

## *Essays for civil liberties and democracy in Europe*

### ***Lex Vigilatoria* - Towards a control system without a state?**

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In 1997 Gunther Teubner edited *Global Law without a State*.<sup>[1]</sup> Among the interesting contributions to the volume is Gunther Teubner's own introductory piece "'Global Bukowina': Legal Pluralism in the World Society" (pp. 3-28). Teubner's main concern is the development of *lex mercatoria*, the transnational law of economic transactions, mostly transnational contract law, which he views as "the most successful example of global law without a state" (p. 3). Global law, according to Teubner, has some characteristics which are "significantly different from our experience of the law of the nation-state" (p. 7):

- The boundaries of global law are not formed by maintaining a core territory and possibly expanding from this, but rather by invisible social networks, invisible professional communities, invisible markets which transcend territorial boundaries.

- General legislative bodies are less important
  - global law is produced in self-organized processes of what Teubner calls "structural coupling" of law with ongoing globalised processes which are very specialised and technical.

- Global law exists in a diffuse but close dependence not on the institutional arrangements of nation-states (such as parliaments), but on their respective specialised social fields - in the case of *lex mercatoria*, the whole development of the expanding and global economy.

- For nation-building in the past, unity of law was a main political asset. A world wide unity of law would become a threat to legal culture. It would be important to make sure that a

sufficient variety of legal sources exists in a globally unified law.

In my own words, ideal-typically about *lex mercatoria*: Transnational economic law is developed not by committees and councils established by ministries in nation-states and subsequently given sanction by parliaments, but through the work of the large and expanding professional lawyers' firms, the jet-set lawyers operating on the transnational level, tying vast capital interests together in complex agreements furthering capital interests. As *lex mercatoria* develops, it is not given subsequent primary sanction by national parliaments but is self-referential and self-validating, finding suitable "landing points" in quasi-legislative institutions (Teubner p. 17) such as international chambers of commerce, international law associations, and all sorts of international business associations. It develops as a system of customary law in a diffuse zone around the valid formal law of nation-states, not inside valid formal law but not too far outside it. Eventually it becomes regarded as (equivalent to) valid formal law or at least valid legal interpretation. It develops continuously, one step building on the other, in the end validating a law or a set of legal interpretations far from the law of the nation-states.

The increasingly independent and self-sufficient development of such a legal arrangement is the crux of the matter. Ideal-typically, global *lex mercatoria* develops of its own accord, based on its own internal sociological logic. There is a great debate going on concerning the independence of global *lex mercatoria* - Teubner calls it a thirty years' war. I will not enter that war here, but simply ask the question: Do we, in recent developments in the late 1990s and the

2000s, see signs of a developing independent global control system, a kind of frightening *lex vigilatoria* of surveillance and subsequent political control? Global control without a state?

The question is complex. There are certainly ties between nation-states in the EU and say Schengen, the SIRENE exchange, Eurodac, communication control through retention and tapping of telecommunications traffic data, the spy system Echelon and so on. For one thing, some of these systems are established on the national level first. The recent British proposal to the EU (in July 2005, after the terrorist onslaught in London 7 July) to make the retention of a wide range of telecommunications traffic data for a year or more mandatory in all member states is an example (though this may be viewed as a strategic way of getting a common system off the ground - note the related proposal from the EU Commission in October 2005). Secondly, some of the systems are established through various joint national efforts. Some of the joint national efforts are complex (meetings and memos over ten years concerning communications control; the lengthy negotiations over Schengen), some of them are simpler (framework decisions, involving agreements of ministers from the nation-states), some of them are very simple (quick common positions cleared by governments). Thirdly, agreements such as partnerships in Schengen, Europol and Eurodac have to be sanctioned by national parliaments.

But at the same time, there are signs suggesting that systems such as the ones I have mentioned are becoming increasingly untied or “de-coupled” (to use Teubner’s term) from the nation-states. For one thing, the parliamentary nation-state sanctioning of arrangements such as Schengen, Europol and Eurodac to a considerable extent takes place without in depth debates in public space, and, significantly, without parties and members of parliaments really knowing to any degree of detail the systems they are sanctioning. Parties and members must necessarily trust the work being done by various sub-committees and officials and so on deep inside i.a. the EU structure, over and above agencies of the nation-states. There is neither time nor motive for anything else. An example is the scrutiny of the various *acquis*, enormous heaps of documents drastically reducing transparency for an ordinary parliament member (or even a researcher).

