DEVELOPMENTS

Networks in Public Law: Notes on the 47th Meeting (2007) of German-Speaking Public Law Assistants in Berlin

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A. Introduction and Overview

Every year, the public law research assistants from all universities in Germany, Austria and Switzerland meet for a conference. This year's meeting of German-speaking public law assistants was the 47th meeting of its kind.[1] For the first time since 1983, and for the first time since German reunification, the meeting took place in Berlin. The meeting was organised by and held at both universities in Berlin – the *Freie Universität* and *Humboldt Universität*. About 250 Public Law assistants from Germany, Switzerland and Austria attended to discuss various aspects of the general topic: Networks.[2]

"Networks" as the general topic of a meeting of Public Law assistants seems remarkable. Whereas political and social sciences have been dealing with network problems since the end of the 1990s, the legal analysis of networks, especially in Public Law, is still an emerging line of inquiry. Although Public Law still has to be elaborated as far as networks are concerned, the various presentations and discussions during the meeting helped to move that effort forward while providing new perspectives on networks in a Public Law context.

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[1] For the history and development of the Meeting of German-Speaking Public Law Assistants in the last ten years *see* Florian Gröblinghoff / Konrad Lachmayer, *Die Assistententagung Öffentliches Recht auf dem Weg ins 21. Jahrhundert*, *in* 55 JAHRBUCH DES ÖFFENTLICHEN RECHTS DER GEGENWART 429 - 454 (Peter Häberle ed., 2007); *see also* the conference reports of the last two years: Marten Breuer, *Law and Medicine: Notes on the Meeting of German-Speaking Public Law Assistants in Vienna*, 7 GERMAN LAW JOURNAL 445 - 452 (2006); Daniel Thym, *The European Constitution: Notes on the National Meeting of German Public Law Assistants*, 6 GERMAN LAW JOURNAL 793-803 (2005).

[2] The proceedings of the meeting will be published at Nomos publishers: Sigrid Boysen *et al.* (eds.), *Netzwerke. 47. Assistententagung Öffentliches Recht* (2007).

The approach of the meeting was to develop different perspectives on networks without limiting the definition of this topic. Thirteen lectures by Public Law assistants from thirteen universities in Germany and Austria gave a broad overview of possible legal approaches to analyzing and discussing networks as a question of Public Law. At the beginning of this year's meeting it often seemed unclear how all the participants might use the term "networks" in a legal context to describe and solve situations and problems concerning Public Law. This lack of clarity was resolved, to no small degree, with the help of the various presentations and discussions that took place over the three days of the meeting.

B. Legislature and Multiple Obligations in Networks

The first part of the meeting dealt with the legitimacy of legislature and jurisdiction in networks and the problem of multiple obligations in network structures. It was stated that there was a necessity of new concepts of legitimation to integrate networks into existing legal systems. Further implications with regard to federalism were analysed. There was a discussion over the possibilities and limits of a transfer of state-related terminology and concepts to cope with networks from a legal point of view.

Actors are usually networked in several directions and are therefore subject to multiple obligations in a network. The value of networks can be seen in their ability to overcome bilateral connections and obligations. The existence of conflicts makes it necessary to harmonise the actions of all concerned actors in the network, of all parts of the network and of the network as a whole.

Karsten Nowrot started his presentation by localising tendencies of federalisation and parliamentarianism in network structures.[3] He used these national structuring principles to describe the integrating and stabilising functions within a network and explained these effects at the examples of international forms of organisation such as the "Forest Stewardship Council"[4] or the "United Nations Global Compact."[5] Nowrot focused on the necessity of referring to the existing Public Law theories when talking about networks and the relevant terminology.

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[3] Dr. Karsten Nowrot LL.M. (Indiana), University of Halle: [*Föderalisierungs- und Parlamentarisierungstendenzen in Netzwerkstrukturen*] (Tendencies of Federalism and Parlamentarianism in network structures).

[4] http://www.fsc.org/en/.

[5] http://www.unglobalcompact.org/.

As for its innovative elements, the concept of networks can be a major factor in the development of new ideas under constitutional law.[6] Referring to the works of Schmidt-Aßmann, Nowrot also supported output-orientated legitimation concepts as a supplement to input-orientated legitimation concepts.[7] Furthermore, he pointed out the importance of transparency and the integration of all players to explain the legitimacy of networks. These requirements are especially necessary because of the informal character of networks and in the case of the creation of normative standards within network structures.

