Laws and networks: Legal pluralism and information and communications technology

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Abstract

This article analyses information and communications technology (ICT) law from the perspective of legal pluralism. It argues that studying legal pluralism within the ICT field advances both the understanding of legal pluralism and the development of ICT law. The author believes that the real challenge for ICT legal scholars and practitioners is to break free from a deeply ingrained legal centralist mindset and genuinely strive to see the dynamic networks of interactions among plural legal orders, actors and networks. This requires imagining law in relation to the ICT field not as a decentralised network but as a distributed network where power is dispersed and similarly shared by diverse and active participants across the inter-network.

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Legal pluralism and ICT

The term 'legal pluralism' rarely appears in legal literature concerning information and communications technology (ICT).[1] However, this does not mean that the idea of plural normative orders and systems governing behaviour within 'semi-autonomous social fields'[2] is completely new or alien to ICT legal scholars and practitioners. In fact, it may be said that despite the lack of express acknowledgement or explicit use of the term, those who are engaged in the study and practice of ICT law are very much aware of the plurality, complexity and multiplicity of contexts and problems within transnational information societies whether in relation to issues of jurisdiction, regulation or governance.[3] This appreciation of the presence of plural legality in the ICT sphere is evident in the proliferation of theories and discourses concerning 'code is law'[4] and 'technology as law'.[5] Given that an informal notion of plural legal orders already exists within ICT, is there any value to introducing the concept of legal pluralism in ICT law and formally using the term? This article argues that studying legal pluralism within the ICT field advances both the understanding of legal pluralism and the development of ICT law. The area of ICT provides those who are interested in legal pluralism with a number of significant case studies of plural normative orders. ICT legal scholars and practitioners, on the other hand, will benefit from the different approaches offered by legal pluralism by helping them gain a better

[1] See Paul Schiff Berman, 'Global Legal Pluralism' (2006-2007) 80 *S. Cal. L. Rev.* 1155; see Richard Jones, 'Legal Pluralism and the Adjudication of Internet Disputes' (1999) 13 *International Review of Law, Computers & Technology* 49l; see Richard Jones, 'The Internet, Legal Regulation and Legal Pluralism' 13th Annual BILETA Conference: The Changing Jurisdiction, 27-28 March 1998.
[2] See Sally Falk Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) 7 *Law & Society Review* 719; see Yves Dezalay and Bryant Garth, 'Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes' (1995) 29 *Law & Society Review* 27, 32 (concept of 'national or international legal field').
[3] Joel R. Reidenberg, 'Lex Informatica: The Formulation of Information Policy Rules Through Technology' (1997-1998) 76 *Tex. L. Rev.* 553, 553-554.
[4] See Lawrence Lessig, *Code: version 2.0* (Basic Books, New York 2006).
[5] Redeinberg (n 3); see Arthur J. Cockfield, 'Towards a Law and Technology Theory' (2004) 30 *Manitoba Law Journal* 383, 406.

understanding of the place and quality of law within the complex interactions among various inter-networked actors who, paradoxically, are subject to but also actively engage with and make up plural normative orders within multilayered techno-social networks. The author believes that the subject of legal pluralism and ICT is sufficiently broad and massive that it cannot be completely or extensively discussed in a single article. Consequently, this article is meant to be an introduction to and an initial exploration of a legal pluralist approach to the networked society.

Legal pluralism

A Critique of Legal Centralism

The concept of legal pluralism and the use of the term itself has been subject to intense study, growing popularity and also persistent criticism over the past decades.[6] John Griffiths, one of the leading scholars on legal pluralism, describes it 'as that state of affairs, for any social field, in which behavior pursuant to more than one legal order occurs'.[7] While there are differing ways of conceiving legal pluralism,[8] this article will mainly utilise the particular descriptive conception advanced by Griffiths.

Legal pluralism is generally seen as a critical response to the 'ideology of legal centralism'[9] or the belief that 'law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions'.[10] Legal centralism, which is closely aligned with legal positivism,[11] conceives of state law as the sole or supreme normative system (in those cases where it formally recognises other

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[6] See Sally Engle Merry, 'Legal Pluralism' (1988) 22 *Law & Society Review* 869; see Franz von Benda-Beckmann, 'Who's Afraid of Legal Pluralism' (2002) 47 *Journal of Legal Pluralism* 37, 37; Anne Griffiths, 'Legal Pluralism' in R Banakar and M Travers (eds), *An Introduction to Law and Social Theory* (Hart, Oxford 2002) 289; Brian Z. Tamanaha,'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 *Sydney L. Rev.* 375, 390.

[7] John Griffiths, 'What is Legal Pluralism' (1986) 24 *J. Legal Pluralism & Unofficial L.* 2, 2 and 38; see Merry (n 6) 870-873 (distinguishing the new, strong and social sciences view of legal pluralism from the classic, juristic and weak version of legal pluralism); see A Griffiths (n 6) 290.

