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Networked statehood: an institutionalised self-contradiction in the process of globalisation?

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ABSTRACT

World economy and world science have not yet found a counterpart in a world state and probably never will. However, the contours of a political system have emerged, which fulfil the functions of statehood at the global level. Such a system does not take the form of a uniform corporative-hierarchical collectivity but of *networked statehood*, ie a network of individual states, international organisations, and transnational regimes. Relying on social science and legal constructions, this article offers a positive and negative definition of this concept and an analysis of its intrinsically self-contradictory character traits. Despite these unavoidable contradictions, this article argues that *networked statehood* still provides considerable advantages and outlines general principles of a future law of networked statehood. These outlines are founded on the belief that networked statehood must be seen as a new and distinct legal form of action but likewise facing the problem of democratic legitimacy.

KEYWORDS Transnational regimes and networks; statehood; globalisation; systems theory; international organisations

1. From network state to networked statehood

With a daring conceptual move - from the constitutional state via the welfare state to the transnational *network state* - Manuel Castells, Karl-Heinz Ladeur, and Thomas Vesting introduce a new collective actor into the transnational scene.¹ The authors devise the transnational network state as a multi-levelled construct.

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¹ Manuel Castells, *End of Millennium: The Information Age: Economy, Society and Culture Vol. III* (Blackwell, 2000) 342ff, 367; Manuel Castells, *Communication Power* (Oxford University Press, 2009) 38ff; Manuel Castells, *The Rise of the Network Society: The Information Age: Economy, Society and Culture*, Vol. 1 (Blackwell, 2000) 77ff; Karl-Heinz Ladeur, 'Der Staat der 'Gesellschaft der Netzwerke'. Zur Notwendigkeit der Fortentwicklung des Paradigmas des 'Gewährleistungsstaates' (2009) 48 *Der Staat* 163; Thomas Vesting, *Staatstheorie* (Beck, 2018) 157ff.

At the lower level, the traditional nation-state hierarchy is transformed into the heterarchy of a network, in which the state is interwoven not only with other political subjects (political parties, associations, social movements) but also with social subjects and private orderings (companies, production networks, contractual alliances), and wherein the state takes at least the role of the network centre.² At the regional level, the authors take the example of the European Union (EU), considered as ‘a network that is fundamentally heterarchically organized despite some vertical patterns of linkage; the central network node here is at best *primus inter pares*’.³ At the global level, finally, it is not merely a matter of the growing importance of an ‘open state’⁴ but rather of a new kind of collectivity that connects international actors. In this decentralised network, transnational regulatory decisions are not taken uniformly. Rather, they are made separately, in forms of ‘disaggregated sovereignty’,⁵ and distributed in an iterative process to several autonomous decision-makers, ie, nation-states, international organisations (IOs), transnational regimes, but also—*horribile dictu*—private regulatory bodies and other types of non-state actors.⁶

The three authors’ use of the term *network state* oscillates between two meanings of this ‘denationalized assemblage’.⁷ On the one hand, it denotes the individual nation-state in its various roles on the three levels; on the other hand, it refers to the newly emerging collectivity of the network itself.⁸

² Vesting (n 1) 517ff. For an earlier attempt to trace the transformation of the nation-state hierarchy into a network, see Gunther Teubner, ‘The “State” of Private Networks: The Emerging Legal Regime of Poly-corporatism in Germany’ (1993) *Brigham Young University Law Review* 553.

³ Vesting (n 1) 517ff; Similarly, Karl-Heinz Ladeur, ‘European Law as Transnational Law – Europe Has to Be Conceived as an Heterarchical Network and Not as a Superstate!’ (2009) 10 *German Law Journal* 1357, 1363 f; and Manuel Castells, ‘A Sociology of Power: My Intellectual Journey’ (2016) 42 *Annual Review of Sociology* 1, 7.

⁴ Udo Di Fabio, *Der Verfassungsstaat in der Weltgesellschaft* (Mohr Siebeck, 2001) 62ff.

⁵ Anne-Marie Slaughter, *A New World Order* (Princeton University Press, 2004) 266; Slaughter gives one of the most influential definitions of network: ‘a pattern of regular and purposive relations among like governments units working across the borders that divide countries from one another and that demarcate the “domestic” from the “international” sphere’ (14). For an overview on the current discussion over the persisting value and/or usefulness of the modern concept of sovereignty in international legal scholarship see the instructive debate between Neil Walker, ‘The Sovereignty Surplus’ (2020) 18 *International Journal of Constitutional Law* 370; and Fleur Johns, ‘The Sovereignty Deficit: Afterword to the Foreword by Neil Walker’ (2021) *International Journal of Constitutional Law*, online: <https://doi.org/10.1093/icon/moab004>.

⁶ On cooperation between public and private actors as a new autonomous form of regulation in transnational relations, see in most recent literature Sol Picciotto, *Regulating Global Corporate Capitalism* (Cambridge University Press, 2018) 269ff; Rebecca Schmidt, *Regulatory Integration Across Borders: Public–Private Cooperation in Transnational Regulation* (Cambridge University Press, 2018) 11ff and 47ff; Poul F Kjaer, *Constitutionalism in the Global Realm: A Sociological Approach* (Routledge, 2014) 4; Fabrizio Cafaggi, ‘New Foundations of Transnational Private Regulation’ (2011) 38 *Journal of Law and Society* 20, 21; Anne Peters and others (eds), *Non-State Actors as Standard Setters* (Cambridge University Press, 2009). On the implementation of international obligations through domestic private agreements see already C Wilfred Jenks, ‘The Application of International Labour Conventions by Means of Collective Agreements’ (1958) 19 *Heidelberg Journal of International Law* 197.

⁷ Saskia Sassen, *Territory-Authority-Rights: From Medieval to Global Assemblages* (Princeton University Press, 2006) 228.

⁸ See Thomas Vesting, *Legal Theory and the Media of Law* (Elgar, 2018) 517ff; Ladeur (n 1) 176; Castells (n 3) 7, describes the transformation of nation-states into a transnational network state as follows: ‘their

It is this oscillation that prompts us to propose a different term. Indeed, we do not consider the concept of *network state* to be particularly suitable. *State* suggests the compact collectivity of a corporate actor and of legal personality, which does not do justice to the new realities. We are dealing with a reticular rather than corporate collectivity, a genuine network between states and other collective actors in the strict sense of network theory, or more precisely: *a networked statehood*.⁹

The current state of the globalisation explains why reticular statehood is more appropriate than a corporate state. If globalisation can be defined as the extension of functional differentiation from Europe to the entire world,¹⁰ it is remarkable how the globalisation of functional systems is proceeding at different speeds.¹¹ The world economy and the world science have not yet found a counterpart in a 'world state' and will not find it in the foreseeable future. Ideas of a world state with a global constitution, as developed by philosophers and international legal scholars, belong in the realm of fantasy at the present stage of development.¹² However, clear contours of a political system of world society have emerged that fulfils the functions of statehood, but in a different form than a uniform corporate-hierarchical collectivity.¹³

At the same time, the relationship between the global political system and the other social subsystems has changed drastically compared to their national counterparts.¹⁴ While in the nation-states of the Western world

existence as power apparatuses is being profoundly transformed, as they are either bypassed or rearranged in networks of shared sovereignty formed by national governments, supranational institutions, conational institutions (such as the EU, NATO, or Free Trade Agreements), regional governments, local governments, and NGOs, all of which interact in a negotiated process of decision making'. Maurizio Ricciardi, 'Dallo Stato moderno allo Stato globale: Storia e trasformazione di un concetto' (2013) *25 Scienza e politica* 75, 83, talks in similar terms about the transformation of the modern nation-state into a 'global state', whereby collective unity has dissolved into a 'diffuse practice of a series of social structures.'

⁹ In this sense, 'state' puts an excessive emphasis on the unity of action, while 'statehood' highlights the disaggregation of state functions alongside the network's processes and structures. Gunnar F Schupert, *Verflochtene Staatlichkeit: Globalisierung als Governance-Geschichte* (Campus, 2014) refers to an 'intertwined statehood' (*verflochtene Staatlichkeit*). See also Vesting (n 8) 499ff.

¹⁰ See Niklas Luhmann *Theory of Society vol.1/2* (Stanford University Press, 2012/2013) Chapter 1 X and Chapter 4 XII; and, in most recent international legal scholarship, Ntina Tsovala, *Capitalism as Civilisation. A History of International Law* (Cambridge University Press, 2020).

¹¹ See Niklas Luhmann, 'Globalization or World Society' (1997) 7 *International Review of Sociology* 67.

¹² See Bardo Fassbender, 'We the Peoples of the United Nations': Constituent Power and Constitutional Form in International Law' in Neil Walker and Martin Loughlin (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, 2007) 269, especially 281ff; Otfried Höffe, 'Vision Weltrepublik: Eine philosophische Antwort auf die Globalisierung' in Dieter Ruloff, Christoph Bertram and Bruno Frey (eds), *Welche Weltordnung?* (Rüegger, 2005) 33ff.

¹³ On these transformations of statehood and of the political, see Kjaer (n 6) 83–4, 97 and Poul F Kjaer, 'The Concept of the Political in the Concept of Transnational Constitutionalism: A Sociological Perspective' in Christian Jorges and Tommi Ralli (eds), *After Globalization - New Patterns of Conflict and their Sociological and Legal Reconstruction* (Oslo: Arena, 2011) 285–321. The result of these transformations is the 'virtual state', according to Domenico Giannino, 'The Virtual State: National Sovereignty and Constitutions Facing Globalization Processes' (2016) 11 *Panóptica* 19, 26–7.

¹⁴ Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press, 2012) 15–41.

the functionally differentiated systems were under the more or less well-functioning political curate of the state organisation, at the global level the functional systems have emancipated themselves to a significant extent from nation-state control and constituted themselves as autonomous world systems. They now enter into new relations with the political system of international relations, which is still fragmented into territorial states and has not developed a formal state organisation at the global level.

However, the most important novelty is that the other global functional systems, in particular the global economy, have developed a new power position, which can no longer be controlled by the political system: 'The State alone does not have the power to challenge effectively the power centers of the transnational economy. The State can be a countervailing power only, when it is connected to a larger network of non-state institutions'.¹⁵ As a result, the functions of the global political system can only be performed in such a way that the individual states coordinate with other states and with non-state regimes, which excludes the traditional hierarchical control of social activities from the outset.

Via networking, societal collectivities have now entered into this coordination process. Their role is no longer limited to mere lobbying activities. The functional systems have formed transnational regimes that, in the form of IOs, hybrid public-private institutions, multinational corporations or non-governmental organisations, directly participate in decisions in the context of international relations.¹⁶ Thus, when the world society's political system is constituted as a negotiating system of individual states, IOs and transnational regimes, corporatist hierarchical forms of collective action are unlikely, if not impossible. To fulfil their political functions, the individual states then establish cooperative-heterarchical relations with the transnational regimes. This novel form of governance can be appropriately described as *networked statehood*.

Despite the repeatedly reiterated assertion that 'network is not a legal concept',¹⁷ we suggest that network becomes a basic legal concept, inspired by the social sciences, now also of international law.¹⁸ In contrast to private law networks, in international public law we cannot use *connected contracts* as a technical legal term. Indeed, the connections within networked states are sometimes formed by international agreements, sometimes by regulatory

¹⁵ Roberto Esposito, *Istituzione* (Il Mulino, 2021) 73.

¹⁶ See again the sources mentioned above (n 6).

¹⁷ Richard M Buxbaum, *Is 'Network' a Legal Concept?* (1993) 704.

¹⁸ Important insights come from Anne-Marie Slaughter, 'Sovereignty and Power in a Networked World Order' (2004) 40 *Stanford Journal of International Law* 283. For a more recent outline of the state of the debate see Manuel P Schwind, *Netzwerke im Europäischen Verwaltungsrecht* (Mohr Siebeck, 2017) 151ff; Jonathan Bauerschmidt, *Die Rechtsperson der Europäischen Union im Wandel: Auswirkungen differenzierter Integration durch Völkerrecht auf die Europäische Union* (Mohr Siebeck, 2019) 95 ff. On the reception of network theory in legal scholarship see generally Shisong Jiang, 'Network Research in Law: Current Scholarship in Review' (2019) 7 *Humanities & Social Sciences Reviews* 528, 529ff.

relations, sometimes by intensified cooperative relations. Therefore, we suggest *networked statehood* as a technical term for both sociological and legal analysis. The contours of *networked statehood* are difficult to identify with reference to the positive law of national and international legal systems, but clearer and more recognisable with reference to the soft law of formal and informal practices, legal and social norms. Networked statehood then subsumes these highly diverse phenomena under one term that designates one of several institutions of the world society's political system. The concept of *networked statehood* should thus be understood as a comprehensive analytical tool, a conceptual genus useful for both descriptive and normative purposes, including a wide array of phenomena and actors as its species.

Indeed, when specific legal rules are supposed to govern networked statehood, then law's 'necessity to decide' (*Entscheidungszwang*)¹⁹ requires that this form of organisation can be distinguished with sufficient clarity for judicial decision-making against other forms of organisation recognised in international law. While it is true that law often increases its ability to decide issues by ignoring aspects of reality difficult to process, the social reality of networks has become overwhelming. Different international and national legal norms (of conduct, attribution of conduct, responsibility, and immunity) apply depending on whether an actor is legally qualified as a state, as an IO, or as a different type of collectivity. In addition, the interlinking of national and transnational components in networked statehood raises difficult issues of compatibility for policymakers and lawyers. Moreover, international law will have to change the traditional demarcations of states from IOs and transnational regimes precisely because they do not provide a separate place for the new networks. Admittedly, this does not mean that these units of action collapse in networking but that their boundaries must be redefined. In a nutshell, this article explores law's potential to recognise and support the relationships which constitute the phenomenon of networked statehood.

