

Commons and Legality: The Case of the Kibbutz

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I. INTRODUCTION

In recent years, numerous incidents of commons, especially those of natural resources held in common, have been examined in highly detailed and nuanced analyses by scholars of various disciplines such as ecology, economics, law, political science and development studies.¹ More recent scholarship is characterized by an attempt to situate common property holding regimes in their economic, political, legal, ecological, social and cultural environments. Instead of a reductive one-dimensional analysis focusing either on the internal arrangements of the common-holdings or on state regulation of the commons, we now have multi-dimensional dynamic analyses which describe the interactions between the commons and its different environments. Such a contextualization of the commons enriches our understanding of the interplay among various physical, social and political variables in the life of the commons. However, most of this literature adheres to rational-actor theories of social life, neglecting to perceive the importance of the cultural life of the commons and its environment. The absence of cultural analysis in the theories regarding the commons is most evident in their treatment of law. While current literature on commons calls for the utilization of a variety of conceptual frames and theories derived from the social sciences in order to provide sophisticated analyses of the environments in which commons operate, upon encountering the legal realm they adopt, almost invariably, the concept of law as an external set of rules and sanctions. Law is habitually viewed as an externally imposed constraint, and even, on occasion, as a threat to the efficient management of the common resource. While at times, the law indeed amounts to such a matrix of rules and sanctions, the legal life of the

¹ A bibliography prepared in 1989 contained about 5,000 studies of common property cases and hundreds more studies have been published since. Important collections of such studies can be found in *THE QUESTION OF THE COMMONS: THE CULTURE AND ECOLOGY OF COMMUNAL RESOURCES* (Bonnie J. McCay & James A. Acheson eds., 1987), *COMMON PROPERTY RESOURCES: ECOLOGY AND COMMUNITY-BASED SUSTAINABLE DEVELOPMENT* (Fikret Berkes, ed., 1989), *RIGHTS TO NATURE: ECOLOGICAL, ECONOMIC, AND POLITICAL PRINCIPLES OF INSTITUTIONS FOR THE ENVIRONMENT* (Susan Hanna, Carl Folke & Karl-Goran Maler, eds., 1996), *THE DRAMA OF THE COMMONS* (Elinor Ostrom, Thomas Dietz, Nives Dolšak, Paul C. Stern, Susan Stonich & Elke U. Weber, eds., 2002) and *THE COMMONS IN THE NEW MILLENNIUM: CHALLENGES AND ADAPTATION* (Nives Dolšak & Elinor Ostrom, eds., 2003).

commons is much more complex. Law is also, or mostly, a cultural component of the life of the commons. Therefore, when studying the commons, one must look at law and the legal environment from a cultural or constitutive perspective. Seen from such a perspective, legality, constituted by the rules of state law and the internal law of the commons, operating through both formal and informal sanctions and embedded in the everyday life of the commons, is accorded its place as internal and endogenous to the commons phenomena.

The history of the formative years of the kibbutz is an intriguing site for testing competing theories regarding the relationship between commons and legality, and more generally, for reflecting on the importance of multi-dimensional dynamic analyses of the relationship between commons and their environments.

The kibbutz is – or at least used to be – a commune, a community of people holding and managing all property together and distributing its benefits equally with no direct link between work or other contribution to commune life and any form of monetary remuneration for it.² At the same time, the kibbutz provides for all the needs of its members (such as food, housing, education and health) through collective consumption, constituting what has become known as the general guarantee for all members. In this way, the kibbutz adheres to the maxim of "from each according to her ability, to each according to her needs". Being an intentional community, the kibbutz is an exemplary and equitable way of communal living for people who believe in the ideals of equality, brotherhood and mutual assistance. Communal ownership of property is a means to achieve these goals.

Early writings on legality in the kibbutz suggest the absence of law, referring to different dimensions of the kibbutz during its formative stages as a source of explanation - the efficiency of internal, non-legal sanctions according to one view or the existence of an anti-law ideological stand according to the other. However, a historical, multi-dimensional study reveals that early kibbutz life was infused with legality, that could be found in three different , though interconnected levels: the

² The first kibbutz was established in 1910 and today there are over 270 kibbutzim spread throughout Israel. Interestingly, while the Israeli kibbutz is renowned around the globe, and over the years, almost every one of its facets has attracted the attention of various academic disciplines, though the past and present of the kibbutz generate fascinating questions for those interested in the phenomena of the commons, an analysis of the kibbutz as a community holding common property is rare. A notable exception is the inclusion of the kibbutz in Ellickson's analysis of communes. See Robert C. Ellickson, *Property in Land*, 102 YALE L. J. 1315, 1344 -1348 (1993).

kibbutz itself, the organizational field to which the kibbutzim belonged and the state. The issue to be addressed, therefore, focuses not on the absence of law, but rather on the every day life experience of the kibbutz members and their perception of these levels of legality. The kibbutzim were registered as co-operative societies under state law and while in compliance with the dictates of state law, there was ignorance, even indifference towards it. Through a historical cultural study of the kibbutz, its organizational field and state law's regulation of the kibbutz, the argument presented in this paper will demonstrate how a specific cultural schema of indifference towards state law was constructed and institutionalized, thus contextualizing legality in a specific commons at a certain period. Such contextualization may serve as a starting point for an exploration of the relationship between the kibbutz and the legal environment, during later stages of kibbutz experience.

The first objective of this paper is to analyze the current trend in the theory of common property holding with regard to the contextualization of the commons and their environments. Perceiving commons as organizations, having internal structure and culture and interacting with their environments, the paper suggests a more sensitive, dynamic, multi-dimensional frame of analysis: one that will examine the interaction between internal variables of the commons and external variables stemming from the environments, and do so along a time axis. Second, the paper aims at situating legality within the dynamic multi-dimensional analysis of the commons. Exposing the assumptions underlying current theory regarding the place of law in the reality of the commons, the paper offers, as an alternative, a cultural approach for the analysis of the relationship between the commons and legality. The power and usefulness of this socio-legal framework of thought will be tested through the presentation of the case of the kibbutz and its legal environment during its formative years. Offering some initial thoughts regarding the transformation of the kibbutz, the paper will conclude by demonstrating the merits of combining old and new insights on the commons and legality in promoting our understanding of the fascinating phenomena of the commons.

II. CONTEXTUALIZING THE COMMONS

In the vast literature on commons, one can discern some general theories or attempts at modeling the commons as well as more case-specific analyses with their careful and nuanced attention to the specifics of the case in hand. Both are necessary components of our discourse on commons. Against a backdrop of contextual analysis, current research calls for elaboration and refinement of the theoretical thinking about the commons. This part shall briefly demonstrate and evaluate this turn to context in commons analysis, offering some initial thoughts promoting a more fruitful framework for contextualized analysis.

A. The Turn Towards Contextualization in Commons' Analysis

1. The Economically-Oriented Perspective

The narration of the traditional, economically-oriented analysis of the commons³ customarily begins with the work of Hardin and Demsetz, although it is by now well-established that both were referring to an “open access” regime and not to commons or communal property, where a resource is owned or used by a group according to specific rules and regulations.⁴

Hardin’s famous prediction of “the tragedy of the commons”⁵ was based on a hypothetical example, a parable, and began with a call for the readers to “picture a pasture open to all”.⁶ Under this analysis, the rational actions of self-interested persons in a commons situation might lead to undesirable consequences both for the individual and for the well-being of the community as a whole. As Hardin concluded, “freedom in a commons brings ruin to all”.⁷ The solution to the commons problem

³ For an analysis of the economically-oriented formulation of the commons problem as an artifact of the economic professional community, see the argument of Riles in Ravi Kanbur & Annelise Riles, *And Never the Twain Shall Meet? An Exchange on the Strengths and Weaknesses of Anthropology and Economics in Analyzing the Commons*, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=587941.

⁴ See Ellickson, *supra* note 2 at 1322-1323, A.P. Lino Grima and Fikret Berkes, *Natural Resources: Access, Right-to-Use and Management*, in COMMON PROPERTY RESOURCES, *supra* note 1 at 32, 38-39 and Henry A. Regier, Richard V. Mason and Fikret Berkes, *Reforming the Use of Natural Resources*, *id* at 110,114-118. On the typology of property regimes, see generally, Margaret A. McKean, *Success on the Commons - A Comparative Examination of Institutions for Common Property Resource Management*, 4 J. THEORETICAL POLITICS 247, 250-253 (1992).

⁵ Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

⁶ Hardin's hypothetical example was understood by many as referring to the medieval English system of open fields and they noted how, in fact, this system was successful for centuries. See Fred P. Bosselman, *Replaying the Tragedy of the Commons*, 13 YALE J. ON REGULATION 391,392 (1996) and the works cited therein, note 9.

⁷ Hardin, *supra* note 5, at 1244.

suggested by Hardin is "mutual coercion that is mutually agreed upon by the majority of the people affected".⁸ Hardin's analysis of the commons is one-dimensional. It looked at the interaction among his hypothetical self-interested individuals living in a world without any historical, social or cultural context. The political context appeared only if we understand Hardin as suggesting state regulation as a solution, but even in this regard, Hardin gave no account of the nature of such state and its other relationships with those subject to its power.

Demsetz'⁹ contribution to a discourse on the commons was a cost-benefit analysis which attempted not only to explain the transition from common property to private property rights, but also to substantiate the ascendancy of the latter. According to Demsetz, the primary function of property rights was to create an incentive to internalize externalities (external costs and benefits) which arise where the gains of internalization become greater than its costs.¹⁰ Thus, the emergence of property rights is connected to the emergence of new externalities, with new or different harmful or beneficial effects.¹¹ In the commons, no costs are associated with a person's exercise of his communal right, and one's costs are borne by others: thus, there is an incentive to over-exploit the resource.¹² Private property rights constitute a better solution because each person shares both the costs and the benefits from his activities. This internalization guarantees that the effects of a person's activities on his neighbors and on subsequent generations will be taken fully into account.¹³

To illustrate his arguments, Demsetz described the transition from a commons into a private property land regime among Indians of the Labrador Peninsula.¹⁴ The externality relevant in this case is the over-hunting of game triggered by the introduction of a fur trade which increased the value of furs. Demsetz' efficiency theory of property regimes, though telling an evolutionary story, was mainly one-dimensional and, other than acknowledging certain changes in external circumstances as the source for new kinds of externalities, focused exclusively on the manifestation

⁸ *Id.* at 1247.

⁹ Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM.ECON.REV.347 (1967)

¹⁰ *Id.* at 348-350.

¹¹ *Id.* at 350.

¹² *Id.* at 354.

¹³ *Id.* at 355-356.

¹⁴ *Id.* at 351-353. Demsetz was criticized for his selective reliance on anthropological information provided by Eleanor Leacock in her research on the Montagnes Indians. See Eric T. Freyfogle, *Land Use and the Study of Early American History*, 94 YALE L. J. 717, 740 (1985).

of an individually-oriented perspective and maximization of such individual's well-being.¹⁵ Demsetz also disregarded other cultural, social and political aspects of the community whose history he analyzed, as well as the ramifications of the encounter between this community and the outside world as evidenced in the practices and norms of fur trading and in the colonial political power supporting this trade.¹⁶

Demsetz's cost-benefit analysis has been refined by subsequent scholars who have examined the efficiency of commons in a somewhat more contextualized manner. A good example is Ellickson's contention, based on the histories of American pioneer settlements, that commons are more efficient in what he termed "large events", where there are increasing returns to scale and the desirability of spreading risks.¹⁷ Ellickson concluded that, where rules and practices among members are

¹⁵ Both Hardin and Demsetz, as do most economists, characterized the human actor as one who pursues maximization of his utility. This is a vision of an asocial human being, an autonomous individualistic being. Thus, this vision assumed that the users of the commons are interested only in short term gains and will not create arrangements to preserve the resource. These ontological and cultural assumptions have recently been challenged. For Rose, this classical analysis characterizes property as the institution through which peoples' conflicting desires about resources are mediated by the allocation of exclusive rights. The desire for resources and the need to exclude others from such resources are at the center of the institution. Underlying this analysis is the presumption that we can define peoples' preferences. Utility-maximizing preferences (a person wants more "good" for himself than less) are taken for granted in the classical analysis and are used to make predictions about property-related behavior. Rose argued that the self-interested person is not the only person we recognize in the real world, and, therefore, there is no reason for assuming this particular type of preference as the basis for understanding property regimes. See Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J. L. & HUMANITIES 37, 40-48 (1990)

¹⁶ Demsetz's evolutionary narrative creates a contradiction. If every person is perceived as acting autonomously in his own self-interest, how does a property regime arise where coordination is at issue? See James E. Krier, *The Tragedy of the Commons, Part Two*, 15 HARV. J. L. & PUB. POL'Y 325, 336-338 (1992). Rose argued that the classical analysis of property turns to storytelling in order to overcome this contradiction. In explaining the origin of property regimes where cooperation is needed, those who tell the story of the self-interested man, "need" to turn to narratives. Both Hardin and Demsetz used stories and not explanations at the crucial point of the emergence of property regime. See Rose, *supra* note at 51. For some elaborated theories on the transitions between property regimes which take context seriously, see Stuart Banner, *Transitions between Property Regimes*, 31 J. LEGAL STUD. 359 (2002), Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. 453 (2002), Katrina Miriam Wyman, *From Fur to Fish: Reconsidering the Evolution of Private Property*, 80 N.Y.U. L. REV. 117 (2005), and Daniel Fitzpatrick, *Evolution and Chaos in Property Rights Systems: The Third World Tragedy of Contested Access*, 115 YALE L. J. 996 (2006). On the debate over the emergence of property rights, see generally Terry L. Anderson & J. Bishop Grewell, *Property Rights Solutions for the Global Commons: Bottom-Up or Top-Down?*, 10 DUKE ENVTL. L. & POL'Y F. 73, 77-84 (1999), and Saul Levmore, *Two Stories about the Evolution of Property Rights*, 31 J. LEGAL STUD. 421, 423-433 (2002).

¹⁷ Ellickson, *supra* note 2 at 1322-1344. Stevenson's comprehensive economic-mathematical analysis which compared the efficiency of private and common property regimes in Swiss Alps grazing areas can also serve as an example for a contextualized efficiency-theory of commons. Stevenson examined and compared among three different common property regimes: shared alps, community alps and

already established, the response of a group is more efficient than the response of individuals. Ellickson's analysis was more attentive to the context in which the commons operated than preceding studies. He mentioned both external variables stemming from the unique economic environment of the American frontier and internal variables such as the rules and practices of the group. However, Ellickson utilized the history of the pioneer settlements merely to illustrate a pre-stated theory, and his description of the context was brief and insufficient, neglecting to consider other important variables of the political and social environment.