[8] F Von Benda-Beckmann (n 6) 72.

[9] J Griffiths (n 7) 3.

[10] J Griffiths (n 7) 3 and 4.

[11] Merry (n 6) 874.

normative systems like customary law) within discrete political and geographic boundaries which normally correspond to the territorial limits of nation-states[12] The problem with a legal centralist's essentialist and positivist view of law is that it fades under the glare of history and the bright lights of current realities.[13] Legal pluralism is a 'common historical condition'[14] that existed prior to the rise of the modern nation-state since the belief in the exclusive authority of state law is only of relatively recent origin.[15] Those doing research in colonial and post-colonial contexts, who were the first to use the term legal pluralism to describe situations of plural normativity,[16] also rightfully claim that laws existed within these communities prior to, during and even after the conclusion of colonial rule and its imposition of Western legal tradition. Furthermore, taking into account the effects of globalisation and the increasing use of global communications networks like the internet, it becomes even more difficult to hold the view of the central and exclusive position of state law vis-à-vis other normative systems when the state itself has ceased to have a preordained central place and source of authority in a post-Westphalian world where governmental regulation has given way to the Foucault-based concept of governmentality.[17] Legal pluralism then is a process of deconstructing the

[12] J Griffiths (n 7) 3.
[13] J Griffiths (n 7) 4 and 38-39 (arguing that legal pluralism is a fact while legal centralism is a myth).
[14] Tamanaha (n 6) 376.
[15] See Tamanaha (n 6) 377-381.
[16] Merry (n 6) 869; J Griffiths (n 7) 6-8.
[17] John Morison, 'Modernising Government and the E-Government Revolution: Technologies of Government and Technologies of Democracy' in N Bamforth and P Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart Publishing, Oxford 2003) 157 (authority exists beyond territory, sovereignty and law); see Merry (n 6) 888; A Griffiths (n 6) 298; Anne Griffiths, 'Anthropological Perspectives on Legal Pluralism and Governance in a Transnational World', Thirteenth Annual Current Legal Issues Inter-disciplinary Colloquium, 7-8 July 2008, 3-5; Reidenberg (n 3) 588; see Nina Glick Schiller, 'Transborder Citizenship: An Outcome of Legal Pluralism within Transnational Social Fields' in von Benda-Beckmann and others (eds), *Mobile People, Mobile Law: Expanding Legal Relations in a Contracting World* (Ashgate, Aldershot 2005) 43; Franz von Benda-Beckmann, Keebet von Benda-Beckmann and Anne Griffiths, 'Mobile People, Mobile Law: An Introduction' in von Benda-Beckmann and others (eds), *Mobile People, Mobile Law: Expanding Legal Relations in a Contracting World* (Ashgate, Aldershot 2005) 4 and 6 (but see the argument on the continued relevance of the nation-state and sovereignty).

'[state] law-centeredness of traditional studies of legal phenomena'[18] by examining 'the extent to which others forms of regulation outside of [state] law constitute law'.[19]

Criticisms of Legal Pluralism

While legal pluralism may be seen as a critique of unexamined assumptions of the exclusivity, universality and supremacy of state law, legal pluralism itself, including the appropriateness of the term,[20] has been subject to criticism.[21] Much of the controversy over legal pluralism centres on the perceived inability on the part of those who proceed from a legal pluralistic point of view to clearly distinguish between law and other forms of social control[22] - i.e., legal pluralism's alleged inability to precisely define 'what is law'.[23] Critics of legal pluralism make well-reasoned arguments but these appear to be based on a narrow and imprecise understanding of what legal pluralism is, which stems from their inability or sometimes refusal to break free from a legal centralist mindset.[24] The objective of legal pluralism has never been to define what law is but to describe, contextualise and situate the interactions among plural normative orders.[25] It is less a theory or a conceptual framework but more of a perspective or an analytical approach to describe an empirical state of affairs within a particular social field.[26] It 'does not describe a type of society but is a condition found'[27] in all societies. Moreover, legal pluralism is not an end in itself but is 'a starting point for looking at the complexities of cognitive and normative orders, and the even more