Lars Viellechner asked whether networks could replace democracy.[8] He demonstrated the idea by examining the creation of rules in international Private Governance Regimes like the regulation of domains by the "Internet Corporation for Assigned Names and Numbers" (ICANN).[9] In this context the network seems to be a *Vertragsverbund* (contractual network)[10] as the co-action in the network is based on numerous contractual relationships. ICANN has made various attempts to strengthen the democratic legitimation of the network, e.g. the elections of the board of directors, transparency measures presented on the ICANN website, and so on. Nevertheless democratic deficits remain.

Because of the lack of democratic structures, at least according to national standards, global networks need a supplementary element to prevent the restriction of individual freedom. According to Viellechner this supplement can be seen in a transnational dimension of fundamental rights. The creation of these regulations, which are similar to civil rights, can happen by a juridification of network structures as well as by accepting the comparison of legal frameworks as a source of legal knowledge. It was discussed whether the guarantee of standards of fundamental rights can actually replace the absence of democratic structures. The

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[6] Rainer Wahl, *Erklären staatstheoretische Leitbegriffe die Europäische Union?*, 19 JURISTENZEITUNG 916, 925 (2005).

[7] E. SCHMIDT-AßMANN, DAS ALLGEMEINE VERWALTUNGSRECHT VOR DEN HERAUSFORDERUNGEN NEUER EUROPÄISCHER VERWALTUNGSSTRUKTUREN (1997); E. SCHMIDT-AßMANN, VERWALTUNGSORGANISATIONSRECHT ALS STEUERUNGSRESSOURCE (1997); E. SCHMIDT-AßMANN, STRUKTUREN DES EUROPÄISCHEN VERWALTUNGSRECHTS (1999); E. SCHMIDT-AßMANN, STRUKTUREN EUROPÄISCHER VERWALTUNG UND DIE ROLLE DES EUROPÄISCHEN VERWALTUNGSRECHTS (2004).

[8] Lars Viellechner LL.M. (Yale), University of Hamburg: [*Können Netzwerke die Demokratie ersetzen? - Zur Legitimation der Regelbildung im Globalisierungsprozess*] (Can Networks substitute democracy – The legitimation of the establishment of rules in a globalizing process).

[9] http://www.icann.org/.

[10] *See generally*, GÜNTHER TEUBNER, NETZWERK ALS VERTRAGSVERBUND (2004).

legal protection of these transnational fundamental rights shall be realized within a global judicial system.[11]

With regard to this judicial cooperation, Olga Arnst gave her lecture on the coordination of courts and the network-like construction operating in the judicial sphere.[12] The intensified relations between national and international institutions of jurisdiction implicate a challenge for the theoretic background of networks. It is necessary to confront the risks of contradictory interpretation and the problem of collision with decisions of democratically legitimated legislation. Arnst developed a system of material and procedural devices of coordination modelled on the preliminary ruling procedure (Art. 234 EC) now smoothly functioning between national courts and the European Court of Justice. She also focused on the relation between the European Court of Justice and the European Court of Human Rights and the implications of the *Bosphorus* decision of the European Court of Human Rights.[13]

After lunch Sebastian Graf Kielmannsegg continued with his introduction of a network in the field of international law. He presented the application of network terminology in the context of European military crisis management as exemplified by different actors in this network, such as the UN, the NATO, the EU and EU Member States.[14] This network turns out to be the sum of a "structural compacting," not yet having reached the legal status of international law.[15] Kielmannsegg focused on the problem of overlapping tasks of the different actors in the network and highlighted the special and multiple role of the Member States.

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[11] *See generally* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004).

[12] Olga Arnst, University of Göttingen: [*Instrumente der Rechtsprechungskoordination als judikative Netzwerke?*] (Instruments of coordination of jurisdiction as judicial networks).

[13] Bosphorus v. Ireland, App. No. 45036/98 (June 30, 2005) (Grand Chamber), http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Bosphorus%20%7C%20Ireland&sessionid=3062854&skin=hudoc-en; S. Douglas-Scott, *A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis*, 43 COMMON MARKET LAW REVIEW (CMLR) 629 (2006); C. Heer-Reißmann, *Straßburg oder Luxemburg? - Der EGMR zum Grundrechtsschutz bei Verordnungen der EG in der Rechtssache Bosphorus*, 59 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 192 (2006); J.-P. Jacqué, *L'arrêt Bosphorus, une jurisprudence "Solange II" de la Cour européenne des droits de l'homme?*, 41 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN (RTD EUR.) 756 (2005).

[14] Dr. Sebastian Graf Kielmansegg, University of Mannheim: [*Netzwerke im Völkerrecht - Strukturen des internationalen Krisenmanagements*] (Networks in international law – structures of the international crisis management).

