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► **To cite this version:**

Afroditi Marketou, Joana Mendes. Making it Work: Law's Agency in Global Governance. *Transnational Legal Theory*, 2024, 14 (4). hal-04395080v2

HAL Id: hal-04395080

<https://hal.science/hal-04395080v2>

Submitted on 10 Jun 2024

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Making it Work: Law's Agency in Global Governance

Afroditi Marketou and Joana Mendes*

Abstract. This paper presents a research agenda for the study of law in the global context. Inspired by the work of Annelise Riles, it invites legal scholars in the field of global governance and law beyond the state to 'take on the legal technicalities' of globalisation. Law and lawyers have a core role in the conception, the construction and the functioning of global regulatory settings. However, the study of the legal technicalities of global governance has been overlooked, both by the theoretically-minded literature on law beyond the state - which tends to look at more 'fundamental' features of law and politics in the global context - and by those studying the actual workings of global governance - who take legal technique for granted as one among other instruments of regulation. We argue that legal technique is too interesting to be reduced to a consequence of wider globalising trends or to a simple instrument of technocratic governance and of power dynamics that escape democratic scrutiny. The study of law as technique can offer insights into how law constitutes social, political or economic phenomena. This kind of self-consciousness and self-reflection is crucial in legal scholarship especially today, as it is a necessary step for opening the way to transformative politics in the field of global governance and beyond. After explaining the drivers and assumptions of our approach and its connection to other research agendas, we expose the possible directions of the inquiry that we propose.

Keywords: global governance, law beyond the state, legal technique, legal knowledge, law's agency

* Afroditi Marketou is Associate Professor (Maîtresse de conférences) in Public Law at the University of Paris-Est Créteil. Email: afroditi-ioanna.marketou@u-pec.fr.

Joana Mendes is Professor of Comparative Administrative Law at the University of Luxembourg. Email: joana.mendes@uni.lu.

This research was conducted with the funding of the Fonds National de la Recherche du Luxembourg (grant: PRIDE17/12251371/DTU-REMSII). It emerged from the roundtables organised in the framework of the Doctoral Training Unit "Enforcement in Multi-level Regulatory Systems" (REMS II) and owes a great deal to the discussions with the PhD researchers in these research meetings and to the participants in the workshop on "Law beyond the state in the 2020s. Methodological and Conceptual Problems" held at the University of Luxembourg in December 2021.

1. Law in globalised fields

The dispersion of normative power in a globalised world has challenged and deconstructed age-anchored divides between public and private, national and international, and even law and non-law. In the past two decades, law has adapted to the emergence of different technologies of regulation, as ever-changing shifts in politics and in the economy impacted the structuring role of the state and of state-based international institutions in defining the tenets of regulation. The ‘fields’ of globalised law (for want of a better term) have grown to encompass vastly diverse phenomena: from the Basel Committee on Banking Supervision and rating agencies to digital platforms, from sovereign welfare funds, to the regulation of food and the definition of technical standards that support industries and trade. They have raised important questions as to the respective roles of law, economics and politics in norm-setting and to the possibility to preserve democratic policy processes that remain anchored in the state. These debates dominated the heyday of economic liberalisation at the turn of the century. They remain relevant in the deeply changed world of the early 2020s, as the contributions to this special issue demonstrate.

Analyses in legal theory, with different degrees of embeddedness in historically and socially situated practice, have long been consumed in a debate on the legal nature and the legitimacy of the norms and institutions resulting from globalisation. Globalised fields have been the object of theories on the nature of law and its possibilities beyond the state or have been used as case studies for the construction of new understandings of the law that largely reproduced the disciplinary boundaries of state law (constitutional, administrative, private and public international law).¹ Due to their constructivist aims – their macro-perspective – these endeavours have mostly ignored the concrete ways in which law creates and sustains the regulatory and power structures in globalised fields. In an international context that hardly supports the normative enthusiasm that existed for the most part of the first decade of the century, these constructivist efforts either have slowly faded or struggle with justification.²

From a different angle, those interested in the actual workings of globalised fields of governance are faced with a multitude of subject matters characterised by political and technical complexity and functional interdependence. The study of those matters has largely required a practice-oriented and problem-based approach to law, in the conviction that law is or must be effective outside of the conventional boundaries dictated largely by its old-age state-focus. In particular in

¹ This is most notably the case for the literature on global constitutionalism, global administrative law and global legal pluralism. See Mattias Kumm, “The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State”, in Jeffrey Dunoff and Joel Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press, 2009), 258-325. Benedict Kingsbury, Nico Krisch and Richard B. Stewart, “The Emergence of Global Administrative Law”, 68 *Law and Contemporary Problems* 3/4 (2005), 15-61. Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge University Press, 2012).

² See, further, Section 2 below.

areas characterised by multiple interdependences, the necessary contextual engagement in the study of law often slips into a relative abandonment of legal dogmatics, or at least into the blurring of what the law carries that is distinctive to understanding and addressing the problems of governance and regulation.³ A strong commitment to interdisciplinarity sometimes goes so far as to contest the disciplinary boundaries of law as a whole, by reducing it to one among other regulatory tools, to an instrument for pursuing goals defined elsewhere, in other fields.⁴ ‘Governance’ and ‘regulation’, themselves terms borrowed from political science, economics, regulatory theory and administrative science,⁵ emphasise the distinctiveness of the normative phenomena that they designate from the point of view of the traditional lawyer. They became a short-hand for phenomena that were once marginal to the legal order or system.

And, yet, the practically-oriented study of globalised fields is rich in its capacity to provide a deeper understanding of law and of legal thinking.⁶ This is even more so, since law and lawyers have a core role in the conception, the construction and the functioning of such fields. They draft the contracts, they advise governments and policy makers, they create the necessary documents and the legal framework allowing for transnational and global social ordering.⁷ Moreover, it is through expert lawyerly work that certain instruments are designed to *escape* legal characterisations.⁸ In a number of cases, non-state norms are perceived as law by social and political actors and enforced as such, through their incorporation in laws, in legal reasoning or institutional practices, or even at a constitutional level.⁹ Traditional justifications connected to the normative monopoly

³ On contextual engagement and the law, see inter alia, Peer Zumbansen, “Introduction: Transnational Law, with and beyond Jessup” in Peer Zumbansen (ed.) *The Many Lives of Transnational Law. Critical Engagements With Jessup’s Bold Proposal* (Cambridge University Press, 2020), 1-54, stressing what it has meant for international law (at 9-10), for private law and state public law (26-27) and noting the ensuring persistence, still today, of the ‘conceptual building blocks’ inherited from the past.

