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Community and Law: Identifying the Locus of Law in Community

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Community and Law: Identifying the Locus of Law in Community

Abstract: "Community and law approach" provides an illuminating insight into alternative legal orderings within a social unit. The comprehensiveness of legal systems within a community or a social unit, provides a suitable basis for a structural framework of alternative legal systems or Legal Pluralism, which is missing in the discourse on Legal Pluralism. "Identifying the locus of law within a community", provides us with an indication on how autopoietic a legal system can be within a social unit, taking into account the social rootedness of legal norms.

I. Introduction

"A legal concept of community is devised to highlight the need for regulatory expression of communal relationships of trust; it recognizes the variety of these relationships and the diversity of forms of their expression. Consequently, it facilitates a pluralistic view of law. It recognizes the importance of order and coordination and the present, though not necessarily permanent, dominance of state law in defining and shaping the regulatory conditions of community."[1]

The ambiguity of the concept of legal pluralism is mainly the result to lack of a comprehensive organizational and/or institutional framework, which may clarify how these legal norms are generated and maintained. Although many definitions and perspectives of Legal Pluralism has passed the revue in the last decades, none of them actually has tackled the issue of the need for a comprehensive and a sound concept of legal pluralism. The main criticism to the concept of Legal Pluralism was its ill-founded analytical foundation.

In this paper I would like to argue that the concept of community, as a social unit, will provide us to overcome this lacuna in defining law as a plural concept. The comprehensiveness of this social unit will exemplify how certain autonomous legal systems can reside without keeping hold on a state system. Moreover, I want to assert that law is being nourished and supported within its social environment, though at the same time comprises a distinct phenomenon than merely a social conduct. In other words, law is part of the social organism but cannot be equated with just social conduct or behaviour.

[1] Roger Cotterrell, *A Legal Concept of Community*,12 Can. J.L. & Soc. 75, 1997

This is why the purpose of this paper is to try to locate the phenomenon of law with a social unit like community. I want to analyse how *community* or *association* generate legal norms (rules) and how they manage to maintain the legal order by their peculiar way of enforcement. More in particular, I want to locate the locus of law, within this overarching social unit, community.

As Cotterrell has put it: "To link law and community is thus to explore continually shifting patterns of social variation expressed or reflected in legal diversity. It is to hold out the possibility of theorizing law as a social phenomenon that is something other, or something more, than the law of the nation state as a political society."[2]

Consequently, I will embark on my inquiry with defining the concept of community in a way with which I can work with I this paper. The concept of *community* has been scrutinized from many fields, like sociological, anthropological, political and economical. Even recently, legal scholars started to show some interest in the concept of *community* as an organizational form, which can accommodate legal norms. This is a result from the effects which has arisen from globalisation and subsequent mobility of human beings, making it easier for communities to travel around and settling down. After this attempt of defining the concept of community, I will continue elaborating the typification, which Ferdinand Tönnies has used for his sociological research.

This typification of Tönnies between Gemeinschaft and Gesellschaft (society), illuminates the postion and the difference which Gemeinschaftt and Gesellschaft expose towards each other. It is within this dichotomy between Gemeinschaft and Gesellschaft, in which I can explain clearly the internal differences between laws as we adopt in the modern society and law with a *community*.

Departing from the Tönnies distinction, one of my arguments to identify the locus of law in community, is to explain the difference of legal framework that underlies a Gemeinschaft and Gesellschaft. Namely, I will claim that the difference between these two frameworks is based on *Trust* on the one hand and *Logical* relationship, on the other.

Trust relationship is one the essential characteristic of a *community*, since it forms the basis for many actions, simply because of the fact that men trust each other, either because of the kind of relationship they maintain or the fact that they share the same value. I will explain this further. I will also try to explain for example why trust in economics is conceived as an important 'social capital'.

[2] See Roger Cotterrell, p.78

Furthermore, I will emphasise on the importance of value in maintaining and enforcing the *trust* relationship. Moreover, I will explain the difference between *Values* as opposed to merely (system) of *rules.* People from the same community, either religious or ideological, or from any other grounds, base they actions mainly on the same *values*. Those *values* are so important because they constitute one the elements to be part from the community. *Values* are guiding lines, which induce an individual to act in a certain way.

Eventually, I will try to explain in this paper how the enforcement of this so-called, *trust* relationship and *values* are being endorsed and entrusted to a certain institution. *Alternative Dispute Resolution* explains, which methods can be adopted to enforce rules within a community. Since trust-based relationship constitutes the cornerstone of this relationship, the subsequent aim of ADR is the restoration of this trust-based relationship. In contrary to the kind of court-based (judicatory)-system we are familiar with, ADR is not based on mathematical construction of legal rules or legal reasoning, which will enforce justice. Instead they will employ all methods that will enable the restoration of trust between members, which underlies their relationship.

Since it is impossible to point out the source or resources of law within a community, by juxtaposing all the above-mentioned three component to societies equivalent, namely *logic*, *rules* and *judicatory system*, I am able to identify the locus of law within community.

II. Concept of Community

A *community* is, as I would delineate it, a social unit, which keeps its outer boundaries closed for outsiders to enter and insiders to leave. It is a social unit, which is a closed, unified system, and because of this it will provide advantages for their members. *Community* is by far not a romantic concept (as Teubner, David Nelken, Steven Brint argue)[3], but a concept, which is as ancient as humanity and is founded the virtue to survive.

A *community* is established for people, sharing common features, which might be language, culture, religion, and profession and so on. In this sense, the community is therefore a closed system. It is made only for people identical on certain aspects, and does not have an open door policy or an exit strategy. In this sense it resembles, as Cotterrell made the comparison, with Carl Schmitt's[4] Friend and Foe dichotomy. The difference between other *communities* is a matter that reinforces the identity of the *community.*

[3] David Nelken, Eugen Ehrlich, Living Law, and Plural
Legalities, Legal Pluralism, Privatisation of Law and Multiculturalism, Volume 9, Number 2 July 2008 Article 6; Günther Teubner, *Two Face of Janus: Rethinking Legal Pluralism*; Steven Brint, *Gemeinschaft Revistied: A Critique and Reconstruction of the Community Concept*,

[4] Carl Schmitt, *Der Begriff des Politischen* (München 1927)

