’EGALITE* 384 et seq. (2010).

joint-ventures that mobilise expertise beyond the limits of stable territorial competencies. The transnational dimension of administrative law is nothing but an expansion of the multi-layered spatial relationships that emerge at the domestic level.¹⁰⁹ The discretion of administrative decision-makers which finds its legitimation¹¹⁰ in the increasing importance of specialised knowledge¹¹¹ that has to be generated within complex procedures and demands the use of adequate methods of control could be opened for the co-ordination of heterogeneous and polycentric knowledge bases of different countries and societies, in the sense that, in transnational procedures, the aggregation and integration of global social norms and knowledge might be regarded as a new meta-rule for the judicial control of administrative discretion.¹¹²

This process demonstrates that global administrative law cannot be conceived as a mere challenge to the sovereign nation state and the permeability of its territorial borders. Its evolution is a consequence of a deeper transformation of both the economic system and the nation state. As has been demonstrated in this article, the central components of the classical liberal legal system were dependent on stable concepts of property and the territory and their paradigmatic role. The evolution of administration and the economic system is characterised by the rise of the information and of knowledge as the main resource and frame of reference for decision-making. The dynamic of the postmodern “knowledge society” is at the bottom of the rapid self-transcendence of the environment of the legal system.¹¹³ Not only the territorial borders of the state, but also the traditional conceptual and institutional separations on which administrative law was founded have been severed.

¹⁰⁹ See for a critique of the increasing role of experts in transnational law David Kennedy, *The Mystery of Global Governance*, in: Dunoff & Trachtman (eds.), *supra*, note 22, 37, 53.

¹¹⁰ For a discussion of the problems related with “democratic representation” in postmodernity see Zumbansen, *supra*, note 82, 141, 144 (2010).

¹¹¹ Guéhenno, *supra*, note 74, 82, 90.

¹¹² See for a similar problem related with the transnational cooperation among regulatory agencies of Member States and the ensuing question whether the “consideration” of the comments of the agency of other Member States can be regarded as a legitimate procedural version of administrative discretion, Karl-Heinz Ladeur & Christoph Möllers, *Der europäische Regulierungsverbund der Telekommunikation im deutschen Verwaltungsrecht*, 120 DEUTSCHES VERWALTUNGSBLATT 525 (2005).

¹¹³ See Gili S. Drori, John W. Meyer & Hokyung Hwang, *World Society and the Proliferation of Formal Organization*, 25, 34, in: id. (eds.), *supra*, note 50.

As a consequence both for the domestic layer of administrative law and the emerging global administrative law, new forms, procedures and meta-rules for an administration beyond the nation state have to be designed.¹¹⁴ Considering the dynamic nature of the administration in, and of, networks, more evaluation¹¹⁵ *ex post* and more indirect rule-making will be necessary: “steering” administrative practice *ex ante* by statutes or by the “application” of informal rules of experience will not be sufficient. The new knowledge base of the “society of networks” will allow for more self-organised rules and patterns, while, at the same time, the decreasing relevance of stable norms in both senses should lead to a focus on procedural norms which are designed with regard to the generation of new knowledge that will be useful for the evaluation *ex post*.

We are still in the process of experimentation which will generate new forms of action, new procedures, new types of co-ordination between public and private actors. It may well be the case that the role of the judiciary in this new evolutionary process will be negligible, not to mention codification by the legislator. What should be conceivable is a new type of co-operation between domestic agencies and the legislator, with the prospect of coupling transnational procedures of decision-making and domestic legitimation and accountability of decision-makers.¹¹⁶ New elements of an inter-twinement of domestic and transnational law might be developing.¹¹⁷

¹¹⁴ For the necessity to spread administrative rules in countries of the “Third World” see www.transparency.org/global_priorities/aid_corruption; Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, *Measuring Corruption: Myths and Realities*, The World Bank Institute. Development Outreach, Januar 2007, www1.worldbank.org/devoutreach; Susan Rose-Ackerman, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES AND REFORM IX (1999); Migai Akech, *Development Partners and Governance of Public Procurement in Kenya: Enhancing Democracy in the Administration of Aid*, 37 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 829 (2006); with a focus on strengthening accountability through administrative law (834).

¹¹⁵ For a theoretical perspective on “evaluation” as second order knowledge that reuses the same knowledge that has already been referred to in the decision making process Rudolf Stichweh, *Wissensgesellschaft und Wissenssystem*, 30 SCHWEIZERISCHE ZEITSCHRIFT FÜR SOZIOLOGIE, 147, 155 (2004).

¹¹⁶ David Dyzenhaus, *Accountability and the Concept of (Global) Administrative Law*, IILJ Working Paper 2008/7, at <http://www.iilj.org/publications/2008-7Dyzenhaus.asp>, 13.

¹¹⁷ For new forms of accountability that emerge at the global level See Helmut Willke, SMART GOVERNANCE: GOVERNING THE GLOBAL KNOWLEDGE SOCIETY 50 (2007).

8. Outlook

The article has tried to build a bridge between the evolution of domestic administrative and postmodern global administrative law. It could be shown that the evolution of administrative law is characterised by periods of creative construction of new forms, instruments and procedures of administrative law in the administrative decision-making procedures. Court control of these processes should not be interpreted as being the only legal source of administrative law (“judge made law”) before the partial codification of general administrative law could be brought about in Europe and the US. If one bears this evolution in mind, it comes as no surprise that the new hybrid postmodern forms of decision-making in both domestic and global public-private networks cannot easily be subsumed under established administrative rules because the experimentation with, and the search for, new forms and procedures of transnational decision-making has not yet come to a conclusion. This constellation is not new in the evolution of administrative law¹¹⁸, and it cannot be reduced to the process of globalisation alone:¹¹⁹ it is one of the phenomena of the emergence of a new paradigm of (administrative) law: the law of the “network society”¹²⁰, a law that no longer refers to stable actors (such as individuals or organizations) but is instead processed by changing project related loosely coupled intra- and interorganizational cooperative “constellations”.

¹¹⁸ See also Armin von Bogdandy, Philipp Dann & Matthias Goldmann, *Developing the Publicness of Public International Law: Towards a Legal Framework of Global Governance Activities*, 9 GERMAN LAW JOURNAL 1375 (2008) available at: www.germanlawjournal.com/pdf/Vol09No11/PDF_Vol_09_No_11_1375-1400_Articles_von%20Bogdandy_Dann_Goldmann.pdf. – but this is a position which neglects the possibility that the concept of law itself might undergo a process of transformation

¹¹⁹ See for the close relationship between domestic institutions and globalization Jude C. Hays, GLOBALIZATION AND THE NEW POLITICS OF EMBEDDED LIBERALISM 8, 11 (2009).

¹²⁰ See Karl-Heinz Ladeur, *Die Netzwerke des Rechts*, 143, in: NETZWERKE IN DER FUNKTIONAL DIFFERENZIIERTEN GESELLSCHAFT (Michael Bommers & Veronika Tacke, eds., 2010).