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CODE INSTEAD OF LAW: *LEX ALGORITHMICA* AS A MODE OF GOVERNMENT OF THE LIVING

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Purpose: This paper explores *lex algorithmica* as a novel form of algorithmic governance that displaces traditional legal processes with computational decision-making. It analyzes how this shift reconfigures key political-legal concepts—sovereignty, freedom, responsibility, and justice—under the conditions of surveillance capitalism.
Design/methodology/approach: Using a genealogical method rooted in social and legal philosophy, the study traces the evolution of modern power from Bentham's panopticon to Foucault's biopower, Deleuze's control societies, and the surveillant assemblage of Haggerty and Ericson. It combines these with contemporary critiques by Hildebrandt, Yeung, and Zuboff to develop the concept of datafication-power, a successor to knowledge-power.
Findings: The research reveals that *lex algorithmica* operates as an opaque, predictive form of normativity embedded in infrastructure rather than institutions. Algorithmic systems determine what is visible, possible, or permissible—often without legal deliberation or accountability. Sovereignty shifts from state institutions to platforms; freedom becomes a variable shaped by code; and justice is undermined by personalization, automation, and opacity. The paper argues that algorithmic rule challenges the foundational liberal assumption of the subject as a reasoning and autonomous agent.
Research limitations/implications: This is a theoretical study; future empirical research should examine specific cases (e.g., scoring systems, predictive policing, automated decision-making) to test and refine the proposed framework.
Practical implications: The article calls for legal and regulatory innovations that can address the normative force of code. It suggests that law must be reimagined as a reflective practice responsive to computational infrastructures and predicative systems.
Social implications: The findings highlight risks to democratic deliberation, public reasoning, and civic freedom. They contribute to debates on data governance, algorithmic justice, and digital sovereignty, underscoring the need for ethical oversight of platforms power.
Originality/value: The paper develops a philosophical genealogy of *lex algorithmica*, positioning it as a transformative mode of power. It offers a unique synthesis of classical and contemporary theories, relevant to scholars in legal philosophy, digital ethics, and political theory.
Keywords: lex algorithmica; algorithmic governance; digital sovereignty; Foucault; surveillance capitalism.
Category of the paper: Conceptual paper.

1. Introduction: A New Form of Normative Power

With the development of digital technologies, we are witnessing a profound transformation of power structures, which increasingly take the form of automated, opaque, and non-negotiable decision-making systems. At the center of this transformation lies the concept of *lex algorithmica*—a set of rules generated and enforced by algorithmic systems, operating beyond the structures of enacted law and without institutional guarantees of procedural fairness. The term, developed by authors such as Karen Yeung (2017) and Mireille Hildebrandt (2015), refers to a form of normativity produced by code—dynamic, personalized, and unaccountable to mechanisms of democratic deliberation. Code replaces the statute, and prediction supplants argumentation.

This process constitutes a key component of surveillance capitalism, which—as argued by Shoshana Zuboff (2019)—not only captures and analyzes human behavior but also shapes and directs it, subordinating users to commercial, political, and regulatory objectives. In this context, *lex algorithmica* is not merely a set of technical rules but a form of power that is both epistemic and existential—one that redefines the basic concepts of law and political subjectivity: sovereignty, freedom, responsibility, justice, and even the very idea of the subject.

The aim of this article is to analyze *lex algorithmica* as a mode of government of the living, developing along a genealogy of power techniques: from Bentham's panopticon (Bentham, 2011), through Foucault's concepts of biopower and governmentality (Foucault, 2009, 2010), to Deleuze's society of control (Deleuze, 2018) and Haggerty and Ericson's theory of the surveillant assemblage (Haggerty, Ericson, 2000).

2. The Panopticon as a Figure of Modern Power

The genealogy of *lex algorithmica* as a mode of governance leads us back to the classical figure of modern surveillance—the panopticon of Jeremy Bentham. Designed at the end of the eighteenth century as a model of the ideal prison, the panopticon was meant to enable complete visibility of the observed and total invisibility of the observer. The mechanism of power was based not on constant intervention but on uncertainty and internalized control: the inmate did not know whether they were being watched at a given moment but assumed they were always being watched (Bentham, 2011). The panopticon did not so much restrict physical freedom as it reshaped internal freedom—introducing mechanisms of self-control, submission, and moralization through the very structure of space and gaze.

Michel Foucault, reinterpreting panopticism in Discipline and Punish (2009), expands it beyond the prison: it becomes a technology that organizes all of modernity. Schools, hospitals, factories, and barracks—all operate as disciplinary devices that order bodies and behaviors. Power functions through normalization and standardization, rather than prohibition or violence. The body becomes the "target surface of power": compliant, classified, and modifiable.