2. The Institutional-Economic Approach

Notwithstanding Hardin and Demsetz's assertions, advanced game theory has persuasively proved the possibility of voluntary cooperation, allowing a view of the commons, not as tragically doomed, but as a viable option.¹⁸ Empirical data from case studies of common property regimes has demonstrated that, around the globe, people have successfully developed norms and institutions which result in the efficient management of common property.¹⁹ A dominant policy-oriented line of research,²⁰ which is properly accommodated within the boundaries of a rational choice perspective, aims at delineating the contours of successful institutional arrangements of commons' management.

Scholars who work within the institutional perspective typically offer a list of “design principles for institutions” based on inferences made by reflecting on a substantive number of case studies of the commons.²¹ While there are differences in

corporation alps, each with its unique history and governing rules. See GLENN G. STEVENSON, COMMON PROPERTY ECONOMICS (1991)

¹⁸ See ROBERT AXELROD, THE EVOLUTION OF COOPERATION (1984), MICHAEL TAYLOR, THE POSSIBILITY OF COOPERATION (1987), ELINOR OSTROM, ROY GARDNER AND JAMES WALKER, RULES, GAMES AND COMMON-POOL RESOURCES (1994) and Armin Falk, Ernst Fehr and Urs Fischbacher, *Appropriating the Commons: A theoretical Explanation*, in THE DRAMA OF THE COMMONS, *supra* note 1 at 157.

¹⁹ For a concise summary of these studies and the history of the institutional analysis of the commons, see Thomas Dietz, Nives Dolšak, Elinor Ostrom & Paul C. Stern, *The Drama of the Commons*, in THE DRAMA OF THE COMMONS, *supra* note 1, at 3, 11-26. Diverse resources were studied, such as water, irrigation systems, fisheries, forestry, and grazing land, among others. Some property regimes under investigation existed for centuries whereas others have only recently been created.

²⁰ The orientation towards policy is openly manifested in the institutional-economic analysis of commons. See, for example, Dietz et al., *id.* at 24.

²¹ The institutional-economic analysis of Ostrom is often cited in the legal literature on commons. See ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990). Equally insightful are the institutional analyses of Wade and McKean. See Robert Wade, *The Management of Common Property Resources: Collective Action as an Alternative to Privatization or State Regulation*, 11 CAMBRIDGE J. ECO. 95 (1987), ROBERT WADE, VILLAGE

method and emphasis among these studies, the structure of their suggestions is similar.²² Their lists of “design principles” refer to the resource system, characteristics of the users' group, the institutional arrangements and the external environment.

Ostrom's search for “design principles for institutions” is a fine demonstration of the nature of contextualization made through institutional analysis. Her focus was on small-scale situations of common-pool-resources (CPR),²³ and the institutions resulting from their organizing process.²⁴ From the empirical data, Ostrom generalized several “design principles”, those essential elements or conditions which help account for the success of the institutions.²⁵

The majority of Ostrom's “design principles” are internal to the CPR itself. Among them are the setting of clearly defined boundaries that differentiate the commons from cases of “open access”, principles that constitute the institutional arrangements, such as congruency between appropriation and provision rules, and local conditions stemming from the environment in which the commons operates,²⁶ collective choice arrangements which ensure users' participation in decision-making, gradual sanctioning in cases of disobedience of the rules, and the availability of low-cost mechanisms for conflict resolution.

According to Ostrom, the users' group in successful CPRs is characterized by relative stability, geographical proximity, homogeneity and an intricate web of connections among participants who share a past and expect to share a future. In such

REPUBLICS: ECONOMIC CONDITIONS FOR COLLECTIVE ACTION IN SOUTH INDIA (1988)[1994] and McKean, *supra* note 4 at 257-276.

²² For a thorough comparison of these and other institutional analyses, with reference to questions of method and substance, see Arun Agrawal, *Common Resources and Institutional Sustainability*, in THE DRAMA OF THE COMMONS, *supra* note 1 at 41, 46-54, 61-63.

²³ In “small-scale” situations, the resource is located in one country and the number of individuals affected varies from 50 to 15,000 persons. See OSTROM, *supra* note 21 at 26..

²⁴ Under Ostrom's analysis, an institution is “the set of working rules that are used to determine who is eligible to make decisions in some arena, what actions are allowed or constrained, what aggregation rules will be used, what procedures must be followed, what information must or must not be provided, and what payoffs will be assigned to individuals dependent on their actions”, *id.* at 51. Ostrom classified CPR into four categories: cases of successful CPRs, cases where it is possible to track the organizing process, cases of failed CPRs and cases of fragile CPRs. For a critique of the way Ostrom ascribed each case to its classification, see Sara Singleton and Michael Taylor, *Common Property, Collective Action and Community*, 4 J. THEORETICAL POLITICS, 309 (1992).

²⁵ Ostrom emphasized, however, that her list of principles does not rise to the level of “necessary conditions”. See OSTROM, *supra* note 21 at 90.

²⁶ This “design principle” states the need for appropriation rules restricting time, place, technology, and/or quantity of resource units to be correlated with local conditions and with provision rules requiring labor, materials, and/or money. Appropriation and provisions rules are the rules which govern the allocation of benefits (withdrawal of resource units) and burdens (contribution to the maintenance of the resource) among the participants. *Id.* at 30-31.

cases, far-reaching norms of behavior evolve²⁷ and concern for one's reputation is instrumental in assuring compliance with the group's norms. In criticizing Ostrom, Taylor and Singleton²⁸ argued that successful CPRs function as a community (characterized by stable, multiplex and direct relations between members who share beliefs and preferences) which serves as a cost-minimizing device.²⁹ “Pleading guilty” to the charge of not using the term “community”, Ostrom³⁰ justly claimed that all the characteristics of community on Taylor and Singleton’s list are components of her analysis, and contended that while community is important, it is, nonetheless insufficient to settle CPR issues.³¹ Moreover, according to Ostrom, community is not necessary *ex ante*, but rather only *ex post*, as it can be constituted as a product of individuals’ effort to establish new institutions to resolve their predicament.³² This treatment of community and its contribution to the sustainability of self-managed commons resonates within Ellickson's thesis that close-knit groups tend to evolve mutually advantageous norms of cooperation,³³ or institutions in the language of the institutional-economic analysis.

²⁷Ostrom explained that the way individuals assess benefits and costs – the manner of assessment influencing their decision to cooperate - depends on the norms that they have internalized. Where there are interactions between participants beyond those connected to the resource itself, individuals are apt to develop strong norms of acceptable behavior and communicate with each other in reinforcing encounters. Thus, we learn that extensive norms, diversity of interactions and social capital are essential to the process of supplying institutions with resolutions for solving collective actions problems. *Id.* at 205-206.

²⁸Michael Taylor and Sara Singleton, *The Communal Resource: Transaction Costs and the Solution of Collective Action Problems*, 21 *POLITICS & SOCIETY* 195 (1993).

²⁹Taylor and Singleton explained how these characteristics of community minimize costs. Search costs are lower because identifying the possibilities for cooperation is easier within an existing community (stable membership and multiplex relations). Bargaining costs are lower because shared beliefs and preferences reduce the range over which bargaining must take place. Monitoring and enforcing costs are reduced, mainly by the stability of the group, the expectation of continuing relations and the directness and variety of the relations. *Id.* at 200.

³⁰Elinor Ostrom, *Community and the Endogenous Solution of Commons Problems*, 4 *J. THEORETICAL POLITICS* 343 (1992).

³¹*Id.* at 344-346.

³²*Id.* at 347-349. An important issue neglected by Ostrom, but discussed by McKean is the distributive impact. In most of the case studies which McKean reviewed, the rules regarding consumption of the resources reproduce the inequalities in private wealth among the community. In her opinion, this pattern of distribution provides an incentive to the wealthier participants to see that the commons is maintained and protected - something which is advantageous from the organization’s point of view. In some successful commons, however, there are egalitarian rules of distribution. This poses a conundrum for McKean and she invested great efforts to explain the phenomenon. The explanations she gave are: essentially equal needs by all households for certain items, the administrative simplicity of using the same rule for different products harvested from the same commons, eliminating competitive harvesting for ecological reasons and beneficial spillover effects on the community – thus enhancing social cohesion and loyalty. Interestingly, McKean did not refer to equality as a shared ideological belief in her explanation. See McKean, *supra* note 4 at 264-272

³³ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1994).

In addition to these internal “design principles”, Ostrom paid attention to the external environment.³⁴ Key is her assertion that, in order to assure the success of CPR, there should be minimal recognition by the state of the rights to organize. Accordingly, the autonomy of the CPR should not be challenged by external government authorities. Ostrom warned that, should external government officials presume that only they have the authority to set the rules, it will be very difficult for local users to sustain a self-governed CPR over the long run. Later on in the book, Ostrom expanded her discussion of the relationships between the CPR and its surrounding political system.³⁵ In her opinion, in predicting institutional change, it is essential to consider not only the internal variables which characterize the particular CPR, but also the type of external political regime under which the CPR operates, whether it facilitates the commons, is indifferent to it or aims at the centralization of power.

The scholarship of the institutional-economic perspective, as illustrated by the writings of Ostrom, with its reliance on case studies and offering “design principles for institutions”, has significantly enriched our understanding of the commons.³⁶ On its face, the “design principles” are multi-variant and multi-dimensional, referring to the many variables both internal and external to the commons. In comparison with the more traditional economic analysis, the institutional approach takes a leap forward towards the contextualization of our understanding of commons. However, as will be elaborated in the next section, the institutional analysis is limited in its effort of

³⁴ Another external variable mentioned by Ostrom is relevant to more complex situations of “nested” CPRs, those which are part of larger systems. See OSTROM, *supra* note 21 at 101-102.

³⁵ *Id.* at 211-214.

³⁶ More recent writing within the institutional-economic perspective has expanded the scope of inquiry and generated important new insights. For example, the effect of homogeneity or heterogeneity among CPR users has been found to work in both directions. In some cases heterogeneity induces cooperation and in others it impedes cooperation. See Pranab Bardhan and Jeff Dayton-Johnson, *Unequal Irrigators: Heterogeneity and Commons Management in Large-Scale Multivariate Research*, in THE DRAMA OF THE COMMONS, *supra* note 1 at 87. Other studies enrich an understanding of participants’ cooperative behavior. See Shirli Kopelman, J. Mark Weber and David M. Messick, *Factors Influencing Cooperation in Commons Dilemmas: A Review of Experimental Psychological Research*, *id.* at 113. However, it should be noted that the method of listing “design principles” might endanger the contextualization project. While lists and models have their merits and are instrumental to the ability to compare data from specific case studies and to infer patterns of social action, they can also be reductive in their abstract formulations and may amount to little more than a “check list” to be examined in new case studies, diverting the researcher’s attention from the unique features and nature of the commons under study and its physical, political and social environment.

contextualization and significantly more is needed in order to achieve a more sensitive contextualized analysis of the commons.

B. A Dynamic Contextualized Analysis of Commons

The institutional-economic analysis of the commons promotes an understanding of the operation of a commons: which factors would enhance the probability that an efficient, self-managed commons will survive, and which risks should be avoided. As many have noted, and as elaborated below, while rich in insights regarding the success and failure of the commons, this approach has several limitations which prevent it, in its current format, from providing a sufficient contextualization of the commons to enable a more responsive understanding of the forces affecting the commons.³⁷

First, scholars of the institutional-economic approach are apt to pay relatively little attention to the relationships between commons and their ecological, technological, economic, social, political, cultural and institutional environments. They tend to treat commons almost as if they are truly autonomous or isolated, neglecting to connect, wholly or partially, their findings on internal variables to external ones.³⁸ In more recent literature, theoretically based criticism of such neglect, as well as attempts at re-conceptualizing the research project may be discerned. For example, Edwards and Steins advocated perceiving "the entire resource system, and the wider social, cultural, ecological and economic environment in which it is embedded" as the "correct subject for research".³⁹ In such a research project the

³⁷ The lists of design principles should not be deemed exhaustive. Instead, they may be supplemented. A study of the commons may be enhanced by examining additional variables. For example, it may be fruitful to compare cases where the common resource is a product of existing social relations with cases where people "came to the resource" and a community evolved out of the need to manage the resource; cases where the prevailing surrounding culture stresses norms of trust and cooperation with cases of a culture of competitiveness and suspiciousness; cases where cooperation is only instrumental to solving collective action problems with cases where cooperation itself is part of the ideological tenets of the group; or cases where the surrounding political and social environment has remained relatively stable with cases where revolutions, colonialism and other destabilizing events have occurred.

³⁸ See Agrawal, *supra* note 22 at 58-59 and David Mosse, *The Symbolic Making of a Common Property Resource: History, Ecology and Locality in a Tank-irrigated Landscape in South India*, 28 DEVELOPMENT & CHANGE 467, 470 (1997).

³⁹ See Victoria M. Edwards and Nathalie A. Steins, *Special Issue Introduction: The Importance of Context in common Pool Resource Research*, 1 J. ENVIRON. POLICY PLANN. 195, 196 (1999). For a suggestion of an analytical framework for the analysis of contextual factors in multiple-use commons, see Victoria M. Edwards and Nathalie A. Steins, *A Framework for Analysing Contextual Factors in Common Pool Resource Research*, 1 J. ENVIRON. POLICY PLANN. 205 (1999).

commons becomes embedded.⁴⁰ The outcome of expanding the scope of investigation to include the environments results in a more “realistic” understanding of the commons, but comes at a price: the ability to translate reality and present its complexity in a relatively clear and simple model is lost.⁴¹

Second, current studies of the institutional-economic thesis belabor the compilation of lists of design principles. The perception of design principles as lists should be replaced by the conceptualization of the principles as a set of interconnected variables, thus transferring attention to the study of causal relations.⁴² For example, the nature of the interactions analyzed by the institutional-economic approach should be refined. The literature habitually describes interactions between the participants and the CPR institution, and interactions between the CPR and the state. A more careful look will reveal that, in actuality, there are three levels of interconnected interaction, each having a unique dynamic: the relationships between individual members and the community/institution, the relationships between the community/institution and the state, and the relationship between individual members as citizens and the state. The relationship between a member and her community is influenced by the rights and responsibilities of the member in his relationship with the state. To different degrees, the relationship between the member and the community influences the relationship between the member and the state. It is a well-acknowledged sociological insight that once established, institutions (groups/communities) develop interests of their own, independent of their members’ interests. So, the relationship between a community and the state is not merely an aggregate of the relations between the members and the state. Since there are inter-level influences, the processes of providing and maintaining institutions at the community level should be analyzed in the context of the other two levels of interaction.⁴³

⁴⁰ See Rob van Ginkel, *Contextualizing Marine Resource Use: A Case from the Netherlands*, 1 J. ENVIRON. POLICY PLANN 223, 224 (1999).

⁴¹*Id.* at 225 (“we must contextualize, lest we run the risk of creating mythologies or empty abstractions”).

⁴² See Agrawal, *supra* note 22 at 45-46, 53 (“lists of factors can be only a starting point in the search for a compelling theorizing of how these factors are related to each other and to outcomes. Instead of focusing on lists of factors that apply to all commons institutions, it is likely more fruitful to focus on configurations that contribute to sustainability”).

