



ELSEVIER

Available online at www.sciencedirect.com

ScienceDirect

journal homepage: www.elsevier.com/locate/CLSRComputer Law
&
Security Review

“Rose is a rose is a rose is a rose” – what about code and law?

Rolf H. Weber

University of Zurich, Zurich, Switzerland

ARTICLE INFO

Article history:

Available online xxx

Keywords:

Code

Distributed ledger technology

Law

Smart contracts

Technological disruption

ABSTRACT

Law and information technology are interlinked. Since Lessig’s “code is law” the discussions address the viability of law in technology markets. But recently, the direction of view has changed by way of conversion; in the context of smart contracts, the notion “law is code” became prevalent. The contribution looks into the interdependencies between law and code and pleads for a new functional understanding of law.

© 2018 Dr Rolf H. Weber. Published by Elsevier Ltd. All rights reserved.

1. Introduction

Over the last three decades it has become obvious that information technology and law are increasingly influencing each other, tying them into a complex system of interrelations. Steve Saxby rightly¹ diagnosed in the Editorial of the Centenary Issue of CLSR the following: in contrast to the past, the Journal would move with a fast pace addressing issues that are fundamental to Internet developments and also intersperse with legal risk analysis that epitomises its already broad canvas. In addition, since the Centenary Issue of 2011 the CLSR can be retrieved in a fully searchable electronic version. Therefore, the occasion of the Bicentenary Issue is the most suitable place to honour Steve Saxby with a contribution shedding some light on networking elements between IT and law.

Various phases of the interrelations between IT and law can be distinguished: At the very beginning the question was addressed how and to what extent information technology

could be used in the law professions (legal informatics). Similarly, informational access to law was a relevant topic. These developments have gone hand in hand with a certain automation of legal and decision-making processes.

A disruptive change following some earlier attempts occurred in 1999 when Lessig used the following chapter title:² “Code is law”. Nevertheless, reading his seminal book carefully makes it clear that the short title is embedded into a broader context and should not be understood very literally, however, the new direction is obvious: Legal rules can be incorporated into code and regulation by code emerged as a new phenomenon. Code-determined regulation defines the legal framework that people need to abide by and might allow an *ex ante* enforcement of the respective rules.

More recently, the reverse influence from law to code gained importance. Law relies on code not only for enforcement purposes, but also for drafting and elaborating these rules, for example in the form of smart contracts. Insofar, the traditional term of codification can be replaced by “code-ification” of law.

E-mail address: rolf.weber@rwi.uzh.ch

¹ Steve Saxby was only wrong in his assessment contained in the Editorial of CLSR 17 (2001), p. 362, that it would be impossible to guess who will be editing CLSR after another 100 issues; fortunately, the editor did not change as we now know.

² Lawrence Lessig, *Code and Other Laws of Cyberspace*, New York 1999, p. 3.

<https://doi.org/10.1016/j.clsr.2018.05.005>

0267-3649/© 2018 Dr Rolf H. Weber. Published by Elsevier Ltd. All rights reserved.

The title of this contribution, namely “rose is a rose is a rose is a rose” stems from Gertrude Stein, written in her poem Sacred Emily in 1922; thereby, she wanted to point out that different perceptions and ideas may result in the use of the same word. The development of the last 20 years in respect of the term “code” and the term “law” lead to the question whether these two notions are exchangeable since a movement back and forth can be observed. In other words, this contribution attempts to look into perceptions of code and law which experienced conversions in the recent past.

2. Code is law

2.1. Origins

The role of technology in designing the legal environment is not a completely new phenomenon. Already in the eighties of the last century scholars have linked social sciences to elements of technology. In particular, the role of technological artefacts as an enforcement tool was described at that time since they are not neutral, but inherently political, and since their design ultimately dictates the type of actions that they might enable or prevent.³ These designs have societal implications, supporting certain political structures and facilitating certain actions and behaviours over others.⁴

Equally in the eighties of last century, special attention was paid to the possibilities of using IT for a better handling of legal processes; the debates centred around “legal informatics” (“Rechtsinformatik”) as developed mainly in Germany (in particular by Wilhelm Steinmüller and Herbert Fiedler).⁵ Some first attempts of putting more emphasis on legal informatics have been successful but the approach did not really have a break-through.⁶

In the nineties of the last century, the notion of information as such was added to the discussions about IT and law. Specifically the concept of a “*lex informatica*” was elaborated with the attempt of developing information policy rules through technology.⁷ The *lex informatica* is composed of a set of rules for information flows imposed by technology and communication networks; as key pillars, content, personal information and ownership rights have been identified.⁸

³ Abbe Mowshowitz; Computers and the myth of neutrality, CSC '84: Proceedings of the ACM 12th, Annual Computer Science Conference on SIGC SE Symposium, pp. 85-92 available at <https://dl.acm.org/citation.cfm?id=808144>; Langdon Winner, Do Artifacts Have Politics?, *Daedalus* 109/1980, pp. 121–136.