From Foucault's perspective, panopticism does not destroy freedom—it shapes it (Foucault, 2009, pp. 206-208). As he notes: "Panopticism is the general principle of modern disciplinary power, whose operation consists in maintaining power relations in which individuals are graspable and continually visible, yet at the same time free and autonomous in their conduct" (Foucault, 2009, p. 208).

The individual remains formally free but functionally subordinated to the logic of visibility and evaluation. This principle of apparent autonomy, sustained by constant visibility, will prove especially important in later, digital forms of governance: the platform user also "can do whatever they want", but only within the limits strictly defined by code and invisible profiling mechanisms.

In this sense, panopticism becomes a prefiguration of *lex algorithmica*: a shift from power based on direct intervention to power that organizes the environment of action. Whereas Bentham designed an architecture of control in which visibility would discipline the subject, and Foucault analyzed panopticism as the matrix of modern disciplinary institutions, contemporary digital platforms transform this model toward environmental, distributed, and computational normativity. As Foucault wrote: "Panopticism is a formula of power that renders individuals visible and subject to the effects of power, while simultaneously enabling their constant classification, assessment, and normalization" (Foucault, 2009, pp. 207-208).

In digital systems—such as Amazon, Google, or Facebook—classification and normalization no longer require visibility in the classical sense. They are replaced by the permanent operability of data. *Lex algorithmica* does not operate through the gaze but through automated decision-making; it does not need a severe observer but a predictive model. As Shoshana Zuboff observes: "The power of digital platforms does not lie in observing individuals but in automatically shaping their future behaviors—without the need for intervention, judgment, or even the subject's awareness" (Zuboff, 2019, pp. 377-378).

Code does not watch—it classifies, recommends, excludes. It does not require a central tower because surveillance is embedded in infrastructure. Just as panopticism enforced discipline through the possibility of being observed, *lex algorithmica* models user behavior through content personalization, scoring, and invisible decision frameworks. Power shifts from the level of institutions to the level of the environment—from enacted norms to encoded norms.

3. Biopower and the Government of the Living: Techniques of Population Normativity

In the later stages of his theoretical work, Michel Foucault develops his analysis of power toward a new paradigm—biopower, that is, power that "takes life into its care" (Foucault, 2010, p. 282). Biopower does not focus on disciplining individual bodies but on managing entire populations—nations, demographic groups, statistical collectivities—through administrative procedures, demographic knowledge, and security technologies. Its goal is the optimization of life: ensuring health, productivity, fertility, and efficiency while minimizing risks, losses, and costs.

In parallel, Foucault formulates the concept of governmentality, understood as a set of techniques for influencing individuals and populations not through prohibition but through the organization of their action environment—through calculations, forecasts, and targeted incentives. As he writes: "To govern is to structure the possible field of action of others; it is an action upon the actions of others" (Foucault, 2010, p. 36). In this sense, power does not so much restrict freedom as it configures it—defining its frameworks, scenarios, and operational algorithms:

"One cannot govern without producing some form of freedom, without organizing it, without determining its points of application" (Foucault, 2010, p. 63).

Contemporary systems based on *lex algorithmica* continue this logic but at a new scale and within a new ontology of action (Hildebrandt, 2015; Yeung, 2017). Predictive data models, classification, and scoring systems become tools for governing the living. Digital platforms organize not only what we see but also what remains unseen; not only what we can do but also what is blocked, deemed risky, or unnecessary. Just as biopower emerged from public health administration, urban planning, and hygiene, so algorithmic biopower arises from the logic of platformization, behavioral optimization, and data extraction.

This shift is crucial for understanding freedom—both in the sense of classical negative liberty (as the absence of external constraints) and positive liberty (as the capacity for self-determination), following Isaiah Berlin's distinction (Berlin, 1991). In Foucault's genealogy, there is no freedom "before" power—every form of freedom is historically constructed and configured by power relations. If freedom, in the classical liberal view, was based on the assumption of a rational, autonomous subject capable of choice under conditions of transparency (Rawls, 1994), then in the age of automated rules and personalized normativity, choice becomes a product of the system rather than its prerequisite. Freedom ceases to be a space of sovereignty and becomes a system variable—subject to optimization, parameterization, and dynamic risk management.

