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Legal subjectivity of market actors: a genealogy of legal devices

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Summary

To what extent have 'legal' practices been, and are they being contributing to the creation of the subjectivity of market actors that is an element of market arrangements? Building upon, and trying to combine quite different streams of literature, my main argument is that the notion of *performat-ivity*can be fruitfully applied, not only to the relation between economics and economic practices, but also to the role that legal devices and concepts have played in the construction of market actor positions. Building upon Latour's network-type analysis of law, upon the performativity-approach initiated by Callon, and upon Sassen's analytical framework for analysing transformations of assemblages, I try to reconstruct a genealogy of legal devices that, up to the beginnings of the 19th century, have contributed to the legal subjectivity required for markets, and that has usually been taken for grantedby economics. It will be argued that legal notions have been incorporated in practices and their related knowledge to such an extent that they have been rendered almost invisible, but have nevertheless to be considered as constitutive (as a kind of normative 'Operating System') of market transactions.

Legal subjectivity of market actors: a genealogy of legal devices

1 *Introduction*

It is generally recognized that law somehow contributes to the development and sustainability of market relations, but when it comes to the measure and character of this contribution, theoretical opinions differ substantially. We might define the borders of this wide area by referring to, at the one extreme, liberal economists who admit to a role of law in providing for property and contracts, but tend to consider other legal arrangements primarily as detrimental to the efficiency of markets; and, at the other extreme, theorists who argue for a fundamental, constitutive significance of law for the possibility of (effective) market transactions.[1] My position in this paper is close to the latter; departing from the sociology of law but regularly crossing borders to socio-economic and legal history, I argue for a constitutive role of law in defining positions in networks that we call 'markets'.

A curious feature of law is its tendency to step back into the wings: even if it at first presents itself on stage, it tends to withdraw as soon as it is successful. As long as it is not being contested, its life is a virtual one: present in day-to-day interactions, but 'neither seen nor noticed'. It might be compared to the Operating System (OS) of our PC's: all the application software, the IT-stuff that we actually use, is based on this OS, but we (luckily) usually need not be aware of it – until it breaks down. At a basic level of social interaction, law is providing for 'social algorithms' in a way which might be compared to a OS.

In economics, sociology and socio-economic history the dominant way to deal with law seems to be to treat it as a derivative, in itself insignificant instrument, used by actors to confirm and stabilize relations that are to be analyzed completely in social or economic terms. As so often, there are good reasons and excuses for a bad practice. A good reason is that each discipline has to be faithful to its own method; therefore so-called 'empirical sciences' primarily reduce inconvenient phenomena as 'normativity' to what they are allowed to observe (f.i. 'expectations'). An excuse might be that economists and sociologists, as far as they are orienting themselves to the ideal of the methods of the natural sciences, are so unfamiliar with the methods of law and legal sciences that they must remain to them a *terra incognita* (even though in early-modern times the legal methodology of proof has laid the foundation to that of experiment in physics). Fortunately, there are exceptions to this main rule, in particular provided by comparatively oriented researchers. I restrict myself to mentioning three of them: historian E.P. Thompson, who showed how the power of elites may be curbed by the legal form they use to legitimize their position; economic historian Karl Polanyi, who analyzed the legal infrastructure in its significance for realizing the type of 'freedom' of labour required for the development of 'market society'; and, finally, sociologist Toby Huff, who argues that developments in law in the 12th century have been constitutive of the rise of modern science in the West (and not in China or Islamic countries) and thus, indirectly, of the Industrial Revolution.[2]

[1] See for the first f.i. Becker; for the second position f.i. Supiot (2000) and Dukes (2011) (as to labour markets).
[2] Thompson(1977); Polanyi (1957; originally 1944); Huff(1993).

Legal subjectivity

The 'legal subjectivity' of market actors is an important precondition of the functioning of markets. 'Legal subjectivity' denotes the attribution of powers to human actors, defined both by the legitimate options of action accorded to them and by the boundaries set to them; it refers to the repertoire of legal devices made available to them for committing themselves and entering into relations with other actors; and it implies, finally, the responsibility of actors for the consequences of the use of these options, legal liability, and the availability of means to enforce them. Legal subjectivity thus constitutes a 'room to move' of market actors, a room that is no way 'naturally' given but a result of social accomplishments.

To be able to function, markets require the interaction of human subjects, free to make their choices between available options. It was already in the High Middle Ages that this requirement was argued for as a generally agreed upon value in market relations, though at that time it was defined negatively: nobody can be forced to make a transaction – however, he ought to be forced to adjust his price if it were obviously unjust.[3] Economists nowadaystend to favour a conception of market transactions in which moral questions like the latter have been bracketed out and in which the 'freedom of choice'-position of a human subject, equipped with calculating abilities, is treated as a given - rather than as itself dependent upon historically contingent conditions. Liberal economists tend to treat law as something that only comes 'afterwards' – as if 'individuals' would exist before the relations that have been, and are constituting them.Law would, in their view,only be required to guarantee property and the stability of contracts, as well as their enforcement.

My argument in this paper is that, besides the latter function, which has beengenerally recognized by economists, law has a more fundamental contribution to the constitution of market relations, and of the kind of 'subjectivity' that economists tend to take for granted. Neither can the 'human subject' be treated as a historically invariant, individual calculator of what best suits his 'preferences', nor is it possible to treat his 'transactions' as part of a 'natural' order of truck and barter. In economics, introducing 'preferences' is basically a theoretical technique to bracket out the variability of human motives, which are not considered to be interesting within the framework of liberal economic theory, and thus to end up with a 'cleansed' (basically rational) subject. In this paper, on the contrary, both 'subject' and 'market' will be considered as only relatively stable elements that form part of a continuous process of transformations that are in part constituted by changing repertoires of legal devices.

In what way would it be possible to reconstruct the developments that have resulted in these legal subjectivity-based practices that we are used to designate by the term of 'markets'? If looked at historically, these developments appear to us as a trajectory of transformations: from local fairs to city markets to national markets to international markets; from traders to citizens to capital owners to international companies; from non-regulated to regulated to deregulated markets; from communal to individual to collectivized actors, etcetera. When analysing them comparatively, it seems we have to consider these transformations as occurring between 'arrangements of elements' that can only be qualified in rather abstract terms, for instance as 'figurations of humans, resources and socio-technical arrangements'. Legal devices areclearly an important ingredient of the latter, and it can be observed that their significance within such a figuration is not a constant but may

[3]Langholm 2003: 67.

substantially change with these transformations.For instance, as Max Weber has already pointed out a century ago: the legal device of 'contract' has, many centuries ago, hardly been used for economic transactions, but rather for transactions for which it was, in his days, hardly used any more (f.i. agreements on public and on family matters, on legal procedure).[4]

One of the pitfalls of such a reconstruction might be that of writing a 'Whig history' of legal-institutional developments, highlighting how the past has brought us where we are now, forgetting about the legal devices that did not 'make it'. This can be avoided by focussing, not on separate legal devices, but rather on figurations, relating the meaning of devices to their place in these figurations. The argument could very well be made in a more comparative way, but that would exceed the boundaries of what can be done in this paper. The works on which I base my argument arerestricted to developments in what may be roughly indicated as Western Europe, and I restrict my analysis to transformations that have taken place from the Middle Ages to the beginnings of the 19th century.

In order to find ways of reconstructing transformations of legal devices in their significance for markets, I explore the relevance of theoretical work of Bruno Latour, Michel Callon, SaskiaSassen and GerdGigerenzer. On the basis of Latour's work as well as of history of law literature, I argue that law represents an essential moment in the coevolution of market societies, constituting subject-positions and padding these subjects with responsibility and accountability. More in particular, I discuss the relevance of the notion of 'performation', developed by Callon and others to reverse conventional notions of the relation between economic knowledge and practices, for that between legal theory and practices. The 'tools-to-theories heuristic' of Gigerenzer (1992), I suggest, may be helpful in analyzing the latter relation. Sassen's approach provides for a counterweight to the focus on micro-transformations in Latour's, and a synthesis of both approaches promises the best perspectives on a genealogy of legal subjectivity in its importance for market relations.

