

# Law and Sociology in “The Information Age”

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## 1 Introduction

Law and sociology is a marginalized topic in Swedish law schools. If taught at all in the mandatory programme for a law degree, it is usually as a brief mentioning in the course on jurisprudence (*allmän rättslära*). This is unfortunate in many respects, one being that law and sociology would provide an apt opportunity for making law students reflect on law in the context of globalisation and the allegedly withering nation-state. How do disparate issues such as the WTO, sweatshops, climate change, information technology, Subcomandante Marcos, corporate responsibility and corporate crime, extradition of Pinochet, portfolio investments, the "war on terrorism" in Afghanistan, and the International Criminal Court – all having in common that practically they challenge the nation-state and state sovereignty – fit with the normative paradigm of the nation-state as the core in legal thinking? Or vice versa; the changing societal structures imply the question of how law becomes legitimate beyond the nation-state. By avoiding statehood altogether or by developing new forms of states?

Fuel for such thoughts are given by numerous sociological studies.<sup>1</sup> One of them is the comprehensive empirical work *The Information Age: Economy, Society and Culture* by Manuel Castells.<sup>2</sup> This trilogy of 1,450 pages addresses almost every societal issue; it comprises statistics on issues ranging from foreign direct investment to the enjoyment of oral sex. While the work illustrates the width of globalization by empirical findings, Castells' theoretical discussion is limited,<sup>3</sup> and the perspectives and examples greatly depend on the interests and experiences of Castells himself. There is not much of motivation as to why this or that particular example is covered, and little discussion on the extent to which the examples reflect a global phenomenon. Nevertheless, to describe the current and complex development is not an easy matter, and Castells impressively outlines how this development penetrates into most areas of society.

However, the legal domain is conspicuous by its absence: Castells does not reflect the slightest bit on the legal prerequisites for or the legal consequences of the described development. There is no explicit link to law, legal thinking or legal science. To the extent he refers to anything related to law, it is only as empirical material (new legislation for women and homosexuals as a proof of the decline of "patriarchalism") or as simple elements of definitions (that

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<sup>1</sup> E.g. Wallerstein, I. *The Politics of the World-economy – The States, the Movements, and the Civilizations* (Cambridge University Press, Cambridge, 1984); Sassen, S. *Losing Control? – Sovereignty in an Age of Globalization* (Columbia University Press, New York, 1996); and Beck, U. *What is Globalization?* (Polity Press, Maiden Mont., 1999).

<sup>2</sup> The titles of the three volumes of *The Information Age* are: Vol. I, *The Rise of the Network Society* (Oxford, Blackwell, 1996); Vol. II, *The Power of Identity* (Oxford, Blackwell, 1997); and Vol. III, *End of the Millenium* (Oxford, Blackwell, 1998, revised 1999).

<sup>3</sup> The theoretical framework of *The Information Age* is further developed in Castells, M. *Materials for an Exploratory Theory of the Network Society*, 5 *British Journal of Sociology* (2000) p. 5.

criminal economy is income-generating activity which is normally considered criminal). No legal reasoning is provided and the contents of legal norms are not described. Hence, the link to legal learning is not as apparent and direct in *The Information Age* as in, for example, the rationality models of Max Weber, the work on law and democracy by Jürgen Habermas, or Pierre Bourdieu's study on the juridical field.<sup>4</sup>

A superficial reading of *The Information Age* may even give the impression that the trilogy does not deal with legally relevant matters at all. Yet, in many ways Castells' research touches upon, albeit implicitly, core elements of law and legal thinking. Castells reveals many challenges for the legal system, but also raises questions, in particular about the legitimacy of law (that is, why norms are recognized as legally binding) in the age, that constitutes the title of his work. In this sense, his empirical findings may challenge some of the fundamentals for legal thinking.