⁴ See, e.g. Charles Sabel and Jonathan Zeitlin, “Learning from Difference: The New Architecture of Experimentalist Governance in the EU”, 14 *European Law Journal* 3 (2007), 271-327. That is also the case in regulation studies. See, generally, Ian Ayres and John Braithwaite, *Responsive Regulation. Transcending the Deregulation Debate* (Oxford University Press, 1992).

⁵ On the terms ‘regulation’ and ‘governance’, in their respective relation to law, see among many, Gérard Timsit, « Les deux corps du droit. Essai sur la notion de régulation », *Revue française d’administration publique* 78 (1996), 375-94, and Emiliós Christodoulidis, “The Myth of Democratic Governance”, in Poul F. Kjaer (ed.), *The Law of Political Economy: Transformation in the Function of Law*, (Cambridge University Press, 2020), 62-88.

⁶ Stressing the link between practice and theory with regard to Jessup’s book *Transnational Law* of 1956 and beyond it, see Zumbansen, n 3 above, 10-28.

⁷ Yves Dezalay and Bryant G. Garth, *Dealing in Virtue. International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press, 1996); David Kennedy, “Challenging Expert Rule: The Politics of Global Governance”, 27 *Sydney L. Rev.* 5 (2005), 1-24; Annelise Riles, *Collateral Knowledge: Legal Reasoning in the Global Financial Markets* (University of Chicago Press, 2011); Antoine Vauchez, *Brokering Europe - Euro-Lawyers and the Making of a Transnational Polity* (Cambridge University Press, 2015).

⁸ Pascale Cornut St-Pierre, “Investigating Legal Consciousness through the Technical Work of Elite Lawyers: A Case Study on Tax Avoidance”, 53 *Law and Society Rev.* (2019), 323-52.

⁹ That happened, for example, with the instruments of conditionality used by ‘the troika’ during the Euro-crisis in the countries subject to financial intervention. See Afroditi Marketou, “Greece: Constitutional Deconstruction and

of the state may have collapsed, but law has continued to ground and constrain social and economic power in ways that cannot be neglected. It remains a fundamental component of the power structures that emerge from, and are shaped within global regulatory settings.

Against this background, we propose an inquiry into the way global regulatory settings actually work, in practice. By contrast to most of the literature engaging in such an inquiry, we are especially interested in the role of law and legal knowledge in this practice. In other words, our purpose is to reaffirm law's force and agency in the technical routines of global governance. In order to do so, we propose a shift in the study of non-state law, from a focus on norms and their legitimacy to a focus on concrete legal practices, tools, and techniques. By contrast to most of the literature on 'law beyond the state', thus, we propose to adopt a 'micro-legal' perspective.¹⁰ This new focus unveils both law's agency in the generation and persistence of global governance, and the deep imbrication between the transnational and the local in this process. We suggest that the study of law as a kind of technical knowledge can offer insights into how law constitutes social, political or economic phenomena and, hence, provide a basis to inquire into possible normative paths, stripped of conceptions on the nature of the law or on how to conceive it beyond and within the state.

This article is structured as follows. Section 2 offers a brief overview of the literature on law beyond the state, to both further situate our approach and identify its distinctiveness. Section 3 details our approach and identifies how a shift from legal norms to legal practices and technicalities can shed light on both the autonomy and instrumentality of law in supporting the exercise of power. Section 4 presents the different sets of questions that such an approach raises.

2. Variations on law beyond the state

The acknowledgement of the centrality of legal expert knowledge in the spaces of politics and economic activity that, at the same time, rely on, and transcend the reach of the state has prompted attempts by legal scholars to redefine the nature and function of law in a context of exhaustion of statehood.¹¹ The at first worried observation of the 'end' or the 'fragmentation' of law gave its place to the hope for law as a meta-theory or general jurisprudence offering the tools for conceptualising and guiding transnational normative ordering.¹² Legal scholars have directed

the Loss of National Sovereignty" in Thomas Beukers, Bruno De Witte and Claire Kilpatrick (eds.), *Constitutional Change through Euro-Crisis Law* (Cambridge University Press, 2017), 179-98.

¹⁰ On this perspective, see Benoît Frydman, *Petit manuel pratique de droit global* (Académie Royale de Belgique, 2014). See also Pascale Cornut St-Pierre's contribution to this issue.

¹¹ For a dense and nuanced account of the relevant literature, see Neil Walker, *Intimations of Global Law* (Cambridge University Press, 2015).

¹² Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (United Nations, 2006); Andreas Fischer-Lescano and Gunther Teubner, "Regime-

their efforts to adjusting existing conceptual schemes – perhaps less so to devising new ones – to make sense of the shifts of power and normativity that globalisation meant. They have done so either within the boundaries of their scholarly fields of law, testing them and widening their scope, or attempting the delineation and construction of new scholarly fields, in more or less intense dialogue with other disciplines.¹³

Global legal pluralists suggested embracing the legal hybridity that is characteristic of globalisation by managing diversity and pluralism through the elaboration of cosmopolitan jurisprudence, institutions, procedures and practices.¹⁴ Transnational law tended to focus on the role and authority that private actors acquired through the expansion of the economic activity beyond the state, and how private law was being mobilised and transformed through the interaction between the public and the private spheres.¹⁵ Global constitutional law and global administrative law, in turn, focused on how public law could grapple with the authority of public actors, either in the form of international organisations or their bodies, or imbricated in hybrid organisational forms, in networks spanning different levels of governance, or still of private actors having regulatory functions.¹⁶ Global administrative law in particular led to vast empirical research into the virtues and limits of transparency, participation, reason giving and judicial review of a wide array of phenomena that, in one way or another, the various proponents held to fall under the epithet of administration.¹⁷ Much of the work that in this vein was developed in Europe inevitably included the EU law dimension of the phenomenon or used the more mature EU legal system as an anchor

Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law” 25 *Michigan Journal of International Law* (2004), 999-1046; William Twining, *Globalisation and Legal Theory* (Butterworths, 2000); Martti Koskenniemi, “The Fate of Public International Law: Between Technique and Politics” 70 *Modern Law Review* (2007), 1-30.

