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Beyond Sovereignty. Decentralized Knowledge Production and Legal Normativity in the (Post-)Modern Age

Philip Schimchen, M.A.

Research Assistant and PhD-Candidate
Johann Wolfgang Goethe-University Frankfurt am Main
https://ror.org/04cvxnb49
Goethe-Universität Frankfurt, Fachbereich Rechtswissenschaft, 60629
Frankfurt am Main, Germany
E-mail: schimchen@jur.uni-frankfurt.de

Beyond Sovereignty. Decentralized Knowledge Production and Legal Normativity in the (Post-)Modern Age

Philip Schimchen, M.A.

(Johann Wolfgang Goethe-University Frankfurt am Main (Germany))

In the postmodern era, the decentralized knowledge production, which is inherent to culture itself, becomes radicalized by a hyper-structure of technological networks. This intensifies the need to rethink the mediality of law and the genesis and transformation of legal normativity from a network-oriented point of view. Decentralized knowledge production and forms of practice then become the foundation of legal normativity and legal subjectivity, thus leading to a vital shift in legal theory that calls on abandoning the paradigm of a sovereign legislator and turning to a polycentric, process-oriented and flexible concept of law, where the law reflects its status as a normative knowledge regime in its own operations.
Keywords: Legal theory, Poststructuralism, sovereignty, subjectivity, network society, law and knowledge.

Anapus suvereniteto: decentralizuotas žinių pateikimas ir teisinis normatyvumas (post)modernioje epochoje

Philip Schimchen, M. A.

(Frankfurto prie Maino Johano Volfgango Gėtės universitetas (Vokietija))

Postmodernizmo epochoje technologiniai tinklai iš esmės keičia žinių kūrimo procesą – jis tampa vis labiau išskaidytas ir decentralizuotas. Tai skatina iš naujo apmąstyti, kaip teisė veikia, kaip atsiranda ir keičiasi teisės normos, žvelgiant iš tinklaveikos perspektyvos. Decentralizuotas žinių kūrimas ir praktiniai veiksmai tampa teisinio normatyvumo ir subjektyvumo pagrindu, lemiančiu esminius pokyčius teisės teorijoje. Šie pokyčiai reiškia, kad tradicinė teisėkūros samprata, grindžiama suvereniu įstatymų leidėju, užleidžia vietą policentriniam, dinamiškam ir procesiniam teisės modeliui. Šiame modelyje teisė ne tik nustato privalomas taisykles, bet ir pati veikia kaip žinojimo sistema, nuolat prisitaikanti prie kintamų sąlygų.
Pagrindiniai žodžiai: teisės teorija, poststruktūralizmas, suverenitetas, subjektyvumas, tinklų visuomenė, teisė ir žinios

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Introduction

It is a constant belief in legal theory that sovereignty is the foundation of any legal order. The law is then, what the sovereign decides. Although the concept of sovereignty has undergone several political changes throughout its history – ranging from monarchs to parliaments – the main idea, that law and sovereignty are irreversibly tied together, has remained.

Contesting this reliance of law on sovereignty is the starting point of this essay. The aim of this study is to conceptualise a law beyond sovereignty that finds its foundation in decentralized forms of knowledge production. The concept of law is then no longer built on terms such as centrality, stability and homogeneity, but instead on the ideas of decentrality, flexibility and heterogeneity. The mediality of law ceases to be one of a written, *ex-ante* prescription, and turns to multi-centric, process-oriented forms that actively engage with the network structure of knowledge production in postmodern societies.