2 *Theoretical tools: performativity, agencements and assemblages*

Since its beginnings in the 17th century economics has presented itself as a type of knowledge and finally as a science that formulates general laws (of a mathematical type), that are able to represent what happens in 'economic' reality. Criticism of economics has for a long time focused on its selectivity in the human motives that it is willing to accept in its basic presuppositions: *homo oeconomicus* may be a wonderful reductionistic starting point for model building, but one should be aware – more than economists usually display while presenting their conclusions – that the validity of the results of economic research is limited by these narrow presuppositions.

In the wake of the 'linguistic turn' the representational conception of science has generally been contested; I will here only refer to the work of Bruno Latour whose minute analysis of laboratory practices has in the end resulted in a radical reconceptualization of knowledge practices.[5]Latour basically argues that while we think about our acquisition of scientific knowledge in terms of an 'objective subject' gaining access to an 'inert matter' in which the laws of nature are lying ready to be discovered, we tend to forget about the difficult and often hardly justifiable ways in which we have to forge the innumerable links of the chain in between them. The 'black boxes' in which we tend to

[4]Weber 1976: 401.
[5]Latour 2005, 2013.

hide the latter, are ruthlessly cracked by Latour, who tends to operate like the annoying guest who insists on looking below the floor before he trusts that it is clean water flowing from the tap. In the end of his analysis, 'subject' and 'matter' are nothing more than the endpoints of this chain of transformations, products of this chain, but in themselves only of illusionary importance.

Michel Callon has developed this perspective into a refutation of economists' representational claim, arguing that economics is to be better understood as a *performative* science.[6] In linguistics, the notion of 'performativity' refers to pragmatic elements of linguistic utterances: some of them merely create that which their semantic content refers to ('I declare you to be married'), the others at least in part create the context in which they are valid.[7] Comparable to the way linguistic utterances are related to their 'felicity conditions', Callon argues, accounts are closely connected to 'their worlds'. In science, statements are characterized by their *indexicality*: they refer to events and to devices, operators and operating modes that are not necessarily explicitly accounted for, but ought to be account*able*. The construction of meaning is part of the relation between accounts and their worlds (Callon prefers to call them 'sociotechnical *agencements*'), but is not able to determine its successon its own: "Any act, even of language, produces effects that might strike back. (…) It is not the environment that decides and selects the statements that will survive; it is the statements that determine the environments required for their survival."[8]*Performation* is then characterized as "the process whereby sociotechnical arrangements are enacted, to constitute so many ecological niches within and between which statements and models circulate and are true or at least enjoy a high degree of verisimilitude. This constantly renewed process of performation encompasses expression, self-fulfilling prophecies, prescription, and performance."[9]

Theoretical practices and day-to-day 'economic' decision-making may thus be mediated by *devices* that objectify their close relation. Decision-making at the stock market floor may, for instance, be mediated by formulas, developed by scientists to predict market behaviour, and consequently implemented in algorithms that are used as a tool for decision-making at the floor. In this way the formula creates its own world, we can see a coevolution of "a formula that progressively discovers its world and a world that is put into motion by the formula describing it (…). We could say that the formula has become true, but it is preferable to say that the world it supposes has become actual." We then have to consider "truth as fulfilled conditions of felicity. The formula that is born performative, and remains so, seems to be constative when the world (finally) acts according to it."[10]

Callon's concept of 'sociotechnical *agencement*' emphasizes how closely accounts and their worlds are interwoven. Not, however, in the sense that a device like a formula would, by definition, act as a self-fulfilling prophesy, the formula is *in itself* not capable of creating and sustaining the *agencement*. The latter may be confronted by incompatible events that consequently will induce an adaptation or reframing of it, the success of which is not assured in advance.

While Callon's theoretical approach emphasizes the constant flow of events in which *agencements* are being reproduced, it should also be possible to discern, within this flow, relatively stable phases

[6]Callon(1998): "economics (...) performs, shapes and formats the economy".Callon also refers to Deleuze&Guattari (1998) as a source of his theory.
[7]Callon 2007: 317-8.
[8]Callon 2007: 323, 332.
[9]Callon 2007: 330.
[10]Callon 2007: 320-1, with reference to MacKenzie (2007).

during which accounts and their worlds are better attuned than in phases of confrontation with incompatible events. It would then, further, be possible to consider these relatively well-attuned phases as instances of 'assemblages' and to account for transformations of relatively stable assemblages consisting of interrelated accounts, devices and practices. Awareness of the intricate flow of events need not preclude an intermediate distancing in order to be able to discern shifts in assemblages, in the same way as what we call 'music', while being constituted by the entire stream of sounds, may be appealing most to our ears when times or keys *change* or *dis*harmonies appear, but requires, to be understood well, that we delve into time, key and harmony of consecutive phases of its stream.

The theoretical work of SaskiaSassen provides for analytical tools to reflect upon continuities and shifts in assemblages.[11] Her analytics of institutional change 'from medieval to global assemblages' are based on three constitutive elements: capabilities, tipping points, and organizing logics.

"Capabilities are collective productions whose development entails time, making, competition, and conflicts, and whose utilities are, in principle, multivalent because they are conditioned on the character of the relational systems within which they function." On the one hand they enjoy, as achievements, a certain stability, but on the other hand their 'valence' may change completely as the relational system of which they are a component, changes. At such a 'tipping point' capabilities may 'jump tracks' and thus produce an intermediation between consecutive orders; then "they are in part constitutive and at the same time can veil the switch by wearing some of the old clothes."[12] The fact that a capability remains and reappears as a component of a new order may thus provide for a 'surface continuity', while shifts at a 'deeper' level may reposition it so as to change its 'valence'. This 'deep structure – surface process'-metaphor also provides for the inverse possibility of surface discontinuities above deep continuities.[13] I would argue that this metaphor of 'layers' is not essential for grasping the idea that notions and practices, achieved and received at a certain place within relational system R_1, may appear the same but be turned into something quite else if received and integrated into a relational system R_2 (f.i., to stay with my musical metaphor: that the melody of the medieval battle song *L'hommearmé* is consequently used to compose a solemn mass).

Sassen uses her analytical model, for instance, in an analysis of the territoriality of government. Up to the 13th century forms of government (including 'feudalism') lacked territoriality, rule was over people. Capabilities for the constitution of territorial rule were developed in the medieval cities, in the territorial frames of medieval urban law. A next figuration was constituted after the shift from an ecclesiastical (based on a divine principle of the validity of law) to a jurisprudential kingship combined with this capability, to form a territorial kingship that later, in a consecutive figuration, would be transformed into a system of territorial (nation) states.[14] I will use this model below to try to grasp developments in concepts and practices of legal subjectivity that condition market practices.

[11] Sassen (2006).
[12] Sassen 2006: 7-8.
[13] Sassen 2006: 12.
[14] Sassen 2006, ch. 2, i.p. 38-49, 59-63.

