

THE LAW OF ONLINE COMMUNITIES AS PART OF A LEGAL CONSCIOUSNESS

SJD proposal – Ayelet Oz

OVERVIEW

My proposal began with two tentative observations: the first is the corpus of scholarly and popular writing that describes the emergence of online communities over the last several decades as a radical alternative to the free market structure and to the way contemporary politics are practiced. The second observation relates to the way these communities govern themselves. Many of the more complex communities use highly formal and official rules which seem to mimic the national legal system. Are these two observations contradictory? Does the use of a legal regulation undermine the radical project of these communities? These are the central questions at the foundation of my dissertation.

In a nutshell, I argue that when on-line communities construct their own legal regulation, they act against the background of the cultural paradigm of law as a mechanism of social control; they are a part of the legal consciousness of the national legal system; and they build their internal norms using the vocabulary, structure and basic assumptions of formal law. Since these assumptions and vocabulary reflect a specific social and historical context, which online communities allegedly challenge, a possible consequence of using this legal mode of thought in their self-regulation would be to limit and undermine their ability to present a radical alternative to the current social and historical structure.

My dissertation will aim to answer the following questions: Does the use of this legal vocabulary undermine the radical project promoted by online communities? Does the political alternative they present lead them to object the assumptions of contemporary law and to create a new

form of legal regulation? Or perhaps the two coexist, and online communities introduce their radical project while acting within the legal consciousness? In the following pages I will demonstrate how I intend to address those questions.

ONLINE COMMUNITIES AS PRESENTING A RADICAL ALTERNATIVE

The Internet allows people to create a range of new social spaces in which to meet and interact with each other. Using different network technologies of many-to-many interaction, thousands of groups were created online over the last decades.¹ Some of these communities – and the obvious examples are big open-source software projects such as Linux or Debian, Wikipedia, and others – support complex collective projects which seemed impossible until recently. These highly developed communities have attracted an increasing scope of scholarly interest from different disciplines.

One central strand of research has emphasized the novelty of the social and economic structures of these online communities. These communities present, according to this view, a radical alternative to established concepts of contemporary social, political and economic structures. For example, in his book, *TWO BITS: THE CULTURAL SIGNIFICANCE OF FREE SOFTWARE*,² Chris Kelty describes the social practices that evolved around the creation of free software – the collaborative creation of a source code that is openly and freely available – as creating a new form of public sphere, which continually modifies the technical, legal, practical, and conceptual means of its own existence as a public. By continually transforming its own infrastructure, the open source community is able to become

1 See Peter Kollock & Marc A. Smith, *Communities in Cyberspace*, in *COMMUNITIES IN CYBERSPACE* (Marc Smith & Peter Kollock eds., 1999) 3, 3.

2 CHRISTOPHER M. KELTY, *TWO BITS: THE CULTURAL SIGNIFICANCE OF FREE SOFTWARE* (2008).

independent of other forms of constituted power and challenge them.³ Yochai Benkler offers yet another understanding of the potential online communities hold for a new way of social and cultural organization. In his book, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM*,⁴ Benkler argues that collaborative online production stands in contrast to the assumptions of the market economy and is based on a large-scale commons-based collaboration.⁵ This collaborative model, in turn, also promotes a new political culture which is more critical and self-reflective.⁶

Kelty, Benkler and others⁷ suggest that complex online communities offer an alternative to the current established understanding of the public sphere and the economy. If these conceptions of the possibilities inherent in online communities have any validity, their challenge should also be targeted at the law, which is embedded in the social context they oppose and supports its material, hierarchical and ideological constraints. One example of such rejection of law is *THE DECLARATION OF THE INDEPENDENCE OF CYBERSPACE*,⁸ in which John Perry Barlow called for a disassociation of online communities from any formal legal system: 'Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather.'⁹

3 *Id* at 3. An interesting comparison could be made between Kelty's analysis and the "structure-denying structures" suggested by Professor Unger. See ROBERTO UNGER, *SOCIAL THEORY: A CRITICAL INTRODUCTION TO POLITICS, A WORK IN CONSTRUCTIVE SOCIAL THEORY* (1987).