The article proceeds as follows. After this introduction, section 2 provides the defining elements of *networked statehood* in both positive (2.1) and negative (2.2) terms. Section 3 discusses its two problematic contradictions, ie the unstable balance between the considerable autonomy of the nodes, and the weak unity of the collectivity (3.1), and the extreme polycontextuality (3.2), which are the main reasons for network failures (3.3). Section 4 describes some advantages of such mode of collective action, namely the potentially productive transformation of its intrinsic contradictions (4.1), as well as the effects of its transversality (4.2), dynamism, resilience (4.3),

¹⁹ Christoph Möllers, 'Netzwerk als Kategorie des Organisationsrechts' in Janbernd Oebbecke (ed), *Nicht-Normative Steuerung in dezentralen Systemen* (Franz Steiner Verlag, 2005) 282.

and iterativity (4.4), and suggests consequences for the law (4.5). Section 5 outlines the general principles of a future *law of networked statehood*, in particular, the necessity to consider it as a technical legal concept (5.1); the development of duties of loyalty of the nodes and rules for the related collisions (5.2); and the liability of the networked statehood itself (5.3). By way of conclusion, section 6 hints at the crucial issue of democratic legitimacy.

2. Definition

2.1. Positive definition

In positive terms, networked global statehood can be conceived as a compensatory institution for two problems of transnationalisation.²⁰ On the one hand, it compensates for the weakening of the nation-state monopoly on the public performance of security tasks and the regulation of social fields such as economic production, finance and the flow of information in society.²¹ On the other hand, it compensates for the aforementioned lack of a unified world state that could have assumed these tasks. The result of both compensations is that the political system reacts to the functional differentiation of world society by building reticular forms of organisation, whose distinctive feature is reconstructing the political system's internal differentiation in the changed political, social and economic landscape that emerged from globalisation.²² In the nation-state, the political system reacts to external impulses by creating different departments in the hierarchical state organisation. In contrast, different external impulses and different internal structures in networked statehood result in autonomously established nodes and the cooperative/conflictual relations between them.

2.1.1. Networked

Networked statehood is a reticular rather than corporate collectivity. It is neither identical with the global political system, nor is it one of its subsystems. Instead, it contributes—next to states, IOs and regimes—to the

²⁰ Networked statehood forms part of the broader trend toward a global 'compensatory constitutionalism' in the sense of Anne Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 *Leiden Journal of International Law* 579, which not only led to the 'sectoral constitutionalisation of various international organisations and the constitutionalisation of the private (economic) realm' (Anne Peters, 'Constitutionalization' in Jean d'Aspremont and Sahib Singh (eds), *Concepts for International Law. Contributions to Disciplinary Thought* (Elgar, 2019) 141ff), but also initiated compensatory transformations of state functions in the transnational space.

²¹ Susan Strange, *States and Markets* (2nd edn, Pinter, 1994) 47ff.

²² Căcilia Hermes, 'Cyberspace from a Network Perspective' (2021) 81 *Heidelberg Journal of International Law* (forthcoming), clarifies these connections by referring to three governance institutions of the global cyberspace, namely the Internet Engineering Task Force (IETF), the Internet Corporation for Assigned Names and Numbers (ICANN), and the Internet Governance Forum (IGF).

functions of the global political system.²³ Relatively autonomous units ('nodes') establish stable and iterative heterarchical relations ('links') with each other as well as simultaneously with the collectivity itself. A node can be a state as a whole, a sub-national or governmental/administrative unit, a formal or *de facto* IO²⁴ or specific administrative bodies of this latter, and even a non-state actor. The latter may well be a hybrid actor of a private-public character or a full-fledged private actor. What matters is that, on the one hand, the collectivity is not to be identified with any of its nodes; and, on the other hand, it performs the function of (re-)producing political decisions at the transnational level. This feature keeps a networked statehood distinct from purely private transnational networks, such as transnational corporate groups or other forms of private orderings that do not perform political functions.²⁵ Importantly, this means that each node continuously re-creates (and to some extent distorts) the entire collectivity from its own sectoral perspective, a feature that also affects issues of legal attribution.

From a dynamic perspective, such features emerge out of the increased interdependence and need of cooperation among political units, and out of the absence of overarching authoritative instances. Therefore, networked statehood as a specific form of collectivity has to endure and, to some extent, mitigate three unresolvable contradictions triggered by globalisation: (1) bilateral relations v multilateral alliance of international actors; (2) competition v cooperation; (3) collective action orientation v individual action orientation.

Still from a dynamic perspective, forms of networked statehood may emerge from a variety of processes.²⁶ Firstly, they stem from formal

²³ This is only an abbreviation for a tension which is often described as the difference between an institutional and a functional perspective. More precisely, networked statehood participates in two different modes of social differentiation, one 'horizontal', ie functional differentiation (politics, economy, law, science etc), the other 'vertical', ie interaction, organisation, society (Luhmann (n 10) Chapter. 4). The network is a variation within the vertical (close to organisations, loose associations, movements, groups). Networks are not subsystems of functional systems; rather, they form their environment but 'belong' to them in a dense operative/structural coupling. They orient their operations on one (sometimes several) function systems. Concretely: states, IOs, regimes and networked statehoods are not parts of the global political systems but orient their operations toward the power/policy complex of global politics (and often simultaneously to the economy or science).

²⁴ On the distinction between formal and informal governmental organisations, see Felicity Vabulas and Duncan Snidal, 'Organization without Delegation: Informal Intergovernmental Organizations (IIGOs) and the Spectrum of Intergovernmental Arrangements' (2013) 8 *Review of International Organizations* 193, 196ff.

²⁵ We do not think of private corporations as being unpolitical. Rather, we use a dual concept of the political—*le politique* versus *la politique*. First, it means institutionalised politics, the political system of states. Second, the political refers to politics in society outside institutionalised politics, the 'internal' politicisation of the economy itself and that of other social spheres, ie the power politics of reflection on their social identity, for example, on the social responsibility of corporations. For details, see Teubner (n 14) 114ff; and Kjaer (n 13).

²⁶ For a typology of transgovernmental networks, Anne-Marie Slaughter, 'The Accountability of Government Networks' (2001) 8 *Indiana Journal of Global Legal Studies* 347, 355ff.

international agreements giving rise to cooperative arrangements, which set only ‘light’ institutional structures with no formal IO. Secondly, and more often, they arise due to the stabilisation of informal agreements or merely factual cooperation. Thirdly, they may emerge through bilateral contact between a member of an already established collectivity and an external newcomer. In all these cases, networked statehood may constitute an intermediate step in an evolutionary dynamic, potentially resulting in a—formal or *de facto*—IO, even against the original will of its members; or in a hybrid collectivity that combines elements of a formal organisation and pure network relations.

2.1.2. Global

Networked statehood is not defined by clear-cut territorial boundaries. Its members (‘nodes’) are ever-changing and, although its processes do not necessarily have a planetary reach, they are in principle unlimited. In this regard, networked statehood is not characterised by inside-out dynamics but, at best, by a centre-periphery one.²⁷ Furthermore, just like other types of actors and collectivities emerging from globalisation, forms of networked statehood are in historical terms original and in functional terms necessary to global governance. In this sense, each example of networked statehood can be considered as a ‘native citizen’ of an emerging global law.²⁸

2.1.3. Statehood

The term highlights the function of iterative production of properly political decisions and policies at the global level. Networked statehood contributes to building and preserving political power in a context different from the Westphalian *ius publicum europaeum*, where the production of power and policy decisions could be structurally, functionally and symbolically rooted within a defined territory. However, in the context of globalisation, power, as the distinct medium of the political system, can effectively be (re-)produced only through forms of networked statehood.²⁹ In this regard, the global

²⁷ Network heterarchy does not exclude hierarchical elements. However, when we refer to the ‘centre’ of a networked statehood we do not mean just power differences between the nodes, but the emergence within the collectivity of a node with contractual or regulatory links to all its satellites.

²⁸ See in the recent literature Poul F Kjaer, ‘Global Law as Inter-Contextuality and as Inter-Legality’ in Jan Klabbers and Gianluigi Palombella (eds), *The Challenge of Inter-Legality* (Cambridge University Press, 2019) 302. For a similar discussion concerning IOs as native citizens of legal globalisation see Angelo Jr Golia and Anne Peters, ‘The Concept of International Organization’ (2020) *MPIL Research Paper Series No 2020-27*, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3659012, outlining a revised and broader legal concept of IO and arguing that it is the ‘natural’ person (1) and a ‘corollary’ (16) to any emerging global law. We extend this reasoning to networked statehood, not because it has the same degree of stability as IOs (see below 2.2.3), but because in logical terms it is not possible to conceive of current global governance without (a concept of) networked statehood.

²⁹ In contrast to Castells’ notion of influence and to Foucault’s conflation of power we adhere to Weber’s and Luhmann’s notion of power as *definiens* of the political: see Niklas Luhmann, *Trust and Power*

networking of state functions creates a bulwark of statehood against all attacks aimed at weakening or even the withering away of the state as a result of transnationalisation.³⁰ At the same time, since networked statehood firmly integrates nation-states in global cooperation, it counters growing nationalist trends.

Referring to *statehood* instead of *state* thus serves several purposes. First, it underlines the absence of a formal organisation. Second, it preserves the functions that have been performed in modernity by nation-states and performs them in the transnational constellation. Third, it implies that single nodes can be either sub-structures of states (administrative agencies, parliaments, sub-national territorial units, cities, courts) or their supra-structures (IOs and regimes).

2.2. Negative definition

In negative terms, we distinguish networked statehood from other collectivities occupying the stage of socio-legal globalisation. In this regard, our definition aims to update dividing lines traditionally set in (international) legal theory.

Indeed, from the perspective of traditional (ie mainly inter-state) international law, states are defined as political communities, territorially organised, that have the capacity to act internationally.³¹ They are conceived as impermeable 'black boxes', due to the principles of equal sovereignty and

(Wiley, 1979). This does not exclude situational transformations of power into influence, persuasion, monetary incentives, but the different organisation in networks does not create a fundamental difference from states. What matters is that, in the changed context of globalisation, states cannot consistently transmit their power acts without entering forms of networked statehood. For a discussion on Castells' power/influence distinction and its actual suitability to the context of globalisation, see Felix Stalder, *Manuel Castells and the Theory of the Network Society* (Polity Press, 2006) 128 ff. For an emblematic case study concerning labour standards and the role of the state in facilitating inclusive and consensual action with non-state bodies of collective interest at national and transnational levels see Janelle M Diller, 'The Role of the State in the Exercise of Transnational Public and Private Authority over Labour Standards' (2020) 17 *International Organizations Law Review* 41.

³⁰ Here it is important to clear up misunderstandings: transnational societal constitutionalism is often understood as if it were based on the premise that the state withers away in globalisation. This is a grotesque—sometimes even deliberate—misunderstanding: see eg Klaus Günther and Stefan Kadelbach (eds), *Recht ohne Staat: Zur Normativität nichtstaatlicher Rechtsetzung* (Campus, 2011) 10. Despite globalisation, the large nation-states remain the most influential political actors. However, new political and social actors have emerged, entering cooperative, competitive, or conflictual relationships with the nation-states. These new constitutional questions arising alongside those concerning state constitutions are the concerns of societal constitutionalism: see Teubner (n 14); Kjaer (n 6); Angelo Jr Golia and Gunther Teubner, 'Societal Constitutionalism (Theory of)' (2021) *MPIL Research Paper Series No 2021-08*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3804094.

³¹ See Article 1(a–d) Montevideo Convention on the Rights and Duties of States, signed 26 December 1933, 165 LNTS 19 (entered into force 26 December 1934); and the *Deutsche Continental Gas-Gesellschaft v Polish State*, 5 Ann Dig ILC 11 (Germano-Polish Mixed Arbitral Tribunal 1929). For a thorough and original discussion on the concept of statehood in international law see in the most recent literature Tom Sparks, 'State' in Jean d'Aspremont and Sahib Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Elgar, 2019) 838–49.

non-interference³² and the general irrelevance of domestic law to the purposes of international law-making.³³ IOs, for their part, are traditionally identified by three elements: (1) a founding instrument governed by international law, (2) state membership, and (3) a ‘will’ distinct from that of its members (*volonté distincte*).³⁴ Further, they are legally ‘(in-)transparent’ due to the varying legal relevance given to single state members or the organisation’s ‘corporate’ veil, especially in terms of responsibility and attribution.³⁵ Finally, in international law, networks, transnational corporations and hybrid actors are generally (and instrumentally) confined to legal invisibility.³⁶

To be sure, such dividing lines have already been questioned for a long time. Especially with the rise of international human rights law and international economic law, states are increasingly bound by negative and positive obligations deriving from individual and collective rights, making the ‘black box’ of their sovereignty more and more transparent.³⁷ Legal scholarship is also progressively developing subtler and broader legal concepts of IOs and other international institutions to accommodate a broader range of actors and meet new analytical and normative needs.³⁸ We argue that the same effort should be made for networked statehood, which needs to be excavated from the situation of legal invisibility where it currently lies.

³² See Articles 2(1) and (7) Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

³³ See Article 46 of the 1969 Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, TS 1155 331.

³⁴ Article 2(a) of the 2011 International Law Commission (ILC) Articles on the Responsibility of International Organizations (ARIO) (UN GA Res 66/100 of 9 December 2011) defines the IO as ‘an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities.’

³⁵ See Catherine Brölmann, *The Institutional Veil in Public International Law. International Organisations and the Law of Treaties* (Hart, 2007) 12, 251ff.

