

THE CAP



PUTTING

ON THE GAP

*Assessing Factors of Efficiency
in the Governance of Information Societies*

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EFFICIENT NORMS – STARTING HYPOTHESIS

„Each legal rule induces efficient behavior and [...] the prevailing legal rule is identified by its efficiency.” (Posner - Economic Theory of Law, 1973)

1. How to create efficient legal norms?
2. Which is the most efficient underlying governance framework?

EFFICIENT NORMS – THE RULE VS. STANDARD DILEMMA

- Standard - general criterion of social choice, efficiency is an example.
- Rule - withdraws from a decision maker's consideration (discretion) one or more circumstances that would be relevant to a decision according to a standard
- “Rule and standard are not merely alternative forms in which to express the commands of the law. Standards are also criteria for rules.”

(Ehrlich-Posner, 1974)

The choice between rule and standard (or a splice thereof) is predefined by the goals of the underlying governance framework

FACTOR #1 – CHOICE OF FRAMEWORK, THE GOVERNMENT VS. GOVERNANCE DILEMMA

- Different systems - different kinds of legal norms (different degree of precision)
- economic underdevelopment and evolutive economic pressure due to the technological revolution create tensions
 - => *re-examination of preexistent regulatory frameworks and their efficiency*

FACTOR #2 – SUSTAINABILITY AND THE COMMON GOOD

- Efficiency - supreme objective of legislators for the service of common good and to ensure sustainability
- The inducement of efficient behavior by prevailing (efficient) legal norms indicate two main parts for research:
 - re-examination of government vs. governance frameworks and norms therein
 - re-examination of the social contract theory in the information society

FACTOR #3 – NORM PRECISION

- can improve efficiency but
- does not necessarily mean that precise Rules are the most efficient norms independent of context
- ✓ *standardization methodologies ensure greater adaptability of norms to the ensuing change?*
- ✓ *codes of conduct, best practice codes?*

PREVAILING NORMS – PRECISION OR DISCRETION?

Schäfer on Posner (2006):

„in those areas of the law in which the efficient norm changes quickly over time because of rapid social, technological or economic change one should expect standards as the efficient norms.”

PREVAILING NORMS – RAPID CHANGE

- Flexibility is key!

“Rapid change makes precise rules obsolete” ->

“Rules are less flexible than standards. Courts, legal dogma and administrative routines [as sources of standards] can react more quickly to technological, social or economic changes than the legislator [as the source of rules].”

(Schäfer, 2006)

STATE VS. CITIZENS – EFFICIENCY AND SOCIAL/TECHNOLOGICAL CHANGE

State – illiberal practices making use of ICTs – surveillance societies – efficient control of subjects

Citizens – interest groups influencing legislation making use of ICTs – efficient control over the legislator's service of the public interest, the common good

Interconnected interests -> paradigm-shift from control societies (Pouillet, Rouvroy, 2009) to networked societies

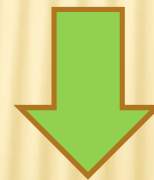
Intention to increase the efficiency of G2C, C2G “platforms” – technology incentivizes change!

EFFICIENCY AND THE SOCIAL CONTRACT (SC) IN THE INFORMATION SOCIETY CONTEXT OF EFFICIENCY

- Rousseau's SC – common good - subjection and agreement
- Infosocial contract – no real „subjection“, claim of rights stronger - *empowered e-citizens* „have a say.“ in identifying and enforcing common good.
- „*end justifies the means*“ - End: more efficient legal norms – Means: enhanced cooperation through efficient communication

FACTOR #6 – EFFICIENT COMMUNICATION

- Claim of rights is formed through communication between the public and the private sector (making use of ICTs)
- Claim of rights -> Active Participation - day-to-day governance of infosoc



Increased Protections – privacy, freedom of information, etc. – via efficient legal norms

FACTOR #7 – REFLEXIVITY (FEEDBACK)

- Subjection (SC), presupposes trust – no trust!
-> The Gap evolves: democratic deficit
- The Cap: empowerment through ICTs aimed at decreasing democratic deficit – HOWEVER –

Insignificant without the enactment of efficient norms in service of the common good reflecting societal needs
-> reflexive law and governance

Reflexive law induces efficient behavior

THANK YOU FOR YOUR ATTENTION!

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Earlier phase of research published:

Márton SÜLYOK:

The Cap on the Gap: Reflexive Governance vs. Democratic Deficit - Creating Theoretical Foundations for a Possible Common Fundamental Rights Policy in the EU, in: Central European Political Science Review, Vol 10, 36-37/2009, 143-167.

Electronic copy available at

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1966395