## 2 The Law and the State

One such fundament is the connection between law and the state. Through centuries, European legal scholars and philosophers have tried to explain the basis and legitimacy of law by linking legal rules to the nation-state and its claim of sovereignty. Thus, Thomas Hobbes held that it was "annexed to the Sovereignty, the whole power of prescribing the Rules."<sup>5</sup> This notion was also a part of the will-of-the-state theories, developed in the 19<sup>th</sup> Century, according to which the law was conceived as an expression of the will of the state in a metaphysical sense. The perspectives to law and society have changed since the 17<sup>th</sup> Century, and the will-of-the-state theories have lost their supporters. The European societies have also gone through processes of democratization in the 20<sup>th</sup> Century, which imply different ideas of sovereignty than that of Hobbes. Even so and despite these changes, the nation-state and the notion of sovereignty have remained icons in our legal thinking. Whatever their values, we are trapped by this conception to the extent that we can hardly imagine a democratic society and legitimate legal norms beyond the nation-state.

The state is fundamental also in the theory and practice of international law: states create the law, either through international agreements (treaties, conventions, protocols and so on) or through customary law (established by state practice and legal conviction). Moreover, while abandoned in current theories on national law, the will-of-the-state theory is alive and kicking in international law. Thus, the will and acceptance of states is of great importance to determine what are valid international rules of law.<sup>6</sup> Put simply, each state also determines by

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<sup>4</sup> Weber, M. *Economy and Society, Volume II* (Berkeley, University of California Press, 1978), chapter VIII; Habermas, J. *Between Facts and Norms* (Cambridge MA, MIT Press, 1996); Bourdieu, P. *The Force of Law: Toward a Sociology of the Juridical Field*, 38 *Hastings Law Review* (1986-87) p. 805.

<sup>5</sup> Hobbes, T. *Leviathan* (London, Penguin, reprinted 1985 (original 1651)) p. 234.

<sup>6</sup> This notion is found in almost any text book on international law. The invocation of states' will or acceptance (or interest or practice) is described by Koskenniemi, M. *From Apology to*

itself what is valid national law within its territory, and any transboundary application is a marginal exception.

Castells' description of the impact on society of the expanded transboundary networks and the retreat of the nation-state challenges this intimate relation between the law and the nation-state, which has dominated our legal thinking. A considerable part of *The Information Age* is devoted to describing how corporations – and others – are being organized in networks and how the economy is becoming increasingly internationalized; the processes of production take place through transboundary networks, and foreign direct investments, international trade and currency flows are expanding.<sup>7</sup> Other effects of this process, Castells argues, are changes in peoples' self-image and identity<sup>8</sup> as well as thriving international crime.<sup>9</sup>

Castells insists that while the nation-state has lost its sovereignty and seems to be losing its power, it has not lost its influence.<sup>10</sup> Nor is its future given, but several factors explain its decline. Among them, Castells' lists not only the loss of control over the economy and the flourishing international crime. The growing incapacity of states to jointly tackle global problems also leads to their weakening as viable political institutions.<sup>11</sup>

While this description is plausible, we are not witnessing an unequivocal development; neither with respect to corporate organization nor the decline of sovereignty. States' capacities, influence and relevance differ from one area (for example, trade, investment and intellectual property) to the other (such as immigration and warfare), and so does the practical relevance of state sovereignty.<sup>12</sup> There are also situations where the state, and its sovereignty, is invoked as a means for solving or at least preventing certain collective problems. Expanded possibilities for states to unilaterally prohibit the import of products harmful to health and the environment – today a limited possibility due to the WTO – is one example of how states' relative self-determination could promote international protection of the environment.

However, the possible decline of sovereignty of the nation-state is not the only reason to look beyond it. Historically and conceptually, the nation-state is founded on the notion of one people–one territory. This is not what today's society looks like; our identity is not based on any homogeneous history or self-perception wrapped in the nation-state. Our identity must take other forms and find other bases, but which are the alternatives?

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*Utopia – the Structure of International Legal Argument* (Helsinki, Lakimiesliiton kustannus, 1989) p. 40-42, as the ascending pattern for arguing about order and obligations in international affairs. This is contrary to the descending argument, which starts from superior ideas, such as justice, common interests, progress or the nature of the international society.