In order to develop this understanding of law, the essay will tackle the following tasks: 1) to outline how the cycle of sovereignty, legitimacy and law is the core compound of most theories in the canon of European continental legal philosophy, highlighting contractualism, decisionism and theories of democracy in particular; 2) to show how the sovereignty paradigm is challenged by poststructuralist philosophy, where power is no longer depicted as something to be held by a sovereign, but instead as a decentralized force, operating through the networks of society through knowledge structures, governing its subject's actions; 3) on the basis of this, two 'anachronisms of law' must be explained, of which the first one consists in a lack of reception of poststructuralist thought in legal theory, which would call for the development of a poststructuralist theory of law that is necessarily the theory of 'a law beyond sovereignty'. Meanwhile, the second anachronism aims at the modality and mediality of law itself, where the mediality of the continental law as a written, *ex-ante* prescription by a sovereign legislator becomes anachronistic to the knowledge structures of the 21st century; 4) following this, the final task is to consider the nature of the legal order as a normative knowledge order. As such, legal normativity and legal subjectivity derive from the cultural practices of decentralized knowledge production and not – at least not primarily – from the will of the sovereign. Hence, the focus will be shifted from a top-down approach to a bottom-up approach. Decentralized knowledge production is a core characteristic of culture itself. It is based on decentralized interactions that are contributing to society's construction of knowledge. In the postmodern era, network technologies (e.g., platforms, algorithms, generative AI, and *Large Language Models* (LLM)) function as a hyper-structure to these practices of decentralized knowledge production by accelerating them, hence fostering society's ability for self-organisation.

Regarding methods, this paper is strictly located in the disciplinary framework of legal philosophy, which means that no methods of comparative law or doctrinal research will be used. The material focuses on different legal theories, instead of specific legal norms or court decisions. The object of study is the concept of law itself. Methodologically, the line of argumentation proceeds on two levels: on one hand, it is a critique of European continental legal thought, and especially its German manifestation. On the other hand, it is the proposition of a 'new' concept of law for the network and knowledge societies of the 21st century. Hence, there is a descriptive and a normative side to this argumentation. Regarding the descriptive approach, this study aims at facilitating a more accurate understanding of the genesis and transformation of legal normativity and subjectivity, while also proposing a normative alternative to the current concept of law, which will be one that actively engages with the decentralized forms of knowledge production.

Despite its theoretical nature, the topic of this research is of high practical relevance, since it offers an approach to face the challenges that have resulted from the ever-changing, dynamic knowledge

production in the 21st century by the means of law, not just by developing new catalogues of legal regulation that have shown to be inefficient as they do not actively comprehend the dynamics and '*Eigen*-Rationality' of the technologies that are to be regulated, but by incorporating the forms of decentralized knowledge production and their respective media-technologies into the mediality of law itself, thus underlining law's status as a normative knowledge order and opening the way for more flexible self-regulative schemes (Ladeur, 2020, p. 302).

The degree of existing research in this field is quite small. Concerning the linkage of law and culture, significant contributions have been made by, e.g., Naomi Mezey (2001) and Lawrence Rosen (2008). However, many approaches that fall under the framework of 'law as culture' imply a misconception of culture as a homogenising collective form rather than stressing its decentralized knowledge production which roots in the forms of experimental, transformative practices. Regarding a poststructuralist theory of law, in the German legal tradition, there is almost no preexisting research, which shows how innovative this study is. When it comes to the interrelation of decentralized knowledge production and legal normativity, highly informative research has been presented by Thomas Vesting (2021) and Karl-Heinz Ladeur (2020).

In order to give an overview of literature and sources, texts from Thomas Hobbes, Carl Schmitt and John Rawls will be used to illustrate how prominent the cycle of sovereignty, legitimacy and law is in traditional legal theory. The poststructuralist critique of this scheme will mainly draw from the works of French philosopher Michel Foucault. Meanwhile, the concept of the network society has been borrowed from Manuel Castells and will be applied to the law by the support of the influential theories from Thomas Vesting and Karl-Heinz Ladeur. As stated in the methodology section, the source material consists exclusively of philosophical texts and does not include any specific laws, legal commentaries, or court decisions, due to the nature of this paper addressing the framework of legal philosophy.

