



Volume 34 No 3, September 2019

DOI: 10.20473/ydk.v34i3.14948

Fakultas Hukum Universitas Airlangga, Jalan Dharmawangsa Dalam Selatan Surabaya, 60286 Indonesia, +6231-5023151/5023252

Fax +6231-5020454, E-mail: yuridika@fh.unair.ac.id

Yuridika (ISSN: 0215-840X | e-ISSN: 2528-3103)

by <http://e-journal.unair.ac.id/index.php/YDK/index> under a Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International License.

FAKULTAS HUKUM UNIVERSITAS AIRLANGGA

Article history: Submitted 11 June 2018; Accepted 19 November 2018; Available Online 23 August 2019

Towards a Hermeneutics of Pathetic Dots: Finding the Gap Between Law and Reality

Bart Jansen*

b.jansen@law.leidenuniv.nl.

Nyenrode Business Universiteit

Abstract

Jansen outlines the methodology of the brainstorm session concerning the findings of the various studies presented at the SMART conference in November 2017. The central questions at the conference focused on how the behaviour of producers of cotton, fabric, and ready-made garments, can be changed in favour of environmental and social sustainability. Jansen provides an interpretation of the Pathetic Dot Theory, designed by Lessig, who assigns an important role to law. In this contribution Jansen presents an approach that can be used to find out in which ways legal means can be applied to achieve an ideal relationship between men and nature

Keywords: Legal Gap; Behaviour of Producers; Human Behavior.

“A desire for an ideal relation among men which we call justice leads to thinking in terms of an achieved ideal relation rather than of means of achieving it”.¹

Introduction

In November 2017, the contributors of this special edition of *Yuridika* took part in the SMART conference in Surabaya, Indonesia. The abbreviation SMART stands for *Sustainable Market Actors for Responsible Trade* and involves an international project that identifies the factors that enable businesses and other market actors to realise their unfulfilled potential to contribute in their own way to development friendly, environmentally, and socially sustainable business, trade, and investment.

*Mr B. Jansen LL.M. is jurist, philosopher and PhD student at Nyenrode Business University. Mr Jansen is also a Lecturer in sociology and philosophy of law at Leiden University and University of Amsterdam and Guest Lecturer at UNAIR.

¹ Nathan Roscoe Pound, *New Paths of the Law* (University of Nebraska Press 1950) [26].

The SMART project does research that promotes sustainable development within the planetary boundaries.² The central questions at the conference focused on how the behaviour of producers of cotton and ready-made garments can be changed in favour of environmental and social sustainability. For this research, we use the *Pathetic Dot Theory* designed by the American jurist Lawrence Lessig, who assigns an important role to law. In the spirit of the famous American legal scholar Nathan Roscoe Pound, we try not to think as much in terms of an ideal relationship between men and nature, but in legal means to achieve that ideal relationship.³ The research presented in this special *Yuridika* edition aims to find these legal means to reduce the gap between law and reality.

There are boundaries to the idea that law is the only regulator. After all, there are many techniques to escape those boundaries.⁴ When we talk about regulation and enforcement, we usually talk about the political process of legislative and executive institutions that tries to bring changes in societies through a different amount or a different type of legislation. For jurists this is not only the customary, but also the literal and figurative “royal road”.⁵ It is in fact the most common way in which regulations can be understood: legislation as a product of politics. In this context, when legislation is clearly positioned in its most ideal situation and in addition, it is clear who has the authority to enforce the legislation in question. In the most ideal situation, it is also evident how the enforcer can maintain the legislation in question. In practice however, we are not always subject to laws that meet our ideal image of legislation. Should laws in any case touch our ideal, then we must admit that these laws are not maintained in an ideal state. Although laws can touch perfection

² Johan Rockström, ‘Planetary Boundaries: Exploring the Safe Operating Space for Humanity’ (2009) 14 *Ecology and Society*. [32]; Johan Rockström, ‘A Safe Operating Space for Humanity’ (2009) 461 *Nature*. [472-475].

³ Nathan Roscoe Pound (n 1). [26].

⁴ Lawrence Lessig, ‘The Law of the Horse: What Cyberlaw Might Teach’ (1999) 113 *Harvard Law Review*. [501-549]. [502]; Ludwig Wittgenstein, *Philosophischen Untersuchungen* (Basil Blackwell 1953). [201].

⁵ Translated by Evelyn S Shuckburgh (ed), ‘The Bible the “Royal Road” Is the Way Com-manded by the Executive’, *Polybius’ Histories, the monarch fulfills this executive role: The Histories of Polybius* (Since Reprinted 1889). [20:7].

in theory or in the books, the state still exists by the grace of human imperfection.

