

## CODE 2.0, LAWRENCE LESSIG

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In ‘A Declaration of the Independence of Cyberspace, John Perry Barlow declared: “*Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather.*”<sup>1</sup> The declaration captured the hope and belief that Cyberspace would liberate us from the physical and coercive powers of the state, and all its undesirable elements. This hope reflects the mood at the collapse of the Soviet Union where the concept of a physical state with boundaries was judged and found less than satisfactory.<sup>2</sup> Thus, the corresponding growth of cyberspace in this time created a conversation whose main summation was: because states have failed, cyberspace is our solace.<sup>3</sup>

In *Code 2.0*, Lessig posits a nuanced version of how events in cyberspace have turned out. In the heyday of the internet, the prevailing belief was that it could not be regulated – as Barlow’s poetry holds. The initial generation of Internet users believed the government would not have the wherewithal to regulate the Internet. However, with time, the Internet has become more regulable for a different reason – commerce. To ensure trust and reliable services online, commerce required users to surrender some of their identity details and subsequently, the government tapped into the commercial actors to regulate the public’s use of the Internet.

The regulation of the Internet is not solely dictated by fiat. There is an interplay between the market, architecture, norms, and the law. These four dimensions have their specific characteristics that dictate the different powers they hold in directing certain behaviours and patterns on the internet. The law regulates behaviour through sanctions – libel law, intellectual property law, and

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<sup>1</sup> LAWRENCE LESSIG, *Code 2.0*, 3 (2006).

<sup>2</sup> LAWRENCE LESSIG, *Code 2.0*, 2 (2006).

<sup>3</sup> LAWRENCE LESSIG, *Code 2.0*, 2 (2006).

so forth. The effectiveness of the law in regulating behavior depends largely on how best the other factors support the control. The fact that the law may not offer perfect regulation in cyberspace is not reason to declare it useless. A mode of regulation does not need to be perfect to be effective. Locks can be picked but that does not mean locking doors is futile.

Norms are accepted models for behavior in a particular context or community. For instance, a person cannot talk about Soviet propaganda in a Facebook group of making cakes. The person would easily be removed from the group. The norms do not a force of law but they serve to regulate certain behaviors in cyberspace as well. They have their own type of sanction within the specific community.

Markets work with prices and profit. The pricing models can prevent access and if the services are presented with higher prices, the people may move to a cheaper competitor. Thus, competition regulates the providers of online services, say, Internet Service Providers. Prices constrain the users' behavior while competition controls the companies involved in Internet business.

There is a misapprehension that cyberspace cannot be changed. That it is immutable. Nevertheless, cyberspace is merely the product of code and code can be changed. Code embeds the values we want to protect or those we want to compromise. Code is neutral, it can be used to promote privacy or it can be created against it. Thus, the underlying architecture is another factor that facilitates regulates. The creator of the code that runs a particular section of cyberspace, say, Twitter, prevents certain behaviours and facilitates others. In this sense, therefore, code is law.

These modalities do not work in isolation. In reality, the law shapes these other factors to ensure a perfectible system of regulation. For instance, the law could shape norms by promoting certain behaviours. The law could dictate policies that the market should follow. The law could prescribe the kind of architecture to be deployed. As such, these factors work in concert with the goal of greater regulation.

The nature of cyberspace has brought new challenges to old values, 'latent ambiguities' as Lessig calls them. In constitutional law, for example, the requirement that searches and seizures must not be conducted unlawfully was to prevent an encroachment of government power into the private lives of people. The government can now conduct searches of people's documents without the

burden of physical rummaging. They can use worms and other styles that software has enabled and essentially search a person's computer without them knowing. The question is how do we protect the old values of personal liberty and security in the new age of burdenless searches? In Lessig's words, how do we 'translate' the old values in new contexts?<sup>4</sup>

Lessig shows that the courts are not impersonal. They are susceptible to the mood and opinion of society. He challenges the way lawyers romanticize the courts as being immune to the public opinion. The courts continually face political resistance if the values they would fight for are contrary to the spirit of the age. He gives an example of the United States constitutional history. The three Civil War amendments on equality were grafted into the Constitution but it took another century for the courts to take a civil rights stance. From 1875 to 1954, the Supreme Court upheld segregation, slavery and other issues we would frown upon. The political context shifted in favour of civil rights and this is part of the reason the Supreme Court handed down *Brown v Board of Education* in 1954 after a century of opposed ideals. As Lessig states, 'if the world does not recognize the wrongness of its racist ways, even a strong statement of principle enacted within our Constitution's text permits a court only so much freedom to resist.'<sup>5</sup>

The book embodies analyses that remain relevant in any discussion of issues on cyberspace. It is a text that carries the wisdom that is needed in the ongoing and never-ending discussion on whether we have regulated cyberspace correctly or whether there is anything more we can do to improve the current systems of regulation.

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<sup>4</sup> LAWRENCE LESSIG, Code 2.0, 316 (2006).

<sup>5</sup> LAWRENCE LESSIG, Code 2.0, 315 (2006).