<sup>7</sup> Cf. in particular Castells, Vol. I, above note 2, chapters 2-4.

<sup>8</sup> Castells, Vol. II, above note 2, *passim*.

<sup>9</sup> Castells, Vol. III, above note 2, chapter 3.

<sup>10</sup> Castells, Vol. II, above note 2, p. 243-246; also M. Castells, above note 3, p. 14.

<sup>11</sup> Castells, Vol. II, above note 2, p. 243-266.

<sup>12</sup> See Sassen, above note 1, comparing the roles of states in the control of economic activities and in defining immigration policies.

### 3 The Network State

Castells sees in the European Union (EU) a possible response of the political system to the network society and the challenges of globalization. The EU, he argues, is a network state; a state where authority (and in the last resort the capacity to impose legitimized violence) is shared along a network without a centre.<sup>13</sup> Thus, there is no sovereign nation-state, and power is shared through "asymmetrical relationships" between the member states.

Like Jürgen Habermas,<sup>14</sup> Castells argues that the "European unification" requires European identity, which is not based on a common history but on a common project; a blueprint of social values and institutional goals. Among the possible elements of such a European project, Castells lists the defence of the welfare state, social solidarity, stable employment, and of workers' rights; the concern about universal human rights and the plight of the "Fourth World"; the reaffirmation of democracy, and its extension to citizens' participation and so on.<sup>15</sup> These are the very fronts where, today, nation-states experience the greatest pressure as a result of globalization; tax cuts, reduced scope of publicly financed welfare, and "flexible" labour law are on the wish list of many corporations. The realization of Castells' vision would indeed balance the political power of corporations in these respects.

To be sure, there is more room for the elements listed by Castells in European policy than in, say, American, and he is probably right in that "most European citizens would probably support these values".<sup>16</sup> Even so, it is obvious that Castells' list is coined by his own preferences rather than by observations. No matter how desirable are his elements of a project identity, there are tendencies in the EU in the contrary direction. I am not primarily thinking of the current xenophobic views marketed by Haider in Austria, Le Pen in France, Berlusconi in Italy or Kjærsgaard in Denmark – they are hardly "eurofreaks" –, but on how the EU institutions themselves may add to the creation of a traditional nation-state identity, in the worse sense of the terms, albeit on a European level. The hardening policy and legislation on refugees as well as the measures – along the borders and within the EU (through identity control) – against an alleged thrive in illegal transport of human beings, as a result of the Schengen Agreement and the changes in the EU Treaty, risk reinforcing a European identity based on ethnocentrism (Fortress Europe) rather than on the solidarity and universal human rights called for by Castells.

Thus the embryo of a possible project identity along the lines of Castells' elements, which would require also political expressions to be realized, risks being offset by legal structures that enhance traditional nationalism. Moreover, certain protectionist tendencies in trade – not related to justifiable restrictions of import because of health and environment concerns – reveal Euro-nationalism

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<sup>13</sup> Castells, Vol. III, above note 2, p. 330-355 (definition at p. 352); and M. Castells, above note 3, p. 14 and 19.

<sup>14</sup> Habermas, J. above note 4, p. 491, argues that a European identity cannot be based on some common origins in the Middle Ages, but on a new political self-consciousness.

<sup>15</sup> Castells, Vol. III, above note 2, p. 353.

<sup>16</sup> Castells, Vol. III, above note 2, p. 354.

rather than the globally engaged Europe called for by Castells. The expansion of the EU increases the cultural and political diversity in the Union. While most likely this development will also promote democracy in Eastern Europe, governance of the EU itself remains a hot issue. The EU is already being criticised for its democratic deficit and the expansion, as such, is not likely to improve that situation. Thus, it is a great task to make European policy and Law legitimate as well as effective.

