E–Government as a New Frontier for Legal Theory

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INTRODUCTION

E-government has the potential to change fundamentally the organization of governments, and the governance practices used in relations with citizens and other governments. Legal theory is clearly affected by these changes. Yet there is no rush to publish on e-government in leading legal theory journals, and there is no visible surge in student demand for courses in e-government. Just as only some areas of governments in developed states have taken advantage of new information communication technologies, so only some areas of legal theory have engaged e-government. Issues in Internet governance and personal privacy dominate legal theory's engagement with e-government, while e-engagement of citizens plays an increasingly important yet still limited role in governments' interaction with citizens. Yet there are signs that this gentle pace may soon change, as leading jurisdictions approach completion of the first wave of service transformation at the same time as concerns regarding a digital divide recede under the growth of access to new information communication technologies. New opportunities for e-government may soon make e-government's progress revolutionary rather than evolutionary, and legal theory will be forced to keep pace.

BACKGROUND

The central questions and methods of legal theory are relatively easy to identify, while the boundaries of legal theory are not, for reasons worth exploring in the context of e-government. The most general question is "What is law?" naturally asked along with "What is a legal system?" and "What is *a* law?" These central questions are often thought to be connected by their shared concern with law's "normativity" or special capacity to assert authority to issue nonoptional norms, which norm subjects typically obey under the guidance of legal officials. The dominant approaches to these questions can be roughly distinguished as descriptive or normative. Descriptive approaches (such as legal positivism and legal realism) use normatively or morally neutral methods in their attempt to describe and explain legal phenomena. Descriptive approaches typically claim the virtue of clarity in understanding legality and legal phenomena as they appear in diverse ways in diverse social situations. By contrast, normative explanations of legal phenomena (such as natural law or Marxist theories) simultaneously evaluate phenomena from the standpoint of normatively committed moral or political theory (Patterson, 1996). Normative approaches typically claim that such neutral analysis is impossible, and argue that the kinds of concepts employed in understanding law are necessarily applied in a normatively committed fashion which reflects our ultimately moral motivations for understanding law—to know how to improve it, to know when to criticize it, and to know how and when to provide justification for it.

Both descriptive and normative approaches may be found separately and in blended theories providing answers to legal theory's core questions, and in adjacent questions typically focused on particular jurisdictions' or eras' experience of law's capacity to require, make permissible, enable, and deny. This experience appears in various areas of legal theory, including discussion of the nature and justification of civil liberties, punishment, privacy, property, contract, and others. Investigations outside the core certainly affect the way core questions are answered, yet there is considerable debate regarding the conditions under which answers to the core questions ought to be changed in light of peripheral developments. These debates are particularly acute at the intersection of legal theory's core questions with theoretical dimensions of social scientific dimensions of disciplines whose focus includes legal phenomena: sociology of law, legal anthropology, and some dimensions of legal history. It is not unreasonable to ask at these junctures just where legal theory comes to an end, and a disciplinary investigation, for example, sociology of e-participation, has begun. Once core questions are left legal theory is not easily distinguished from surrounding disciplines, and mere focus on legal phenomena by a discipline naturally facing theoretical questions does not amount to "legal theory" in any informative sense of the term. It is advisable then, for reasons of clarity and to avoid unnecessary engagement in methodological debate, to confine this discussion

to the effect of e-government on legal theory's core questions, and within those borders to strive for clarity in understanding what, precisely, about the social phenomena of legality or lawfulness is affected, if at all, by e-government.

The early days of e-government brought little of obvious interest to legal theory's core questions. Many changes appeared to affect the business operations of government, and not the nature of government itself, providing increased efficiencies in existing processes under a thin veneer of innovation. Where processes and services were converted from a paper base to an ICT base, processes and services often remained largely the same (OECD, 2003). The institutional and sometimes constitutional inertia of existing "silos" of authority in government augur against units of government using the new ICTs to seek new methods of collaborative interunit policy making, to change services, or to change the way a service is delivered. Doctrines of ministerial responsibility, for example, have tended to establish decision-making hierarchies within the public service which cannot be easily changed simply because there is some merit to doing so and available technology to do so effectively. Similarly, provision of online "brochure ware" touting a department's function seems to be a novel mode of advertising and little more, as do haphazard attempts at ICT-enhanced public consultation. Indeed, to the extent that e-government technologies do not change the nature of government or citizens' interaction with government, e-government has no effect on the core questions of legal theory and a limited effect on adjacent questions. Two developments and their infrastructure have, however, generated issues of interest to legal theory's core and adjacent investigations. Let us begin with infrastructure.

E-GOVERNMENT AND LEGAL THEORY TODAY

Internet Governance

Governance of the Internet has implications for our understanding of the nature of legal system, sovereignty, and the legality of what is said to be international law. Any attempts to use distinctively legal norms to govern the Internet must recognize that while states may conceive themselves to have vital interests in certain uses of the Internet, the Internet is not the kind of thing which is at risk of being hoarded or occupied by a state in the absence of agreement to make it an internationally held and governed entity. The Internet is a nonterritorial communications method using largely nonproprietary standards to enable territorially located users to exchange information.

The Internet is not itself dependent on any particular physical location or piece of enabling software. Precisely how the Internet's nonterritoriality and nonproprietary standards might matter to legal theory is presently emerging. The United Nations (UN)-sponsored World Summit on the Information Society (http://www.itu.int/wsis/) has given political clout to efforts to internationalize governance of technical standards, naming and other resource allocation, and Internet use policy and dispute resolution. The UN-sponsored Working Group on Internet Governance and the International Telecommunications Union are leading these efforts, which may soon displace prior acceptance of the U.S.-based ICANN (Internet Corporation for Assigned Names and Numbers) and the (IETF) Internet Engineering Task Force (IETF), and still earlier reliance on self-regulation carried out by volunteers. As the Internet grows in social and economic importance, the list of those seeking to influence the Internet's governance has grown, now including states, coalitions of states such as ASEAN and the G8, and international organizations of varying degrees of formality, including the World Intellectual Property Organization (WIPO), the World Trade Organization (WTO), and the Organisation for Economic Co-operation and Development (OECD) (Mueller, Mathiason, & McKnight, 2004).

Displacement of nationally based Internet governance by international bodies does not, however, automatically amount to international Internet governance via legal institutions of norms. Many legal theorists are skeptical regarding the legality of what is purported to be international law, pointing to its lack of an authoritative norm-setting body, lack of adjudicative bodies holding compulsory jurisdiction, and lack of enforcement power. If the legality of international law is itself in doubt, the legality of international norms which eventually emerge from the UN-gathered coalition of state and nonstate actors may be equally in doubt. The problem of assessing the legality of international Internet governance may be made even more complex by the nonterritorial and nonproprietary nature of the Internet. While the struggle goes on to internationalize governance of technical standards and naming, convergence of the Internet with technologies such as mobile telephony continues, and hacking and viruses and other free-flowing "pollutants" of the Internet threaten sovereign states' interests. Sovereign states may soon find themselves less interested in naming conventions, and more interested in issues whose importance to sovereign states gains them the attention of legal theorists, particularly issues concerning the security of national borders and national wealth. A wide range of descriptive and normative questions arise in this tension between state interests and an international resource. On what principled descriptive or normative basis could a distinction be made between a state's communications

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