A more elaborate, but a quite simple definition of what community should denote, is provided by Tönnies, on whose conception of community I will base my exploration on the locus of law within community. Tönnies argues namely that "The group which is formed through this positive type of relationship is called an association (Verbindung) when conceived of as a thing of being which acts as a unit inwardly and outwardly. The relationship itself, and also the resulting association, is conceived of either as real and organic life- this is the essential characteristic of the Gemeinschaft (community)- or as imaginary and mechanical structure- this is the concept of Gesellschaft (society)".[5]

Althussius on the other hand gives us a more political, and strangely enough a more sophisticated outline of what *community* signifies. According to him, "The community is an association formed by fixed laws and composed of many families and collegia living in the same place. It is elsewhere called a city in the broadest sense, or a body of many and diverse associations.--- Furthermore, this community is either rural or urban. A rural community is composed of those who cultivate the fields and exercise rural functions."[6]

Steven Brint tries to give us a more elaborated, sociological account of what community actually entails and gives a detailed outline on which parts community is composed of. He defines community as "…aggregates of people who share common activities and/or beliefs and who are bound together principally by relations of affect, loyalty, common values, and/or personal concern (i.e. interest in the personalities and life events of one another. Motives of interaction are thus centrally important in this definition, as they were for Tönnies. However, at least one outcome of these motives is also important. Because of the relative informality and consummatory character of communal relations, communities are based on a sense of familiarity with others whose full personality is relatively well known and not predominantly shaped by formal role relations. Thus, while a sense of community can be sustained in aggregates of as many as tens of thousands, true communities of place are invariably relatively small. It is perhaps unnecessary to add that not all communal social relations are amicable; a sense of security in the face of disliked others is deeply characteristic of communal relations."[7]

Robert Sampson on the other hand tried to distinguish the concept of *community* further and gave a further clarification in how communities are erupted. He argues, "The systemic model of community social organization conceptualises the local community as a complex

[5] Talcot Parsons, *Theories of Society*, Tönnies *"Gemeinschaft und Gesellschaft",* p.191
[6] Johannes Althusius, Politica (1614), p. 40
[7] Steven Brint, Gemeinschaft Revisited: A Critique and Reconstruction of the Community Concept, p.9

system of friendship and kinship networks and formal and informal associational ties rooted in family life and ongoing socialization process (Kasarda &Janowitz 1974). The term systemic highlights the theoretical focus on the system of social ties embedded within ecological, institutional, and normative community structures. The basic hypothesis derived firm this conceptualisation is that length of residence is the key exogenous factor that influences attitude and behaviour toward the community. "[8]

Above, I have tried to give some definitions of the concept of community in order to have a kind of view in which way we have to look when we start to explore to the locus of law in community. A clear concept of "community and Law" approach is not given. It leans very much on sociological account of *community* and is therefore very much dependant on sociological description of *community.*

Still Cotterrell has made an attempt to provide at least a kind of guidelines of where to look at if we try to apply the concept of community in legal perspective.

Cotterrell has tried to make a distinction in different forms of communities following Max Weber's concept of community. He argues that: "Following this schema, community can be associated, first, with habitual or traditional forms of interaction: with the often accidental circumstance that people find themselves coexisting in a shared environment. This is *traditional community.* It includes what sociologists often refer to as "local community"- the coexistence of people in a defined geographical space; a neighbourhood, for example. But an empirical correlate of traditional community is also found in the sharing of language. A linguistic community, in ordinary terminology, is a group of people who have a particular language or dialect in common. Often, of course, local and linguistic groups reinforce each other's identity. Secondly, community may be associated with a convergence of interest among a group. This is *instrumental* community, or community of interest. Is closest empirical correlate is a typical business community, or perhaps the original European Economic Community. Thirdly, community may refer to the sharing of beliefs or values that stress solidarity and interdependence. This can be termed *community of beliefs.* Religious congregations, churches or sects of various kinds most obviously approximate this type. Finally, the uniting of individuals by their mutual affection may be thought of in terms of community. This type can be called *affective community*. The legal philosopher John Finnis has noted that this is the kind of community in which "groupness" in itself is most important; indeed, "the most intense form of community [is] the friendship of true friends." These four ideal types correlate indirectly with Max Weber's four ideal types of social action. Their

[8] Robert J. Sampnson, Linking the Micr- and Macrolevel Dimensions of community Social Organization 70 Soc. F. 43 1991-1992 .

formulation is an effort to extent Weber's typification of action into a typification of basic forms of collective involvement and interaction. Thus, traditional community correlates with Weber's type of traditional action, instrumental community with purpose-rational action, community of belief with value-rational action, and affective community with affective action."[9]

Thus, the concept of community, as I am utilizing it in this paper has nothing in common with the *communitarian* political ideology. This approach is not a political concept but a more sociological/anthropological one, which tries to determine the inner social organization that exists within the society. Society, as such is a concept, which is emanated from a political theoretical approach that departs from the ruler-ruled dichotomy. However, society is not just a blank accumulation of individuals, which are kept together by the state, in the contrary. Society is further demarcated by different groups, organizations communities and association that has a greater influence on shaping and influencing the individual than the state alone.

Society or 'Gesellschaft' as Tönnies phrased it, is a creation of state, which is comprised of a collection of different individuals altogether. Society is shaped in such way that it suits the governing structure of the state. This also explains why any other intermediary governing structures like communities are not allowed within the state, at least officially. However, due to global changes around the world, which increased the mobility of different communities from third world countries to the west, this firm institution of a society got challenged somehow. Because of this demographic changes around the world, community as a concept gained importance in sociological research, into the nature of its institutional framework. Community, as a vital factor in society, has been ignored not only from a sociological point of view, (or at least not enough attention has been attached to this concept) but especially from legal point of view. Blood and honour revenge is for example one of the customs, which is the result of communal bondage, which an immigrant has with its kin, or community, which can be traced all the way back to their village.

The importance of "Community and Law" approach is twofold. First of all it tries to exemplify the social and legal framework of that particular society. By having a clear picture of how this framework works, it enables the state, at least, to develop a policy that is adequate and effective enough to deal with problems that arises because of it. Especially in United Kingdom, Germany, France, The Netherlands and Scandinavian countries, there is a need to understand how this community structures work, in order to deal with the consequences that arises because of the clash between the community structure and society. In this kind of

[9] Roger Cotterrell, *A Legal Concept of Community,* P.81 12 Can. J.L. & Soc. 75 1997, p.9

situation, criminal or immigration law does not provide adequate solution to solve the conflict. They will only deal with the symptoms of the problems.