4 Yochai Benkler, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006).

5 *Id* at 8.

6 *Id* at 15.

7 See JAMES BOYLE, *SHAMANS, SOFTWARE AND SPLEENS* (1996); ANDREW LIH, *THE WIKIPEDIA REVOLUTION* (2009); HOWARD RHEINGOLD, *SMART MOBS: THE NEXT SOCIAL REVOLUTION* (2002).

8 JOHN PERRY BARLOW, *A DECLARATION OF THE INDEPENDENCE OF CYBERSPACE* (1996), <http://homes.eff.org/~barlow/Declaration-Final.html>.

9 *Id*.

In order to explore how these communities suggest an alternative to contemporary law I will study their internal regulation.

THE LEGAL REGULATION OF ON-LINE COMMUNITIES

There is no formal legal regulation of the internal structures of online communities. The legal regulation of the Internet – Internet law - is best portrayed as 'regulation from a distance'.¹⁰ Rather than directly allowing or prohibiting certain internal norms and governance structures in cyberspace, the regulation of online communities is mostly achieved through designing the infrastructure of the Internet¹¹ and the application of generally-applicable legal rules to the Internet.¹² While these should obviously not be disregarded, given this relatively distant or overly general legal framework, online communities still have sufficient autonomy to sustain internal authority and self-governance.¹³ Therefore, the internal legal regulation of online communities cannot be seen as directly emerging from the contextual legal regime.

Nonetheless, a brief survey of the internal regulation of several of these communities suggests that they are not spaces of unfamiliar regulation but appear instead to be governed by formal, official and enforceable norms. These criteria, which frame the monopoly on the use of enforcement mechanisms,

10 Susan S. Silbey & Patricia Ewick, *The Architecture of Authority: The Place of Law in the Space of Science*, in *THE PLACE OF LAW* (Austin Sarat et al. eds., 2003) 76.

11 For a critique of this kind of regulation see LAWRENCE LESSIG, *CODE: AND OTHER LAWS OF CYBERSPACE, VERSION 2.0* (2006).

12 For a detailed discussion of the legal regulation of cyberspace see RAYMOND S. R. KU & JACQUELINE D. LIPTON, *CYBERSPACE LAW: CASES AND MATERIALS* (2006).

13 Compare to Silbey, *supra* note 10.

allow us to adequately define the internal regulation of online communities as a *legal* regulation, as opposed to regulation by "softer" social norms.¹⁴

Wikipedia,¹⁵ for example, has a complex legal structure that consists of forty-two official policies (mainly governing behavior and content) and 356 specific guidelines (mainly governing style and formatting) which all users are expected to follow if they wish to contribute to the encyclopedia.¹⁶ Its arbitration committee, which generates norms and inflicts punishments, handles disputes using an adversarial method which includes procedurally specific modes for submitting evidence. Another example of a formally governed online space is the open-source software community Debian.¹⁷ The Debian Project is governed by the Debian Constitution and the Debian Social Contract which set out the governance structure of the project and its goal of developing a free operating system.¹⁸ The Debian Constitution states, for example, the powers vested in developers¹⁹ and the community's decision-making bodies.²⁰ A third example is DailyKos,²¹ a successful collaborative political blog, publishing news and opinions from a liberal point of view. DailyKos has detailed principles for the ways in which content may be posted on the site by members of the community²² and procedures for dealing with unwanted users.²³ While these examples do not necessarily point out that all complex online

14 See MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* (1964). Compare with ROBERT ELLICKSON, *ORDER WITHOUT LAW* (1991). For a similar argument that describes the internal regulation of Wikipedia as legal, see R. STUART GEIGER, *THERE IS NO CABAL: AN INVESTIGATION INTO WIKIPEDIA'S LEGAL SUBCULTURE* (2007) <http://www.stuartgeiger.com/wordpress/academic-works/2007/05/31/there-is-no-cabal-an-investigation-into-wikipedias-legal-subculture/>.

15 <http://wikipedia.org/>.

16 See Geiger, *supra* note 14; DAVID HOFFMAN & SALIL MEHRA, *WIKITRUTH THROUGH WIKIORDER* (2009). http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1354424.