There is so much more than legislation in the social relations between people; human societies are characterised by numerous other factors, such as political, cultural, religious, physical, and economic aspects. The design and changes of these kinds of institutions are very important. They explain how social cohesion, social inequality, and identity come about. These are other rules than the legislative rules, given by an official who writes and passes laws: the *legislator*. We are also subject to even another type of rules: invisible rules or things that we rarely regard as rules, because they are so ingrained in our daily lives. These are not only regulatory rules that regulate antecedent existing activities; some also *create* the opportunity for certain activities. For instance, one might think of the example of chess, where the rules are constitutive for the game itself in the sense that playing chess is partly enabled by acting in accord with the rules of the game itself. If you do not follow the rules, you are not playing chess.⁶ Following a rule is, just like giving an order, making a statement or playing a game of chess: nothing more than a custom, a use, an institution.⁷ Therefore, there are many customs, uses, and institutions that are part of our daily lives and that create a certain human behaviour.⁸ They not only create but also control and determine a type of behaviour.

The Pathetic Dot Theory

The American lawyer, academic, and political activist, Lawrence Lessig has developed a theory to reflect on this complex matter: The *Pathetic Dot Theory*, or the *New Chicago School Theory*. This socio-economic theory about regulation was introduced in a paper by Lessig in 1998, named “The New Chicago School”,⁹ and later in 1999 popularised in his book *Code and Other Laws of Cyberspace*.¹⁰

⁶ John Searle, *The Construction of Social Reality* (Simon & Schuster 1995).[27-28].[43]; Ludwig Wittgenstein (n 4).[31].

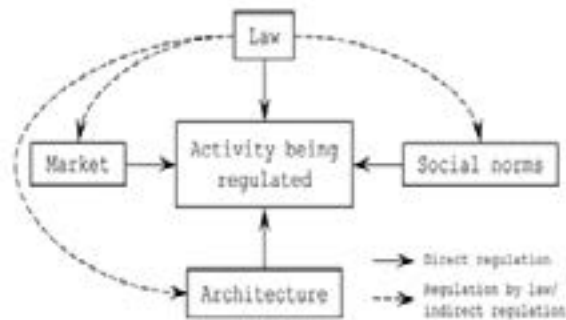
⁷ Ludwig Wittgenstein (n 4).[199].

⁸ John L. Austin, *How to Do Things with Words* (Oxford University Press 1976).[40].

⁹ Lawrence Lessig, ‘The New Chicago School’ (1998) 27 *The Journal of Legal Studies*. [661-91].

¹⁰ Lawrence Lessig, *Code and Other Laws of Cyberspace* (1st edn, Basic Books 1999).

Lessig discusses how four forces regulate lives of individuals: the law, social norms, the market, and architecture (technical infrastructures). The lives of individuals are the *pathetic dots* in questions. These four sorts of boundaries work on the pathetic dots through sanctions amongst other things. These sanctions can be of legal or social nature.



II.A. Sanctions

The law facilitates the legal sanctions, as it stipulates which behaviour can be carried out to avoid legal punishment. The term legal sanction generally refers to the legal punishment measures used to prevent misconduct and to enforce legal norms. In criminal law, sanctions are needed to restore the legal peace that has been disrupted by reprehensible behaviour. In addition, potential offenders must be deterred. In private law, for example, contractual fines are imposed to this purpose.¹¹ An example of a sanction in social security law is the reduction of the unemployment benefit. In international law, the UN Security Council uses economic sanctions to convince other states to comply with its decisions. The primary effect of legal sanctioning is simply the announcement of certain standards of conduct and the imposition of penalties for anyone wishing to deviate from those norms of behaviour. On top of that, deviations are less common. This is a method of social control that maximises individual freedom in a number of different ways within the mandatory legal framework.¹² Social sanctions, as reactions on the part of a society

¹¹ We must, however, be aware that contractual fines can reach the opposite: Uri Gneezy and Aldo Rustichini, 'A Fine Is a Price' (2000) 29 *The Journal of Legal Studies*. [1–18].

¹² H.L.A. Hart, 'Prolegomenon to the Principles of Punishment', *Proceedings of the Aristotelian Society* (Philpapers 1960). [1–26]. [21].

or its majority to a mode of behaviour, which is thereby approved or disapproved, are facilitated by social norms.¹³ Social norms cannot be found in the law, but social norms can certainly be observed in real life.¹⁴ We can make epistemically subjective statements about things that are ontologically objective (for instance someone's individual opinion about a mountain) and similarly, we can make epistemically objective statements about things that are ontologically subjective.¹⁵ If that weren't the case, sociology would not exist. This is the basic assumption of every social theory: there are social facts that we can study in a scientific way. Lessig writes that social "norms constrain through the stigma that community imposes".¹⁶ A *stigma* is an undesirable otherness compared to what we would have expected. It is a generalisation of a specific act or peculiarity of a person to their overall character.¹⁷ The stigma creates a status of the person who stands out from the others.