3 *Law's 'integrity' and its (re)construction in practices: notes on Latour's 'beings of law'*

Above I already referred to Latour's criticism of the Moderns and their ontology in terms of a subject/object-bifurcation. In a recent publication[15] he has made an intriguing further step by introducing, instead of this double ontology, a *pluriverse* of ontologies, in which 'beings of law' figure as one of them. They tend to bring in a "preposition that engages everything that follows in a specific mode that is both limited and assured."[16] The ontological tonality of law results in its qualification as 'superficial' and 'formal'; 'superficial' because it refers only to attachments and is remarkably flexible as to contents, 'formal' because it respects the forms that make it possible. Latour takes the adjudicative process as a paradigmatic instance and considers law as a chain of *passes* (manifested in a series of *dossiers*), that to an outsider appear as an incomprehensiblesequence of discontinuities but to legal experts as a continuity (that's in fact what constitutes their expertise). The one end of this chain consists of multiform 'complaints', the other of texts which mobilize 'the law as a whole'.[17] In the end, it is 'legal integrity' that counts. The originality of law as a 'mode of existence' lies in its *archiving* all the passes, ensuring the "*reattachment* of frames of reference. Thanks to law, you can *multiply the levels of enunciation without causing them to disperse.*" At the prize, however, of "sticking to the forms."[18] The legal form is that of an *assignation,* creating 'subjects', enunciators and enunciatees, it thus "*ensures* the continuity in time and space of courses of action that would otherwise always scatter (…). While in fact there is neither real continuity of courses of action nor stability of subjects, law brings off the miracle of proceeding as though, by particular linkages, *we were held to what we say and what we do.* (…) 'without law', utterances would be quite simply unattributable".[19] Kyle McGee notes: "The law passes through the *totality* of practices that construct society – but as it moves, it seeks only a hook, never a complete replication of a thing. Everything but this hook is disregarded or suspended – it does not exist from a legal point of view. It *formats*, just so as to *select* and extract something to which *assignment and imputation* can be made".[20] These '*vincula juris*' are the 'wiring' system by which the force of law travels. Latour claims that the transformations do not lead back to anything like a 'center of calculation' (as with mathematical practices of abstraction in physics), but McGee argues that this is incorrect: they carry the actors back to the legal archive. "As a result, there is a crucial *practice of abstraction* within the practice of law", that gradually strips away matter; "the law has its own specific techniques to 'render local' (selective translation, formatting) and to 'render global' (attachment to a text that is part of an archive) and even to travel back and forth".[21]

Within the framework of this paper it is not possible to do justice to the implications of Latour's approach of law. But two points may here be raised. First, what place is to be accorded to 'legal integrity' in his analysis, in particular in light of Latour's warnings against the use, in his view so common in sociology, of abstract categories as explanations of actions? After all, 'legal integrity' is not just an observing analyst's term to describe the direction of the passes made by legal practitioners, but also somehow part of practice itself. Latour notes: "the passage of law gradually modifies the

[15]Latour(2013).
[16]Latour 2013: 359.
[17]Latour 2013: 364.
[18]Latour 2013: 369.
[19]Latour 2013: 369-71.
[20] McGee 2014: 163.
[21] McGee 2014: 164-5.

relation between the *quantity* of facts, emotions, passions, as it were, and the *quantity* of principles and texts on which it will be possible to rule."[22] By merely referring to quantities, he carefully evades to go along with the legal experts' notion of 'legal *quali*fication', even though his methodical exhortation to 'follow the actors' might have urged him to pay attention to what these experts at least think they are performing. If we include that, Latour really seems to come close to the classical description of legal activity as finding out how to qualify facts by applying a rule. Now what level of reference to principles and text will be sufficient to make it possible to rule? Although he was not in favour of it, legal sociologist Max Weber did not hesitate to qualify *Kadijustiz* (case-by-case adjudication by a 'wise man') as a 'legal' judgment,[23] although, as one might say in Latour's terms, if we can speak of 'integrity', it would in this type of cases merely be incorporated in (the black box of) the person of the judge; reference to principles or text (i.e. the black box, more common to us, of legal administration) does in this type of 'doing justice' not play any role whatsoever. My proposal would be to solve this problem in two ways.
First, by interpreting 'integrity' in terms of the "imperative to justify that underlies the possibility of coordinating human behaviour", as proposed by Boltanski&Thévenot.[24] When trying to find an agreement in case of conflicting claims, there will be a need for justification and generally this pursuit will imply a tendency to look for higher principles of equivalence. The type of justification to be mobilized, however, will be dependent upon the present figuration or network of actors involved, and *could* involve principles and texts, but not necessarily; its legal character may also be based upon other *dispositifs*.
Second, although the 'integrity' that is crucial to 'law' always implies reattachment of levels of enunciations, it seems fruitful to distinguish two different types of legal integrity that may be claimed: (a) *categorical integrity*: by relating facts or judgments to categories; and (b) *spatio-temporal integrity*: by connecting enunciations and enunciators in time and space. If we stick to Latour's 'chain of documents', we might say that the latter refers to the way law passes over the local breaks between consecutive documents, while the first - in line with the criticism of Kyle McGee mentioned above - regards the logics of the global totality of the legal archive to which the documents are being related.

My second point, related to this, is that Latour focuses on the pragmatic 'micro' of these passes to such an extent that it is not easy to grasp how long-term continuities would enter into, and be reproduced in these passes. If the methodical device is 'to follow the actors', how do we (and how do they) perceive these continuities? When Latour notes that "we are still so Roman when we judge", is legal history then an actor in itself?[25] And in what way is, in these passes, the framework of the totality of the legal archive being anticipated? Latour gives only part of an answer by pointing to the formality of law: form is so important because in it the totality of law would be present. Another, methodological answer of his would probably be that abstractions ('society') may, as explanatory concepts, be forbidden to the analyst, but may actually be in use in practices, and as we have to 'follow the actors', these concepts may even *be* 'actants' and therefore, but only as such relevant to analysts.

Latour rejects what he calls the 'freeze frames' that sociologists present, and is viewing hardly anything but constant transformations instead. He sometimes uses the analogy of movies, that

[22]Latour, *AIME*: 364.
[23]Weber 1976: 486.
[24]Boltanski&Thévenot 2006: 37.
[25]Latour 2013: 366.

consist of a regular transformation of 24 fixed frames per second, but is perceived (visually constructed) by us as a continuous movement. Continuing in the line of this analogy, I would argue that the importance of looking at the constructive work in our going from the 22^{d} to the 23^{d} frame should not preclude us from also distinguishing different scenes in a movie or even from identifying 'where this scene leads to'.

4 *Basic legal devices: Western building blocks of the performation of lasting interdependencies*

What I look for, in this paper, are continuities and discontinuities in legal devices that contribute to the making of credible commitmentsat 'markets' and thereby to the development of chains of mutual commitments that market transactions are based upon, and that in this way, I argue, help produce the legal subjectivity that is defined in law, and taken for granted in economic theory.

In 'modern' theories, legal devices are often treated as *instruments* that are used by human actors to realize certain prefigured goals. Social sciences are prepared to accept the idea that goals may 'shift' or even that of some sort of 'inversion' in which the means oppose the end, but these phenomena are treated as unintended aberrations from the 'normal' case of instrumentality. A network approach opens the perspective to a relatively autonomous contribution of legal devices to social transformations. Instead of as a 'toolkit' these legal devices can be considered as a *repertoire,*changing and generally (but not necessarily) getting more complex over time, from which devices may be mobilized. The *legal* character of these devices consists of their creating subject positions that impact on the options of action of those who are going to take these positions and of the enforcement mechanisms connected to the powers as well as restrictions that these options confer. Legal devices may restrict options (by forbidding them or by stating their legal indifference) but may also extend them (empowerment). If we would look at them from a functionalistic viewpoint, we might say that they contribute to the level of differentiation and of complexity that can be stably organized in a community.

Without anticipating a problematic distinction like that between 'private' and 'public law', a number of areas where guaranteeing these commitments is of special importance can easily be distinguished: in relations between traders, in family matters and transfer of real estate, in relations between rulers and subjects and in settling disputes between rulers. Each of these areas brings along its own specific features and the use of varying devices to make for stability. I here draw from legal history the devices that have had an significant impact on the formation of subjectivity and investigate them closer, using the theoretical handles set out above.

Two socio-technical transformations ofgeneral importance should be mentioned first. The gradual spread of *literacy* – in the southern part of Western Europe and in particular in Italy preserved in notarial practices but more uncommon to the north – as a technique of documentation has had an enormous impact on legal practices. It increased the significance of documents. For instance, in England it is said to have started from royal government in the 12th century, 'filtering down the social scale' in the 13th, so that at the begin of the 14th century the majority of the peasant population had

gotten accustomed to charters and written contracts.[26] In the more restricted form of royal diplomas and charters of privileges, however, literacy has a much older history.

