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Law's agency in global governance: inquiries into algorithmic governance and finance

Afroditi Marketou^a and Joana Mendes^b

^aAssociate Professor (Maître de conférences) in Public Law, University of Paris-Est Créteil, Paris, France; ^bProfessor of Comparative Administrative Law, University of Luxembourg, Luxembourg, Luxembourg

Financialisation and the development of technologies of automated assessment and decision have been among the most important drivers of globalisation. In these two fields, traditional legal categories and techniques initially constructed in state-based law seem to have languished, leaving leeway for private actors to develop new kinds of social ordering. The contributions in this special issue account for the concrete ways in which lawyers and their expert knowledge, at the national, international or EU level, have played a core role in the construction of the objects that have gone global and in the legitimation of the new social hierarchies produced by these processes of globalisation. In this way, the papers gathered here demonstrate the interplay of the legal and the technocratic, the global and the local, the new and the old in the complex fabrication of a 'law beyond the state'.

The magnitude of the legal challenges that developments in finance and technology pose in the early 2020s requires arguably a different perspective into the role of law with regard to global social and economic interactions that, while not dispensing the states, cannot manifestly be contained by the laws they define. The analysis of how far the study of new legal objects requires legal scholars to renew their research methods, and in what way, is arguably still wanting. Does the emergence of new practices and possible different demands on law necessitate renovating our analytical devices? If so, how can we maintain critical distance from those objects and practices and from how they are framed by the relevant actors? Which theories, if any, can provide normative standpoints in this regard? These questions were the starting point to delineate a research agenda for the study of law in the global context. In the article that frames the contributions to this special issue, we return briefly to the literature on the 'law beyond the state' that proliferated in a period of relative optimism with the diffusion of authority beyond the state and with the legal phenomena that ensued. Against this

CONTACT Afroditi Marketou  afroditi-ioanna.marketou@u-pec.fr  Public Law at the University of Paris-Est Créteil, Paris, France

background, we propose now a shift of focus from legal norms to legal practices and technicalities, and move away from inquiries on the nature of law in the context of globalisation.¹ We argue that legal technique is often the thread that weaves together the various normative layers that, cutting across different geographical levels, hold the structures of globalisation. This ‘micro-legal’ perspective, far from fetishising the law, is important to unveil the agency of law in the processes of globalisation. Mobilised to fill in gaps and address tensions arising from economic and technological developments, legal techniques not only permit but also steer the directions of globalisation.

Focus on concrete practices and legal tools sheds light on the concrete processes by which legal technique, concepts and methods legitimate normative solutions embedded in technocratic governance. Against prevalent depoliticised narratives on the legal framings of ‘algorithmic bias’, **Raphaële Xenidis** critically questions the transposition of traditional legal concepts and techniques in the field of algorithmic governance. Her contribution unveils the peculiar agency of analogy as a core legal technique to bridge the regulatory gaps that new technologies open. Focusing on discrimination law, she argues that behind the apparent neutrality of analogy—treated as a technique of legal reasoning that bridges the analogical and the digital worlds—fundamental distributional choices are made and justice arrangements enshrined. She unveils the ‘social imaginaries’ embodied in the legal techniques of discrimination law created for the analogical world, shows the frictions between them and algorithmic rationality, and argues that the translation by analogy of those legal techniques to the digital world can ‘erode the ontological foundations of discrimination law’ and neutralise the safeguards that it has created in the analogue world. She argues that, under the guise of redressing the discriminatory harms arising from the expansion of automated assessment and decision-making tools, equality law, applied by analogy, actually grounds power and erases, or even validates, social hierarchies deriving from algorithmic sorting.

Drawing on the example of EU law, Xenidis highlights that the legal solutions devised by policy-makers, the tech industry and epistemic communities to regulate algorithmic discrimination generate analytical frames of the technology that, drawing on analogy, can be legally problematic. Xenidis invites us to shift the regulatory focus from ‘the technology’ to the socio-technical infrastructure, its underpinning logic of capitalistic extraction, and its constitutive politics of exploitation and domination validated and sustained by legal discourse and techniques. This shift of perspective brings back human agency and material reality into the picture and sheds

¹ Annelise Riles, ‘A New Agenda for the Cultural Study of Law: Taking on the Technicalities’ (2005) 53 *Buffalo Law Review* 973–1033, 980.

light upon alternative legal solutions that may better address the power asymmetries produced or reinforced by technology and recalibrate the role of private and public actors. But Xenidis's paper goes further to critically contrapose the traditional legal subjectivity constituted by anti-discrimination law and the different algorithmic legal subjects. She explores how the disconnect between them can shield inequalities from legal scrutiny. Her analysis goes still further to show how traditional modes of reasoning in anti-discrimination law, in addition to objects and subjects, are challenged by algorithmic knowledge production. She ultimately shows that overlooking these ontological differences and applying analogical reasoning means validating new forms of algorithmic hierarchies and subordinations. 'Opening the black box of analogical reasoning' enables her to show how far algorithmic reasoning not only challenges anti-discrimination law but also risks neutralising it and turning it into an instrument that validates new hierarchies.