¹³ On the overhaul of disciplinary boundaries, see, among many, the brief overview by Horatia Muir Watt, ‘Conflicts of laws unbounded: the case for a legal-pluralist revival’ 7 *Transnational Legal Theory* 3 (2016), 313, 315-21, herself engaging in a revival of conflict of laws as a discipline to make sense of law in the global sphere. Interdisciplinarity becomes radical in Teubner’s societal constitutionalism. Drawing on the work of Niklas Luhmann, Teubner reconstructs constitutionalism as a theory that makes sense of different types of social ordering in the globalised configuration. In this reconstruction however, constitutionalism abandons some of its major characteristics in its conventional understanding for lawyers, that is, its connection to institutionalised politics and its connection to the nation-state. See Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalisation* (Oxford University Press, 2012).

¹⁴ Paul Schiff Berman, n 1 above. For an application in the field of private international law, see Muir Watt, n 13.

¹⁵ Ralf Michaels and Nils Jansen, “Private Law Beyond the State? Europeanisation, Globalisation, Privatisation”, 54 *American Journal of Comparative Law* (2006), 843-90; Harm Schepel, *The Constitution of Private Governance. Product Standards in the Regulation of Integrating Markets* (Hart, 2005).

¹⁶ E.g. Kumm, n 1. Kingsbury, Krisch and Stewart, n 1. In the digital environment, this aspiration to constitutionalisation is now expressed in the growing literature on “digital constitutionalism”. See Nicolas Suzor, “Digital Constitutionalism: Using the Rule of Law to Evaluate the Legitimacy of Governance by Platforms”, 3 *Social Media + Society* (2018), 1-11; Edoardo Celeste, “Digital constitutionalism: a new systematic theorization”, 33 *International Review of Law, Computers & Technology* (2019), 76-99.

¹⁷ See, e.g., Sabino Cassese (ed.) *Research Handbook on Global Administrative Law* (Edward Elgar, 2017).

on how to conceive of law in similar settings.¹⁸ Throughout, the blurring of boundaries between the public and private spheres became widely accepted.¹⁹

These approaches have had in common a constructivist ambition to ground, tame or, simply, make sense of ‘beyond-the-borders’ legal phenomena, from selective views. They have oscillated between doctrinal construction that tended to extend or partially replicate state-law paradigms and the normative critique, with varying degrees of theoretical ambition, but almost always with the view of establishing a field, being situated in one, and taking some critical distance to existing explanations of law beyond the state.²⁰ Global constitutional law and global administrative law, in particular, shared a strong normative commitment to the elements of public law that were in the making in international and transnational institutions that, in their view, could tame public authority, hold it accountable to various audiences and make it, in some sense, legitimate. With their common object of study – law in the global context – these different projects also focused on the impact of globalisation on the foundations of legal authority.

The merits of these scholarly approaches to law beyond the state are contested between those who lament the empowerment of increasingly authoritative and unaccountable private actors and those who have heralded the creation of a global rule of law or of a global constitutional order of rights.²¹ This different normative positioning is illustrated by the contrasting views of the critics of ‘global or cosmopolitan constitutionalism’, on the one hand, and of the advocates of constitutionalism beyond the state, on the other. Global constitutionalists sought to reconstruct the rule of law, democracy and rights’ protection in a normative project intended to pursue the constitutionalisation of the liberal world order.²² This positioning was anchored on the assumption

¹⁸ E.g. Edoardo Chiti and Bernardo Mattarella (ed.), *Global Administrative Law and EU Administrative Law* (Springer, 2011); Armin von Bogdandy, “The European Lesson for International Democracy: The Significance of Articles 9 to 12 EU Treaty for International Organizations”, 23 *European Journal of International Law* (2012), 315-34; Daniel Halberstam, “Systems Pluralism and Institutional Pluralism in Constitutional Law: National, Supranational, and Global Governance” in Matej Avbelj and Jan Komárek (eds) *Constitutional Pluralism in the European Union and Beyond* (Hart, 2012), 85-126. On the WTO, see among others Ernst-Ulrich Petersmann, “Human Rights, Constitutionalism and the World Trade Organization: Challenges for World Trade Organization Jurisprudence and Civil Society”, 19 *Leiden Journal of International Law* (2006), 633-67.

¹⁹ Paul Schiff Berman, “From International Law to Law and Globalisation”, 43 *Columbia Journal of Transnational Law* (2005), 485-556.

²⁰ Peer Zumbansen, “Transnational Law: Theories and Applications”, in P. Zumbansen (ed.) *Oxford Handbook of Transnational Law* (Oxford, 2021), 3-30, moving away from the characterisation of transnational law as a ‘legal field’ (‘largely unsettled’ one – at 17) and approaching it as a ‘critical project’, ‘a critical methodological framework’, ‘an experiment on both legal theory and legal doctrine, in methodology and social theory’ (original emphasis), ‘a methodological challenge’.

²¹ Mattias Kumm et al, “The End of the ‘West’ and the Future of Global Constitutionalism” 6 *Global Constitutionalism* (2017), 1-11; Jacob Eisler et al. “The Pendulum Swings Back: New Authoritarian Threats to Liberal Democratic Constitutionalism” 11 *Global Constitutionalism* (2022), 1-8.

