

A. Introduction

The Self-Reflexive Imaginaries of Law: Essays on Contemporary Legalization in an Age of Algorithmic Law and Platform Governance

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McQuilla² for the Coalition for Peace & Ethics)**

We could say. . . that there is a kind of juridico-disciplinary pincers of individualism. There is the juridical individual as he appears in . . . philosophical or juridical theories: the individual as abstract subject, defined by individual rights that no power can limit unless agreed by contract. And then, beneath this, alongside it, there was the development of a whole disciplinary technology that produced the individual as an individual reality, as an element of the productive forces, and as an element also of political forces. This individual is a subjected body held in a system, of supervision and subjected to procedures of normalization.³

¹ Member, Coalition for Peace & Ethics, also holds an appointment as the W. Richard and Mary Eshelman Faculty Scholar, Professor of Law and International Affairs at Pennsylvania State University (B.A. Brandeis University; M.P.P. Harvard University Kennedy School of Government; J.D. Columbia University) where he teaches classes in constitutional, corporate, and transnational law and policy. Professor Backer is a member of the American Law Institute and the European Corporate Governance Institute. For further information see his website, Backerinlaw, available [<https://backerinlaw.com>].

² Member, Coalition for Peace & Ethics, a researcher and program associate for the business and human rights and globalization project initiative committee at the Coalition for Peace & Ethics. He is a recent graduate of Penn State's School of International Affairs where he served as a graduate assistant for Professor Larry Catá Backer. He graduated having completed concentration in International Business. He received his B.A. in Government with a concentration in Middle Eastern North African Studies. He is developing expertise in ratings systems, data driven governance, supply chains, and human rights in economic activities.

³ Michel Foucault, *Psychiatric Power: Lectures at the Collège de France 1973-1974* (Graham Burchell (trans) Picador2006), p. 57.

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Today, globalization has turned Michel Foucault's innovative insight of 1973 into a certainty today. That certainty has produced a shift in the focus of collective techniques of herding humans. In the last century the primary focus was on formal lawmaking in and as an expression of a political sovereign, the juridical power of the state expressed through the commands and judgments of a state apparatus. Globalization produced significant governance gaps that made this focus less relevant. Confined within physical territories once deemed an efficient means of defining the various spaces of the juridical, traditional juridical structures and its legal architecture could not reach the transnational.⁴ The resulting governance gaps⁵ has expanded the locus within which law may be sourced from the state to governmentalized private collectives, especially business entities,⁶ even as it has provided a new basis for post-global empire based in the internationalization of extraterritorial projections of state power.⁷

At the same time, the methodologies of governance, and therefore the manifestation of law has also undergone a substantial change.⁸ In this century, the primary focus appears to be shifting to the interwoven techniques of management: These include techniques that focus on nudging behavior through assessment tied to systems of punishments and rewards. One thinks here of global administrative law⁹ fractured and privatized.¹⁰ Legal pluralism,¹¹ then, has morphed from

⁴ Philip C. Jessup, *Transnational Law* (Yale University Press, 1956).

⁵ John G. Ruggie, *Just Business: Multinational Corporations and Human Rights* (WW Norton, 2013).

⁶ Burkhard Eberlein, 'Who Fills the Global Governance Gap? Rethinking the Roles of Business and Government in Global Governance,' (2019) 40(8) *Organization Studies* 1125-1145.

⁷ Cf., Catherine Coumins, 'Minding the 'Governance Gaps': Re-Thinking Conceptualizations of Host State 'Weak Governance' and Re-Focusing on Home State Governance to Prevent and Remedy Harm by Multi-National Mining Companies and Their Subsidiaries,' (2019) 6 *The Extractive Industries and Society* 675-697.

⁸ See, Larry Catá Backer, 'Next Generation Law: Data Driven Governance and Accountability-Based Regulatory Systems in the West, and Social Credit Regimes in China,' 2018) 28 *Southern California Interdisciplinary Law Journal* 123-172.