³⁶ On the invisibility of networks, see eg David T Zaring, ‘International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations’ (1998) 33 *Texas International Law Journal* 281; Jan Klabbbers, ‘Institutional Ambivalence by Design: Soft Organizations in International Law’ (2001) 70 *Nordic Journal of International Law* 403; Kal Raustiala, ‘The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law’ (2002) 43 *Virginia Journal of International Law* 1; Moria Paz, ‘States and Networks in the Formation of International Law’ (2011) 26 *American University International Law Review* 1241. On transnational corporations see Fleur Johns, ‘The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory’ (1993) 19 *Melbourne University Law Review* 893; Jean-Philippe Robé, ‘Multinational Enterprises: The Constitution of a Pluralistic Legal Order’ in Gunther Teubner (ed), *Global Law without a State* (Dartmouth Gower, 1997) 45.

³⁷ See, among many, Theodor Moron, *The Humanization of International Law* (Brill-Nijhoff, 2006); Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge University Press, 2016); Eyal Benvenisti, *The Law of Global Governance* (Brill-Nijhoff, 2014).

³⁸ See Golia and Peters (n 28) 1, 16–17; Armin von Bogdandy, Matthias Goldmann and Ingo Venzke, ‘From Public International to International Public Law: Translating World Public Opinion into International Public Authority’ (2017) 28 *European Journal of International Law* 115.

2.2.1. *State-based collectivities*

Networked statehoods produce political decisions through iterative acts that simultaneously bind single nodes and the entire collectivity. Such processes, however, occur at a meta-level, ie in a second-level chain of transmission which leaves the decisions to the single nodes. Further, a single node may well be a whole state, or its sub- or supra-structures or a regulatory private entity. In this sense, a networked statehood is always potentially hybrid and, at the same time, both a result and a driver of what has been described as disaggregation of states.³⁹ The distinction between states and networked statehood, based on the impenetrability of the former, is still tenable only to this limited extent.

However, while these features mark a clear difference with states, they bring networked statehood closer to forms of state cooperation that had emerged during the early stages of globalisation, such as confederations, river commissions, and the congresses of the so-called Concert of Europe in the nineteenth century⁴⁰ which resemble cases of contemporary networked statehood such as the G7, G8 and G20. Although confederations may somehow be considered as a type of networked statehood where the nodes are single states, the difference that remains is that the respective competences of the centre and the single nodes are relatively well-defined. In networked statehood, on the contrary, the competences of each node and the centre often generally overlap to a greater extent, especially when the iterative links are not particularly formalised or institutionalised.

2.2.2. *'Pure' networks and other loose institutional arrangements*

Distinguishing networked statehood from other forms of 'soft' cooperation, institutional arrangements and 'pure' contractual networks is more difficult. As a matter of principle, a networked statehood is based on the fiduciary relationship of a node towards both other nodes and the collectivity.⁴¹ This implies a double orientation of the actions of the single nodes: on the one hand, towards their own interest; on the other hand, towards the interest of the entire reticular collectivity.⁴² Networks

... demand a paradoxical double orientation of actions from the participants: One and the same action is simultaneously exposed to the individual orientation of the network nodes (and thus to the normative requirements of the

³⁹ See Slaughter (n 5) 103–4.

⁴⁰ A form of heterarchical coordination among European powers aimed at preserving the status quo that arose from the Napoleonic Wars. On these early forms of cooperation see Anne Peters and Simone Peter, 'International Organizations: Between Technocracy and Democracy' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press, 2012) 170, 171ff.

⁴¹ See Schwind (n 18) 140, 143ff.

⁴² Margit Neisig, 'Social Systems Theory and Engaged Scholarship: Co-Designing a Semantic Reservoir in a Polycentric Network' (2020) *Journal of Organizational Change Management* 1, 6, 10–11.

bilateral social relationship) and the collective orientation of the network (and thus to its normative requirements).⁴³

Such a fiduciary relationship can be found in a wide array of institutional arrangements where no formal IO is established, especially in multilateral environmental agreements⁴⁴ featuring standing secretariats, expert- or treaty-bodies or *organes communs*,⁴⁵ in turn often based in the administrative structures of a distinct, full-fledged IO. This makes such arrangements perfect candidates for networked statehood, especially when the individual/collective double-orientation is present.

However, there are two key differences with networked statehood. First, ‘pure’ networks and looser institutional arrangements do not feature the fiduciary relationship of the single nodes towards both the other nodes *and* the collectivity at the same time. Secondly, they are not primarily oriented towards the transmission/reproduction of political decisions at the global level.

As concerns the first difference, in multilateral environmental arrangements, for example, standing secretariats and expert bodies embody the common purpose of the collectivity. The single nodes establish fiduciary relationships *also* with them, irrespective of their relationships with other nodes. In other instances, the (potential) *organ commun* or treaty body is set up exclusively for organisational reasons, and fiduciary relationships only exist among the nodes.⁴⁶ Further, such arrangements are also usually characterised by intrinsic instability and institutional dynamism. Indeed, they—or the looser or more isolated entities they are made of—are often

⁴³ Dan Wielsch, ‘Die Ermächtigung von Eigen-Sinn im Recht’ in Ino Augsberg, Steffen Augsberg and Ludger Heidbrink (eds), *Recht auf Nicht-Recht: Rechtliche Reaktionen auf die Juridifizierung der Gesellschaft* (Velbrück, 2020) 179, 191 (our translation).

⁴⁴ See seminal Robin R Churchill and Geir Ulfstein, ‘Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law’ (2000) 94 *American Journal of International Law* 623.

⁴⁵ In international law, a ‘common organ’ is defined as an individual or entity that acts on behalf of multiple international persons and does not have a separate international legal personality. James Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013) 340; Evelyne Lagrange, ‘La catégorie ‘organisation internationale’’ in Evelyne Lagrange and Jean-Marc Sorel (eds), *Droit des Organisations Internationales* (LGDJ, 2013) 35, 87–8; Carlo Santulli, ‘Retour à la théorie de l’organe commun’ (2012) 116 *Revue Générale de Droit International Public* 565. In the specific field of environmental agreements, see Bharat H Desai, *Multilateral Environmental Agreements. Legal Status of the Secretariats* (Cambridge University Press, 2010); Volker Röben, ‘Environmental Treaty Bodies’, *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2015). According to Gloria Fernández Arribas, ‘Rethinking International Institutionalisation through Treaty Organs’ (2020) 17 *International Organizations Law Review* 457, the main element of distinction between IOs and treaty bodies is the absence of their own organ(s) rather than the absence of international legal personality.

⁴⁶ An example is the Administering Authority over the territory of Nauru. Set up by the 1965 Trusteeship Agreement between Australia, New Zealand, and the UK, the Authority was *de facto* controlled by the Australian government, of which it basically constituted a shorthand, also in the relationship with the other parties. In this instance, the Trusteeship Agreement neither created a (*de facto*) IO (as recognised in *Certain Phosphate Lands in Nauru, Nauru v Australia*, Preliminary Objections (ICJ, 26 June 1992), ICJ Rep 1992, 240, para 47) nor established a networked statehood, as, despite the Administering Authority, the fiduciary relationship only existed between the parties/nodes.

subject to a process of institutional ‘thickening’ and/or ‘progeny’. This means that the collectivity’s institutional structures or its centre may progressively acquire the capacity to act and decide autonomously; or create new and more autonomous institutional structures. From a legal point of view, this implies a progressive legal autonomisation, which can, in turn, lead to the (potentially unintended) emergence of a *de facto* IO or the spill-over of its powers/functions.⁴⁷

As concerns the second difference, here it suffices to recall the example of the Internet Corporation of Assigned Names and Numbers (ICANN).⁴⁸ As is well known, this private body was founded as a network of private and public actors that runs the internet domain name system and is committed to a multi-stakeholder approach involving states, private business sector, civil society, and IOs. However, despite its (much criticised) attempts to engage with issues outside its technical remit, such as promoting democracy,⁴⁹ its operations remain clearly oriented towards internet governance. To be sure, this does not mean that the ICANN does not play any role in the political system at the global level but—and this is a key point—it does so only insofar as it participates in a broader reticular collectivity mainly oriented towards the reproduction of political decisions, ie as a node of a networked statehood, not necessarily only involved with internet governance.⁵⁰

2.2.3. *International organisations*

We submit that the main difference with IOs does not lie in the three elements recalled above, nor in their legal ‘(in-)transparency’. Indeed, several *de facto* IOs⁵¹ do not have explicitly recognised international legal personality, nor does their membership necessarily include international law subjects. Likewise, the varying legal relevance given to either the single members, the institutional structure, or both is not an exclusive feature of IOs.⁵² Indeed, precisely the possibility of double attribution (to both the nodes and the centre) seems to follow from the double action orientation typical of networked statehood.

⁴⁷ Andrew T Guzman, ‘International Organizations and the Frankenstein Problem’ (2013) 24 *European Journal of International Law* 999; Tana Johnson, *Organizational Progeny. Why Governments are Losing Control over the Proliferating Structures of Global Governance* (Oxford University Press, 2014) 1ff.

⁴⁸ See online: www.icann.org.

⁴⁹ Matthias Kettemann, *The Normative Order of the Internet. A Theory of Rule and Regulation Online* (Oxford University Press, 2020) 105ff.

⁵⁰ Milton Mueller, ‘Communications and the Internet’ in Jacob Katz Cogan, Ian Hurd and Ian Johnstone (eds), *The Oxford Handbook of International Organizations* (Oxford University Press, 2016) 536.

⁵¹ Examples are the pre-WTO GATT, the pre-Lisbon EU or, more recently, the OSCE. See Jan Klabbers, ‘Presumptive Personality: The European Union in International Law’ in Martti Koskenniemi (ed), *International Law Aspects of the European Union* (Kluwer, 1998) 231; Vabulas and Snidal (n 24) 204; and Mateja Steinbrück Platise, Carolyn Moser and Anne Peters (eds), *The Legal Framework of the OSCE* (Cambridge University Press, 2019).

⁵² See recently André Nollkaemper and others, ‘Guiding Principles on Shared Responsibility in International Law’ (2020) 31 *European Journal of International Law* 15.

An alternative criterion may be the collectivity's capacity to adopt measures that are legally binding upon the members/nodes,⁵³ by either unanimous or majority vote. However, if one were to adopt such a criterion as exclusive, only a few entities could be qualified as IOs properly. Further, from a more substantive perspective, with few exceptions, member states retain the right to opt-out, at one point or another of the IO's internal law- or decision-making.

A subtler additional criterion lies in the higher autonomy of IOs. Indeed, both formal and *de facto* IOs enjoy autonomy in the sense that the organisation's will can be put into practice and results in changes in real life. 'To be autonomous, the collectivity must not only be "willing", it must also be "able"'⁵⁴ through its own institutional structures, for example a standing secretariat. Importantly, autonomy

is a graded concept which does not only have a formal/legal side but needs a factual power base [which] does not emerge by looking merely at the formal international legal personality but only by additionally examining the rules on the functioning of the organization.⁵⁵

As such, autonomy can only be assessed on a case-by-case basis.

While the degree of autonomy of the institutional structures/centre of IOs shifts the balance between individual and collective interest almost exclusively towards the latter, networked statehood is characterised by an unstable balance between the collective and individual interest in the orientation of the nodes' actions. However, as already said, (mostly *de facto*) IOs may arise out of a process of institutional thickening/autonomisation of networked statehood, triggered by the latter's intrinsic instability.

To give some examples: an inter-state group such as the G20 lacks autonomy and stable and formal infrastructure,⁵⁶ and it is based on the double orientation toward individual and collective interests. Thus, it undoubtedly is a case of networked statehood. On the other side of the spectrum lies, eg, the Organization for Security and Cooperation in Europe (OSCE), a non-personified entity not established by international treaty, which, however, possesses such a degree of autonomy that it can be today considered a *de facto* IO.⁵⁷

⁵³ Mathias Koenig-Archibugi, 'Fuzzy Citizenship in Global Society' (2012) 20 *The Journal of Political Philosophy* 456.

⁵⁴ Golia and Peters (n 28) 9.

⁵⁵ *Ibid.*, 10.

⁵⁶ For an in-depth analysis concerning the distinction between the G20 and an IO under the traditional definitional criteria, see Peter H Henley and Niels M Blokker, 'The Group of 20: A Short Legal Anatomy From the Perspective of International Institutional Law' (2014) 14 *Melbourne Journal of International Law* 550, 580–6.

⁵⁷ Lia Tabassi, 'The Role of the Organisation in Asserting Legal Personality: the Position of the OSCE Secretariat on the OSCE's' in Mateja Steinbrück Platise, Carolyn Moser and Anne Peters (eds), *The Legal Framework of the OSCE* (Cambridge University Press, 2019) 48; Niels Blokker and Ramses A Wessel, 'Revisiting Questions of Organisationhood, Legal Personality and Membership in the OSCE: The

Other entities may be placed in the middle of the spectrum. For example, the Basel Committee for Banking Supervision (BCBS) was first established in 1974 as a ‘standing committee of experts on banking and foreign exchange regulations and supervisory practices’⁵⁸ by the central bank governors of the G10 countries and Switzerland but was provided with a legal basis (the Charter) only forty years later. Today, it is ‘the primary global standard setter for the prudential regulation of banks and provides a forum for cooperation on banking supervisory matters’.⁵⁹ Its members include ‘organisations with direct banking supervisory authority and central banks’.⁶⁰ However, according to section 3 of the Charter, it ‘does not possess any formal supranational authority. Its decisions do not have legal force. Rather, the BCBS relies on its members’ commitments (...) to achieve its mandate’. Arguably, actors such as the BCBS enjoy some degree of autonomy, and although their legal output cannot be formally attributed to them, it can be attributed to the collectivity of participants, which should be held jointly accountable. Against this backdrop, it might be argued that the BCBS, which first emerged as a form of networked statehood, is currently evolving into a *de facto* IO.⁶¹

The spectrum, however, does not exhaust the possible interrelations between IOs and networked statehood. These collectivities often establish symbiotic relationships.⁶² This is apparent when a networked statehood emerges in the internal structure of IOs or in their external relations. On the one hand, a networked statehood needs IOs for their capacity to adopt ‘hard’ regulation and to increase the legitimacy or legal consistency of their policy measures. On the other hand, IOs need networked statehood’s flexibility, informality, speed and capacity to involve diverse stakeholders, in order to effectively accomplish their mandate.⁶³

This dynamic emerges in the current functioning of some full-fledged IOs, such as the International Telecommunication Union (ITU), which, starting from 1994, adopted a client-oriented approach and recognised more rights and obligations to private sector members.⁶⁴ This evolution triggered the

Interplay Between Law, Politics and Practice’ in Mateja Steinbrück Platise, Carolyn Moser and Anne Peters (eds), *The Legal Framework of the OSCE* (Cambridge University Press, 2019) 135.