²² Kumm, n 1; Anne Peters, “Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures”, 19 *Leiden Journal of International Law* (2006), 579-610; Anne Peters, “The Merits of Global Constitutionalism”, 16 *Indiana Journal of Global Legal Studies* 2 (2009), 397-411. On the ambiguity

that new sites of authority meant a fundamental shift to the very nature of law, to which law could and should respond by developing further the often only incipient forms of constitutionalism identifiable beyond the state. Critics of this view are deeply skeptical of the possibility to transpose the tenets of modern constitutionalism – and with it the state-shaped understanding of the law – to constrain, by a similarly conceived law, the power exercised beyond the state.²³ Klabbers, in particular, notes the ephemeral nature of a ‘self-validating’ perspective on law, that, by focusing on selected elements of the empirical reality, offered only a ‘narrow explanation’ thereof, with a strong normative outlook that did not compensate a weak theoretical basis.²⁴

Similarly, the efforts of global administrative law to anchor legality in global settings have been criticised and eventually faded, despite the success that the field enjoyed until the last decade. While the empowerment of specialised regulators, in various public-private formations and interactions, made administrative law a suitable candidate to analyse the continuous transformations of public authority, the global administrative law approach conveyed a sense of legitimation that law alone cannot support. The field was empirically rich, showcasing the varied forms that public authority took. But studying such forms of authority from a procedural perspective is largely unsatisfactory.²⁵ It presumes law’s ability to constrain authority in areas where this remains essentially at the disposal of decision-makers and it reinforces the instrumentality of law to externally-dictated goals. Depending on the substantive regimes to which procedural principles apply, they empower private actors and favour business interests against locally protected public interests.²⁶

These debates are important, insofar as they try to make sense of the possibilities of law and, inevitably perhaps, reveal its limits in complex institutional and normative settings that imbricate the global and the local. Critics emphasise law’s legitimising and enabling power. They point to the fact that different theories and discourses on law beyond the state might be too optimistic as to law’s systematic and constraining qualities, while neglecting its political drivers and

of constitutionalisation, see Martin Loughlin, “What is Constitutionalisation?” in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism* (Oxford University Press, 2010), 47-69.

²³ Jan Klabbbers, “Constitutionalism Lite”, *International Organizations Law Review* 1(2004), 31-58. Alexander Somek, *Cosmopolitan Constitutionalism* (Oxford University Press, 2014); Loughlin, n 22 above; equally critical of a-historical transpositions, but targeting EU constitutionalism, see Dieter Grimm, *Constitutionalism: Past, Present and Future* (Oxford University Press, 2016). For an excellent account of the controversy around constitutionalism beyond the state, see Neil Walker, “Beyond the Holistic Constitution?” in Dobner and Loughlin, n 22 above, 291-308.

²⁴ Jan Klabbbers, “Constitutionalism as Theory” in Jeffrey Dunoff and Mark Pollack (eds.), *International Legal Theory: Foundations and Frontiers* (Cambridge University Press, 2022), 220-39, noting that “[global] constitutionalism could only exist as interpretation” (235).

²⁵ But see Richard Stewart, “The Normative Dimensions and Performance of Global Administrative Law” 13 *International Journal of Constitutional Law* (2015), 499-506.

²⁶ Paul Merttenskötter and Richard Stewart, “Remote Control: Treaty Requirements for Regulatory Procedures” 104 *Cornell Law Review* (2018), 165-231. On the specific characteristics of authority in global governance and ensuing difficulties of legitimation, see Michael Zürn, *A Theory of Global Governance: Authority, Legitimacy, and Contestation* (Oxford University Press, 2018), 8-11.

consequences.²⁷ For those promoting such theories and discourses, by contrast, developing a law beyond the state is the best among the alternatives that we have left in the global constellation, in which the nation-state ceases to constitute a privileged site for forming a collective identity and for defining the common interest.²⁸ What emerges from these debates is the difficulty of identifying the political in the technical routines of expertise that shape global regulatory settings, that is, of bridging the empirical usages of law beyond the state, on the one hand, and their conceptual and normative implications to law, on the other.²⁹ But, as Muir Watt pointed out in passing, practice often does not wait for theory to come to terms with shifting realities.³⁰ The backlashes against globalisation and its ancillary economic liberalism intensified since the global financial crisis. Rising socio-economic inequalities, the persistence of national populism, and the depletion of the climate and the environment emergencies have taken precedence over what may be idle debates on what counts as law.³¹ While scholars are still struggling to come to grips with reality and with the role of law in shaping that reality, it remains unclear what can be the end point of questioning the concepts and assumptions, empirical and normative, with which they have been working, in particular when seeking new ways of conceiving of the law. In the changed world of the early 2020s, the constructivist projects of the past and the widely shared belief in law's capacity to construct a supranational or even global society that they expressed, have withered.³² The study of legal technique can, however, unveil the ways in which law constructs globalised fields and can, eventually, be mobilised to induce change in the power structures that animate them.

3. What law does: a shift in the study of law in global governance

What we propose then, is to inverse the process of the inquiry. It is no longer a question of what counts as law, whether globalisation has meant a shift in law's credentials, how law can or should be conceived in contexts of legal complexity and interdependence, or of who benefits from law in

²⁷ Claire Cutler, "Legal Pluralism as the "Common Sense" of Transnational Capitalism", 3 *Oñati Socio-legal Series* 4 (2013), 719-740. Christodoulidis, above n 5. Klabbers above n 24.

²⁸ As noted by Martin Loughlin, "The Misconceived Search for Global Law", 8 *Transnational Legal Theory* 3 (2017), 353-9, and the reply by Neil Walker, "The Shaping of Global Law" 8 *Transnational Legal Theory* 3 (2017), 360-70.

²⁹ Loughlin identifies as a crisis of representation of political authority (at 358), rather than a crisis of law, as the main problem posed by globalisation.

³⁰ Muir Watt, n 13, 351.

³¹ Loughlin (n 28) whose argument the title encapsulates: globalisation posed empirical rather than conceptual questions about the law. See also the reply by Walker (n 28 above, 368-70). In a similar sense, Zumbansen (n 20), proposing a 'practice-driven approach' to transnational law (24-27).

³² For an account of a parallel development in European legal studies, see Loïc Azoulay, « Solitude, désœuvrement et conscience critique. Les ressorts d'une recomposition des études juridiques européennes », 50 *Politique européenne* (2015), 82-98.

global governance. Instead, we propose to take globalised fields of governance as a rich field of inquiry for making conclusions about law and legal knowledge itself.