⁴³As Hanna and Jentoft observed, the identity of the participants in a commons is constituted on several dimensions. They are individuals with personal interests, needs, and skills, they are embedded

Third, the underlying assumptions of the institutional-economic analysis regarding human nature and the nature of a community further limit the scope of the investigation into the dynamic of the commons. The institutional-economic approach perceives the participants in the commons through the lenses of the rational self-interested individual, bringing into the common pre-determined preferences or shaping them according to the pay-off system of the institutional arrangements of the commons. The commons as a social entity or community is analyzed as a cost-minimizing mechanism. The community is conceptualized as an instrument whose goal is to promote the well-being of its members.⁴⁴ As Riles correctly stated, such a rational actor approach fails to explain the complexity of the social world of the commons with its different patterns of norms, rules, sanctions and behaviors.⁴⁵ In the competing world view of the socially-constructed socially-embedded person and of a community as having an existence of its own, independent of its members may assist in giving a full accounting of the social complexity of the commons.⁴⁶ Such an approach gives due attention to the cultural life of people and their communities, as well as to the symbolic world in which they live,⁴⁷ while also allowing a view of the community as a site of conflict and contention.⁴⁸

members of communities and they are citizens of states which set the normative dictates of permissible behavior and required responsibilities. According to this formulation, "each level of identity is embedded in a larger social, economic and political sphere, and interacts with other levels through both cooperation and conflict". See Susan Hanna and Svein Jentoft, *Human Use of the Natural Environment: An Overview of Social and Economic Dimensions*, in RIGHTS TO NATURE, *supra* note 1 at 35,45.

⁴⁴ On the competing perceptions of community, see generally, ANTHONY GIDDENS, *CAPITALISM & MODERN SOCIAL THEORY* (1971), WILL KYMLICKA, *LIBERALISM, COMMUNITY AND CULTURE* (1989), ANDREW MASON, *COMMUNITY, SOLIDARITY AND BELONGING: LEVELS OF COMMUNITY AND THEIR NORMATIVE SIGNIFICANCE* 17-63 (200), GRAHAM DAY, *COMMUNITY AND EVERYDAY LIFE* 1-25 (2006), Ronald R. Garet, *Communitarianism and Existence: The Rights of Groups*, 56 S. Ca. L. Rev. 1001 (1983) and Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 Corn. L. Rev. 1 (1989).

⁴⁵ See Riles *supra* note 3.

⁴⁶ For a suggestion on how to incorporate various approaches in the social sciences which allow for treating the commons as an embedded social construct, see Bonnie J. McCay, *Emergence of Institutions for the Commons: Contexts, Situations, and Events* in THE DRAMA OF THE COMMONS, *supra* note 1 at 361.

⁴⁷ See William M. Adams, Dan Brockington Jane Dyson and Bhaskar Vira, *Managing Tragedies: Understanding Conflict over Common Pool Resources*, 302 SCIENCE 1915 (2003) and Mosse, *supra* note 39 at 472.

⁴⁸ For a comparison between the competing views on commons as community, see Arun Agrawal and Clark C. Gibson, *Enchantment and Disenchantment: the Role of Community in Natural Resource Conservation*, 27 WORLD DEVELOPMENT 629 (1999).

Incorporating the frames of thought suggested by the institutional-economic approach with those offered in more recent writings which look at the commons from a cultural perspective, this section of the paper may be concluded by suggesting a structure for a dynamic contextualized analysis of the commons. Under this framework, the study of an incident of a commons, examines four dimensions in the life of the commons:

1. **Inside the common:** when studying a commons, the researcher may look at variables such as the physical characteristics of the resource and their symbolic meanings;⁴⁹ the mechanisms of resource management; the content of the norms and rules governing the commons, the life-cycle stage of the organization⁵⁰; the level of obedience to the rules and legitimization accorded to decision-making institutions, an in-depth study of the social and demographic characteristics of the users' group and the nature of social dynamics among the group's members (including social stratification, power relations, and conflict management), as well as the symbolic cultural life of the commons.

2. **Outside the commons:** a study of the ecological, economic, social and political environments in which the commons is situated. Key is the study of the institutional arrangements and modes of operation of the state and state agencies (or other relevant sovereign powers). It may also be the case that the commons is part of an organizational field which mediates between it and the state.⁵¹ Where relevant, it

⁴⁹ On the symbolic meaning of common resources, see Mosse, *supra* note 38 at 472. On the symbolic meaning of resources see, generally, Arjun Appadurai, *Introduction: Commodities and the Politics of Value* in *THE SOCIAL LIFE OF THINGS 3* (Arjun Appadurai, ed., 1986), HELGA DITMAR, *THE SOCIAL PSYCHOLOGY OF MATERIAL POSSESSIONS: TO HAVE IS TO BE* (1992) and *HISTORY FROM THINGS: ESSAYS ON MATERIAL CULTURE* (Steven Luban & W. Davia Kingery, eds., 1993).

⁵⁰ Similar to other organizations, the life of a self-managed CPR entails different stages of development and transition. Ostrom suggested that the same theory and analysis may be applied to study the processes of institutional provision and institutional change. See OSTROM, *supra* note 21 at 140-141. It is, however, questionable whether the interplay among the various internal and external design principles would have the same patterns of interaction, independent of the life-cycle stage which the CPR is experiencing at the time of the investigation.

⁵¹ According to Scott, organizational fields are defined in terms of shared cognition or normative frameworks, or a common regulative system. See W. RICHARD SCOTT, *INSTITUTIONS AND ORGANIZATIONS* 56 (1995). According to this conceptualization, organizations that do not "belong" to one industry may form an organizational field provided they share "an area of institutional life". See Stephen J. Mezas, *Using Institutional Theory to Understand For-Profit Sectors: The Case of Financial reporting Standards* in *THE INSTITUTIONAL CONSTRUCTION OF ORGANIZATIONS: INTERNATIONAL AND LONGITUDINAL STUDIES* 164 (W. Richard Scott & Soren Christensen eds., 1995)(referring to the 200

may be directed to beneficial to examine the characteristics of such an organizational field, its cultural life and power structure, as it may have a significant effect on the behavior and cultural modes of thought within the commons.

3. Studying interactions: Since internal and external variables interact with each other in a multiplicity of forms and directions, generating diverse effects on the commons, it may be useful to pay attention to the patterns of such interactions.

4. Studying changes: a study of the commons conducted along a time axis, may enrich our understanding of the mode of operation and effects of internal and external variables, the interactions between them at any given time, and the dynamic of changes and transformation within the commons, and in its relationships with the environment.⁵²

The proposed framework for conducting an analysis of the commons is structural in nature, allowing a great degree of flexibility in constructing explanations and importing insights from various schools of thought on the nature of social action into the analysis. It is neither reductive, nor exhausting, but rather is open-ended, leaving ample room for case-specific sensitivity. This framework may be useful for conducting a case study of a certain commons or when looking for ways to “heal” a failing commons, as well as when formulating a policy regarding the appropriate patterns for construction and management of a commons. The contention here is not that the study of a commons invariably necessitates the examination of all internal and external variables and their interaction in the past and present. In some cases such a comprehensive examination may not be needed, while in others it may only be necessary with regard to certain variables and interactions. Usually, it will be difficult, if not impossible, to predetermine the desired extent and scope of the research. However, the framework may be useful in such cases by suggesting dimensions of inquiry and directing the conduct of an initial study aimed at determining what variables and dimensions should be explored in a more thorough and detailed manner.

largest firms in the U.S. as an organizational field because they compare themselves to one another and takes the others’ patterns into their considerations).

⁵² On the importance of the time axis, see van Ginkel, *supra* note 40 at 230 and Mosses, *supra* note 38 at 470.

The next section takes a closer look at the legal realm and incorporates it into the dynamic, multi-dimensional, contextual analysis of the commons.

III. COMMONS AND LEGALITY

A. Legality and the Theory of Commons

The scholarship on commons has become more and more sensitive to the broader context of the environment in which commons operate, or at a minimum, has become conscious of the need to develop more responsive and nuanced theories and methods of inquiry regarding the relationship between the commons and the environment. Conversely, with respect to the legal sphere, such sensitivity is sorely lacking, and an almost unified, rigid perception of the law prevails over a to-be-preferred approach of delving into the social institution of law in all its complexities.

Law is usually perceived in commons' scholarship as part of the state's machinations. On occasion, the analysis does not relate directly to the law, but merely provides a general treatment of the interaction between the commons and state authorities. Law is perceived as external to the commons, and occasionally even as a threat to efficient self-management of the resource. The dominant theory simply asserts the "design principle", under which the state should accord the commons a minimal recognition of rights to organize and establish its own rules.⁵³ It is argued that the state should allow the commons to develop its institutional framework without being threatened by state intervention in its internal affairs, and state legislation should only be "enabling" and not regulatory. Normatively, this argument promotes a recognition of the commons' right to conduct its affairs autonomously. The assertion of commons' autonomy stems from a policy emphasis on "community

⁵³ See OSTROM, *supra* note 21 at 101: "[I]f external governmental officials presume that only they have the authority to set the rules, then it will be very difficult for local appropriators to sustain a rule-governed CPR over the long run". See also Wade, *supra* note 21 at 105. Carol Rose observed that Ostrom's analysis of CPRs as prior to politics is a modern version of Locke's social contract theory. See Carol Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 333-334 (1996). In part, this argument does not do justice to Ostrom, especially if we note the importance she ascribed to the role of state agencies in the process of providing institutions. It is fair to say that Ostrom viewed the state as a threat when it intervenes in a successful CPR situation or prevents the creation of one, but not otherwise.

management”, based on efficiency theories,⁵⁴ an extreme ideology of communitarianism or a on the view that the revival of local communities is the answer to the plight of an indigenous commons.⁵⁵

As will be elaborated in this section, such a treatment of the law is flawed both normatively and descriptively. Law is not merely an external factor; it is also endogenous to the commons constituting an integral part of its cultural environment. Law contributes to providing and sustaining the commons in more than one respect, though its practices may be indirect and not easily revealed or measured. Normatively, it is questionable whether the commons should be accorded autonomy with regard to all its internal arrangements and operations.

1. Imposition of Law

The perception of state's regulation of the commons is habitually perceived in the scholarship on commons as amounting to an imposition of law that threatens the-ability of commons to self-regulate their internal affairs. From a normative point of view, the perception of legal or other state intervention as a threat to the commons is problematic. It is also not sufficiently supported by empirical observations.

Many of the examples used to support this perception discuss colonized commons, where the intervention of colonial authorities, carried out through the imposition of legal and market institutions, has led to the weakening or even the destruction of communal or tribal common ownership.⁵⁶ Indeed, most of those writing about the legal aspects of the colonial experience have agreed that, as Chanock concluded, “law was the cutting edge of colonialism”⁵⁷. A dominant strand in the literature on law and colonialism focuses on the cultural differences between the colonized people and the law imposed on them by the colonizers, evidenced by the

⁵⁴ The theory of law and social norms also supports the argument for commons' autonomy. One of the claims made by these theorists is that members of close-knit groups govern themselves through wealth-maximizing norms. See ELLICKSON, *supra* note 33, and ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000).

⁵⁵ See Mosse, *supra* note 38 at 468, 471.

⁵⁶ See, for example, THOMAS R. BERGER, *VILLAGE JOURNEY: THE REPORT OF THE ALASKA NATIVE REVIEW COMMISSION* (1985), Stuart Banner, *Conquest by Contract: wealth Transfer and Land Market Structure in Colonial New Zealand*, 34 *LAW & SOC'Y REV.* 47(2000), and Fitzpatrick, *supra* note 16 at 1011- 1016.

⁵⁷ See MARTIN CHANOCK, *LAW, CUSTOM AND SOCIAL ORDER; THE COLONIAL EXPERIENCE IN MALAWI AND ZAMBIA* 4 (1985).

exercise of power through the imposition of the colonizer's law.⁵⁸ It views the law as external to the social actors, and examines the impact of law on society, finding that the law usually destroyed existing traditional authorities and relationships, norms and cultural values and economic self-sufficiency.⁵⁹

In more recent "law and colonialism" literature, analyses of the relationships between colonizers and colonized has become more complex than previously portrayed. This literature teaches that there are various dialectic and mutually

⁵⁸Cooper's characterization of the colonial legal system as part of the colonial conquest represents this approach. He argued that the conquest meant "the creation of a state, action through decrees or other legalistic measures, the development of institutions and procedures for enforcing decrees or settling disputes, and an arrogant assertion of the right – if not the duty - of the state to use such mechanism to remake social and economic structures". See Frederick Cooper, *Contracts, Crime and Agrarian Conflict: From Slave to Wage Labor on the East African Coast* in *LABOUR, LAW AND CRIME* 228 (Francis Snyder & Douglas Hay eds., 1987). See also Rene R. Gadacz, *Folk Law and Legal Pluralism: Issues and Directions in the Anthropology of Law in Modernizing Societies*, 11 *LEGAL STUDIES J.* 125, 135 (1987). Within this approach there are different ways of understanding the nature of colonial imposition of law on the colonized. For example, writing about the British land law in Kenya, Okoth-Ogendo defined imposition as encompassing "any situation where fundamental change is contemplated in society through the medium of law or legal institutions whose content is clearly contrary to the perceived and accepted normative order of those whose behavior it seeks to regulate or change". See H.W.O. Okoth-Ogendo, *The Imposition of Property Law in Kenya*, in *THE IMPOSITION OF LAW* 147 (Sandra B. Burman & Barbara E. Harrell-Bonds eds., 1979). Three elements are thus defined: an attempt to induce fundamental change, an application of norms that are external to society and the absence of democratic consensus. Thus, while colonial circumstances are the prototype of an imposition, they do not exhaust the incidents of imposition. Imposition may occur, according to this definition, even when the source is internal to society. For example, processes of collectivization and farmers' regulation in Eastern Europe. See András Sajó, *Compulsory Prosperity: Some Effects of the Regulation of Farmers' Cooperatives in Hungary*, *id.* at 223. While Okoth-Ogendo's definition focused on the content of the rules and the process by which they were formulated, Pospisil's definition highlighted the source of authority as the critical defining element. For Pospisil, situations of colonial acculturation are those where cultural change is provided by law imposed by the authorities of the dominant, intrusive culture. See Leopold Pospisil, *Legally Induced Cultural Change in New Guinea*, *id.* at 145. The source of authority may be mixed. A British colonial practice in many cases was to implement local law, either religious or customary, sometimes by British judges and at other times by local judges. See Sally Falk Moore, *Treating Law as Knowledge: Telling Colonial Officers What to Say to Africans About Running "Their Own" Native Courts*, 26 *LAW & SOC'Y REV.* 11 (1992). See also Gordon R. Woodman, *Customary Law, State Courts and the Notion of Institutionalization of Norms in Ghana and Nigeria* in *PEOPLE'S LAW AND STATE LAW* 143 (Anthony Allott & Gordon R. Woodman eds., 1985). In order to implement local law, the British engaged in projects of accumulating, arranging, writing and translating the law. As the literature demonstrates, this "local law" had little resemblance to any "authentic" or living law of the colonized. See BERNARD S. COHN, *COLONIALISM AND ITS FORMS OF KNOWLEDGE: THE BRITISH IN INDIA* 60 (1996) and Sally Falk Moore, *History and the Redefinition of Customs on Kilimanjaro*, in *HISTORY AND POWER IN THE STUDY OF LAW* 237 (June Starr & Jane F. Collier eds., 1989).