Technological and computing innovations not only constitute a new object of regulation but are often incorporated in the law and used as mechanisms for the shaping or the enforcement of legal norms. As legal artefacts, algorithms and automated decision-making tools exalt the technocratic dimension of law and redefine the power relationship between states and private actors. In this process, lawyers seem to be simply following developments taking place elsewhere, in other fields, enchanted by technology's ever-increasing promises of perfect enforcement, efficiency, transparency, accessibility to all and total inclusion, which resonate with their liberal ideals of freedom, autonomy, equality, formalism, and democracy. In his contribution to this issue, **Peer Zumbansen** unveils such dynamics in the field of platform economy, where the increasing use of technologies such as banking mobile apps and smart contracts supports hope for the possibility of a global community built on 'distributed property and trust'. Zumbansen takes issue with the democratisation promise of decentralised finance (DeFi) and its praise of how the use of financial technologies will allow 'everyone' to become 'their own investor-shareholder-entrepreneur'. In his analysis, fintech raises fundamental regulatory and normative concerns and risks becoming a 'runaway train, which is going down too many tracks at once for any moral or other decision-making methodology to make any meaningful choice'.

Approaching DeFi's democratisation promise through the critical lens of political economy, Zumbansen questions DeFi's ability to provide a response to the financial crisis, and a framework for transformative politics and individual inclusion. Zumbansen highlights that DeFi's ideal of a world of intermediary-free financial exchanges based on 'just technology', and of a global financial market discharged from state intervention, is combined with a postulate for a universal and secure access to the market-place that is hard to ground on the actual political economy of socio-economic inequality. His

contribution neatly shows that, bypassing the law and the democratic processes of traditional norm-production and replacing them with code, DeFi 'soundly echoes the formalist assumptions that a legal abstraction from a disturbing reality will work well in practice'. When contrasted to the real-world asymmetries in digital access and bargaining however, DeFi's utopia is exposed as depriving public institutions of their possibilities to pursue public goods and to protect the vulnerable in view of facing socio-economic disparity and exclusion. In this way, the ongoing normative debates on the merits of fintech and DeFi illustrate an ever-deepening divide between 'those adhering to the "bureaucracy" of democratic "institutions" and those laying fire to them in the name of 'freedom'.

Zumbansen highlights the complex interplay between the global, the 'billions' that are expected to benefit from the technology-based democratisation of finance according to the DeFi enthusiasts, and the local, the realities of social exclusion, structural socio-economic inequalities that require state, or at least, public intervention. He invites lawyers to critically reflect on the use of their concepts and techniques against the background of DeFi's projected future, while not neglecting the core role that state-based institutions and their law have played in the construction of financial markets, in the implementation of financial precepts and in facing the challenges of global finance and its crises. In this way, Zumbansen brings the agency of state-based law and legal knowledge back into the game of global finance and encourages us to critically question the new division of labour between politics and the market advanced by technocratic financial governance. This is a major concern for **Guido Comparato** too, who focuses on the role of state-based legal doctrines, techniques and institutions in the construction of the transnational law of finance, in its implementation at a local level and in mitigating its negative implications.

Taking as an example the law of financial services, Comparato studies legal technique as a medium by which political conflicts between the global and the local are displayed and resolved. The global financial system relies on a set of rules developed by technocratically legitimated actors allegedly beyond the state, under the aegis of private autonomy, and as such is often portrayed as a product of transnational law. Yet, that same system also produces socioeconomic externalities that might need to be tackled at the national level. Acknowledging this tension, Comparato analyses the reciprocal interaction of the different regulatory levels involved in the law of financial services. He considers the way the transnationally engineered, allegedly neutral and technical legal solutions are received in different contexts and highlights possible instances of conflict relating to the politics of financial law. He first looks at how certain interests find expression at the transnational level, through the medium of legal technical concepts and methods. He then considers how the legal technical features rooted in the

transnational level concretely play out locally, to verify the extent to which they are incorporated, rejected, or altered. By highlighting the often-conflictual nature of such interconnections, Comparato's contribution brings to the fore the political rather than the technocratic-economic dimension of the transnational law of finance and the need to recognise the imminently political dimension in the economic functions of commercial and private law.