⁵⁸ Nico Krisch, ‘Capacity and Constraint: Governance through International and Transnational Law’ in Martin Lodge and Kai Wegrich (eds), *The Problem-solving Capacity of the Modern State Governance Challenges and Administrative Capacities* (Oxford University Press, 2014) 199, 207ff.

⁵⁹ See online: <https://www.bis.org/bcbs/>.

⁶⁰ Section 1 of the Basel Committee Charter, 2013.

⁶¹ See Golia and Peters (n 28) 16, arguing that the BCBS may count as an IO in a broad sense.

⁶² Raustiala (n 36) 6; Burkard Eberlein and Abraham L Newman, ‘Escaping the International Governance Dilemma? Incorporated Transgovernmental Networks in the European Union’ (2008) 21 *Governance* 25, at 28 refer to ‘synergistic cooperation’.

⁶³ On these topics, see seminal Harold AK Jacobson, *Networks of Interdependence: International Organizations and the Global Political System* (Knopf, 1984).

⁶⁴ Dietrich Westphal, ‘International Telecommunication Union (ITU)’ in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2014) 1, 3; Mueller (n 50).

need for a forum where broad, informal discussions on global telecommunication policies and strategies could take place, which led to the establishment of the World Telecommunication Policy Forum (WTPF). Similar examples may be found in the cooperation between the UN Environment Programme (UNEP) and the International Olympic Committee (IOC) regarding environmental regulation in the sports sector;⁶⁵ in the so-called Ruggie process in the field of business and human rights;⁶⁶ in the involvement of private actors and other IOs in the governance of the World Health Organization (WHO);⁶⁷ and in the governance of financial markets.⁶⁸

Further, a symbiotic combination of an IO and multiple forms of networked statehood—or, as Ladeur puts it, a network of networks⁶⁹—seems to be a convincing way to conceptualise the EU, beyond super-state ambitions and *sui generis* narratives.⁷⁰ Indeed, despite the (admittedly relevant) powers of the organisation's centre, constituted by the European Council-Commission-Parliament triad, the EU could not exercise its own—either internal or external—competences and overcome the deadlocks coming from intergovernmentalism, or pursue the indefinite goal of an 'ever closer union', without a wide array of both formal and informal, horizontal and vertical, networks.⁷¹ Enhanced cooperation procedure;⁷²

⁶⁵ Schmidt (n 6) 154ff.

⁶⁶ *Ibid.*, 130ff. Other examples can be the G77 at the UN, the G33 in the WTO context, or the Alliance of Small Island States on climate change issues (AOSIS). For the intertwining of organs, fora, programs, networks, principles and norms, as well as several kinds of formal and informal participation mechanisms of states and non-state actors in the UN, and the IRs methodologies to analyse it, see Janne Mende, 'From Exploration to Explanation. Researching the United Nations and other International Institutions' (2020) *MPIL Research Paper Series No 2020-02*, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3526756.

⁶⁷ The most notable example of such partnerships is the Codex Alimentarius Commission, a joint venture of the WHO and the FAO. See in recent literature Steven A Solomon and Claudia Nannini, 'Participation in the World Health Organization' (2020) 17 *International Organizations Law Review* 261.

⁶⁸ See Fulya Apaydin and Charles Roger, *Blurring Boundaries: (In)formality and the Governance of Global Financial Markets* (GLOBE – The European Union and the Future of Global Governance, 2020) referring to the BCBS, the International Organization of Securities Commissions, the Forum for European Securities Commissions and the Committee of Central Bank Governors to show that, while many informal bodies have undergone formalisation, many others have become intertwined with formal ones. Moreover, they point to four distinct legal dynamics: entanglement, nesting, integration, and conversion.

⁶⁹ Ladeur (n 3) 1363–1364.

⁷⁰ Eberlein and Newman (n 62). Somek distinguishes between systems based on law and systems based on mutual trust: Alexander Somek, 'The Cosmopolitan and the Federal Margin of Appreciation' (2020) *U Iowa Legal Studies Research Paper No 2020-16*, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3561996, 3, 23.

⁷¹ Seminaly Giandomenico Majone, 'Mutual Trust, Credible Commitments and the Evolution of Rules for a Single European Market' (1995) *EUI Working Paper RSC No 95/1* 1. Tanja A Börzel, 'The European Union—A Unique Governance Mix?' in David Levi-Faur (ed), *The Oxford Handbook of Governance* (Oxford University Press, 2012) 614, argues that the EU's governance mix is governed *in* (rather than *by*) networks, which public actors dominate. In the most recent literature see generally Mariolina Eliantonio, Emilia Korkea-aho and Oana Stefan (eds), *EU Soft Law in the Member States: Theoretical Findings and Empirical Evidence* (Hart, 2021).

⁷² Massimo Bordignon and Sandro Brusco, 'On Enhanced Cooperation' (2006) 90 *Journal of Public Economics* 2063; Daniela A Kroll and Dirk Leuffen, 'Enhanced Cooperation in Practice. An Analysis of Differentiated Integration in EU Secondary Law' (2015) 22 *Journal of European Public Policy* 353, 360–1, 364.

comitology;⁷³ Open Method of Coordination (OMC);⁷⁴ parliamentary,⁷⁵ judicial,⁷⁶ and urban networks;⁷⁷ trilogue negotiations in the legislative process;⁷⁸ the Euro Group on financial matters of the Euro Zone;⁷⁹ EUROPOL and FRONTEX on security affairs,⁸⁰ are key in both generating and implementing EU policies at all governance levels.⁸¹

3. Two open flanks

Having defined networked statehood, we now turn to analyse in deeper detail the intrinsic weaknesses of this reticular collectivity. Indeed, as successful as networked statehood can generally be in resisting the attacks of its globalist and nationalist opponents, it is defenceless on two open flanks, arising in the form of two self-contradictions that in principle cannot be eliminated. They

⁷³ Christian Joerges and Jürgen Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology' (1997) 3 *European Law Journal* 273, 287.

⁷⁴ Erika Szyszczak, 'Experimental Governance: The Open Method of Coordination' (2006) 12 *European Law Journal* 486.

⁷⁵ Thomas Malang, Laurence Brandenberger and Philip Leifeld, 'Networks and Social Influence in European Legislative Politics' (2019) 49 *British Journal of Political Science* 1475.

⁷⁶ Giuseppe Martinico, 'Judging in the Multilevel Legal Order: Exploring the Techniques of 'Hidden Dialogue'' (2010) 21 *King's Law Journal* 257; Maartje de Visser and Monica Claes, 'Judicial Networks' in Pierre Larouche and Péter Cserne (eds), *National Legal Systems and Globalization New Role, Continuing Relevance* (Asser Press - Springer, 2012) 345; Thomas Wischmeyer, 'Generating Trust Through Law? Judicial Cooperation in the European Union and the "Principle of Mutual Trust"' (2016) 17 *German Law Journal* 339; Ingolf Pernice, 'La Rete Europea di Costituzionalità –Der Europäische Verfassungsverbund und die Netzwerktheorie' (2010) 70 *Heidelberg Journal of International Law* 51.

⁷⁷ Kristine Kern, 'Cities as Leaders in EU Multilevel Climate Governance: Embedded Upscaling of Local Experiments in Europe' (2019) 28 *Environmental Politics* 125; Helmut Aust, 'Cities as International Legal Authorities: Remarks on Recent Developments and Possible Future Trends of Research' (2020) 4 *Journal of Comparative Urban Law and Policy* 82.

⁷⁸ Deirdre Curtin and Päivi Leino, 'In Search of Transparency for EU Law-Making: Trilogues on the Cusp of Dawn' (2017) 54 *Common Market Law Review* 1673; Giacomo Rugge, 'Trilogues and Access to Documents: De Capitani v Parliament' (2019) 56 *Common Market Law Review* 237.

⁷⁹ Uwe Putter, *The Eurogroup: How a Secretive Circle of Finance Ministers Shape European Economic Governance* (Manchester University Press, 2013). On 16 December 2020, the ECJ, reversing the previous holdings of the General Court, held that the Euro Group does not constitute an EU body established by the treaties whose acts might give rise to non-contractual liability of the EU, based on three elements: (1) the Euro Group is an intergovernmental body for coordinating the economic policies of the Member States whose currency is the euro; (2) the Euro Group cannot be equated with a configuration of the Council and is characterised by its informality; (3) it does not have any competence of its own or the power to punish a failure to comply with the political agreements concluded within it. However, the ECJ pointed out that individuals may bring an action to establish non-contractual liability of the EU against those institutions in respect of the acts that the latter adopt following such political agreements of the Euro Group. In particular, it is for the Commission, as guardian of the Treaties, to ensure that such political agreements are conform with EU law, and any inaction on the part of the Commission in that regard is liable to result in non-contractual liability of the EU. See Judgment in Joined Cases C-597/18 P *Council v K Chrysostomides & Co and Others*, C-598/18 P *Council v Bourdovalli and Others*, C-603/18 P *K Chrysostomides & Co and Others v Council* and C-604/18 P *Bourdovalli and Others v Council*, and Press Release No 160/20 (16 December 2020) online: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-12/cp200160en.pdf>.

⁸⁰ Schwind (n 18) 184ff; and more generally Carolyn Moser, *Accountability in EU Security and Defence. The Law and Practice of Peacebuilding* (Oxford University Press, 2020).

⁸¹ Paul Craig, 'Shared Administration and Networks: Global and EU Perspectives' in Gordon Anthony and others (eds), *Values in Global Administrative Law* (Hart, 2011) 81; Schwind (n 18) 319ff.

are neither merely logical contradictions, nor mere errors of reasoning, but rather real contradictions, firmly institutionalised in the reality of networks.

3.1. *Autonomy of the nodes v weak unity of the collectivity*

The first self-contradiction arises between the multitude of highly autonomous nodes on the one hand and a peculiar collective unity of the network on the other hand. Such unity is only weakly developed but constitutes the actual characteristic of the network as opposed to merely contractual relations.⁸² The network as a whole is made up of its autonomous parts, although these latter contribute to the unified network statehood in the first place. Further, the single nodes are clearly distinguishable from the network, although the collective entity constitutes them as parts of the network.⁸³ Unlike in federations, in networked statehood this contradiction cannot be overcome by a hierarchical structure where the centre takes precedence.

Within networked statehood, this immanent self-contradiction makes it difficult or even impossible: (1) to distinguish the realm of bilateral relations of the members from the realm of the multilateral association which nevertheless exists; (2) to reconcile the regulatory competition between states and regimes with a cooperative behaviour required for global governance; and (3) to coordinate the overlapping competences of the network centre and the network nodes. Similarly, in the network's external relations, this self-contradiction makes it problematic to coordinate states and regimes' conflicting regulatory decisions.⁸⁴

From a legal point of view, this first contradiction also generates significant problems in terms of attribution and responsibility and, more generally, accountability at both the national and international level. Further, it affects the working reality of the networked statehood itself. To draw an example from the 'judicial dialogue' within the network, the recent conflict between the ECJ and the German Federal Constitutional Court has made painfully apparent the difficulties of such an almost paradoxical *unitas multiplex*.⁸⁵

⁸² See T Aaron Wachhaus, 'Anarchy as a Model for Network Governance' (2012) 72 *Public Administration Review* 33, arguing that 'anarchy' should be the main conceptual lens in the study of networks.

⁸³ Roman Guski, 'The Re-Entry Paradox: Abuse of EU Law' (2018) 24 *European Law Journal* 422, 426 describes in this way the antinomic structure of the EU.

⁸⁴ For similar difficulties raised by private networks, see Gunther Teubner, *Networks as Connected Contracts* (Hart, 2011).

⁸⁵ On 5 May 2020, the German Federal Constitutional Court held that the decision of the European Central Bank (ECB) to establish a Public Sector Purchase Programme and the CJEU judgment upholding this decision were 'manifestly disproportionate' and thus *ultra vires*: BVerfG, 2 BvR 859/15, paras 117ff. (English translation online: www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html). On the dangers of judicial networks at the European level, see eg Rasmussen, Holdgaard, Daniella Elkan and Gustav Krohn Schaldemose, 'From Cooperation to Collision: The ECJ's Ajos Ruling and the Danish Supreme Court's Refusal to Comply' (2018) 55 *Common Market Law Review* 17. At the global level see Angelo Jr Golia, 'Judicial Review, Foreign Relations and Global Administrative Law: The Administrative Function of Courts in Foreign Relations'

3.2. Polycontextuality

The second self-contradiction of networked statehood is its extreme polycontextuality,⁸⁶ ie the fact that a plurality of different partial rationalities has been integrated into the network. Indeed, the political rationality of the traditional nation-state is supposed to govern all societal sectors, in the sense that the function of power-building for collective decisions dominates all other social problem-solving modes. In contrast, within networked statehood several social rationalities—political, economic, scientific-technical, cultural—which are realised in the various nodes of the network, collide with each other. As a matter of principle, this happens in a non-mediated way, as such rationalities are ruthlessly implemented in the ‘tunnel vision’ of different regimes, without a decision-making centre that would ensure their compatibility.⁸⁷ In networked statehood, political rationality is only one among several colliding ones which emerge in different policy fields.