⁵⁹ See Robert L. Kidder, *Toward an Integrated Theory of Imposed Law*, in *THE IMPOSITION OF LAW*, *supra* note at 289, 292. For example, Svensson argued that "the imposition of American law on tribal communities... had been mainly accomplished by eroding the pillars upon which the autonomous Indian communities rested: distinct identities and the land base, resources and political power to sustain these identities". The European failure to distinguish among the distinct Indian communities and cultures led to the imposition of racial categories, alien to the ways the Indian identified and classified themselves. See Frances Svensson, *Imposed Law and the Manipulation of Identity: The American Indian Case*, *id.* at 69,71. For a more complex analysis see STUART BANNER, *HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER* (2005).

constitutive relationships between state law and unofficial forms of order. The emphasis is both on the ways in which state law penetrates the other normative order and exercises its constitutive power, as well as on the diverse reactions of variously affected social fields. Unofficial normative orders are depicted as resisting state law, manipulating it to their needs and even exercising constitutive power on state law⁶⁰. At times, the penetration of the colonial legal system was not always complete⁶¹, resulting in a gap between the declarations of the colonial administration and its actual success in transforming the colonized society⁶². In some cases, different classes of the colonized society diverged in their ability to resist or manipulate the situation of the plurality of normative orders⁶³. What emerges clearly from this literature is the wide range of reactions of the colonized, and their ability, albeit limited, to negate the effects of the “imposition”.⁶⁴ Nonetheless, looking solely at colonial experience in

⁶⁰ See generally Kidder, *supra* note at 291-303, June Starr & Jane F. Collier, *Introduction* in HISTORY AND POWER IN THE STUDY OF LAW, *supra* note 58 at 1,9, and Sally Engle Merry, *Law and Colonialism* 25 LAW & SOC'Y REV. 889 (1991).

⁶¹ In some cases, the legal system did not penetrate the whole territory of the colonized people. See, for e.g. June Prill-Brett, *Ancestral Land Rights and Legal Pluralism; Another Land Reform in the Highlands of Northern Philippines*, 9 LAW & ANTHROPOLOGY 43 (1997). Moreover, it is clear that in some cases, the indigenous people continued with their former ways as much as they could, and yielded to colonial power only when they had no other alternative. See for example, Sally Falk Moore's description of the Kilimanjaro area, *supra* note 58 at 12 and 42.

⁶² See Nicholas B. Dirks, *From Little King to Landlord: Colonial Discourse and Colonial Rule* in COLONIALISM AND CULTURE 175 (Nicholas B. Dirks ed. 1992) (examining the gap between colonial legal discourse regarding imposition of new legal categories and the actual minor differences it created in everyday life of land relations in south India).

⁶³ See for example, Jacqueline Vel, *Umbu Hapi Versus Umbu Vincent: Legal Pluralism as an Arsenal in Village Combats* in LAW AS A RESOURCE IN AGRARIAN STRUGGLES 23, 25 (Franz von Benda-Beckmann & M. van den Velde eds., 1992). On the lack of attention to the role of the elite in the law and colonialism literature, see Nathan J. Brown, *Law and Imperialism: Egypt in Comparative Perspective*, 29 LAW & SOC'Y REV. 103, 105 (1995).

⁶⁴ Using the example of the Spanish colonizers, de Certeau claimed that “submissive, and even consenting to their subjection, the Indians nevertheless often made of the rituals, representations, and laws imposed on them something quite different from what their conquerors had in mind; they subverted them not by rejecting or altering them, but by using them with respect to ends and references foreign to the system they had no choice but to accept”. See MICHEL DE CERTEAU, *THE PRACTICE OF EVERYDAY LIFE* xiii (1984). In a similar vein, Chanock argued that what was perceived by the British as the customary law of the African communities - as timeless law- was actually a newly created law. Viewing law not only as a way to conceptualize relations but also as a weapon within the colonized African society, Chanock showed how this weapon was used in the power struggle among different interested segments of African society. The outcome of this power struggle was that African customary law was used in the colonial courts of the state. Thus, what is known as African customary law cannot be understood without examining its creation as part of, or in light of, the economic changes the indigenous society had been undergoing and the emergence of new and various interests among different segments of African society. See CHANOCK *supra* note 57 at 3-24. The same power struggle over the production and meaning of colonial law can be discerned among the colonial elite. See Joan Vincent, *Contours of Change: Agrarian Law in Colonial Uganda, 1895-1962* in HISTORY AND POWER IN THE STUDY OF LAW, *supra* note 58 at 153, 156 (arguing that “imposed law in the colonial territories reflected the articulated interests of the ruling class, but it was at the same time an outcome of fractional struggle within that class”).

order to generate a general assertion about the inherent danger to the commons as a result of the application of an imposition, may be unnecessarily restrictive.

Moreover, the perception of law as a threat is deficient. The law was, and still is, a mechanism of domination, although it can also be benign, and even beneficial. The literature on commons includes many examples where state intervention or involvement was instrumental to the sustainability of commons and the rejuvenation of its community. There are new and innovating ways through which the state co-manages resources with communities or is involved, directly or indirectly, in supporting the revitalization of self-management of common resources by local-level communities.⁶⁵ Against a background of the conflicting historical evidence, it seems that, although a healthy suspicion of state authorities might not be misguided, it must also be contextualized, and translated into an assertion of a need for a strong autonomy only where justified.

2. The Autonomy of the Commons

In its direct treatment of law, or through reference to the state generally, a dominant argument in the literature on commons calls for the recognition of the right of commons to be left alone. The normative issues to be considered when contemplating this argument deserve an in-depth discussion that is beyond the scope of this paper. The following is a statement of some initial thoughts on the subject.

The question of commons' autonomy is similar to the question of groups' rights, and should be discussed in that same vein. As the modern western state has expanded the use of its regulatory powers, the question of the relationship between the state, representing society at large, and sub-groups, minorities and other private associations has become more significant. In recent decades, scholars from a variety of disciplines have advanced arguments as to how the modern liberal state ought to treat such communities. The suggestions have ranged from total assimilation to multiculturalism, from state intervention to state tolerance⁶⁶.

⁶⁵ See Filkret Berkes, *Cross-Scale Institutional Linkages: Perspectives from the Bottom Up*, in THE DRAMA OF THE COMMONS, *supra* note 1 at 293, 298-299, 301-310.

⁶⁶ See, for example, KYMLICKA, *supra* note 44, Charles Taylor, *The Politics of Recognition*, in MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 25 (Amy Gutmann ed., 1994), THE RIGHTS OF MINORITY CULTURES (Will Kymlicka ed., 1995), Deborah Rhode, *Association and Assimilation*, 81 NW. U. L. REV. 1061 (1986), Robert Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy and the First Amendment*, 76 CAL. L. REV. 297 (1988), Aviam Soifer, *Freedom of Association; Indian Tribes, Workers and Communal Ghosts*, 48 MD. L. REV. 350 (1989)

Promoting the idea of the right to culture, some have argued, similarly to the arguments made in commons' scholarship, that the state should respect the distinct cultural norms and the laws of sub-groups, and accordingly, should leave the governance of internal affairs to the sub-groups, imposing only minimal constraints. However, respecting the group's autonomy may entail a price-tag where the fundamental rights of its members as citizens of the state or the rights of outsiders are compromised.⁶⁷ Where a commons denies a member her share in the enjoyment of the common resource on which her subsistence depends, where a member is denied her right to participate in collective decision-making, where the commons arbitrarily sanctions a member or puts unjustified limitations on members' right to exit or when the commons is involved in discriminatory practices of exclusion⁶⁸- should the state refrain from intervening?

Moreover, in dealing with natural resources, the internal rules of the commons and its degree of success in sustaining such resources may have negative externalities on the surrounding environment. When confronted with a failing commons, would an intervention whose aim is to prevent such externalities be unjustified because it infringes on the autonomy of the commons?

These are core questions, and require treading a fine line between group rights and member rights, based on our normative stand. However, it may be argued that the specific implementation of the preferred policy should be context-sensitive.

3. Commons and Legal Environments

Edelman and Suchman distinguished between two meta-theoretical perspectives on law and organizations: the rational-materialistic perspective and the cultural perspective.⁶⁹ The rational-materialistic perspective conceptualizes organizations as rational wealth maximizers and perceives the law to be a system of incentives and penalties. Because of its emphasis on organization-level-rational-action, this perspective tends to assume that organizational identities, interests and

and Mark D. Rosen, *The Outer Limits of Community Self-Governance in Residential Associations, Municipalities, and Indian Country: A Liberal Theory*, 84 VA. L. REV 1053, 1061 (1998).

⁶⁷ See generally, IS MULTICULTURALISM GOOD FOR WOMEN.(Susan Moller Okin with respondents, Joshua Cohen, ed., 1999)).

⁶⁸ On a normative model of commons that preserves exit while promoting cooperation, see Hanoch Dagan and Michael A. Heller, *The Liberal Commons*, 110 YALE L. J. 549, 566-602 (2001). On the right to entry see *id.* at 570-571.

⁶⁹ Lauren B. Edelman and Mark C. Suchman, *The Legal Environment of Organization*. 23 ANN. REV. SOCIOLOGY. 479 (1997).

capacities exist independently of the law.⁷⁰ The treatment of law by commons' scholarship can be so classified.

Looking at the relationship between commons and legality from a cultural perspective leads to a more complex and enriched understanding. The cultural perspective sees organizations as cultural rule-followers which use the law as a system of moral principles, scripted roles and symbols. Organizations look to the law for normative guidance as they seek their place in a socially-constructed cultural reality.⁷¹

The sociological neo-institutionalism literature on law and organizations emphasizes both the constitutive functions of law and the complex, mutual constitutive relationship between organizations and their legal environment.⁷² While the law provides the categories and definitions through which organizations construct an understanding of themselves and their environment, the organizations themselves take part in the process of constructing these categories and definitions,⁷³ thus constituting the endogeneity of the law.⁷⁴ Organizations influence the meaning of the legal categories and definitions through their actions and the creation of meaning. The same holds true with regard to commons. For example, Ruddle⁷⁵ described how customary informal law governing Japanese' fishery for centuries was enacted, with some amendments, as state law. This is a case where the "bottom-up" and the "top down" were successfully linked as a constitution of historical continuity.

⁷⁰ *Id.* at 484-485.

⁷¹ *Id.* at 482, 495.

⁷² *Id.* at 492-506 (1997). See also Mark C. Suchman & Lauren B. Edelman, *Legal Rational Myths: The New Institutionalism and the Law and Society Tradition*, 21 *LAW & SOCIAL INQUIRY* 903, 909-928 (1996).

⁷³ On the mutually constitutive approach to law, see, generally, Austin Sarat & Thomas R. Kearns, *Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life*, in *LAW IN EVERY DAY LIFE* 21, 22 (Austin Sarat & Thomas R. Kearns eds., 1993), AUSTIN SARAT & WILLIAM L. F. FELSTINER, *DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS* 10-17 (1995) and Kitty Calavita, *Blue Jeans, Rape, and the "De-Constitutive" Power of Law*, 35 *LAW & SOC'Y REV.* 89, 100-103 (2001).

⁷⁴ On the endogeneity of law, see Lauren B. Edelman, *The Legal Lives of Private Organizations*, in *THE BLACKWELL COMPANION TO LAW AND SOCIETY* 231, 238-245 (Austin Sarat, ed., 2004).

⁷⁵ Kenneth Ruddle, *Solving the Common-Property Dilemma: Village Fisheries Rights in Japan Coastal Waters*, in *COMMON PROPERTY RESOURCES*, *supra* note 1 at 168. Consider also Acheson's description of a change in attitude among Maine's fishermen towards state regulations. Traditionally, the lobster fishermen opposed any attempt to regulate their activities, but commencing in the 1980s, they began to favor regulations they believed would lead to efficient management of the commons. Furthermore, their leaders have been instrumental in passing legislation which created a model for joint-management. See James M. Acheson, *Where Have All the Exploiters Gone? Co-Management of the Maine Lobster Industry*, *Id.* at 199.

As a constitutive environment, law may provide the commons with a model of, and for, organizational life.⁷⁶ Indeed, the law regarding the forms of legal incorporations or otherwise enacted models of organization defines certain types of formal structures by which organizations can be incorporated, for example, a partnership, corporation or cooperative society. If enacted, Dagan and Heller's construct of the liberal commons may be added as an example of legal models of organization.⁷⁷ Using Ann Swidler's concepts, each of these legal structures may be said to constitute a cultural "strategy of action", that is, a way of organizing collective action⁷⁸. According to Swidler, culture is "a tool kit" or repertoire from which actors select different pieces for the construction of lines of action⁷⁹. Thus law, as part of that culture, contains a repertoire of different forms of organization from which the legal subjects may choose, yet at the same time, limits such choice of possibilities for organization and incorporation.

The cultural perspective on the position and role of law in the life of organizations, and the evidence emerging from case studies on commons, demonstrate that law may both be imposed on the commons, as well as be constructed by the commons. Law affects the commons and, in turn, is affected thereby. There is no room for an *a priori* assertion regarding the incidence of one direction of influence over the other.

B. The Dynamic Analysis of Legality and Commons

Legality is part of the commons, and should, therefore, be incorporated into the dynamic, contextualized analysis of the commons. Where appropriate, the formal internal laws of the commons, its prevailing social norms and the interaction between the two, should be investigated. Various social and cultural components may be examined in this regard, including acquiring a knowledge of the system of order, its legitimacy, practices of use, avoidance or resistance of law, and the modes of thought through which the participants in the commons conceptualize and assign meaning to

⁷⁶ Law provides such environments that, as Edelman and Suchman argued, help to determine "what types of organizations come into existence and what types of organizational activity gain formal recognition". See Edelman & Suchman, *supra* note 69 at 483-4.

⁷⁷ On the construct of liberal commons see Dagan & Heller, *supra* note 68. On the role of law as a set of background rules, providing the infrastructure of liberal commons institutions, see *id.* at 577-578.

⁷⁸ Ann Swidler, *Culture in Action: Symbols and Strategies*, 51 AMERICAN SOCIOLOGICAL REVIEW 273, 276 (1986) and ANN SWIDLER, TALK OF LOVE: HOW CULTURE MATTERS (2001).

