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UNIVERSITY OF AMSTERDAM

KNOWLEDGE, POWER AND LAW  
BEYOND THE STATE

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# **Knowledge, Power and Law**

## **Beyond the State**



**Edited by Maria Bartl and Eljalill Tauschinsky**

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## INTRODUCTION: SLICING THROUGH THE GORDIAN KNOT

This collective paper discusses the many faceted entanglements of knowledge, power and law within, and, even more so, beyond the state. Several eminent scholars in the field offer their view on how the knowledge-power-law nexus should be framed, and what its most salient problems are. Some of them build on each other, others are contradictory; we have collected them all, because we believe them to be representative of the ongoing debates and practical problems of law and governance beyond the state.

We started this project from the intuition that the role played by knowledge in post-national law-making is both growing and changing. Two trends are prominent. On the one hand, a particular kind of knowledge - expertise<sup>1</sup> - acquires new political roles, legitimizing a growing body of law. On the other hand, the expertise based law-making empowers a different set of actors beyond the state – not only ‘experts’ *stricto sensu*, but also the executive or industry, which are recognised suppliers of expertise.

Yet, it is not at all self-evident that expertise should enjoy such overwhelming prominence in post-national law-making. Knowledge is diverse and ubiquitous. It ranges from personal or social embedded knowledge to highly formalised and traded sorts of knowledge (science, technical information), from tacit and embedded forms of knowledge to highly codified forms, developed through certification. While it is obvious that laws are based on and interpreted relying on knowledge, nothing dictates that this knowledge needs to take the form (and restrictions) of expertise. We need at the very least to question the power dynamics engendered by the institutional choice of expertise as the dominant knowledge in post-national governance.

Many of the acclaimed benefits and critiques of expertise-led decision-making are well established. They were articulated centuries ago within the context of national administrations. But, we argue, when Weber or Gaus argue for the governance through (superior) knowledge and expertise, they do so against a background of much more tightly knit political, social and cultural contexts in which national administrations finds themselves. This is what changes beyond the state. Many of the problems of expertise-led law-making are aggravated beyond the state, or emerge entirely anew, thanks to the disembedding of knowledge production from a broader political, social and cultural context, which have provided a controlling and legitimizing environment for this highly formal type of knowledge production. This is the challenge of the post-national constellation.

In this collective working paper, we look at the intertwining of knowledge, power and law from three different perspectives. In the first chapter, we examine *Performativity* of Expertise to answer the question why this form of knowledge has so much power over law (Tauschinsky, Christodoulidis, Farrand, and Everson). Tauschinsky offers an outline of the authority claims of expertise, and what they *do* for postnational law. Christodoulidis links the production of expertise to the processes of governance, elaborating how normative choices embedded in various indicators covertly shape the content of law. Farrand distinguishes between different

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<sup>1</sup> We understand ‘expertise’ to be a specific kind of knowledge. Expertise is characterized by its high ‘quality’ and by external recognition. Even though ‘expertise’ can include a ‘skill’ aspect and thus can have a personal, tacit dimension, it is usually taken to be applicable (and thus recognizable) objectively.

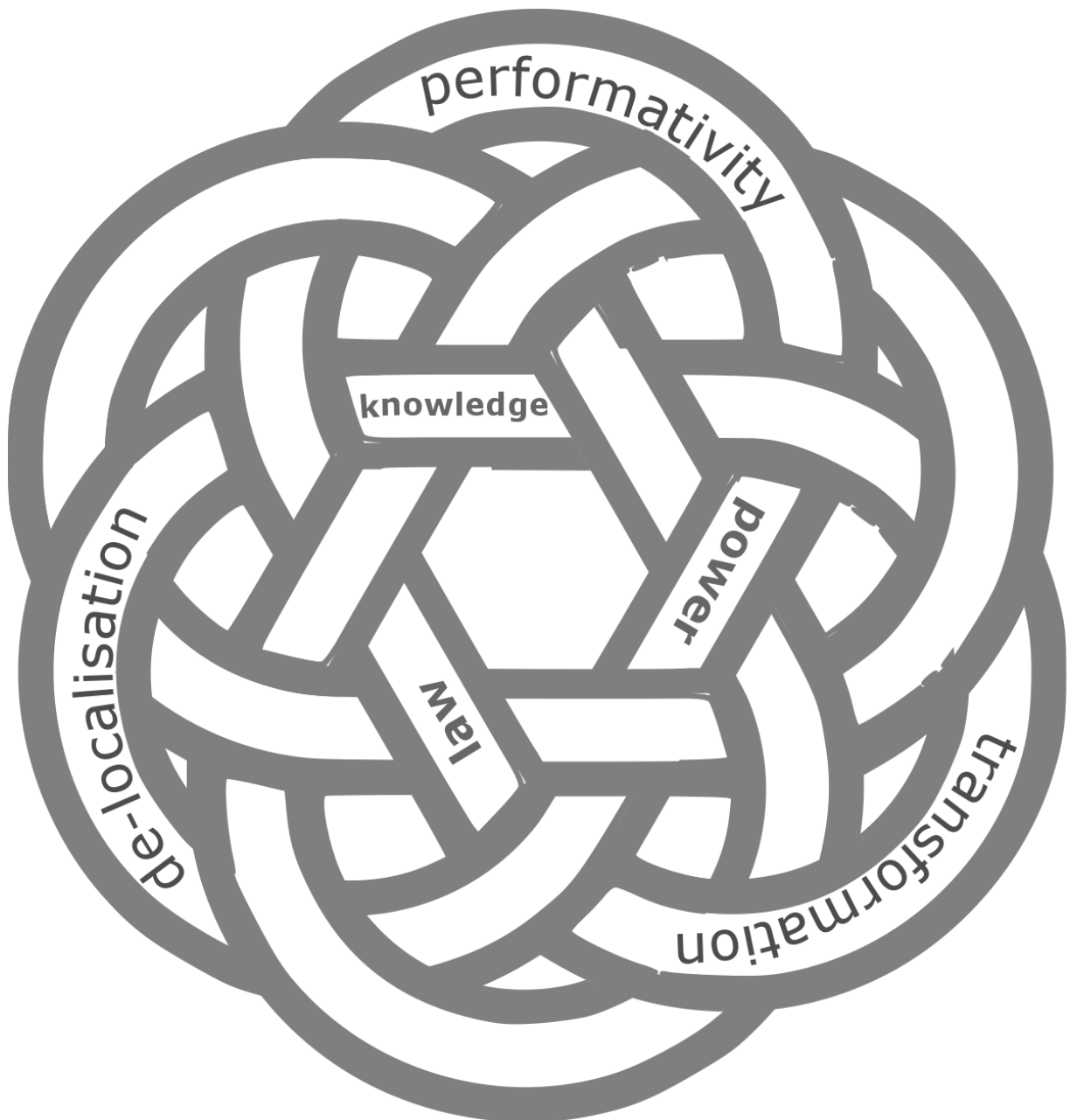
types of knowledge, showing how their different performative value distributes political opportunity and power. Finally, Everson describes the way in which knowledge lacunae in contemporary governance, re-phrased as risks, becomes both available to pricing and to (market) management.