[18] Merry (n 6) 874.
[19] Merry (n 6) 874 and 889.
[20] See Merry (n 6) 875-878 and 889 (the different terms used to describe non-state laws).
[21] See Brian Z. Tamanaha, 'The folly of the "social scientific" concept of legal pluralism' (1993) 20 *Journal of Law and Society* 192; see Simon Roberts, 'Against legal pluralism: Some reflections on the contemporary enlargement of the legal domain' (1998) 42 *Journal of Legal Pluralism* 95; see Gunther Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism' (1992) 13 *Cardozo Law Review* 1443.
[22] Merry (n 6) 871, 878-879 and 885 (problem of immobilisation); A Griffiths (n 6) 307; but see F von Benda-Beckmann (n 6) 47, 54 and 56.
[23] Tamanaha (n 6) 391-392; A Griffiths (n 6) 289.
[24] F Von Benda-Beckmann (n 6) 41-42, 45 and 72 (argues that the misunderstandings stem from the fact that people on both sides of the debate fail to perceive that they have different research questions and objectives); Franz von Benda-Beckmann, 'Comment on Merry' (1988) 22 *Law & Society Review* 899, 900; See Tamanaha (n 6) 391.
[25] Merry (n 6) 889; J Griffiths (n 7) 2 (legal pluralism is a descriptive theory).
[26] J Griffiths (n 7) 2; Von Benda-Beckmann (n 6) 69.
[27] Merry (n 6) 869 and 879; Tamanaha (n 6) 389.

complex ways in which these become involved in human interaction'.[28] As a 'sensitizing and analytical tool',[29] legal pluralism 'challenges the exclusiveness and self-evidence of any single normative system'[30] and opens up new and different ways of seeing, studying and imagining law beyond state law.[31] In sum, legal pluralism is not an end but a beginning of a more open-ended, inclusive and dynamic process of understanding law.[32]

Proceeding from the above clarification, the proper approach then to legal pluralism is not to view it simply as a theory to be tested but as an empirical fact that requires observation and analysis.[33] The purpose of this article, therefore, is not to belabour the seemingly intractable debate of what is *the* concept of law and the definitional morass that inevitably ensues,[34] but to show the importance of perceiving legal pluralism as a 'social fact'[35] within transnational information societies in order to better understand how plural normative orders affect the behaviour of and similarly arise from the actions of inter-networked social actors.

Legal pluralism within the ICT field

Plural Legal Orders

In light of the controversies surrounding legal pluralism in various legal circles, it is surprising that lawyers doing ICT law have apparently found no difficulty recognising the condition of plural normativity and working and conducting research with this plurality in mind. It may be said that it is easier for ICT lawyers to come to terms with the idea of plural legal orders since, due to the effects of globalisation and the profound social changes brought about by new technologies, legal pluralism is not just a theoretical issue to be debated but has become a common feature of an increasingly interconnected world where such plurality poses

[28] F Von Benda-Beckmann (n 6) 39-40, F Von Benda-Beckmann, (n 24) 898.
[29] F Von Benda-Beckmann (n 6) 40 and 48.
[30] F Von Benda-Beckmann (n 6) 69.
[31] F Von Benda-Beckmann (n 6) 37.
[32] See A Griffiths (n 6) 304.
[33] A Griffiths (n 6) 297.
[34] Tamanaha (n 6) 391-392 (Tamanaha believes that the issue of 'What is law?' is incapable of resolution).
[35] J Griffiths (n 7) 297; Merry (n 6) 886 (facts are normative); Tamanaha (n 6) 394.

significant regulatory challenges that need to be understood and addressed.[36] In fact, initial scholarship on ICT law propounded the idea of cyberspace as an autonomous space that is not and could not be subject to the jurisdiction of sovereign states.[37] While the utopian and libertarian bent of earlier works has been abandoned,[38] the core ideas of plural modes of control, multiple sites of power and the involvement of transnational actors and networks, remain central to and constitute the main theoretical and analytical bases of most ICT legal writings.

Lawrence Lessig who popularised the maxim 'code is law' has no trouble using the word 'law' to describe non-state normative orders.[39] Lessig conceives of regulation as the sum of the interactions among four distinct but interdependent modalities that constrain behaviour - law, social norms, the market, and architecture.[40] He believes that architecture or code, which is 'the instructions embedded in the software or hardware that makes cyberspace what it is', acts as a powerful regulator.[41] For Lessig, 'Architecture is a kind of law: It determines what people can and cannot do'[42] and 'code writers are increasingly lawmakers'.[43] He pushes the concept of code as law further by distinguishing between 'East coast code' and 'West coast code', the former being the law enacted by legislatures while the latter is law created by software programmers.[44] Lessig wants to emphasise the significant role computer code plays in regulation because those involved with state law tend to ignore other modalities of