Secondly, "Community and Law" approach will enable us to understand 'law' as a socially embedded phenomenon, however without discarding the phenomenon of law as such. Law cannot be merely perceived as a social process, like social scientists has done. Being socially embedded means that it derives its legitimacy from the social environment, but it does in no way mean that it is a sociological phenomenon. This is why my aim in this paper is to identify and locate "law" within the community structure instead of explaining the whole social process.

III. Tönnies Typology between Gemeinschaft and Gesellschaft[10]

1. The Theory of Tönnies and the distinction between Gesellschaft and Gemeinschaft

Tönnies typification of Gemeinschaft and Gesellschaft enables me to contrast the structural settings between community and society, in order to clarify the distinction between modern law and law within community. However, there are some minor remarks, which I want to expose first, before embarking on the issue.

One of the criticism against Tönnies' analyses, which I want to refute, is that his typification is simple, romantic and not appropriate for sociological, scientific research. As Brint asserted "Tönnies' highly connotative approach invited confusion about the defining coordinates of community, and it encouraged the tendency of subsequent writers either to romanticize or debunk community, rather than to approach the issue of community and community types in a rigorous analytical spirit."[11] Because these typifications are not scientifically elaborated and outlined it just reflects certain sentiments of some who yearn for "the good old days".

The problem with sociology and with certain institutions which has to be unravelled within sociology, is that one has to start with simple typification in order to embark scientifically on a particular issue. Making first steps in sociological inquiry requires simple typifications in order to demarcate the research object carefully. From there on one can continue exploring or clarifying it further, or outlining research area within a certain topic. Moreover, only after certain simple typifications one can continue doing some empirical scientific work, based on this typification.

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[10] Talcot Parsons, *Theories of Society*, Tönnies *"Gemeinschaft und Gesellschaft",* p.191; Helmuth Plessner, René König und Joseph R. Gusfield, *Grenzen der Gemeinschaft*

[11] S. Brint, *Gemeinschaft Revisited: A Criticque and Reconstruction of the Community Concept*, Sociological Theory, 2001, p.3

Because "Community and Law" approach is still in its infancy, Tönnies' typification will therefore also be used in my paper in order to clarify certain elements, which exists within community structure as opposed to "society" structure". This typification is not used as scientifically proven facts, but tools to embark on a certain research area. Since I want to exemplify how *community* as a structure generates legal-normative rules, it is therefore essential to me to put it against society's structure. Only in this dichotomy we will understand how community can generate legal norms, because there is no other way. And from here on one can continue further to make his point by attaching an example to illustrate the theory that is developed.

Concerning the claim, which is generally aimed at the advocates of *community* approach (like Eugen Ehrlich) that Tönnies adheres to a kind of romantic nostalgic theory of community, is based on a presumption and cannot be derived from facts. As Associationalists like Althussius, Gierke, Paul Hirst and Eugen Ehrlich has stressed, *community* as a concept is not ideal theory but based on reality and facts, which is all but romantic. Community is an organization of individuals who come together to cooperate. In its traditional, rural, peasant-like version, *community* aims at survival. Every sociologist is aware of the oppressive nature of communities, which might be oppressive against individuals. This is mainly the reason why community is unravelled, in order to understand how it functions. I also have to add that in a political environment in which community as sub-unit is precluded, it is off course the task of sociologists to put it back on the agenda again stressing on certain attention and stressing on its importance.

The alternative to Tönnies' concept of community is that of Durkheim as proposed by Brint. According to Brint: "Durkheim's work represents the most important alternative to Tönnies' typological approach. Like Tönnies, Durkheim[12] was impressed by the importance of community relations for equipping human beings with social support and moral sentiments. Durkheim's Conceptional breakthrough was to see community not as social structure or physical entity but as a set of variable properties of human interaction that could be found not only among tradition-bound peasants of small villages but also among the most sophisticated citizens of modern cities."[13]

For scientific sociological inquiry, I would agree with Brint and adopt Durkheim's concept of community as an appropriate concept. However, Durkheim's concept does not contribute to my inquiry in identifying the locus of law within *community*. It would be an apt

[12] Emile Durkheim, *The Elementary form of Religious Life*, transl. By Joseph Ward Swain; Mustafa Emirbayer, Emile Durkheim: Sociologist of Modernity, Blackwell Publishing
[13] See, Steven Brint, p.3

theoretical foundation for empirical research, but would not help me in explaining how *community* generates legal norms.

2. Gemeinschaft and Gesellschaft

According to Tönnies "All intimate, private, and exclusive living together, so we discover, is understood as life in Gemeinschaft (community). Gesellschaft (Society) is public life-it is the world itself." Gemeinschaft, according to Tönnies should therefore be perceived "…as a living organism, Gesellschaft (society) as a mechanical aggregate and artefact. Everything real is organic in so far as it can be conceived only as something related to the totality of reality and defined in its nature and movements by this totality."[14]

The importance and the necessity to address the sociological anatomy of communities is that (just like we have to address pluralistic legal systems in legal science), is the fact that the natural organizational structures, which already exits prior to societies structure, is being overshadowed by the society as an organizational structure. This also explains that when legal scholars or sociologists who are trying to explore in the nature of community as a natural organization, they are being blamed of being "romantic".

Community as an organization is established based to serve "necessity" of people, while society is perceived as an artificial construction of the state to enable individuals to pursue their lifehood the way they please. This artificial construction is characterized by Logical construction between individuals. Logical relationships constitutes the cornerstone of Gesellschaft as depicted by Tönnies, and is artificial to the extent that the state has to maintain it by enforcing its power.

According to Tönnies, community or Gemeinschaft is created by "…blood, denoting unity of being, is developed and differentiated into Gemeinschaft of locality, which is based on a common habitat. A further differentiation leads to the Gemeinschaft of mind which implies only co-operation and co-ordinated action for a common goal."[15]

Departing from this definition he distinguishes community in "…1) kinship, (2) neighborhood, and (3) friendship as definite and meaningful derivations of these original categories."[16] Although not exhaustive, this distinction provides us the "spheres" of influences, in which communities (or associations) might arise.