While chapter one offers an overview of different mechanisms in which knowledge exercises power over law, the second chapter discusses the consequences of *De-localisation of Knowledge*, ultimately raising the question of the distributive consequences of the governance beyond the state (Bartl, Lixinski, and Muir-Watt). Bartl describes how de-localisation of knowledge from thicker political, social and cultural contexts reduces the epistemic value of such disembedded knowledge. Lixinski shows how the processes of de-localisation and re-localisation of expert knowledge impact indigenous cultures, including the processes of constructing subjective identities and the redistributive consequence thereof. Finally, Muir Watt criticises the way in which liberal legal orders fail to respond to the problems that emerge due to the disembedding of knowledge and power in global markets and, at the same time, outlines how some of the emergent problems that arise may be approached.

The third chapter deals with the *Transformation of Law*, and in particular with the question whether the new constellation of power and knowledge beyond the state requires different thinking about the concept and the role of law (Micklitz, Patterson, Gupta, and Kukovec). Micklitz describes three major ways – institutional, procedural and substantive – in which law has been disembedded beyond the state. Patterson suggests that constitutional thinking of the 20<sup>th</sup> century will not be able to respond to the problems related to the global knowledge economy, while Gupta explains that global environmental problems can not be solved without global constitutionalism. Kukovec raises the question regarding the proper role of legal analysis: the starting point should be that of unjust, hierarchical, and we would add often *local* injury and misrecognition.

Finally, the collective working paper ends with Gordon's problematisation of the whole concern with the 'local' as something we should normatively endorse, offering the example of international law as exhibiting a positive form of 're-localisation' of knowledge. We will respond to this contribution in the conclusions, since it allows us to further elaborate the purpose of this project.

# PERFORMATIVITY





# 1. PERFORMATIVITY

By Eljalil Tauschinsky

Even while we criticise the use of expertise, we need to recognise the existence of structural reasons, which ground the pre-eminence of expertise in post-national law-making. These relate in particular to the performative role expertise fulfils. First, thanks to its appeal to universality and reason, expertise supports legitimacy claims within various functionalist institutions. Second, expertise provides a convenient knowledge basis for non-national law, being separate from any need for embeddedness in or representativeness of communities, purporting to unite us in our rationality rather than in our sense of belonging.

These structural reasons, however, cannot do away with the critique raised against the prominence of expertise. Instead, we still have to diagnose the loss of 'control' mechanisms stemming from the dissociation of knowledge production from tighter political, social and cultural contexts. These contexts, which have 'softened' expertise through its 'forced' responsiveness to broader political, social and cultural discourses, processes and practices, have ensured the correction of eventual biases. In the post-national constellation, where such 'control' is absent, expertise has the potential to run amok.

Why is the kind of knowledge termed 'expertise' so important in post-national law-making? Why are we happy to hear that a political decision (quite likely by elected representatives) was taken on the basis of expert consultations? Why do we perceive expertise as 'better' knowledge in normative terms than the knowledge that our representatives possess per their function or 'most useful' in terms of practical necessity? In other words, we question here the performative role of expertise in post-national law-making.

The core element founding the prominence of expertise is the claim that it makes law 'more rational', 'more objective' or more functionally effective. This has been argued many times since Weber, so much so that it is nearly a commonplace.

What does the claim to 'rationality, objectivity and effectiveness' *do* for post-national law? First, expertise seems to compensate for the fact that post-national law lacks a significant number of inclusive 'affiliation based' processes of knowledge accumulation. In other words, expertise is able to cater for the validity claims of post-national law we like to entertain – the 'excellence' (best knowledge) and objectivity and neutrality (applying to all of us universally) - without laying bare what post-national law actually misses.

Secondly, expertise based claims to objectivity and neutrality resonates well with some of the traditional claims of international law, namely primacy and universality. International law's discourse makes claims to universal applicability, based on its output (peace or prosperity, but also on justice or equality), which requires expertise's excellence, objectivity and neutrality.

Post-WWII focus on functional (international) integration, which presupposes the technocratic execution of common goals and objectives, departs from similar claims to neutrality, objectivity and superiority. Functionalist institutional design builds on the idea that we can dissociate

political goals, and a-political execution of these goals, on the basis of neutral and objective (best) knowledge provided by experts.

Let us conclude with two critiques. Is it desirable that the law be rational, objective and effective? Probably. But these characteristics remain only a part of what we want law to be. Law is simultaneously understood, and valued as, a means of self-expression, intersubjective identification and integration. This latter, more 'subjectivist' understanding of law, bound to the specific community/society to whom the law belongs, integrates a different understanding of knowledge and knowing that focuses more on contextual (local, cultural) characteristics, relying on interaction and affect as means to practice law. Not surprisingly, from this latter point of view, the use of expertise in post-national law-making has become strongly contested.

Second, if we accept that expertise actually presents the 'best' knowledge, which should be the basis of governance – instead of, for instance, politics -- we shift power in twofold manner. First, we grant the carriers of expertise – experts – certain authority. Second, and more problematically, this grant of authority presents us with yet another power-shift: in principle, it ceases to be important who the carriers of this superior knowledge are: how they are socialised, which interests they have or how this knowledge was obtained. Expertise is understood to be inherently objective and neutral.