⁴ Primavera De Filippi/Hassan Samer, Blockchain Technology as a Regulatory Technology: From Code is Law to Law is Code, *First Monday* Vol. 21 np. 12 (5 December 2016), available at <http://firstmonday.org/ojs/index.php/fm/article/view/7113/5657>.

⁵ For a more detailed description of this approach see the overview in Rolf H. Weber, IT-Recht – Bausteine einer neuen Disziplin, *Jusletter IT*, 23 February 2017, ch. 3.1.

⁶ See Rolf H. Weber, *Information Law in Swiss Legal Culture*, Zurich 2017, pp. 1–2.

⁷ Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 *Texas Law Review* 1989, p. 553, pp. 569 et seq.

⁸ See also Rolf H. Weber, *Regulatory Model for the Online World*, Zurich 2002, pp. 92/93.

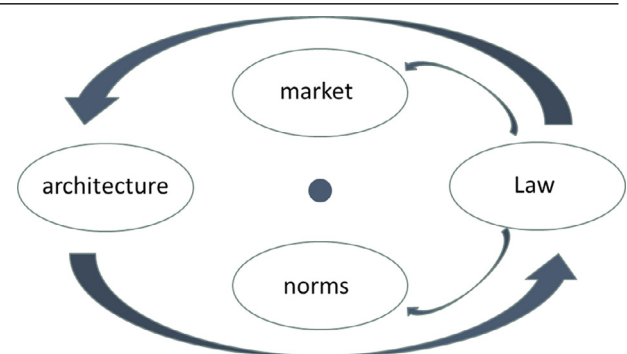
2.2. Lessig's disruption

The theory of a code-based regulation has primarily been developed by Lawrence Lessig. Nevertheless, historically the use of the term “code” goes back to Niklas Luhmann who employed the system-specific “code” as the expression of a binary opposition between a positive and a negative value.⁹ In theory, the closure of the legal system is co-extensive with its coded communicative operations. The code of the legal system is the opposition between “Recht” (legal) and “Unrecht” (illegal).¹⁰

From a pure terminological perspective, code can be a series of instructions and rules designing the work of a computer (IT) or a systematic collection of codified rules and regulations (law).¹¹ Technologically, the code is to be described as a design of the hardware and software elements constituting any kind of network and communications protocols and allowing these elements to interact with each other; the constraints of the code are self-executing and apply without specific intervention from the participants.¹²

According to Lessig, human behaviour is regulated by a complex interrelation between four forces, namely law, markets, social norms, and architecture.¹³ Code solutions, similarly to legal rules, principally reflect “information” that allocates and enforces entitlements.¹⁴ Apart from the well-known phenomena of law, markets, and social norms, the fourth “regulator” (architecture) combines constraints of physics, nature and technology; the architecture determines what the place of the online world will be extent in the life of individuals.¹⁵

At least to a certain, legal rules are influencing technical codes. Such influence can come from legislators and from private rule-makers on a national or international level. Applying this perspective, the chart of the four forces has the following shape:¹⁶



The short chapter title “code is law” does not mean that code equals law, i.e. the equation “code = law” does not cor-

⁹ Niklas Luhmann, *Das Recht der Gesellschaft*, Frankfurt 1993, pp. 60 and 69–70.

¹⁰ *Ibid.*, pp. 165–213.

¹¹ Felix Gantner, „Code is Law“ aber „Is Law Code“?, *Jusletter IT*, 22 February 2018, no. 17.

¹² Lessig (n. 2), pp. 236–237.

¹³ *Ibid.*, pp. 87–88.

¹⁴ See also Rolf H. Weber, *Future Design of Cyberspace Law*, 5/4 *Journal of Politics and Law* 2012, p. 1, p. 4.

¹⁵ Lessig (n. 2), pp. 89–90.

¹⁶ Weber (n. 8), p. 96, based on Lessig (n. 2), p. 93.

Download English Version:

<https://daneshyari.com/en/article/6890391>

Download Persian Version:

<https://daneshyari.com/article/6890391>

[Daneshyari.com](https://daneshyari.com)