17 <http://www.debian.org/>

18 <http://www.debian.org/devel/constitution>; http://www.debian.org/social_contract.

19 <http://www.debian.org/devel/constitution#4>.

20 <http://www.debian.org/devel/constitution#1>.

21 <http://www.dailykos.com/>.

22 For example, tagging is a prerequisite to posting a diary entry. See http://www.dkosopedia.com/wiki/DailyKos_FAQ#Tag_Guidelines.

23 http://www.dkosopedia.com/wiki/DailyKos_FAQ#Dealing_with_trolls

communities use formal and official means of self-regulation, it does suggest that formality is a common attribute and that the internal regulation of complex online communities resemble the formal legal system not only from a theoretical perspective. The everyday practice of norm-creation and enforcement in these communities also seems to reproduce the structure and vocabulary of formal law. This, in turn, triggers the question of the structural sources of this internal legal regulation. These, I argue, are to be found in the legal consciousness of the formal legal system.

THE CONCEPT OF LEGAL CONSCIOUSNESS

The theoretical concept of legal consciousness defines law as a set of conceptual categories and schema that help construct, compose, and interpret social relations.²⁴ My own use of the concept of legal consciousness lies at the overlap of three strands of scholarly literature – Critical Legal Studies, Law and Society and Legal Pluralism.²⁵ In Critical Legal Studies, the concept of legal consciousness is a tool for understanding the basic “language” of the legal system. Duncan Kennedy, in his article *Three Globalizations of Law and Legal Thought: 1850-2000*,²⁶ uses the concept of legal consciousness to describe a similar mode of thought among different legal systems throughout the world in a given historical context. Kennedy shows how different systems use the same conceptual vocabulary, organizational schemes, modes of reasoning, and characteristic arguments.²⁷ In the Law and Society literature, legal consciousness is often understood as the colloquial understanding of law in the

²⁴ See Susan S. Silbey, *After Legal Consciousness*, 1 ANNU. REV. LAW SOC. SCI. 323,327 (2005).

²⁵ See *id.*; Chris Fuller, *Legal Anthropology, Legal Pluralism and Legal Thought*, 10(3) ANTHROPOLOGY TODAY 9 (1994).

²⁶ Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in THE NEW LAW AND DEVELOPMENT: A CRITICAL APPRAISAL 19 (David Trubek & Alvaro Santos eds., 2006).

everyday life of ordinary people who are not a part of the legal system.²⁸ The Legal Pluralism tradition undermines this dichotomy between 'the legal system' and 'the real world' by addressing means of social control which are not enforced by the state as another version of law. Moreover, legal pluralism adds a political claim to its description, undermining the importance of the formal national legal system vis-à-vis non-formal legal systems. Legal pluralism sees the legal consciousness of the formal legal system not only as taxonomy, but as an ideology and a discursive system that limits and constrains future meaning-making.²⁹

My dissertation – which traces the use of formal legal structures in non-legal radical groups – draws on the combination of these three strands of literature. Similarly to Critical Legal Studies, I examine a very abstract understanding of legal regulation, one which addresses 'the salient aspects of the legal order that are so basic that actors rarely, if ever, bring them consciously to mind'.³⁰ At the same time, like the legal pluralists, I wish to undermine the dichotomy between 'legal' and 'extra-legal' regulation, by insisting on analyzing the internal regulation of online communities as a *legal* regulation. Yet unlike the legal pluralists, I do so without endorsing the political argument associated with this tradition. In a way, my dissertation aims to question this very argument. When I ask if being a part of the legal consciousness of formal law necessarily means adopting its political and ideological attitudes, I also welcome the possibility of a negative answer, enabling the integration of different political endeavors under the same legal consciousness.

27 *Id* at 22.

28 See Sally Merry, *Concepts of Law and Justice Among Working Class Americans*, 9 LEG. STUD.FORUM 59 (1985); Susan Silbey, *Legal Consciousness*, in NEW OXFORD COMPANION TO LAW (2008); PATRICIA EWICK & SUSAN SILBEY, THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE (1998).