To sum up, in the post-national context, where the inclusive membership processes for law-making are available to a much more limited extent, while we still have to find solutions to global problems, we rely on 'de-localised' forms of knowledge to support the validity claims of post-national law. At the same time, this 'floating' form of law has called for contestation based on more local process, taking usually the form of: *this is all nice and good, but it doesn't apply to us, it doesn't apply to here, and who are they to decide about us in the first place.*

## 2. THE POWER OF NUMBERS: DISEMBEDDING THROUGH INDICATORS

**By Emilios Christodoulidis**

In his pioneering work *La politique des grandes nombres* (1993) Alain Desrosières argued controversially that economic and social statistics do not measure a reality that pre-exists them but generate a 'new' reality of their measurements. This is because the production, processing and use of statistical social data both rely on and abstract from the contexts from which such data are drawn. Whereas interpretative choices, local conventions, idiosyncrasies and particular pre-understandings underlie and mark the generation of social meaning, the production of statistical data involves severing from such contexts in order to read equivalence into heterogeneity and to allow aggregation and comparability. In this, quantitative performance replaces qualitative understanding. Significantly, in all this the normativity of statistics remains hidden. As Desrosières puts it, 'the "undisputable facts" which [statistics] are summoned to provide (but which they themselves contributed to authorising) do not themselves provide for the modality of their discussion.'

One of the key ways in which the operation of statistical information is mobilised is through benchmarking and the use of indicators. Principally associated with scholarship emerging from

New York University (key figures amongst whom are Benedict Kingsbury, Sally Engle Merry and Kevin Davis,) the theorisation of indicators as a technique of global governance has been at the centre of literature both facilitative and critical of policy-making. The 'critical' take includes the following questions: How does the increasing use of indicators in global governance affect the distribution of power, and the power of the governed? How does it affect the nature of decision-making about the allocation of resources and efforts to monitor compliance with global standards? Spanning an extraordinary range from public actors such as the World Bank or the US State Department, to NGOs such as Freedom House, to hybrid entities such as the Global Fund, to private sector political risk rating agencies, indicators are used to compare and rank states for purposes as varied as deciding how to allocate foreign aid or investment and whether states have complied with their treaty obligations. According to a broadly accepted definition:

'An indicator is a named collection of rank-ordered data that purports to represent the past or projected performance of different units. The data are generated through a process that simplifies raw data about a complex social phenomenon. The data, in this simplified and processed form, are capable of being used to compare particular units of analysis (such as countries or institutions or corporations), synchronically or over time, and to evaluate their performance by reference to one or more standards.'

The key elements in this definition are simplification and comparability: simplification is based on reductions of complex situations on the basis of criteria of salience. 'Indicators simplify 'raw' data and then name the resulting product take the form of, or can readily be transformed into, numerical data.' Indicators 'measure', for example, the level of respect for the rule of law in a given country in a given year in a way that may be represented by an indicator such as the 'rule of law index'. That simplification can involve aggregation of data from multiple sources, it will certainly involve filtering that excludes certain data. The criteria are used to abstract key features and keep them constant across situations, which in turn allows the comparability of the situations; comparisons produce data which are fed into processes of decision-making. Governance comprises the means used to influence behaviour, and the production and the distribution of resources.

To understand indicators as technologies of governance is to look at the ways in which they are capable of delimiting and altering the topology and dynamics of global governance across the board: at the level of processes of standard-setting, decision-making and, for those of a more radical bend, contestation in global governance.

Regarding 'contestation', the 'critical' take on indicators is alert to built-in biases and is alert to the need of revisability even, or especially, where the structuring assumptions are tacit. There is also an acknowledgement that a significant degree of selectivity is exercised by the compiler of the information in terms of the choice of indicators, the relative weight ascribed to them, the margins available regarding (smoothing over) data unavailability, a selectivity in turn significantly magnified when it comes to composites which aggregate a variety of indicators or cross-cutting compilations. Across the spectrum of this selectivity the critical theorising of indicators invites qualifications and revision opportunities: 'The theory or idea embedded in an indicator may be developed or reframed by its users or by other actors in ways that differ from anything intended by the producers.' (p11) And further: 'The use of indicators as a technology of global governance can be expected to affect where, by whom, and in relation to whom governance takes place; the processes through which standards are set; the processes through

which decisions are made about the application of standards to particular cases; and the means and the dynamics of contesting and regulating exercises of power in global governance.'

But how seriously is one to take this reflexivity? Surely not seriously enough to un-do what is their specific reduction – achievement! The function of indicators is constitutively that of simplification, quantification, comparability, and it is only with and not over these functions that revisability can be invited. It is thus of the very essence and functionality of indicators that they abstract, suppress and generalize. The acknowledgement that the 'transformation of particularistic knowledge into numerical representations that are readily comparable strips meaning and context from the phenomenon. In this numerical form, such knowledge carries a distinctive authority' (11). It is this authority that explains why they are produced as, and used as, markers for larger policy ideas and what has made them a key tool of governance.

It is at the level of the hidden normativity of indicators that the critique of governance needs to be understood and undertaken, confronting the obvious ways in which political choices that subtend social policy that travels as governance are obscured in the designation of the practice as 'good', on allegedly objective standards and against highly questionable distributions of utility and rationality.

### 3. TRADING INFORMATION FOR INFLUENCE: FORMS OF KNOWLEDGE AND THE POWER OF LEGITIMACY

**By Benjamin Farrand**

The question of the dynamics of knowledge in post-national lawmaking is an interesting one, yet one that also is in need of additional clarification, in order to clearly separate 'knowledge' and 'power'. From a Foucauldian perspective the two are inextricably linked, but they are not the same. In *Power/Knowledge*, Foucault stated that 'knowledge and power are integrated with one another [...] It is not possible for power to be exercised without knowledge, it is impossible for knowledge not to engender power'. Power and knowledge are mutually interdependent and mutually constitutive but distinct. The relationship between the two is that knowledge requires an apparatus of knowledge-production in which relations of power are invested, and cannot exist without that apparatus. In turn, Kelly states, 'there is no apparatus invested in power relations which does not itself produce knowledge'. Laws and institutions can constitute forms of apparatus for knowledge-production, and through their embedding within these institutions, constitute a form of power. In turn, the power exercised through law, or by institutions, produces a certain form of knowledge – what is legal, or illegal, for example, or what may be considered as being within or outwith a particular institution's competences. The concept of institutional path-dependency is equally reflected in the power-knowledge interactions – the power of an institution to act is constrained by the knowledge of the limits of that institution. Furthermore, to be unaware, or lack knowledge on a particular subject impacts upon the power to act – one cannot legislate for a situation for which one is unaware.

