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iFairness – Constructing fairness in IT (and other areas of) law through intra- and interdisciplinarity

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ABSTRACT

As information and communication technologies have gradually invaded every aspect of our daily lives, the body of law that we call IT law has not only expanded, but it also pushes traditional areas of law to become more tech-savvy. This article makes a plea for a more intra- and interdisciplinary approach towards developing the future IT law, on the one hand, and towards educating the future IT lawyer, on the other hand. It substantiates the need for lawyers from different fields and non-lawyers to engage in a constructive dialogue when determining, interpreting and enforcing fairness standards in contemporary and future IT law, and outlines directions for integrating such dialogue in university curricula.

Since Steve Saxby founded CLSR in 1985 – a third of a century ago – the scope of IT law has grown ever wider and continues to accelerate. In his letter inviting us to contribute to the 200th issue (by which we feel very honoured), he even drew the parallel with Moore's law in terms of the early exponential growth in capacity of the silicon chip! Indeed, when (some) universities in Belgium introduced IT law in the curricula of law schools in the 1990s, this was usually done under the form of a course offering the whole spectrum of e-commerce, data protection, telecommunications, electronic signatures and cybercrime (leaving aside some variety due to academic freedom). The progressive ones also introduced courses on legal informatics, in which law students were confronted with insights from computer science. Nowadays, you need to follow specialized LL.M. programmes that immerse you in dedicated courses on all of the aforementioned topics, in order to call yourself an IT lawyer.

As information and communication technologies have gradually invaded every aspect of our daily lives, the body of law that we call IT law has not only expanded, but it also pushes traditional areas of law to become more tech-savvy. Digital goods are challenging the foundations of property law; contract lawyers need to adjust to smart contracts and blockchain; virtual currencies push the boundaries of financial law; automated systems (like self-driving cars) necessitate a re-thinking of liability and insurance law; and algorithms, AI, machine learning, and automated decision-making may have serious implications for human rights law (and, by the way, also for the legal profession *as such*).

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This raises the question (again[1]) whether there is still scope for a separate area of law which we label 'IT law'. Is IT law nowadays not rather omni-present, be it in public law, administrative law, (intellectual) property law, contract law, tort law, business and financial law, criminal law, etc.? Will the IT law departments that emerged in the 1980s–1990s (established by the pioneers from the 'old boys network' who gathered in February this year in Namur on the occasion of the Emeritus celebration of Yves Poullet) gradually be subsumed in the traditional law departments? (It is probably overambitious to think that the IT law departments will conquer all the others…?) Or will IT law (and the corresponding departments at university and within law firms) also maintain its specific character in the future, and if so, what exactly distinguishes IT law from other areas of law?

It is not our intention to discuss the precise boundaries of IT law in this contribution (which would risk ending up in talking about "the sex of angels"[2]). Rather to the contrary, we would like to push a bit further the argument made by our outgoing editor-in-chief a decade ago, namely that we should be cautious about trying to define IT law by reference to *specific* technologies (e.g. personal computers, the Internet, etc.).[3] At the time, he posited that the boundaries of modern IT law were to be defined by two *general* technological developments, namely *digitisation* and the *networked computer.* Those are indeed two very large containers that offer space for the technological developments that are the focus of attention of today's IT lawyers – such as big data, Internet of Things, blockchain, AI, self-driving cars, etc. But we would like to add that it is precisely the absence of specific boundaries that gives IT law the flexibility to evolve and to focus on new technologies as they emerge. Only by nurturing its inherently intra- and interdisciplinary nature,[4] IT law can continue to flourish in the future (and result in many more fascinating pieces in CLSR). We therefore want to make a plea for a reinforced *intra-* and *inter*disciplinary (hence the "i" in iFairness) approach towards developing the future IT law, on the one hand, and towards educating the future IT lawyer, on the other hand. But, more boldly, this article also wants to advocate for immersing *all* future lawyers in the fascinating world of IT (law), and vice versa, to integrate a mandatory course on law and ethics in curricula of STEM sciences.