Second, the spread of legal expertise as from the 12th century gradually influenced legal practices. "Customary procedures devoid of intellectual justification yielded to the reasoning that informed the Roman law of sale or the new canon law of marriage." At the same time legal experts provided for an intellectual approach of power that was embraced by power holders.[27]

4.1 Supplication

In the High Middle Ages, the relation between the secular and the divine order is deemed to manifest itself in visible 'signs of …': relics account of the reality of saints, sacraments reflects the invisible membership of the community of Christians, rituals the existence of power relations. Deferential language towards secular rulers reflects the use of the model of God as dispatcher and the Pope as keykeeper of the treasury of Grace as a liturgical model also for secular powers. *Supplication*: "the act of begging a favour or forgiveness in a formal language of entreaty (..) encapsulated the relation of lordship and dependence that was the core of ideal political relations in a single, concise formula" and acted as a device by which these relations were defined. The ritual ended with a decision of the lord on the matter of the request, in writing, but at least as important as its content was the written description of the elements of the ritual: the deferential approach (*humiliteradire*) of the petitioner, reflecting voluntary subjection, the graciousness of the lord in responding to the request, and the ritual form that urges the lord to grant a request that has been made humbly and devotedly.[28] The written diploma, that resulted from it, "was the relic, as it were, of this rite of sacred power." Koziol refers to "a set of axiomatic assumptions that contemporaries brought to their lives and that shaped their experience", a "root metaphor" that in its projection also on other, conceptually underdeveloped fields ultimately becomes self-validating.[29] Ritual discourse worked because it was a shared discourse – all members of the ruling elite could use it – if they had the power, but ritual did not make them more or less powerful.[30]

An originally religious model of hierarchical relations and a ritual device of supplication, the framework of which both confirms the power of higher officials and creates or strengthens mutual relations between supplicant and official, is being adopted in secular matters as well and provides for the ritual devices that rulers use to affirm and legitimize their power. The concept of his ruling as derived from God's authority permits this way of staging his rulership.[31] The ritual creates the position of supplicant, the option of individual deference of a 'subject' in the faith of a conventional rule that urges the lord to be 'graceful'.

4.2 Kiss of peace / amicitia

As from the 11th century, in the relations between rulers the 'kiss of peace' develops into a device of 'making peace' – which was, much more than violence, the real stuff of politics of that time.

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[26] Musson 2001: 120.
[27] Bisson 2009: 459.
[28] Koziol 1992: 8, 45-55.
[29] Koziol 1992: 94.
[30] Koziol 1992: 307.
[31] Cf. Rosenwein 1999: 151.

KirilPetkov has, departing from a Durkheimian conception of ritual, analysed the significance and development of this ritual form. Ritual reconciliation was a way of publicly entering into interpersonal relations, at all levels, and was, as usual then, "embodied in incorporated practices".[32] The Roman *fides*, originally an important social duty, however without force of law, develops under the influence of Christianity into a personal quality ('fidelity') which connects itself to the ritual performance of a kiss, that primarily creates a mutual alliance and only secondarily restricts options of acting. This alliance is also indicated as *amicitia*, but this friendship then had a clear legal content, though conditional to both parties' willingness to comply with it – it was dissolved as soon as one of them opted out ('fealty'). *Amicitia* developed as a device next to the legal devices of 'kinship' and of artificial forms derived from it. The mutual performance of the ritual kiss "compromised hierarchy by 'opening'the thresholds of the human frame and forged a new shared identity (…) by efficiently altering being in the world. (…) In this way ritual peace contributed to individuation (…), inscribed the social order it stood for upon the ritual actors' sensory perceptions."[33] The ritual kiss connected apperceived experiences to obligations; "the ritual taking of liability and the acknowledgement of duty were the supreme expressions of the freedom of the sovereign individual to exercise his or her rights." [34] Even if the actor was not free to change the script of the ritual sequence, he or she did have options when it came to the act of performing the kiss, which was thus an embodiment of individual sovereignty, be it in an action of self-limitation. "Choice manifested the active participation of the individual in drawing the lines around the territory of the self".[35] The ritual of the kiss was bound strongly to its corporeal performance but, if performed well, created apperceptions, both in the performing actors as in the audience, of inner dispositions being harmonized, thus legitimizing as well as stabilizing new interpersonal relations, and contributing to the experience of subjectivity.

4.3 Immunity and privilege

Originally, 'immunity' was a device by which a king or lord excluded some domain (f.i. that of a monastery) from being entered by his officials – to raise taxes or administer justice. Together with its canonical counterpart of the 'exemption' given by Pope or bishop, they rise in the 6th, in the written form of charters in the 7th century.[36] It is precisely by way of this declaration of restraint that the lord, at the same time, *claims* his rule over territory as well as officials, and *makes an alliance* with the beneficiary, f.i. the monastery. The act of granting privileges states or reconfirms an original power over things, and is at the same time part of a politics of making alliances.

A transformation of the device occurred mid 8th century, when 'protection' was coupled to immunity. The device 'jumped tracks': not the restriction of the lords' and bishop's own power was the main issue, but the protection of, in particular, clerical properties against misuse by others. End of the 9th century immunities were mobilized to create areas of ('the king's') peace, in fact a further extension of the notion of protection, at a moment when other forms of restricting and granting powers (f.i. granting jurisdiction: *bannus*) developed alongside.[37]

[32]Petkov 2003: 4-6.
[33]Petkov 2003: 327.
[34]Petkov 2003: 331.
[35]Petkov 2003: 331.
[36]Rosenwein 1999: 4.
[37]Rosenwein 1999: 96-101, 138.

The basic technique of this device: drawing lines in the field of exercising powers, defining an 'inside' and an 'outside', is thus, in a first movement, mobilized to *exclude* some areas from the power of the lord, in a second to define an area of *inclusion* in the protection of the lord. Basically, it has been a model for devices to be integrated in later formations, like 'citizenship' and the exclusion of a 'private' sphere from intrusion by government.[38] The principle that 'city air makes one free' was based on a spatial and temporal exclusion, within the city walls, from a lord's sphere of influence, in the words of Henry I (1100-1135): "And if any one shall live in the said vill for a year and a day, no matter whence he come and whether he be free or serf, ever after he is to remain my free man."[39] Even if they formally kept their character of a one-sided legal act, the contents of charters of privilege increasingly display their bilateral character, often as a result of negotiations between lord and subjects (then typically not any more introduced as 'petitioners' in the *narratio*of the charter). The normative structure of European cities of the 13th-17th centuries, which for Germany has been qualified as 'civic republicanism', comprised the constitutional definition of a 'private' area of personal freedom as well as a protection against arbitrary action of city officials.[40]

4.4 The oath

A central device of committing oneself has been, for more than a millennium, the oath. According to Prodi the *oath* took on, in the Early Middle Ages, the character of a Christian sacrament. The Western dualism of religious and worldly authorities, already prepared in the 6th and 7th century and firmly established in the Papal Revolution of the 12th century, allowed it to develop in a way essentially different from the monistic East (Constantinopel, Muslim Asia). The oath has been quickly assimilated by newly Christianized peoples and has been adopted at great pace as a general device of commitment, among others to administrative authorities. The religious notion of 'incarnation' is extended to the secular sphere: at the crossroads of the invisible and the visible world, the oath, according to Hincmarof Reims (9th century), 'allows man to partake of the Divine and to incarnate the Divine Truth into his worldly social relations'. By the gestures and words that are part of the oath, the invisible *fides* becomes perceptible.[41]

The oath contributes to the legalization of human relations: taking the oath means presenting yourself as an active (legal) subject. Its sacral powers provided the Church with this capacity of legalizing relations and, although the Church reserved jurisdiction over matters of oath, it did at first hardly interfere with its contents. Originally it was strongly associated with ritual gestures (touching relics or the Bible), in the end an invocation of God as witness suffices.As a sacral guarantee of commitment, the oath played an important role as a device of formalizing the constitutional basis of the city communities, as from the 11th/12th century. Although a civic oath had been for some time already been mandatory under Charlemagne, it only becomes a common practice in the new cities, to affirm membership of both the city community and the associations making it up, like the guilds. The guilds are considered to be based legally, first on a privilege conferred upon the citizens that makes free to thema jurisdictional space, but then, second, on a *coniuratio* (common oath) by which citizens commit themselves to a guild that fills this space with an institutional structure.[42]Legal-technically

[38]Coopmans 1986: 99-100.
[39] Cited by Strahm 1947: 100.
[40] Schilling 1992: 7.
[41] Prodi 1997: 64.
[42] Prodi 1997: 180f; Althoff 1990: 119f.

this oath has the character of a conditional self-condemnation: the legal subject entering into guild membership declares himself to be liable to pay fines or bear other sanctions if he would in the future commit a breach of the rules specified in the guild's charter. No legal procedure would then be required, except for a guild representative establishing the fact of the breach.

