Technology and the doctrine of legal sources

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Abstract

Law is, to a large extent, a manifestation of instrumental rationality – or, in other words, of Technology – making Law, as a discipline, forgetful of itself. It could be argued, e.g., that academic lawyers are all too eager to submit to the dominance of the Other, in the form of other disciplines or, for instance, in the form of Technology itself. A case in point is the question concerning the status of the doctrine of legal sources in the digital era. This question is prompted by the indisputable fact that the ways in which lawyers retrieve legal information have, during the course of the last decade or so, changed significantly on account of the massive proliferation of information technology – extending even into the legal life-world. Need not, then, the doctrine of legal sources change accordingly? Has it not already? In the current essay, it is suggested that these questions – however captivating – should be treated with a measure of skepticism.
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I would like to make a point. A point that is simple, or simple enough. Still, I feel, it needs to be made.

What I will be saying is, basically, that Law is not at the mercy of Technology, or not necessarily so – and my example will be the so-called doctrine of legal sources. The doctrine of legal sources is not at the mercy of technology, i.e. despite the fact that we are, nowadays, wholly dependent upon technology when retrieving legal information.¹

The need to make that point is provoked by the submissive nature of modern law. Submissive nature? Yes, the discipline of Law is, as is often pointed out, plagued by feelings of inferiority vis-à-vis the other academic disciplines, especially vis-à-vis the natural sciences.² Seemingly, these feelings stem from the curious idea that law is no proper object of scientific study, somehow not real enough, forcing us, the proponents of legal scholarship, to try, as best we can, to make up for this deficiency, clinging to – in effect bowing down before – any extra-legal phenomenon that we consider sufficiently real: Utility, Society, Economics, Politics, Technology … or in whatever other guise the ideology of the Real makes itself manifest.³

¹ Were we not always? Is not a book “technological”? But let’s not get ahead of ourselves.
² Tuori, Critical Legal Positivism, Aldershot 2002 p. 285: “Legal science seems to be constantly plagued by a bad conscience. It doubts its scientific status and has an insatiable need to prove, both to itself and to others, that it shares the defining features of a scientific paradigm.” See van Gestel – Micklitz, Revitalising Doctrinal Legal Research in Europe: What about Methodology?, in Neergard – Nielsen – Roseberry (eds.), European Legal Method – Paradoxes and Revitalisation, Copenhagen 2011 pp. 29-32, for the standard historical references, from Kirchmann’s Die Wertlosigkeit der Jurisprudenz als Wissenschaft (1848) and on.
³ What is “the ideology of the Real”, i.e. the ideology commonly known as “realism”? The definition offered by Lyotard, The Postmodern Condition: A Report on Knowledge, Minneapolis 1984, p. 75, is useful: “Realism, whose only definition is that it intends to avoid the question of reality implicated in that of art […]”. This is actually very close to Nietzsche’s understanding of realism in Nietzsche, The Gay Science, New York 1974 nr. 57.
First, though, a remark on truth and repetition. Repeating something makes it true.\textsuperscript{4} If that is the case, in the digital era, Truth is everywhere. In fact, there is so much “truth” out there that we do not know what to do with it. It is also true that Truth is lost through repetition.\textsuperscript{5}

Wittgenstein writes, in the preface to his \textit{Tractatus}: ”[...] what I have here written makes no claim to novelty in points of detail; and therefore I give no sources, because it is indifferent to me whether what I have thought has already been thought before me by another.”


There is nothing original in what follows. Not much, anyway. Still, the thoughts I am about to relate are mine. Others might have had similar thoughts, but that is, I insist, not my concern.\textsuperscript{6}

This essay is entitled “Technology and the doctrine of legal sources”, and that title carries a narrative.

That is, it is no mere conjunction, stating, simply, that, to begin with, there is something – “technology” – and, in addition to that, as it were, something else – “the doctrine of legal sources” – an A and a B – leaving the question of content – of this text – open.

No, the context – ever helpful – provides. There is a narrative here, alright, and quite a distinct one, at that.

To start out: Here and now, the title “Technology and the doctrine of legal sources” poses a question. It is certainly possible to frame that question in any number of ways, but this, let’s say, is it: “What effect has technology had on the doctrine of legal sources?”