3.3. Consequences: the risks of ‘network failure’

The so-called network failure⁸⁸ is the much-criticised consequence of such institutionalised self-contradictions, triggering what Vesting calls a ‘splinter dynamic’ that can hardly be controlled.⁸⁹ Because of its peculiar internal structure, networking raises new problems while reinforcing the problems it is called to address. Indeed, just like other modern institutions, networked statehood has inherent self-destructive tendencies.⁹⁰ Internal tensions arise from its own hybrid form, which combines and yet remains different from both contract and organisation. These tendencies are reinforced by internal conflicts of trust between participating states and transnational regimes.⁹¹ If

in Helmut Aust and Thomas Kleinlein (eds), *Encounters between Foreign Relations Law and Public International Law - Bridges and Boundaries* (Cambridge University Press, 2021) 130.

⁸⁶ The term has been introduced by Gotthard Günther, ‘Life as Poly-Contextuality’ in Gotthard Günther, *Beiträge zur Grundlegung einer operationsfähigen Dialektik*, vol 1 (Meiner, 1976) 283 for developing multi-dimensional logics and has been applied to different contexts of social systems.

⁸⁷ Comparing national and transnational settings, Kleinlein criticises such ‘thematic sectorialisation’ of regimes, Thomas Kleinlein, ‘Fragmentierungen im Öffentlichen Recht: Diskursvergleich im internationalen und im nationalen Recht’ (2017) 17 *Deutsches Verwaltungsblatt* 1072, 1078. On the conflicts of power, policies and rationalities in transnational networks, see Tommaso Soave, ‘Three Ways of Looking at a Blackbird. Political, Legal and Institutional Perspectives on Pharmaceutical Patents and Access to Medicines’ (2016) 8 *Trade Law and Development* 137.

⁸⁸ Gunther Teubner, ‘And if I by Beelzebub Cast out Devils, ...’: An Essay on the Diabolics of Network Failure’ (2009) 10 *German Law Journal* 115.

⁸⁹ Vesting (n 8).

⁹⁰ This gives rise to a debate on *global un-governance*: Deval Desai and Andrew Lang, ‘Introduction: Global Un-governance’ (2020) *Transnational Legal Theory* 219; MG Bastos Lima and J Gupta, ‘The Policy Context of Biofuels: A Case of Non-Governance at the Global Level?’ (2013) *Global Environmental Politics* 46, highlighting the high degree of indeterminacy, instability and incoherence resulting from the two self-contradictions of network failure.

⁹¹ Picciotto (n 6) 269ff.

one adds external political pressures, which push the actors to behave opportunistically, network failure is often inevitable. The resulting potential for conflict within the internal relationship, on the one hand, and vis-à-vis external actors, on the other, is considerable, and the well-known phenomenon of 'organised irresponsibility' has found a worthy successor in 'reticular irresponsibility'.⁹²

Indeed, the enthusiasm which initially characterised the debate on networks has to confront today empirical experience, showing that transnational networks often lead to deadlocks, blockades of coordination, serious interface problems, permanent conflicts in decision-making, asymmetric power relations, opportunistic behaviour of states and regimes, negative externalities, and—particularly serious for the commitment to the public interest and democracy—the hegemonic 'capture' by the interests of private collective actors.⁹³ In a recent material-rich study on transnational regulation based on public-private cooperation, two main risks of networked statehood are identified: the 'risk of capture by dominant interest groups, which use their powerful role in the bargaining processes to their advantage'; and the 'complexity of cooperative models and regulatory networks, which makes their steering difficult and resource-intensive and as a consequence can easily trigger failure'.⁹⁴

A prominent case of 'network failure' can be identified in the G7/G8. Originating in the early 1970s after the collapse of the Bretton Woods monetary system and the first oil crisis, the inherent limits of this networked statehood have ultimately prevented effective coordination on crucial economic, political, and transnational issues. The same limits emerge, for example, in the context of global environmental governance, where the most ambitious regimes (the Kyoto and Paris agreements), again based on networked statehood, seem to show little or no effectiveness. This was mainly due to tensions between, on the one hand, the collective interest which had not been championed by any strong organisation; and, on the other hand, individual interests which had been pushed forward by

⁹² For these references see Scott Veitch, *Law and Irresponsibility. On the Legitimation of Human Suffering* (Routledge, 2007); and Teubner (n 88).

⁹³ For this critique see Schmidt (n 6) 207ff; Yannis Papadopoulos, 'Problems of Democratic Accountability in Network and Multilevel Governance' (2007) 13 *European Law Journal* 469; Volker Boheme-Nessler, *Unschärfes Recht: Überlegungen zur Relativierung des Rechts in der digitalisierten Welt* (Duncker & Humblot, 2008) 534–5; John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge University Press, 2000) 84–7. The harshest criticism of network failure can be found in Philip Alston, 'The Myopia of the Handmaidens: International Lawyers and Globalization' (1997) 8 *European Journal of International Law* 435; Annelise Riles, 'The Anti-Network: Private Global Governance, Legal Knowledge, and the Legitimacy of the State' (2008) 56 *American Journal of Comparative Law* 605.

⁹⁴ Schmidt (n 6) 206 with detailed documentation of the two risks. See also Jochen von Bernstorff, 'The Structural Limitations of Network Governance. ICANN as a Case in Point' in Christian Joerges, Inger Sand and Gunther Teubner (eds), *Transnational Governance and Constitutionalism* (Hart, 2004) 257; Riles (n 92); Gadinis Stavros, 'Three Pathways to Global Standards: Private, Regulator, and Ministry Networks' (2015) 109 *American Journal of International Law* 1.

strong actors (states), in turn ‘hijacked’ by private collective actors.⁹⁵ Even a full-fledged IO such as the WTO has been facing an existential threat, due to the opportunistic power politics implemented by the US under the Trump administration,⁹⁶ which weakened the symbiotic forms of networked statehood that allow its functioning.⁹⁷

4. Productive self-contradictions?

However justified it may be, the critique of network failure creates the illusion that these contradictions can be resolved, that there might be an effective alternative form of organisation for the political system at the global level. Current problems of transnational regulation, and the fact that science, technology, business, and information media are already *de facto* transnationally interlinked, make the networking of regulatory activities almost unavoidable, which in turn leads to the emergence of networked statehood. The necessity of networking is based on the fact that the participating states and transnational regimes have only a limited and relative authority of their own, which therefore have to flow into common authority, ie an authority

whose legitimacy is mutually constitutive and mutually constraining between (...) bodies which *prima facie* have the standing of authority, but which cannot alone have independent legitimacy because of the existence of the other and the need for interaction.⁹⁸

The duality between self-contradiction and its absence is thus misleading. The self-contradictions of networked statehood are unavoidable and should be treated as such. What matters is: are the self-contradictions necessarily destructive, or can they be productively transformed? And: under what conditions? After all, the peculiar organisational form of networking can point to several advantages over traditional statehood, possibly turning self-contradictions into productive solutions.

⁹⁵ Guri Bang, Jon Hove and Detlef F Sprinz, ‘US Presidents and the Failure to Ratify Multilateral Environmental Agreements’ (2012) 12 *Climate Policy* 755, 761ff; Elizabeth R DeSombre, ‘The United States and Global Environmental Politics: Domestic Sources of U.S. Unilateralism’ in R A Axelrod, S D VanDeveer and D L Brownie (eds), *The Global Environment: Institutions, Law, and Policy* (CQ Press, 2010) 192; Håkon Sælen and others, ‘How US Withdrawal Might Influence Cooperation under the Paris Climate Agreement’ (2020) 108 *Environmental Science & Policy* 121.

⁹⁶ Ernst-Ulrich Petersmann, ‘The WTO Legal and Dispute Settlement Systems in Times of Global Governance Crises’ (2020) *MPIIL Research Paper Series No 2020-28*, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3659021 5–6.

⁹⁷ José E Alvarez, ‘The WTO as Linkage Machine’ (2002) 96 *American Journal of International Law* 146, framing the WTO as a ‘linkage machine’ of the global trade regime.

⁹⁸ Nicole Roughan, *Authorities: Conflicts, Cooperation, and Transnational Legal Theory* (Oxford University Press, 2013) 138.

4.1. Cultivating contradictions

The central task facing networked statehood is then coping with the inevitable contradictions described above.⁹⁹ This means cultivating, promoting, increasing, and effectively institutionalising them. The Italian philosopher Roberto Esposito compares such contradiction-prone network logic to the *ars combinatoria* of Gottfried Wilhelm Leibniz: a ‘multiplicity of action, which articulates the variety of diverse institutional languages in a network “leibniziana” of independent and interrelated monads.’¹⁰⁰

In this field, the BCBS is again a good case in point. Both its centre and its nodes are autonomous institutions, meant to deal with the contradiction between the national scope of banking regulation and the transnational scope of (the social and economic effects of) banking instability.¹⁰¹ Operating as networked statehood on this unavoidable contradiction offers these entities the chance of closely coordinating the management of common concerns whilst increasing their own autonomy.

4.2. Transversality

The high autonomy of functional regimes and nation-states enables networked statehood to observe the world from very different perspectives. At the same time, this offers the opportunity to productively transform multiperspectivity in a chain of decisions. In such a transversal passage through the respective intrinsic rationalities of states and regimes, the decisions of networked statehood can gain in substantive adequacy.¹⁰² This feature emerges most prominently in the reality of international environmental law,¹⁰³ where arrangements such as the Convention on International Trade in Endangered Species (CITES), or platforms such as the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES),¹⁰⁴ or private and hybrid entities such as the International Union for Conservation of Nature (IUCN)¹⁰⁵ or the Marine Stewardship Council

⁹⁹ Soave (n 87) 178; Schmidt (n 6) 87.

¹⁰⁰ Esposito (n 15) 69–70.

¹⁰¹ Lawrence LC Lee, ‘The Basle Accords as Soft Law: Strengthening International Banking Supervision’ (1998) 39 *Virginia Journal of International Law* 1; Maximilian JB Hall and George G. Kaufman, ‘International Banking Regulation’ in Pier Carlo Padoan, Paul A Brenton and Gavin Boyd (eds), *The Structural Foundations of International Finance Problems of Growth and Stability* (Elgar, 2003) 92.

¹⁰² On transversality as epistemic method in a situation of mutually incompatible perspectives see especially Wolfgang Welsch, *Vernunft: Die zeitgenössische Vernunftkritik und das Konzept der transversalen Vernunft* (Suhrkamp, 1996).

¹⁰³ Churchill and Ulfstein (n 44).

¹⁰⁴ Guillaume Futhazar, Denis Pesche and Sandrine Maljean Dubois, ‘The IPBES, Biodiversity and the Law: Design, Functioning and Perspectives of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services’ in Charles MacManis (ed), *Routledge Handbook of Biodiversity and the Law* (Routledge, 2017) 395.

¹⁰⁵ The IUCN is an association under Article 60 of the Swiss Civil Code. Members are governmental authorities, eg environment agencies (not states themselves) and NGOs such as the World Wildlife Fund.

(MSC)¹⁰⁶ establish fora and procedures to bring their political, economic, scientific, and cultural nodes together, and reach results, in the form of information-dissemination, listing, best practices, and policy proposals.¹⁰⁷

4.3. Internal dynamics and resilience

At this point, it is possible to see the decisive characteristic of networks as a ‘transsubjective evolutionary structure’ that offer advantages to networked statehood, as Ladeur in particular points out.¹⁰⁸ It is not, as it is often said, the structural linkage of all nodes with all other nodes that is decisive—this view is still too static—but the dynamic process of permanent change driven by many nodes simultaneously, which inevitably but unpredictably affects the whole. In particular, the dynamics of negotiations between nation-states and private regulatory regimes create new regulation patterns in networked statehood.¹⁰⁹ In comparison with other collectivities that also (re-)produce political decisions, this dynamic of networked statehood potentially mobilises time more productively: some of its parts can evolve into more advanced stages of cooperation and decision-making, while others lag behind, without losing its (weak) unity altogether. This feature may also explain their particular resilience in some instances.

Historically, the diplomatic or legal deadlocks blocking the development of the EU have been usually overcome by narrower alliances of states or judicial networks pushing the agenda of the ‘ever closer union’, ie what has come to be known as ‘multi-speed Europe’.¹¹⁰ *Mutatis mutandis*, the same dynamic can be observed in how the economic crises, triggered by the post-2009 debt crisis and the COVID-19 pandemic, have been managed. In both cases, forms of networked statehood—operating to overcome the *impasse* deriving from political and economic competition among Member States/nodes—ended up strengthening cooperation or even integration.¹¹¹

¹⁰⁶ The MSC is an international non-profit organisation registered in the UK, US, Australia, Singapore, and the Netherlands. It is governed by a Board of Trustees of up to 15 members, advised by a Technical Advisory Board and a Stakeholder Council. See Jaye Ellis, ‘Network Governance for High Seas Fisheries: The Role of the Marine Stewardship Council’, 5 August 2011, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1905493.

¹⁰⁷ Jaye Ellis, ‘Social Nature’. Political Economy, Science, and Law in the Anthropocene’ in Paul F Kjaer (ed), *The Law of Political Economy* (Cambridge University Press, 2020) 181.

¹⁰⁸ Ladeur (n 1) 176.

