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The Rule of Law Crisis: Between Indefinable Values and Technological Determinism

**Keywords:** rule of law, human rights, democracy, values, technological determinism, intrusion of technologies, inner contradictions

The increasingly popular concept of technological determinism – the premise that technology and in particular AI will determine and correct the path the society is following – is a dangerous delusion. There is a central narrative about technology that is beneficial for humanity and societies. This leads to a phenomenon that can be tentatively called TechnoLogic: perfection, rationalization and calculation in their certain meaning begin to dominate, as well as an approach in which any problems are proposed to be solved with help of better technologies.

Technological determinism claims that technology determines the development of society, and in some extreme manifestations, this concept considers technology as an independent agent. In general, this term refers to the belief that technology is ‘a key governing force in society’ (Smith, 1994). This kind of determinism includes, among other things, the notion that people can – only – adapt to the development of technology, which has its own internal logic (Jandric, 2023). This is also a view that can be valuable when we consider social-shaping tendencies of technology (Dafoe, 2015).

Besides, people talking about technological determinism try to draw public attention to the impact of technology at both the macro and micro levels and argue that precautions about over-determination are to be taken seriously. ‘Many modern technological artifacts and systems are so complicated that no single person, or group of persons, has an overall grasp of them or knows the design in full, which means that the risk of unforeseen consequences of technology increases’ (Hallström, 2022). In light of the addition of a digital dimension to almost all human activity and considering the widespread deployment of increasingly sophisticated algorithms, the hazards of technological determinism are imminent.

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For the purposes of this paper, I propose to think of technological determinism as a trend in which technology largely determines modern society in general and the European legal order in particular. I argue that technologies have already begun to shape the European legal order. Breakthrough technologies may shift the fundamental pillars of this order. Targeted yet all-encompassing influence, profiling, and manipulation with the assistance of AI can undermine democracy. The shift towards exclusively online interactions and the ungrounded accumulation of vast amounts of personal data on servers has a devastating effect on fundamental human rights. Decisions made based on algorithmic recommendations, a lack of clarity, and the erosion of the public debate can be detrimental to the rule of law.

At the same time, the essential meaning of values continues to beemasculated and depreciated. This is especially true for those values that are so foundational and significant that their essence were agreed upon between people in societies only in the most general form, and their concepts were and are debatable. We keep hearing big and beautiful words much too often – so often they’re losing their meaning. What’s more, when it comes to actions – we don’t really see that the big and beautiful ideas ever become reality, despite the hope that the values that we share as humans must remain fundamental for the development of societies. In the first place, those are democracy, human rights, and the rule of law. The system of fundamental values underlying the European legal order is based on this triad. That said, we are witnessing a certain crisis of the triad: populist regimes are gaining more and more power, the Supreme Courts of some countries are losing independence, the world appears unable to stop even the outright breaches of human rights, – the list goes on. Our core values are stricken with disease. Russia’s war against Ukraine is one horrendous symptom of the disease.

Values losing their essence is one part of it, their being eroded by technologies is another. This leads to a serious crisis of values.

Another facet of this phenomenon is attempts to solve social and political problems with the help of technological tools. In particular, to eliminate discrimination in the workplace, hiring algorithms are used instead of in-person interviews with HRs. Parsing algorithms then withdraw all who are not giving their CV in proper machine-readable form. However, instead of contributing to the reduction of discrimination, more often than not technological solutions lead to its growth, and also contribute to the emergence of such new forms as algorithmic discrimination.

The algorithms developed by biased creators will – intentionally or not – reflect these people’s prejudices. For instance, an algorithm designed for rating a defendant’s risk of committing crimes was prone to significant racial disparities: it was
particularly likely to falsely flag black defendants as prospective criminals, while mislabelling white defendants as less likely offenders (Angwin et al., 2016). Another type of algorithmic discrimination cases include the repetition and reproduction of discriminatory social practices. There is a well-known example of the algorithm that Amazon used for hiring, in which AI sorted out women’s resumes. The AI built a pattern based on previous practices of not hiring women for some positions and concluded that it is preferable to hire men (Dastin, 2018).

