Digisprudence: developing a legal-theoretical approach to rational compliance by design

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January 2018

The literature concerning the regulation of technology is rightly beginning to focus more on *ex ante*, or 'by design', enforcement. Despite almost two decades having passed since Lawrence Lessig's *Code* was first published, the acceptance that 'code' (as opposed to law) has the power to regulate, and an appreciation of that power, is still developing, particularly since it requires a level of interdisciplinary openness to which the conservative legal world is occasionally hostile.

One aspect of interdisciplinarity that has not received much treatment in the literature is the cross-over between legal theory *per se* and the regulation of technology. Although much useful work has been done in the fields of regulatory theory, actor-networks, markets, and behavioural economics, not often have these analyses engaged very deeply with the law on its own terms. There is value in addressing the law and legal practitioners in conceptual language that they understand and are familiar with, in order not just to 'bridge the gap', but also to give due respect to the institutions and traditions of law making and application.

This paper takes a step towards such an approach. Legisprudence is a principled, normative, aspirational *ex ante* legal-theoretical framework designed to facilitate rational law-making (legislation). Those goals include coherent systematicity, consideration of normative impact, sensitivity to extra-legal context, and contemplation of emergence. Legisprudence does not prescribe a full-proof means of achieving 'perfect' legislation, but rather a set of aspirational principles that the legislator can have in mind when 'designing' her norms.

The proposal here, beginning with the premise that those who create technological architectures are in a very real sense 'legislating', is that the standards that operate to sensitise one regulatory modality to the normative characteristics of the legal system might assist in sensitising another, namely software code. Arguably, the characteristics and power of software code make this a necessity – even stronger than that in the context of traditional, visible, legislation – particularly if we are to avail

ourselves of the corrective mechanisms of legality built into the legal system. The potential alternative is fiat governance by code, modulated only by a market that clearly cannot respond adequately to its intentions and effects.

This paper considers the legisprudence framework as a potential means of promoting rational code-making, or *digisprudence*, particularly in the sphere of "compliance by design" systems such as DRM. A normative framework that promotes jurisprudentially-desirable outcomes in the "design" of legislation might have some utility when applied to the design of code when it operates as an embodiment of law.