Lastly, it can be said that this study is highly original in the following three aspects: firstly, it contests a foundational concept of legal philosophy, which is the sovereignty paradigm, and proposes a law beyond sovereignty; secondly, it introduces poststructuralism into the canon of legal philosophy; and thirdly, it outlines a new concept of law for the 21st century that engages with the decentralized knowledge production and its respective media technologies.

1. Law and Sovereignty

In traditional Western legal philosophy, the concepts of law and sovereignty are irreversibly tied together. The sovereign takes on the role of the autonomous legislator, whose will determines the legal normativity. Thus, the sovereign becomes the foundation of the legal order. This argument is present in almost all strains of political thought – no matter how different their underlying political ideologies are. All of them construct the cycle of legitimacy, sovereignty and law, which hence becomes the immanent structure not only of these legal theories, but also of many positive legal orders themselves, which, in the intent to rationalise their structure and power, heavily draw from the argumentative figures that legal philosophy has to offer.

Three currents of legal philosophy will be examined here with the objective of illustrating how present this cycle of legitimacy, sovereignty and law is, and how differently its ideological bias can be depicted. Contractualism, Decisionism and Theories of Democracy will be discussed in the following. The aim here is not to give a full introduction into all these legal theories, but rather to highlight the specific notion of the cycle of legitimacy, sovereignty and legal normativity that each of them presents.

Starting with Contractualism, one can think of philosophers such as Hobbes, Locke, Rousseau, but also Rawls, who, in the second half of the 20th century, presented a slightly different approach, which

still follows the argumentative scheme of Contractualism, but which, e.g., replaced the assumption on a state of nature by the 'veil of ignorance' in what he calls "the original position" (Rawls, 1972, p. viii, 136 ff.). All contractualist theories follow a three-step argumentation, which starts out with the assumption on a hypothetical state of nature in which the human beings are not influenced by any societal or political forms, but their natural traits govern their conduct. This state is then depicted as undesirable or at least less desirable than the societal state. Therefore, step two describes the desire of the individuals to overcome their natural state and to transcend into the societal state. This step implies the willingness of the individuals to agree on the social contract and the virtual act of its 'signing'. Step three then is the established societal state, which had been instituted by the social contract. Describing this procedure as a cycle of legitimacy, sovereignty and law, one might say that the social contract institutes/legitimates a sovereign ruler who functions as a legislator. This interpretation can be observed on a very explicit level in the texts of Hobbes, for example, where the institution of a sovereign, who protects the individuals, is the fundamental goal of the social contract and is legitimised by the will of the individuals to institute such a sovereign. Hobbes also describes that the law is nothing but the will of the sovereign, which is articulated in the form of commands, hence laying the foundation of what was later described as 'command theory' in legal theory (Hobbes, 2018, Chapter 26 "Of Civill Lawes").

In Decisionism, which is a movement in political thought whose most prominent figure is the German jurist Carl Schmitt, the sovereign decision becomes the foundation of any legal order. Schmitt recognizes a pre-eminence of 'the political' before the law. He describes 'the political' as a homogenised, political force which should direct the law. Liberal elements of a legal order, such as the rights of minorities or parliamentary decision making, are seen as obstacles for this political force in the field of law by Schmitt (Dreier, 1999, p. 75 f.). The sovereign becomes legitimised here by his political existence, and the legal order is the result of an authoritative decision, leaving the sovereign will as the origin of legal normativity.

Thirdly, contemporary theories of democracy are presenting a particular notion on the cycle of legitimacy, sovereignty, and law. In their trait to be democratic, they all must necessarily set the people sovereign as the foundation of the political and legal order. The layouts of these orders in democratic theory are broad – ranging from the classical representative, parliamentary democracy over direct democracy to newly discussed forms of radical democracy where the institutionalised forms of political participation become substituted by more flexible and agile political forms. No matter how different the actual practices of law-making are described by these theories, they all set the collective actor 'the people' as the sovereign, who is legitimised by the traditional democratic idea of self-determination through self-governance, and who constitutes legal normativity through democratic procedures, which vary from theory to theory.