This is not to say that all knowledge is the same. Of particular relevance to the operation of the European Union and its composite institutions is the knowledge that can be designated as 'expertise'. Whether we consider the operation of the EU in its supranational capacities, in particular represented by the Commission, or in its intergovernmental capacities, such as through the Council, expertise plays a large part in decision-making. The formal and informal decisions taken by the Council, supported by the Committee for Permanent Representatives (COREPER) bodies, are largely influenced by perceptions of expertise, whereas the Commission as law-maker relies heavily upon 'expert' knowledge provided by those sectors in which they seek to legislate. The EU represents a shift from 'government', centralized, hierarchical and formal, to 'governance', in which rule-making supplants public ownership and enforcement, with an emphasis on the use of authority, rules and standard-setting to provide a framework for regulation, with the act of regulation being delegated in self-regulatory regimes. Yet how do institutions such as the Commission determine how best to regulate a particular sector? Underfunded, over-stretched and with a highly diverse range of sectors and actors to oversee, the Commission is not well-placed to determine the substance and form of acts of regulation (be they formal laws, in the form of Directives or Regulations, or informal rules in the form of benchmarks, standard setting and establishing best practice). The Commission relies upon the provision of information by external representatives of those sectors that are to be regulated in order to make regulatory decisions. While this is often dismissed as being mere lobbying, the Commission works within an institutional framework in which the 'expert' is deferred to, providing added legitimacy to a perceived 'technocratic' means of governance. Within the frame of contemporary Western liberal democracy, stakeholder participation and an arguably hegemonic discourse in which 'the private sector does it better', private sector actors, such as industry representatives are in a position to strongly influence the direction of legislation. They possess 'expert knowledge', perceived as essential to good law making, and in turn, possess 'institutional knowledge', namely the functioning and complexities of the European institutions, the language in which they work, as well as often having personal contacts amongst policy-makers. This 'institutional knowledge' allows for the exercise of influence over decision-making – in turn, by framing 'expert knowledge' in terms that can both be used by and used within the Commission, such as those of economic growth, efficiency and effectiveness, the information provided is more likely to be considered as 'expert' by the Commission. They are more likely to be called for future evidence submissions, reinforcing the position of those actors as 'expert' and possessing 'expert' information.

In comparison, other actors, while possessing information that could be considered 'expert knowledge', such as academics, may lack 'institutional knowledge', impacting upon their ability to be heard. While they may provide useful information, it may not be framed in a way that is either usable by Commission actors, or fit within their frame of discourse. While there may be knowledge, by falling outside of the usual frame of accepted language, the ability to exercise power through that knowledge over the legislative process may be significantly limited. Alternatively, citizen activist organisations may possess some 'institutional knowledge', but lack the 'expert knowledge' required by the Commission to form the basis of legislative actions. By way of example, in determining the impact of a particular policy upon economic development, a 200 page report compiled by an internationally recognised firm such as PriceWaterhouseCooper, framed in the language of efficiency and development, may be considered as far more expert than a twenty page report written by a voluntary staffer at an NGO that, lacking 'expert knowledge', is written in more vague or abstract terms. Even should the sympathies of a

Commission working staff member be with that NGO on that particular topic, as the policy-making process of the EU relies highly upon 'expert' information, they lack the institutional power to base legislation upon that submission.

In summary, while knowledge and power are very closely linked, they are ultimately different. Furthermore, it is helpful to break down 'knowledge' into its different forms, which may be mutually reinforcing and help to add to the formal legitimacy of law-making processes. Institutional knowledge has to be coupled with expert knowledge in order to be successful in having influence over decision making – one without the other may ensure access, but cannot ensure legislative legitimacy within the dominant understandings of how the European Union institutions function, whereas expert knowledge provided without institutional knowledge may be discounted as not falling within the bounds of acceptable/accepted discourse, or fail to reach the right actors.

## 4. TECHNOCRATIC CERTAINTIES

By Michelle Everson

### **Shotgun Politics**

There is no alternative: the brutal imposition upon Greece of a socially-unsustainable regime of economic conditionality in July 2015 has been presented as an economic imperative by the governments and technocrats of the Eurozone. The effort made by the Syriza-led Greek Government to win for itself a space for a politics of choices, or for the pursuit of solvency through state-stimulated growth has been decisively foreclosed. Economic conditionality and the dissolution of state funded welfare is an immutably unforgiving feature of the modern world.

The brutality of the European Union's post-economic-crisis commitment to a shotgun politics whose exact contours are – for some unlucky ESM debtor states – dictated by the unholy technocratic alliance of Commission, ECB and IMF (the 'Troika'), cannot be denied: millions of often poorer European citizens are now subject to an austerity regime of slashed pensions, privatisation and unemployment, as well as greatly diminished health care. Yet, brutality cannot be opposed through democratic process or through constitutional complaint: it must be accepted in its entirety. This leaves us with one vital question: what has happened to the European project; one originally founded in peaceful union between the democratic states of the western European continent, and one which was built up on socialising post-war traditions?

For Martti Koskenniemi, writing more generally about the managerialist quality of international regimes, an end to politics, as well as to democratic process within post-national forms of organisation, has its roots in the power of administrative science. Drawing explicitly upon Foucauldian first principles, Koskenniemi attributes the normatively-void discourse and fact of internationalist managerialism to the cumulative transfer of administrative capacity from national governments to post-national governance regimes, and to the concomitant establishment of the post-national powers of expansive technocratic calculation:

If 'government' connotes administration and division of powers, with the presumption of formal accountability, 'governance' refers to de facto practices and is – like those corporate enterprises

in which the term originates – geared to the production of maximal value (Koskenniemi 2009:409).

Our modern internationalism has no normative content, is blind to social and democratic value and is concerned simply to expand its powers. Has the EU also become an instrument of managerial science, a mask for normatively-voided managerialism? The answer to this question must be no and this for one simple reason: the technocratic assault being made upon debtor states within, for example, the European Stability Mechanism is not void of politics. It is instead an arena for a shotgun politics founded in a dominant belief that there is no economic alternative to the imposition of austerity.