Max Weber already saw the potentialities of the oath as a legal device; he indicated that the oath may be a universal way of fraternization, but lends itself technically just as well to be used as a guarantee of purposeful contracts.[43]

4.5 Property

'Property', in the way it 'works' as a legal concept in innumerable day-to-day practices, lends itself probably best to elucidate the *defining* character of legal concepts, in the literal sense of drawing boundaries between what counts legally' and what doesn't, between who can legitimately do what and who can't, and to show that this defining power, in a next step, provides for opportunities to impose a normative structure on human relations of interdependency. A primary movement of *exclusion*, in this case of powers to (legitimately) deal with things, provides in a second step for the facilities to enter into specific and selective relations. Legal devices thus allow for more complex social relations, in a way that usually combines three elements:

(1) *Attribution*: attributing powers to 'legal subjects', exclusive of claims of others, regarding a certain domain of action;
(2) *Mutual recognition*: in which movement not only the (legal) subjectivity of those empowered is increased but at the same time also the original legitimate power of the attributing power holder affirmed;
(3) Resulting in *facilitation of complexity*: attribution of powers facilitates legal subjects' entering into selective relations of a greater diversity, usually to a certain extent guaranteed by the attributing power holder; and this results in a higher complexity at macro level.

In view of the abundant literature, I must restrict myself to indicating the contribution of 'property'to market subjectivity in an anecdotal way.When during the 11th and 12th centuries the Dutch peat area is being reclaimed, the Bishop of Utrecht gives out parts of this area 'in hereditary ownership' ("in jure proprietarioalienaretamquam allodium suum") to reclaimers, who are thereby authorized to give it out in property to farmers, with reservation of a (small) 'recognition tithe' and the bishop's rights of jurisdiction. Thus in one and the same move is being recognized the position of the bishop as a political lord, and are created positions of owners of land empowered with the right to sell their land freely, thus contributing to the rise of a market in land.[44]

4.6 Synchronised one-sided acts of transfer

The notion of a mutual transfer, as embodied in 'contract', has been a relatively late development; in medieval trade, transactions are to be better described as one-sided acts of transfer,synchronised by rituals like clapping hands or drinking together. By making transactions in a public space like the market, or by transferring or making promises in front of (reliable) witnesses, the stability of these transfers in time (or, in Latour's terms: connecting utterances at the moment of transaction with later utterances of either of the 'parties') can be assured. If not the whole good or service can be

[43] Weber 1976: 402.
[44] Van der Linden 1955.

delivered at the moment of the transaction itself, some form of 'symbolic' transfer is usually part of the ritual. The 'God's penny', for instance, confers upon the party who has accepted it a duty – in the perception of people up to the 18th century usually not only a legally but also a divinely sanctioned duty - to live up to the promise he or she has made (f.i. to enter into 'service' and work during half a year or a year for the other party). 'Earnest money' and the tally were also legal devices of physical transfer that helped to guarantee delivery in the future. The conception of a combination of one-sided legal actions was not only a matter of practices but was also reflected in 17th-century legal theory (f.i. Grotius), which tried to base contract upon consecutive expressions of will (instead of the later notion of a `consensus').

4.5 Contract

An important innovative device was made available by combining Roman Law with Christianity. The corpus of Roman Law, 'rediscovered' and made available by copying ancient texts in the 11th century, did not in itself contain the notion that every - formally correctly concluded - contract would be binding; on the contrary: all kinds of specific, 'invested' contracts would be legally binding, but the formless, 'nude pact' would *not*. However, a Christian notion of contractual faith, derived from the idea of a Covenant between God and Man,was adopted by the jurists of Bolognato supplement these Roman notions, and in that way they were able to found the binding character of formless agreements (*nudapacta*). In his faithfulness to promises, they argued, Man is considered to take part in God's Justice.[45]The combination of Roman contract with the Christian notion that it is sinful not to keep up to your promises, thus allowed 12th-century canonical lawyers to develop the concept of a generally binding contract.[46] Christian practices of confession, introduced in clerical practices in the 11th century and consequently extended to practices of interactions between priests and fidels, thus supported the legal development of a general contract, the breach of which would anyhow be a violation of God's divine order, and thus result in pains to be suffered in the hereafter.
In consequence of this turn, the formalities required to conclude valid contracts tended to decrease and the possibilities of enforcement in case of conflict increased. It was mainly the struggle between clerical and secular powers in the aftermath of the Gregorian Revolution (1070-1125) that allowed lawyers to develop the law system into a technology that could be kept largely independent of religious contents. Meanwhile the analogies with divine justice and penitence enhanced the force of contract for a long time: analysing 18th-century diaries of commercial men, Richard Biernacki found that breach of contract was abhorred, not so much on behalf of the consequences for their trade partner or their relation with him, but rather for its impact on the Last Judgment and their existence in the hereafter.[47]

5 Transformations of legal devices in socio-technical assemblages

In the former section legal devices have been analysed as relatively separate assemblages of elements of diverse origin. In this section they will be related to market requirements and I will make a first effort to locate their transformations in a larger context of societal transformations.

[45]According to Grotius, cited by Behrends 1981: 970.
[46] Legendre 1999: 134-5.
[47] Richard Biernacki, …

First, four aspects of market relations may be distinguished in which legal devices are playing a constitutive role:[48]

(1) Definition of spheres of governance (exclusion of power, inclusion of protection);
(2) Attribution of competences (power, responsibility, liability) to participants in markets;
(3) Facilitation of (mutual) commitments (relevant rituals, contracts);
(4) Organisation of market conditions (equality or differential access, money, transparency).

I will elaborate on each of this aspects in the subsections below.