These three examples demonstrate that, in fact, the cycle of sovereignty, legitimacy and law is the essential structure of Western political thought and that the sovereign in its form as an autonomous legislator, whose will determines the legal normativity, is present in almost all of these theories establishing a theoretical bond between law and sovereignty. Questioning this bond is the point of departure for this paper.

2. The Deconstruction of Sovereignty in Poststructuralist Thought

In Poststructuralism, a movement in French philosophy in the 1970s/1980s, the concept of sovereignty becomes entirely deconstructed by establishing new ways to conceptualise 'power' which rely on the idea of subjectivity. Power is no longer regarded as something to be held by a sovereign, and it also

abandons the cycle of legitimacy and sovereignty (Foucault, 1982, p. 778; "We had recourse only to ways of thinking about power based on legal models, that is: What legitimates power? Or, we had recourse to ways of thinking about power based on institutional models, that is: What is the state?"). Instead, power is thought of as a discreet force, operating through the webs of society (these 'webs of society' are described by the term 'culture' in cultural theory). It does so by being related to knowledge regimes – the so-called 'dispositifs' in the terminology of Michel Foucault – that exercise power over the subjects (Foucault, 1977, p. 28). A *dispositif* is a compound of knowledge producing discourses, power relations and institutions. Thus, its structure resembles the one of a network. It consists of a variety of cultural practices that constantly reinforce and modify the knowledge structures and therefore the power they execute. Foucault initially conceptualised this power as a subjectifying force that he connected to the idea of discipline. While the term 'subjectivity' in the works of Foucault refers in general to a compound of knowledge and practice that establishes a perspective within the subject that governs its actions, in the context of discipline, it describes a particular process of internalized self-surveillance (Foucault, 1977, p. 138). Another depiction of 'subjectivity' can be found in the later works of Foucault, where, under the framework of the so-called 'aesthetics of existence', the subject makes use of its ontological freedom to act differently than imposed on it by the *dispositif*, hence creating a new subjectivity in the act of practice itself (Foucault, 2005, p. 879). Subjectivity then becomes the result of a process of the practical formation of the self (Foucault, 2005, p. 876). This process is always open, not teleologically restricted, and experimental. It generates new forms of knowledge and practice and may thus lead to shifts within the *dispositifs*, although the focus does not lie on this transformative dynamic towards the *dispositif* but rather on a transformation of the self.

Taking these ideas into account, a sovereign subject becomes an impossibility. Every subject's knowledge and actions are fundamentally intertwined with the network structures of the *dispositifs*. And so is the law itself. The legal normativity is then nothing more but an effect of the knowledge and power structures, making the law an element of the *dispositif*. This opens up a new way to conceptualise law beyond sovereignty, since it is no longer the legislator who autonomously determines the legal normativity but instead the culture – in the sense of human practice – itself.

3. The Anachronism of Law

This observation leaves us with two different anachronisms of law. The first one aims at describing that the modality and mediality of law in the continental legal tradition is opposed to the knowledge structures of the society it is practiced in, while the second one describes a lack of reception of poststructuralist thought in the philosophy of law carried out at Law Faculties, hence letting it become anachronistic to its equivalent in the Humanities.

Starting off with the first anachronism, the continental legal tradition builds on a mediality of law that consists of written legal norms, previously issued by a sovereign legislator (*ex-ante*), which are applied by using the method of 'subsumption', which is an argumentative scheme that examines whether a certain incident falls under a specific legal norm. This procedure implies not only that legal normativity depends on a central, sovereign entity, the legislator – which was already criticised in the previous paragraph – but also bears the idea of a particular knowledge structure which assumes that only what has been fixated in written text can be law, and that it must be exercised according to the – in most cases presumed – will of the legislator. This knowledge structure of norms as prescriptions contrasts the knowledge structures of the postmodern network societies, in which knowledge becomes decentralized and constituted through a series of practice rather than a central body prescribing it by

the means of his sovereign will. Knowledge is multi-centric in the postmodern era, and it is the product of constantly ongoing practical transformation. The idea of sovereign prescription through written *ex-ante* norms becomes anachronistic here.