Furthermore, once the various systems are up and going, they interlock through informal agreements and arrangements, rapidly expanding their practices - a kind of customary law, again in the diffuse zone around valid formal law. In other words, the systems are increasingly integrated “horizontally”. There are numerous examples of this.[2] There seems to be an important relationship between the “horizontal” integration or interlocking aspects of the various systems, and the “vertical” weakening of ties or de-coupling aspects to nation-state agencies: The more integrated or interlocked the systems become (“horizontal” integration), the more independent of or de-coupled from national state institutions they will be (“vertical” weakening of ties) when the agendas for future developments and operations are set. Integration, interlocking, links the systems together in functional terms. Given moves are therefore simply regarded as “necessary” or imperative, irrespective of the thinking which might be valid on the nation-state level. Interlocking at the system level also makes particular developments seem imperative from the point of view of the nation-state level. For example, the “package” consisting of the SIS, Europol and Eurodac, in which all three systems are increasingly intertwined in terms cooperation and goals, has made it increasingly “obvious” and “necessary” for Norway to participate in all three of them - if not without debate, at least with a minimum of debate. The question of Norwegian participation in the first of these, the SIS, created some critical debate. Norwegian participation in Europol and Eurodac hardly reached the newspapers or television at all.

The horizontal integration of the systems expands by internal sociological forces, far from the control of nation-state institutions. Eventually, the horizontal interlockings and the vertical de-couplings are taken as *givens*, simply to be reckoned with. System functionaries - and all together there are thousands of them - take pride and find legitimacy in such developments. They become part and parcel of their systems, they find colleagues, and even emotional attachments in their systems, they define their particular system as something they should foster, feeling great satisfaction when they manage to make the system function still better. These are entirely commonplace processes; this is how we all become more or less enveloped by the systems we are working in.[3] A small

example: In a discussion with Norwegian Schengen personnel some years ago, I ventured the guess that their doings were not all that rational after all - they probably took great pride and satisfaction in the computerized technical and complex activities they were involved in and were continuously developing. The response was instant - fumbling with papers, some blushing, some openly agreeing.

To be sure, the various horizontally interlocking systems have their national “landing points”, but, much like *lex mercatoria*, not through strong vertical ties to responsible and authoritative parliamentary settings, but in quasi-legislative institutions - in this case especially branches of the law enforcement agencies with their strongly vested interests.

#### Conclusion

A cautious conclusion for the time being: I would say that there is a development towards increasingly *diluted* ties to the institutions of the nation-states. While not global law fully without a state, a dilution of connections with the formal institutions of the nation-state is taking place. Most significantly, the institution of parliamentary sanction has become, at least in many European states, a perfunctory exercise with a silent public as a context.

But perhaps a “state” is re-entering the scene on a different level? At least as far as the European control systems are concerned, the importance of the institutions of the European Union is enhanced as the nation-state institutions fade.[4] Any state, also a European State, requires certain institutions.<sup>4</sup> One of them is policing (but not necessarily of the kind we are witnessing today).

However, the European control systems, though largely emanating from the EU, also have tentacles far beyond the EU, interlocking horizontally with various systems of control in the US and other parts of the Western world. The EU-FBI attempts, pointed out so clearly by Statewatch, to develop transnational communication control over the last ten years is a case in point.

Are we, then, facing once again a developing, unfinished, expanding global control, if not without a state so at least with increasingly diluted ties to state institutions? A *lex vigilatoria*, if not developing entirely of its own accord, at least with strong internal sociological forces leading the development, and control measures increasingly out of state control?

If so, we need to understand these sociological forces better if we are to oppose and contain them. A penetrating and critical research project exactly on this, for example under the auspices of Statewatch, would be in order. Such a project could develop into counter-force. From a critical point of view, it is vital to stem this tide before it is too late.

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#### Footnotes

1. Aldershot: Dartmouth Publishing.

2. See my “The Rise of the Surveillant State in Times of Globalization”. In Colin Sumner (ed.), *The Blackwell Companion to Criminology*, Oxford: Blackwell Publishing 2004, pp. 437-451.

3. See my *Silently Silenced. Essays on the Creation of Acquiescence in Modern Society*. Winchester: Waterside Press 2004.

4. It is possible that the European state may be taking a different form to that at the national level. While it is not evident in the “first pillar” (economic and social affairs) it is arguable that since the Tampere Summit (October 1999) the “third pillar” (policing, immigration, judicial cooperation, internal security) is adopting EU-wide “state” functions and roles. The same may be said of the “second pillar” (military and foreign policy) since the Nice Treaty (2000). If this is so then maybe we are seeing the construction of a “coercive” EU state.

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