

Should Law Keep Pace With Technology? Law as *Katechon*

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Abstract

It is a commonly held belief that the law is unable to keep up with the fierce technological development and innovation that denote our times. The current essay attempts to show that this characteristic of the law should not necessarily be considered a disadvantage. Using the Biblical concept of the *katechon*, we argue that the law fulfills a katechontic function vis-a-vis technological progress. That is to say, its retarding effect might create positive spillovers that open spaces for debate, discussion, contestation, resistance, and reconstruction.

Keywords

law and technology, commons-based peer production, technological change, techno-determinism, *katechon*

Technology and Change

In the science, technology, and society (STS) community, the prevalent attitude toward the law is usually a negative one: that the law is unable to keep up with the fierce technological development and innovation that denote our time (this journal has published several essays on the issue; see Tranter, 2010; Trosow, 2010; Vanderburg, 2007). But is this really an inability, or is it not rather the point? And if so, is this necessarily a bad thing, even, or especially, from the STS perspective? The following outline attempts to shed light on this issue.

On one hand, law prescribes behavior and penalizes non-compliance. With law, in the current context, we mean positive law, law that formally exists in a given space in time and that is enforced by the state that exists—definitions of law abound, but this is the function one we mean. Law as a system in a specific place in time is therefore the normative utopia that the state in question wants to achieve (see Drechsler, 2003). It freezes the ethical desire—and/or the power structure—of the current regime, more so in common or statutory law than in case law. On the other hand, technological development, as well as innovation, is about progress, about profits, and about change—neither normative nor frozen. In most discourses today, all this is positively connoted, and it takes reminding that this is not necessarily the case. But as Max Weber (1922) famously pointed out, change is the default but stability is the civilizatory achievement.

If we believe in (mild) techno-determinism, which today probably most people dealing with the topic effectively do—even if in theoretical discussions, many in the STS community would claim to have more sophisticated views—then

technology, especially the technology that dominates the current (or the next) techno-economic paradigm, runs its course (Perez, 2002): Never mind what the current law is, it will eventually adapt. The dominating technology may be influenced, it may be steered; it does not “drive history” alone (Smith & Marx, 1994); but it is an irreducible and as such unstoppable factor.

It can be argued that law measures technology against what is desirable now, and it is by and large not interested in economic advancement. This is, of course, an obstacle for technology; legal practice may delay the development of technology and hence the competitive advantage of an entrepreneur, a firm, or even a state. For example, the latter is happening right now regarding the regulation of nanotechnology in the European Union vs. the USA (cf. Drechsler, 2010). Law has, therefore, the natural and systemic tendency to hold up technological change—examples to the contrary, of laws, say, that encourage certain forms of entrepreneurship, are exceptions that prove the rule. This tendency is not a fault of the law; rather it can be considered a feature.

In contrast, the (financially interested) technology leadership, epitomized by the Silicon Valley set, sees the state and especially the law as blockers of progress and thus attempts to remove such obstacles, often via populist mechanisms

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(Packer, 2013). The adherents of the “Californian ideology” (Barbrook & Cameron, 1996), premised on antistatist and techno-utopianism beliefs, envision a postindustrial, knowledge-based economy where technology will liberate everyone. By default, their reform designs for the public sector generally are highly suspicious of delays, which they try to eliminate. They fail to realize that the entire idea of modern Western (representative) democracy—in their Madisonian variants—is delay (*Federalist* No. 10). The friction caused by the law is another example of the retarding function of institutions generally that one sees as a flaw but that actually has a beneficial effect—not even as spillover in the case of Madisonian democracy but as one of the desired outcomes. When people decide too fast, often they decide badly.

The Katechon

On a very theoretical level, we can therefore say that the law fulfills a katechontic function vis-a-vis technological progress, that is, it serves as a *katechon*. What is a katechon? In the center chapter of his Second Epistle to the Thessalonians (2 Thess 2, 6-7), Apostle Paul warns the Christian community there, which has obviously experienced some confusion, that the Second Coming of the Lord, the Rule of God, has not taken place yet and that alleged information from him saying so has been false. Paul explains that there is a sequence that must take place before this: First, the Antichrist must reveal himself; he will pretend to be God. But even this has not happened yet (2 Thess 2, 1-5).

And now ye know what withholdeth that he might be revealed in his time.

For the mystery of iniquity doth already work: only he who now letteth will let, until he be taken out of the way. (6-7)

So, the second coming of Christ can only happen after the rule of the Antichrist, but someone or something is holding the latter up, and that is the *katechon* (Greek *κατέχων*).

How can we understand this passage? Obviously, there is something that holds him, meaning the Antichrist, up, until the latter will be revealed “in his time.” The mystery of evil is already there, moving, noticeably; however, it cannot gain power before the katechon has vanished (in Greek, the gender of the katechon shifts [he/it in this short passage; it is also not clear whether the vanishing is active or passive, i.e., whether the katechon must leave or will be destroyed). In sum, right now, there is something or somebody who holds up the Antichrist (who is already about); he or it will do so until he leaves or is removed. Then the Antichrist comes to power, confusing and seducing many, and only then the Lord comes back and kills the Antichrist (this is the second coming, the millennium, the *parousia*).