5.1 Defining spheres of governance

Ad (1). Early markets in Western Europe have developed in a figuration of mutually strengthening positions of traders and rulers. In the High Middle Ages monasteries, benefiting from an already privileged position towards secular powers, opened up their forecourts to traders for exchange 'under the cross' that divinely clinched their contracts. Kings and lords recognized the advantages of this practice and, in order to adopt it,as from the 7th century took to the legal device of *letters or charters of 'privilege'*, which had, in its turn, been derived from the *exemptio* granted by bishops and recognized in canonical law.[49] Incharters of privilege they defined marketplaces indirectly, by way of categories of participants, who were,for the duration of the fair, excluded from normal jurisdictional power of the lord,thus creatingroom for semi-autonomous regulation by a market master or bytrading communities in this way invited to organize themselves. Kings offered traders special protection during their travel towards marketplaces.
As often, granting a privilege which formally created an exception to the lordly rule, is not to be seen as forfeiting power but rather claiming and*staging* it.[50] As from the 10th century kings and lords successfully claim market *regalia* precisely by handing them out to new, or sometimes to already existing markets. In that way they were able to forge relations between themselves and traders and increase both the legitimacy of their lordship and their income (sales taxes), while traders welcomed a well-regulated market and more adequate, quicker and safer legal procedures in cases of conflict. Privileges were accorded to categories of *persons*('merchants') and have thus indirectly contributed to the early rise of merchants' guilds;[51]only later have they been extended to all regular inhabitants of merchant cities and thus got a *communal* rather than a categorical character. This transformation has contributed to practices in which participants, as a way of reflecting upon their practices, have embracedthe concept of rights-bearing *burgesses*, who are not defined by their profession but by their partaking of the legal community of a city.
In this next turn chartered privileges partakeof the foundation of cities. Within a few generations about the 12th century, economic and demographic developments in Europe result in a fabulous increase in the number of towns (+ 5000) and of urban populations (from 1 to 10 percent), and in changing balances of power between cities and secular and clerical powerholders. Urban

[48]Fligstein2001: 32-5 gives a somewhat comparable typology of 'rules' required for markets, but his fourth type, 'conceptions of control', includes tactics, hierarchies of firms and other 'local knowledge', outside of the scope of 'legal devices' as it is conceived in this paper.
[49]Fouracre 1995: 57.
[50]Davis 2012: 144. Pierre Legendre has also argued for the essentially *theatrical* construction of legitimacy (Legendre 1999: 127).
[51] In the Netherlands, f.i., the guild of the merchants of Tiel, described as well as criticized by Alpertus von Metz in the year 1020.

communities define themselves by, formally,[52] requiring and obtaining a charter of privilege from their lords which grants them a collective exemption from taxes or tributes and from part of the jurisdiction of the lord. This negative definition ('freedom from …') allows them, in turn, to positively organise their own jurisdiction. Thereto they find, and put together, elements from earlier formations, among which are: a traditional conception of 'Dinggenossen' (participants in legal procedures) not only 'finding' but also actively 'molding' their law, the use of written charters and the use of the oath as a device of commitment (see about this below Ad (3)). This *bricolage*results in the important innovation of *future-oriented* general, written rules, and of citizenship, no more only in the negative sense of 'exclusion from lordly power, but as a legal status which is part of a communal, future-oriented enterprise.

Another important innovation, which further strengthened this transformation, was the adoption of the '*corporation*' as a legally autonomous entity. Developed as a concept by which the Church understood its own legal organisation, it was adopted to explain and legitimize the existence of communal forms as cities, lay brotherhoods, guilds, universities and other forms of communal organization. It contributed to the development of their self-rule, of internal decision-making by majority vote, to the separation of collective vs. individual interest to be represented to external rulers, and, generally, to the development of public rooms that facilitated an open debate and, in the end, the development of 'modern western science'.[53]

'Brotherhood' is a concept in terms of which membership in this community is being idealized; it marks the switch from what started as 'exclusion' by privilege from 'foreign' rule, towards the potential 'inclusion' of all *citizens* in the community of the town, believed to be destined to rule itself. On the one hand reflection upon practices of participation, both in the community and in the local market, generates notions of formal equality.Active participation in the affairs of the town, on the other hand, presupposes capacities and loyalties, the lack of which was later to become a reason to exclude part of the inhabitants from citizenship.

At the end of the 18th centurythe device of 'citizenship', developed in the cities, is adopted by proponents of the nation state, dissolved from its city context and transformed into the countervailing notion of 'national citizenship'. Communal forms of (market) organization are then being regarded as subversive competitors to what should be a state regime at national level. States are making efforts to define communal forms of organisation as illegal, guilds are abolished, communal forms of organization regarding markets are only going to be revived to some extent in the second half of the 19th century. As to citizenship, finally, should be made mention of new transnational notions, like 'EU-citizenship', that are nowadays being proposed and defined.

Resuming the transformations of elements:

a. The legal technique, basically negative ('freedom from…') of 'exemption' is developed in relations between bishop and monastery;
b. As (letter or charter of) 'privilege' it is adopted by secular rulers in relations with officials or (categories of) traders;
c. The scope of privilege is extended from (its validity for) a professional category to the community of inhabitants of a market town,
d. Who then turn it into a positive, communal, 'inclusive' device: self-regulation, citizenship,

[52] The form of the charter conforms to the then current hierarchical model ('Those of town X requested me to…., and because I am the benign lord of the region of X, I grant them….') but is not necessarily an adequate representation of the way the charter has come about. Cf. Coopmans 1986: 110.

[53]Huff 1993: 146-7, 315.

e. Which is going to imply a certain subject-position and idealized identity in terms of freedom, equality and brotherhood;
f. Then 'citizenship' is dissolved from its city-context and transformed into the competing notion of 'national citizenship'.

In summary, market participants are operating in a legal sphere historically constituted by the legal device of 'privilege', which implies that an exclusion from 'normal' secular jurisdiction is positively turned into the creation of normative spaces of self-rule. In the use of the legal device of 'privilege' formal recognition of external, secular powers goes hand in hand with the development of communal forms of organization and of the legal-political device of 'citizenship', which then contributes to a normative structure of equality and 'brotherhood' and to experiences of subjective control.

5.2 Attributing competences

Defining and framing the powers, responsibility and liabilities of participants is an important precondition of market transactions.This can easily be clarified by imagining all those involved in the production of some good, let's say a piece of cloth that you buy at the market, and imagining (watch out, it's becoming a nightmare!) that, after you've bought it, they are all coming after you with claims, the shepherd for having been paid too less for his wool, the spinner for having suffered an injury while spinning it, the dyer for not yet having received payment from the textile trader who ordered it, his neighbour for the pollution the dyer caused in his garden, etc., etc. One of the advantages of the institutionalization of markets is that you can resolutely turn down their claims and tell them to make off, saying 'As I bought this piece at the market, I have nothing to do with your claims'.[54]
Legal notions of property and contract are defining powers and drawing dividing lines between claims that can, and that cannot be 'legitimately' pursued; in that way they contribute to 'disentangling' (Callon) the networks of human and non-human entities.[55]When analysing contracts, a common way is to look for what they include (terms, liabilities etc.), but at least as important as this is what they *exclude*, of what by means of them is shifted to the realm of legal insignificance.[56]Callon has adopted the notion of 'framing' to conceptualize this mechanism; in the words of Peter Holm: "in order for market actors to calculate the probable outcomes of their choices, buyer and seller must be produced as fairly separate and autonomous agencies. The object to be traded must be constructed as reasonably stable and thinglike. A minimum of agreement as to the nature and limits of property rights and how they can change hands must be negotiated."[57]Callon has stressed that framing is never a stable achievement, and might be challenged by counterforces, provided that they have been able to mobilize sufficient counterforce. Framing is thus constantly threatened by what he calls 'overflowing': what has been made insignificant and been excluded, might forcefully knock at the door or break through the wall to reclaim a legitimate position.
Historically,it is again the period between the mid of the 11th and of the 12th century during which the number of merchants has fabulously grown (from a few thousands of them in Europe to

[54] The importance of 'framing' has been forcefully argued by Michel Callon(1999), though at that time without duly recognizing the contribution of legal devices to its performance; in a later contribution he allows for 'other, equally performative, anthropological programs' next to economics (Callon 2007: 347).
[55]Davies &Fouracre (1995: 10-1) provide some nice examples of the entanglement of transactions in the Middle Ages.
[56] In the field of employment relations, this idea has been further developed in Knegt (2008).
[57] Holm 2007: 234.

hundreds of thousands about 1200) and the *lexmercatoria*has been developed, not so much by lawyers as by the merchants themselves, as an integrated system of commercial law.[58] Legal devices like bills of exchange and forms of credit, regulated by this law, have significantly contributed to the further development of trade relations.[59] Later *common law*, *Landrecht* and city rules have generally framed market transactions. An important condition for a high level of participation in markets has been the availability of sufficiently effective procedures for enforcing contracts, in case of dispute. One of the typical elements of early markets was that enforcement was left to (representatives of) merchants themselves, who usually then opted for a dispute resolution procedure that was prepared to decide within a few days on matters laid before them. Awareness of the accessibility of legal means of enforcement contributed to their self-awareness as 'subjects bestowed with rights' and thereby increased the accessibility of markets themselves.