Thus, the most striking feature of current crisis is not that it is devoid of politics, but rather that foreclosure of a political space for the establishment of democratically-legitimated alternatives has been accompanied by its own aggressively-political commitment to pursuit of a market-driven exit from crisis. The rejection of Keynesian approaches to the overcoming of crisis is as pervasive within the Eurozone as it is politically-dominant: a political programme of private wealth creation as solution to Greek malaise is imposed as *credo*; as a faith that cannot fail. The slashing of state budgets and the privatisation of state function is designed to stimulate private wealth creation and has its own appearance of holiness, or its own apparent normativity: we are imposing pain now so that the working man and woman will enjoy benefit in the future. At the same time, the discourse of austerity projects its own inevitability: we have no choice, this is the way the world is, and this is the only way forward. The economics of the private market have become an objective reality, a space which we cannot contest. Equally, however, the market has also morphed into a machine which, it is asserted, will provide us with a certainty of growth and wealth. The duality of the discourse of economic conditionality is immediately striking: the ‘is’ of the market is made inseparable from the ‘ought’ of pursuit of wealth through austerity.

### **The economic certainties of risk**

In its turn, the miraculous conjoining of is and ought within a political imperative of austerity and the wondrous end of political contestation in the welfare-securing inevitability of economic growth, may be argued to mirror and reproduce the birth of new certainties in economic method. The birth of a modern discipline of economics may be argued to date from 1921 and the publication by Frank Knight of his thesis that certain profit might be secured where the uncertainties of market operation can be translated into risks, such that they can be managed (Knight 1921). From the hidden hand to observable and manageable phenomena: the emergence of modern economics as a discipline of objective observation also found its counterpart in the academic endeavour both to project and to control the machine of the market. For Knight himself, this effort was, in his final analysis, utterly illusory. Combining philosophy with his economic observations, Knight characterised the entrepreneurial spirit not as one of pedestrian risk management but, rather, as one of the embracing of the non-quantifiable uncertainties of market operation. Supply and demand remained adjuncts to human interaction and, for that reason, would always be subject to stochastic variation: only the brave would hazard their all in market exposure because true profit is born of uncertainty. However, for yet others within the discipline scientification became an ambitious end in itself, such that economic observation sought its own realities within market operation, more particularly seeking to master the market by identifying and combatting the “disutility” of market uncertainty (Outreville 2011).

The movement, management and pricing of risk have moved from the periphery to the core of financial activity (Born & Zhu 2012:251).

Sovereign debt crisis, the immediate source of Greek misery, must similarly be seen in the far broader context of financial crisis, and with this in the context of the epoch-defining economic preoccupation with the extirpation of a disutility of market uncertainty. Current pressure upon state budgets has followed directly on from the general loss of liquidity in banking and capital markets. These markets are themselves ruled – at least since the ‘big bang’ of 1980s capital market liberalisation – by a dominant economic and technocratic belief that market operation poses risks, rather than uncertainties; and, above all, that it poses risks that can be managed.

This unholy alliance between economic theory and technocratic direction within an increasingly scientific process of risk management has surprised as much as it has confounded, above all because it has outlived the financial crisis which so brutally exposed its flaws. “Financial innovation is of limited value relative to the risks engendered” (Garicano & Lastra 2010:7): an assessment common within financial literature has nonetheless found little purchase within a post-crisis environment, which continues to tolerate the financial innovation that created the bad risks which swept through the financial system to precipitate collapse. Instead, continued belief in a science of risk management has only strengthened a technocratic approach to the regulation of capital markets, has prompted – in only one amongst many prominent examples – transfer to Central Banks within the Eurozone and throughout the globe of a new function to exercise “macro-prudential supervision” over banks and markets which pose “systemic risks”.

### **A psychological malaise**

At one level, the counterfactual nature of modern economic and technocratic method is difficult to prove: this age is one of big data, exponential technological advance and the undreamed of ability to master vast amount of information, such that many new regulative opportunities may be discerned. Yet, the very certainty of the risk management approach, the political refusal to afford macro-economic credibility to any thesis that postulates the unmanageable uncertainties that might undermine economic growth, are just as surely indicators of the strangeness and inadequacies of an ‘is-ought’ approach to economic management; of the challenge it poses to our classic scientific method grounded, founded – following Popper – in the potential for falsification.

Given this, a particularly interesting counterpart to the scientific tendency within a modern discipline of economics may be found in the writings of one atypical economist of the post-war period, Walter A. Weiskopf. As mainstream economic study increasingly subsumed itself within the effort to master a posited objective reality of markets, Weiskopf turned instead to the business of observing economists. Taking a psychoanalytical approach, Weiskopf identified the existence of uncertainty as a ‘psychological malaise’. Uncertainty is unbearable to human nature and this is equally true in the sphere of economics. Asking himself whether ideas or interests led the discipline, Weiskopf concluded that there was no difference between the two and that, in the shadow of uncertainty, symbolism becomes the only and primary tool with which to overcome uncertainty: only in creating symbols can we hope to make any sense of a wholly incomprehensible world. In turn, our symbolism is subsequently legitimated, or systematised with the aid of scientific discourse and method (Weiskopf 1977; 1979; 1984).



The challenge made by Weisskopf to the development of modern economics as a scientific discipline is a deep one: where this analysis is taken to its conclusion, the science of economic method is revealed as a chimera, no more than a mask for a symbolic effort to understand the impossible, to conquer an uncertainty which cannot be mastered. At the same time, symbolism is the product both of ideas and of interests, such that the impartiality of economic method – and its servitor technocracy – is always in doubt.