⁷⁹ *Id.* at 277.

their actions in the legal realm. The dimension of the environment can also be part of the study, namely, the formal and informal legal practices of the state and its agencies, and, where relevant, the legal realm of the organizational field with which the common is affiliated. It may be useful not to study these two dimensions separately, since internal law and state law (and the law of the organizational field) interact with one another, generating different social outcomes. In certain cases, the time-axis may be helpful in understanding the levels of legal orders and their interaction.

A contextualized analysis may be achieved by utilizing numerous theoretical concepts. True to the nature of the call for a contextualized analysis, it should be noted that no one theoretical framework is able to capture the full scope and variety of legalities. Following, this paper proposes one such conceptual framework which may, in certain cases, be a valuable starting point for the study of the legal life of the commons. It utilizes concepts and insights from the scholarship on legal pluralism, legal consciousness, as well as the “cognitive pillar” of sociological new-institutionalism, all of which share an understanding of reality as socially constructed, and of social structures and human agency as mutually interrelated.⁸⁰ Each of the three is needed to play a certain part in the analysis, while together, in concert, they mold into one comprehensive whole. Legal pluralism provides the platform for the analysis of the interaction between levels of legality in the commons - the internal and the external - and enables a study of such interaction along a time axis. The concept of legal consciousness is the cognitive schema of thought found among the participants of the commons regarding the legal realm,⁸¹ and provides a way to study the mutual-constitutive relations between the levels of legality. Finally, insights based on new-

⁸⁰ The perspective of the social construction of reality views an ongoing process of creating, maintaining and reproducing reality through a reciprocal relationship of structure and actions. Such reciprocity of structure and actions also entails a reciprocal relationship of structure and human agency. While human cognition consists of symbolic representations of the world that are socially constructed and objectified into social structures, it is human agency that maintains and reproduces these understandings through human interactions. According to this view, cognitive frameworks mediated by social processes account for the ways in which actions are produced and repeated while these repetitive actions generate the shared institutionalized understanding of self, others and society. See, generally, PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* (1967).

⁸¹ According to Sewell schemas are the “fundamental tools of thought” of a society and include “the various conventions, recipes, scenarios, principles of actions, and habits of speech and gesture”. Being tools of thought, schemas are virtual and are embodied or instantiated in resources, thus schemas are dependent on resources for their reproduction and validation. On the other hand, the cultural schemas mediate the strength of resources and direct their use. See William H. Sewell, Jr., *A Theory of Structure: Duality, Agency and Transformation*, 98 *AMERICAN J. SOCIOLOGY* 1 (1992)

institutionalism scholarship will assist in understanding those processes within the commons and its environment which constitute legal consciousness.⁸²

1. Legal Pluralism

Legal pluralism offers a description of the legal field in modern societies as consisting of a plurality of normative orders interacting with each other.⁸³ As Galanter observed, the relationship between official law and unofficial ordering is not invariably a matter of mutual exclusion.⁸⁴ The new conceptualization of legality has led to a more complex and interactive conceptualization of questions regarding the mutual constitutive relationship between official and unofficial forms of ordering.⁸⁵ The legal pluralism perspective examines the ways by which state law penetrates and shapes the other normative orders, as well as the ways these normative orders accept or resist penetration by state law, and exercise constitutive power in relation to state law.

Moore's notion of society as consisting of "semi-autonomous social fields" has gained wide support. According to Moore, a semi-autonomous social field is one that "can generate rules and customs and symbols internally, but that it is also vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded".⁸⁶ These social fields penetrate each other in diverse ways.⁸⁷ Some writers, like Merry, accorded state law a special status in its interaction with

⁸² On the merits of combining insights from the literatures on legal consciousness with neo-institutional approaches see, generally, Eric W. Larson, *Institutionalizing Legal Consciousness: Regulation and the Embedding of Market Participants in the Securities Industry in Ghana and Fiji*, 38 LAW & SOC'Y REV. 737, 738-740 (2004).

⁸³ See Griffiths, *What Is Legal Pluralism?*, 24 J. LEGAL PLURALISM 1, 38 (1986). ("It is when in a social field more than one source of 'law', more than one 'legal order' is observable, that the social order of that field can be said to exhibit legal pluralism"). See, generally, Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOCIETY REV. 869 (1988) and Marc Galanter, *Justice In Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM 1 (1981).

⁸⁴ See Galanter, *supra* note at 23.

⁸⁵ See Merry, *supra* note 83 at 873. As Starr and Collier explained "legal orders should not be treated as closed cultural systems that one group imposes on another, but rather as 'codes', discourses, and languages in which people pursue their varying and often antagonistic interests". See Starr & Collier, *supra* note 60 at 9. According to Fitzpatrick, state law is integrally constituted in relation to a plurality of social forms. He argued that "[s]tate law does take identity by deriving support from other social forms. Thus, it would appear to be once social form among many, even as a subordinate form. But in the constitution and maintenance of its identity, state law stands in opposition to and in asserted domination over social forms that support it. There exist a contradictory process of mutual support and opposition". See Peter Fitzpatrick, *Law and Societies*, 22 OSGOODE HALL L. J. 115 (1984).

⁸⁶ See SALLY FALK MOORE, LAW AS PROCESS: AN ANTHROPOLOGICAL APPROACH 55-6 (1978).

⁸⁷ *Id.* at 78.

other semi-autonomous social fields because it provides an inescapable framework for the practice of the other normative orders.⁸⁸

By affording the insight that the legal field contains a plurality of normative orders, the perspective of legal pluralism enables an examination of the multifaceted relations between state law and other legal forms of ordering within a society, the commons being one of them. This perspective questions when and why state law shapes the other systems of law and vice versa. A study of the interactions between two fields cannot, however, be complete without scrutinizing their elements: the structure and culture of each. The examination of the internal processes, forces and cultural components of the semi-autonomous fields may help explaining why the interaction between them adopts one character or another. Moreover, since legal pluralism views the mutually-constitutive relations between the levels of legality as a process, where appropriate, the analysis may also be sensitive to the time-axis and examine the dynamic interaction in both its stable and/or changing facets. However, the literature of legal pluralism does not provide the tools for such an examination and should, therefore, be supplemented by other perspectives on legal phenomena. The framework proposed here uses the concept of legal consciousness and the neo-institutionalism analyses of organizations and their environments to realize such an objective.

2. Legal Consciousness

The study of legal consciousness adds to an understanding of the more refined and subtle ways through which the mutually constitutive relations between state law and other forms of ordering are played out.⁸⁹ According to Ewick and Silbey, this is the study of “how legality is experienced and understood by ordinary people as they engage, avoid and resist the law and legal meaning”⁹⁰ within structural constraints.

⁸⁸ See Merry, *supra* note 83 at 897.

⁸⁹ Different writers use the term “legal consciousness” to denote various phenomena and, consequently, it has become indeterminate both with regard to its definition and with regard to the collectivities that may possess it. See generally, David M. Engel, *How Does Law Matter in the Constitution of Legal Consciousness?* in HOW DOES LAW MATTER? (Austin Sarat & Garth Bryant eds., 1998). In his study on welfare recipients, Sarat used Trubek’s definition of legal consciousness as “... all the ideas about the nature, function and operation of law held by anyone in society at a given time” and argued that ideas should be studied as embedded in structure and constraint. See Austin Sarat, “... *the Law is All Over*”: *Power, Resistance and the Legal consciousness of the Welfare Poor*, 2 YALE J. L. & HUMANITIES 344 n.1 (1990).

⁹⁰ See PATRICIA EWICK & SUSAN B. SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* 35 (1998).

The cultural schema of thought regarding legal consciousness, which operates when people participate in the construction of legality⁹¹, is collectively, not individually, constructed, and thus, is historically situated and shaped.⁹² It is an account of the legal experience within and without formal legal institutions and interpretations. Analyzing the narratives of their interviewees, Ewick and Silbey found a variety of legal consciousnesses, each invoking “a particular cluster of cultural schemas and resources that position the law and the individual in relation to one another”.⁹³ They describe three types of legal consciousness: “before the law” (where legality is imagined and treated as an objective realm of disinterested action, removed and distant from the personal lives of ordinary people), “with the law” (the treatment of legality as a game with a set of rules to be played and changed by the players) and “against the law”(where the law is perceived as an arbitrary product of power).⁹⁴ However, in the study of other social fields, in other places at other times, one can discern various contents to the cultural schema of legal consciousness, as well as various processes of its construction, reproduction and change.⁹⁵

The framework of analysis proposed here suggests examining the legal consciousness of the commons as a social field. Being a socially constructed schema of thought, legal consciousness is one of the cultural components of the commons through which the participants make sense of their world and their experiences within it. Legal consciousness mediates the understanding of the participants both with regard to official and unofficial law within the commons and with regard to state legality. The participants experience and understand the interaction between the commons and state law through the terms, perceptions and schemas of their culture. Where the commons is affiliated with an organizational field, this wider field should

⁹¹ *Id.* at 45.

⁹² *Id.* at 46.

⁹³ *Id.* at 47.

⁹⁴ *Id.* at 28. For a detailed account of the three types of legal consciousness, see *id.* at 74-107, 129-64, 181-220. Ewick and Silbey argued that the three types of legal consciousness are entwined, and although they seem contradictory, this contradiction is a source of strength for legality. *Id.* at 31-31, 226-30. However, in their demonstration of this argument they referred only to the combination of “before” and “with” the law. *Id.* at 230-1. Incorporating ideology and hegemony as the processes which produce a specific pattern in social structure, Ewick and Silbey introduced the dimension of power and constraint into their analysis. “Before the law” and “with the law” are depicted as part of the hegemonic culture. *Id.* at 225-6. On the legal consciousness of resistance, see also Sarat, *supra* note 90.

⁹⁵ See Laura Beth Nielsen, *Situating Legal Consciousness: Experiences and Attitudes of Ordinary Citizens about Law and Street Harassment*, 34 LAW & SOC'Y REV. 1055, 1060 (2000).

also be looked at as an arena for the production and reproduction of legal consciousness.

3. New-Institutionalism

The sociological new-institutional theory of organizations focuses on the effects on organizations by cultural beliefs operating in their environments.⁹⁶ Thus, the theory is able to generate important insights regarding the commons as organizations and their cultural worlds, including the legal sphere.

The “cognitive pillar” of the theory expands its interests to questions of formation, persistence and change of institutions.⁹⁷ Writers within “the cognitive pillar” are interested in the processes of the constitution of reality and the cultural frameworks through which meaning is created⁹⁸, thus their focus is on the schemas of the social structures. Indeed, the view that relations between objectified structures and agency are reciprocal is typical of this writing.⁹⁹ Therefore it is appropriate to apply the insights of the “cognitive pillar” to the study of legal consciousness and to categorize legal consciousness as an institution.

The neo-institutionalism literature is helpful in understanding the source of institutionalized schemas and how they become institutionalized. Institutionalization is the process by which certain understandings of the world come to be taken for granted, as well as the state of affairs in which these institutions define and limit the avenues of actions available to the actors.¹⁰⁰ Special attention is given in this regard to historical or longitudinal analysis.¹⁰¹ The literature reflects two primary approaches.

⁹⁶ SEE SCOTT, *supra* note 51 at 31, 92-132.

⁹⁷ See *id.* at 64-89. The term “institution” was defined by Scott in the broadest terms: “Institutions consist of cognitive, normative and regulative structures and activities that provide stability and meaning to social behavior... Although constructed and maintained by individual actors, institutions assume the guise of an impersonal and objective reality”. *Id.* at 33-34. On the maintenance and persistence of institutions, see Lynne G. Zucker, *The Role of Institutionalization in Cultural Persistence*, in *THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS* (Walter W. Powell and Paul J. DiMaggio eds., 1991) 83. More recent writing focuses mainly on explaining institutional change. See generally, Elisabeth S. Clemens & James M. Cook, *Politics and Institutionalism: Explaining Durability and Change*, 25 ANNUAL REV. SOCIOLOGY 441 (1999).

⁹⁸ See SCOTT, *supra* note 51 at 40. According to Scott’s conceptualization, the regulative pillar focuses on the regulative aspects of institutions in constraining and regulating behavior through rule-settings, monitoring and sanctioning. The normative pillar emphasizes values and norms. *Id.* at 35-40

⁹⁹ See *id.* at 41, 49-51.

¹⁰⁰ See Zucker, *supra* note 97 at 85.

¹⁰¹ See W. Richard Scott, *Introduction: Institutional Theory and Organizations*, in *INSTITUTIONAL CONSTRUCTION*, *supra* note 51 at xi,xix-xx. See also Arthur L. Stinchcombe, *Social Structure and Organization*, in *HANDBOOK OF ORGANIZATIONS* 142, 153-69 (James G. March ed.,1965) and James N. Baron, Frank R. Dobbin & P. Devereaux Jennings, *War and Peace: The Evolution of Modern*

One depicts institutionalization as a top-down process, while the other describes a bottom-up process emphasizing the participation of the actors in the constitution of institutions.¹⁰² Early neo-institutionalists pointed at the environment as the supplier of institutions and at various processes by which the institutions are imposed on organizations belonging to the same field or adopted by them. Meyer and Rowan argued that, in their struggle to survive, to attain and maintain legitimacy, organizations comply with the institutionalized cultural norms of their environment, even though this may be irrational and not in accordance with criterion of efficiency. Compliance is achieved through what Meyer and Rowan called decoupling, the separation of the formal and informal structure of organizations.¹⁰³ Using the term isomorphism, DiMaggio and Powell described the attempts of organizations to resemble in their structures and activities the dominant established patterns within their environment.¹⁰⁴ They point to three types of isomorphism processes: coercive isomorphism (resulting from “formal and informal pressures exerted on organizations by other organizations upon which they are dependent”), mimetic isomorphism (imitation arising out of uncertainty), and normative pressures (stemming primarily from professionalization).¹⁰⁵ Others have pointed at variances among organizations in their vulnerability to the pressures of the environment and have noted diverse modes of reactions towards such pressures.¹⁰⁶ In more recent writings, new-institutionalists

Personnel Administration in U. S. Industry, 92 AMERICAN J. SOCIOLOGY 350 (1986) (situating historically changes in the control systems prevailing in U.S. industries).

¹⁰² See Mark C. Suchman, *Localism and Globalism in Institutional Analysis: The Emergence of Contractual Norms in Venture Finance*, in INSTITUTIONAL CONSTRUCTION, *supra* note 51 at 164.

¹⁰³ See John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, in NEW INSTITUTIONALISM, *supra* note 97 at 41. This separation “enables organizations to maintain standardized, legitimating, formal structures while their activities vary in response to practical considerations.” *Id.* at 59. According to Meyer & Rowan, formal structure is a “blueprint for activities which includes, first of all, the table of organization: a listing of offices, departments, positions, and programs”, while the informal structure of organizations is the actual day-to-day work activities, how things are really being done”. See *id.* at 41-2.