The following paragraphs will further elaborate on what motivates in our view such an intra- and interdisciplinary approach, by making the link to the various convergence phenomena that we have encountered during our personal academic journey. In a second instance, we will launch some ideas on how to prepare the ground for such an approach and frame them in the context of contemporary trends towards more integrative thinking (even 'postdisciplinarity') in research and education.

1. ICT convergence

A more integrated and interdisciplinary approach in IT law has been necessitated by the different waves of convergence that we have witnessed ever since the digitization of our information and communication networks, economies and societies, in general, and the rise of the Internet, in particular. Convergence has been a buzzword since the end of the previous century and, in simple terms, means the blurring of boundaries (of previously distinct sectors, economies, legal frameworks, etc.). The liberalization of the telecommunications markets in the 1990s triggered a first convergence wave, when digital technology started to allow both traditional and new communication services – whether voice, data, sound or pictures – to be provided over many different networks. The European Commission explored different options for regulatory responses in its 1997 Convergence Green Paper.[5] Eventually, the EU legislator moved from a vertical, silo-based approach (telecommunications versus broadcasting versus IT) to a horizontal approach in which 'technology-neutrality' became the new mantra. Its 2002 regulatory framework for electronic communications networks and services was meant to apply to all transmission networks and services, irrespective of whether they conveyed signals by wire, radio, optical or other electromagnetic means, and irrespective of the origin of the network (telecoms, broadcasting, electricity sector…). Technology-neutrality also led the EU legislator to expand, in 2007, the scope of the Television without Frontiers Directive (renaming it into Audiovisual Media Services Directive), in order to cover also video services that 'looked, felt and smelt' like

[1] Also when IT law emerged as a topic for academic study in the 1970's, critics of the establishment of IT law as a separate discipline carped that IT law was *"merely a rag-bag of aspects of established legal disciplines such as contract law and intellectual property law"*; cf. Steve Saxby & Caroline Wilson (2007). "IT law in context: a critical overview". In: S. Heatherington (Ed.), *Halsbury's Laws of England Centenary Essays* (pp. 85-102). London, UK: LexisNexis Butterworths, available from https://eprints.soton.ac.uk/48453/1/Halsbury_final_19.09.07_pdf.pdf. It is striking that Wikipedia still thinks that IT law or 'cyberlaw' *"does not constitute a separate area of law, but rather encompasses aspects of contract, intellectual property, privacy and data protection laws"*; https://en.wikipedia.org/wiki/IT_law (Don't know where that leaves all those of us who have worked on issues in telecommunications, digital media, e-commerce and cybercrime…).

[2] Or, in its Anglo-Saxon version, about "how many angels can dance on the head of a pin".

[3] Steve Saxby & Caroline Wilson (2007). "IT law in context: a critical overview", *supra*, note 1.

[4] With *intra*disciplinarity, we refer to the interaction of different subjects within a single discipline, in this case the interaction of different legal fields (within the discipline of law). *Inter*disciplinarity refers to the interaction of two or more different disciplines (like law, economics, history, mathematics, computer science, etc.). According to the often used definition of the OECD this interaction *"may range from simple communication of ideas to the mutual integration of organizing concepts, methodology, procedures, epistemology, terminology, data and terms organized into a common effort on a common problem with continuous intercommunication among the participants from the different disciplines."* On the different notions of intra-, multi-, cross-, and interdisciplinarity, see e.g. Lisa R. Lattuca, "Creating Interdisciplinarity: Grounded Definitions From College and University Faculty", *History of Intellectual Culture*, 2003, Vol. 3, no. 1, available from <https://www.ucalgary.ca/hic/files/hic/lattucapdf.pdf>.

[5] European Commission, Green Paper on the convergence of the telecommunications, media and information technology sectors, and the implications for Regulation – Towards an information society approach, 3 December 1997.