[15] *See* DEMOCRATIC ACCOUNTABILITY AND THE USE OF FORCE IN INTERNATIONAL Law (Charlotte Ku and Harold Jacobson eds., 2002); Russell A. Miller, Book Reviews – Ku & Jacobson, *Democratic Accountability and the Use of Force in International Law*, 100 AMERICAN JOURNAL OF INTERNATIONAL LAW 980 (2006).

These Member States often use their military capacities for their own national tasks as well as for tasks in numerous organisations such as the UN or the NATO. These multiple obligations can pose a network problem because a parallel usage of capacities of the various actors in the network is factually excluded. The network of international crisis management in international law is only partly based on legal obligations and is primarily a decentralised cooperation of different actors on a voluntary basis.

Ferdinand Wollenschläger presented the development of European Union citizenship and the increasing relevance of a network of national and European citizenships.[16] He described the relation between national citizenship and Union citizenship as a network within the multi-level system EU. The European individual can no longer be referred to as a national citizen. There is a rising significance of Union citizenship with the installation of a common market in the EU and the importance of fundamental European freedoms such as free movement of persons or the right of residence for citizens of the EU. This statement was intensively discussed because some participants of the meeting disbelieved the existence of a network within the system of national and Union citizenship.[17]

Angelika Siehr dealt with a topic concerning European integration.[18] Her approach to the topic of networks was the significance of land use regulation for a European integration policy by using network structures. She presented the different organisation of land use regulation and land use planning on a European level. Siehr described the role of a cross-border network design concerning regional cooperation and suggested that network structures often make use of soft law to cope with the challenges of integration. She finally presented her opinion that network structures are suitable for integration in correlation with land use regulation because of its flexible, interactive and future orientated composition.[19]

D. Administration & Networks

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[16] Dr. Ferdinand Wollenschläger, University of Munich: [*Netzwerk der Angehörigkeiten. Staats- und Unionsbürgerschaft als komplementäre Zugehörigkeitsverhältnisse im Mehrebenensystem Europäische Union*] (Networks of citizen. National Citizenship and Citizenship of the Union as complementary relations in a multi-level system of the European Union).

[17] *See especially* FERDINAND WOLLENSCHLÄGER, GRUNDFREIHEITEN OHNE MARKT. DIE HERAUSBILDUNG DER UNIONSBÜRGERSCHAFT IM UNIONSRECHTLICHEN FREIZÜGIGKEITSREGIME (2007).

[18] Dr. Angelika Siehr LL.M. (Yale), Humboldt-Universität Berlin: [*Europäische Raumentwicklung als netzbasierte Integrationspolitik*] (European regional planning as a network related policy of integration).

[19] *See* e.g. MURRAY RAFF, PRIVATE PROPERTY AND ENVIRONMENTAL RESPONSIBILITY – A COMPARATIVE STUDY OF GERMAN REAL PROPERTY LAW (2003).

The second day of the meeting was themed "Networked Administration" and dealt with the dogmatic renaissance of legal and extra-legal phenomena of networks. Administrative authorities often cooperate beyond the structure and hierarchy of authorities in national and transnational networks. This collaboration brings an advantage concerning horizontal coordination but it also results in a loss of vertical control. This result raises the question of democratic legitimation and obligations concerning administrative action in these networks. It also poses the question: how can these networks fit into the theories of administrative law?

Whereas Kielmansegg dealt with networks in the context of outer security, Bettina Schöndorf-Haubold gave her tribute to this year's meeting with her presentation on inner security.[20] She described the development of security networks in Germany and the European Union – a phenomenon of legal reality that can be perceived as part of European administrative cooperation (*Europäischer Verwaltungsverbund*) and can be understood as a type of Administrative Organisational Law. Established networks of security exist on a national level in Germany (on a federal basis between *Bund* [federation] and *Ländern* [federal states]) as well as on a European level. There is a special legally problematic aspect concerning networks of security that are undermining structures of the allocation of rights and duties. The "Combined Counterterrorism Center" (*Gemeinsames Terrorismusabwehrzentrum*)[21] was mentioned as an example for such an autonomous institution developing a structure superior to a basic informal network. Furthermore, Schöndorf-Haubold focused on the traditional transfer of democratic legitimation on a personal and a factual level more than on output-orientation. The conditions of a constitutional state also have to be respected by networks whenever and wherever they become effective to the outside. Referring to this it seems of great importance that legal aspects such as transparency, responsibility, standards of data protection and liability are respected and guaranteed within networks. Schöndorf-Haubold also highlighted the command to separate police and intelligence services and identified this as a structural principle rather than a constitutional principle.