¹⁰⁴ See Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, in NEW INSTITUTIONALISM, *supra* note 97 at 63, 64-5.

¹⁰⁵ *Id.* at 67-70.

¹⁰⁶ See Christine Oliver, *Strategic Responses to Institutional Processes*, 16 ACADEMY OF MANAGEMENT REVIEW 145 (1991) (incorporating insights of institutional analysis and rational-choice in mapping and explaining the diverse responses of organizations to environmental pressures). For a review of relevant studies see SCOTT, *supra* note 51 at 118-132. For an analysis of organizational responses to pressures from the legal environment see Lauren B. Edelman, *Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace*, 95 AMERICAN J. SOCIOLOGY 1401 (1990) and Jeb Barnes and Thomas F. Burke, *The Diffusion of Rights: From Law on the Books to Organizational Rights Practice*, 40 LAW & SOC'Y REV. 493 (2006).

have introduced to their analyses the notions of interests, agency and power, especially in regard to institutionalization and de-institutionalization processes.¹⁰⁷

In line with this literature, an analysis of legality in the commons may trace the processes of the institutionalization of schema of legal consciousness throughout the different levels of legality, exhibiting sensitivity both to environmental pressures and to struggles among members of the commons over power, control and legitimization.

Combining the legal pluralism perspective, the concept of legal consciousness and the study of the emergence and institutionalization of cultural schemas as part of the organizational processes and their interrelationship with their environment, provide a framework for a dynamic multi-dimensional contextualized analysis of legality in the commons. The framework offered by this paper is not the only model which may be generated to examine the commons and legality from a cultural constitutive approach; in some contexts it may be useful in framing the questions to be asked, while in others it might be irrelevant. A framework for analysis should also be contextualized. In the next section, this paper will demonstrate the usefulness of the framework suggested here, by applying it to the question of legality in the unique case of the kibbutz during its formative stages.

IV. LEGALITY IN THE KIBBUTZ

The question of legality in the kibbutz is a suitable venue for demonstrating the merits of the dynamic analysis presented above. Early writings on this issue suggest the absence of law, referring to various dimensions of the kibbutz during its formative stages as a source of explanation. Utilizing the proposed framework of analysis, the hypothesis propounded in this paper is that early kibbutz life was infused with legality. The issues to be addressed concentrate on the experience of the kibbutz members and their perception of the absence of legality. It is not a case of imposing state law on a commons, nor is it a case of the primacy of the commons' internal form

¹⁰⁷ See Paul DiMaggio, *Interest and Agency in Institutional Theory*, in INSTITUTIONAL PATTERNS AND ORGANIZATIONS 3, 12-6 (Lynne G. Zucker ed., 1998), and Paul J. DiMaggio, *Constructing an Organizational Field as a Professional Project: U. S. Art Museums, 1920-1940*, in NEW INSTITUTIONALISM, *supra* note 97 at 267. Analyzing the construction of an organizational field of business corporations, Galaskiewicz showed “how field leaders can act purposively (albeit under conditions of bounded rationality) to construct and create institutions which in turn control and govern organizations’ actions”. See Joseph Galaskiewicz, *Making Corporate Actors Accountable: Institution-Building in Minneapolis-St. Paul*, in NEW INSTITUTIONALISM, *supra* note 97 at 293.

of ordering. It is both and neither. Through a historical cultural study of the kibbutz, its organizational field and state law's regulation of the kibbutz, this proposal will demonstrate how a specific legal consciousness which mediated state law was constructed and institutionalized.¹⁰⁸

The analysis made here portrays the kibbutzim's legal consciousness of ignorance and indifference towards their Rules as cooperative societies under state law. This study is an attempt to explain how such a legal consciousness was established and institutionalized. The explanation offered here involves analyzing a process by which a dominant perception of the marginal place of state law in the everyday life of the kibbutzim was constituted, a perception which eventually became taken-for-granted. Thus, the legal consciousness of indifference was an outcome of a process of estrangement from state law.

A. Social Control or Anti-Law Norm?

The question of legality in the kibbutz has attracted scholarly attention with two main arguments being proposed; both refer to the internal dimension of the kibbutz life as an organization.

One line of reasoning was raised by Swartz in his by now classic study on social control and social structure.¹⁰⁹ Studying the kibbutz in the late 1940s, Swartz argued that social control in the kibbutz was exercised through non-legal sanctions as applied by the community as a whole or its general assembly. Because the kibbutz lacked any specialized agency for social control, Swartz concluded that there was no formal legal control on the kibbutz. Swartz based his explanation on the special features of the kibbutz and its social and economic structures. Because the kibbutz is a primary group with face-to-face interaction based on its collectivist economy, the exercise of non-legal sanctions is efficient, with no need for the formal exercise of law. Swartz' argument resonates with more recent writings on law and social norms, with its contention that the efficient exercise of social control in small, close-knit and non-hierarchical communities explains the lack of application of state law and even

¹⁰⁸ The analysis detailed in this part is based on an extensive historical study. For the sake of simplicity, most of the citations and references were omitted. For the full historical study, see AVITAL MARGALIT, *STRANGERS IN THE DOMAIN OF LAW: THE CONSTRUCTION OF THE KIBBUTZIM'S ESTRANGEMENT FROM STATE LAW* (JSD Dissertation, Boalt Hall School of Law, University of California, Berkeley) (2001).

¹⁰⁹ See Richard D. Swartz, *Social Factors in the Development of Legal Control: A Case Study of Two Israeli Settlements*, 63 *YALE L. J.* 471 (1954).

ignorance of law among such communities.¹¹⁰ When looking at legality solely from the internal dimension and from an economic-oriented perspective, Swartz' argument is plausible. However, the question arises as to whether such an analysis is sufficient in order to fully grasp an understanding of the role which legality plays on the kibbutz commons. As will be demonstrated below, the answer is in the negative.¹¹¹

Another argument with regard to legality on the kibbutz is Shapiro's suggestion that, initially, the kibbutz was ideologically against the law, and this ideology acted against bringing legal control into the kibbutz.¹¹² Shapiro looked at only one cultural component - an anti-law norm, and, again, only at the internal dimension of the social life of the kibbutz. In fact, a closer historical study reveals the limitations of Shapiro's argument.

Was the kibbutz antagonistic to the law? Shapiro argued that, initially, the kibbutz regarded law as "alien to the familial intimacy of the kibbutz"¹¹³. The social relationships among kibbutz members living in a small, close-knit group were based, at least in their eyes, on intimate face-to-face interactions. There was no place for legal control, with its impersonal character, in the daily life of the kibbutz. Shapiro based his argument on the experience of Degania Aleph, the first kibbutz, as described and explained by its members. However, the small, intimate or organic kibbutz was only one model of kibbutz way of life during the 1920s.¹¹⁴ The kibbutzim of the 1920s were not cast in one mold. They differed in ideology, mode of social organization and management, as well as in their relations with the organized

¹¹⁰ See, for example, ELLICKSON, *supra* note 33.

¹¹¹ For further criticism on Swartz see John Griffiths, *The Division of Labor in Social Control* in 1 TOWARD A GENERAL THEORY OF SOCIAL CONTROL 37, 40-7 (Donald Black ed., 1984).

¹¹² See Allan E. Shapiro, *Law in the Kibbutz: A Reappraisal*, 10 LAW & SOCIETY REV. 415, 421, 433 (1976). Shapiro also argued that although the social conditions on the kibbutz changed, the kibbutz did not develop legal control in Swartz's sense of the term. Criticizing Swartz' definition of legality, Shapiro argued that legality does exist on the kibbutz, manifested both by the normative system and by the legal functions of the general assembly. In response to Shapiro's first argument, Swartz consented that "[I]f it could be shown that these different beliefs were present in the original ideology, prior to the founding of the first kibbutz (1910) that would suggest a plausible rival hypothesis." See Richard Swartz, *Law in the Kibbutz: A Response to Professor Shapiro*, 10 LAW & SOCIETY REV. 439, 440.

¹¹³ Shapiro, *supra* note at 421, 433

¹¹⁴ On the kibbutzim in the 1920s see, generally, HENRY NEAR, THE KIBBUTZ MOVEMENT: A HISTORY - ORIGINS AND GROWTH, 1909-1939 (1992), ON THE EARTH (Muki Zur, Tair Zvulun & Hanina Porat eds., 1981) (Hebrew), JONATHAN FRANKEL, PROPHECY AND POLITICS: SOCIALISM, NATIONALISM AND RUSSIAN JEWS, 1862-1917, 366-70, 390-427 (1981), THE SECOND ALIYA: STUDIES (Israel Bartal ed., 1997 (Hebrew), HENRY NEAR, THE KIBBUTZ AND THE SOCIETY, 1923-1933 (1984) (Hebrew), ELKANA MARGALIT, COMMUNE, SOCIETY AND POLITICS (1980) (Hebrew), ELKANA MARGALIT, HA'SHOMER HA'TZAIR: FROM YOUTH COMMUNITY TO REVOLUTIONARY MARXISM (1971) (Hebrew), THE BOOK OF THE THIRD ALIYA (Yehuda Erez, ed., 1964) (Hebrew), BARUCH BEN AVRAHAM & HENRY NEAR, STUDIES OF THE THIRD ALIYA (1995) (Hebrew) and BARUCH BEN AVRAHAM, HEVER HA'KVUTZOT (1976) (Hebrew).

labor movement. The argument of the anti-law norm must, therefore, be examined carefully with regard to each model of kibbutz life. The word “kibbutz” itself denoted, at that time, a country-wide cluster of various groups, engaged in agricultural settlement or working in urban centers, constituting together a large commune. In both of the larger country-wide kibbutzim - Gdud Ha'avoda and Ein-Harod - there was a high level of legal formalization, written regulations, and the formal exercise of dispute resolution processes. The members of these kibbutzim outnumbered those of the small and intimate ones, and only some of the latter might have been characterized by an anti-law norm.

Moreover, during the 1920s, the corporate structure of the kibbutzim went through a process of formalization and was legalized under state law as a cooperative society. Neither Swartz nor Shapiro paid attention to the fact that the kibbutz was governed by Rules, enacted under state law¹¹⁵ and that it was state law which conferred authority on the kibbutz general assembly to formulate regulations and reach decisions in particular cases. The question of the relationship between the kibbutz and the Cooperative Societies Ordinance, 1933 or the state agency of the Registrar of Cooperative Societies is not raised in their exchange.¹¹⁶

Also, during the same period, the kibbutzim, as part of belonging to the organizational field of the labor-movement in Palestine, formulated their constitutions as entities affiliated with such movement. Discussions on the constitutions of the kibbutzim and their Rules as cooperative societies under state law reveal complex and sophisticated interactions between the internal social order of the kibbutzim and their legal environment. It is within this broader context that the study of legality of the kibbutzim should be conducted.

B. Reframing the Debate

Since 1927, all existing and newly established kibbutzim have been registered as cooperative societies, with their Rules approved by the Registrar of Cooperative Societies. According to state law, the Rules are the constitution of the cooperative

¹¹⁵ “Rules” is the legal term used in the Cooperative Societies Ordinance, 1933, for the by-laws of a society defined thereunder, denoting its articles of association.

¹¹⁶ Similar neglect is found in other ethnographic works on the kibbutz that examined the ways in which the kibbutz settled disputes. See Terence M. S. Evens, *Stigma, Ostracism, and Expulsion in an Israeli Kibbutz* in *SYMBOL AND POLITICS IN COMMUNAL IDEOLOGY* 166 (Sally Falk Moore & Barbara G. Myerhoff, eds. 1975) and Michael Saltman, *Legality and Ideology in the Kibbutz Movement*, reprinted in *THE SOCIOLOGY OF THE KIBBUTZ* 125 (Ernest Krausz & David Glanz, eds., 1983).

society, a contract between the society and its members, and between the members themselves¹¹⁷. The Rules include: the objectives of the society, its structure, the respective powers and authority of all the governing bodies of the society, and the rights and duties of the members.

Yet, decades after the Rules of the kibbutzim as cooperative societies were first drafted, approved by the state and used by all incorporated kibbutzim, we find ignorance and indifference regarding what is ostensibly the “constitution” of the kibbutz among its members. The fact that the kibbutz was a legal entity under state law with binding Rules of association did not become common knowledge among kibbutz members, and those who were aware of the Rules did not imagine them as having a role in the regulation of the everyday life of the kibbutz. While kibbutz members were aware that the law may regulate many aspects of their lives as individuals (for example, family law) and that it may regulate the life of the kibbutz as an economic body, they were indifferent to the law that was purportedly the legal base for their existence as a collective. This indifference towards the Rules was a taken-for-granted, institutionalized component of the kibbutzim’s culture. Nevertheless, the kibbutzim complied with the dictates of the legislation on cooperative societies as well as with the Rules.

For various reasons, the fact that indifference towards the Rules was, for decades, an institutionalized cultural component of the kibbutzim’s organizational field is puzzling. First, the kibbutzim were part of the Histadrut (the General Federation of the Jewish Workers in Palestine) and cooperative societies were the preferred mode of incorporation among the Histadrut's economic organizations. Officials of the Histadrut, and later of the kibbutz movements, were in close contact with the Registrar of Cooperative Societies, and their representatives were involved in the enactment of regulations pursuant to the Cooperative Societies Ordinance. Second, the kibbutzim are totally integrated into Israeli society, even perceiving themselves as its elite, and generally comply with state law. Therefore, the fact that the kibbutzim are unique communities with norms which differ in some respects from those of the surrounding society, most notably with regard to holding of property, can not by itself explain their indifference and ignorance of the Rules. Third, internally, the kibbutzim are not opposed to laying down rules of conduct. Some kibbutzim were

¹¹⁷ See C.A.524, 525/88 Pri Ha'emek v. Sde Yakov, 45(4) P.D. 529, 546-7.

formalistic in their organization from the beginning while others, with more anarchical tendencies in their initial stage, went through a development process of bureaucratization and formalization. Different aspects of kibbutz life were dealt with according to well-known internal norms and practices, usually backed by formal decisions of the general assembly.¹¹⁸ Thus, the kibbutzim were not indifferent to rules as such, but only to their Rules under state law. Fourth, the Rules were not imposed on the kibbutzim. On the contrary, the Rules – those of 1927, 1934 and the 1960s – were shaped in negotiations between the representative organizations of the kibbutzim and the state.

The indifference to the Rules is even more puzzling because the kibbutzim did comply with the law regarding cooperative societies. General assemblies of the kibbutzim were called and their minutes recorded according to law. The executive of the kibbutz (the committee) was also elected according to the law. Law dictated the respective powers of the general assembly and of the committee. Over the years, members of the kibbutz and its elected officers functioned according to the procedures determined by the law. The question then is how the simultaneous existence of compliance and a legal consciousness of indifference can be explained.¹¹⁹

¹¹⁸ See Allan E. Shapiro, *Law in the Kibbutz: The Search Continues*, in SOCIAL CONTROL AND JUSTICE 343, 346-9 (Leslie Sebba ed., 1996), DANIEL DE MALACH, THE FORMAL ORGANIZATIONAL CHANGE IN THE KIBBUTZ 32-34 (1995)(Hebrew). On legalization and stages in organizations' life cycles, see Sim B. Sitkin & Robert J. Bies, *The Legalization of Organizations: A Multi-Theoretical Perspective*, in THE LEGALISTIC ORGANIZATION 19 (Sim B. Sitkin & Robert J. Bies, eds., 1994).