II.B. Boundaries

In addition to sanctions, the theory of Lessig also focuses on market and architecture. Market and architecture do not impose sanctions but create obstacles. In economics, the term market generally refers to the (real or virtual) place of the gathering of the supply and demand of a certain good. The price of a good that leads to a match between the quantity offered and the quantity demanded, the so-called market equilibrium, is called the market price or the equilibrium price. Talking about boundaries, in the market, we could think of determining a certain product price as a

¹³ Alfred Reginald Radcliffe-Brown, *Structure and Function in Primitive Society: Essays and Addresses* (Free Press 1952).[205].

¹⁴ Robert A. Kagan and Jerome H. Skolnick, 'Banning Smoking: Compliance Without Enforcement.', *Smoking Policy: Law, Politics, and Culture* (Robert L, Oxford University Press 1993). [69-94].

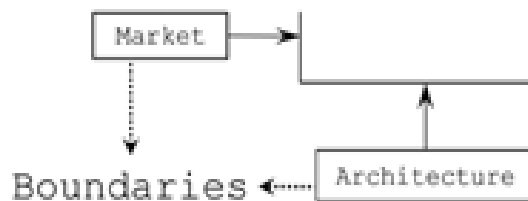
¹⁵ John Searle (n 8).[8].

¹⁶ Lawrence Lessig, *Code: Version 2.0* (Basic Books 2006).[124].

¹⁷ Erving Goffman, *Stigma. Notes on the Management of Spoiled Identity* (Penguin 1963).[8].

boundary option: “[M]arkets constrain through the price that they exact”.¹⁸ When it comes to technical infrastructures, objects are physical as rivers, building materials or walls: “[A]rchitectures constrain through the physical burdens they impose”.¹⁹ Someone who lives on a riverbank will use the river more than someone who does not live on a riverbank.

These four constraints form the space in which we can not only make epistemically objective statements about which legal regulations are most appropriate or most effective but can observe also how legislation integrates or segregates with other forms of regulation that are possibly social, cultural, religious (social standards) or financial, economic (markets) in their core. We can also make epistemically objective statements about ontologically objective matters that affect behaviour, such as walls or rivers, but which we do not see at the first moment.



Although the four limitations are different, they are very clearly dependent on each other. One can counteract or support the other. Architecture or technology can undermine law or social norms. However, it is also possible that the technology supports legal practice.²⁰ Some sanctions and boundaries allow others, whereas other boundaries exclude the possibility of all other type of boundaries. Boundaries work together, although they function differently and the effect of each of those limitations is different. We can call any boundary or sanction a “regulator” and we can consider each regulator as a separate modality of regulation. Every modality has a complex nature. The interaction between these four modalities is therefore

¹⁸ Lawrence Lessig, ‘The Law of the Horse: What Cyberlaw Might Teach’ (n 5).

¹⁹ *ibid.*

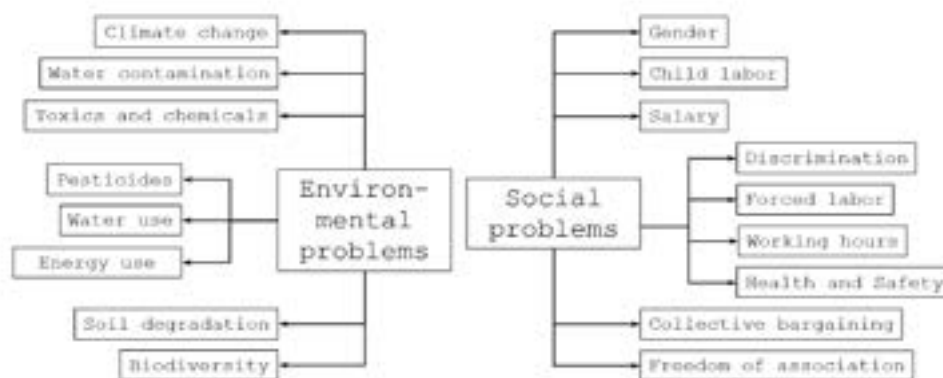
²⁰ Benjamin H. Barton and Stephanos Bibas, *Rebooting Justice: More Technology, Fewer Lawyers, and the Future of Law* (Encounter Books 2017).

difficult to describe.²¹ Nevertheless, for now it is enough to see that the modalities are interconnected and that in a sense they combine to produce the regulation to which the *pathetic dot* in a certain area is subjected.²² Now we can use the same model to describe the regulation of social problems and environmental problems in the manufacturing of ready-made garments.