## **Symbolic ideologies**

### *Scientific 'universalism' and the democratisation of capital*

Writing with much hindsight, left-leaning critique of the technocratically-flavoured economic revolution dating from the Thatcherism and Reaganomics of the 1980s has been myopic, not only to the degree that it has failed adequately to weight the democratising attractions of capital liberalisation but, also, since it was founded on a core misconception, which equated liberalisation with deregulation. The UK Gower Report of 1983, presaging the 1986 Financial Services Act and, above all, its author's curt assertion that he was not 'in the business of protecting fools from themselves', may now be viewed as paradigmatic, not simply of the Big Bang unfettering of private capital markets, but also of a long-term and globalised trend that has opened up the vital benefits of the ready credit of financial innovation for a mass population more commonly used to the deprivations of opportunity rationing. The understandable preoccupation with the programme to end nationalised ownership within the establishment of the shareholder society, has thus perhaps found its most unfortunate counterpart in an under-theorising of the consequences of capital market reform and the revolution in the provision of financial services.

Above all, universalist impulses – or a globalisation-driven quest for an objectively-universal measure of welfare – together with the increasing dominance of scientific claims to management-mastery of social process, have also played their own important part in inducing the left to implicate itself within, rather than to resist capitalist hegemony, through its pursuit of a programme of 'privatised Keynesianism', whereby private capital markets have substituted for state welfare (Crouch 2011). At the same time, the redefinition of private capital creation (debt) as leverage, or as an objectively-definable risk that can be simultaneously fostered and controlled, has allowed governments of the left and the right to abdicate their political responsibility for the pursuit of public welfare. This has been achieved within a very modern materialism, or a scientific outlook that posits a reality, or inevitability of social organisation that, just like the physical universe, is extraordinarily complex in its composition, but which can likewise be made predictable within ordered method. However, as political ideology has ceded to scientific materialism within the transfer of risk management processes from the physical to the social realm, modern markets have themselves also become increasingly alienated from their inspirational roots in spontaneous social interactions; they have been fatally distanced from a Hayekian normativity of liberating unmanageability, to be constrained and contained, instead, within an increasingly dominant paradigm of technocratic certainty.

### *Render unto the Globalised Market...*

The European Union is not alone in the extent of its denial of a Hayekian truth of a market of spontaneously unmanageable human exchange relations. Instead, mainstream political debate in

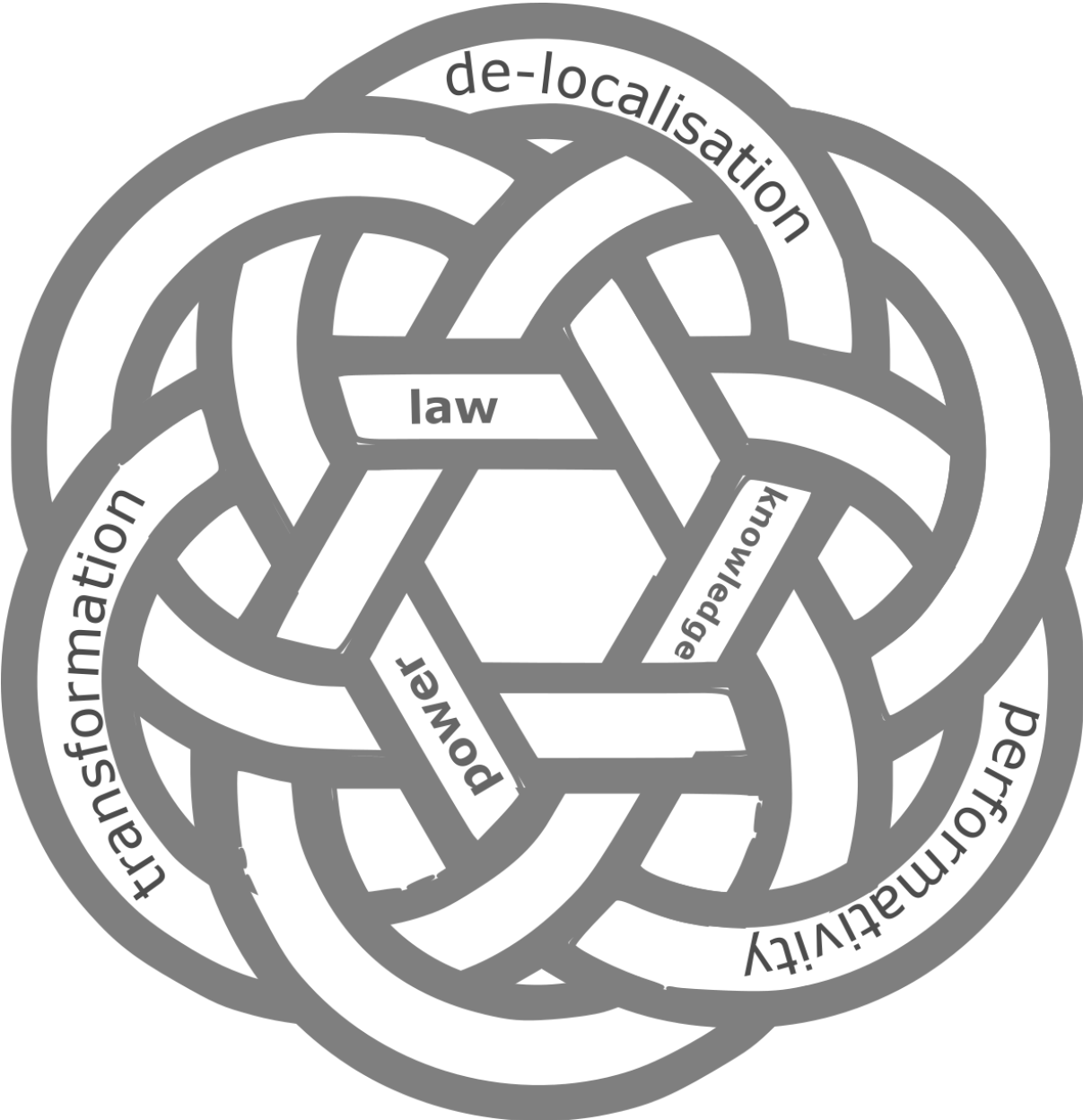
the age of privatised Keynesianism has been remarkable only for its silence about the consequences of the amplified socio-economic expectations that have been levelled at private financial markets following state welfare withdrawal: above all, the inevitability of individual loss due to market failure, but also the difficulties facing the denuded state in the matter of the co-ordination of competing welfare claims. To render unto markets the truth of the uncertainty that is theirs, would appear to be too unpalatable a political utterance for almost all. However, both within Europe and far beyond, the attractions of political abdication are only magnified by the material allure of the science of new economic liberalism, or their promise of value-neutrality in the positing of universal welfare gain within market disciplines, which are deemed – counterfactually – to be a given force of nature.