In this respect, we take the cue from the transnational law literature, in that we propose to study law beyond the state as an empirical phenomenon, irrespective of inherited preconceptions on the role of public and private actors.³³ Zumbansen argues that one must focus on the empirical phenomena that one may call ‘transnational’, and, thus, avoid the sterile contraposition between the transnational and the national, as well as the scholarly turfs on asserting or preserving what stands on both sides of a purported contraposition.³⁴ Only such an inquiry, he argues, can allow us to see through the hidden assumptions on law (specifically, its liberal undertones present too in the theoretical field of transnational law) and subject them to critical scrutiny.³⁵ We share with these positions the empirical leaning of research on law beyond the state. Our interest, however, is not to understand how legal orderings come about, the dynamic processes through which they unfold, or their impact. We rather focus on the attributes of law-likeness, on how legal forms and their analogues are mobilised to produce the solutions to the perceived problems of governance, and how, in this process, they shape those problems and global governance themselves.³⁶

How does law make global governance work? In order to answer this question, we suggest a shift in the study of non-state law from a focus on norms (law and legal orderings) to a focus on practices and their meaning to understand law and its possible agency. In other words, we propose to see law as a set of techniques and knowledge tools, which, employed in the professional routines of global governance, generate the peculiar truths, worldviews, and species of social ordering that sustain different processes of globalisation.

Critical legal scholars have pointed to the core role of legal expertise in global governance. In their work, law is seen as a professional practice, composed of expert vocabularies, technical routines, recurrent patterns of argument and disagreement, shared assumptions and narratives and identifiable professional styles.³⁷ However, and quite surprisingly, the literature on law beyond the state is characterised by a lack of interest in the most crucial element of legal expert knowledge: legal technique. The theoretically-minded writings on law beyond the state, due to their constructivist ambition, share a tendency to look for what is *beyond* legal technicalities. In this

³³ Terence Halliday and Gregory Schaffer, *Transnational Legal Orders* (Cambridge University Press, 2015), 3.

³⁴ Zumbansen, n 3 above, 33.

³⁵ *Idem*, 34, but also 38-9, proposing transnational law as ‘a short-hand for a critical and methodological engagement with law in a globally connected space of intersecting, overlapping and competing processes of norm creation but also of norm contestation’.

³⁶ On the relevance of the legal form, see Halliday and Schaffer, n 33 above, 15.

³⁷ Kennedy, n 7 above. *Idem*, *A World of Struggle – How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press, 2016). Duncan Kennedy, “Three Globalisations of Law and Legal Thought: 1850-2000”, in David Trubek and Alvaro Santos (eds), *The New Law and Economic Development* (Cambridge University Press, 2006), 19-73. Dezalay and Garth, n 7 above. In the field of EU law, see Emilia Korkea-aho and Päivi Leino-Sandberg (eds) *Law, Legal Expertise and EU Policy-Making* (Cambridge University Press, 2022).

perspective, which we can term ‘macro-legal’, technical legal questions are perceived as trivial and mundane, when compared to fundamental normative concerns as to the role and potential of law in the post-national constellation. By contrast, legal technique is taken for granted in more practically-oriented literature on global governance and multi-level regulation. Its political and cultural consequences are not questioned; it is simply seen as an instrument to be perfected. Indeed, in this context, legal technique represents a mere technology, that is, simply a way for achieving a desired outcome.³⁸ The instrumental and technical vision of law in the field of global governance has made it difficult for specialists to reflect on their tools and to question their function.

The approach that we propose is inspired by the intuition that legal technique is too interesting to be reduced to a consequence of wider globalising trends or to a simple instrument of technocratic governance or power struggles.³⁹ The mastery of technical legal concepts and methods gives meaning to everyday lawyerly work, and a sense of belonging to the legal profession. Its employment legitimises law as a project and the forms of global governance that it sustains.⁴⁰ As a ‘species of social imagination’, legal technique expresses and sustains common narratives and beliefs about the law and its relationship to its context.⁴¹ At the same time, legal concepts, rules and problem-solving methods enable ‘decision in the face of the undecidable, and resolution and closure in the face of ongoing complexity’.⁴² Through a set of material artefacts such as files, contracts, treaties, collateral agreements, reports and codes, legal technique serves as a mechanism of communication and can stabilise relationships and expectations between actors that sometimes lack any other apparent social link.⁴³ Commitment to the inner logics of legal technique and to the commonly accepted aesthetics of legal expertise empowers legal actors, as it enables pursuing certain ends through law. At the same time, legal technique constrains and channels the different ways in which these ends can be pursued.⁴⁴ Even more, legal technique can have an impact on these ends themselves, as it constrains what we can expect of law more generally.

³⁸ Annelise Riles, “A New Agenda for the Cultural Study of Law: Taking on the Technicalities”, 53 *Buffalo L. Rev.* (2005), 973-1033, at 977.

³⁹ *Idem*, 980.

⁴⁰ On the interest of legal technique as an object of sociological study, see more generally Pascale Cornut St-Pierre, « La technique juridique, objet de science sociale ? Pour une sociologie pragmatique des controverses techniques en droit », 9 *Jurisprudence – Revue critique* (2020).

⁴¹ Clifford Geertz, *Local Knowledge: Further Essays in Interpretative Anthropology* (Basic Books, 1983), 232.

⁴² Ralf Michaels and Annelise Riles, “Law as Technique”, in Marie-Claire Foblets, Mark Goodale, Maria Sapignoli, and Olaf Zenker (eds), *The Oxford Handbook of Law and Anthropology* (Oxford University Press, 2020), 860-78.

⁴³ Annelise Riles, “The Anti-Network: Private Global Governance, Legal Knowledge and the Legitimacy of the State”, 56 *Am. J. Comp. Law* (2008), 605-29.

⁴⁴ Pierre Schlag, “The Aesthetics of American Law”, 115 *Harvard Law Review* (2002), 1047-118.