29 Sally Merry, *legal pluralism*, 22 LAW AND SOC. REV. 869, 891 (1988).

30 Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought*

THE REGULATION OF ONLINE COMMUNITIES AS A PART OF LEGAL CONSCIOUSNESS

The first part of my study will be an in-depth analysis of several complex online communities, using methods of legal anthropology. This kind of research will allow me to analyze my data to identify themes that overlap with results reported in existing studies of popular and professional legal consciousness. Furthermore, an anthropological study of internal regulation online is uniquely illuminating due to the technological features of the Internet. A problem that is commonly experienced in the study of non-formal legal systems is the lack of documentation. Usually, many of the social processes that could shed light on the emergence of law are left informal and undocumented, and the researcher cannot know what was on the minds of the participants when they constructed the norms.³¹ On-line communities, on the other hand, offer an opportunity for a deeper understanding of these mechanisms since unlike other social groups, the entire communication between group members is documented and archived by default, due to the textual character of the technology. In Wikipedia, for example, one could get a complete picture of a certain legal development by reading throughout the “History” and “Discussion” pages. In other on-line communities, the information is usually kept intact in mailing lists and on-line forums, which include all of the communication that took place, both formal and informal. Moreover, to this wealth of data I will add interviews I plan to conduct and analyze. Together, these will allow me to provide a novel and accurate description of the phenomenon of internal legal regulation online.

Later, in order to study the influence of the formal legal system on online legal regulation, I will construct the basic categories of online legal thought - its underlying premises, its institutions and the

in America, 1850-1940, 3 RESEARCH IN LAW & SOCIOLOGY 3 (1980).

³¹ See Andrea G. McDowell, *From Commons to Claims: Property Rights in the California Gold Rush*, 14 YALE J. L. & HUMAN. 1, 49 (2002).

nature of arguments that could be created in order to take a stand within it. I will construct the internal dichotomies and categories of online regulation and see whether they correlate with those of the formal legal system,³² which is commonly portrayed as consisting of different areas of law, such as contracts, property, and the penal system, which are frequently constructed in sharp opposition to one another.³³ Another fundamental aspect of online legal regulation I will consider is the mechanism for the development of law. In Anglo-American legal thought, law develops through precedent, which combines rule-making with adjudication. Is there a parallel in the law of online communities?³⁴

Another method I will use to trace the ways in which formal law affects the internal regulation of online communities is by following the agents and mechanisms that introduce formal legal consciousness into online communities. My wealth of data will not only allow me to reach structural conclusions, but will enable me to identify when a certain concept was introduced, who raised it, and which arguments were made to support it. Thus, I will be able to accurately track the mechanisms of diffusion of formal legal concepts outside the formal legal system and into online legal regulation.

32 James Grimmelmann, on the contrary, presupposes this correlation and uses the law of online communities as a direct source for a comparative study of contracts, property etc. see James Grimmelmann, *Virtual Worlds as Comparative Law*, 49 N.Y. L. Sch. L. Rev. 1 (2004). A possible counter-example for this assumption is the site Slashdot (www.slashdot.org). Slashdot's moderation system uses the same mechanism of thumbs-up/thumbs-down both for "punishment" (hiding a user's comment) and "reward" (making the user's comment more accessible), thus challenging the autonomy of the penal system. See www.slashdot.org/moderation.shtml.

33 For example, for the dichotomy between the law of the market and the penal system, see BERNARD E. HARCOURT, *NEOLIBERAL PENALTY: THE BIRTH OF NATURAL ORDER, THE ILLUSION OF FREE MARKETS* (2008) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1278067; for the dichotomy between family law and private law see Frances E. Olsen, *The Family and the Market: A study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

34 Hoffman and Mehra, for example, suggest that Wikipedia separates these two functions and does not follow precedent. See Hoffmand and Mehra, *supra* note 14.