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[36] See Tamanaha (n 6) 386.
[37] See John Perry Barlow, 'A Declaration of the Independence of Cyberspace' 8 February 1996 <http://homes.eff.org/~barlow/Declaration-Final.html> accessed 26 March 2009; see David R. Johnson and David Post, 'Law and Borders - the Rise of Law in Cyberspace' (1996) 48 *Stan. L. Rev.* 1367; Lessig (n 4) 3.
[38] Andrew D. Murray, *The Regulation of Cyberspace: Control in the Online Environment* (Routledge-Cavendish, Abingdon 2007) 7 and 42; see Francois Bar, John E. Richards and Christian Sandvig, 'The Jeffersonian Syndrome: The Predictable Misperception of the Internet's Boon to Commerce, Politics, and Community', March 2000 <http://www-rcf.usc.edu/~fbar/Publications/jeffersonian-syndrome.PDF> accessed 26 March 2009; see Margaret S. Elliot and Walt Scacchi, 'Mobilization of software developers: the free software movement' (2008) 21 *Information Technology & People* 4, 9-10.
[39] Lessig (n 4); see Murray (n 38) 42.
[40] Lessig (n 4) 121, 123-124 and 340.
[41] Lessig (n 4) 121, 342 and 344.
[42] Lessig (n 4) 77.
[43] Lessig (n 4) 79.
[44] Lessig (n 4) 72-73; see Roger Brownsword, 'Neither East Nor West, Is Mid-West Best?' (2006) 3(1) *SCRIPT-ed*.

regulation or believe the state legislation is inherently superior.[45] As he expounds on his idea of four modalities of control, Lessig implicitly recognises the existence of plural and interdependent legal orders within cyberspace.[46] It is quite surprising that, while those with strong backgrounds in legal and social theory cannot or refuse to accept the notion of legal pluralism, someone like Lessig, who views state law as 'a command backed up by the threat of sanction',[47] is able to recognise 'regulation beyond law'[48] and even theorise about legal plurality within the ICT field.

Other academics and writers studying law and technology similarly have no trouble with plural legal conditions brought about by the growing use of global ICT. Faced with 'an unstable and uncertain environment of multiple governing laws, changing national rules, and conflicting regulations', Reidenberg conceives of 'lex informatica' as a parallel rule system to state law which acts as a type of lex mercatoria for the global information society.[49] Like Lessig, Reidenberg believes that technology-based rules exert and are the source of significant regulatory control.[50] He argues that, while the introduction of technology produces regulatory problems, technology can also serve as an effective means of resolving legal conflicts.[51] While lex informatica is considered a distinct system, it shares common elements and features with state law such as having a source of authority, jurisdiction, rulemaking capacity, a quality of customisability and an effective means of enforcement.[52] Reidenberg seems to imply that these shared characteristics give lex informatica a quality of 'law'. However, unlike state law which is limited to the physical area over which the state exercises territorial sovereignty, lex informatica goes beyond territorial borders and has jurisdiction

[45] Lessig (n 4) 126.
[46] See Lessig (n 4) 298-299 and 301 (explains that a person using the Internet is simultaneously and equally subject to the laws of the state and the laws of cyberspace).
[47] Lessig (n 4) 340.
[48] Lessig (n 4) 136.
[49] Reidenberg (n 3) 553, 555, 569 and 592; see Dezalay and Garth (n 2) 40.
[50] Reidenberg (n 3) 582 and 587.
[51] Reidenberg (n 3) 557.
[52] Reidenberg (n 3) 569, 571, 580.

over transnational acts done on the network itself.[53] While state law and lex informatica have overlapping jurisdictions and states may influence the substance of lex informatica by directly or indirectly imposing legal and policy rules on technology developers who reside within their territorial borders, code writers still retain relative autonomy to enact technical rules.[54] But it should be borne in mind that the reverse is also true, lex informatica may similarly constrain state law and its ability to regulate.[55]

Diverse Actors and Multiple Networks and Fields

The plural ways of seeing law beyond state law in the ICT field profoundly affects the legal centralist's concept of law and traditional notions of the source and position of law and legal authority. ICT legal scholars like Reidenberg convincingly argue that 'law and government regulation are not the only source of rulemaking'.[56] Foucault's concept of 'governmentality'[57] is especially significant in the context of transnational inter-networked societies where the state is neither the sole relevant actor nor its territory the only site of power. As Morison says, 'the governmentality approach sees power diffused through a diverse number of sites, both traditional in the sense of law, police, courts, and legal systems and extends by way of families, experts, professions, counsellors, churches etc who are concerned with governmentality, or the 'conduct of conduct'.[58] Legal pluralism then is not just about an awareness of plural legal orders but also a recognition of the diversity of active subjects within multiple social fields. The subjects and the situs of plural legal orders, therefore, are key foci of the study of legal pluralism within the ICT field.[59]

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[53] Reidenberg (n 3) 570.
[54] Reidenberg (n 3) 570-571.
[55] Reidenberg (n 3) 583.
[56] Reidenberg (n 3) 554.
[57] Morison (n 17) 158-159.
[58] Morison (n 17) 159-160.
[59] Jacques Vanderlinden, 'Return to Legal Pluralism: Twenty Years Later' (1989) 28 *J. Legal Pluralism & Unofficial L.* 149, 151-152.