How does the title “Technology and the doctrine of legal sources” pose the question of the effect of technology on the doctrine of legal sources? How, exactly, does it manage to do that? One

\textsuperscript{4} Indeed, \textit{repetitio est mater studiorum}, as the phrase has it.
\textsuperscript{5} Writes Nietzsche, in Kaufmann’s translation (Nietzsche, \textit{op. cit.} nr. 265): “What are man’s truths ultimately? Merely his \textit{irrefutable} errors.” cf. ibid. nr. 110.
\textsuperscript{6} Just to be clear, I’m not attempting to give myself license to ignore the basic rules of academic writing. And I am “giving sources” – the source of the present paragraph is, as can be seen, the passage from the preface to Wittgenstein’s \textit{Tractatus} cited in the preceding paragraph. I am repeating his message, watering it down, while at the same time, hopefully, preserving what I take to be true in it, namely this: Thinking is personal. Indeed, that thought can be traced all the way back to the very first thinker – Thales (according to tradition), allegedly the source of that well-known motto of Greek philosophy, “\textit{Gnothi seauton}” (“Know thyself”); see Diogenes Laertius, \textit{Lives of Eminent Philosophers}, Vol. I, Cambridge, Massachusetts-London 1972 pp. 37, 41.
might well wonder. There is, in the title, no question mark or any other sign revealing the presence of a question. On the face of it, the title doesn’t exactly do anything – apart, perhaps, from proclaiming that this (technology) and that (the doctrine of legal sources) will be the subject of the current essay.

The question, posed in the title, is implicit. And what here is achieved at the implicit level, is achieved through the use of the concept of technology. How so? Technology is, among other things, a matter of movement – and movement in a specific direction: forwards, upwards; not in the strict spatiotemporal sense, but, first and foremost, in a normative sense. Our notion of technology is tied to our notion of progress. And progress is, still, a basic norm of our society, if not the basic norm. That is to say, it is not that we are actually making progress, but, rather, that we are obliged to make progress (whatever that is). Progress is, as Wittgenstein puts it, the form of our civilization.7

In striving for progress, technology is often that which drives us. Technology is ever changing, and we have to keep up. (Our visions of the future are typically visions of future technology, of the technology that is yet to come – flying cars, robots, teleportation, time travel and what not.) We have to keep up. The train is leaving, to use a Swedish expression. Tåget går. The train – in another age a symbol of technology itself – is leaving: It is getting late, and we better hurry. And this is another aspect of the motion of technology. Technology moves fast, and it stresses us.

Technology calls for change and, in this manner, exerts pressure – in a very indeterminate way, in more or less every direction, and it reaches far. Among the things supposedly affected by technology are political history, democracy, friendship, art, love, nature and, indeed, the notion of reality itself.9 Our culture is under the sway of technology, or so it would seem.

Technology masters our life-world. By virtue of that apparent fact, in principle, the juxtaposition of the concept of technology with, more or less, any other concept provokes the question of effect. And so, the title of this text – “Technology and the doctrine of legal sources” – reads as a request: We are called upon to assess the influence of technology on the doctrine of legal sources.

8 Technology might well be considered a sickness; the sickness of our age.
9 Specifically, I am here thinking of the teachings of Baudrillard.
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Effects go one way. Where there is an effect, there is a cause. The formula of cause and effect applies ... and the doctrine of legal sources is made into an object, something acted upon, something passive – whereas technology is the agent, the dominant partner in the relationship.10

The story told in the title is, then, a story of subordination – the subordination of the doctrine of legal sources – and more generally, the subordination of law – to technology.

So ... shall we join in? Shall we re-tell that story – it is all too familiar – and re-enact the theme of law’s subordination to technology? Shall we make the attempt to actually answer the question calling to us in the title? What effect has technology – and more specifically, the information technology going rampant in our age – had on the doctrine of legal sources? Is that question worth our while? Hardly surprising, I have a different idea – a different idea altogether...

The question – in question – is not necessarily a bad one. Still, I say we ought to resist its pull. It is a matter of scientific ideology, or ethics. Personally, I favour an ethics of care – of onsorg, or Sorge. Truth is brittle. We should take care, lest we shatter her,11 in an all too eager grasp. Easy does it.12

To begin again, the question what effect technology has had on the doctrine of legal sources obscures, from view, the nature of the objects concerned, namely technology and the doctrine of legal sources.13 What is technology? And what is the doctrine of legal sources? These questions are not simple and we should approach them with respect.

Who is to say that we do not? Approach them with respect, that is. Is the question of the effect of technology on the doctrine of legal sources somehow disrespectful? Yes, it is. And it happens like...