4. Society of Control and Datafication: A New Architecture of Digital Power

In his brief essay Postscript on the Societies of Control (2018), Gilles Deleuze proclaims the end of the disciplinary society in the Foucauldian sense and announces the emergence of societies of control. Whereas disciplinary institutions (school, factory, prison) were enclosed spaces where the individual was subjected to normalization, the society of control operates without boundaries, in open circuits—through continuous monitoring, updating, and real-time modulation of the individual. "We no longer find ourselves enclosed in a disciplinary society - Deleuze writes - instead, we are in a society of control, which is in the process of replacing it. No need to confine anymore; control is carried out in open spaces" (Deleuze, 2018, p. 151).

This is not institutional power but networked and infrastructural power—diffuse, modulatory, and flexible. The individual is no longer the primary unit of analysis; instead, we encounter data about the individual: profiles, tokens, and registry entries. Power no longer requires direct observation—it operates via digital signals that allow profiling and intervention without physical contact, judgment, or consent.

This shift leads us to a fundamental mechanism of contemporary governance: datafication. This is the process by which actions, emotions, decisions, and relationships are transformed into digital data—measurable, processable, and subject to algorithmic inference. As Nick Couldry and Ulises Mejias (2019) argue, datafication is not just a technology but a new form of epistemic power: the act of "taking the world as a source of data". It is an operational ontology that allows not only the representation of reality but also its production, classification, and regulation.

In this perspective, *lex algorithmica* appears as an apparatus of datafication–power, functioning analogously to Foucault's model of knowledge–power. In the traditional configuration, knowledge—produced and legitimized by institutions (e.g., science, medicine, law)—served to regulate bodies and populations; it was the basis for intervention, classification, and the shaping of norms. As Foucault demonstrated, there is no knowledge without power and no power without knowledge—every form of knowing carries a normative order (Foucault, 1977/2009).

In the age of *lex algorithmica*, this role is assumed by a new apparatus: datafication–power. Data take on the role of technical truth—they are treated as the native representation of reality, and their algorithmic processing becomes the basis for decisions about access, risk, fit, or social value. Normativity is no longer written in law but emerges dynamically from data operations—without deliberation, without legitimation, and often without the subject's awareness.

This shift represents not only a technological evolution but an epistemological and political revolution: a transformation of what is considered knowledge and how knowledge becomes power—from written text to code, from judgment to scoring, from institutions to infrastructure.

5. The Surveillant Assemblage: Complex Power Architecture in the Post-Panoptic Era

In response to the transformations of the disciplinary society and the rise of the society of control, Kevin Haggerty and Richard Ericson propose the concept of the surveillant assemblage as a tool for describing contemporary forms of power. In their article The Surveillant Assemblage (2000), they present surveillance not as a coherent institutional structure but as a dispersed configuration of techniques, devices, and logics that connect ad hoc, dynamically, and beyond centralized control. This is a form of post-institutional power, operating on data—transforming bodies into digital profiles, behaviors into risk vectors, and individuals into digitally managed objects. As Haggerty and Ericson argue: "The surveillant assemblage operates by abstracting human bodies from their territorial settings and separating them into a series of discrete flows. These flows are then reassembled into virtual 'data doubles', which can be scrutinized and targeted for intervention" (Haggerty, Ericson, 2000, p. 611).

Surveillance is no longer about disciplining the body in space but about decontextualizing information, transforming and recirculating it across networks that cross traditional institutional and systemic boundaries (Haggerty, Ericson, 2000, p. 613).

In this model, surveillance has neither a single center nor a unified goal. It links state logics (police, courts, intelligence agencies), market logics (platforms, advertising, credit scoring), and technological logics (algorithms, sensors, cameras, APIs) into hybrid systems that escape traditional categories of law and politics. This is infrastructural and operational power, not governing through norms but through flows—of data, access points, and predictive outcomes.

Lex algorithmica, in this context, is neither law in the classical sense nor its simulation—it is a layer of code that enforces rules in real time, often without the subject's knowledge or recourse of the subject" (Yeung, 2017, p. 511; Hildebrandt, 2015, pp. 71-73). Haggerty and Ericson write about "the blurring of the distinction between those who watch and those who are watched" (Haggerty, Ericson, 2000, p. 618)—and this is undoubtedly what *lex algorithmica* does: it transforms the user into a function of the system that they themselves help co-create through data, clicks, and reactions.

It is within the framework of the surveillant assemblage that the new configuration of the datafication–power apparatus becomes most visible: there is no longer a single institution that collects data and makes decisions—there are interconnected systems that automatically reconfigure the rules of action, adapting them to the user's profile, location, history, and behavior. *Lex algorithmica* thus becomes a keystone: the code that binds the assemblage, unifies its logic, and enforces decisions without the need for human intervention.

