

Book Review

Smart Technologies and the End(s) of Law

by Mireille Hildebrandt

Novel Entanglements of Law and Technology.

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'Smart Technologies and the End(s) of Law' is the new book by Professor Mireille Hildebrandt. Hildebrandt holds the chair of Smart Environments, Data Protection and the Rule of Law at the Institute for Computing and Information Sciences (iCIS) at Radboud University Nijmegen. Also, she is a research professor of Technology Law and Law in Technology at the research group for Law Science Technology and Society (LSTS) at Vrije Universiteit Brussels. Finally, Mireille Hildebrandt is an associate professor of Jurisprudence at the Erasmus School of Law, Rotterdam. Her work focuses on the relationship between the emerging socio-technical infrastructure (internet, Web 2.0, Ambient Intelligence) and the autonomy of the human subject that is both presumed and produced by constitutional democracy. In the past, she has published several books. Together with Serge Gutwirth she edited 'Profiling the European Citizen' (Springer 2008) and with Antoinette Rouvroy 'Law, Human Agency and Autonomic Computing' (Routledge 2011). She is also the editor of the Digital Enlightenment Yearbook.

Her new book revolves around emerging technologies, and in particular the new reality in which human and technology, offline and online, private and public are increasingly intertwined. She suggests that in the future, there will be no strict distinction between these classic concepts – rather, that there will be one sphere in which all such distinctions have been mixed. For this new reality she uses the term 'Onlife'. 'Onlife' singles out the fact that our 'real' life is neither on- nor offline, but partakes in a new kind of world that we are still discovering. Simultaneously, the animation of our physical environment involves various types of data-driven agency. One could say that our physical surroundings are somehow coming alive. The author links that to the trend that the distinction between humans and technologies

will disappear or will at least become increasingly blurry. The new smart technologies and soft robotics are discussed in detail. Robots are not only becoming more like humans in a physical sense, they are also becoming increasingly smart and able to function as though as they were quasi-humans. The increased reliance on smart technologies, for example smart walls talking to networked computers and smart refrigerators, means that there is not only an influence on the world in which we live, but that our lives become intertwined with these technologies. Soft robotics, but also objects such as Google cars, pose the question of how we should approach these technologies. Are they mere objects programmed by us, or should they be approached as quasi-human agencies? Are such agencies responsible for their own actions, is it the programmer, or is it the environment on which these agencies act and react?

To answer these questions Hildebrandt distinguishes between different types of agencies, such as agents defined by deterministic algorithms, agents based on machine learning, agents based on multi-agent systems, and finally, what she calls, complete agents. She argues that we should attribute some agency to the new smart technologies. This is not to say that objects have a spirit, but it is to say that the classic distinction between subject and object, between intellect and matter, is more granular than is commonly believed in the western world. That is why Hildebrandt turns to Japanese philosophy and culture. She argues that we might learn a big deal from the Japanese attitude to objects. Though not equating them to humans in any way, Japanese culture does attribute some form of agency to certain objects. Hildebrandt argues that this might help us to better understand and deal with the new technologies, which are clearly not human, but at the same time are capable of independent action and decision making. She also refers to other Japanese concepts such as *aida* (inbetween), *basho* (face or place) and *waiki-mae* (situated discernment). Furthermore, she points to the 'as-if' tradition in Japan: although people might

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have overheard a conversation or been confronted with certain private information, they should act as if they have never heard of it or as if the information was not meant for them. In this way a form of privacy is retained although the other might have overheard the information. According to Hildebrandt we might learn from this tactic that private information and personal data are increasingly accessible and fluid.

Still, Hildebrandt suggests that there are a number of problems with the new technological reality, soft robotics, ambient technologies, and Big Data processes that these Japanese strategies cannot effectively tackle. She moves on to discuss several fundamental rights and values which might be challenged in the 'Onlife' world, such as privacy, our identity, freedom, and several public goods. Profiling, obviously, might cause for digital sorting, which might result in practices of discrimination and stigmatization. Perhaps the biggest fear Hildebrandt sees is the potential for structurally undermining human autonomy. This, she argues, is basically due to two causes. First, people are constantly influenced in their decisions by the new technologies, which ties up to the new debate about nudging. The new technologies often 'know' what is 'best' for us, in terms of behavior, eating patterns, exercise or anything else. Consequently, these technologies might influence us in our behavior, especially if the technology is paid for by health insurance companies or a health care provider. Second, citizens are often unaware of the fact that they are influenced in this way. The lack of transparency regarding these types of nudges and how devices exactly make their 'decisions' might further undermine the autonomy of people because they cannot defend themselves against processes which they do not know nor understand.