¹¹⁹ The case of the kibbutzim can be described as one of symbolic compliance. Such compliance is achieved through what Meyer and Rowan called decoupling, the separation of the formal and informal structure of organizations. See Meyer & Rowan, *supra* note 103 at 41-42. This separation "enables organizations to maintain standardized, legitimating, formal structures while their activities vary in response to practical considerations". *Id.* at 59. The same process is observed where the compliance with legal pressures is not necessarily substantive, but merely superficial and ceremonial. See Edelman & Suchman, *supra* note 69 at 496-7. In such cases, the organization is engaged in concealment. While complying outwardly and attaining legitimacy, the organization disguises its nonconformity to the legal environmental pressures. Outwardly, the kibbutzim complied with the dictates of the law regarding cooperative societies, but inwardly the law did not penetrate and the kibbutzim were governed by their own system of rules. Indeed, on close examination of the compliance of the kibbutzim, we discern that most of the legal requirements the kibbutzim complied with were of a procedural nature. The kibbutz members and officials were engaged in mindless conformity with legal procedures. The institutional arrangements of the field ensured the compliance while maintaining a cognitive gap between the kibbutzim and the Rules through the legal consciousness of indifference. While the concept of symbolic compliance with law helps us to describe the phenomenon, it does not provide us with an explanation of the origins of indifference to law. The origins of a cultural schema such as legal consciousness may vary, due to differences between organizational fields and their environments. Thus, the enigma of the particular case of the kibbutzim remains - why, of all possibilities, was the reaction to the Rules and the legal environment one of indifference? How and why was this cultural schema of legal consciousness created and how was it institutionalized?

The explanation offered in the next section analyzes the relations between two levels of legality in the kibbutz – state law and the law of the organizational field. The indifference should be understood against the background of the process of the structuration of the organizational field to which the kibbutzim belonged, namely, the organizational field of the Histadrut. It was in this formative period that the kibbutzim and other organizations in the field were established and incorporated under state law. The cultural components of the field and of the different organizations comprising it emerged at that time. It was a process embedded in ideological controversies and, even more, in a power struggle over domination of the field. Culture and practices of power and resistance account for the creation and institutionalization of the indifference to the Rules. Law, both internal and on the state level, played a crucial part in the process.

C. The Construction of Estrangement

The investigation of the legalization of the kibbutzim necessitates a study of the organization and legalization of the Histadrut organizational field. The kibbutzim were part of the Histadrut from its inception. Kibbutz members were to be found in every institution of the Histadrut, and some of them belonged to the Histadrut leadership. During the 1920s, disputes between the Histadrut Central Executive Committee (hereinunder, the “Executive”) and parts of the kibbutz movement arose, but even at the height of confrontation, it was obvious to the disputing parties that they belonged to the same ideological and political sector. The history of the kibbutzim in the 1920s and 1930s cannot be understood unless studied in the context of the history of the Histadrut. More specifically, the legalization of the kibbutzim and their registration under state law were part of the process by which the Histadrut itself was organized and legalized during the 1920s. The concepts, terms and norms that dominated the process of legalization of the kibbutzim stemmed from the cultural world created and institutionalized by the Histadrut. Therefore, before studying the legalization of the kibbutzim, the cultural world of the Histadrut organizational field in regard to law and legalization must first be understood.

The decade of the 1920s was the period of the structuration of the Histadrut organizational field. The Histadrut itself was established in 1920 and incorporated into it most of the institutions of the labor movement. It was a complex organization engaged in almost all spheres of life. The Histadrut consisted of many units, differing

in their spheres of operation, their forms and their composition of personnel. Included in these units were a bank, cooperatives for the production and supply of goods, agricultural collective settlements, a health care service, building contractor, work placement and immigration offices, trade unions and local Workers' Councils and a center for cultural activity. The comprehensiveness was compatible with the concept that the workers should be able to satisfy all their needs - economic, cultural and social within the Histadrut framework. The negative aspects of this complexity were exacerbated by the lack of any defined organizational relations among the different units. Moreover, during this period, a sense of disaffection arose. Workers were disappointed by the leadership because of mismanagement and failure to meet their high expectations. Different groups within the Histadrut began to demand more autonomy in their affairs, and members refused to obey the leadership dictates. Such phenomena made the introduction of new organizational tools necessary. The ideas for organizational reform by the Histadrut's leaders, first and foremost among them being David Ben-Gurion, were transformed during the restructuring process - from creating a general commune of all Jewish workers in Palestine to building a centralist organization with a legal basis. When Ben-Gurion became the "secretary general" of the Histadrut in 1921, his main concern was how to guarantee the commitment of the members to the Histadrut leadership and, thereby, to the project of nation building.¹²⁰ From Ben-Gurion's perspective, the key issue was the commitment of the economic enterprises. Ben-Gurion was suspicious of powerful independent economic institutions. He explained this suspicion by saying that the natural tendency of such organizations was to increase their autonomy for the sake of economic success, without qualms about deserting the interests of the working class. Even the kibbutzim, the most collectivist element within the Histadrut, were not to be trusted according to Ben-Gurion, since their socialism was confined within their boundaries and in their external relations they acted according to their own narrow interests. The

¹²⁰The Histadrut's composition and political character did pose a problem of commitment. The Histadrut was created as a pluralistic organization consisting of different ideological parties and based on voluntary membership. How could the leadership ensure the obedience of members in a pluralistic and voluntary organization? Moreover, the Histadrut was open to all. The sole conditions for membership were a minimum age of 18 years and making a living based upon self-labor without exploiting others. This allowed members of the Histadrut to hold diverse ideologies that were not always fully committed to all its goals. Many joined the Histadrut in order to enjoy its work and health services. Some were not socialists and others were not Zionists. All this led to a concern that, in a clash between the narrow economic interests of the members and the national interest, the former would prevail.

solution was the creation of an elaborate hierarchical structure of governance in which a new organization - the Workers' Society - would function as the "holding" cooperative presiding over the organizational structure of the "subsidiaries", and enjoying special powers and privileges.

After long discussions, the second convention of the Histadrut approved the establishment of the Workers' Society. Under this plan, all the affiliated economic enterprises would be legally incorporated as subsidiary societies of the Workers' Society. The proposal stressed the legal nature of the Workers' Society and the idea that, through law and ownership of the cooperatives and settlements, the Society would have the power to supervise their activities. The Workers' Society was to be registered according to state law, and accorded special rights and privileges regarding the management and supervision over all the economic institutions of the Histadrut. The governing bodies of the Workers' Society would have the same personnel composition as the equivalent governing bodies of the Histadrut, thus ensuring the perpetuation of the political control over the economic enterprises.

The Histadrut Executive attempted to exercise its control over the incorporated economic institutions by planting in their governance structure certain devices to ensure the ability of the Executive to prevent or negate all moves and decisions incompatible with its policies. In some of the economic institutions, the Workers' Society – synonymous with the Histadrut Executive - held a special class of shares, called founders' shares, to which 50 percent of the voting rights were attached. Also, in some of the incorporated economic institutions, the Workers' Society enjoyed, under the rules of the organization, special rights with regard to the appointment of all or some of the executive or the managing committee of the organization. Moreover, the rules of some incorporated cooperative societies gave the Executive, through its control of the Workers' Society, a right of veto over the decisions of the general meetings. The veto rights of the Workers' Society entitled it to participate in the general meetings of the subsidiary societies and to veto any resolution passed by the society on the grounds that it was contrary to the rules of the Workers' Society and/or principles of cooperation

The legal aspects of the Workers' Society were not obscured. On the contrary, Ben-Gurion, in his speeches and articles, emphasized that the Society would be a legal entity approved by the government. The legalization of the economic activities

of the Histadrut was explained as an inevitable step in the development of the labor movement – no longer a small family, but not yet a state. Legal measures, backed by the state, would, of necessity, replace the “familial control”. The legalization was also rationalized for pragmatic reasons. The economic institutions operated financially and, in general, within the formal framework dictated by state law. In order to sue and be sued, purchase and sell, take or give loans, a legal personality is needed. Thus, obtaining a legal status under state law is inevitable. It was emphasized that the Workers’ Society, although a different legal entity, would be no more than the economic façade of the Histadrut; an instrument for achieving the Histadrut’s goals, designed according to the specific social, economic and legal natures of the economic activity.

Law played a major role in the process of the organization of the Histadrut’s organizational field during its formative years. It was part and parcel of every move in the structuration of the field. The Executive used state law instrumentally. As Ewick and Silbey noted, “from an instrumental perspective, law makes available tools, resources, symbols, and vocabularies useful in the construction of social life”.¹²¹ The Executive worked hand-in-hand with the pre-state British Mandate government and cooperated with it, both in its law reform initiatives and in the constitution and structuration of its organizational field. The Executive was skilled at using and manipulating state legislation to its interests. In its rhetoric and actions, the Executive professed openly that it used state law to shape the Histadrut and its units in a way that would serve the realization of its goals. State law was used in order to demarcate the boundaries of the organization, to differentiate it from the rest of the Jewish sector, and to educate and mold the members and the economic enterprises. The leadership asked what structure of organizations, modes of incorporation, and state law devices would help maintain the control and domination of the Executive, or as rhetorically phrased: would help guard the national interests against narrow economic ones. From the available legal repertoire, the Executive chose that which was most suitable to its needs. By doing so, the Executive treated state law as a tool to mold its members and economic enterprises in order to promote the objectives of nation-building. The professed character of this instrumentalist use of state law was an

¹²¹ See EWICK & SILBEY, *supra* note 90 at 132.

integral part of the cultural norms which were created and institutionalized during the formative years of the organization.

Characterizing the Histadrut's relationship towards state law as instrumentalist is telling only part of the story. Seen from the constitutive approach to law, the conceptualization and design of the organizational tools of the Histadrut, namely the Workers' Society and its subsidiaries, was a process embedded in the concepts, norms and terms of state law. The discussions in the political parties, the Executive, the councils and conventions were infused with state law terminology. The debates were about shares, voting power, members' obligations, capital structure, rules of incorporations etc. – all of which are part of the legal realm of state law. It was the language of state law which determined the rights, privileges, obligations and duties of every actor in the organizational scheme. It was state law to which the Executive resorted in constituting itself as the hegemonic power within the organizational field.

However, this instrumental-constitutive conceptualization only partially reflected the complexity of interrelations between state law and the Histadrut. The structuration of the Histadrut's organizational field and the relative positions the different actors came to hold in it may have been the product of the exercise of the constitutive power of state law, if not for the intervention of the Executive and the position it occupied as an intermediary between state law and the various Histadrut enterprises. The Executive did not merely use state law instrumentally. It celebrated the instrumentality of law, while presenting such law as one of its own. The Executive promoted the perception of Mandate law as alien, manipulating popular cultural sentiment against the British because of their policy regarding Jewish immigration to Palestine, to further the Executive's own interests. This duality - opposition and cooperation - was part of the Executive's practice in its striving for dominance and hegemony in the organizational field.

For a body not characterized as keen on democratic culture, the process of the organization and legalization was uncharacteristically open. Every proposal, draft and discussion was reported to the public. The drafts of Rules of the cooperatives, with their obscure legalistic language, were formulated and immediately published in the Histadrut media. Rules were printed in booklets and distributed among the members. While this "democratic" process assisted in achieving legitimacy for the newly established institutions, it also created a direct connection between the lay members and the legal components of the organizational field. Members became familiarized

not only with their rights and duties, but also with the unique position of the Executive. Yet the law to which they were subjected and which conferred special rights on the leadership, the law that defined and constituted the relative positions of the members, the economic enterprises and the Executive - that law was not presented as the law of the state. It was presented as “our law”.

The Executive, in its actions and rhetoric, appropriated the constitutive power of the law to itself. Although the organizational process was embedded in state legalism, it was conceptualized as belonging to the Histadrut. Legalization and incorporation were explained as the outcomes of the legal demand that operating economic enterprises must be registered by the government, and subordinated to state supervision only in passing. Registration of the economic enterprises was described as a step taken only after an autonomous decision had been reached by the Histadrut, and because it was instrumental in attaining the goals of the organization. In the same manner, in all the debates over the capital structure of the subsidiary societies, it was only in passing that mention was made of the debate being on a subject matter concerning state law. Instead, it was depicted as though it was an internal debate.

More significantly, the mode of incorporation of a cooperative society was dissociated from its legal origins. Although the debates concerned these societies’ Rules under state law, the subject was introduced and conceptualized as concerning “our cooperatives”. This dissociation of the cooperative mode of incorporation was coupled with the use of the term “our principles of cooperation”. Dissociating the cooperatives from state law was instrumental to the substitution of the Western cooperative principles with a set of more “tailored made” principles.

By implementing all the above, the Histadrut leadership posited itself between state law and the actors in the organizational field. It impaired the ability of state law to exercise its constitutive power, replacing it with the power of the Executive to constitute and institutionalize its own interpretations of law throughout its organizational field.

The position of the Executive as an intermediary had yet another consequence. All the registration processes were concentrated in the hands of the Executive and its legal advisors. It was meant to be a device for controlling the relationships between the Histadrut’s subsidiaries and state law. The Executive controlled and dictated every manifestation of either support or resistance to the law. The Executive strove to monopolize the relations with all the official governing bodies of state law, in the

same manner in which it strove to monopolize the relations between the economic enterprises and Zionist organizations.

All the practices of the Executive - the use of state law to structure the organizational field and the relative powers of the its actors, the celebration of this instrumental use of law and the legal devices found or permitted by state law on the one hand while on the other dissociating the legal content from its origins in state law, and the presentation of the legal content as part of the cultural world of the Histadrut - had a cumulative effect on its members. For the lay member of the Histadrut, the law was equated with the law of the Histadrut. The Constitution of the Histadrut was perceived as the fundamental legal document, and the Members' Court was the institution for adjudication to which the lay member could bring any grievance. State law was marginalized, becoming almost a non-issue in the daily affairs of the members within the Histadrut. If there was a legal issue, such as laws regarding on-the-job safety, it was the province of the Executive, who handled the matter. The Rules of the cooperative in which one was a member, to the extent mentioned and referred to, were perceived as a document of the society, having no connection with the state. State law was an instrument to be used by the leaders solely whenever it seemed useful to do so. The member became distanced and indifferent to state law. This legal consciousness of indifference towards state law was an outcome of the practices of the Executive. It was a process by which the lay member became estranged from state law.