¹⁰⁹ Burkard Eberlein, Kenneth A Abbott and Julia Black, ‘Transnational Business Governance Interactions: Conceptualization and Framework for Analysis’ (2014) 8 *Regulation & Governance* 1; Stepan Wood and others, ‘The Interactive Dynamics of Transnational Business Governance: A Challenge for Transnational Legal Theory’ (2015) 6 *Transnational Legal Theory* 333, 339.

¹¹⁰ Frank Schimmelfennig, ‘Theorising Crisis in European Integration’ in Desmond Dinan, Neill Nugent and William E Paterson (eds), *The European Union in Crisis* (Palgrave Macmillan/Red Globe Press, 2017) 316, 324ff.

¹¹¹ In the first case, creating a supranational, semi-centralised system of financial supervision over States’ budgets; in the second case, creating the first form of European debt mutualisation. See Michael Ioannidis, ‘Europe’s New Transformations: How the EU Economic Constitution Changed during the

At the global level, similar effects of networked statehood can be observed. For example, concerning the 2001 Doha Declaration on TRIPS and public health adopted by the WTO Ministerial Conference, a *de facto* amendment to the TRIPS agreement pushed by a group of countries headed by India, eventually led to the introduction of Article 31Bis TRIPS in 2017 expanding the international system of compulsory licences.¹¹² This, as well as the recent establishment of an Interim Appeal Arrangement, supported by the EU, China and other WTO countries,¹¹³ constitute responses to the two main recent challenges facing the global trade system, namely the failure of the Doha round of negotiations at the turn of the millennium and the sabotage by the US of the WTO Dispute Settlement System.¹¹⁴ Even the establishment and relative success of the G20 could be seen as a resilient response—in the form of an upscaling—to the abovementioned failures of the G7/G8. Indeed, while the compliance performance of the G8 had been to certain extent higher, the G20 showed a higher capacity for setting directions, making decisions and shaping global governance development.¹¹⁵

4.4. Iterativity

In networked statehood, the final, binding decision typical of the hierarchical nation-state is replaced with iterative decision-making acts from a multitude of observational positions. This gives networks an advantage over hierarchies. They can reconstruct, connect to, and influence each other, and restrict, control, and provoke innovation. Moreover, they are not forced to take a collective decision on substantive norms. The unity at the top of the hierarchy is replaced by the recursivity of decisions within the network.

Eurozone Crisis' (2016) 53 *Common Market Law Review* 1237; Michael Ioannidis, 'Between Responsibility and Solidarity: COVID-19 and the Future of the European Economic Order' (2020) 80 *Heidelberg Journal of International Law* 773; from the specific perspective of network theory, James D Savage and Amy Verdun, 'Strengthening the European Commission's Budgetary and Economic Surveillance Capacity since Greece and The Euro Area Crisis: A Study of Five Directorates-General' (2016) 23 *Journal of European Public Policy* 101. This is without prejudice of the issues concerning the efficiency, legitimacy and social impact of the policies implemented, especially by the so-called Troika (IMF, EU Commission and ECB) during the Greek debt crisis.

¹¹² Protocol Amending the TRIPS Agreement, WTO general council, decision of 6 Dec 2005 (WT/L/641), in force since 23 Jan 2017, online: www.google.de/url?sa=t&rc=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKewjzu6jil4_wAhWjShUIHZPGC74QFJAegQIAhAD&url=https%3A%2F%2Fwww.wto.org%2Fenglish%2Fres_e%2Fbooksp_e%2Fsl_i_e%2F20TRIPSAmendment.pdf&usg=AOvVaw0UHKK4mflj_1BGrow6zZNY. See also Armin von Bogdandy and Pedro A Villarreal, 'The Role of International Law in Vaccinating Against COVID-19: Appraising the COVAX Initiative' (2020), *MPIL Research Paper Series No 2020-46*, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3733454 4–5.

¹¹³ EU Commission press release, 'Interim Appeal Arrangement for WTO Disputes Becomes Effective', 30 April 2020, online: https://trade.ec.europa.eu/doclib/press/index.cfm?id=2143&utm_campaign=24f476658c-EMAIL_CAMPAIGN_2020_05_01_05_02&utm_medium=email&utm_source=POLITICO.EU&utm_term=0_10959edeb5-24f476658c-189723609.

¹¹⁴ Petersmann (n 96).

¹¹⁵ Marina Larionova and John J Kirton (eds), *The G8-G20 Relationship in Global Governance* (Routledge, 2015).

The self-legitimation of such an observation network occurs, as Ladeur formulates in perhaps his strongest provocation of legal hierarchical thinking, ‘through a practice of experimentation that is accessible neither to individuals nor to the state’.¹¹⁶

These advantages come up most prominently in judicial networks, especially within the EU, whereby the courts involved decide cases iteratively. This often creates mutual tensions between different decisions, which potentially allows for a more reflexive jus-generation than in the traditional judicial hierarchies. In the recent *Taricco* saga, the Italian constitutional court pushed the ECJ to a substantial *revirement* in the same proceedings,¹¹⁷ via the preliminary ruling procedure under 267 TFEU and the credible threat to apply the so-called *controlimiti*.¹¹⁸ The result was a mutual re-enforcement of both nodes’ (self-)legitimation: the national court for being able – through ‘dialogical’ means – to reverse the previous ruling of the ECJ; and the ECJ for showing responsiveness toward national concerns. A similar dynamic can be found outside judicial networks: the formal or informal cooperation between competition and anti-corruption authorities – especially in transatlantic relations – is a perfect example of iterative links that establish a *de facto* transnational (administrative) law.¹¹⁹

4.5. Legal consequences

Networked statehood, as we have shown, cannot overcome its internal self-contradictions. On the contrary, it must endure and cultivate them. For lawyers, always working on the resolution of contradictions – also understood as a problem of justice – the task of not resolving self-contradictions of an institution, but rather to promote them, is a provocation. Nevertheless, here is the point: whether networked statehood processes the extreme ambivalence or even polyvalence of its self-contradictions destructively or productively is a question of political strategy and at the same time of its legal constitution.

The law of networked statehood thus faces the task of developing *legal* forms of organisation and responsibility, promoting the advantages of

¹¹⁶ Karl-Heinz Ladeur, *Postmoderne Rechtstheorie: Selbstreferenz - Selbstorganisation - Prozeduralisierung* (Duncker & Humblot, 1992) 82 (our translation).

¹¹⁷ Compare the *Taricco I* Judgment, Case C-105/14 (Grand Chamber, 8 September 2015) to the *Taricco II* Judgment, Case C-42/2017 (Grand Chamber, 5 December 2017).

¹¹⁸ See Italian Constitutional Court, order no 24/2017 (English translation online: www.cortecostituzionale.it/documenti/download/doc/recent_judgments/O_24_2017.pdf); and judgment no 115/2018 (English translation online: www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_2018_115_EN.pdf).

¹¹⁹ Eg UNCTAD Intergovernmental Group of Experts on Competition Law and Policy, Note of the Secretariat, ‘Informal cooperation among competition agencies in specific cases’, 28 April 2014, online: https://unctad.org/meetings/en/SessionalDocuments/cicldp29_en.pdf; in the specific field of competition law, Jörg P Terhechte, *International Competition Enforcement Law Between Cooperation and Convergence* (Springer, 2011).

decentralisation and polycontextuality, while at the same time decisively strengthening the networks' integration.¹²⁰ The law needs to realise that networked statehood is one of the phenomena of 'global un-governance',¹²¹ resulting in a high degree of indeterminacy, instability and incoherence. Law must accordingly provide normative support for

a set of practices which may actively seek to encounter, produce, and harness their own indeterminacy (or the experience and expression of it) as a generative principle. The impossibility of closure is an enabling precondition for these practices, rather than an obstacle to be overcome or managed, or a limitation to be accommodated. These are practices oriented not towards the production of stable and coherent artefacts, but rather the maintenance and exploitation of their instability and incoherence.¹²²

What organisational norms will contribute to strengthening network integration against centrifugal tendencies in what Luhmann¹²³ calls the 'heterarchical, connectionist, network-like linking of communications'?¹²⁴ In particular, what remedies can law offer for the Achilles' heel of networks, ie their internal coordination problems? Here a correlation between social norms and legal norms should be established. Efforts must be made to build—in the words of Ladeur—a 'social epistemology' of law as the 'management of the coherence of legal and extra-legal regularities' of networks.¹²⁵ It would advance 'thinking in networks' on three levels: a sociological analysis of networked configurations;¹²⁶ epistemic models of network thinking as a stabilisation of non-hierarchical horizontal ties; and legal rules for reticular operations and self-descriptions.¹²⁷

In more detail, Wielsch develops several methodological 'building blocks' for a 'social hermeneutics in law', which analyses law's

¹²⁰ In these terms for public-private networks, see Schmidt (n 6) 208ff.

¹²¹ Desai and Lang (n 90).

¹²² *Ibid.*, 10.

¹²³ Niklas Luhmann, 'Der Staat des politischen Systems: Geschichte und Stellung in der Weltgesellschaft' in Ulrich Beck (ed), *Perspektiven der Weltgesellschaft* (Suhrkamp, 1998) 345, 375.

¹²⁴ Lars Viellechner, 'Können Netzwerke die Demokratie ersetzen? Zur Legitimation der Regelbildung im Globalisierungsprozess' in Sigrid Boysen and others (eds), *Netzwerke* (Nomos, 2007) 36, 43 gives first answers to this question.

¹²⁵ Ino Augsberg and Karl-Heinz Ladeur, *Die Funktion der Menschenwürde im Verfassungsstaat: Human-genetik - Neurowissenschaft - Medien* (Mohr Siebeck, 2008) 164ff; Karl-Heinz Ladeur, 'Die rechtswissenschaftliche Methodendiskussion und die Bewältigung des gesellschaftlichen Wandels' (2000) 64 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 60, 78ff.

¹²⁶ On recent sociological analyses of networks, particularly the operationalisation of their fragmentation, polycentricity and institutional complexity, see Rakhyun Kim, 'Is Global Governance Fragmented, Polycentric, or Complex? The State of the Art of the Network Approach' (2019) *International Studies Review* 1, 13ff.

¹²⁷ Ino Augsberg, Tobias Gostomzyk and Lars Viellechner (eds), *Denken in Netzwerken: Zur Rechts- und Gesellschaftstheorie Karl-Heinz Ladeurs* (Mohr Siebeck, 2009) 3, 14ff.

understanding of social reality as a complex process which reconstructs the self-reference of social systems within the self-reference of law.¹²⁸ For networked statehood, three of these building blocks, which are particularly relevant, will be discussed in more detail below: (1) ‘enabling and stabilizing new forms of social cooperation via independent legal forms that cannot be traced back to other legal forms’. This suggests that an autonomous and more precise legal concept of networked statehood should be developed, which is of course based on existing legal concepts of contract and organisation but needs a new definition because it cannot be understood as a market transaction nor as an organised hierarchy (see 5.1.); (2) ‘the recourse to a special institution-generating interpretation in cases where an institutional context for interactions has not yet been established’. Indeed, networked statehood is not yet a fully developed social institution. This requires a high degree of sensitivity from the law for the network’s institutional normativity and an openness for its future developments (see 5.2 and 6); (3) ‘the creation of new attribution points, especially for the legal constitution’ of networked communication processes. This is particularly relevant for the action attribution within networked statehood, where the principle of double attribution plays a central role. For the legal treatment of negative externalities, the question, which attribution points of network liability (network nodes, network centre, the whole network) need to be created, will arise (see 5.3.).

5. Toward general principles of a law of networked statehood

5.1. Networked statehood as a legal concept

Networked statehood is not to be understood as a mere metaphor, nor only as a social or economic science construct, but *also* as a legal concept.¹²⁹ It designates a legal unit of action where no hierarchical centre acts in a

¹²⁸ Wielsch (n 43) 201 (our translation). Wielsch describes the role of law in establishing new institutions in the online world that have not been stabilised in digital practice and where the courts cannot rely on existing social institutions but have to anticipate new institutions. In our transnational context, a similar rupture happens when only incipient networked states are evolving, but courts still need to decide on their form.

¹²⁹ We subscribe to the constructivist view that legal scholars are not only observers but participants in the legal system when they introduce new concepts into legal argumentation – in this case, inspired by social science constructs. Of course, such concepts need to be consistent with the legal doctrine and its conceptual potentialities, but in any case, they legally ‘exist’ and contribute to shaping legal systems. Whether courts and other participants will select such variations is a different matter in legal evolution. Such endeavour has a normative thrust, insofar as it aims to increase law’s capacity to govern new social realities by ‘seeing’ them (see above 1). See Niklas Luhmann, *Law as a Social System* (Oxford University Press, 2004) 305ff; and in recent literature, Jacob Livingston Slosser and Mikael R Madsen, ‘Institutionally Embodied Law: Cognitive Linguistics and the Making of International Law’ (2020) *iCourts Working Paper Series, no 208, 2020*, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3680449.

legally binding manner, but rather a multitude of legally autonomous decision-making units create normative commitments for themselves and—selectively—for the entire network. This is what makes such a collectivity special.¹³⁰ The legal model for such a ‘many-headed hydra’ would not be the federation or the confederation of states. Rather than an intermediate form between these ideal-types, networked statehood would have to find its legal identity beyond them. The model of the decentralised group of corporate law, which has developed into an independent network-like legal concept—a legal ‘network system with simultaneous orientation towards individual and collective purposes’¹³¹—would offer certain suggestions, despite the fundamental differences between political and economic rationality. Networked statehood is not simply a loose association of autonomous units but an independent collective unit itself. Even when a centre comes to existence, it takes the role of a *primus inter pares*.