Besides, the need to follow the rules dictated by the logic of technology also leads to the fact that many of those who cannot act in this way are left behind. In fact, there is a serious divide already between tech-savvy and non-tech-savvy people. This exacerbates the digital divide, non-inclusivity, and self-censorship, ultimately leading to non-participation.

The pressure of technologies coupled with the fundamental values crisis – their lack of definition and the incapability of societies to make them work – all of these are bringing us to a dead end. The only way out of the deadlock appears to be honesty. We need to honestly face up to the fact that the current system of values has deep inner contradictions aggravated by the intrusion of technologies. A theoretical model to overcome the contradictions is to be proposed. A two-stage approach could help here: (1) identifying the eroded elements of the value triad, (2) re-considering the values and working out a definitive and clear system that will work in the immensely complex world of today. We ought to start with the rule of law as the most compromised element of the triad.

Undoubtedly, the definition and elemental composition of such a value as the rule of law is the subject of serious debate. At the same time, if we take the triad of values in the context of the European legal order, the consensus may be the one that proposed by the Venice Commission (2011). In this case it is necessary to consider such elements as (1) legality, (2) legal certainty, (3) prevention of abuse/misuse of powers, (4) access to justice, and (5) equality before the law and non-discrimination. The listed elements, in turn, consist of smaller elements or indicators. Thus, if we take such an element of the value of the rule of law as access to justice, then it includes independence and impartiality, which, among other things, includes independence of the judiciary, independence of individual judges, and impartiality of the judiciary.

Were these elements of the rule of law compromised with the help of technologies and/or due to devaluation of values? It seems that every part of this value has undergone erosion to a greater or lesser extent.

The number of influences on independence and impartiality, in particular, is enormous and increasing day by day. On a personal level, judges and juries, like other
people, are involved in the digital space to some extent today. They may have social media accounts and other digital footprints that make it easier to profile them and obtain a more accurate psychological profile. This, in turn, is used to strategize in litigation based on the vulnerabilities and characteristics of specific decision makers. At the public level, digital tools and especially algorithms make it relatively easy to manipulate public opinion. They allow, for example, certain opinions about judicial processes to be widely disseminated, imbued with the right doubts and the right emphases, to influence both decision-makers and public expectations of those decisions. This is especially important in high-profile cases with wide publicity or political implications.

Predictive analytics should also be mentioned in the context of its impact on independence. The pretended or actual predictability of judicial processes with the help of artificial intelligence technologies can lead to consequences such as public doubts about the impartiality or professionalism of judges, as well as increased pressure on judges. In addition, many begin to imperceptibly and excessively trust the results of certain technological applications, primarily algorithms, perceiving them as objective, unbiased and infallible.

Thus, we need to recognise that the judge who makes the decision and gives the verdict is exposed to far more influences and attempts at influence through technology today than two decades ago. In other words, it is not a person in an empty, silent judicial chamber anymore. The imaginary judicial suite does not resemble a library in which someone chooses information independently, even if sometimes help or advice from professionals is needed. It is rather a noisy room at the crossroads of information flows, and this person is constantly but almost imperceptibly pushed to some of them. It is rather a crossroads where someone stands with a phone in their hand, constantly feeling the urge to scroll the feed, habitually using search engines, being highly influenced by opinions – widely distributed and, at first glance, supported by the public opinions, – sometimes being subtly manipulated by technologies, sometimes purposefully and successfully attacked through certain technologies.

Today, as Stanley Greenstein rightly noted, ‘A challenge will be to determine which values to balance technology against […] the values enshrined in the rule of law operate as a good starting point in determining the fabric of any society’ (2022). It is necessary to reconsider the notion of this value, defining its key elements that should not be lost in any event to focus on their protection and recognize that less essential elements will inevitably be lost in the digital age. By the same token, a number of other values and principles should be re-evaluated to understand what is and what is not core values to be protected at any cost.
However, in such a two-step approach, we should not adopt a technical approach in the sense that we can decompose and algorithmize the entire process regarding the rule of law. It should not be forgotten that the sense of justice, the desire for equality and the perception of independence are not always and should not be measured and weighed.

References