10 Is it even possible to think the question what effect the doctrine of legal sources has had on technology?
12 With Baudrillard, Simulations, Brooklyn 1983 p. 13 f., we may ask ourselves if it is possible for science (“always murderous”) to leave its object alive: “Doesn’t every science live on this paradoxical slope to which it is doomed by the evanescence of its object in the very process of its apprehension, and by the pitiless reversal this dead object exerts on it? Like Orpheus it always turns around too soon, and its object, like Eurydice, falls back into Hades.”
13 After all, nature loves to hide, as Heraclitus (B123) put it.
this.\textsuperscript{14} The question presupposes that the doctrine of legal sources in fact \textit{can} be subject to the influence of technology, that the schema of cause and effect is applicable and that technology and the doctrine of legal sources in this sense are entities found within the same realm, or partition of the real – like two billiard balls on the same table.\textsuperscript{15}

Indirectly, then, the question has something to say on the nature of technology and the doctrine of legal sources – something that is not necessarily true; in fact, something worth questioning. Our question generates questions. To make that clear, it is perhaps sufficient to invoke the fact/value dichotomy, the distinction between that which is and that which ought to be – seeing as the present state of technology is a \textit{factual} matter, whereas the doctrine of legal sources would, I guess, be \textit{normative}.

Whatever actually happens – whether in the sphere of technology or not – has, in the logical sense, no implications in the world of Norms. With this distinction in mind, we might, then, feel \textit{inclined} to dismiss the question of the influence of technology on the doctrine of legal sources – to consider it simply invalid. It is – and I repeat this – a matter of logic. Lawyers may spend all their time online, using only the most fashionable Internet resources available in their search for law, and still, the doctrine of legal sources would remain unaffected – it is simply not descriptive; it is \textit{prescriptive}, and as such, in theory, not subject to falsification – not, at least, in the stricter sense of the word. How legal materials are actually handled is, in principle, or so it would seem, irrelevant.

I am not saying that this analysis is justified. Causality is one thing and the logical validity of inferences another, or so they say. And it is no longer possible – not in the way it used to be (in the heyday of logical positivism and scientism) – to take the validity of the fact/value-dichotomy for granted; it has been discredited, to the point of becoming blunt as an analytical tool.\textsuperscript{16}

\textsuperscript{14} As is often the case, the first step is the one that altogether escapes notice; cf. Wittgenstein, \textit{Philosophical Investigations}, 2\textsuperscript{nd} ed., Oxford 1958 § 308.

\textsuperscript{15} Hume’s text in “An Enquiry Concerning Human Understanding” sec. IV pt. I., is, as far as I know, the primary cause of the tradition of using billiard balls as examples when discussing causality. (Billiard balls are mentioned once in his ‘\textit{Treatise},’ in sec. XIV.)

\textsuperscript{16} It is, so to speak, no longer the knife to cut reality at the joints; see e.g. Putnam, \textit{The Collapse of the Fact/Value Dichotomy and Other Essays}, Cambridge, Massachusetts-London 2002. Not that the fact/value-dichotomy has become \textit{useless}. The
What I am saying, what I am saying, is that it is risky – dangerous even – to, unthinkingly, attempt to answer the question of the status of the doctrine of legal sources in the digital era if we are interested in, care about, the nature of technology and the doctrine of legal sources respectively. There are questions within that question – the question how we are to account for the normative nature of the doctrine of legal sources when discussing the relation obtaining between this doctrine and technology being one of them.

What is the doctrine of legal sources? What is its nature? More specifically, is it in its nature to be subject to the influence of technology? Having brought the distinction between facts and values into play we might ask: Is the doctrine of legal sources a fact or a norm, possibly a set of norms?

Well, every norm that is endowed with force might be said to exist – they are in place, that is, somewhere – and why shouldn’t we accord norms existence? And so, norms carry their own facticity. They are facts, though, perhaps, of a special order. Indeed, just now I made a reference to the “world of Norms”, which amounts to the same thing. Worlds are made up of things. It’s a fact – a grammatical fact, one might say, meaning, that is how we express ourselves.

But now – when discussing the ontological status of norms – we find ourselves deep within the labyrinth of the philosophy of norms, or legal philosophy, and sooner or later we must concede – we will be forced to concede – that we are lost, quite lost. Much like the fly in Wittgenstein’s famous bottle. If we were not lost, we would not be doing philosophy.

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concepts of facticity and normativity are not devoid of content and the distinction between them still carries meaning – it really goes without saying, and no development within the field of academic philosophy, or within any other field, can change that fact. However, the rhetorical maneuver of invoking this dichotomy is, nowadays, less likely to impress. We are – following the examples set by Austin, the later Wittgenstein, Heidegger and others – more likely to be impressed by a more nuanced, weaker, style of thinking; regarding, for instance, the fact/value dichotomy as a rhetorical device – in itself normative, the descriptive guise notwithstanding.