The lack of any legal reasoning in *The Information Age* explains why Castells fails to tell us how or why the legal norms or decisions of the EU should be legitimate. There is of course no immediate, logical link between, on one hand, sociologically observed changes of states and state sovereignty and, on the other hand, sovereignty as a normative concept;<sup>17</sup> i.e. between the *sein* (is) and the *sollen* (ought). Still, the legitimacy of the legal order is not immune from or completely unrelated to the former either. So the fact that we are used to legitimize national and international norms through the connection to the nation-state does not exclude the possibility of other means in the future. The legitimacy of the EU and its legal rules depends on how the relation between the Union and the member states is perceived, but also on how the political power of the "network state" is handled internally, that is in the "asymmetrical relationships" suggested by Castells, in respect to the boundless market as well as to multinational corporations.

Concentrating on the European identity, this formal dimension of the legitimacy of law is not a part of Castells' study. Yet, it cannot be ignored. While networks are characterized by their flexibility and ability to adapt, political decision-making and legislation require some frames to fix the balance of powers ("political nodes). The need for a European constitution – which would entail a more fixed structure of law and decision-making in the EU – has been voiced<sup>18</sup> and governmental negotiations have taken place for this end.<sup>19</sup> The possibilities at hand for the public to participate in the European institutions are also critical for the legitimacy of European norms. In post war Europe, an important legitimacy factor for national legal rules has been the self-perception of members of the public as participants in the making of laws.<sup>20</sup> In this respect, the possibility to vote is but one, albeit important, foundation for making us accepting the legal system in large although we may disagree in the details. Other essential factors are public debates of draft legislation, freedom of speech, transparent institutions, and open media, which make changes of the laws possible with the involvement of the public. In the long term, also the legitimacy of the EU and its legal norms, as well as the project identity called for by Castells, depends on the citizens' sense of participation and responsibility in the making of legal rules. A development towards increasing participation and

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<sup>17</sup> Koskenniemi, M. *The Future of Statehood*, 32 Harvard International Law Journal (1991) 397.

<sup>18</sup> See e.g. Habermas, J. *Why Europe Needs a Constitution*, 11 New Left Review (September/October 2001) 5.

<sup>19</sup> Cf. the Draft Treaty Establishing a Constitution of Europe, submitted by the European Convention, Brussels, 18 July 2003, CONV 850/3.

<sup>20</sup> This is a basic theme in Habermas, above note 4, where he applies his discourse theory on law and legal thinking.

increasing responsibility requires an expanded European public sphere, but also further integration.<sup>21</sup>

While Castells limits his outlines on the network state to the European continent, it is possible, perhaps even likely, that this kind of regionalization, with shared powers and/or quasi-federal structures, will expand also in other regions. In the summer of 2000, for example, the first steps were taken towards an intended African Union (AU), inter alia, in order to counteract the continuing marginalization of Africa.<sup>22</sup> The prerequisites for network states and resembling integrating constellations differ with historical, economical, social and political conditions, and of course Africa cannot duplicate the European Union. Whatever the aim of the AU and the likeliness of its realization, the notion of an African Union or a "multinational-state" is interesting and appealing, keeping in mind that with some exception the pasted and often "imposed" nation-state has never functioned in Africa.<sup>23</sup> There are also other regional projects of economic integration (such as Nafta, Mercosur, and Asean), but so far none of these provides for supra-nationality in line with the EU.

#### 4 Legal Subjectivity and Responsibility

*The Information Age* not only outlines the changed prerequisites for the legitimacy of law. It also hints at structures and tendencies, which may have a more direct impact on legal thinking and the practical application of law. Even though national rules may have some limited extraterritorial application, in essence each jurisdiction and legal system applies to its particular territory. Castells argues that in the network society, power and important societal functions are less and less arranged around what he refers to as "space of place" in favour of "space of flows".<sup>24</sup> Without being blinded by the exciting distinction, it is easy to observe the limited possibilities for a country to unilaterally control the increasing degree of transboundary processes for production and decision-making, as well as the expanded flows of information, currency and pollution. The volatile courses are complicated from a legal point of view. While these processes are not new, the increasing scope of these courses implies a change not only of degree as compared to the situation some decades ago.