What we propose then is to ‘take on the legal technicalities’ of globalisation.⁴⁵ Law is a thread that weaves the interdependence between different sites of public authority and of private economic sphere. Different geographic layers (international, national, local) intersect with varied normative layers (the norms produced or mobilised may be public or private) and involve different types of legal institutions and actors (judicial, administrative, legislative, private corporations, networks) at different stages of the process of norm formation, institutionalisation, monitoring and enforcement. Focusing on the sets of legal concepts, techniques and practices that generate and sustain the different processes of globalisation, on the ‘micro-legal’ perspective, places the legal phenomena we analyse both *beyond and within* the landscape of domestic (largely national, but also EU) law.⁴⁶ It thus allows to take the local dimension of globalisation seriously, while not denying the possibility of law beyond the state. This is particularly relevant to make sense of the increasing backlashes to projects of supranational integration from a legal point of view. At the same time, focusing on legal technicalities presumes that law has its own autonomy and is not merely instrumental to other rationalities that have driven globalisation, even if law itself may have been transformed in this process. Law has its own agency in the process of globalisation.

Our focus on law as technique is inspired by the work of legal anthropologist Annelise Riles.⁴⁷ We take our cue from her approach to law as a set of knowledge tools and her focus on the aesthetics of law. While this approach implies awareness of the importance of context to understanding the functioning of the law, it places this context in the background to rather emphasise that law, as a tool – as ‘technique’ – has an agency of its own. Taking issue with the instrumental vision of law that is pervasive among legal and socio-legal scholars, this strand of scholarship sheds light on the fact that ‘the material and discursive tools of legal technique carry lawyers along in ways that are independent of human wishes and intents’.⁴⁸ Like Riles, it is not our purpose to fetishise the law, but to show how legal technique matters in the fabric of social and political structures. Our approach is, however, different and in some aspects more modest than hers, as we do not aim at engaging in the rich anthropological work that grounds her research. While Riles addresses her call to take on the legal technicalities mainly to her colleagues in anthropology and social science, we argue that the perspective of law as technique can be useful within the legal field, and specifically when analysing law in globalised fields, as it can offer an alternative to the constructivist literature on law beyond the state.⁴⁹ The inquiry we propose does not seek to map

⁴⁵ Riles, n 38 above.

⁴⁶ While this is acknowledged by proponents of global and transnational law, it remains implicit in these terms. See, e.g. Walker, *Intimations of Global Law* n 11 above, 162. Halliday and Schaffer’s conception of transnational legal orders is also deeply interconnected with nation-state law (n 33 above, 13, 19-20).

⁴⁷ See, among others, Riles, *Collateral Knowledge* (n 7 above), Michaels and Riles, n 42.

⁴⁸ Michaels and Riles, n 42 above.

⁴⁹ For some examples of legal scholars using the work of Annelise Riles, see Alain Pottage, “Law after Anthropology: Object and Technique in Roman Law”, 31 *Theory, Culture & Society* (2014), 147-66; Cornut St-Pierre, n 8 above; Vincent Réveillère, “Inquiring into Conceptual Practices: Legal Controversy at the Court of Justice of the

the different elements that could compose a theoretical construction of ‘global law’.⁵⁰ Rather, it aims at offering a basis for a critique informed by the empirical account of the operation of concrete legal objects and attitudes to ‘governance problems’.⁵¹ This instrumentalisation of the inquiry also distances our approach from the anthropological work of Riles.

4. Possible directions of the inquiry

The kind of research that we propose invites a more general reflection on legal knowledge and thinking through specific case studies in the field of global governance. It invites a focus on concrete legal practices, tools, forms, techniques, argumentative styles and reasoning methods. We will not detail here the diverse methodological strategies that can be followed for such a study, which range from ethnographic fieldwork to the reflective analysis of classical legal material.⁵² Nor do we aim at providing a complete and coherent analytical toolkit for performing such an inquiry, as the concepts and methods that can prove useful to the researcher will largely depend on the object and the context of the research itself. In the paragraphs that follow, we will simply expose three sets of possible questions that an inquiry on legal technicalities may raise. They illustrate the potential of the approach we propose.

i. Which novelties and continuities does law have in globalised fields?

The debate about the legal nature of the norms produced in the context of globalised fields of law has been largely connected to the legitimacy of the relevant actors. When it flourished, in the midst of the ‘third globalisation of law’,⁵³ this debate has been often combined with a narrative around the erosion of the state and ‘new’ forms of normative power beyond it. But theoretically-minded scholars deciding to adventure in the field of global governance experience a feeling of déjà-vu: legal realists have long shed light on the relative character of the public-private divide,⁵⁴ while legal pluralists’ work has shown that the existence of ‘unofficial’ law, produced outside the offices of state bureaucracy and outreaching its control, is an inherent feature of legality.⁵⁵ Is the

European Union”, in Mikael Rask Madsen, Fernanda Nicola et Antoine Vauchez (eds), *Researching the European Court of Justice. Methodological Shifts and Law’s Embeddedness* (Cambridge University Press, 2022), 133-57;

⁵⁰ See Walker, n 11 above.

⁵¹ On the instrumentalisation of anthropological knowledge by lawyers, see Annelise Riles, “Anthropology, Human Rights, and Legal Knowledge: Culture in the Iron Cage”, 108 *American Anthropologist* (2006), 52-65.

⁵² On the different possible inquiries, see Réveillère, n 50 above.

⁵³ Duncan Kennedy, n 37 above.

⁵⁴ Morris R. Cohen, “Property and Sovereignty”, 13 *Cornell L. Q.* (1927), 8-30.

⁵⁵ Sally Falk Moore, “Law and Social Change: The Semi-Autonomous Field as an Appropriate Subject of Study”, 7 *Law & Society Review* 4 (1973), 719-46.

phenomenon that we are studying so new or is the novelty of global governance part of a mythology whose function, among others, is to emphasise its modern or advanced character?

The shift in the focus of the study, from global governance as norms to global governance as set of empirically observable practices, nuances the novelty and distinctiveness of the legal techniques employed in globalised fields. In her seminal article “The Anti-Network: Global Private Law, Legal Knowledge, and the Legitimacy of the State”,⁵⁶ Riles takes issue with classical accounts of global private law as a product of state power, as a set of norms, or as a coherent system constructed by a network of private actors. Instead, she proposes to see global private law as a ‘flurry of activity’ composed of specific knowledge practices, which obviate the need for norms, networks or, even, for a legal system. Based on an observation of the way Japanese traders produce and exchange legal documents for the global swaps markets, Riles argues that global private law does not substitute state law-making by producing new kinds of authority or legitimacy. It rather mirrors the state by replicating the knowledge practices of ‘state work’, that is most notably, its peculiar way of channeling politics through bureaucratisation and proceduralism. In her contribution to this issue, Hubkova takes her cue from Riles to argue that certain multi-level administrative practices in the field of financial regulation are effective because they replicate the aesthetics of state law. Taking the example of soft law-making in the context of EU financial supervision, she observes how the administrative practices involved in this process successfully mimic law-making and law-enforcement procedures. Hubkova thus shares with the ‘technical turn’ of socio-legal scholarship⁵⁷ the approach to law as a set of practices that are linked between them by a set of material and aesthetic features.