⁹ Cf., Benedict Kingsbury, Nico Kirsch, and Richard B. Stewart, 'The Emergence of Global Administrative Law,' (2005) 68 (3 & 4) *Law and Contemporary Problems* 15-62 ("Underlying the emergence of global administrative law is the vast increase in the reach and forms of transgovernmental regulation and administration designed to address the consequences of globalized interdependence in such fields as security, the conditions on development and financial assistance to developing countries, environmental protection, banking and financial regulation, law enforcement, telecommunications, trade in products and services, intellectual property, labor standards, and cross-border movements of populations, including refugees." *Ibid.*, 16; 20-23).

¹⁰ See, e.g., Larry Catá Backer, 'Fractured Territories and Abstracted Terrains: Human Rights Governance Regimes Within and Beyond the State,' (2016) 23 *Indiana Journal of Global Legal Studies* 63-94.

¹¹ See, e.g., Sally Engle Merry, *Legal Pluralism*, (1988) 22 *Law & Society Review* 869-896.

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one focused on many types of the same thing (state based sovereignty founded) legal orders, to one in which legality itself became a part of the mix of plurality.¹² Yet, the discussion has now moved beyond legal pluralism and transnational legal orders.¹³ It now has moved from the qualitative character of traditional legal orders to the quantitative approaches of compliance and accountability based systems. And it has moved from the physical spaces to platforms.¹⁴ These transformations have as great an impact in Marxist Leninist systems, as they do in liberal democratic ones—though context and modes of application vary.¹⁵ Either way, the role and effect of plural law and legalities is now an important element of the management of and by collectives.

It is this context that provides the framework against which the short essays offered in this second issue of volume 16 can be most usefully considered. The essays suggest the ways that this movement from the sovereign legal to plural legalities—that is from the formal, qualitative, and public expression of command, to its insinuation into the practices, habits, and expectations of collective bodies—have become deeply embedded each in the other. One does not speak here of zero sum binaries. One speaks here of union that produces new forms of managing individuals and in the process reshaping the institutions developed for that purpose. In the process the legal becomes both more variegated and diffuse.¹⁶

The essays are organized in two parts. The first, *The Condition of Law*, considers the modalities of insinuation of disciplinary legalities alongside, beneath, and within the traditional architecture of law its public institutions. This part includes three essays.

The first of the three essays in this part, *Law is What it Says it is. . . Thoughts on Weaving the Strands of Emerging Systems of Enforceable Expectations in Contemporary Global Order(ings)*, considers the semiotic ambiguities when the primacy of the old verity—that law is the state and the state is law—is once again challenged by the rise of communities around which the habits and mechanisms of law migrate. The central

¹² See, e.g., Geoffrey Swenson, 'Legal Pluralism in Theory and Practice,' (2018) 20(3) *International Studies Review* 438-462; Martha-Marie Kleinhans and Roderick A. Macdonald, 'What is Critical Legal Pluralism?,' (2014) 12(2) *Canadian Journal of Law & Society* 25-46.

¹³ Terrence C. Halliday and Gregory Shaffer (eds), *Transnational Legal Orders* (Cambridge University Press, 2015).

¹⁴ See, Mark Fenwick, Joseph A. McCahery, and Erik P. M. Vermeulen, 'The End of 'Corporate' Governance: Hello 'Platform'' (2019) 20 *European Business Organization Law Review* 171-199.

¹⁵ See essays in Milton Mueller and Yik Chan Chin (eds.), *Special Issue: Platform Power and Regulation in the US and China: Comparative Analysis*, (2022) 14(2) *Policy & Internet* 235-502.

¹⁶ Larry Catá Backer, 'The Structural Characteristics of Global Law for the 21st Century: Fracture, Fluidity, Permeability, and Polycentricity,' (2012) 17 *Tilburg Law Review* 177-199.

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issue of law then moves from the performance of sovereign jurisdiction to the harder task of weaving of norms assumes an interesting interaction with cultural drivers--with the expectations of society as it moves to refine the meaning of core principles. This is especially apparent, for example, in the ways in which the transformation of sports gendering, and regimes of corporate social responsibility.