As Walter also teaches us in his disregarded writings, the allure of a certainty of welfare maximisation within scientific economic process is not new. Whether founded in the Newtonian mechanical determinism, congruent with the invisible hand of universal welfare maximisation of neo-classical economics, or more subtly-reliant upon the Keynesian levers of direction over a ‘Heisenbergian’ paradigm of complex organisation, the modern system of economics was necessarily blinded from the very outset to indeterminate phenomena which were not and could not be systematised within its own symbolism. Similarly, the chimera of scientific economic modelling often masks a procrustean marriage between interests and ideas, between constructed knowledge and desires, and can only be combatted through development of an ‘economic morality’:

Most disputes in economics are about ends. How should resources be allocated? What should be produced and who should get what? There are those who see in these normative questions mere conflicts of interest; they will see economics as the discipline of political economy. Those who believe that such questions are questions of ultimate goals and ends of human life will see economics as a moral science (Weisskopf 1984:360).

Thirty years later, the contemporary marriage between economics and scientific method, in all of its reification of technocratic method and blindness to Hayekian uncertainties, would also seem only to deny the political and the moral dimensions of resource allocation. Weissenberg notably placed much of his own moral faith in the transferral of Habermasian efforts to bridge facts and norms from the philosophical to the economic discipline; yet, just as Habermasian visions of constitutional patriotism can now appear exhausted in their paradoxical closure to the moral indeterminacy of globalisation, our contemporary, political and moral abdication for public welfare is perhaps a similar reflection of heightened psychological malaise in the face of the myriad uncertainties of economic globalisation. The tyranny of technocratic certainty, its all-too-ready preparedness to abdicate an inspirational pursuit of universal welfare to new processes of capital formation, as well as its chimeric belief in its own powers to oversee and manage debt as risk, is also a failure of symbolically-constrained imagination.

# DE-LOCALISATION



## 5. DE-LOCALISATION OF KNOWLEDGE

By Marija Bartl

Since the normative claims of expertise build on certain epistemic convictions regarding the nature of knowledge, the critique of its normative claims are often based on the expertise's performance: namely on the question whether expertise-led law-making does actually deliver objectivity, neutrality, and universality. In this contribution I will argue that the critiques of expertise become even more salient beyond the state because of the process of de-localisation of knowledge. Disembedded from the broader political, social and economic contexts, which have provided for both the meaning and the 'reality check' on its content, expert knowledge ceases to respond to the lived material reality of the majority. In the process of de-localisation I argue, that expert knowledge becomes less *true*.

The three major (yet intertwined) lines of critique of expertise are democratic, elitist and epistemic. The democratic critique focuses on the political character of decisions taken under the veil of neutral expertise. This critique suggests that one can not dissociate political from a-political decision-making, or divide tasks of 'technical' and 'implementing' nature from public policy where values play a significant role. The 'elitist' critique suggests that while experts carry with them their own social, cultural, economic belonging, and often their organisational rationality, they fail to represent the interests and values of all affected. The third critique is more pronouncedly epistemic. Expertise/science is not good enough; it does not take all relevant considerations on board, or it neglects different kinds of knowledge that may be relevant for deciding a particular question.

I do not aim to provide herein a comprehensive overview of the critiques of expertise, and will satisfy myself with the inference that these challenges exist and are not marginal. Instead, I aim to suggest that the increased reliance on expertise beyond the state renders the major lines of critique far more salient because of the importance of the situatedness of experts and expertise for both its meaning and validity.

Let me start with an example from the banking sector. Within the framework of the Basel Committee, experts from national specialised agencies come together with the members of industry to develop regulatory standards. These experts (employees of financial ministries and central banks, or the members of the industries) are the bearers of explicit or 'codified knowledge' – expertise – within their respective environments. Their expert knowledge is however embedded, or personally situated, in several ways.

First at the level of the individual expert, the expert is embedded through her participation in various social relations, social networks, cultural environment, or social classes (micro level). Second, experts are embedded at the level of organisations, in ministries or central banks, which are characterised by certain internal discourses as well as more tacit organisational knowledge and non-codified shared understandings (meso level). Finally, the expert is individually, as well as through her organisational placement, further embedded in a broader political, social and cultural context of a particular political community (macro level).

We need to understand the embeddedness at all three levels as both enabling – it enables the experts to 'know what they know', to attribute meaning, but also to relate to the context in which they find themselves. At the same time the embeddedness is also constraining – it not only forms

what experts know, but also can enforce certain level of responsiveness to the reality or truth presented by the context in question.

Simplifying, in post-national governance, certain constraints linked to the situatedness of experts weaken, while other may get stronger. Going back to our example, while the governmental and industry experts still remain personally situated within their networks, as well as organisationally situated (within their ministries or industry), broader social, political and cultural contexts become far thinner. Yet it is this level of the situatedness of experts that is the best channel for tacit knowledge regarding the lived material reality of the less privileged majorities.

As a consequence, while experts still reproduce their knowledge, including tacit knowledge flowing from their personal history, along with the reproduction of the organisational discourses and understandings, to which they remain bound, they are far less constrained by public debate, cultural exchange or the material reality of the broader political community to which they belong. Not being confronted directly with the lived social reality of 'the many', it will be easier to endorse the validity of monetarism in Frankfurt than in Athens.

The de-localisation of knowledge has been often justified by the need to escape (national) politics. It has been argued that the state had become inappropriate as the ultimate locus of decision making for normative and practical reasons. Yet, the de-localisation of law-making processes that came with the move away from the national arena is not normatively neutral or necessarily always 'practical', raising theoretical issues of its own. The reproduction of formal knowledge without the 'reality check' of broader socio-political exchange is, in our view, a reason to doubt both the 'quality' of dis-embedded expert knowledge as well as its neutrality/objectivity. If this expert knowledge is not able to address, effectively, the concerns of those whom it governs, its quality is compromised. If, on the other hand, as a consequence of this knowledge, we observe patterns of regressive redistribution, its objectivity and neutrality may be questioned.