The de-centering and diffusion of authority and power among different social actors and across multiple sites is manifest in what Reidenberg calls the institutional shift where non-state actors, institutions and fora located outside of the conventional governmental framework become the key actors and loci of the regulation and governance of transnational networked societies.[60] Private, technology-focused actors and institutions like the Internet Engineering Task Force (IETF), the Internet Corporation for Assigned Names and Numbers (ICANN), the Internet Society (ISOC), the World Wide Web Consortium (W3C), and the European Telecommunications Standards Institute (ETSI), which are geared toward the promulgation of technology standards and whose memberships are composed of technologists and technical experts, are 'significant negotiators and mediators of global power and control'[61] and have become 'the real political centers of Lex Informatica'.[62] In his study of internet standards processes, Froomkin found that the work of the IETF, which describes itself as 'a loosely self-organized group of people who contribute to the engineering and evolution of Internet technologies…. [and] the development of new Internet standard specifications'[63], is an example of 'complex nongovernmental international rulemaking'[64] that takes place without the impetus or involvement of states but whose influence and impact are felt globally as well as within all localities that are connected to the internet. Froomkin concluded that the IETF's internal rulemaking process 'is an international phenomenon that conforms well to the requirements of Habermas' discourse ethics',[65] and even serves as a

[60] Reidenberg (n 3) 591; Kathy Bowrey, *Law and Internet Cultures* (Cambridge University Press, Melbourne 2005) 44.
[61] Bowrey (n 60) 44; see Charles Vincent and Jean Camp, 'Looking to the Internet for models of governance' (2004) 6 *Ethics and Information Technology* 161.
[62] Reidenberg (n 3) 591 and 592; Bowrey (n 60) 12.
[63] P Hoffman, 'The Tao of IETF: A Novice's Guide to the Internet Engineering Task Force' 16 February 2009 <http://www.ietf.org/tao.html> accessed 26 March 2009, sec. 3.
[64] A. Michael Froomkin, 'Habermas@Discourse.net: Toward a Critical Theory of Cyberspace' (2003) 116 *Harvard Law Review* 749, 752.
[65] Froomkin (n 64) 754.

model for a more democratic and, consequently, more legitimate form of decision-making that state actors should work toward.[66]

ICANN is another notable case of legal pluralism in action within the ICT field. ICANN styles itself as 'a not-for-profit public-benefit corporation with participants from all over the world dedicated to keeping the Internet secure, stable and interoperable…. [and] promotes competition and develops policy on the Internet's unique identifiers'. Like the IETF, ICANN is a nongovernmental actor whose jurisdiction naturally cuts across international and national spheres due to the global nature of the Internet and its accompanying domain name system which ICANN manages. While ICANN claims to be a neutral, global institution exercising 'technocratic self-governance',[67] it has been much criticised and is constantly being accused of buckling under the influence of state policies and national laws, particularly those of the United States, and pandering to the private interests of multinational companies.[68] ICANN's strong and historical connections with the United States Government and its less than democratic and inclusive policies (e.g., not giving the public the right to elect some of its board members) have caused many to question its legitimacy and the power it wields over the internet.[69] These conflicts occur because even if ICANN has a seemingly 'limited mandate to administer certain (largely technical) aspects of the Internet infrastructure…. deciding a right to a domain name is not simply a technical matter…. the right to 'own' names is already governed by established bodies of law'[70] like international and national trade mark laws.

[66] See Bowrey (n 60) 56-61.
[67] Jack Goldsmith and Tim Wu, *Who Controls the Internet?: Illusions of a Borderless World* (OUP, New York 2006) 182; Bowrey (n 60) 50.
[68] Goldsmith and Wu (n 67) 168-171; Froomkin (n 64).
[69] Murray (n 38) 107-108 and 114.
[70] Bowrey (n 60) 50.

While conditions of intersecting legal orders within a social field are not new, their existence and effects become even more salient in the realm of ICT.[71] In the case of ICANN, the pronounced competition and interaction among state laws, social norms, market forces and technical code resulted in the establishment of a new type of non-national law called the Uniform Domain Name Dispute Resolution Policy (UDRP), which is a new method of resolving internet domain name disputes. According to Helfer and Dinwoodie:

> The UDRP is a new legal creature unlike any of its international dispute settlement antecedents. It is a hybrid system containing an amalgam of elements from three decision-making models - judicial, arbitral, and ministerial - and it draws inspiration from international and national legal systems. However, neither the UDRP's substantive content nor its prescriptive force necessarily depend upon the laws, institutions, or enforcement mechanisms of any single nation-state or treaty regime.[72]

While the UDRP has not been spared criticism, it is an example of non-state law being relatively successful in addressing the transnational problem of domain name disputes that state law on its own could not have adequately resolved.[73] Thus, there is an increasing awareness of the need for multiple approaches to regulation and resorting to similar 'hybrid'[74] laws that take into account the inherently plural legal conditions of networked environments.[75] The legitimacy of private normative orderings distinct from state law is gaining acceptance in various transnational ICT fields like virtual worlds,[76] trans-local