[14] Talcot Parsons, *Theories of Society*, Tönnies *"Gemeinschaft und Gesellschaft",* p.191; Helmuth Plessner, René König und Joseph R. Gusfield, *Grenzen der Gemeinschaft,*p.192
[15] Idem
[16] Idem

Living in a community emphasises on the "locality" or proximity of the environment. Everything is kept simple and compact in contrary to life in a society, Gesellschaft. In a Gesellschaft everything is endless, and big. Moreover, cosmopolitanism for example, can be perceived as a big society rather than a big community. Since cosmopolitans do not know each other and they also would not bother to know. Paradoxically this is why they are cosmopolitans. They reside everywhere, without getting affected by the environment. They can settle down and feel at home wherever they are.

Communities, in contrary to societies, are created on the "sameness" principle of their community members. They live in the same territory, they speak the same language, and they have the same habits the same customs. As Sampson argues: "The ordinary human being, therefore- in the long run and for the average of cases-feels best and most cheerful if he is surrounded by his family and relatives. He is among his own (chez soi)"[17]

Because community structure is comprehensive "Neighbourhood describes the general character of living together in the rural village. The proximity of dwellings, the communal fields, and even the mere contiguity of holdings necessitate many contacts of human beings and cause inurnment to and intimate knowledge of one another." [18]

In general, compared to Gesellschaft, living outside a Gemeinschaft is hardly to imagine. Community's can be seen as a kind of safe havens, where process of movements are relatively free but outside the safe circles of community, suddenly the environment becomes more dangerous and incomprehensible. While society orderings enable individuals to move in large amount of space, but with the side effect of being distracted from its surroundings, community on the other hand gives a certain freedom of action but within a confined spatial and social territory. Outside this territory, it is hard of communal member to interact. This explains also why communities are largely closed to outside world.

IV. Trust, Values and Alternative Dispute Regulation

1. Trust versus Logic

a) Trust

Trust versus *Logic* resembles Tönnies' typification of Gemeinschaft versus Gesellschaft and Organic (natural) versus Artificial typification of social structures. Natural, is that what occurs out of nature, because of necessity or the requirements of the nature as such. Since human beings are "social beings", in nature they are forced to cooperate with each other and one

[17] Robert J. Sampnson, Linking the Micr- and Macrolevel Dimensions of community Social Organization 70 Soc. F. 43 1991-1992 .
[18] Idem

reaches automatically to trust relationship, which exists between family members, between father and son, Husband and wife, neighbours and so on. These relationships are not voluntarily entered but entered because the nature urges people to collaborate and cooperate together. This leads consequentially to a situation in which people has to trust each other and create s system where they will *trust*.

Trust, in a community, is the natural glue that keeps the members naturally bonded and connected. This natural connection of *trust* is rediscovered by economical science as an advantageous element, which can lower the cost that goes along with business contracts. As Avner Greif argued "Reputation-based exchange is characterized by a low cost but a high marginal cost of exchanging with unfamiliar individuals. Law-based exchange, however, is characterized by the high fixed cost required to set up an effective legal system but the low marginal cost of establishing new exchange relationship."[19] This is why, as Kahan argued, "In this self-sustaining atmosphere of trust, reliance on costly incentive schemes becomes less necessary."[20]

This advantage by way of *trust* in economical science is called, social-capital. The trust relationship, which exists between parties, lowers the cost that usually goes along with the regular contract. If men trust each other, they will not make an appeal to the costly legal apparatus that is set in force in order to accommodate impersonal exchange. But what does social capital (in economical context) entail?

Social capital according to Portes is described in the following way "Whereas economic capital is in people's bank accounts and human capital is inside their heads, social capital inheres in the structure of their relationships".[21] Contacts and networks are advantages that derive from social components, which benefits business contacts. As such trust is perceived as a social surplus that can be measured in economical terms.

In this respect, it is argued that what contributes to trust-relationship is the fact of reciprocity between the parties. As Kahan has clearly mentioned, "…logic of collective action counsels the creation of appropriate external incentives, the logic of reciprocity suggests the importance of promoting *trust"*[22]

Collective action, as mentioned by Kahan is triggered by collective goals and aims, these collective goals are in turn, supported and accommodated by values, which are shared

[19] Avner Greif, *Impersonal Exchange Without Impartial Law: The Community Responsibility System*, 5 Chi. J. Int'l L. 109 2004-2005, p.3
[20] Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, , Michigan Law Review, Vol. 102:71
[21] Portes, A. (1998) Social capital: Its origins and applications in modern sociology. *Annual Review of Sociology* 24 (1) pp.1-24
[22] Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*

commonly and which I will try to explain beneath. People trust each other because they know they belong to a certain "totality". As Olson argued:" "In collective-action settings, individuals adopt not a materially calculating posture but rather a richer, more emotionally nuanced *reciprocal* one. When they perceive that others are behaving cooperatively, individuals are moved by honor, altruism, and like dispositions to contribute to public goods even without the inducement of material incentives."[23]

These elements are not 'created' out of nothing, but are a natural result of having a kind of common goal. It is within this common aim in group's settings, those certain elements like honour, reciprocity and cooperation appears. What we try to do with sociological inquiry is to exemplify and identify these elements.

As Kahan maintained, "And often, though certainly not always trust is specially characteristic of affective relationships. Certainly, its existence tends to promote the affective (emotional) element in social relationships. Trust implies power and dependence; the person trusted has the power over the one who trusts, as long as trust lasts. But Community is not a matter of 'one way' trusting relationships….Trusting relationships in a community are necessarily reciprocal."[24]

The relationship between reciprocity and trust is not one of enumeration but a kind of accumulation of elements. Both elements reinforces each other, that is to say, that trust enables reciprocity and the reciprocity, in itself, necessitates trust. Since there are many other social elements involved in a "social unity" that keeps the unit in a certain direction, these elements are not exhaustive. These are just some elements, which I brought in order to explain in where we could locate law in a social unit like "community".