This is where Castells' network theory also touches upon another core concept of law: legal subjectivity. The legal system is full of constructions, the

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<sup>21</sup> Cf. Habermas, above note 4, 491.

<sup>22</sup> For documents, see "<http://www.africa-union.org>" (visited 12 October 2004).

<sup>23</sup> In an attempt to develop the foundation for an African multinational state, Tshiyembe, M. *L'Afrique face au défi de l'État multinational*, [2000] *Le Monde diplomatique* (September) 14, holds that the structure should be an "integrated federation" based on "the principle of shared sovereignty". An important motive for Tshiyembe is to find a polity which prevents the ethnic conflicts taking place in several African states. Castells discusses Africa and its marginalization in the global economy in Vol. I, p. 133-136, and Vol. III, above note 2, p. 70-127.

<sup>24</sup> Castells, Vol. I, above note 2, p. 376-428.

purpose of which is to practically handle abstract notions. Accordingly, we consider companies with limited responsibility, co-operatives and foundations as persons with rights and obligations. The legal subjects can be made responsible for their acts, but the allocation of responsibility is more problematic when the effects originate from the totality of the acts of several subjects or when the effects do not materialize until long after the act was carried out. If Castells is right, such control becomes even more complicated, since the basic unit of economic organization, in his view, "for the first time in history" is not a subject (individual or collective), but "made up of a variety of subjects and organizations, relentlessly modified as networks adopt to supportive environments and market structures".<sup>25</sup> This change does not do away with the fact that the production processes and networks entail adverse effects on human health, the environment, and society at large. The implied question, therefore, is: How can networks be made responsible? Castells gives no answers to this.

Adjusting legal methods and forms to external conditions does not mean that the legal construction must exactly conform to sociologically observed processes. In principle, it is possible to define subjects and actors (parent companies, subsidiaries and others) with responsibility for different parts of the production line. Responsibility can, for instance, be channelled beforehand to one of the actors ("nodes"?) involved. Yet, experience tells us that it is complicated to impose legal responsibility in "diffuse" and transboundary cases. With the expansion of these network processes (if they expand), new forms and legal constructions will be necessary.

The described development also calls for a review of legal theories in different respects. One such case is that of the traditional distinction between international and national law, which quite likely will lose some of its importance, and also obtain a new meaning. Conventions on human rights, but also on environment protection and labour law, show how international rules aim at affecting the legal situation of individuals.<sup>26</sup> Law-making is increasingly taking place through international conferences and negotiations, albeit by states. Issues previously conceived as internal affairs are today understood as international concerns and subject to international agreements.<sup>27</sup>

Still, an abundance of issues and social changes have not yet been matched by legal arrangements. Castells describes, for instance, the witnessed growth in foreign direct investment and how multinationals are establishing themselves in different countries. The expanded economical power of the multinationals also implies political power. Moreover, multinational corporations may avoid

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<sup>25</sup> Castells, Vol. I, above note 2, p. 198.

<sup>26</sup> An attempt to draw up contours for a new understanding of the relationship between international and national environmental law, partly from the perspective of individuals' legal situation, is found in Ebbesson, J. *Compatibility of International and National Environmental Law* (Dordrech, Kluwer, 1996), p. 3-99.

<sup>27</sup> One such example is the 1998 Aarhus Convention on Access to Information, *Public Participation in Decision-making and Access to Justice in Environmental Matters*, 38 International Legal Materials (1999), p. 259. The convention actually pertains to issues such as secrecy and transparency in the public administration, administrative and judicial procedures, public involvement in political affairs, that is classic attributes of state sovereignty.

responsibility for harmful conduct – such as harming the environment, inadequately treating employees, or violating human rights – when subsidiaries are established, either by liquidating the subsidiary or by moving the enterprise from one jurisdiction to another. The situation is even more complicated where transnational corporations, without a link to any particular “home country” cause harm to e.g. health, the environment or to competing corporations. Yet, Castells argues that