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[71] See Lessig (n 4) 300.
[72] Laurence R. Helfer and Graeme B. Dinwoodie, 'Designing Non-National Systems: The Case of the Uniform Domain Name Dispute Resolution Policy' (2001) 43 *William And Mary Law Review* 141, 149.
[73] See Michael Geist, 'Fair.com?: An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP' August 2001 <http://aix1.uottawa.ca/~geist/geistudrp.pdf> accessed 26 March 2009; see Warren B. Chik, 'Lord of your domain, but master of none: the need to harmonize and recalibrate the domain name regime of ownership and control' (2008) 16 *I.J.L. & I.T.* 8; but see M. Scott Donahey, 'The UDRP - Fundamentally Fair, but Far From Perfect' (2001) 6 *Electronic Commerce & Law Reports* 937.
[74] See Andrew Murray and Colin Scott, 'Controlling the New Media: Hybrid Responses to New Forms of Power' (2002) 65 *Modern Law Review* 491.
[75] Helfer and Dinwoodie (n 72) 151-152; see Jose M.A. Emmanuel A. Caral, 'Lessons from ICANN: is self-regulation of the internet fundamentally flawed?' (2004) 12 *I.J.L. & I.T.* 1; see Ethan Katsh, 'Bringing Online Dispute Resolution to Virtual Worlds: Creating Processes Through Code' (2004-2005) 49 *N.Y.L. Sch. L. Rev.* 271.
[76] See F. Gregory Lastowka and Dan Hunter, 'The Laws of the Virtual Worlds' (2004) 92 *Cal. L. Rev.* 1; see Andrew Jankowich, 'EULAW: The Complex Web of Corporate Rule-Making in Virtual Worlds' (2006) 8 *Tul. J. Tech. & Intell. Prop.* 1.

internet communities,[77] cross-border contractual relationships,[78] and international commercial disputes.[79] In fact, the recognition of plural normative orders is so pervasive that a number of European and state laws relating to ICT explicitly take account of the vital role bottom-up approaches such as self-regulation and co-regulation play in effectively governing the ICT sphere.[80]

Legal pluralism within the ICT field therefore requires a paradigm shift and a refocusing of the research inquiry on the social actors themselves and the multiple fields and networks within which plural legal orders occur.[81] A key insight that ICT legal studies may draw from legal pluralism is not a definition of *what* law is, but more importantly, *who* are the active subjects of law and *where* law is to be found.[82] As Griffiths points out, the 'social locus of law is often rather amorphous, overlapping and competing, more or less, autonomous social fields'.[83] Vanderlinden believes that it is 'the individual who is the converging point of multiple regulatory orders which each social network necessarily includes'[84] and argues that an approach to legal pluralism 'centered upon the 'subjet de driot' can be far more fruitful'.[85]

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[77] See Matt Ratto, '"Don't Fear the Penguins": Negotiating the Trans-local Space of Linux Development' (2005) 46 *Current Anthropology* 827; see Gabriella Coleman, 'The Political Agnosticism of Free and Open Source Software and the Inadvertent Politics of Contrast' (2004) 77 *Anthropological Quarterly* 507, 512; see Samuel M. Wilson and Leighton C. Peterson, 'The Anthropology of Online Communities' 31 *Annual Review of Anthropology* 449, 453; Fabrizio Marrella and Christopher S. Yoo, 'Is Open Source Software the New Lex Mercatoria' (2007) 47 *Virginia Journal of International Law* 807.

[78] Thomas Schultz, 'Carving up the internet: jurisdiction, legal orders, and the private/public international law interface' (2008) 19 *E.J.I.L.* 799, 836-837 (emergence of a distinct 'eBay law'); see Ethan Katsh and others, 'E-Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow Of "Ebay Law"' (2000) 15 *Ohio St. J. on Disp. Resol.* 705.

[79] See Mohamed Wahab, 'Globalisation and ODR: Dynamics of Change in E-Commerce Dispute Settlement' (2004) 12 *Int'l J.L & Info. Tech.* 123; see Leon E. Trakman, 'From the Medieval Law Merchant to E-Merchant Law' (2003) 53 *U. Toronto L.J.* 265.

[80] See Damian Tambini and others, *Codifying Cyberspace: Communications self-regulation in the age of Internet convergence* (Routledge: Abingdon 2008); see Directive 2007/65/EC [2007] OJ L 332/27, recital 36 (the European Audiovisual Media Services Directive); see 'Safer Social Networking Principles in the EU', 10 February 2009 <http://ec.europa.eu/information_society/activities/social_networking/docs/sn_principles.pdf> accessed 26 March 2009 (the European Commission favours the approach of industry self-regulation in relation to online content and services).

[81] A Griffiths (n 6) 294; J Griffiths (n 7) 31.

[82] Von Benda-Beckmann (n 6) 71.