Furthermore, this specific mediality of law also heavily influences the philosophy of law canon in the continental legal tradition. While most theories function as a justification for the necessity of this particular written, *ex-ante* prescription by a sovereign legislator (cf. Section 2), the ones that offer different approaches to the mediality of law are marginalized. This accounts especially for poststructuralist theories and theories of the 'knowledge society' and the 'network society' (Castells, 1996; cf. Section 3). All these theories question the state's presumably fundamental role in legislation and trace legislation back to decentralized social practices. Thus, they depict a law beyond sovereignty.

4. Legal Normativity and Decentralized Knowledge Production

This leads to the main hypothesis of this essay: Legal normativity and legal subjectivity derive from cultural practices of decentralized knowledge production and not – at least not primarily – from the will of the sovereign. This implies that the genesis and transformation of law must be conceptualised as a bottom-up instead of a top-down process (Ladeur, 2020, p. 299). It is not a sovereign entity prescribing from a somehow external position, what the law is for its subjects, but it is the subjects themselves who immanently (re-)produce and transform legal normativity. A law that engages with the network structure of knowledge regimes is based on heterarchy and decentrality instead of centrality, stability and homogeneity – as the characteristics of the sovereignty paradigm could be summarized.

In order to develop a more profound understanding of a law that incorporates network structures, further light must be shed on the peculiarities of the network structure in relation to the terms 'culture' and 'postmodernity'. Culture in an ethnographic sense refers to the sum of all forms of human practice. According to Bernhard Waldenfels, especially the practical interaction with things, media and technology creates aesthetic experiences of self-transformation (Assmann, 2008, p. 13). This idea can be linked to Foucault's concept of the aesthetics of existence. It then outlines a specific mode of transformative practice that leads to shifts in the knowledge regimes. These practices are experimental, subjectivity-creating processes. If culture in this regard is less about collective forms and identity, and more about decentralized, interactive practices that (re-)produce and transform knowledge, then culture itself becomes a network. This idea is also supported by the theory of *dispositifs* and knowledge regimes as explained in Section 3, since all forms of knowledge production are dependent on cultural practices.

Then, if all cultural knowledge production functions like a network, what makes the postmodern era distinct from other historic periods? It is precisely what could be called a "radicalization of decentralized knowledge production" that takes place in the postmodern era. The decentralized knowledge production inherent to culture itself meets a 'hyper-structure' that is an explicit network that engages with the networks of culture and accelerates their information flow and organization as well as their ability to construct flexible orders. This network-hyper-structure consists, first and foremost, of new technologies that are incorporating decentralized knowledge production such as social media platforms, Artificial Intelligence, and *Large Language Models* (LLM). By this, the information structures of the 21st century rely heavily on constructing a hyper-structure of cultural decentralization. In consequence, the question for 21st century legal theory must be, what a law would look like, that offers an equivalent structural approach.

This issue is surely not properly addressed by discussing the legal politics around new technologies and their regulation on a doctrinal level. The challenge of 21st century legal theory calls on conceptualising

a new mediality of law, that is built on multi-centrism, process-orientation and flexibility and reflects its characteristic of being a normative knowledge regime itself in its own operations (Ladeur, 2020, p. 319). To achieve such an understanding of law, one must first abandon the belief that law consists only of what is issued by a sovereign legislative entity, and shift back to the idea that law's mediality is a product of knowledge regimes and power structures itself and can thus be changed. Apparently, law has no predetermined mediality. As Friedrich August Hayek puts it in his study *Rules and Order*: "Law is older than Legislation" (Hayek, 2013, p. 70). He indicates that law is not bound to any specific form of legislative procedure, nor to a state as such. It is something that social groups inherently produce as an integral part of their cultural life and activities. This is also where cultural theory and liberal theory align, when it comes to conceptualising law beyond the state and beyond sovereignty, retracing it back to decentralized practices in society and the idea of self-organization ('spontaneous order' in the words of Hayek). The evolving and flexible structures of law are then built on individual freedom that opens up fields of innovation.