As Olson further stressed in "The reciprocity theory, in contrast, sees individuals as moral and emotional reciprocators. Most persons think of themselves and want to be understood by others as cooperative and trustworthy and are thus willing to contribute their fair share to securing collective goods."[25]

It is important to stress that members in a social units care more about long-term expectations than short term. And for the sake of convenience, I like to claim that logical relationships, which I will explain hereunder, are based on short-term expectations and outcome. That is why clear decisions are desired rather than something ambiguous like restoring a relationship. The benefit of restoring a relationship is not something one would experience immediately and also the result is not as clear as in regular legal system, based on

[23] Mancur Olson the Logic of Collective Action 1965
[24] Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*
[25] Idem

logic. Since logic based, regular legal system aims at regulating and systematizing every action of an individual, it makes every action of an individual immediately judge able.

b) Logic

Logical relationship, on the other hand, fills in the lacuna, which exist in, when one removes the trust element. Since trust cerates certainty and predictability, one needs a substitute for this trust element, which is being found in the logical construction of legal rules (and logical and deductive reasoning). Logic is an apt way to create a system in which the individual on an impersonal basis (so without knowing each other) can enter into relationship. As Cotterrel put it: "Active interpersonal trust is largely replaced in many situations by a more passive confidence in impersonal systems (for example, financial, economic or political systems; or systems of activity represented by large business corporations or other organizations). Many of these social systems are defined, stabilized, and guaranteed by the law of the centralized state."[26]

To go a step further, one can even argue that the community responsibility system as Avner Greif defined it, could be even used for impersonal exchanges. In this case, it was the community as whole that stood guarantee for the dealings of the individual. As he argues: "Mechanism enabling individuals to credibly communicate their social and personal identities are substituted for mechanisms for contract enforcement based on public information regarding past actions. Collective responsibility can thus foster impersonal exchange when past actions are not public information and personal identities cannot be credibly communicated across communal boundaries in the absence of collective responsibility:"[27]

Logical construction, therefore, emancipates individuals from their environment and at least to a certain extent, gives them the presumption that a society can be build based on impersonal relationships between individuals. The logical axiomatic construction of logic, lies at the roots of our modern society with economics, or economical relationship as the groundwork for social relationship. Human beings are considered as Homos Economicus by Adam Smith,[28] which means that we, human beings, are entrusted with a rational mind to make the right decision for our self. As rational human beings, our decisions are logical and therefore mathematical. Economical science, which is dedicated in the study of the rational homo economicus' social relationship with one another, constructed a whole social

[26] Roger Cotterrell, *A Legal Concept of Community*, P.81 12 Can. J.L. & Soc. 75 1997, p.33
[27] Avner Greif, *Impersonal Exchange Without Impartial Law: the Community Responsibility System*, 5 Chi. J. Int'l L. 109 2004-2005
[28] Adam Smith, *Wealth of Nations*

relationship on merely mathematical formula. What they argue is that the way human beings act is very logical and easy to be predicted. Human actions can be calculated beforehand and regulated.

It is mainly on this presumption that the modern concept of law is founded on. The modern concept of law as Max Weber argued is the product of capitalism in which legal rules try to assure the flow of capital to a certain class in the society.[29] The so-called certainty, which the modern legal system is praised to have, is based on this logical system of rules, in which actions are framed in this so called ”logical framework”. Outside this logical order, anything else seems obscure and ambiguous.

Therefore, it is important to stress that logical methodology substitutes the loss of trust in impersonal relationships between partners, because “The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind.”[30]

Resembling law with mathematics allows men to predict and regulate human behaviour according to beforehand, determined calculated rules. Moreover, law was considered as just a mathematical science. As Boonin has stressed ”If Law was even compared with mathematics and the judge was considered a kind of geometrician, which implied that judges’ decisions were as bound by rules and as logically necessary as mathematical proof.”[31]

As Von Jehring clearly expressed this (and his) annoyance of the employment of logic in law, he argues, “This desire for logic that turns jurisprudence into legal mathematics is an error and arises from misunderstanding law. Life does not exist for the sake of concepts but concepts for the sake of life. It is not logic that is entitled to exist but what is claimed by life, by social relations, by the sense of justice-and logical necessity, or logical impossibility, is immaterial. One could have considered the Romans mad, if they had ever thought otherwise, if they had sacrificed the interests of life to the dialectics of the school.”[32]

Duncan Kennedy, very well illustrates the kind of picture that I want to draw in this paragraph about our modern concept of law. He argues “Judgments of validity in modern "legal science" are (i) not judgments about a matter of fact, but correct or incorrect interpretations of the logical requirements of the meanings of the system of norms. They

are (ii) not ethical judgments, because the logical coherence and gaplessness of the system of norms provides no warrant whatever of the moral desirability or moral (as opposed

[29] See Max Weber, *Economy and Society*
[30] Leonard G. Boonin, Concerning the Relation Logic to Law, p.156
[31] Leonard G. Boonin, Concerning the Relation Logic to Law, p.156
[32] Rudolph von Jehring ,*Der Geist des Römischen Rechts* (1852)

to legal) validity of the norm system as a whole or of any particular norm. They are (iii) "scientific" judgments, because validity is established according to interpretive procedures

strictly bound by logic.[33] As he further stressed ”In this system, as I explained above, gaps are filled by the analysis of the system, presupposed to be internally coherent, to build a chain downward from some unquestionably valid abstract provision, or upward to and then downward from some logically required though unenacted abstract provision.”[34]

The way Logic keeps the systems sustained, by creating its own independent validity system (which enables legal positivist Philosophers like Kelsen, to claim that Legal Systems work on their own) by way axiomatic deduction, has made legal science earn the title of science. But in effect it has no direct relationship with the main goal of the purpose of law, namely to have a normative effect on individuals. Because of Logical validity system, less attention has been paid on the normative effect of law and its subsequent effect on the society. Which would in turn remind us, that law is not a science, but a social phenomenon, indebted in the society.

2. Values versus Rules

a) Values

The topic on values and rules will encompasses a whole encyclopaedia of books in order to outline and analyse it, reflecting on different scholarly perspectives, whether, (legal) philosophical, sociological or anthropological. This is utterly not my aim in this paper. What I want to expose is how the underlying distinction of legal consciousness or the generation of legal norms between Community an society generates legal norms. It should help us to understand how for example, the Diamond Dealers Club, which I will explain in paper three or the Jirga of Pashtunwali Afghans, do not use rules,- whether to not put in written legislative acts,- but base their drawings on values. While our modern concept of law is based on a logical system, which logical systemized (or logically reasoned) rules, whether written or not (court decision and/or legislative acts), in order to induce individuals to certain actions. Values contain intrinsic inducements by norms, while rules (might) contain extrinsic inducement by norms.

