ETHICS AS AN ESCAPE FROM REGULATION, OR ETHICS-WASHING 1.1 TO ETHICS-SHOPPING?[2]

A strange confusion among technology policy makers can be witnessed at present. While almost all are able to agree on the common chorus of voices chanting 'something must be done,' it is very difficult to identify what exactly must be done and how. In this confused environment it is perhaps unsurprising that the idea of 'ethics' is presented as a concrete policy option. Striving for ethics and ethical decision-making, it is argued, will make technologies better. While this may be true in many cases, much of the debate about ethics seems to provide an easy alternative to government regulation. Unable or unwilling to properly provide regulatory solutions, ethics is seen as the 'easy' or 'soft' option which can help structure and give meaning to existing self-regulatory initiatives. In this world, 'ethics' is the new 'industry self-regulation.'

Rigorous ethical approaches?

This approach does not do justice to many of the proponents of ethical approaches to technology who think long and hard about ethical frameworks for technology development. It is however indicative of the increasingly common role of technology ethics in political debates. For example, as part of a conference panel on ethics, one member of the Google DeepMind ethics team emphasised repeatedly how ethically Google DeepMind was acting, while simultaneously avoiding any responsibility for the data protection scandal at Google DeepMind (Powles and Hodson 2018). In her understanding, Google DeepMind were an ethical company developing ethical products and the fact that the health data of 1.6 Million people was shared without a legal basis was instead the fault of the British government. This suggests a tension between legal and ethical action, in which the appropriate mode of governance is not yet sufficiently defined.

Ethics / rights / regulation

Such narratives are not just uncommon in the corporate but also in technology policy, where ethics, human rights and regulation are frequently played off against each other. In this context, ethical frameworks that provide a way to go beyond existing legal frameworks can also provide an opportunity to ignore them. More broadly the rise of the ethical technology debate runs in parallel to the increasing resistance to any regulation at all. At an international level the Internet Governance Forum (IGF) provides a space for discussions about governance without any mechanism to implement them and successive attempts to change this have failed. It is thus perhaps unsurprising that many of the initiatives proposed on regulating technologies tend to side-line the role of the state and instead emphasize the role of the private sector. Whether through the multi-stakeholder model proposed by Microsoft for an international attribution agency in which states play a comparatively minor role (Charney et al. 2016), or in a proposal by RAND corporation which suggests that states should be completely excluded from such an attribution organisation (Davis II et al. 2017). In fact, states and their regulatory instruments are increasingly portrayed as a problem rather than a solution.

Case in point: Artificial Intelligence

This tension between ethics, regulation and governance is evident in the debate on

artificial intelligence. To provide just one example, here the position of the European Commission is most telling, in which it states that:

> *Draft AI ethics guidelines will be developed on the basis of the EU's Charter of Fundamental Rights, following a large consultation of stakeholders within the AI Alliance. The draft guidelines will build on the statement published by the European Group of Ethics in Science and New Technologies (European Commission 2018a).*

This statement is so confusing on numerous levels that it deserves a closer analysis. The EU intends to build ethics guidelines on the basis of the existing EU Charter of Fundamental Rights. However, if this is the EU's intention, why not simply call for the implementation of fundamental rights in digital technologies?

At the same time, the ethics guidelines will also "build on" the recommendations of the work of the main EU body on ethics - The European Group on Ethics in Science and New Technologies (EGE) - which have developed a set of 'Ethical principles and democratic prerequisites' as part of their report on the Ethics of Artificial Intelligence (European Group on Ethics in Science and New Technologies (EGE) 2018). The principles developed by the EGE cover numerous aspects related to fundamental rights such as human dignity, but also introduce completely unrelated aspects such as sustainability, while entirely leaving out other aspects such as freedom of assembly or cultural rights.

From fundamental rights to potential rights

This leads to a considerable blurring of lines in regard to both ethics and rights. Ethics—even in an applied sense—is distinct from the law and human rights. At the same time EU fundamental rights are not understood as fundamental rights but rather as ethical imperatives to be complied with in a non-binding fashion. While admittedly the European Commission does threaten more strict regulation of AI, it does not specify under what conditions this would take place or what this legislation would look like. Such legislative specification is however urgently necessary.