[83] J Griffiths (n 7) 30-31.

[84] Vanderlinden (n 59) 151.

[85] Vanderlinden (n 59) 152.

Semi-autonomous Networks

A legal pluralist perspective can clearly provide important contributions to ICT law. This is particularly true, since, despite the difference in the field sites and the subject matter of their researches, ICT legal scholars and legal pluralism researchers share the same basic interest in studying law in relation to various techno-social networks as well as the actors who belong to these networks. Legal pluralism is primarily focused on examining the condition of plural normativity within a 'semi-autonomous social field', which Moore describes as:

> the small field observable to an anthropologist be chosen and studied in terms of its semi-autonomy - the fact that it can generate rules and customs and symbols internally, but that it is also vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded. The semi-autonomous social field has rule-making capacities, and the means to induce or coerce compliance; but it is simultaneously set in a larger social matrix which can, and does, affect and invade it, sometimes at the invitation of persons inside it, sometimes at its own instance.[86]

A semi-autonomous social field (e.g., a standard-setting group such as the IETF) influences and is similarly influenced by multiple and overlapping fields that its members are a part of such as basic familial and social institutions, professional or commercial associations, religious or spiritual groups, the nation-state and even the transnational spheres of affinity. If one replaces the term 'social field' with the word 'network', which Vanderlinden prefers,[87] it becomes readily apparent that most if not all ICT legal scholarship has been or is about the study of law and different 'semi-autonomous networks'. For example, it may be said that the precursor of ICT law, cyberlaw, essentially deals with the study of law and the semi-autonomous global network of computer networks - the internet. The concept of the semi-autonomous network could be useful in resolving the long-running and intractable debate in ICT law of whether the internet can be regulated by state law. Viewed as semi-autonomous

[86] Moore (n 2) 720.
[87] Vanderlinden (n 59) 150; but see Schiller (n 17) 29 (who prefers the term 'social field' over networks).

networks, the internet and the different communities, spaces and phenomena that it gives rise to (e.g., virtual worlds), can be conceived of as being subject to their own internally created norms but are simultaneously subjected to other norms such as state and non-state laws.

This interplay between laws and networks has actually been the subject of notable ICT legal research in recent years. In *The Wealth of Networks*, Benkler explains how:

> Ubiquitous low-cost processors, storage media, and networked connectivity have made it practically feasible for individuals, alone and in cooperation with others, to create and exchange information, knowledge, and culture in patterns of social reciprocity, redistribution, and sharing, rather than proprietary, market-based production…. The networked information environment has permitted the emergence to much greater significance of the nonmarket sector, the nonprofit sector, and, most radically, of individuals.[88]

Through greater and wider use of ICTs such as the internet, networks and communities of non-state actors are able to efficiently generate important social norms, cultural innovation and economic value while being relatively independent of 'property-based markets and hierarchically organized firms' (i.e., governments and companies).[89] In his widely-cited book, Zittrain, explains how the 'generative' nature of the internet is a product of different legal, technical, social and economic decisions.[90] The heated debate over net neutrality shows why the functioning of the internet itself cannot be resolved independently from the multiple legal, social and economic actors and networks that are involved in its constitution and operation.[91] It comes at no surprise then that Marsden, in light of the complex interactions among plural actors, norms and networks involved in net neutrality, recommends the hybrid approaches of co-regulation and self-regulation.[92] While the term 'legal pluralism' was not expressly used in

[88] Yochai Benkler, *The Wealth of Networks* (Yale University Press, New Haven and London 2006) 462.
[89] Benkler (n 88) 463.
[90] Jonathan Zittrain, The Future of the Internet And How to Stop It (New Haven & London, Yale University Press 2008) 20.
[91] See Christopher T. Marsden, *Net Neutrality: Towards a Co-regulatory Solution* (Bloomsbury Academic, London and New York 2010); see also Barbara van Schewick, *Internet Architecture and Innovation* (The MIT Press, Cambridge and London 2010).
[92] Marsden (n 91) 221-222.

the above works, it cannot be doubted that they all tend to support the existence of and the value of studying plural normativity in the digital networked environment.

Given the mutual interdependence between laws and networks, it is essential then to seriously examine the plural normative orders, actors and networks that are attendant in a particular research area. Murray has done interesting work in mapping out the complex regulatory webs and matrixes in cyberspace using systems theory and system dynamics.[93] The author strongly believes that legal pluralism too can serve as an important conceptual lynchpin to the above and future studies on laws and techno-social networks.[94]

The Network is the Law

The use of the metaphor of networks is very appropriate in studying legal pluralism in relation to ICT because it captures the dynamic interconnectedness between the two. For Geertz, who advances a symbolic and interpretative approach to legal pluralism, '"law", here, there, or anywhere is part of a distinctive manner of imagining the real'.[95] Networks are quite useful in imagining law's plural and web-like qualities.[96] Santos conceives of law as 'a network of legal orders'[97] and calls the 'intersection of different legal orders'[98] *interlegality*, which is:

