

Code is More Than and Less Than Law

Author : Daithí Mac Síthigh

Date : August 14, 2020

Laurence Diver, *Digisprudence: the design of legitimate code*, 13 **Law, Innovation & Technology** __ (forthcoming, 2020), available at [LawArXiv](#).

We often say that code is law, but what kind of law is it? Laurence Diver's new article, *Digisprudence: the design of legitimate code*, introduces his 'digisprudence' theory, associating himself with the welcome emphasis upon design that is seen in particular in current work on privacy (e.g. [Woodrow Hartzog's Privacy's Blueprint](#)) and in Ian Kerr's attention to [the power of defaults](#), and doing so in light of a rich body of scholarship, from well beyond technology law, on law and legitimacy.

Code is not law, Diver says, with tongue slightly in cheek. It is more than law, constituting and regulating at the same time, rather than needing interpretation by addressees as law does. Yet it is also less than law, in the absence of, for instance, the possibility of disobedience. Drawing from ideas in the jurisprudential canon, including the morality of law and the more recent 'legisprudence' ideas of [Luc Wintgens](#) (on core principles for limiting subjective notions of freedom), Diver asks us to think of how 'constitutional' ideas such as legitimacy ought to be embedded in the software 'legislature', i.e. the contexts and environments for, and methodologies of, the production of software. He is rightly adamant that we must focus on production, arguing that code must be legitimate from the outset rather than often futilely retrofitted once it is in the wild.

This article summarises the findings of Diver's doctoral research at the University of Edinburgh, and points to themes of his current work at [COHUBICOL](#) (Counting as a Human Being in the Era of Computational Law). (Indeed, digisprudence as a theory is clearly influenced by Edinburgh legal theorists past and present, including [Neil MacCormick](#), [Zenon Bankowski](#), and Diver's doctoral supervisor [Burkhard Schafer](#)). From this work, Diver identifies the centrality of explanation and legitimacy to the acceptability of legal orders, drawing a firm distinction between law and legalism. He finds that code-as-law suffers from the worst excesses of legalism—narrow governance rather than principles, an inability to view and contest decisionmaking—and is, by its nature, resistant to the countervailing forces, such as requirements for certainty, or constraints upon sovereign power, that make law acceptable. (For a related argument, emphasizing the resulting need for new countermovements, see the [Jotwell commentary](#) on Julie Cohen's book *Between Truth and Power* by Mireille Hildebrandt, who leads the COHUBICOL project.)

This article is full of thoughtful insights, which support the development of the theory of digisprudence, and are also capable of application on their own terms. I highlight two of them here. First, the affordances of software, a science and technology studies concept increasingly discussed in writing on law and technology which focuses on how design has an impact on use and behaviour, are discussed alongside the less familiar concept of *disaffordances*, or the restrictions imposed upon users. Brilliantly, Diver takes note of Lessig's idea of 'architectures of control' but then draws our attention to choices made *by designers* to embed such disaffordances in objects and systems, engaging with work including that of [Dan Lockton](#) (founder of the [Imaginaries Lab](#)) and [Peter-Paul Verbeek](#) (co-director of the [Design Lab](#) in Twente). Second, Diver makes the powerful point that we should not be led by whether code authors position themselves as regulators, or having the authority to regulate—instead, we should look at what the code does and how it affects users. This is particularly important in a world where much of

the production happens in the private sector and without some of the more obvious public law mechanisms of accountability and oversight.

In what is largely a conceptual article, Diver nonetheless applies emerging arguments to current circumstances. He chooses blockchain applications for this purpose, though his approach is less about how blockchain disrupts “insert legal area of choice” and more about how the desire for smart contracts and the like challenges how we think about rules. Tellingly, Diver mentions DRM at the outset of the section on blockchain; as with critiques of DRM, Diver asks the reader to reflect on the implications for governance and legitimacy of a widespread shift from more familiar legal approaches towards an apparently promising technological solution.

Digisprudence itself is explained in a table, where the characteristics of computational legalism are matched to Fullerian (morality of law) and legisprudential principles, resulting in a short and clear set of design-focused affordances, of which contestability is the core – because it allows both individuals and institutional to be empowered. If these concepts are considered at the right stage in the process (i.e. at the time of design), a form of legitimacy, recognisable as constitutional in nature, is possible. Quite properly, Diver points to areas that are ripe for digisprudential analysis, including machine learning and robotics.

As in many parts of the world a new and quite unusual new academic year approaches, there are also some great opportunities to use Diver’s digisprudence theory in teaching law and technology, even for revisiting earlier stages of technological development, such as the rise in influence of commercial social media platforms, or the debates, which now cross the decades, on regulating search. Though studying the way in which code regulates behaviour has rightly become an established feature of technology law, Diver’s contribution calls on us to look to the design process (and research on design) and to the limits of legalism, if we really want to understand and promote the legitimacy of such regulation.

Cite as: Daithí Mac Síthigh, *Code is More Than and Less Than Law*, JOTWELL (August 14, 2020) (reviewing Laurence Diver, *Digisprudence: the design of legitimate code*, 13 **Law, Innovation & Technology** __ (forthcoming, 2020), available at LawArXiv), <https://cyber.jotwell.com/code-is-more-than-and-less-than-law/>.