Values contain reason for human action, just like rules do. It forces people to act in a certain desired way. The totality of these reason are contained in values. Not all values are

[33] Duncan Kennedy, *The Disenchantment of Logically Formal Legal Rationality, or Max Weber's Sociology in the Genealogy of the*Contemporary Mode of Western Legal Thought, 55 Hastings Law Journal 1031 2003-2004
[34] Idem p.36

normative in nature, meaning that it will not induce individuals to act. But the totality of the values creates an intrinsic normativness, which will make human beings act in a certain way. The reason might be cultural, religious or based on certain business ethics, which the members are acquainted with.

Values can therefore be perceived as guidelines for actions to behave in a certain way. It does consist of norms, but these norms are contained in the totality of (the shell of) values, which are persuasive. This is why values (from a sociological point of view) can be perceived as a normative set of conducts, which are desired or required to be taken. In order to take up an inquiry into sociological nature of values, I have confined myself to Max Weber's theory of values for two reasons. First he makes a connection between incentives and actions. The importance of this method is that it provides us with a kind inclination into where the law could reside in community. Since community members live according to certain values and not so much by legal-rules, it is important to understand how this unfolds in practice. Another reason for me to adopt Max Weber's theory is that his theory on values and actions is a part of a comprehensive sociological inquiry into how the modern society is changing. This juxtaposition of different systems is of importance for my research. In the previous paragraphs and in previous paper I have already depicted a certain account of Max Weber upon law and logic.

Max Weber introduced the modern approach to sociology by scrutinizing the action of individuals. Instead of bluntly describing certain sociological features or concepts, Weber made an attempt to analyse human behaviour and how it would effect other fellow individuals. Based on this method, Weber made an attempt to portray certain incentives that lie behind human action. He made an initial distinction between *purpose-rational* and *value rational* action

He explains *purpose- rationality* and *value-rationality* in the following way:"[Social conduct may] be determined rationally and oriented toward an end. In that case it is determined by the expectation that objects in the world outside or other human beings will behave in a certain way, and by the use of such expectations as conditions of, or as means toward, the achievement of the actor's own, rationally desired and considered, aims. This case will be called *purpose-rational conduct.* Or, social conduct may be determined, second, by the conscious faith in the absolute worth of the conduct as such, independent of any aim, and measured by some such standard as ethics, aesthetics, or religion. This case will be called *value-rational conduct."*"[35]

[35] Max Weber on Law in Economy and Society, (Max Rheinstein ed., Max

This highly elaborated outline of Max Weber, in which he tries to portray and link a comprehensive array of reasons to certain actions. This include both analysis of human behaviour based on irrational reasons as well as on rational reasons. Value-rational reasons for actions are conceived as irrational motives for certain actions. Value-rationality, in contrary to what the words project, are motives that make an appeal on emotions and believes. As he further clarifies, ”From the standpoint of instrumental rationality, however, value rationality is always *irrational*, and increasingly so as the value to which the action is oriented is elevated to the status of the absolute value. For as the *intrinsic value* of the action (pure conviction, beauty, absolute goodness, absolute devotion to duty) comes to the fore more unconditionally and exclusively, reflection on the consequences of the action diminishes.”[36] So compared to purpose rationality (instrumental rationality) he argues that value-rational reasons are “always irrational”. In a way human beings are driven both by rational purpose aimed reason as well as intuitive, emotional reasons.

Instead of just describing what value should entail, he connected those values with certain human action. In the end it is the action that counts. This is why Weber has classified six, so-called ”value spheres” that would influence our conscience. As Oakes clearly enumerated: “Weber seems certain that there are precisely six such spheres, and no less confident as to what they are: religion, the economy, politics, aesthetics, the erotic (*die Erotik*) and intellectualism.”[37]

b) Rules

Rules on the other hand are just systematically collected directives of human action, it constitutes guidelines in how one should behave. The validity of ‘rules’ as ‘rules’ lies both in the logical framing of the rule, logical systematisation with other rules and logical application. In all these rules’ validity stems from logical construction. Rules are just like values, a facilitation of norms, but they inducement are extrinsic in contrary to values, which are intrinsic. Rules are always being enforced from outside and needs to an effective enforcement institution.[38]

Rheinstein and Edward Shils trans., Free Press 1954) (1925).

[36] Max Weber, *Economy and Society*, (1978) ed. Guenther Roth and Claus Wittich. Berkeley: University of California Press

[37] Guy Oakes, *Max Weber on Value Rationality and Value Spheres*, p.28

[38] See H.L.A. Hart, Essays in Jurisprudence and Philosophy, (Clarendon Press, Oxford Press, 1983), Neil Mc Cormick, “the concept of law and ‘The Concept of Law’, (1994)14 Oxford Journal of Legal Studies

According to Fuller, "Rules are systematic, public, products of perspective legislation, intelligible, consistent, feasible, and administered written."[39] Rules are therefore norms, which are induced from outside by way of enforcement procedures. Without enforcement procedure, no one would feel inclined to obey the rules, or at least the majority of rules.

Kelsen on the other hand, brought up a more elaborated account of legal rules within a normative logical system, in his celebrated book called, *Die Reihne Rechtslehre*. He argues that a whole range of legal rules, hinges on a kind of "Grundnorm" (Basic norm), which function as a kind of an automatic validity system. Each rule is being scrutinised through other rules within the chain, up to the "Grundnorm".

According to Kelsen, "Eine Vielheit von Normen bildet eine Einheit, ein System, eine Ordnung, wenn ihre Geltung auf eine einzige Norm als Letzten Grund dieser Geltung zurückgefürht werden kann. Diese Grundnorm konstituiert als die gemeinsame Quelle die einheit in der Vielheit aller eine Ordnung bildenden Normen. Und dass eine Norm zu einer bestimmten Ordnung gehört, geht nur daraus hervor, dass ihre Geltung auf die- diese Ordnung konstituierende- Grundnorm zurïckgeführt werden kann. Nach der art der Grundnorm, das heisst aber nach der Natur des obertsen Geltungsprinzips lassen sich zwei verschiedene Arten von Ordnungen (Norm-systemen) unterscheiden. Die Normen der einen Art "gelten", das heisst das von ihnen angegebene Verhalten der Menschen ist als gesollt anzusehen, kraft ihres Gehaltes: weil ihr Inhalt eine unmittelbar evidente Qualität hat, die ihm Geltung verleiht."[40]