Attention to the legal expert practices and knowledge of global governance shows that globalisation is ‘the product of a history replete of legal materials’.⁵⁸ 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. This also sheds light on the complex interplay between the global and the local, the technical and the political, in the actual workings of global governance. Comparato’s contribution in this issue highlights, for instance, how commercial law, while intended to provide the techniques to support transnational economic rationality, cannot in practice be severed from the political considerations that are usually considered the realm of domestic public law. Echoing the concerns raised by Hubkova and Comparato, Zumbansen argues in this volume that the emerging and fast-proliferating field of

⁵⁶ Riles, n 43.

⁵⁷ Frédéric Audren, « Un tournant technique des sciences (sociales) du droit ? », 23 *Clio@Thémis* (2022), <https://doi.org/10.4000/cliothemis.2635>.

⁵⁸ Benoît Frydman, « Comment penser le droit global ? », *Working Papers du Centre Perelman de Philosophie du Droit*, 2012/01, <http://www.philodroit.be>, 16.

‘decentralized finance’ illustrates the woes of traditional financial regulatory instruments in adapting to increasingly privatized and border-crossing infrastructures of value creation.

ii. *Legal imaginaries of global governance*

The law beyond the state literature often assumes that globalisation entailed a paradigm shift in our perception of the law, and that we have moved away from the Westphalian era to a new era in which law is largely a global phenomenon. By contrast, critics, most notably statist and political economy scholars, continued to emphasise the important role of the state in enabling and enforcing transnational norms. Focus on the concrete legal practices of globalisation can shed new light on this debate. Indeed, it might be that what changes in the global context is not so much the credentials and identity of law themselves, but the point of view of expert lawyers when experiencing it.

What do the legal techniques of global governance tell us about lawyers’ depictions and expectations of law and of its impact on society? What kind of aspirations and fantasies inspire the concrete projects of lawyers engaging with law beyond the state? How does legal expert knowledge sustain and develop these images, aspirations and fantasies?⁵⁹ Cornut St-Pierre’s contribution to this issue traces the global circulation of a specific legal technique, securitisation, from its origins in US mortgage markets to its recent redeployment as a purported tool for ecological transition. By looking into international financial lawyers’ literature, she identifies the legal problems that had to be addressed, and the legal solutions that were devised, for securitisation to spread globally. Based on this investigation Cornut St-Pierre argues that what has gone global in the field of law and finance 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. The core features of such legal knowledge are its perception as a private know-how for global ordering, its integration of finance’s worldview into legal reasoning and legal instruments, and its embodiment of new social representations less protective of debtors.

More broadly, studying the legal expert knowledge of global governance as a cultural practice can be valuable in order to explore the peculiar ways of imagining the world, the law, the state, and society that it expresses and sustains.⁶⁰ The legal techniques of global governance are seen as

⁵⁹ In the field of domestic constitutional law, see Jacco Bomhoff, “Making Legal Knowledge Work: Practicing Proportionality in the German *Repetitorium*”, *Social & Legal Studies*, forthcoming. Bomhoff analyses the teaching practices of the German *Repetitoren* to provide a cultural study of ‘proportionality review’ as a template of legal knowledge and as a fundamental legal method in German legal and constitutional imagination.

⁶⁰ On law as part of ‘a distinctive manner of imagining the real’, see Geertz, n 41, 173.

means to ends that are defined outside the law, through complex decision-making processes involving experts in different fields. In this context, law is a blueprint for enforcement, once the ‘real’ disputes, concerning what we want to achieve, have been resolved in scientific or other forums.⁶¹ The worldviews, mentalities and ideologies of lawyers specialising in the field are often eclipsed in the name of a general pursuit of effectiveness or efficiency. The fundamental questions that global governance raises concerning human rights, the nature of justice and the relationship between state and society are typically reduced to tedious technical details, concerning procedural transparency or stake-holder participation. Lawyers specialising in the field often imagine themselves as ‘modest witnesses’ of scientific truths established elsewhere, they are ‘practically minded experts’ seeking to make their legal devices enforceable and focused on the perfection of the workings of the regulatory machine.⁶² This is even more the case in the highly specialised fields of algorithmic governance and financial law, which compose the subject matter of this special issue.

And yet, the cultural study of legal techniques in the context of globalisation can tell us much about how lawyers imagine expert knowledge and science, about the place that uncertainty and risk occupy in legal knowledge, as well as about the relative importance that lawyers attach to issues of form and consistency, on the one hand, and substance, on the other. As Zumbansen neatly shows in this volume, enthusiasm around the decentralisation of finance and its promise to democratisation and transparency are underlay by an “unfailing trust in technology and in the human capabilities to discard one’s chains and strive for freedom”, while it neglects structural inequalities, and digital and financial divides. In this sense, the praise of decentralised finance in the name of freedom of contract, autonomy and democracy echoes the formalist assumptions that a legal abstraction from a disturbing reality will work well in practice. The insights of such an inquiry can be useful beyond the field of global governance, as these are core features of technocratic governance more generally. The kind of study that we propose will thus shed light on the engineering ethos, on the modest, applied and experimental vision of law that is characteristic of modernity. This ethos has been part of law beneath the blanket of normativity, while it has perhaps been more evident in highly specialised fields where law has been mostly instrumental to regulation.

iii. Legal technologies at work in global governance

The research proposed aims to go further and to describe the legal technologies of global governance ‘as something more than just the consequence of wider cultural trends, and as

⁶¹ Riles, n 38, 977.

