



TECHNOLOGY, HUMAN RIGHTS AND THE LAW

Dr. Nupur Chowdhury
Assistant Professor of Law
Centre For The Study Of Law And Governance
Jawaharlal Nehru University
nupur@jnu.ac.in

July/2020
Lecture Notes
Creative Common License

Contents

- Introduction – Unpacking the title words
- Typology of Interaction between technology, humans rights and the law
- Working through examples
- Research Questions

Introduction-

Unpacking the title words

Unpacking - Technology

- What do we mean by technology?
 - Quite simply it means the application of scientific knowledge – to produce goods and services for human use
 - Technologies / technological products range from the complex to the simple (by simple – I mean those products which we take for granted – and which therefore appear simple OR non-technical' to us)
 - For instance simple technologies – e.g. Roads, Paper, Buildings, etc. (Past which has been mastered)
 - Complex Technologies – e.g. Artificial Intelligence , Gene Editing, etc.

Meaning of human rights

- Rights which inhere (not conferred) in humans due to their innate nature – Rights which assure the dignity of the individual and allow for the full development of humans
- Based on the natural rights arguments drawn from theorists like Aquinas
- Progressive expansion of the nature and content of what constitutes 'human rights' (Generations of Rights)
 - Started with securing basic individual liberties *vis-à-vis* the nation state
 - Twentieth Century onwards - Human rights *vis-à-vis* – other powerful actors like transnational corporations (discourse developed because they were as powerful as nation states and therefore in a position to undermine human rights)
- Content of human rights – life, liberty, freedom of speech and expression, right against discrimination, information, education, health, livelihood, social security
- Rights operate both at the level of individual and collectives (group rights)

What is Law?

- Rules issued by the State to regulate public conduct (and also private actions which have a bearing on public conduct)
- Nature of law – historically has been in the form of proclamation – black letter law – means law as printed in statute books (e.g. Official Gazette)
- Purpose of law is to regulate public conduct – can be achieved through various means:
 - Command and control (classical type) – Permit or Prohibit
 - Creating incentives (tax instruments)
 - Nudge (information campaigns) – encourage self regulation
- Law is only one form of regulation - there can be other forms – like architecture. Space can be structured so as to allow for certain activities and disallow other activities
 - Example – ramps versus stairs (Ramps are better because they allow for universal access whereas stairs privileges the access of those without disabilities)
 - True for both the Digital and physical worlds.
- Architecture (technology) can be also be used to regulate public conduct – for instance – speed breaker – there are implications for human rights !

Typology of interaction between technology, humans rights and the law

Typology – Classification of Relation Types between Technology, Human Rights and Law

- Type 1 - Technology may undermine or help secure or expand human rights
 - Technologies may have differential impact on social classes, castes or geographical communities - regulators need to be cognizant of this – given that technology operates under existing socio-economic and political conditions – thus it may happen that certain technologies undermine the human rights of specific social groups and simultaneously help expand the human rights of certain other social groups
 - What should we do with technologies which undermine human rights?
 - The options are limited to either banning or regulating after effects so as to neutralize impact on human rights – but this is done in an ad hoc manner – only where there is resistance through social movements
 - Currently we lack a well structured institutional mechanism to track and study the impact of all technologies on human rights – either at the subnational or State or at the International level

Typology – Classification of Relation Types between Technology, Human Rights and Law [Cont...]

- Type 2 – Technology as form of regulation (as against law (published rules – aka black letter law - to regulate public conduct)) will undermine dignity and therefore human rights
- Types 3 – Technology (as a form of private regulation of public conduct) can undermine the capacity / indeed replace the State's ability to regulate public conduct – and also it's capacity to secure human rights

Working through examples

Type 1

- Technologies that expand/help secure human rights ?
 - ICTs – expanded information – dismantled information monopolies– helps hold State accountable – but it also has a negative impact – privacy
- Technologies that undermine human rights (dignity)
 - Gene Editing – e.g. Designer babies
 - EU – Recent Position Paper on AI ethics

Type 2

- Technology as a form of regulation will undermine dignity
 - Technology as a form of regulation (architecture) – is efficient because it prevents non-conformity with the applicable order/law of the state– as increasingly a preferred option for regulators
 - E.g. Speedbreaker / use of water tankers or tear gas to disperse crowds
 - What could be the problem?
 - Such regulation is usually silent - in terms of being invisible - and difficult to challenge
 - Regulation does not engage with the intelligence or faculty of the regulated or faculty of those being regulated – presumes humans are rule breakers – this undermines dignity (reduces adults to children as it undermines their agency – capacity to make choices)
 - Technology nullifies choice – eliminates possibility of violation

Type 3

- Types 3 – Technology (as a form of private regulation of public conduct) can undermine the capacity / indeed replace the State's ability to regulate public conduct or secure public interest goals – and also it's capacity to secure human rights
 - E.g. Platform capitalism – the ability of facebook to define the contours of speech and expression in the digital space
 - E.g. Uber's internal policies undermine labour standards
 - E.g. Use of narco-analysis and lie detector tests on accused undermining the right to be presumed innocent under the criminal justice system.

Research Questions (Not an exhaustive list)

- How should we regulate a specific Technology – which can both expand and undermine two different human rights?
 - For instance ICTs can strengthen right to expression and freedom of speech and expression while simultaneously compromise privacy (thereby dignity)
 - Difficult to answer since both human rights may not be listed in a priority list – and therefore incommensurable (i.e. both of independent and equal standing – and therefore a trade off is illegitimate)
- Should technologies which evidently undermine human dignity – be allowed – given that they may have beneficial impacts – such as allowing harvesting of organs/treatment of rare diseases, etc. ?
 - Often technology developers argue that banning a technology should be the last option – since it is difficult to enforce + may lead to competitive advantage of developers in other jurisdiction (economic argument) + impede scientific discovery
- When TNC's limit the ability of the State to regulate public conduct – what can be the response of the State?
 - Grand Coalition of Legislators – DMIC report on misinformation and fake news
 - Facebook's Oversight Board – Company's autonomous mechanism for accountability – can self-regulation be effective ?
- Is there any institutional mechanism – which reviews the impact of all technologies on human rights ? – Is it even on the agenda – it can be noted that most reactions are to specific technologies?
 - International Level – within the UN system and outside it?
 - Regional level – ASEAN, NAFTA, EU, SAARC?
 - Domestic level – what about NHRC / Statutory and Constitutional Bodies which protect specific social groups?

Suggested Readings

- R. Brownsword (2008) *Rights, Regulation and the Technological Revolution*, Oxford University Press.
- Lawrence Lessig (2006) *Code 2.0*, Basic Books.
- Alex Faulkner (2010) *How law makes technoscience*, CSSP Working Paper.
- Langdon Winner (1986) *Do Artifacts have politics? The Whale and the Reactor: a Search for Limits in an Age of High Technology*, University of Chicago Press.
- Andrew Feenberg (1999) *Questioning Technology*, Routledge.
- G. Sartor (2011) "Human Rights in the Information Society: Utopias, Dystopias and Human Values," *Philosophical Dimensions of Human Rights*, Springer.
- Nupur Chowdhury (2018) "Privacy and Citizenship in India: Exploring Constitutional Morality and Data Privacy," *NUJS Law Review*, Vol 11, Issue 3 (2018)
- *The Malicious Use of Artificial Intelligence: Forecasting, Prevention and Mitigation* (2018) Future of Humanity Institute, University of Oxford; Arizona State University

Shared with
BE THE CLASSROOM SERIES
www.betheclassroomseries.com

Nupur Chowdhury