5.3 Facilitating commitments

Before dealingtoo much with remedies, however, we should shortly consider the place that devices available for making, or entering into credible commitments have taken in consecutive assemblages, with a focus on transformations relevant to markets. For markets in medieval cities, we should distinguish between two levels at which these credible commitments have been important: the collective level of institutions and the level of market transactions. At the level of collective arrangements of markets, the oath remained for a long type a recognized device for committing oneself to associations like craft guilds. As a '*juratus*' (sworn) member of a guild, a trader had committed himself to craft-specific rules for the production and the way of trading his products.
As to the level of market transactions, there is an enormous amount of specialized legal devices that have developed on the basis of mutual acts of transfer or of the binding force of nude contracts, so transformations of these can only be treated here in a very general way.The most significant transformation is the gradual decline of tactile, non-literate ritual elements of transactions (symbolic transfer, handclasp, shared drink), in favour of literate forms (registering important transactions at the city hall, notarial or other written contracts), and a gradual movement from 'mere exchange', under the influence of lawyers' Roman law notions of contract, to the notion of mutual contracts with defined obligations.[60] The availability of remedies required that goods sold had to be specified by type, quality, weight, capacity and number, and its price fixed, otherwise it would not be possible to bring a case before a judge. 'Defined obligations' thus contributed to the further quantification of goods.

5.4 Organizing market conditions

Regulation was a way of balancing the different interests in terms of which the figuration of medieval towns can be understood. "Ordinances and charters indicate that town authorities wanted stability, order and income; traders wanted flexible and secure facilities; burgesses wanted protection and profit in their trade and operations; guilds wanted high standards and exclusivity; and consumers wanted cheap and plentiful goods. Medieval markets encompassed a complex interplay of forces,

[58] Berman 1983: 333-5, 340.
[59] Berman 1983: 336. Berman (at pages 348-50) gives an impressive list of features that distinguish this European commercial law from law in other parts of the world.
[60] Davis 2012: 199.

which created a compromise between restrictive and free-market policies".[61]The current term 'transparancy' may in retrospect also be applied to measures taken to assure the quality of products, the fairness of transactions and the binding force of them upon those who fail to perform what they had promised to. The design of physical marketplaces (around the 'market cross') and regulations ordering that all transactions should be made in the open, are made to that end, in the exceptional case of England already by royal legislation of the 10th century.[62]

Regularly, however, the city charter was the legal device by which the public order of the market has been constituted. Not unlike modern 'Operating Systems', they spread quickly over medieval towns, it was not unusual that they were copied from town to town and got their local, specific features only later as regulatory measures were used by city governments to settle local disputes. An additional legal device was constituted by the guilds' charters, in a comparable way copied and further developed by (the assembled members of) the guilds themselves, but usually also issued as a city charter, in order to confirm the power it should have also towards non-members. The latter requirement caused regulation to be what one could call a four-party process, in which some kind of balance had to be found between the interests of guild members (masters), their workers (journeymen, apprentices), the citizens-customers and the city government.

This arrangement has gradually been undermined by two socio-economic developments. First, the rise, in particular in the production of textiles, of merchants-capital owners who started both to organize the production of masters in the cities, making an end to their factual (but not their formal) independency, and by recruiting labour in the countryside, by using the putting-out system and its associated legal devices. Second, new industries in the city (f.i. soap, sugar) succeeded to keep out of the guild system; their activities were nevertheless regulated by city charters. As from the end of the 18th and the beginnings of the 19th centuries national states in part did away with this regulation at city level, and were only gradually prepared to accept a need for regulation at state level.

6 Law and performation

In the sections 4 and 5 I have tried to give an inventory and partly to reconstruct a genealogy of legal devices that have contributed to the constitution of the subjectivity of market actors. My main focus has been on legal practices that are known to us from historical research. We noticed, however, by referring to Callon and others, that theoretical knowledge and economical practices may be closely connected, and an analysis of the role of legal concepts in practices points in the same direction. It is thus time to come back (in subsection 6.2) to the question, raised in section 1, to what extent the notion of 'performation' can be fruitfully applied to the relation between legal concepts and practices. But first a further comment on Callon's analysis is required.

6.1 Is Callon right about the performation of economics?

Michel Callon attributes a crucial role to economics in performing that which conditions the success of a neoliberal 'anthropological program'. It disentangles 'things' from human beings, focuses on individual human agencies and neglects the unequal distribution of calculative means and capacities between agencies.[63] It is unclear, however, to what extent it ought to be to *economics* that the

[61] Davis 2012: 176.
[62]Davis 2012: 177-8.
[63]Callon 2007: 343.

realization of these conditions should be ascribed to. Rather economics herein appears to be building upon what has been performed and institutionalized by *legal*devices.

For one thing, economists, including Callon, tend to treat markets as if it were goods that are being traded in these markets; however, as Nobel Prize-winner Ronald Coase has stressed, it is not goods but "rights to carry out certain actions" that are being traded in markets.[64] Long before the existence of any economic doctrine, the "disentanglements which cause market goods to proliferate while dissociating them from the agencies that are in a position to produce and trade them"[65] have been performed by legal means, among others in the process of constituting regional markets in the Early Middle Ages in France and in that of the constitution of cities in the 11th to 13th centuries in the 'city belt' of Western Europe. Conditions of commodification like stable weights and measures, reliable coins, checks on product quality and enforcement of contracts are since then part and parcel of the organization of market relations.

Second, the focus on individual human agency has become a central element of economics only in the 17th century and it still is, but it is dependent upon a legal attribution of power and responsibility the origins of which predate economic theory by at least six centuries. Thus to treat this only as an element of a kind of operatively closed economic program without referring to its dependency on the durable performance of a theological and legal-institutional program seems to me to be missing the point. Without the legal framing of "humans in their somatic envelope" the configuration of "a passable version of *homo oeconomicus*" would be impossible.[66]

Third, the neglect of an unequal initial distribution (in this case of calculative means and capacities) has been, since the High Middle Ages, a steady feature of Western European law and in particular of liberal law. This neglect may be interpreted in light of a civic effort to find terms of agreement.[67] So although Callon seems to treat law as a matter of form, a mere derivation from the content relevant to what he considers as the neoliberal program, all three of the elements of this program are crucially constituted and defined by performances of legal programmes. I will therefore now elaborate on the constitutive contribution of law to subjective positions in market arrangements.

6.2 Is 'performation' an adequate label for what law does?

In section 2 Michel Callon's theory on the performativity of economics has been shortly treated and commented. The success of economic formulas in representing economic regularities has to be explained in part by the fact that these formula's, developed by economists, are transformed into algorithms that are being used in economic practices, resulting in a circulation between economic knowledge and practice that is rather covered by the notion of performation than by that of representation.