Peter Johann Thyri used the European competition regulations[22] to describe a three-dimensional construction of national competition authorities and the European

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[20] Dr. Bettina Schöndorf-Haubold, Universität Heidelberg: [*Netzwerke in der deutschen und europäischen Sicherheitsarchitektur*] (Networks in the German and European security architecture).

[21] http://www.bmi.bund.de/nn_165104/Internet/Content/Themen/Terrorismus/DatenundFakten/Gemeinsames__ Terrorismusabwehrzentrum__de.html.

[22] Council Regulation 1/2003, On the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty , 2003 O.J. (L 1) 1 (EC).

Commission.[23] This European network of competition authorities works on a horizontal level concerning national competition authorities of the EU-Member States as well as on a vertical level concerning the relationship between a national authority and the EC Commission.[24] The European Commission has a major role in this network of national and supranational competition authorities. This competition network is special insofar as it is based on a "constitution" (EC-Law) whereas most networks are not (yet) imbedded in a constitutional framework. The specific regulations of anti-trust and competition law brought Thyri to the conclusion that, within this field of law, the concept of networks is not only a legal concept but is also pioneering the establishment of a European Administrational Network.

Karsten Herzmann addressed the problem of necessary cooperation between the moderator and all other actors in the market, using the the energy sector as an example.[25] He concretised his thesis by referring to the legal situation of the German energy industry law (*EnWG – Energiewirtschaftsgesetz*)[26] and the installation of a central energy authority to communicate with all relevant actors. Herzmann emphasised the importance and risks of autonomy and transparency to communicate in this specific network of the energy sector.

In the afternoon, a panel discussion with prominent participants dealt with the question whether infrastructure should be seen as a warranty deed or as a mandate for socialisation – i.e. whether the provision of network infrastructure is a state obligation and the state should have the role of a regulator of infrastructure networks or if these networks should be exposed to national or international competition. Infrastructure is a necessary "tool" of modern society and of a state in the 21st century. Water, energy, traffic, communication and so on cannot be imagined without networks. The state is – step-by-step – backing out of the provision of infrastructure networks. This leads to the question: should the state keep regulating infrastructure networks or would privatisation lead to more competition within a special area of infrastructure. Kurt Bodewig, Prof. Dr. Gralf-Peter Calliess, Joachim Fried, Prof. Dr. Edda Müller, Prof. Dr. Gunnar Folke Schuppert and Dr. Stefan Wernicke talked about the necessity of changes of

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[23] Dr. Peter Johann Thyri LL.M. (NYU), LL.M. (DUK), University of Salzburg: [*Das Europäische Netzwerk der Wettbewerbsbehörden. Auf dem Weg zum integrierten europäischen Verwaltungsverbund?]* (The European network of competition authorities. On the way to an integrated European administrative cooperation?).

[24] http://ec.europa.eu/comm/competition/index_de.html.

[25] Karsten Herzmann, Universität Gießen: [*Konsultationen als Instrument der Regulierung des Energiesektors*] (Consultations as an instrument of regulating the energy sector).

[26] http://www.gesetze-im-internet.de/enwg_2005/index.html.

networks in the range of rail-infrastructure. There was an active discussion over problematic legal, practical and political areas between privatisation and regulation of networks concerning railway. Different legal and political aspects and opinions concerning the increase and decrease of state actions to provide infrastructure were presented from a political, legal and economic approach. Whereas most participants in the panel discussion preferred the privatisation of infrastructure networks to enforce competition, especially Joachim Fried from the German Railway (*Deutsche Bahn*) argued for the continuation of state regulated infrastructure networks.

E. Theories of Networks Under Public Law

The third and last day of the meeting was devoted to an attempt to develop a general Public Law theory of networks to analyse the function of law in a network and the benefit of networks for law. The intention of the organizers was to present different examples of Public Law networks at first and to present theories at the end of the conference against the background of the various examples presented earlier during the meeting. Therefore, the overall question was, if there was any reason in a Public Law theory of networks and if such a network theory could work.

Alexandra Kemmerer[27] presented a normative theory of networks. She started her presentation by accessing the network topic through conceptual, historical and metaphoric perspectives. In her normative theory she defined the knot of a network as a possibility to intervene in a normative way. All relations between the several knots in a network were perceived as different possibilities of action. The development of law such as global differentiations of normative systems, transnationalism and the fragmentation of law are leading to a break-up of the distinction between sovereign and private, national and international, evolution and control. By applying a normative theory of networks these new questions and problems of law should be easier to grasp and realize. The discipline of Public Law does not have to reinvent the normative knot as it already exists in neighbouring disciplines such as political science. However, it seems necessary to translate the existing techniques into networks, network sections and fragments of a global system of law – i.e. a theory of the translation of law in a transnational and fragmented global law.