The second essay of this part, *The Private Law of Public Law: Brief Observations on Decisions*, examines how the apparatus of the Norwegian Pension Fund Global institutions serves as a remarkable, and for its structure and resources, quite successful instrument of Euro-Norwegian internationalism. It does so by quite strategic and targeted interventions at the center of the global elite's engagement with the challenges that threaten its (discursive and normative) hegemony. To that end, the essay considers the governmentalization of the financial sector—the deployment of a private law of public law, through the institutions, norms, and interventions of the Norges Bank and its Council on Ethics in the management of Norway's sovereign wealth fund, its Pension Fund Global. The essay starts with a consideration of the mechanisms of private oversight by public bodies—the administration of economic enterprises through share ownership and access to capital. It then considers the deployment of private law as public politics. Lastly, it considers the way that the Pension Fund Global seeks to manage cultural practices abroad through an application of environmental protection principles.

The last essay of this part, *Memory, Solidarity, and Social Collectives in Heartland and Periphery: From the Chinese Massacre of 1911 in Torreón, Mexico to the 1944 Landing at Normandy*, moves from the primary engagement of law to its culture and performance in history. It considers how the normative expression of rules (as commands or expectations) is tightly bound up in the political performance of history. These performances shift the meaning of memory even as interpretation changes the meaning of text. That becomes a more complicated endeavor where the memories are shared in equal and unequal relationships of dependence. The dynamic between the performance of cultural politics in an imperial center, and its replication within its first and second order dependencies, is sometimes complicated by the echoes of displaced imperial systems and their cultural patrimony. Spaces like what is now Mexico provide an important space for understanding the way these dynamics play out. Mexico serves as a reminder, as well, that the world is not entirely a reflection of the politics of imperial centers, though they are a reflection of them. The act of memory—and its gestures—in Mexico, touch on the larger issue of the consequences and preservation of memory in the construction and reconstruction of popular narratives of the state. It is well revealed, for example, in the context of the memory of the great victories of the Allied Forces in the Second World War.

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The second, ***Algorithmic Law and Platform Governance***, suggest the ways that the condition of law is further shaped by the modalities used to express and apply it. This part includes four essays.

The first of the four essays, *Data Driven Democracy (in the West): A Look from the Field and the Quantitative Turn*, considers the semiotics of efforts to quantify and measure democracy. Unlike normative markers, the reduction of democratic ideology to a set of indicators also makes it possible to fine tune the process of identifying and correcting defects, of monitoring, and of disciplining deviance among states. It also suggests the growing authority of data driven ratings systems on the disciplining of ideology and its application in public organs. Nonetheless, the effective control over that disciplining remains held by the core influencers that emerged after the Second World War: bureaucrats, technocrats, and academics who together constituted a techno-ideological complex responsible for the care and maintenance (and refinement) of the ruling ideology. That is in part what makes quantifying democracy fascinating and important. It is fascinating for the way in which it reveals (at least in part) the quantification of ideology as well as the ideal against which it is measured. It is important because of the way in which its output reinforces the power of the techno-ideological complex and its influence on the operations of the state.

The second of the essays, *Platform Government: The Emerging State of Contests for Control of Society From Jack Ma and China to Mark Zuckerberg and Australia*, considers four inter-related stories: (1) the disciplining of Jack Ma; (2) the completion of the first cycle of data protection and cybersecurity laws in China; (3) the detachment of data services from Ant; (4) the glimmerings of the Western parallel developments in the contest between Australia and Facebook. Each is briefly considered below. Together they suggest the intertwining of platforms as a governance space, and its power to bring together within its "spaces" all of the coordinate parts necessary for the management and consumption of human production in the service of the stability and prosperity of collectives overseen by those given that task under contextually different political-economic models. To platform governance vehicles, and eventually the platforms themselves will become fused with or into the state apparatus. Around it the production of objectives, of monitoring, and of control will shift around the administrative apparatus' heart and its logic—from exogenous and prosecutorial to endogenous and managerial. And with it, the conflation of risk and regulation assumes a new form.