In this sense these are 'potential fundamental rights', developed under the shadow of hierarchy of the European Commission. They certainly cannot be claimed at present and if these potential fundamental rights are 'violated' (whatever that means in the context of ethical commitments to uphold fundamental rights) they would be no legal recourse of any kind available. Indeed, it is in fact likely that these rights would actively need to be violated frequently and these violations would need to be made public widely, in order for the European Commission to be willing to do anything about their actual violation. In that sense, these potential rights serve as an inspiration for potential action rather than a commitment to their implementation.

The same confusion applies to any potential ethical behaviour based on these potential fundamental rights. Should actors who wish to uphold such an ethical

framework actively violate the rights frequently in order to ensure that the European Commission turns potential rights into actual fundamental rights? How should they act ethically under a shadow of hierarchy expecting their conformity? The EGE acknowledges at least some of these challenges in suggesting that there is a danger of 'ethics shopping' in the approach followed by the European Commission, in which "regulatory patchworks" (European Group on Ethics in Science and New Technologies (EGE) 2018, 14) are seen as the source of this problem. In this context language, AI ethics are essentially a quasi-binding instrument, which will be made binding only if it is sufficiently violated.

Beyond myths of law, ethics and technology

In a masterful book on Technology and the Trajectory of the Myth, David Grant and Lyria Bennet Moses argue thinking about the law as "more than simply a 'roadblock' on the road to greater technological innovation" (Grant and Moses 2017, 215). While acknowledging that this is the case, ethics is evidently more than a value-laden framework to pre-empt or evade the law. Both law and ethics exist in parallel and can contribute to positively influencing human behaviour. Where they can and should meet is in the design process of technologies, which itself can enable certain forms of human behaviour. Here the idea of Value based Design, Privacy by Design (Cavoukian 2009), Legal Protection by Design (Hildebrandt 2016), Human Rights Based Communications Infrastructure (Wagner 2012) and Ethical Design (Balkan 2017) align to a considerable degree on many of their practical recommendations for the development of technology. Evaluating Rights and Ethics in Practice.

Yet the possibility to implement these solutions in technical design does not answer a more difficult question: how then to differentiate the many ethical frameworks out there and decide which are more likely to deliver appropriate ethics? How to ensure that ethics shopping or ethics washing does not become the default engagement with ethical frameworks or rights-based design?

Broadly speaking, I argue that it is possible to differentiate between 'thin' and 'thick' approaches to technology design and development, regardless of whether these are ethical or human-rights based. In order for these ethical approaches to be taken seriously as 'thick' approaches they should at minimum conform to the following basic criteria:

1. External Participation: early and regular engagement with all relevant stakeholders.
2. Provide a mechanism for external independent (not necessarily public) oversight.
3. Ensure transparent decision-making procedures on why decisions were taken.
4. Develop a stable list of non-arbitrary of standards where the selection of certain values, ethics and rights over others can be plausibly justified.
5. Ensure that ethics do not substitute fundamental rights or human rights.
6. Provide a clear statement on the relationship between the commitments made and existing legal or regulatory frameworks, in particular on what happens when the two are in conflict.

While this list is relatively straightforward, many initiatives are not able to respond to these challenges. As has been discussed above both attempts at developing ethical technologies by Google DeepMind and AI ethics guidelines by the European Commission have not managed to address many of the challenges above. This is particularly confusing as in other areas like the profiling of European citizens (Hildebrandt and Gutwirth 2008), the EU takes a much stronger regulatory fundamental rights-based approach. This approach is most prominently found in the EU's General Data Protection Regulation (GDPR) and has many similarities to the 'thick' approach to technology design and development described above.

Thus, is a world in which ethics-washing and ethics-shopping are becoming increasingly common, it is important to have common criteria based on which the quality of ethical and human rights commitments made can be evaluated. If not, there is a considerable danger such frameworks become arbitrary, optional or meaningless rather than substantive, effective and rigorous ways to design technologies. When ethics are seen as an alternative to regulation or as a substitute for fundamental rights, both ethics, rights and technology suffer.

Notes

[1] Chris Marsden at the 20th FIPR Conference in Cambridge on 29 May 2018: http://youtu.be/LRiAcbvSA3A?t=1h8m20s.

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