Technology and Regulation

Special Issue: Should Data Drive Private Law?

Christoph Busch, Catalina Goanta, Katarzyna Kryla-Cudna,
Monika Leszczyńska, Vanessa Mak *(eds)*

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Technology and Regulation (TechReg) is an international journal of law, technology and society, with an interdisciplinary identity. TechReg provides an online platform for disseminating original research on the legal and regulatory challenges posed by existing and emerging technologies (and their applications) including, but by no means limited to, the Internet and digital technology, artificial intelligence and machine learning, robotics, neurotechnology, nanotechnology, biotechnology, energy and climate change technology, and health and food technology. We conceive of regulation broadly to encompass ways of dealing with, ordering and understanding technologies and their consequences, such as through legal regulation, competition, social norms and standards, and technology design (or in Lessig's terms: law, market, norms and architecture). We aim to address critical and sometimes controversial questions such as: How do new technologies shape society both positively and negatively? Should technology development be steered towards societal goals, and if so, which goals and how? What are the benefits and dangers of regulating human behaviour through technology? What is the most appropriate response to technological innovation, in general or in particular cases? It is in this sense that TechReg is intrinsically interdisciplinary: we believe that legal and regulatory debates on technology are inextricable from societal, political and economic concerns, and that therefore technology regulation requires a multidisciplinary, integrated approach. Through a combination of monodisciplinary, multidisciplinary and interdisciplinary articles, the journal aims to contribute to an integrated vision of law, technology and society. We invite original, well-researched and methodologically rigorous submissions from academics and practitioners, including policy makers, on a wide range of research areas such as privacy and data protection, security, surveillance, cybercrime, intellectual property, innovation, competition, governance, risk, ethics, media and data studies, and others.

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Special Issue

People differ with respect to their preferences, personalities, cognitive abilities, or attitudes. Yet the way in which private law has evolved in the past centuries sacrifices heterogeneity for the sake of the legal certainty that flows out of generalizations and typifications. Law distinguishes between different groups of individuals such as consumers and professionals, or even between average and vulnerable consumers. These groups are however based on conspicuous features that would justify differential treatment. For instance, determining a profile of the average consumer requires a context, such as a given industry or age group, and reflects specific considerations such as the consumer's skills in retrieving information about a transaction.

Decades of research in psychology and behavioral economics generated a tremendous amount of knowledge about people's behavior, creating typologies with regard to their personality traits, intertemporal or social preferences as well as cognitive skills. Later use of Big Data analysis showed that these types can be predictive of people's behavior, as well as informational needs or other specific characteristics. Recently, legal scholars proposed that insights generated by this research on granular legal rules could be embedded in private law by, for instance, introducing different default rules or privacy disclosures depending on people's personality traits or preferences.

This special issue tackles the question of whether and how data shapes private law. The development of new technologies enables the collection and processing of both personal and non-personal data at an unprecedented scale. The implications of this phenomenon for private law are twofold. On the one hand, the use of data in interactions between individuals may require adjustments or reconceptualization of private law rules and principles. On the other hand, data might be also used by legislators to help create new private law rules as well as to develop consumer empowerment tools to balance their position when transacting with businesses.

Taking these different perspectives, the papers included in this special issue explore the implications of data for private law. The first article by Antonio Davola addresses the question of how the law deals with the use of data by businesses in their interactions with consumers. Davola analyzes existing private law rules on defective consent and argues that these rules could offer potential protection to consumers when they are targeted by businesses' personalized commercial practices. He juxtaposes this solution with those provided by consumer law and data protection regulation, as well as competition law.

Exploring the second perspective – how data can be used in the development of private law – Fabiana di Porto, Tatjana Grote, Gabriele Volpi, Riccardo Invernizzi demonstrate how data can be relied on in the legislative process. Di Porto et al. propose an automated text analysis method to extract information from contributions submitted by stakeholders in the process of public consultation. Specifically, the authors compare the use and understanding of core terms by various stakeholder groups consulted when developing proposals of Digital Markets Act and Digital Services Act.

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