

# Technological normativity v. Legal normativity – the virtues of the explicit

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# From governance to governmentality

Governing = structuring the possible field of actions of others; acting upon the possibilities of actions of others. Two approaches:

- **Governance**: institutional stage: coordination of stakeholders involved in technical standardization (production of *optimal interactions* of actors in the technological landscape)  
    -> **technical standardization**
- **Governmentality**: applications and uses stage: the way by which conducts may be directed (production of *regular conducts* in society), transformations of the modes of exercise of power.  
    -> **technological normativity**

# Interactions between governance and governmentality

- Standards:
  - normative neutrality a priori (absence of explicit regulatory aim)
  - implemented and deployed in unpredictable applications, thus hardly revised or challenged (choosing a standard is acting upon the possibilities of action of other people)

# ICTs and governmentality

- Impact on structures of human interactions and on social dynamics
- Ubiquity of ICT cognitive (quasi-prothetic) interfaces, deeply embedded in the fabric of daily life
- Actuarial turn: detection, classification, forward-looking evaluation (of behaviours, merits, needs, preferences) allowing for preventive and pre-emptive regulation... 'onto-power' shaping subjectivity at pre-conscious stage. What disappears: the capacity to give account of the reasons of our behaviours and preferences.

# Typology of technological norms

- Normative intensity:  
Regulative /(persuasive)/ constitutive  
(J. Searle, M. Hildebrandt)
- Transparency or opacity of normative content: Implicit / explicit
- Articulation with, without or against legal rules:  
in the prolongation of law / independent from legal rule.

# Comparison between technological and legal normativities

- **Territorial Scope**
    - Linked to a territory and a culture
  - **Mode of creation**
    - In principle democratic discussion following constitutional rules
  - **Mode of expression**
    - Explicit through a readable text
    - Transparency of the rule and obtrusive character: visible constraint
  - **Mode of dissemination**
    - Mainly by publication of the text, technology of script, language
- **Territorial scope**
    - To a certain extent, global and *a priori* not linked to a culture
  - **Mode of creation**
    - Private or governmental decision following economic or general interest reasons
  - **Mode of expression**
    - Implicit and apparently obvious (no alternative)
    - Transparency as invisibility and unobtrusiveness
  - **Mode of dissemination**
    - By contamination due to the interoperability
    - Cumulative effects of the usages

# Comparison between technological and legal normativities

- **Effectiveness**
  - *A posteriori* control and punishment
  - No 100% effectiveness (importance of implicit level of normativity)
- **Contestability**
  - Individual or collective
  - Essential in the functioning of the system: **recursivity**
- **Effectiveness**
  - *A priori*
  - Might be effective at 100%
- **Contestability**
  - Possible but difficult to organize due to the opaque and apparently obvious functioning of the system

# Comparison between legal and technological normativities

Intermediate conclusions:

Legal and technological normativities only apparently two « twin sisters » (M.Hildebrandt) – radical discrepancies due to the explicit character of the legal norm and its intrinsic contestability (recursivity through interaction between legislative and judicial power). New role for the law: organizing the ‘contestability’ of technological norms?

# The dialog between the two normativities: alliances or challenges?

- The legal normativity challenged by the technological one: Are there still borders? Which sovereignty for the legislators? « Code is a code » (Lessig)
- The technological normativity against the legal one : e.g. the privacy killing technologies
- The technological normativity at the legal normativity rescue: the PETS, IPETS, CPETS, etc
  - Towards a greater effectiveness of the legal rule but...

# The dialog between the two normativities: alliances or challenges?

- Subversive side effects of the T.N on the L.N.
  - Exemples: tatoeing (IPR) or P3P (Privacy)
  - Challenging the concepts of our legal system and the balance embedded into our legislation

# Is there still a lawyer in the room?

- The claim for transparency of the technological normativity ( e.g. the statistical inferences behind the building up of profiles, the « ranking » methods used by Google)
- The obligation to « qualify » the impact of the technological normativity and to deepen the traditional legal concepts and their significances taking fully into account the new environment (see e.g. the e-ID card, IP and the DRM)
- The «precaution principle » – the need to create public debates (e.g. the EU RFID debate)
- The reassertion of fundamental values:
  - Non discrimination: against social sorting
  - Human Dignity which means respect of autonomy

# Is there still a lawyer in the room?

- « Capacitation » of the individuals as a way to guarantee the human self-development but in the same time to ensure a vivid democracy.
  - Access to virtual public space and regulation of the « gatekeepers »: extension of the notion of universal service
  - Privacy as a « fundamental fundamental H.R. » in double sense: right to seclusion and right to master my informational environment (What? By whom? Why?)

# SO: We need lawyers in the room!

If you want further discussions on these issues,

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