One example where parts of this new mediality of law can already be observed are specific contract schemes in the Silicon Valley. In order to tackle the complexity and discontinuity of development processes in the high technology sector, the private actors have developed flexible contracts that engage with the process by establishing mechanisms that process changes automatically and shift to an *ex-post* management, that abandons an *ex-ante* prescription (Vesting, 2021, p. 197 ff.).

Conclusion

Of course, Silicon Valley contract schemes are not the end of the line. The case just exemplifies how certain mechanics of a network mediality of law could potentially be incorporated into concrete legal structures. Discussing a specific example should never hide the fact that rethinking the mediality of law is a fundamental task which requires an interdisciplinary approach and a radical perspective. The following aspects, outlined in this study, are vital for this endeavour:

Firstly, law itself must be described as a normative knowledge order. Hence, the assumption that legal normativity fundamentally differs from other forms of normative knowledge due to its foundation in a specific legislative procedure must be dismissed. The legislative process itself and its main protagonist, the legislator, are both embedded in knowledge regimes – *dispositifs* in the terms of Foucault – that are socially immanent constructions and are therefore subject to exploration and transformation through practice. The legislator is not a sovereign and autonomous entity whose will determines the legal normativity, but the legislator oneself is just an effect, a subject so to speak, of/to the knowledge producing discourses and their immanent power relations.

Secondly, the transformation of knowledge regimes and therefore also of the legal normativity lies in decentralized forms of practice. These are in particular transgressive forms of practice that push the boundaries of knowledge by creating new subjectivities in the act of practice itself, being a transformation of the self by an 'aesthetics of existence' (Foucault). Decentralized forms of practice, that are at the core of cultural knowledge production, are then becoming the foundation of the legal order.

Thirdly, considering this, a new mediality of law can be projected that leaves behind the ideal of written, *ex-ante*, prescription and turns to a law that engages with the network dynamics of cultural knowledge production that are based on flexible nodes of decentralized practice. This network structure law is polycentric and process-oriented, and it fully abandons the ideal of a sovereign legislator. It is a concept of law that engages with the knowledge structures of the 21st century and their network technologies. It is not trying to oppose them by sticking to prior forms of prescriptive legal regulation,

but instead actively engages with them and incorporates their functionality within itself. This process ultimately leads to a self-transformation of law: The law then reflects its own status as a normative knowledge regime in all its operations.

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Philip Schimchen, M.A., Research Assistant at the Chair of Public Law, Media Law and Media Theory (Prof. Vesting, Goethe-University Frankfurt), is pursuing a PhD in Legal Theory with a thesis called *Law as Cultural Practice*, which is funded by the German Academic Scholarship Foundation (Studienstiftung des deutschen Volkes). He is currently a Visiting Doctoral Student at Universidad Complutense de Madrid, Faculty of Philosophy and he has previously studied Philosophy, Cultural Studies, Political Science, Romance Philology and Law in Frankfurt, Dortmund, Barcelona, Cádiz and Lisbon.

Philip Schimchen, M. A. – Frankfurto prie Maino Johano Volfgango Gėtės universiteto Viešosios teisės, medijų teisės ir medijų teorijos katedros (vadovas – prof. Vestingas) mokslinis asistentas, rengia teisės teorijos srities daktaro disertaciją „Teisė kaip kultūrinė praktika", kurią finansuoja Vokietijos akademinių stipendijų fondas („Studienstiftung des deutschen Volkes"). Šiuo metu yra vizituojantis doktorantas Madrido Komplutensės universiteto Filosofijos fakultete. Anksčiau studijavo filosofiją, kultūros studijas, politikos mokslus, romanų filologiją ir teisę Frankfurte, Dortmunde, Barselonoje, Kadise ir Lisabonoje.