If we look at the sequence

Katechon ⇒ Antichrist ⇒ Rule of God,

again, we see that the special nature of the katechon—that what makes this figure theoretically so powerful is not the holding up, or delaying, of the coming of the Antichrist, which would be more or less trivial, but it is *that by doing so, the katechon holds up the parousia also*. In other words, the katechon is truly ambivalent. The catastrophe is avoided but at the cost of avoiding utter bliss and happiness also—and only for the time being. The katechon thus, at the cost of delaying the coming of the best, delays the worst that would have to come first.

This figure has always fascinated theology and political philosophy from very different perspectives. Often, it has been interpreted politically, as symbolizing the state itself, preventing civil war but holding up a truly human order; the main interpretation was to see it as the Roman Empire, and while this went out of fashion in theology, it seems to be back in fashion now (Metzger, 2005). It was reintroduced to contemporary political discourse by the German jurist Carl Schmitt (1950, 2003; see also Grossheutschi, 1996), who was as problematic as he was influential, and later represented by the Italian philosophers Giorgio Agamben (2005) and Paolo Virno (2008).

This is an interesting combination, because Virno and Schmitt are eminent state thinkers almost symbolizing the classical “left” and “right,” whereas Agamben can be said to bridge them in this theoretical interest. In fact, Schmitt is often seen as someone quite close to the Antichrist himself, “the German top anti-liberal of the twentieth century” (Lilla, 1997; see Müller, 1999). Virno is considered one of the most radical thinkers of the postoperalist political and intellectual tradition, which is said to draw from Wittgenstein, Heidegger, German “philosophical anthropology,” Foucault, and Deleuze (Penzin, 2010). “Agamben has become one of the most influential thinkers working in the wake of the generation of Deleuze, Derrida, and Foucault” (Clemens, Heron, & Murray, 2008, p. 2). What is important is that all three are much-discussed thinkers, and their use of the concept of the katechon in the political sphere speaks for its power.

From Schmitt, who talks about katechontic functions and about a variety of candidates for the title over the millennia—institutions, rulers, thinkers—we derive, next to the political aspect in itself, the idea of the *katechon* as metaphor, rather than just what St. Paul meant when he used the term (Grossheutschi, 1996; Schmitt, 1950).

What Agamben (2005) brings to our debate is a particular aspect of his close reading and highly complex interpretation of the text that concerns 2 Thess 2. As he emphasizes, St. Paul does not use the term Antichrist as St. John does, although it is clear that this is what is meant (Agamben, 2005). Rather, it is *ἀνομος anomos*—or *a-nomos*, and the concept itself, *anomia*. *Nomoi*, however, means laws, or the law in our current sense—although in classical Greek philosophy, it often also includes spheres such as “order” and “customs”; *Nomoi* is the name of Plato’s last book on political philosophy (see Drechsler, 2003). As Agamben emphasizes, in 2 Thess 2, “*Anomia* should not be translated here . . . by the generic

‘iniquity’ or the even worse rendering ‘sin.’ *Anomia* can only mean absence of law and *anomos* the one outside of the law” (Agamben, 2005, p. 110; Meier, 1988, pp. 161-163, has retained the word *anomia* as well in the concept of a discussion of Schmitt’s *katechon*). If the Antichrist is the lawless one, then, especially if we say that the *parousia* is really no time of formal legal order because it will not be necessary anymore, it is not a big stretch to say that the *katechon*, that which or he who holds up the absence of law, *is* the law.

What one can emphasize with Virno (2008) is the possibility to change things through action during the time-space created by the *katechon*, which impedes both the “war of all against all” and totalitarianism but does not necessarily eliminate either. To quote Bratich’s (2009) review of Virno (2008), the latter considers the *katechon* as a paradoxically radical device that acts as a host, even welcoming the worst in order to bind it. The result here is that by not expunging the negative but by keeping it nearby, one is able to oscillate between the positive and negative. Moreover, one secures the persistence of oscillation as such, which for Virno is key to any just republican order. One can see the relevance to the political question posed at the outset (founding a social order on human frailty and capacity for evil): Keeping negation close at hand can restrain it and make it amenable to transformation (Bratich, 2009).

In a nutshell, Virno (2008) locates the *katechon* in the human ability to use language: “Virno’s homeopathic approach takes the linguistic poison and finds in it another pathway, a bifurcation at the root that produces its own remedy” (Bratich, 2009, p. 74). In our context, understanding law as a temporarily crystalized, unfinished artifact of language may permit people to create and preserve institutions (i.e., standardized patterns of rule-governed behavior) and at the same time to change them through social debate and struggles.