Kelsen was one of the first legal positivists who tried to emphasise on the legal system that exist only out of legal rules, and finds its validity in the logical systematisation of those rules. According to Kelsen, legal rules (for Kelsen legal norms, and legal rules are interchangeable. Norm means "sollen", "ought"). It suffice here to mention that legal rules is aimed conditioning a certain action and in this respect as Kelsen has put it constitutes to be an "ought".[41]

In contrary to legal-rules as we know, norms within values can be drawn from values, but they cannot exist outside the scope of values. Values constitute the foundation in which norms

[39] Carol J. *Greenhouse Looking at Culture, Looking for Rules*, Man, New Series, Vol. 17, No. 1 (Mar., 1982), pp. 58-73, p.60

[40] Hans Kelsen, *Rheine Rechtslehre*, Scientia Verlag Aalen,1. Auflag p.62

[41] Carol J. Greenhouse, Looking at Culture, Looking for Rules, Man, New Series, Vol. 17, No. 1 (Mar., 1982), pp. 58-73 Published by: Royal Anthropological Institute of Great Britain. Greenhouse distinguishes between rules and norms in anthropological way. Although there is a difference between a rule and a norm, in order to make my point about the distinction between values and rules, I will not go too much into the distinction between rules and norm. In this case is suffice to mention that to Kelsen, "norm" meant "sollen", thus rules.

gets its meaning. As in legal semiotics' conception of narativization explains, a legal rule can never be comprehended without the narrative context in which it resides.[42]

To illustrate this, one can mentioned the distinction between the Quran and Sharia rules. The Quran is the primary source for Muslim, which contain values for personal or group purposes. It gives direction on how one should live their lives, but can never be a source for governing purposes, since it does not contain any clear-cut rules. In the contrary, the holy book is rather vague and ambiguous to be employed as a legal source, containing rules. The Sharia however is derived from the Quran, and contains only rules, which can be used for governing purposes. They are clear and ordered against a certain logical framework. Islamic jurisprudence is an independence science based on the Quran, but is not as original as the Quran itself. While Quran contain only values, rules that are derived from the Quran are gathered together in the Sharia.

3. Judicatory System versus Alternative Dispute Resolution

a) Alternative Dispute Resolution

In the past decades the interest in Alternative Dispute Resolution has increased immensely, because of its cost and outcome effectivity. While ADR is considered to be a collection of extra-judicial methods for legal disputes, it can also be used for non-legal or extra-legal disputes. Moreover, the roots of ADR lie in anthropological and sociological inquiries in alternative ways to reach for a solution, than by legal and judiciary methods. Since judiciary is expensive and takes quite longer than ADR, one started to adopt ADR in regular judicial conflicts likes business agreements, divorce procedure, so anything in which maintaining a good relationship becomes important.[43] This is why ADR emphasises more on a method that restores broken relationships than trying to adjudicate, which does not mean that adjudication is disregarded. Resorting relationships does not mean that it cures the relationship but it just makes it possible that a certain dialogue remains in order to achieve certain aims. This explains for example why mediation, as a form of ADR, is being employed in divorce cases.

Which does not mean that it cures the relationship but it at least tries to find a solution in which a certain kind of relationship can be maintained, in order to pursue certain duties. Like in divorce access with children, ADR is mainly adopted because it reduces a lot stress and harm to children and maintaining the contact between parents for the sake of children is essential. This is why ADR is widely endorsed in divorce cases, but also in business contracts.

[42] Bernard Jackson, *Making Sense in Jurisprudence*, 1996, Bernard Jackson, Semiotics and Legal Theory, 1997

[43] Robert Mnookin, *Alternative Dispute Resolution* Robert Mnookin, Harvard Law School John M. Olin Center for Law, Economics and Business Discussion Paper series,p.2

ADR is a collection of possible methods for dispute resolution among which we can name *mediation, conciliation, negotiation* and *arbitration*.[44]

Starting with *arbitration*, arbitration is a direct alternative for state-structured judiciary system in which the judge is appointed to resolve the disputes, which reach the court. The difference between the court procedure and arbitration lies mainly in the fact that the arbiter is chosen by both parties and the judge in the regular justice system is appointed. What also matters in arbitration is that many cases that reach arbitration are cases, which are founded on privately- drawn contracts or private legal systems, being agreed upon. So in essence, arbitration already bears a kind of particularity in this case.

However, one cannot just assume arbitration only as "privately" installed judge. In the contrary. One can discern arbitration between *official* arbitration and *unofficial* arbitration. Official arbitration is always covered by official acts like the British Arbitration act.[45] The subsequent courts or tribunals, which are founded upon those acts, like the Jewish Beth Din courts or the Muslim Arbitration Tribunal, are all based on these acts.[46] Their decisions are therefore legally and officially binding. It is recognized by official institutions of the government.

Mediation on the other hand is a method in which a conflict, a dispute or an agreement, whose terms has still to be settled, are solved. A third party, with an objective view on the matters and relationship, tries to find ways in which both parties would meet in the middle way and agree. The aim is not to inquire about the nature or the roots of the problem and make judgements (Like the judiciary or arbitration does), but instead to find an agreement between the parties who can find themselves in the agreement itself. Maintaining a solid endurable relationship is the main prerequisites in mediation. Because even if agreements are reached, the parties has to apply the terms of the agreements in practice. This is the reason why they both have to agree, and as long as they do not agree with one of the terms the mediation process will just continue. In the judiciary system however, people do not have to agree with the adjudication terms. The terms will just be enforced by the judge, by enforcement mechanisms like fine, or even imprisonment. .

[44] Gordon R. Woodman, *Alternative Law of Alternative Dispute Resolution*, 32 Cahiers de Droit. 3 1991
[45] Maria Reiss, *The Materialization of Legal Pluralism in Britain: Why Shari'a Council Decisions should be non-binding*?
[46] Shaykh Faiz *Family Law, minorities and legal pluralism: Should English Law give more recognition to Islamic Law?* Family Law, minorities and legal pluralism: should English Law give more recognition to Islamic Law;
Ihsan Yilmaz, *The challenge of post-modern legality and Muslim legal pluralism in England* Journal of Ethnic and Migration Studies Vol. 28, No. 2: 343, 354 April 2002

Negotiation on the other hand shares the same characteristic and principles as mediation but is applied in commercial practices. In negotiation the parties do not want to solve a conflict or getting out of a ditch, instead they want to reach the most suitable contract or agreement for both parties as possible. They will try to get an agreement, which is the most profitable for both parties. They mostly enter into negotiation with a prior set goals, which they want set through by way of negotiation. They can negotiate alone or if desired with a third person to guide the negotiations.[47]

Conciliation is a kind of *mediation* but it's emphasising lies predominantly on post-conflict restoration of relationships. The kind of situations in which conciliation is being employed is mostly harsher than in mediation. While in mediation takes place in the middle of a conflict or just after the conflict, conciliation only happens long after the conflict has already made a lot damage for both parties. One can say that the parties who opt for conciliation are tired of the conflict and want to settle down the conflict.