As a poly-corporate actor in which states, IOs and private collective actors are linked together, networked statehood simultaneously realises the legal autonomy of its members and its collective identity. Here, a peculiar double attribution of action is at work. Indeed, the legal acts of the nodes produce a binding effect for the nodes themselves and—selectively—for the network as a whole. This binding of the whole by decisions of the parts goes far beyond the occasional ‘piercing the veil’, as developed in corporate law as well as in IOs law. At the same time, the double attribution of the nodes’ acts should be reflected in the double orientation of legal obligations for all participants. Indeed, while the nodes are oriented towards their own purposes, they are at the same time and to the same extent legally obliged to pursue the overarching objectives of the network.¹³² Vesting ascribes to networked statehood the ability to break the usual connection between ‘the collective person’s capacity to act and its unit of representation’ contained in the conventional idea of sovereignty and replace it with the idea of a ‘multitude of simultaneously acting decision-making bodies’.¹³³

Shaping networked statehood as a legal concept, in turn, implies outlining at least two legal policy fields: the relations between the nodes within the networked statehood and the responsibility of the networked statehood toward third parties.

¹³⁰ See generally Gunther Teubner, ‘The Many-Headed Hydra: Networks as Higher-Order Collective Actors’ in J McCahery, S Picciotto and C Scott (eds), *Corporate Control and Accountability* (Clarendon Press, 1993) 41.

¹³¹ Marc Amstutz, *Globale Unternehmensgruppen* (Mohr Siebeck, 2017) 79.

¹³² Neisig (n 42) sees a bridging concept between organisation theory and normative practice in this double orientation.

¹³³ Vesting (n 1) 162. In further detail Teubner (n 130); Hans-Heinrich Trute, ‘Die demokratische Legitimation der Verwaltung’ in Wolfgang Hoffmann-Riem, Eberhard Schmidt-Assmann and Andreas Vosskuhle (eds), *Grundlagen des Verwaltungsrechts, Bd 1* (2012) § 6, paras 17ff; and sources above (n 5).

5.2. Loyalty obligations of the nodes and collision rules within networked statehood

The internal lawmaking of networked statehood—in the form of declarations, standard-setting, decision-making, rankings, reporting—contributes to its (self-)construction, evolution and potential reinforcement. It may well reach the level of a proper (internal) legal system, especially if a stable distinction between primary and secondary norms *à la* Hart emerges.¹³⁴ But how should the minimal substantive content of networked statehood's internal law look like? Any such law should at least address two essential issues, namely duties of loyalty and collision rules.¹³⁵

Regarding the nodes' duties of loyalty, they should include both those towards the other nodes and the networked statehood as a whole. In the context of public international law, such duties increasingly emerge in the ever-growing relevance of good faith, first recognised in the 1970 Friendly Relations Declaration of the UN General Assembly.¹³⁶ Indeed, today good faith—broadly defined as a principle seeking to protect trust and predictability in legal relations of co-operation—¹³⁷ has emerged as a general 'interstitial norm' *à la* Vaughan Lowe.¹³⁸ Good faith is a 'Janus-faced' tool without determinate normative content but still relevant to dissociation and integration of international law regimes, affecting both procedural and substantive obligations of involved actors.¹³⁹ Importantly to our purposes, it has expanded its scope also to (some) unilateral acts; as well as to non-state actors and

¹³⁴ Herbert L A Hart, *The Concept of Law* (Clarendon, 1961) 71ff; Gunther Teubner, *Law as an Autopoietic System* (Blackwell, 1993) 36ff; Gunther Teubner, 'Breaking Frames: The Global Interplay of Legal and Social Systems' (1997) 45 *The American Journal of Comparative Law* 149. The most advanced analysis—in both theoretical and empirical terms—on (the dynamics of) the emergence of legal systems within transnational networks can be found in Oren Perez, 'Transnational Networks and the Construction of Global Law' in Paul Schiff Berman (ed), *The Oxford Handbook of Global Legal Pluralism* (Oxford University Press, 2020) 474; and Oren Perez, 'Transnational Networked Authority' (2020) *Conference Paper, "Multiple Legalities: Conflict and Entanglement in the Global Legal Order"* 1. These studies show that networks' normative systems create their own legal validity through a mix of self-reference, cross-reference and external reference of their norms.

¹³⁵ This is without prejudice of the potential constitutionalisation of networked statehood, an issue lying outside the scope of this article. See however Andrea Hamann and Héléne Ruiz Fabri, 'Transnational Networks and Constitutionalism' (2008) 6 *International Journal of Constitutional Law* 481; Oren Perez and Ofir Stegmann, 'Transnational Networked Constitutionalism' (2018) 45 *Journal of Law and Society* 135.

¹³⁶ *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, UN Doc A/RES/2625(XXV) (24 October 1970).

¹³⁷ Guillaume Futhazar and Anne Peters, 'Good Faith' in Jorge E Viñuales (ed), *The UN Friendly Relations Declaration at 50 An Assessment of the Fundamental Principles of International Law* (Cambridge University Press, 2020) 189.

¹³⁸ Vaughan Lowe, 'Sustainable Development and Unsustainable Arguments' in Alan Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press, 1999) 20; Guillaume Futhazar, 'The Normative Nature of the Ecosystem Approach: A Mediterranean Case Study' (2021) 10 *Transnational Environmental Law* 109.

¹³⁹ Futhazar and Peters (n 137) 209ff, also for a detailed analysis of the legal and constitutional relevance of good faith in different international law regimes.

(sub-)national agencies involved in transnational administrative and regulatory processes,¹⁴⁰ to the point that Thilo Kuntz has recently coined the phrase ‘transnational fiduciary law’.¹⁴¹

But how to deal with actual *conflicts* of loyalty?¹⁴² From the differences between the networked statehood and the classic modern state, it follows that the various legal systems within the network need to be constantly coordinated and made compatible with each other. However, these collisions cannot simply be decided hierarchically at the central level.¹⁴³ Therefore, within the networked statehood, a new transnational order emerges, possibly adjusting relevant rules of international law itself. Such order would require an overarching legal framework, where the legal conflicts between the various nodes can be dealt with in the sense of a *unitas multiplex*.¹⁴⁴ This means

to introduce a new principle of unity which, not unlike the process of constitutionalisation of national law, opens the regimes, which previously operated separately, toward each other and makes them susceptible to overarching values of an emergent quasi-constitution.¹⁴⁵

Private international law (PIL), which looks back on a long tradition of strictly heterarchical conflict-of-laws solutions, could offer some suggestions for the internal legal system of networked statehood.¹⁴⁶ At the same time, however, the new conflict-of-laws rules would have to go beyond the classic PIL, for they would have to resolve not only conflicts between nation-state legal systems but also conflicts with the legal norms produced by the transnational regimes within networked statehood, ie partly with the domestic law of IOs and ‘public’ regulatory regimes and partly with rules of the ‘private’ regulatory regimes. Moreover, it would have to do justice to the multi-level architecture by dealing not only with horizontal conflicts on one level, as in PIL, but also with vertical and

¹⁴⁰ *Ibid.*

¹⁴¹ See generally Thilo Kuntz, ‘Transnational Fiduciary Law: Spaces and Elements’ (2020) 5 *University of California Irvine Journal of International, Transnational & Comparative Law* 43.

¹⁴² On the development of a conflict of laws system adequate for networks, see especially Christian Joerges, ‘The Idea of a Three-Dimensional Conflicts Law as Constitutional Form’ in Christian Joerges and Ernst-Ulrich Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Hart, 2010) 491; Karl-Heinz Ladeur, ‘The State in International Law’ in Christian Joerges and Josef Falke (eds), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets* (Hart, 2010) 397.

¹⁴³ Vesting (n 1) 163. Bauerschmidt refers to the still tentative approaches to developing of conflict-of-laws rules in international law under the heading ‘connection conditions’, Bauerschmidt (n 18) 106ff.

¹⁴⁴ Anne Peters, ‘The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization’ (2017) 15 *International Journal of Constitutional Law* 671; Monica Hakimi, ‘The Integrative Effects of Global Legal Pluralism’ in Paul Schiff Berman (ed), *Oxford Handbook of Global Legal Pluralism* (Oxford University Press, 2020) 558; more generally Mario Prost, *The Concept of Unity in Public International Law* (Hart, 2012).

¹⁴⁵ Karl-Heinz Ladeur, ‘Regime-Kollisionen’ in Lars Viellechner (ed), *Verfassung ohne Staat: Gunther Teubners Verständnis von Recht und Gesellschaft* (Nomos, 2019) 211, 215 (our translation).

¹⁴⁶ Bertrand Ancel, *Éléments d'histoire du droit international privé* (Éditions Pathéon Assas, 2017).

diagonal¹⁴⁷ collisions between the levels.¹⁴⁸ If the schemes of classical PIL are thus generalised, networked statehood could profit, as Michaels argues, from a fourfold advantage of conflict-of-laws: ‘the discipline’s experience with plurality, its epistemological take on plurality, its specifically technical character, and its ethical potential’.¹⁴⁹ Therefore, internal conflicts-of-law-rules should deal with the following legal questions:

Overlapping jurisdictions: in networked statehood, there is no hierarchy of decision-making bodies, thus no third impartial instance which resolves the actual collisions. Rather, such collisions are decided in a heterarchical and decentralised way by the courts and quasi-courts of the nodes themselves, on an equal footing with those of the centre (state courts, transnational arbitration courts, private-regime conflict-resolution instances, courts of the network’s centre). The lesson to be taken from PIL is decisive: each of these instances independently develops conflict-of-laws rules and decides on concrete collisions. The coordination takes place according to the principle of transnational responsiveness through mutual consideration and communication between the decision-making instances.¹⁵⁰

Transnational competence: in networked statehood, competence to adjudicate a collision should be determined based not on the territorial elements of the legal relationship but the functional ones. The question here is: Which of the national and non-governmental issue-specific legal systems participating in the network has the closer connection, the ‘primary coverage’ of the overlapping jurisdictional circles?¹⁵¹ This criterion should also be used to develop restrictions for forum-shopping.

Collision rules: such rules determine which of the conflicting legal systems to choose from and then apply the law of one of the participating nodes, a

¹⁴⁷ ie conflicts between special international law and domestic law of a different field, eg conflicts between WTO procurement law and domestic environmental law. See Rike U Krämer, *Die Koordinierung zwischen Umweltschutz und Freihandel im Mehrebenenrechtsverbund am Beispiel des Vergaberichts* (Mohr Siebeck, 2014); Joerges (n 142).

¹⁴⁸ Horatia Muir Watt and others (eds), *Global Private International Law. Adjudication without Frontiers* (Elgar, 2019); Horatia Muir Watt, ‘Conflicts of Laws Unbounded: The Case for a Legal-Pluralist Revival’ (2016) 7 *Transnational Legal Theory* 313; Joerges (n 142). For a mapping of conflict-management techniques and a wide array of international law examples, see Peters (n 144) 695ff; in the specific context of foreign relations law, see Golia (n 85).

¹⁴⁹ Ralf Michaels, ‘Global Legal Pluralism and Conflict of Laws’ in Paul Schiff Berman (ed), *Oxford Handbook of Global Legal Pluralism* (Oxford University Press, 2020) 629, 641.

¹⁵⁰ Lars Viellechner, *Transnationalisierung des Rechts* (Velbrück, 2013) 265 ff. See also Slaughter (n 5) 246ff, referring to the principles of legitimate difference, positive comity, checks and balances, and subsidiarity.

¹⁵¹ Joel P Trachtman, ‘Institutional Linkage: Transcending Trade and ...’ (2002) 96 *American Journal of International Law* 77. The first forms of such criterion of primary coverage can be traced back to the Permanent Court of International Justice, *Jurisdiction of the European Commission of the Danube between Glatz and Braila (Advisory Opinion)* (1927) PCIJ Rep Series B No 14, 63. The Court issued an advisory opinion on the Danube Commission in which it stated that ‘[W]hen in one and the same area there are two independent authorities, the only way in which it is possible to differentiate between their respective jurisdictions is by defining the functions allotted to them’ (at 64), and distinguished ‘territorial’ and ‘functional’ powers (at 67).

nation-state, an IO or a regime involved. Here, the interlocking reciprocal references to foreign and domestic law, as developed by PIL in its long tradition (qualification, preliminary questions, *renvoi*, *ordre public* etc.), ensure a high degree of appropriateness of the rules finally applied. This technical character of conflict-of-laws allows for adequate legal methods, which are superior to both the simple rules of *lex posterior*, *lex specialis* etc. and to a diffuse balancing of values.¹⁵² Muir Watt refers to suggestions that PIL can offer a conflict-of-laws in the network state:

‘Choice of law rules and standards, diverse ‘approaches’, theories of incidental application, *renvoi* and (with a pinch of imagination) subsidiarity, deference and deliberative polyarchy are all but a few of the techniques at its disposal with which it can offer the navigation map that legal pluralism arguably lacks’.¹⁵³

New substantive law: in certain circumstances, courts should follow a substantive law approach, developing new solutions out of the conflicts of national and regime law.¹⁵⁴

Tunnel vision: in this conflict-of-laws referral game, there is a crucial difference between nation-states claiming universal decision-making competence and public and private transnational regimes that only follow their own tunnel vision.¹⁵⁵

5.3. Responsibility of Networked statehood

The law of networked statehood would also need to include liability rules dealing with its negative externalities. Such responsibility should target both the collectivity and its nodes. Collective responsibility should include network-adequate rules on remedies of the network centre for violations committed by a node;¹⁵⁶ on joint and several liability of all members in case of shared responsibility; on ‘sister liability’—as in corporate law—for violations of a single node in case of cooperation with another node, and finally, on collective liability of the network as a whole for certain damages caused by its nodes. Since the network itself does not have own assets, its direct liability is excluded. However, in situations where the conduct of the nodes is so intertwined that individual actors and their conduct cannot be legally isolated (for example committee decisions), a two-step procedure

¹⁵² Michaels (n 149) 637–8.

¹⁵³ Muir Watt (n 148) 321.