Now, contrary to economics, legal theory is not pretending to 'describe' or represent an actually existing order of things, in terms of the currently dominant conception of the relation between

[64]"What is exchanged on a market is not, as economists often suppose, physical entities, but rights to carry out certain actions" (R.H. Coase, 'The Institutional Structure of Production', *American Economic Review* vol. 82 (1992), no. 4, p. 717).
[65]Callon 2007: 345.
[66] Citations from Callon 2007: 347-8.
[67]Boltanski&Thevenot 2006: 28-31. See also p. 7 above.

knowledge and 'factual' regularities to be found 'outside'. So, at first sight, it may look as though legal theory could not be 'performative' in the sense that Callon and other authors claim for economics. However, there are at least three reasons for a more qualified conclusion as to that. First, legal acts used to be performed in a typically ritual way and taking part in such ritual acts used to be conceived as partaking of a divine order, the structure of which had been revealed in theology and canonical law. Performing such an act was performing a sacramental act, connecting the supernatural to the natural and projecting the divine order upon the latter, which is almost by definition an act of performation. Second, at the times when law had the greatest innovative impact on the order of society, i.e. in the 12th and 13th centuries, law was conceived, by lawyers as well as ruling elites, in terms of a recovery (from Roman Law) of knowledge on natural regularities, be it those of the order of society. This conception was, in fact, a secularized version of the ritual act mentioned at the first point: legal acts are conceived as the performance of a natural order. Third, concepts from legal theory *are* being incorporated, then as well as now, in legal devices that get closely connected to practices in ways that co-define what will be actually happening. When, for instance, in day-to-day conversation, we talk of 'property', we tend to use it in a seemingly descriptive way, usually without being aware of the normative, legal character of the term. These points are in themselves already reason enough to look at the contribution of law to market relations from a 'performative' perspective.

If we look at the legal devices, set out in section 4, and at their places in transforming socio-technical assemblages in section 5, the performative character of these devices is apparent. In the ritual acts involved in supplication and peace-making, subject-positions are created defined by a 'giving away' that at the same time defines relative positions in terms of (newly created) mutual relations, "an embodiment of individual sovereignty, be it in an action of self-limitation" (Petkov, above section 4.2). Privilege and oath are both one-sided acts, but only in a formal-technical sense; what they perform is forging relations as well, in both cases between a 'legal subject' (lord, citizen) and a community that is partly constituted by the act(s) (f.i. a monastery, city or guild). By making his oath, a prospective citizen is performing his entering into citizenship, or a prospective guild member is performing his entry into the guild and his liability in the event of breach of rules of the guild's charter. The prospective servant accepting a God's penny from the hands of his future master, is thereby performing the acceptance of his service and legally and morally bound to that, etc.

Growing literacy has tended to diminish the ritual embedding of transactions in favour of written documents, but we are still used to put our signatory on a legal declaration or to tick the little square before we download new software – which might, in another context than this paper, suggest the question of the ritual character of the 'small print' that we then formally agree with.

6.3 Transformations of assemblages

In section 4 I have sketched transformations of socio-technical assemblages, of which legal devices are parts. The analytical tools provided by SaskiaSassen have proven to be fruitful in this enterprise. It can thus be established that the position and 'valence' of legal devices may undergo transformations, but the process by which this transformation is brought about, would need further exploration.

One way to approach this question is already suggested by the definition of 'performation' given above (in section 2): "the process whereby sociotechnical arrangements are enacted, to constitute so

many ecological niches within and between which statements and models circulate and are true or at least enjoy a high degree of verisimilitude." To understand the way that devices, developed and accorded a position in a certain assemblage, 'jump assemblages' (to paraphrase Sassen) and are being adopted in other ones, we may profit from an approach, developed by GerdGigerenzer for transformations in scientific theories. The basic idea of his approach, known as the 'tools-to-theory heuristic', may be summarized thus: in organizing themselves, people are getting acquainted with the tools they use in practices to evaluate their works; in as far as these practices have proven themselves, they are prepared to accept theoretical proposals in other fields which refer to these same tools-practices, which then tend in turn to strengthen the circulation of tool-based concepts and 'their' practices.[68]His hypothesis can be treated as a further theoretical development of the 'between niches' in the formulation of 'performation' above. A classical example of this mechanism is the invention of the mechanical clock which inspired believing (and believing they all were!) natural scientists of those times to take up the theoretical image of 'God the Clockmaker' as a model of how 'natural laws' could be conceived of, without detracting from God's Omnipotence, and of the way they could be legitimately approached by scientists. Two more instances are closer to the subject of this paper. The firstone is the way the notion of 'contract' has been adopted by political theorists (as from Hobbes) on their way to define liberalism. And the second one, probably still more important, is the way religious notions have been adopted in legal theory, how for instance, as from the 11th century, the conception of the Purgatory and the clerical practice of the confession have contributed to legal notions of individual responsibility and liability. Harold Berman even argues that all essential Western legal concepts have a theological origin.[69]

6.4 Creating the 'legal subject'

Law's relevance to the existence and functioning of markets is not restricted to the kind of performativity set out in section 6.1. Thus far, I have argued that law is in part constitutive of what actors do; as Suchman& Edelman write: "law provides (…) a taken-for-granted categorical structure for social relations – and provides a set of accepted rituals for manipulating that structure".[70] A further step is to argue that the practices of legal devices are also performative in the sense of creating legal subjectivity.

Although we tend to treat legal subjectivity as a self-evident matter, it is not. Early medieval humans perceived themselves primarily as members of families, as 'man of' a lord, as members of a community and of 'the people of God' impersonated by the Pope. 'Freedom' was a term for being embedded in a community, 'unfree' were those who lacked that and were all on their own. The 'rights' one had, were the rights of the community. Only later the growing availability of legal devices that defined subject positions gradually also increased the level to which humans became 'legal subjects' and perceived their 'subjectivity'.

Mary Poovey has analysed a comparable mechanism in het study of the rise of 'double-entry bookkeeping' (DEB).DEB acted as a rhetorical device, used by merchants to defend the public utility of their commercial activities and to reproach criticism of the Church based on the clerical prohibition

[68] Cf. Douglas & Ney 1998: 31. They argue the economic theory of 'diminishing marginal utility', metaphorically referring to physiological processes, to be an example.
[69]Berman 1983: 195.
[70]Suchman&Edelman 1996: 936.

of usury. Because of its systematic internal consistency the ledger displayed a symmetry that was associated with God's world and with justice, formal precision prevailed over the accuracy of data. The system created 'writing positions' so that whoever took them and wrote in the ledger, tended to subordinate his position and personality to the rules of the DEB system; "the 'personal-moral metaphors' of accounting tended to realizewhat they purported to describe – by encouraging the company's agents to act as responsibly as the books represented them as being."[71]The DEB system thus had the double effect of disciplining agent and merchant: an agent who is aware that he will be evaluated by the merchant on the basis of the ledger, will tend to monitor himself, while the merchant in his turn "must have wanted to be what he told his agent he was."[72]In this way the attribution of responsibility and the provision of accountability devices act as *subjectivators*: while these devices are commonly considered only as 'means of communication', they create subjective positions to be taken by humans thereby perceiving a proportional increase in subjective personality.

The legal devices, set out in section 4, share this element of subjectivation. The bowing of the supplicant before his lord and the displaced graciousness of the lord's response constitute interrelated subject positions that are 'richer' than before the act of supplication. Contemporaries report that the incorporated practice of the 'kiss of peace' not only 'moved' both actors, but also succeeded in convincing spectators of the *amicitia*that was thereby established, and the spectators even sometimes got directly involved themselves, when, for instance, they were conferred the duty and the right to sanction defecting behaviour of each of the parties. The charter of privilege, conferred upon the inhabitants of a city-to-be, made them into (potential) citizens, empowered to organize their own commercial and administrative internal affairs. Taking the oath, as a device of taking up citizenship, implies presenting yourself as an active (legal) subject. Being endowed with the free ownership of a piece of peat land brings one in the position of being authorized to sell it and thus act as a trader on a market in land. And after accepting the God's penny from your future master it may feel heavy in your hand because you know you have now accepted an even divinely sanctioned duty to enter service with him.

Legal devices are thus creating subject positions that, if taken, have an impact on options of action and generate, in the wake of the responsibility and liabilities implied, legal subjectivity and an awareness of personality. In this respect, Latour'svision of subjectivity as 'only' the end of chains of practices, deserves to be developed further. An adequate analysis of transformations of these chains (and of their ends) seems to be possible only, however, if on the one hand we allow for a broader conception of law (instead of Latour's actual focus on legal-institutional practices) and if we succeed in fruitfully combining network theory with Sassen's analytics of assemblages.

[71]Poovey 1998: 58.
[72]Poovey 1998: 60-1.

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