⁶² *Idem*, 1004, citing Dona Haraway.

something more robust than putty in the hands of the technocrat'.⁶³ Drawing on STS scholarship, Riles observes that technologies play a fundamental role in the production of knowledge, in a way that 'changes in seemingly mundane tools can lead to fundamental epistemological shifts'.⁶⁴ Since knowledge is power, shifts in knowledge relations affect the corresponding social power structures.⁶⁵ By constituting knowledge, legal technique also generates its own objects and forms of subjectivity, such as legal persons, corporations, investment instruments, patents and their owners or tax products, as well as the corresponding social realities and representations.⁶⁶ What we propose then is to account for 'the agency of technocratic legal form'.⁶⁷

In her influential article "Jurisdiction and Scale", Valverde highlights the ways the legal machinery of jurisdiction, by delimiting spaces and distributing power, acts to perform 'an ethnomethodological miracle by which incommensurable processes, or processes with incommensurable logics, are kept from clashing by being assigned to different authorities.'⁶⁸ As she observes, jurisdiction sorts not only the 'where', but also the 'who', the 'what', and the 'how' of governance. In a similar vein, in his study of the citizenship case law of the European Court of Justice, Réveillère shows that, by adopting the technical language of the Court, the parties vest their arguments with a specific legal form, which allows them to pursue their objectives effectively. At the same time however, EU law techniques determine the kind of objectives that can be pursued in ways that escape EU legal actors' will.⁶⁹ In this issue, Xenidis also takes the agency of legal technique seriously, to contrast it with the agency of another form of technique or technology, that of algorithms. As she shows, legal rationality and 'algorithmic reason' clash in the ways in which they produce objects, subjects, categories and models. Algorithmic rationality distorts the modelling of social reality operated by discrimination law and thus unsettles the patterns of power distribution and the allocation of burdens and benefits enacted by legal techniques. Xenidis thus draws on STS scholarship to critically assess recent efforts to regulate algorithmic governance, especially at the level of the EU. Also Hubkova, in this issue, stresses the agency of the legal form from a totally different perspective. She argues that non-legal objects –

⁶³ Idem, 980.

⁶⁴ Riles, n 38, 986.

⁶⁵ See Mariana Valverde, *Law's Dream of a Common Knowledge* (Princeton University Press, 2003), 1.

⁶⁶ See Alain Pottage and Martha Mundy (eds), *Law, Anthropology and the Constitution of the Social: Making Persons and Things* (Cambridge University Press, 2004). See also Pottage, n 50 above. Alain Pottage, "Law Machines: Scale Models, Forensic Materiality and the Making of Modern Patent Law", 41 *Social Studies of Science* 5 (2011), 621-43. See, still, Simon Deakin, David Gindis, Geoffrey M. Hodgson, Kainan Huang and Katharina Pistor, "Legal institutionalism: Capitalism and the constitutive role of law", 45 *Journal of Comparative Economics* (2017), 188-200, and Katharina Pistor, *The Code of Capital* (Princeton University Press, 2019), Chapters 1 and 9.

⁶⁷ Riles, n 38, 986.

⁶⁸ Mariana Valverde, "Jurisdiction and Scale: Legal 'Technicalities' as Resources for Theory", 18 *Social & Legal Studies* 2 (2009), 139-57, at 145.

⁶⁹ Vincent Réveillère, *Le juge et le travail des concepts juridiques. Le cas de la citoyenneté de l'Union européenne* (LGDJ, 2018).

guidelines and recommendations in EU financial law – benefit from the strength of law by replicating the ‘traditional’ law-making and enforcement techniques.

Conclusion

Against the background of a more general disinterest in legal technique that is characteristic of the literature on global governance and law beyond the state, we propose to take on the legal technicalities of globalisation. Legal technique is neither too trivial nor simply a tool in the ever-more pervading technocratic governance beyond or without the state. Law has its own agency in the processes of globalisation. It is legal expert knowledge and lawyerly work that make global governance work. We suggest that the study of law as technique, as a kind of expert knowledge and practice with its peculiar tools, concepts, ways of thinking, aesthetic forms, reasoning styles and mentalities, can provide insights as to the concrete routine ways in which law constitutes and sustains the power structures that emerge from, and are shaped within globalised regulatory settings. In this paper, we have presented the intuitions and assumptions that guide our approach, its added value and the possible directions that the research that we propose can take.

While our project is not directly normative, the kind of self-consciousness and self-reflection in legal scholarship that we propose is a necessary step for opening the way to transformative politics in the field of global governance. Drawing on the insights of STS scholarship, Riles reminds us that ‘technologies come into being in order to overcome the political and epistemological limits of existing knowledge, and hence these technologies are best understood quite literally as politics by other means’.⁷⁰ Globalised fields of law and their legal devices come about precisely because of the incapacity of producing common goods or tackling problems within the state boundaries, or within the once conventional framing of international relations and law. The characteristics of legal expert knowledge are thus a critical feature of the common sense and the ideology underlying ongoing processes of globalisation. Indeed, law-likeness is pervasive in global governance and, arguably, it is what allows the ‘haves’ to come out ahead.⁷¹ In this way, our project links to the normative concerns that have underpinned the growing field of law and political economy, which European scholars have also started developing, in dialogue with the revival begun in the US.⁷² A

⁷⁰ Riles, n 38, 986.

⁷¹ Marc Galanter, “Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change”, 9 *Law and Society Rev.* (1974), 95-160.

⁷² Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski and K. Sabeel Rahman, “Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis” 129 *Yale Law Journal* (2020) 1784-1835. Christian Joerges, “Why European legal scholarship should become aware of Karl Polanyi: The Great Transformation and the integration project” 1 *European Law Open*, 4 (2022), 1067-1079; Peer Zumbansen, “Economic Law – Anatomy and Crisis”, LPE Project, 17 November 2021 (<https://lpeproject.org/blog/economic-law-anatomy-and-crisis/>), Anna Beckers, Klaus Eller, and Poul Kjaer, “The transformative law of political economy in Europe”, 1 *European Law Open* 4 (2022), 749-759.

focus on the legal technique, instead of theories on the nature of law and its possibilities beyond the state, can show the *fil rouge* that sustains globalised power structures and interlocks the global and the local, and is, arguably, a necessary step to induce change in ways that can better address the current global challenges.