[27] Alexandra Kemmerer LL.M.Eur., University of Würzburg: [*Der normative Knoten. Über Recht und Politik im Netz der Netzwerke*] (The normative knot. About law and politics in the net of the networks).

Matthias Goldmann[28] used new forms of (administrative) action (*Handlungsform*) as a possibility to develop a Public Law theory of networks. These forms of action can have the function of increasing the legitimacy of controlling networks that are characterised by informal actions, non-binding instruments and heterogeneous actors. A special form of action can help identify a consistent legal regime by minimizing problems of legitimacy in transnational networks. Goldmann supported his thesis with the example of "OECD Guidelines"[29] that offer collective constitutive characteristics but can also be differentiated e.g. concerning procedural aspects.

Eike Michael Frenzel posed some critical questions concerning the origin of the term "network" in the German legal system.[30] Using § 50a of the *Gesetz gegen Wettbewerbsbeschränkungen* (GWB – German Competition Act)[31] he explained that the German term "*Netzwerk*" was based on the translation of the English term "network" in EC 1/2003. It seemed important that this English term could also be translated with other German terms such as "*Verbund*" or "*Netz*" – terms whose meanings are more clarified in the German legal system. Frenzel concluded that special attention should be paid to the "how" and "why" of the reception of such terms in national legal systems when trying to compile a general Public Law network theory.

Jörn Lüdemann finally asked, in the last presentation, which methodological instruments should be used by the theoretic background of Public Law to incorporate the theoretical and empirical results of social and political science for constitutional and administrative law. Especially for networks there exist comprehensive "dogmatic instruments" in these related disciplines. The necessity of reception is complicated by the fact that so far there exists no differentiated reception theory for law. Such a theory would have to compensate for the disadvantages of a basically positive specialisation but also respect existing

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[28] Matthias Goldmann, MPI Heidelberg: [*Neue Handlungsformen zur Strukturierung transnationaler Netzwerke. Eine Darstellung am Beispiel der OECD*] (New forms of action to structure transnational networks. A presentation at the example of the OECD).

[29] http://www.oecd.org.

[30] Dr. Eike Michael Frenzel, University of Augsburg: [*Vom Verbund zum Netzwerk. Die Musik des Zufalls als Erkenntnisquelle*] (From „Verbund" to networks. The music of chance as source of knowledge).

[31] http://www.gesetze-im-internet.de/gwb/index.html.

boundaries of disciplines. The autonomy over methods definitely would have to remain with the several disciplines.[32]

F. Conclusion

Whereas there has already been research concerning network problems in political and social sciences for some years, the concept of networks is still a new approach in diverse aspects of law in general and especially Public Law. The presentations of the meeting brought new concepts, ideas and theories regarding the application of networks to Public Law research. This year's meeting of German-speaking law assistants in Berlin was probably the first large scientific assembly to advance Public Law research in connection with network problems. Throughout several vivid discussions during the meeting it became clear that the concept of networks from a legal perspective can only be approached by integrating neighbouring disciplines such as the political and social sciences. After the meeting it can be concluded that networks in legal frameworks need an interdisciplinary approach.

Special praise is owed to the organising team in Berlin (Dr. Sigrid Boysen, Ferry Bühring, Dr. Claudio Franzius, Dr. Tobias Herbst, Matthias Kötter, Anita Kreutz M.A., Dr. Kai von Lewinski, Florian Meinel, Dr. Jakob Nolte, Dr. Sabrina Schönrock). The meeting promoted a lot of interesting discussion and revealed that research in Public Law concerning network problems will continue and will deepen. Within this further discussion the presentations and proceedings of this year's meeting are certain to play a prominent role. They will be published in 2007 by Nomos.[33]

The 48th meeting of German-Speaking Public Law Assistants will take place in Heidelberg, from 26-29 February 2008.[34] The topic will be "Freedom and Security."

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[32] Dr. Jörn Lüdemann, University of Bonn: [*Öffentliches Recht und Rezeptionstheorie. Netzwerke als Lehrstück für den Bedarf nach einer reflektierten Rezeption der Nachbarwissenschaften*] (Public Law and the reception theory. Networks as a didactic play for the necessity of a reflected reception of neighboured disciplines).

[33] http://www.nomos.de.

[34] For further information see, http://www.assistententagung.de.