> the phenomenological counterpart of legal pluralism… the conception of different legal spaces superimposed, interpenetrated and mixed in our minds as much as in our actions, in occasions of qualitative leaps or sweeping crises in our life trajectories as well as in the dull routine of eventless everyday life. We live in a time of porous legality or of legal porosity, of multiple networks of legal orders forcing us to constant transitions and trespassings.[99]

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[93] Murray (n 38) 244 and 247.
[94] See Michael Anthony C. Dizon, 'Participatory democracy and information and communications technology: A legal pluralist perspective', *European Journal of Law and Technology*, Vol. 1, Issue 3, 2010 <http://ejlt.org//article/view/30/63> accessed 24 February 2011 (for an extended, in-depth analysis of legal pluralism in relation to the transnational anti-digital rights management (DRM) campaign).
[95] Merry (n 6) 886 citing Clifford Geetz, *Local Knowledge: Further Essays in Interpretative Anthropology* (Basic Books, New York 1983) 184; see Boaventura de Sousa Santos, 'Law: A Map of Misreading: Toward a Postmodern Conception of Law' (1987) 14 *Journal of Law and Society* 279, 286.
[96] See Murray (n 38) 244.
[97] Santos (n 95) 299.
[98] Santos (n 95) 298.
[99] Santos (n 95) 297-298.

As applied to the ICT field, legal pluralism or interlegality is mainly about searching for a semblance of law or a quality of legality in the network of networks - i.e., in the inter-network of statutory lawmaking, administrative rule-making, judicial rulings, acts of co-regulation and self-governance and the taken-for-granted norms of everyday life within the inter-networked society. It is less about replacing a top-down view of law with a bottom-up one, but it entails perceiving conditions of plural legality taking place in all directions of network interactions. It requires imagining law within the ICT field not as a decentralised network with multiple centres but as a 'distributed network'[100] without centres of authority and where power is dispersed and similarly shared by diverse and active participants across the inter-network. As Braithwaite explains, 'To the extent that there are richer, more plural separations within and between private and public powers in a polity, there is a prospect of moving towards a polity where no single power can dominate all the others and each power can exercise its regulatory functions semi-autonomously even against the most powerful branch of state or corporate power'.[101]

If technologists subscribe to the idea that 'the network is the computer',[102] it would not be too much of a stretch for ICT legal scholars to imagine that *the inter-network is the law*. It should be noted though that this is an empirical and not a definitional statement that aims to describes *not what but where* law is 'to be looked for'[103] in complex interactions among plural laws, actors and networks. A legal pluralist approach to ICT law means not just studying the laws of networks but also the networks of laws.

Law and the inter-network

[100] The internet is well-known example of a distributed network where the power and intelligence of the network is located in the periphery and resides in the interactions among the computers that make up the network.
[101] John Braithwaite, *Regulatory Capitalism* (Edward Elgar, Cheltenham UK and Northampton USA 2008) 26 (see the similar concepts of 'governed interdependence' and 'networked governance').
[102] See Spencer Reiss, 'Power to the People' Wired Magazine 4.12 December 1996 <http://www.wired.com/wired/archive/4.12/esgage.html> accessed 26 March 2009 (this phrase is attributed to John Gage).
[103] F von Benda-Beckmann (n 6) 71.

Until recently, legal pluralism and ICT law have been considered separate and unrelated fields. However, as this article has shown, they share many nodes and points of contact. ICT legal scholars have always been comfortable with the notion of plural legal orders influencing behaviour within a particular social field or network, which is the central idea of legal pluralism. Reidenberg's 'lex informatica' and Lessig's principle of 'code is law' provided the starting points in ICT law for thinking about law beyond the laws of the state. Since the late 1990s, a significant number of ICT legal studies have focused on how multiple non-state actors and non-state norms regulate or govern behaviour in the inter-networked society together with or in spite of the state and state laws. On the important topic of networks, this article discussed how the legal pluralist concepts of the semi-autonomous social field and interlegality can be productively applied to ICT legal studies. The author believes that the value of legal pluralism to ICT law will become even more pronounced in the coming years since there is an emerging 'socio-legal turn' in ICT legal studies.[104] Murray's idea of 'symbiotic regulation'[105] and Berman's research on 'global legal pluralism'[106] are some examples of the interesting work that is being done in this growing area where the main focus is studying the interconnections and interactions among plural legal, technological and social networks. Legal pluralism can truly be vital to understanding law and the inter-networked society.

[104] See Murray (n 38) 37 (who calls this field 'socio-technical legal studies').
[105] Murray (n 38) 244.
[106] Paul Schiff Berman, *Law and Society Approaches to Cyberspace* (Ashgate, Aldershot 2007).