Conclusion

Provisional Conclusion on this Edition: Environmental and Social Problems

In our empirical research, we discovered an enormous gap between law and reality, regarding the textile supply chain. On the surface, there is often no reason to criticise the laws of countries such as Vietnam, India, Bangladesh, Turkey, Indonesia or the Netherlands. For example, there is orderly legislation on child labour, forced labour, working hours, salary, health and safety, gender and discrimination, freedom of association, collective bargaining, water use, water contamination, toxics and chemicals, pesticides, climate change, soil degradation, energy use or biodiversity.



Positive law, case law or law from other sources, *law in the books* or *black letter law*, is of course important but is not enough to really understand how the law develops, what it does to justice, what the law does not do to it, how the law can be implemented or can be made more effective and sometimes how it can be made less harmful – the so called *law in action*. Another argument to bridge this gap between law and reality

²¹ Lawrence Lessig, *Code: Version 2.0* (n 17).[340-345].

²² *ibid.*[124].

is that when jurists decide on normative problems, express judgments, and announce legislation; this frequently happens with far-reaching concerns, without knowing right from wrong regarding social or environmental mechanisms, pathways, consequences, and side-effects. In such manner legal regulations are created without a reality check.²³

In this special edition of the legal magazine *Yuridika* we bring these gaps to the front using Lessig's socio-economic theory. In each paper a study will be presented related to the specific social and environmental problems of the country concerned. The authors will share information about the laws and regulations that are applicable to the social and environmental hotspots identified in a specific country in the textile supply chain. In addition, all authors in this edition will try to find solutions for the social and environmental problems they denounce.

Bibliography

Alfred Reginald Radcliffe-Brown, *Structure and Function in Primitive Society: Essays and Addresses* (Free Press 1952).

Benjamin H. Barton and Stephanos Bibas, *Rebooting Justice: More Technology, Fewer Lawyers, and the Future of Law* (Encounter Books 2017).

Erving Goffman, *Stigma. Notes on the Management of Spoiled Identity* (Penguin 1963).

Evelyn S Shuckburgh (ed), 'The Bible the "Royal Road" Is the Way Commanded by the Executive', *Polybius' Histories, the monarch fulfills this executive role: The Histories of Polybius* (Since Reprinted 1889).

Frans L. Leeuw, 'Empirical Legal Research: The Gap between Facts and Values and Legal Academic Training' (2015) 11 Utrecht Law Review.

H.L.A. Hart, 'Prolegomenon to the Principles of Punishment', *Proceedings of the Aristotelian Society* (Philpapers 1960).

Johan Rockström, 'A Safe Operating Space for Humanity' (2009) 461 Nature.

———, 'Planetary Boundaries: Exploring the Safe Operating Space for Humanity'

²³ Frans L. Leeuw, 'Empirical Legal Research: The Gap between Facts and Values and Legal Academic Training' (2015) 11 Utrecht Law Review.[23].

(2009) 14 *Ecology and Society*.

John L. Austin, *How to Do Things with Words* (Oxford University Press 1976).

John Searle, *The Construction of Social Reality* (Simon & Schuster 1995).

Lawrence Lessig, 'The New Chicago School' (1998) 27 *The Journal of Legal Studies*.

——, *Code and Other Laws of Cyberspace* (1st edn, Basic Books 1999).

——, 'The Law of the Horse: What Cyberlaw Might Teach' (1999) 113 *Harvard Law Review*.

——, *Code: Version 2.0* (Basic Books 2006).

Ludwig Wittgenstein, *Philosophischen Untersuchungen* (Basil Blackwell 1953).

Nathan Roscoe Pound, *New Paths of the Law* (University of Nebraska Press 1950).

Robert A. Kagan and Jerome H. Skolnick, 'Banning Smoking: Compliance Without Enforcement.', *Smoking Policy: Law, Politics, and Culture* (Robert L, Oxford University Press 1993).

Uri Gneezy and Aldo Rustichini, 'A Fine Is a Price' (2000) 29 *The Journal of Legal Studies*.

HOW TO CITE: Bart Jansen, 'Towards a Hermeneutics of Pathetic Dots Finding the Gap Between Law and Reality' (2019) 34 *Yuridika*.

--This page is intentionally left blank--