The third essay, *Algorithmic Corruption: The Case of the World Bank and its Rating Systems*, considers the regulatory problem of corruption in quantitative measures. Since the Enlightenment and the rise of narratives of quantitative divinity in the West, it has become common to deepen cultural presumptions that (1) numbers do not lie; (2) that data serves as its own defense against corruption; (3) and that

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"following the science" inevitably serves the community as protection against the corruption of discretionary governance by humans. As a consequence cultures grounded in metrics, in quantitative assessment, and in the fortune telling of predictive analytics has come to dominate an administrative culture now rebuilt to satisfy collective desires to manage virtually every aspect of human life. But the language and meaning making projects of mathematics is as corruptible as any other human activity. That corruption can infect the entire process of algorithmic governance (even in its form as ratings systems based nudging and embedding of values) is hardly surprising. The corruption scandal at the World Bank, involving the data and analytics in its Doing Business annual country surveys provides the context.

The last essay, *The Woke State and Publicly Managed Social Collectives: China Leads the Way*, considers the way technology is deployed to build effective rule systems for the preservation of social systems and the political institutions meant to protect and develop that system. Now popularized and weaponized, "wokeness" references an ideological and discursive state of being aligned with the times as such may be defined by a meaning making collective with great influence or in power. Wokeness in this sense serves as a disciplinary tool. It is positive in the sense of its fundamental normative ideals; it is negative in its use to manage and control what is determined to fall outside the realm of the woke. Wokeness finds in mirror image in some trajectories of narrative construction and discourse in China. Orthodoxy must be preserved as a key element of democratic centralism and of the role of the vanguard in leading the nation. In China, it is the vanguard that is both woke and that is charged with the responsibility of protecting the wokeness of the masses. Two recent examples suggest the contours of Chinese wokeness. The first touches on the reporting of online expression that violates a wokeness taboo (Chinese online reporting zone for harmful information); the second touches on the regulation of algorithmically based recommendations management systems.

Together, these essays weave the various strands of law, and private disciplinary measures with regulatory effect, into a new fabric of governance. Each, in turn is itself a strand in the weaving of an evolving way of understanding the ways in which collectives are managed. In the process, it points to the great and profoundly transformative project of meaning changing of a system that had been stable for some time. The old categories, their meaning and characteristics are giving way to a new vocabulary that embeds meaning into new categories. In the end the sum of power relations remains stable; its location now fractures in new ways and speaks with different worlds. Investment vehicles become the organs for the application of international law and norms; enterprises become the new privatized administrative bureaucracies of compliance based systems overseen by public bureaucracies; and the vocabulary of memory serves as a malleable vehicle for the investment of old terms and

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principles with new meaning that better serve emerging politics of identity.

More interesting still is the re-definition of old terms in new context, and the invention of a new vocabulary of institutionalized power systems. What was once conceived as a singularity has been disaggregated as a regulatory subject—the state, the enterprise, and other traditional organs of institutional management. At the same time what was once disaggregated is becoming unified as a regulatory object—production chains, the predictive model and other systems or processes for the production of objects such as stability, wealth, and objects that are consumed. Even politics can now be translated from the qualitative language of principle to an analytics based on other quantitative measurement of a large number of factors. In the process the locus of power shifts from those who control principle to those who translate it into concrete form and then measure it. These changes are now described by a new language, a language of numbers and equations, of simulation and predictive analytics. Data becomes the new center of administrative operation. It is produced and consumed for a variety of purposes and organized within administrative bureaucracies as well as in more abstracted platforms. Production and consumption now serves as the loom on which legalities are woven. Platforms serve as a public square which must be maintained in good order. The management of public opinion drives consumption as well as the good order of political bodies. The language of risk becomes the organizing principle of compliance and accountability.

We hope our readers find the essays of some value.

Larry Catá Backer
Matthew McQuilla
CPE Members
CPE 16(2) Editors