The interplay between the global and the local in the construction of global financial law is at the core of **Pascale Cornut St-Pierre's** investigation. Instead of focusing on the origin of the techniques and on the institutions that apply them, however, she chooses another strategy: she traces the global circulation of a specific legal technique, securitisation. Cornut St-Pierre's contribution starts from the observation that financial law, at a global level, is both very fragmented—between national, regional, and international jurisdictions, between public and private regulators, between hard and soft law, etc.—and remarkably 'fluid'. The fluidity of financial law does not result from a theory, system or authority that transcends national borders, but it is rather the feat of practitioners, who, through their everyday work, have succeeded in devising legal-financial techniques that ensure transnational financial transactions. Among these techniques, securitisation is a prominent example of financial law's fluidity and of law's agency beyond the state. Originally used in the US mortgage markets, securitisation has spread all over the world as an instrument of financial regulation. Recently, in its version of 'green securitisation', the same technique is incorporated in agendas of ecological transition and supports hope for a sustainable financial system.

Economic geographers have shown how securitisation models had to be re-engineered before travelling to new spaces, in order to adapt to local political, institutional and economic conditions. Cornut St-Pierre's contribution focuses on the role of legal techniques and expert knowledge in this process. Through a survey of international financial lawyers' literature, she investigates the seemingly mundane technical problems that securitisation lawyers have had to solve, concerning the constitution of special purpose vehicles, the assignment of receivables, and the construction of new asset classes, for securitisation to spread globally. In this way, she reveals the role of lawyers as 'key actors of assetisation'. But Cornut St-Pierre's contribution goes further to shed light on the underlying representations that sustain the legal techniques of securitisation. She neatly shows that 'what has become globalised in the field of law and finance in the past decades is not primarily a set of transnational norms or authorities, but a repertoire of legal techniques, values, and rhetoric for framing and solving legal problems: a financialised legal knowledge'. In this new way of 'doing law', legal technique is perceived as a private know-how allowing to transcend borders and to address the 'legal hurdles' that local legal regimes and

debtor protection instruments pose to the smooth flow of capital around the world.

Comparato's and Cornut St-Pierre's investigations expose globalisation as 'the product of a history replete of legal materials'.² While these materials are perceived as fragile or outdated in the global constellation, they remain available for recycling to the service of new normative constructions, with radically different rationales. These authors neatly show how global and local, legal and financial, state and non-state elements interact in the area of transnational law to such an extent that questions concerning the legal or public nature and origins of rules and power—while perhaps of academic interest—become redundant in practice, where rules are followed by the business community because of the function that they perform rather than their nature and pedigree.³ **Pavlina Hubkova** interrogates the agency of 'traditional' law in the construction of the transnational law of finance, but she rather focuses on this law's aesthetics than on legal doctrine itself. Taking as an object of study the soft law produced in the context of the EU financial supervision, Hubkova inquires into the law-likeness of the regulation through guidelines and recommendations adopted by European Supervisory Authorities (ESAs).

Hubkova investigates how the involvement of the ESAs in the process of making prescriptive rules, though in a soft and non-mandatory way, affects the shape of rules that the financial institutions are supposed to obey. She starts from the observation that even if the guidelines and recommendations cannot be considered law in the traditional sense, their real impact is very much law-like. Based on this observation, she goes on to show the concrete ways in which these acts are replicating the aesthetics of law both in their processes of adoption—these resemble the decision-making upon the binding legal acts within the Council of the EU—and in their outlook, since their content, structure and appearance are not very different from that of directives or regulations. Hubkova argues that ESAs' guidelines and recommendations, just like 'traditional' EU law, elaborate upon vague or open-textured provisions contained in binding acts in order to provide for concrete and detailed rules. At the national level, the national competent authorities (NCAs) are effectively enforcing those acts as if they were law. Therefore, she argues, while hiding in the shadow of law, the soft rulemaking based on the cooperation between the ESAs and the NCAs has a significant impact on the behaviour of financial institutions and on the whole policy field. Based on the idea that law as such is a vehicle of power, Hubkova shows that 'the entire administrative practice, which consists of soft

² Benoît Frydman, « Comment penser le droit global? », *Working Papers du Centre Perelman de Philosophie du Droit*, 2012/01, <http://www.philodroit.be>, 16.

³ R Michaels, 'The True Lex Mercatoria: Law Beyond the State' (2007) 14(2) *Indiana Journal of Global Legal Studies* 447, cited by Guido Comparato in his contribution to this issue.

rulemaking and the effective enforcement of such rules, is powerful because it successfully mimics law-making and law enforcement procedures’.

Through a set of inquiries in the fields of algorithmic governance and global finance then, this special issue invites the reader to a reflection on the agency of legal knowledge and legal technique in the construction, functioning and legitimation of global governance. The contributions gathered here critically question common conceptions of what is technical and political, of what is ‘out of reach’ for lawyers, in the ‘black box’ of the algorithm or in the mercy of global financial markets, and of what legal knowledge and lawyerly work actually does.