After having given a kind of brief introduction into certain methods of ADR, I will now try to illustrate how ADR functions in practice. I will especially focus on non-official methods, in order to stress my arguments of self-governing, autonomous social units' like associations and communities.

To illustrate how ADR functions in practice, especially in non-official, non-state way, I will use Afghanistan as an example. Afghanistan is characterized by the heavy presence of tribes, communities, clans and Kinships. The conflicts they resolve is very peculiar and with a logical mind, absolutely not comprehensible. Conflicts need a thorough engagement in the subject manner. One cannot solve a conflict by merely logical deductions. So this is why they attach a lot of value on conflict prevention by way of adhering to certain values, very strictly[48], which have to be preserved, and if than still a conflict erupts than recourse is been done to unconventional methods.

The importance of prevention of conflict, and conflict centeredness of ADR appears in the phrase of Ali Wardak where he stresses that "The primary concern in this case is to strike a balance between preventing the conflict from becoming a tribal enmity of revenge killing and the restoration of collective tribal honour."[49] The methods applied are simple but effective and adjusted to the problems at the floor. To illustrate a short example as stressed by Wardak in which Afghans try to solve their conflicts by arranged marriages between conflictions

[47] Gordon R. Woodman, *Alternative Law of Alternative Dispute Resolution*, 32 Cahiers de Droit. 3 1991
[48] See Bernt Glatzer, *The Pashtun Tribal System,* Ch 10 in G. Pfeffer & D. K. Behera (ed.): Concept of Tribal Society
[49] Ali Wardak, Jirga, *A traditional Mechanism of conflict Resolution in Afghanistan*, p11

families. As he said, "Interestingly, in the last option of responding to murder, the offender and the victim's relatives (or their respective tribes) are not only reconciled by *jirg*a, but become (new) relatives by marriage. But, the individual - a woman in this case - often pays the price for the tribe's social survival in this patriarchal group-oriented society. This practice is not only in direct conflict with Afghan legal norms, but also a violation of the principles of Human Rights. This and the exclusion of women from *jirga* process are a reflection of the patriarchal social structure of Afghan society."[50]

Here we find a very lucid combination of a practise, which is necessary in order to restore the relationship between certain families and the same time a value-judgement based on universalistic perception by… himself. Whether women's right is being harmed is something that is not at stake. Who would care about women's rights (or anybody's right) if the whole community (-ies) were being threatened to be exterminated.

Group survival prevails above individual's autonomy, which is being protected by certain rights deriving from the constitution. As I will explain further in the next coming papers about Afghanistan's constitution, one of the main lacunas in all the past-enacted constitution was the emphasis on rights, which did find any recourse within the society. .

b) Judicatory System

The judicatory system is very much linked to the logical reasoning and systematisation of legal rules as I have depicted above. That is why in this paragraph there is not much to say except to stress an again the fact the judicatory system aims to try to ascertain issues in order to continue. Instead of "restoring the relationship" the judicatory system is stately imposed adjudication system, in which the emphasis is laid on reaching certain 'goals' or 'results' rather than restoring relationships.

As mentioned above, this is why the judges act as geometricians, simply because rules have to be applied according to certain logic. Everything that fall out of certain logic does not exist.

Whether we have the continental legal systems with its enacted codes and judiciary that applies it or the common law system, which has the fact finding judiciary (an active judiciary) and encoding of their judgements, in all these cases judgements are made according to certain logical reasoning. Because, it is within this logical structure that certainty can be guaranteed.

[50] Idem

V. Conclusion

Defining law as being socially embedded brings us automatically to the concept of community. Community as a concept provides us the necessary outer 'shell', which embraces the whole social dynamism within the context, which contributes to the development of legal rules. The only thing, which lawyers can do, is only to try to locate how certain processes can contribute to the generating and maintain of legal rules within community.

In order to comprehend the phenomenon of "community and law" approach, it necessitates changing the mentality from in trying to find the locus of law. For this purpose, Tönnies theory and his typification between "Gemeinschaft" and "Gesellschaft" provide us with the necessary tools to explore where law resides in community.

By typifying in the same token the concepts, *Trust versus Logic, Values versus Rules, Alternative Dispute Resolution versus Judicatory system*, I am able to exemplify the locus of law in community.

Trust relation as we found out, constitutes one of the core foundations of the legal system within communities. Ina trust relationship, which exist between family relatives, neighbours, and communities like in rural villages, enable a personal based exchange system, where the reputation of an individual, family or community, constitutes enough certainty to enter in to a "business" relationship. While in logical structure, logic has substituted the Trust relationship, by logical, mathematical reasoning, which establishes a kind of trust system for "impersonal exchange". It means for example that a foreigner can enter into business without even knowing the other (trade) partner well.

While Trust relationship is made possible by a value system, either religious or cultural, Logical system is sustained by a logical construction of enforceable rules. Values induce people's behaviour by intrinsically, without a clear enforcement from outside. Whereas the logical system, with (legal) rules is extrinsic, and needs a clear organ which will enforce these rules. This explain for example why people who employ value system hardly use a code or a written system of (legal) rules, this is simply because they "know" how it is.

The final typification, which illuminates the centre of "law" within the community, is the typification between Alternative Dispute Resolution and Judicatory system. While the emphasis in the first one lies on how to restore the relationship between individuals or families, the latter just ascertains certain aggregation of facts, like Boonin calls it "like a geometric".

These typifications enable us to identify law within any community or association, instead of trying to analyse whether certain behaviour should be classified as law or not.

Within this “community and law” approach, one can identify law, without really getting too much into detail about whether one behaviour should be called law or not. Since law is socially embedded, but that does not mean, as many social scientist argue, that law can be conceptualised as a “social process”.

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