The legalization of the kibbutzim was part of the process of the organization of the Histadrut's field, but in comparison with the legalization of other enterprises it was unique. The case of the kibbutzim posed some difficulties not to be found, at least not to the same degree, in regard to other Histadrut subsidiaries. First, while ideology was a prevalent mobilizing power among the participants of the field, in the kibbutzim it played a more salient role. The kibbutzim shared the national and socialist cultural components with the rest of the organizational field, however, in addition, they were imbued with the awareness of creating new forms of socialist communities. Their aspirations varied, from the creation of a general commune embracing the whole working class to creating a prototype for the future of society at large. These grand ideals differentiated the kibbutzim from other, merely economic, enterprises and also contributed to their stronger demand for autonomy. Second, as a consequence of the above, the kibbutzim were organized collectives and not just aggregates of individual

workers with common interests. They formed communities with multiplex relations, strong leadership, and despite their economic dependence, internal social resources enabled them to fight for their vision and autonomy, while resisting the attempts of the Executive to control and dominate them. Third, because of their communal way of life and rejection of private property, some of the mechanisms of legal dominance could not be applied to the kibbutzim. Since there were no shares, no founders' shares with half the voting rights could be allocated to the Executive and, because of their communal character and not being mere economic enterprises, the kibbutzim adhered to self-management and would not agree to the imposition of managers by the Executive. Since the Executive was never satisfied with only one or two measures of dominance, it had to devise innovative modes of control and supervision especially tailored for the kibbutzim. As a result, legalization of the kibbutzim was marked by duality. Two legal documents, each operating on separate legal levels, were drafted during the 1920s – the “constitution” of the kibbutzim within the Histadrut and the Rules under state law. The content of the final drafts of these two documents was similar, but the cultural meaning attached to each differed significantly. The process of drafting the internal constitution of the kibbutzim within the Histadrut was prolonged. It was debated in various forums during the years 1923 to 1927. Beginning as a democratic process, its end was in the hands of a few Histadrut bureaucrats. During the democratic phase there was a deep, serious discussion on law and the content of the constitution, reflecting the power-struggles and ideological differences both within the kibbutz movement, and between part of it and the Histadrut Executive. There were struggles over the content of almost every article of the constitution, at times even over certain phrases. This nature of the legalization both reflected and constituted the centrality of the law of the organizational field. In contrast, the registration of the kibbutzim as cooperative societies under state law was carried out mostly by the Executive and Histadrut lawyers. The Histadrut staged the registration under state law as a second order process and indeed there was little discussion on it among the kibbutzim. Out of the process of the organization and legalization of the kibbutzim, two schemas of legal consciousness emerged. According to one cultural schema, the law of the Histadrut was imagined as the embodiment of the organization and as part of the identity of the organization. It was put at the core of legality. State law was imagined as not belonging to the everyday life of the kibbutz, but to the realm of activities of the dominant player of the field,

namely the Executive of the Histadrut. Thus, state law was marginalized. The division of the legalization process contributed to - and even strengthened - the estrangement of the kibbutzim from state law.

It should also be noted that, the policies of state authorities enabled and contributed to the process of distancing. At the time the kibbutzim were being registered, the governing British approach consisted of a passive clerk with the title of Registrar of Cooperative Societies. Thus, although the Rules were negotiated with the Registrar, he played no substantive role. When the British changed their approach to one of active supervision over cooperative societies, they focused their efforts on an attempt to create a cooperative sector among the Arabs. It was convenient for the government that only one organization, the Histadrut, represented the numerous kibbutzim. The Executive of the Histadrut, directly or through its lawyers, represented the kibbutzim in the negotiations of the Rules, again functioning as intermediary between state law and the kibbutzim.

Estrangement and indifference were an instilled and manipulated legal consciousness which became institutionalized. The estrangement of the kibbutzim from state law served the interests of the Histadrut Executive through the creation of a dependence thereon in the kibbutzim's relations with the state. Thus, it was not the legal nature of the Rules which distanced the kibbutzim from them, since law was a major arena for the kibbutzim's ideological debates and struggles over power. The alienation was due to the operation of mechanisms of legal domination by the Executive. The kibbutzim were not by nature strangers to state law, but were actively manipulated into becoming estranged from it.

D. From Estrangement to Indifference

Estrangement from state law became an institutionalized legal consciousness of indifference. Several variables contributed to the institutionalization of this legal consciousness, mainly the routine nature of the practices of estrangement. Routines are repetitive patterns of activity or organizational performances¹²² that can operate as carriers of institutions¹²³. In the case of the kibbutzim, the practices that became

¹²² See Sidney G. Winter, *Survival, Selection, and Inheritance in Evolutionary Theories of Organization* in ORGANIZATIONAL EVOLUTION: NEW DIRECTION 269, 274-7 (Jitendra V. Singh ed., 1990).

¹²³ See SCOTT, *supra* note 51 at 54-5.

routine both created and maintained the institution of the legal consciousness of indifference.

Although the power relations in the Histadrut's organizational field had changed, the structural hierarchy regarding the legal levels did not. Kibbutzim were organized into various movements that constituted mid-level organizations. In many respects, these kibbutz movements copied the practices of power of the Executive; the leadership of the movements replaced the Executive in the role of legal intermediaries monopolizing the relations with the authorities of state law. Thus, the relations of the kibbutzim with state law persisted as indirect and mediated by powerful actors. Power and interests continued to play a key role in the institutionalization and maintenance of indifference.¹²⁴

The state authorities' non-intervention in the internal affairs of the kibbutzim - though formally they had the power to do so - also contributed to the persistence of estrangement. Political considerations accounted for this policy by the state. During the mandate period, the British emphasized the development of cooperatives among the Arab population and generally considered the Jewish cooperative sector as capable of taking care of its own affairs. This policy of non-intervention persisted long after the establishment of the State of Israel, mainly because of the relatively formidable political power of the kibbutzim. State supervision of compliance with law was limited to the formal requirements of the Cooperative Societies Ordinance.¹²⁵. The lack of manifested state supervision contributed to the self-perception of the kibbutzim as being autonomous from the state and enhanced the sense of belonging to the organizational field.

Various mechanisms operating within the organizational field were created to ensure the persistence of estrangement on the one hand while, on the other, ensuring the continuation of compliance. In accordance with the Cooperative Societies

¹²⁴ Zucker argued that social knowledge, once institutionalized, will exist as a fact, as part of objective reality, and may be transmitted directly on that basis. See Zucker, *supra* note 97. On the other hand, DiMaggio held that institutionalized organizational forms are reproduced when actors are willing to do institutional work in order to reproduce them. Institutional work is undertaken by actors with material or ideal interests in the persistence of the institution. See DiMaggio, *supra* note 107. The case of the kibbutzim demonstrates that power and interests played a role not only in the creation of institutions but also in their persistence. An actor functioning as a legal intermediary exercised power to maintain his position and the institutionalized cultural schemas that supported it.

¹²⁵ On the preference of state agencies to adopt culturally constructed, easily observable symbols of compliance, see Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AMERICAN J. SOCIOLOGY 1531,1568 (1992).

Ordinance, an audit union for the kibbutzim was established.¹²⁶ This unit not only audited the books of the kibbutzim and prepared their annual balance sheets and reports to the Registrar, but also supervised procedures of the general assemblies, acceptance of new members, and so forth, in order to ensure compliance with the law. Booklets containing standard forms of reports on general assemblies and meetings of the managing committee of the kibbutzim were distributed and became a standard way of inspecting compliance with law. When new kibbutzim were established, they were registered with the model Rules and did not need to formulate their own Rules. Often, the kibbutz movement handled the registration. It even became customary for the registered founders of a new kibbutz to be officials of the movement that took care of the formal procedures. No involvement of the members of the newly founded kibbutz was required.

Thus, all dealings with the Registrar's office were handled through the audit unit or through the kibbutz movements. Agencies and bodies other than the individual kibbutzim were responsible for all that was formally related to the Rules. What was required from the kibbutzim was merely formal compliance with the procedures determined by their audit unit. In the daily life of the kibbutz there was no presence for the Rules as substantive guidelines. The kibbutzim became indifferent to the Rules – a kibbutz complied with their dictates but had no conscious image of them as regulating its life as a community. When new kibbutzim were founded they behaved according to the routines of the field and adopted the already institutionalized legal consciousness of indifference. It was these practices and this legal consciousness that enabled the kibbutz to regulate its internal affairs in what was perceived by Schwartz as the efficient exercise of non-legal sanctions and the lack of legal control.

V. LEGALITY AND THE CHANGING KIBBUTZ: NOTES FOR FURTHER RESEARCH

This paper advocated the merits of using a dynamic multi-dimensional framework of analysis of the commons, one that directs our attention towards the interactions between the internal arrangements and culture of the commons, and its ecological, political, social, and economic environments. This proposal emphasized the desirability of a similar contextualized analysis regarding the place, role and

¹²⁶ See §2(a), Cooperative Societies Ordinance (“Audit Union means a registered association of societies, of which the principal object is to arrange for the audit of the registered societies which are its members in addition to supervision and cooperative education”).

power of the legal realm in the life of the commons and proposes a framework for such an analysis. Taking the existence of a plurality of legal-normative orders as its underlying assumption, this paper suggested viewing the commons as an organization situated within a legal environment and interacting with such an environment on a multitude of levels and forms. This proposition also presented the concept of the cultural schema of legal consciousness as mediating between the commons as an organization and its legal environment. Delving deeper into the question of legality in one commons - the kibbutz – during its formative stages, this paper demonstrated how rich and nuanced our understanding of legality in the commons becomes when considering the commons not merely as an economic enterprise, but also as a social and cultural field of human interaction.

Early research on the legality in the kibbutz, conducted from an economic perspective, concluded that, as a result of its property regime and everyday practices, non-legal sanctions as a mode of social control were efficient, and, therefore, there was no need for an application of the law. Nonetheless, the findings of the detailed socio-historical analysis of the formative years of the kibbutz presented in this paper demonstrate that such an economic explanation is only part of the story. In the case of the kibbutz, with its adherence to a property regime of a commune that gained broad support from the political, social and legal environments, it has been found that general compliance with the applicable regulative legislation (the Cooperative Societies Ordinance and the Rules) is coupled with a legal consciousness of ignorance and indifference towards such legislation. In its analysis of the kibbutz, its wider organizational field and state law, this paper attempts to explain the social processes which initially led to the marginalization of state law in the cultural world of the kibbutz, and, then, subsequently to the emergence and institutionalization of a legal consciousness of indifference towards state law, although remaining in compliance therewith. On the other hand, a comparative, current inquiry into the kibbutz, presents an entirely different picture.

In the mid-1980s, most kibbutzim experienced a grave economic crisis that can only partially be attributed to causes inherent in the commune system.¹²⁷ The

¹²⁷ On the current crisis in the kibbutzim, see generally CRISIS IN THE ISRAELI KIBBUTZ (Uriel Leviatan et. al. eds. 1998), 22 J. RURAL COOPERATION (nos.1-2) (special issue: The Kibbutz in the Mid 1990s: Crisis and Changes) (1994); ELIEZER BEN-RAFAEL, CRISIS AND TRANSFORMATION: THE KIBBUTZ AT CENTURY'S END (1997), ELI AVRAHAMI, THE CHANGING KIBBUTZ: AN EXAMINATION OF VALUES AND STRUCTURE (2000) and DANIEL GAVRON, THE KIBBUTZ: AWAKENING FROM UTOPIA (2000).

sudden and unexpected slump in the kibbutz economies dealt a serious blow to the pride and self-image of kibbutz members, as well as to the standing of the kibbutz in the eyes of the Israeli public. The crisis was followed by waves of departures by members from kibbutzim. The sense of security stemming from the promise of the general guarantee was shattered and calls for the need to change the kibbutz became common. While about third of the kibbutzim still adhere to the fundamental ideological values adopted by the early kibbutzim, the majority of the kibbutzim have, to various degrees, modified the communal aspects of their life, limiting the scope of the general guarantee and demanding personal responsibility in its stead, and constituting a direct connection between members' work and their monetary remuneration, thus introducing precepts of a market economy into the kibbutz. New mechanisms of management and collective decision-making were introduced, all with the same aim – decreasing the level of participation and cooperation, thereby lessening the power of the community. These modifications are an outcome of long and hard-fought struggles among rival sectors within the kibbutz movement. Such struggles exposed the internal hierarchies that stratified the supposedly egalitarian kibbutz. The modifications benefited mostly the relatively young professionals among kibbutz members resulting in the emergence of a new realization of the legal facets of kibbutz. The kibbutzim rediscovered and adopted state law and the Rules as part of their patterns of discourse and action.¹²⁸ Kibbutz officials as well as members became aware of the kibbutz as a legal entity, with legal obligations and rights under state law. Seeking legal advice became common, and there were numerous cases where kibbutz members filed grievances with the Registrar of Cooperative Societies or state courts.

Initially, when the legal aspects of the kibbutz first became exposed to its members, state agencies were, generally, reluctant to intervene, and did so only as a last resort. Only close to a decade after the kibbutz crisis first emerged, did the state finally exercise its regulative powers with regard thereto. Currently, newly-enacted regulations pursuant to the Cooperative Societies Ordinance, under which all kibbutzim are incorporated¹²⁹, and decisions by the governing body of the Israel Lands Administration from which the kibbutzim lease most of their lands, allow the

¹²⁸ See Uri Zeligman (Registrar of Cooperative Societies), *The Changing Kibbutz and its Legal Status*, 28 ME'BEFNIM 52 (1999) (Hebrew).

¹²⁹ On the new regulations, see Amnon Lehavi, *Mixing Property*, SETON HALL L. REV. (forthcoming).

kibbutzim to privatize their property in part, both by conferring private holdings in housing and, to some extent, also in its productive assets to its members, thus introducing private property rights in that which was previously held communally.

How may these changes in the kibbutzim be accounted for? Is the transformation towards the emergence of private property rights an outcome of new externalities? Is it an outcome of the failure of the kibbutzim to follow desirable design-principles of successful commons? What part did the changing preferences and ideological tenets of the members play in the impetus towards privatization? What role did the decline in the status of the kibbutz play in the larger Israeli society? Why do some kibbutzim continue to adhere to their traditional commons while others are happy to re-mold their property regime? In light of the contentions presented in this paper, there is no single, simple answer. The search for an explanation for the changing face of the kibbutz should be conducted through the dynamic multi-dimensional framework that will help determining the venues of the inquiry.

The same premise holds true with regard to the question of legality that relates to the emergence of an awareness of the legal realm in the life of the kibbutz and its members, changes in the internal mechanisms of social control and their effectiveness, changes in the legal environment, in Israel generally, and the kibbutz particularly, and the interaction and mutually intertwined influences of the various levels of legality. Understanding the place, function and power of legality in a commons, necessitates, therefore, empirical observations, directed by a framework based on a dynamic multi-dimensional analysis to assist in contextualizing the relationship between the commons and legality.