“the network enterprise is increasingly international (not transnational), and its conduct will result from the managed interaction between the global strategy of the network and the nationally/regionally rooted interests of its components. Since most multinational firms participate in a variety of networks depending on products, processes, and countries, the new economy cannot be characterized as being centered any longer on multinational corporations, even if they continue to exercise jointly oligopolistic control over most markets. This is because corporations have transformed themselves into a web of multiple networks embedded in a multiplicity of institutional environments.”<sup>28</sup>

The transboundary structures, networks, and activities of enterprises have become an all the more important political issue, but has not yet entailed much legal changes.<sup>29</sup> So far, corporate responsibility has only been “regulated” by non-legal, “soft” standards, set out in codes of conduct and recommendations of interest organizations, in some case in cooperation with intergovernmental organizations.<sup>30</sup>

The outlined development also places human rights in a new context.<sup>31</sup> In addition to re-thinking the relationship between international and national law in general, the notion of human rights is a case for new legal theory. It is not surprising that, so far, the protection of human rights has referred to the protection of the individual against the state, considering that the state has provided the greatest threat of violations. This view is rooted in history, in pragmatic reasoning and in ideology. Yet, there is no conceptual hindrance to expand these rights so as to be applicable not only in vertical relation, but also directly against corporations (which is already possible in some national systems). Considering the witnessed expanded power, influence and responsibility of transnational corporations, this notion of horizontal application is not that far-fetched. – Well, Castells says nothing about this, but he provides fuels for legal thoughts and reflections...

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<sup>28</sup> Castells, Vol. I, above note 2, p. 194-5.

<sup>29</sup> One may argue that the failure of the OECD to conclude a multilateral agreement on investment (MAI) in the second half of the 1990s was one such example.

<sup>30</sup> See the OECD Guidelines for Multinational Enterprises, “<http://www.oecd.org/dataoecd/56/37/1922442.pdf>” (visited 2 October 2003), and the Global Compact, “<http://www.unglobalcompact.org>” (visited 2 October 2003). An example of guidelines for corporations related to conventions and documents on human rights is Amnesty International, International, *Human Rights - is that any of your Business?* (London, Amnesty International, 2000).

<sup>31</sup> See previous note.

## 5 What's New?

The well documented description by Castells of the network society, and the thesis that the nation state has lost its power and sovereignty, challenges legal thinking and theories on the legitimacy of law. So far, some of the changes described by Castells have had an impact on the law in its structure and content. In addition to innovations in information technology, current globalization has been fuelled by legal changes in the form of national currency deregulation and by expanded principles on free trade in the WTO. Yet, it has not lead to any shift in general legal thinking.<sup>32</sup>

In the end of Volume III of the trilogy, Castells asks himself rethorically whether he describes a new World or not. The same question can be put with respect to legal understanding. Does the described development provide new dimensions to law-making and the legitimacy of law? In many senses the answer is yes. To be sure, for a limited period of time, the external changes may be squeezed into the traditional image of law and the form of the nation state; thus by arguing that Swedish or any other legal system and the theoretical understanding is not affected by the membership of the EU, the increasing internationalization, or the retreat of the nation-state. Perhaps such a description is even intended to maintain the legitimacy of law. Most likely, the effect would be the contrary. Again, while sociological observations have no direct, logical impact on the legal system, in the long run, the description of the legal system as well as the theories of the binding property of these norms must somehow correspond to societal changes. This calls for the emancipation of the law from the traditional nation-state. Whether Castells' network state, quasi-federal structures or other forms of governance or intitutions give the answer, begs a question mark. As a matter of jurisprudence and legal reasoning, however, the question should also be addressed to our law students.

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<sup>32</sup> Even so, there is a growing amount of literature on these issues, e.g. Likosky, M. *Transnational Legal Processes – Globalisation and Power Disparities* (London, Butterworths, 2002), legal literature on these issues.