What kind of solution does Hildebrandt propose? The author focuses on data protection law, the EU Data Protection Directive specifically. She points to the rules on transparency, on the control of individuals over personal data and on the provision concerning automatic decision making. Also, the Directive specifies the right of people to know that they have been subjected to an autonomic decision making process, why and through which logic the computer or algorithm functions. Hildebrandt suggests that this might allow people to profile the profilers, as they then understand who is profiling them and how. But obviously, she suggests, this is not enough to pro-

vide for good protection of citizens' rights in the near future. That is why she introduces the concept of legal protection by design. She argues that law should be technology-neutral, in the sense that it should not focus on regulating specific technologies. However, she suggests, law is not itself neutral towards technology in a sense that it stands in the tradition of written texts. Hildebrandt argues that law and the legal domain stand in fact in a written tradition and are intertwined with textual interpretation. Hildebrandt argues that in the new 'Onlife' world, we need to move on from a purely textual tradition and integrate the legal and the technological tradition. Her proposal, she clarifies, is not regulation through technology, such as privacy by design, but involves a structural change of the legal domain in the new technological environment, whereby the exclusive focus on texts is somewhat loosened.

Hildebrandt's book is very thoughtful and certainly adds to the existing literature and provides the readers with new and inspiring ideas. Still there are some questions which the book leaves unanswered. Three will be discussed here briefly. First, Hildebrandt suggests that the origins and the core of data protection rules lie in individual and subjective rights for data subjects; she further argues that data protection instruments provide a positive right for data controllers to process personal data. She describes the Data Protection Directive as a rule-based instrument, providing juridical rules to which all actors must abide. This undoubtedly correctly captures one part of data protection regimes, but it most certainly disregards another and more prominent tradition in European data protection instruments. Rather than providing rules and hard norms, most data protection documents have functioned as codes of conduct like instruments, laying down very common-sense concepts such as 'do not collect more data than you need', 'be transparent about what you do', 'if you store data, do it safely', etc. Such principles are not hard juridical rules, but function as ethical principles or guidelines and duties of care. Moreover, the individual rights do not form the core of the past and existing data protection instruments. The current directive only specifies three individual rights, of which one (the right to resist automatic decision making processes) is insignificant. Rather than focusing on individual and subjective rights, most data protection regimes focus on the duties (of care) of the data controllers. Control over personal data by data subjects

is not engrained in the Directive. Finally, the Directive does not give a positive right to data processors to process data if they abide by the rules of the Directive. Law (in the private sector) presumes the liberty of those to act (for example to process personal data) and determines under what conditions this may be done. The positive right, to which Hildebrandt refers, is presumed in the private sector, it is not granted by the legal regulations. It remains unclear why Hildebrandt deliberately ignores this important and more dominant tradition in data protection regulation.

This leads to the second point, namely Hildebrandt's exclusive focus on subjective rights. She argues that the introduction of subjective, individual rights for humans has been a turning point in (legal) history. It means we can claim a certain freedom for ourselves and are not at the disposal of the whims of the king. Although he may be generous and give us much freedom, we are always subjected to his discretion, Hildebrandt suggests. She recounts a situation in which she asked her students whether they would rather have privacy or a right to privacy. She was happy to see her students vote for the *right* to privacy by majority. Even though a right is certainly valuable, it seems that Hildebrandt goes somewhat too far. It seems like here emphasis on and believe in individual rights is exactly the problem that has caused the current disarray in data protection. Certainly, privacy, or any other freedom, is only partially valuable if it can be taken away at any moment. But equally, a right to privacy is only valuable if it leads to actual privacy protection. And that is precisely what seems to be lacking at the moment. People do have individual and subjective rights, but they are often unable to claim those rights and if they do, they have to take up the legal battle against a state or large company. People often do not invoke their subjective rights because they are mostly unaware that their data are collected and because there are so many data collections, that it becomes almost impossible for individuals to assess every data collection on the question of whether it contains their data, whether they are processed according to the law and if not, to go to court. Moreover, individual rights tend to protect in-

dividual interests, but the problem of the new technological paradigm is precisely that the environment as such is changed and that everyone living in that environment is affected. Not only an individual, but general interests are at stake. Consequently, the attribution of individual and subjective rights is part of the problem, not part of the solution. Why not look for other forms of privacy protection such as through class actions, group rights or governmental institutions such as the data protection authorities?

Finally, in her book Hildebrandt focuses solely on law in contrast to technological regulation. She is right to argue that law should not be focusing on regulating specific technologies. She is also right to reject the idea of 'code is law', famously propagated by Lawrence Lessig. But why focus solely on technology and law and not on ethics or moral standards, on soft law, self-regulation, or any other instrument, which is neither technological code nor hard law? In many sectors people face the fact that regulation through black letter law fails in many respects. One reason is the territoriality principle and the fact that actors are located across borders and continents, another is the lack of clear rules and principles, and still another is the fact that whole sectors have sometimes developed their own, private concept of morality, which is largely detached from the ethos of the ordinary citizen. Examples may be found in the clothing sector, banking sector, industries with an impact on the environment, etc. Here, recourse is often taken to other forms of regulations, such as oaths, codes of conduct, self-regulation and soft law instruments. In many respects, data protection fits these examples. Additionally, it is problematic to enforce rules because many actors are located in different countries and continents. It is difficult to set good standards because of the rapid evolving technological and organizational developments a sector (especially in Silicon valley) has developed its own moral standards and ethical principles, etc. The question remains why Hildebrandt is not prepared to go beyond the simple dichotomy between regulation through law and regulation through technology and look to, for example, ethics and softer forms of regulation.