The Law as *Katechon* and Technology Today

Along these lines, we can then say that the law as *katechon* holds up the (bad effects of) technological change but therefore also prevents a technologically changed better life for all. The *katechon* does, at some point, give way to catastrophe and then bliss—in our case, the *techtopia* will come at some point—but for now, it is held up, and this may not be so bad. That the law as such does not seem to give way any time soon legitimately fits the metaphor historically, as well, even if one stays close to the text—the Thessaloniki Christians two millennia ago might have expected the Second Coming sometime soon, similar to certain expectations of singularity today (Andersen, 2014), but while there have been several historical events that seemed like Armageddon, surely Paradise never arrived. And the state as such is with us still, as well, perhaps more than ever—because, one might argue, it is inevitable for today’s human living together in time and space.

But holding up does not only mean preventing the catastrophe; it also means creating a space and making it possible to discuss things. If it is true that any new technology should be subject to contestation, reconstruction, and democratic participation (Feenberg, 1999; Vanderburg, 2005), then one could even say that this is a positive feature overall: The law creates a creative delay, a discussion space, and the possibility to take all stakeholders on board.

If we understand technology not as a destiny but as “a social battlefield,” where individuals, large companies, and social groups struggle to influence and change technological design and meanings (Feenberg, 1999, 2002), then the law as *katechon* would create participative opportunities as a positive spillover, that is, this is not the point of the delay but a desirable consequence. For example, industry-lobbying processes from technological companies are often observed when it comes to drafting and implementing laws. It is the law that actually prevents special interests from rampantly acting in utter “freedom” (as in “free market”). Hence, one could say that law allows for different forms of social organization, as well as of resistance, to emerge.

This is, for instance, the case with the emergence of commons-based peer production (CBPP). In general, CBPP is about the social production of value in the form of nonrival goods that can be reproduced at near-zero marginal cost (Benkler, 2006; Kostakis & Bauwens, 2014). Ideally, once individuals have access to computers and a socialized network, they can freely self-aggregate and produce novel open-source knowledge, software, designs, and, as of late, hardware of remarkable use value. The free encyclopedia Wikipedia and myriad free/open-source software projects exemplify this emerging mode of production, enabled by the forces of technology used to expand access to intellectual goods (in the vein of Trosow, 2010).

In a time of polarization, no equilibrium has been reached with regard to global governance of the Internet (Mueller, 2010), which has become a highly contested political space (MacKinnon, 2012). There appears to be a battle—not exactly Armageddon but still a serious one—between those who are trying to turn the Internet into a tightly controlled information medium and those who are trying to keep the medium independent—the long debates over proposed legislations that would enforce strict copyright, the use of Digital Rights Management technologies, and the banning of open-source crypto-currencies, like Bitcoin, come to mind. CBPP has arguably been taking advantage of the law’s creative delay, emerging from this positive spillover and managing to build its own legal ecology with the copyleft licenses that are intended to protect the socially created value from predatory interests. It may be important to consider in this context the discussions (see Scholz, 2012) regarding the appropriation of commonly produced use value by large corporations. To face this problem, some of us (Bauwens & Kostakis, 2014) have argued for the development of a new reciprocal property regime, for example, in the vein of the Peer Production

License (Kleiner, 2010), that would contribute to the sustainability of the CBPP projects and their participants. There is even the danger of a “parody of the Commons” here, that is, “the full absorption of the Commons as well as of the underpinning peer-to-peer relations into the dominant mode of production” (Kostakis & Stavroulakis, 2013, p. 412) if the state and the law do not support and protect the social production of value.

Altogether, especially during the past 100 years, when technological development has been on an exponential curve, the role of the law is perhaps more important than ever. Our legal system might seem antiquated, but our argument is that this is not always a drawback—antiquated means keeping up previously negotiated standards—and that, therefore, in some sense it is not antiquated at all: Before changing our laws according to the technologies that currently define our lives, it is important to have a discussion space, not least to allow for social struggles to take place. If at a given time, the law codifies, embodies, and crystallizes elements of the past, it simultaneously creates the conditions for its enhancement or even for radical reformation. In addition to this, to draw an analogy from architecture and Salinger’s (2008) critique on modernism, the aggregated knowledge of the past is that the law should be neither neglected nor negated but critically approached, questioned, and integrated.

“We need to know the limits of our creations before we can act responsibly; and that can only be done by reinserting them into an order of sense,” Vanderburg (2007, p. 331) writes in this journal. The law as *katechon* offers participative opportunities for all stakeholders to debate, to quote Feenberg (2002, p. v), “the variety of possible technologies and paths of progress among which we must choose.” So, the law, which seems obsolete, opens a space for people to choose, in the face of the “Californian ideology” that wants us to believe that “There Is No Alternative” and that we have no choice. The law as *katechon* can restore human (or at least, nonengineering) agency vis-à-vis fierce technological development. If there are any standards for good living together that are not *automatically* superseded by technological development—and why should the latter be the case?—clearly this is a good thing.

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