¹⁵⁴ Teubner (n 14) 154ff; seminal Arthur Taylor von Mehren, ‘Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology’ (1974) 88 *Harvard Law Review* 347.

¹⁵⁵ Muir Watt (n 148) 346.

¹⁵⁶ For example, the temporary exclusion of the node held responsible from the collective elaboration of common standards; or from the network altogether, as happened in the case of the G8 with Russia over its annexation of the Crimea peninsula.

should be followed. First, the network as a collectivity will be construed as the point of attribution for the illegality of the wrongful acts as such. Secondly, joint and several liability will be channelled to the single nodes involved.

Here again, in public international law rules for shared responsibility of different kinds are slowly but constantly emerging.¹⁵⁷ They could form the starting point for building a law of networked statehood liability. An interesting model is presented by the Principles 21, 22 and 24 of the 1972 Stockholm Declaration of the UN Conference on the Human Environment,¹⁵⁸ establishing a regime of strict liability and duties of cooperation for transboundary pollution, which could also be applied for damage caused by activities of private actors within states' jurisdiction or control.¹⁵⁹

The progressive rise of due diligence—initially a notion pertaining only to the secondary rules of state responsibility, which has shifted to the level of primary rules—in multiple fields of international law¹⁶⁰ also signals the expansion of broadly speaking collective obligations as concerns 'community interests', cooperative settings and modes of action, especially when it comes to member states' obligations to monitor the conduct of IOs.¹⁶¹

¹⁵⁷ See in the most recent literature Katja Creutz, *State Responsibility in the International Legal Order: A Critical Appraisal* (Cambridge University Press, 2020) 238 ff. Interesting insights come from Lorenzo Gasbarri, 'The Dual Legality of the Rules of International Organizations' (2017) 14 *International Organizations Law Review* 87, 114 who insists on a concept of *dual legality* that can be transposed *mutatis mutandis* to the relationship between the internal law of networked statehood and international law. He underlines that the dual legality of the rules may enhance forms of shared responsibility between different entities, while also stressing that '[T]he outcome of the dual legality is not to establish indiscriminate joint and several liability.'

¹⁵⁸ UN Doc A/CONF.48/14/Rev. 1. Despite its formally non-binding character, the Stockholm Declaration is legally significant, and several of its principles have emerged as legally binding norms. In *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, para 29, the ICJ declared that the obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States 'is now part of the corpus of international law relating to the environment.' The duty to co-operate was defined as a 'fundamental principle' of international law by the ITLOS (*MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, 95, para 82; *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, 4, para 140). Principle 22 has also led to the adoption of several treaties on responsibility and liability for extraterritorial environmental harm.

¹⁵⁹ For similar regimes of strict liability in international law, see Article VII of the 1967 Convention on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies; Art. II of the 1972 Convention on International Liability for Damage Caused by Space Objects; Articles 8(2) and (3) of the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities.

¹⁶⁰ Heike Krieger, Anne Peters and Leonhard Kreuzer (eds), *Due Diligence and Structural Change in the International Legal Order* (Oxford University Press, 2020).

¹⁶¹ Art. 40(2) ARIO (n 34) on the fulfilment of the obligation to make reparation. See also Kristina Daugirdas, 'Member States' Due Diligence Obligations to Supervise International Organizations' (2020) *U of Michigan Law & Econ Research Paper No 20-019*, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3539181, arguing that the obligations set by the ARIO are framed too narrowly. In particular, the ILC should have recognised that member states would incur responsibility by aiding and assisting or directing and controlling acts by IOs that violate the latter's international obligations; and that, when an IO breaches an international obligation, member states have a duty to make sure that the IO can implement all the obligations triggered by such violation, and not just the obligation to make full reparation.

A further model comes from the already mentioned ‘Guiding Principles on Shared Responsibility in International Law’, a recent scholarly endeavour aiming to codify and advance the rules of shared responsibility of ‘international persons’.¹⁶² The project’s purpose is to make the rules of shared responsibility previously set by the ILC for states and IOs consistent in cases involving an indivisible injury to which contribution may be individual, concurrent or cumulative. Significantly, although in this project the phrase ‘international person’ as potential duty-bearer refers only to states and IOs, the authors make clear that it is ‘without prejudice to the possibility that other actors, such as individuals or other non-state actors, bear international obligations and share responsibility in certain circumstances’.¹⁶³ Principle 3 is also particularly relevant, as it sets the conditions for the attribution of shared responsibility for a single internationally wrongful act, thus covering situations where ‘conduct is carried out by a person or entity acting on behalf of more than one international person at the same time’, and ‘situations in which a wrongful act is carried out by the common organ of multiple international persons’.¹⁶⁴ Therefore, it may well be that constellations of networked statehood will qualify as collective actors bearing shared responsibility, or at least that such ‘Guiding Principles’ may serve as a reference model.

6. Democratic legitimacy of networked statehood?

Finally, what about democracy? Here our term ‘institutionalised self-contradiction’ takes on a completely different—and positive—meaning. Indeed, in the transition from national to transnational institutions, the principle of democracy undergoes a drastic transformation. Until the emergence of globalisation, the principle of democracy, despite its numerous variations, had been able to combine more or less satisfactorily two contradictory tendencies: identity-based consensus-building, on the one hand; and the institutionalisation of dissent, on the other. While the mutual reinforcement of the two contradictory tendencies is fraught with difficulties in the nation-state, in a transnational setting, the attempt to combine consensus tendencies

¹⁶² Nollkaemper and others (n 52). See however the critique by BS Chimni, ‘The Articles on State Responsibility and the Guiding Principles of Shared Responsibility: A TWAAIL Perspective’ (2021) *European Journal of International Law*, online: <https://doi.org/10.1093/ejil/chab004>, arguing that since the Guiding Principles merely seek to supplement the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), they fail to address the shared responsibility of state and non-state actors, such as multinational corporations, for the violation of human rights and environmental norms and the application of the special and different treatment (SDT) principles in determining shared responsibility.

¹⁶³ *Ibid.*, 22 (Commentary to Principle 1, para 1). Fernández Arribas (n 45) stresses the possibility of applying international institutional law also to international entities not qualified as IOs under the existing criteria prevailing in scholarship or set in the ARIO (n 34).

¹⁶⁴ Nollkaemper and others (n 52) 30 (Commentary to Principle 3, paras 4–5).

and internal conflicts becomes a squaring of the circle. Their enormous economies of scale and scope push transnational regimes within the network to concentrate exclusively on the second element of democracy, ie increasing organised dissent. In this regard, we present three interrelated theses.¹⁶⁵

First thesis – democratic self-contestation: While the nation-states within the network will continue to rely on the principle of political representation—which can still be understood as an expression of the traditional democratic symbiosis of consent/dissent—the autonomous transnational regimes can only implement the principle of institutionalised self-contestation, even self-contradiction. Such democratic self-contradiction as an institution depends on two conditions: that the transnational regimes increase their irritation-sensitivity to external demands; and, at the same time, that they effectively institutionalise internally organised dissent.¹⁶⁶

Second thesis – epistemic subsidiarity: Such an institutionalised self-contradiction cannot be realised in the same way in each of the transnational regimes participating in the network. Rather, it would require different forms reflecting the extreme diversity of units and functionally differentiated regimes within the networked statehood. The guiding principle of ‘epistemic subsidiarity’ developed by Jasanoff for the nation-states participating in a transnational network could apply as well to transnational regimes. Epistemic subsidiarity should provide an orientation for designing procedures of democratic self-contestation.¹⁶⁷

Third thesis – involvement of transnational collective actors in the spontaneous arena: Both democratic self-contestation and epistemic subsidiarity will contribute to consensus-building and institutionalisation of dissent, only when collective actors with a *political* orientation will effectively and consistently channel social pressure in the iterative decision- and law-making of the different forms of networked statehoods. This will require a more stable and intensified networking¹⁶⁸ not only of actors so far confined in the institutional politics of the single nodes (political parties, trade unions, local media companies, local grassroots movements) but also of private and

¹⁶⁵ On the question of the extent to which democratic procedures can be institutionalised in transnational regimes, see in deeper detail Gunther Teubner, ‘*Quod omnes tangit: Transnational Constitutions Without Democracy?*’ (2018) 45 *Journal of Law and Society* 5.

¹⁶⁶ For an interesting proposal, see eg Annamaria Viterbo, ‘The European Union in the Transnational Financial Regulatory Arena: The Case of the Basel Committee on Banking Supervision’ (2019) 22 *Journal of International Economic Law* 205, 222 ff, focusing on European Parliament’s attempts to become an active player in the transnational financial regulatory arena as an opportunity to enhance the democratic legitimacy of the BCBS.

¹⁶⁷ Sheila Jasanoff, ‘Epistemic Subsidiarity: Coexistence, Cosmopolitanism, Constitutionalism’ (2013) 2 *European Journal of Risk Regulation* 133, 141. On its legal institutionalisation, see Jaye Ellis, ‘Scientific Expertise and Transnational Standards: Authority, Legitimacy, Validity’ (2017) 8 *Transnational Legal Theory* 181; Ellis (n 107).

¹⁶⁸ On the links between the network nodes, which can give rise to processes of deliberation and critique, as a condition for legitimacy and accountability, see again Perez, *Transnational Networked Authority* (n 134) 27ff.

hybrid actors that are ‘native’ to transnational arenas (human rights NGOs, international advocacy groups, international press, non-profit certification bodies).¹⁶⁹ Actual democratisation and legitimation of the several forms of networked statehood cannot but involve the *material* conditions of political legitimacy, even in the completely changed context of globalisation. To be sure, this thesis goes beyond the mere design of new procedures or the schemes of participatory democracy emerged especially during the reform era of 1990–2005 within IOs¹⁷⁰ but points to the necessity that transnational networked collective actors perform the same societal—constitutive, limitational, symbolic—functions they used to perform within nation-states, and in particular the elaboration of and the political struggles over different policy options.¹⁷¹

The law of networked statehood is then called to support the institutionalisation of democratic self-contestation. This implies appropriate sanctions in cases when the regimes violate its principles: invalidity of single legal acts, non-recognition of regime law, financial sanctions, and as a means of last resort withdrawal of membership and exclusion from the network.¹⁷² By these means, it should also ensure that the various adjudication bodies of the network nodes respect the principle of mutual responsiveness between themselves and the network centre.¹⁷³

¹⁶⁹ Balakrishnan Rajagopal, ‘International Law and Social Movements: Challenges of Theorising Resistance’ (2003) 41 *Columbia Journal of Transnational Law* 397; Tarik Kochi, ‘The End of Global Constitutionalism and Rise of Antidemocratic Politics’ (2020) 34 *Global Society* 487.

¹⁷⁰ See, among many, WTO, Guidelines for arrangements on relations with Non-Governmental Organizations, WT/L/162, Decision of 18 July 1996; World Bank, Consultation with civil society organizations, general guidelines for world bank staff (2000); WHO, Policy for relations with nongovernmental organizations, Report by the Director-General, 14 April 2003, A56/46; Permanent Council of the Organization of American States (OAS), Review of the Rules of Procedure for Civil Society Participation with the OAS, 31 March 2004, CP/CISC-106/04; African Union (AU), Statute of the Economic, Social and Cultural Council of the African Union (ECOSOC), approved by the Assembly, Decision on ECOSOC of 8–9 July 2004, Assembly/AU/Dec.48(III) Rev.1. Recent experiments and proposals concern the Civil Society Mechanism in the Committee on Food Security (CFS) at the FAO; the UN Environmental Assembly; the UNITAID, a ‘global health agency’ at the WHO; and the 2015 process of selection of the UN Secretary-General. In the literature see Jonas Tallberg, Thomas Sommerer, Theresa Squatrito and Christer Jönsson, *The Opening up of International Organizations: Transnational Access in Global Governance* (Cambridge University Press, 2013); and Alexandru Grigorescu, *Democratic Intergovernmental Organizations? Normative Pressures and Decision-Making Rules* (Cambridge University Press, 2015).

¹⁷¹ Seminally Margaret E Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Cornell University Press, 1998). For contributions going in this direction in recent literature, see John D Clarke, ‘The Globalization of Civil Society’ in James W Walker and Andrew S Thompson (eds), *The Emergence of Global Civil Society* (Wilfrid Laurier University Press, 2008) 3–23; Christian Volk, ‘Why Global Constitutionalism Does not Live up to its Promises’ (2012) 4 *Goettingen Journal of International Law* 551, 567, 571–4; Isabelle Ley, ‘Opposition in International Law – Alter-nativity and Revisibility as Elements of a Legitimacy Concept for Public International Law’ (2015) 28 *Leiden Journal of International Law* 717; Antje Wiener, *Contestation and Constitution of Norms in Global International Relations* (Cambridge University Press, 2018); Sigrid Boysen, *Die postkoloniale Konstellation* (Mohr Siebeck, 2021) 311–12.

¹⁷² See only Oona Hathaway and Scott Shapiro, ‘Outcasting: Enforcement in Domestic and International Law’ (2011) 121 *Yale Law Journal* 252, 306ff.

¹⁷³ Vesting (n 8); Viellechner (n 150) 265ff.

Therefore, in several ways, the deficiencies of networked statehood—the object of many well-deserved criticisms—are transformed into an appeal to ‘institutional imagination’.¹⁷⁴ So there it is again: networked statehood—an institutionalised self-contradiction!

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¹⁷⁴ Roberto M Unger, ‘Legal Analysis as Institutional Imagination’ (1996) 59 *Modern Law Review* 1. To be sure, such exercise of institutional and theoretical imagination should consider both pre-existing and resulting relations of powers involved in the process: see generally Zoran Oklopčic, *Beyond the People: Social Imaginary and Constituent Imagination* (Oxford University Press, 2018).