6. Summary: Toward a Legal Philosophy of the Code Age: Sovereignty, Justice, and Resistance in the World of Lex Algorithmica

From the perspective of the genealogy presented here — from Bentham's panopticism, through Foucauldian biopower and the society of control, to the surveillant assemblage and the datafication-power apparatus—it becomes evident that *lex algorithmica* is not merely a technological problem. Rather, it represents a fundamental challenge for contemporary philosophy, especially legal philosophy. Code not only regulates behavior—it redefines key concepts of law, subjectivity, responsibility, justice, and freedom. As Mireille Hildebrandt observes: "Lex algorithmica shifts normativity from text to code, from deliberation to computation, from the sovereign to the dataset" (Hildebrandt, 2015, p. 102). Power is no longer expressed through norms but through predictive models; it is not enacted by an institution but generated by data and updated by algorithms (Yeung, 2017, p. 126).

This entails a redefinition of the very notion of sovereignty—no longer as dominion over territory or people, but as the operational capacity to program the rules that determine what is possible, visible, probable, or permissible. The digital platform becomes the sovereign, managing not only communication and economic infrastructures but also the logic of normativity embedded in interface design, scoring systems, and recommendation engines. As Yanis Varoufakis puts it: "The new form of domination does not consist in wielding political control over the state but in controlling the code—algorithms decide who sees what, when, and how. It is not the market that rules, but the cloud" (Varoufakis, 2023, p. 186, translated from Polish edition; see original in Varoufakis, 2023). According to him, we are witnessing the transformation of capitalism into technofeudalism, in which power is no longer political or market-based but infrastructural and predictive.

In this context, freedom does not disappear—it is transformed into a system variable, governed by predictive models and personalization. If in Isaiah Berlin's framework, negative liberty meant the absence of external constraints and positive liberty the capacity for autonomous action (Berlin, 1991), then in today's *lex algorithmica* systems, the boundaries of freedom are no longer drawn by political authority but by platform infrastructure. In classical liberalism, the limits of freedom had an ethical-social character. As John Stuart Mill wrote: "The only freedom that deserves the name is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs" (Mill, 1995, p. 87). Freedom ends where the freedom of another begins. In Mill's view, this "other" was typically the state. Today, however, it is not the state that restricts individual agency, but the logic of code, which constructs what is possible, accessible, and permissible—without needing violence or prohibition.

In *lex algorithmica* systems, this principle is suspended: it is no longer our relation to others, but the individual's behavioral profile and predictive value that define what is possible or allowed. The code—invisible, unargued, automated—governs without asking.

From the perspective of justice and freedom, the problem of *lex algorithmica* lies in its lack of deliberation, accountability, and recourse. Algorithms operate rapidly, automatically, and often opaquely—they are not subject to moral critique, intention analysis, or procedural assessment. In legal systems, even the strictest rule can be challenged, appealed, or argued. *Lex algorithmica* removes that possibility through personalization, atomization, and automation—it offers no space for the kind of rational justification that law is bound to in theories of justice. Ronald Dworkin argued that freedom and justice are inseparable because: "A free man is someone who has the right to be treated with dignity—as a rational being who can be the recipient of a justification, not merely the object of someone else's decision" (Dworkin, 1998, p. 93). And elsewhere: "Being treated as an equal citizen means having the right that every government decision that affects one's life and liberty be made in accordance with a fair procedure" (Dworkin, 1998, p. 126).

In *lex algorithmica*, such procedures are absent—decisions are generated by statistical models, without explicit rules, accountable authors, or an appealable authority. What is lost is not only transparency but also the moral justification of law itself. In these conditions, analyzing statutes or institutions is no longer sufficient. What is needed is a new philosophy of power and freedom in the age of code—one capable of recognizing that modern domination is no longer expressed through prohibition but through the design of environments of action that organize what is visible, possible, and permissible. As Mireille Hildebrandt writes: "Law must reclaim its role under the conditions of code—not as text, but as a reflective practice vis-à-vis operational technologies" (Hildebrandt, 2015, p. 73, trans. mine). Such a philosophy must not restrict itself to diagnosis—its task is to generate a language of resistance to a power that does not shout but modulates. As Shoshana Zuboff points out, the threat today does not lie in censorship but in the fact that: "Knowledge becomes the property of power, and ignorance—a state administered by the system" (Zuboff, 2019, p. 497).

For this reason, we need a form of reflection that:

1. Unmasks the invisible mechanisms of behavioral and environmental design.
2. Rebuilds concepts of freedom and responsibility that can make sense in a world governed by data.
3. Identifies spaces for existential and epistemic resistance that do not merely refer to past models of sovereignty but instead create new forms of community, co-responsibility, and awareness.

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