THE BOUNDARIES OF LEGAL CONSCIOUSNESS

If my hypothesis about the influence of formal national law on online communities is correct, we should observe different on-line legal regimes under different formal legal regimes. Online communities acting under different national legal regimes should use a somewhat different internal vocabulary matching their legal environment. Therefore, a comparative analysis of the way different online internal regulations have emerged in communities which share the same platform and the same technological affordances, but act under different formal national legal systems, is an important part of my study.

Such analysis is possible due to the decentralized and international structure of Wikipedia, for example. Wikipedia is constructed of many independent local Wikipedias throughout the world, each community mostly based in one country, while maintaining a relationship to one another. I will combine my own familiarity with the Israeli and American national legal systems with a series of collaborative investigations I will initiate with the cooperation of researchers all over the world, an attempt to look into the relationships between other domestic Wikipedias and their respective legal systems. This international perspective will strengthen my hypothesis by creating a closer connection between the scope of national legal consciousness and online legal regulation.

CONTRIBUTION TO LEGAL SCHOLARSHIP

My proposed study contributes, in the first place, to the study of the social and legal construction of cyberspace. Scant research has been conducted regarding the law of online communities. Some studies offer a functional analysis based on the efficiency and robustness of the procedures created by online

communities.³⁵ Other work focuses on the ways in which formal law – and specifically Internet and communications law – shapes the incentives of these communities to create different means of self-regulation.³⁶ Both lines reflect lacking perceptions of online legal regulation – either as completely free from legal regulation³⁷ or as bound by formal law.

My research transcends these two approaches in order to develop a third approach to understanding the regulation of cyberspace, one that does not limit itself to examining the legal rules that directly shape online communities, and at the same time, does not picture it as a completely new and independent form of social practice. It's the subtleness of the concept of legal consciousness that allows me to avoid both extremes and introduce a new and complex way to the study of the legal regulation of cyberspace.

But my study does not only enrich the understanding of cyberspace. I also aim to present a challenge to the literature of legal consciousness. The combination of the radical project online communities carry with their use of formal legal structures uniquely illuminates the ways in which law holds the potential to limit innovative governance as a consequence of the persistence of familiar cultural schema. Thus, it calls for broader critical thought regarding the shaping of formal law. Moreover, the unique wealth of data available in the study of online communities opens a possibility for a better understanding of the mechanisms by which concepts and structures diffuse outside of the formal legal system and are implemented in non-legal systems.

35 See Siobhan O'Mahony & Fabrizio Ferraro, *The Emergence of Governance in an Open Source Community* (2007) http://www.business.ualberta.ca/tcc/documents/TII_3_OMahoney_Ferraro_final.pdf.

36 See David R. Johnson & David Post, *Law and Borders – The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996).

37 See Jennifer Mnookin, *Virtual(Ly) Law: The Emergence of Law in an Online Community*, in CRYPTO ANARCHY, CYBER STATES AND PIRATE UTOPIAS (Peter Ludlow ed., 2001).

FIELDS OF STUDY

- 1) INTERNET AND SOCIETY - PROFESSOR YOCHAI BENKLER, *Jack N. and Lillian R. Berkman Professor for Entrepreneurial Legal Studies, Harvard Law School (overall supervisor)*

Professor Benkler will guide me in the interdisciplinary study of the social aspects of the Internet. This field will allow me to gain a broad understanding of the phenomenon of online collaboration and the radical alternative it suggests vis-à-vis current economic and social thought.

- 2) LEGAL THEORY - PROFESSOR DUNCAN KENNEDY, *Carter Professor of General Jurisprudence, Harvard Law School*

In order to be able to compare online legal regulation with the legal consciousness of the national legal system, I must master the scholarly writings that address the abstract characterizations of law. Professor Kennedy will guide me in reading the main scholars of legal theory, so that I could portray a coherent theory of the nature of formal law.

- 3) SOCIOLOGY AND ANTHROPOLOGY OF LAW - PROFESSOR SUSAN S. SILBEY, *Head of the Anthropology Program at MIT*

The emergence of law in online communities is a part of ongoing research on the role of law in everyday life, intersections with and variances from formal legal materials, studied through sociological and anthropological lenses. This field will provide me with the methodological and theoretical tools I need in order to conduct my proposed research.

PRELIMINARY READING LIST

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