17 I am hinting at “[d]ie verborgene Einheit vom Sein und Schein” (Heidegger, Einführung in die Metaphysik, 6. Aufl., Tübingen 1998 p. 75), i.e., the undisclosed unity of being and appearance.

18 This notion of grammar is derived from the works of the later Wittgenstein. See e.g. Wittgenstein, Philosophical Investigations §§ 90, 307, 496, 497.

19 Wittgenstein, Philosophical Investigations § 309.
It would seem, then, that the doctrine of legal sources, when the question of the nature of that doctrine is taken seriously, is, in a way, resistant to the demands made upon it by technology. Provided that we are careful enough, we cannot deliver what is expected of us. Simply put, we need to know what the doctrine of legal sources is in order to deal with the question what effect technology has had on that doctrine, unless, of course, we are willing to settle for some random buzzwords. Who is to say what the doctrine of legal sources is? No one knows. There is no explicit doctrine of legal sources. Sure, there is the so-called “hierarchy of legal sources” taught to first-year students, but that has very little, if anything, to do with the way sources are treated in legal thinking, and I have never seen anything looking even remotely like a believable account of what it means for a source of law to hold a place in the hierarchy of sources. And if we widen the scope … the question of legal sources is ultimately about the limits of law. What is a matter of law? And what is not? To hope to be able to answer that question from within the confines of the legal perspective is … how shall I put it … optimistic.

Luckily, legal thinking – law in practice – is doing perfectly fine without an explicit doctrine of legal sources. We do not have to settle the philosophical issues involved in order to do law. It is true, in our struggle to understand what we are doing we engage in theorizing – at least some of us do – but that is an open ended process. Interpretation is always on the way, as Gadamer puts it. And the theories we construct – if indeed we do construct any theories (most lawyers don’t) – are reflections on, and of, our practice – they are never the basis of that practice.

And … so what? If Heidegger was correct in his analysis of Technology – and possibly he was – it is in its nature to force an instrumental matrix upon our life-world. And this oppressive instrumentality – all-embracing – constituted, in his view, a threat to Thought. Where Technology is at work, Thought is in danger. That is, I would like to suggest, what is at stake when the doctrine of legal sources is confronted with the new information technology.

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21 “Analysis” is not really the word.
22 I am referring to the texts known as “Die Frage nach der Technik” and “Die Kehre”, published together in Heidegger, Die Technik und die Kehre, Stuttgart 1962.
The logic of technology requires us to define, to attempt to define, a new doctrine of legal sources. But at the moment we move in that direction we are submitting, sacrificing, the doctrine of legal sources to a mode of being that is alien to it – necessarily alien: we are assessing it instrumentally, for the sake of something else, disregarding whatever inner worth or meaning it may have, making ourselves deaf to whatever it is that it has to say.

As thinking lawyers, we should refuse that maneuver. In our age, there is a constant pressure to submit to technological rationality – to speak, to be intelligible, to make explicit, to convert into numbers, to make everything transparent – as if our language was grafted directly onto reality itself, as if it were possible to once and for all speak the real, leaving no doubt, about anything.

As if it were possible to state, explicitly, where law comes from – now, as opposed to yesterday – and then to act on that statement.

And that is a weird idea. Even if we could articulate what it is that we are doing when we are finding law – and we cannot –, handling that articulated doctrine would obviously not be part of it. A lawyer too bent the theoretical way to see this, needs to remind him- or herself that, as Jhering once put it, the legal technique did not come into the world with jurisprudence; the former precedes the latter. Practice is not governed by theory.

23 And what would that look like? Something like this?

1. Statute
2. Precedent
3. Preparatory works
4. Online services providing legal information
5. Legal doctrine
6. …

And the danger is real. Technological rationality – which from the Heideggerian point of view is a form of stupidity – threatens law as it does all cultural phenomena. But there is hope. As Hölderlin insists in one of Heidegger’s favourite passages:

”Wo aber Gefahr ist, wächst
Das Rettende auch.”

That is, roughly translated: “But where there is danger, that which is saving also grows.” It is precisely because the pressure exerted by technological rationality is so severe, the danger so great, that it is impossible to remain unthinking. We are called into action. To save the honour and integrity of our concepts and doctrines. 26 To care for that which still has meaning.

Let us, then, resist the lure of technology. For as long as law is a matter for thinking beings, 27 finding law will remain an open process.

26 I am paraphrasing Lyotard, op. cit. p. 82.
27 ”Thinking beings”, not, e.g., ”humans” – when our own creations can do law, the distinction between humans and machines – which is a moral distinction – will have lost its relevance.