## 6. PERFORMATIVITY, (DE-)LOCALISATION KNOWLEDGE AND THE POLITICAL PROCESS IN INTERNATIONAL HERITAGE LAW

By [Lucas Lixinski\\*](#)

### **De-localizing knowledge with and beyond the state: the case of heritage law**

Within the state, knowledge is de-localized in the process of production of nomination files for domestic tentative lists. More specifically, international law in the area of cultural heritage shapes domestic practices to the extent that those treaties command states to create domestic structures that replicate the international ones, and reinforce the objectives of the international treaties. One of these structures is the listing process, which is best discussed in its context beyond the state.

Beyond the state, knowledge in the context of post-national law often has a claim to universality. In the context of culture and cultural heritage, that claim often reaches beyond what international processes can actually deliver.

In UNESCO processes, even though the production of knowledge with respect to heritage relies on the input from States, the more substantive investigation over the claims of value of heritage and its merits is done by experts. For instance, with respect to World Heritage, these experts are members of organizations like ICOMOS and IUCN, and travel from one location to the next assessing the “outstanding universal value” of heritage sites against universal criteria. In other words, they have to make the worth of heritage fit into one of the boxes of the criteria for outstanding universal value. That process of translation cuts both ways: if on the one hand it makes heritage more easily understandable across the globe, on the other hand it also decontextualizes heritage, and moves heritage’s value away from the people who live (with or around) heritage.

Recent instruments like the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage explicitly mention the need for community involvement, and the 1972 World Heritage Convention’s Operational Guidelines have been amended precisely to promote more engagement from communities. These instruments act as attempts to re-localize knowledge, in some respects.

This type engagement is important, as it gives communities the chance to discuss heritage in their own terms, parallel to the State (even if it is still ultimately the State that has the prerogative to nominate heritage for safeguarding under these instruments). However, all of this engagement is still filtered by experts, as they are the ones who produce the reports and mediate the knowledge inputted locally. As a result, heritage holders are treated first as objects, rather than subjects, with respect to their own heritage. They are informed about what heritage is and why it should be protected, but do not get to make the final decisions about those themes. In the process, they become themselves part of the heritage on whose behalf they speak.

### **Role of political processes for channelling the concerns of indigenous peoples and other types of non-expert communities into law-making**

The political process can play a valuable role in channelling the concerns of non-experts into law-making. One of those possibilities is what Michel Callon (2009) and others have called “dialogical democracy” through “hybrid forums”. Hybrid forums essentially work as means to bring together experts, non-experts, laypersons (in the case of built heritage, people who live in or around heritage sites) and politicians together. The non-expert groups involved play the important role of rebalancing the interests at stake away from expert rule, and generate their own forms of knowledge that have a bearing on governance. Specifically with respect to the law, it means the law stops operating as the enforcer of expert rule, and can again function as a language for the articulation of claims by the broader community. In practice, it means putting local actors front and centre in law-making and law-implementation. In some instances, the application of dialogical democracy means partly doing away with representative democracy as the primary means of law and policy design, or at least adding other mechanisms next to it.

There is an important distinction to be drawn in this context between “documentary” expertise and “participative” expertise. In the former, expertise is a profession that can hardly be challenged; in the latter, expertise is something that is open to different capacities, and that can inform how people relate to heritage (Tornatore 2011). The approach of dialogical democracy in many respects recalls the idea of participatory action in social theory (Fals Borda, 2001), which also proposes blurring the distinction between the expert and the layperson, or, perhaps more radically, between the object of study and the researcher, as action research seeks to do. Participatory action means reconsidering the role of the heritage holder as a part of the heritage themselves, and restoring some of their agency, which is often stripped away in favour of base decisions about whether heritage should be protected, for instance, and on what terms. These decisions are the rules of the game, which the expert lays out acting as the stage manager. Further, in the case of heritage, it would mean understanding that heritage is not only something to be gazed at, but something that is lived by people who should have a say in how their heritage is understood by the field of heritage and the regulatory spaces associated with it. PAR enhances dialogical democracy by helping constitute the actors needed for the hybrid forums, and by validating these fora as producing important and actionable knowledge about heritage and its values.

Dialogical democracy in the heritage context would work such as to inform processes about how heritage is chosen for listing or other forms of protection, why it is valued, and what the narrative of value around it is. In the specific context of intangible cultural heritage, for instance, the 2003 Convention for the Safeguarding of the Intangible Heritage requires that communities, groups and sometimes individuals be involved at a domestic level in the process of identifying heritage to be added to national inventories that serve as the basis for international nominations. And that is a terrific new development in heritage law internationally, but it is still fraught with difficulties. More specifically, and borrowing a critique from the context of “participatory development” (Kapoor, 2008), it is still experts who decide the rules for participation of communities, how they get to be defined, when they speak, and for what purposes.

## 7. WHEN METHOD IS DANGEROUS: POLITICAL STAKES OF METHODOLOGY AS KNOWLEDGE WITHIN THE POST-NATIONAL LEGAL PARADIGM.

by **Horatia Muir Watt**

**In a Nutshell**

Legal methodology as a specific form of legal knowledge shot through with ideology, both empowers and disempowers in the same way as other forms of legal knowledge, but perhaps less visibly so. The discipline of private international law, which has always prided itself on its exclusively methodological content, has facilitated the disembedding (the « regulatory lift-off », Wai 2002) of the global economy (and its knowledge structures) first by providing the methods and categories through which privatisation has taken place, and then by excluding from legal notice the normative activities in which private actors indulge, so as to create a regulatory limbo. In this respect, a particular understanding of private law, shielded and separate from the public and political, and the limited acceptance of legal pluralism, framed as conflicting State norms,

has led to demise of any effective governance of privatised regimes. The search for plausible methodological alternatives to this dominant paradigm by probing legal knowledge in a global perspective is potentially subversive (“a dangerous method”), since it requires scrutiny of the underlying visions of the world ingrained in private international law as a disciplinary field, which are likely to uncover power relations and distributional effects. This is why the deconstruction of the ideologies implicit in legal methodology has to be done, if any form of re-empowerment through re-embedding of legal knowledge is to take place.

### **Law as Methodological Knowledge**

Law’s claim to being a specific form of (social) knowledge is largely linked, at least in the modern Western tradition, to its predominantly methodological content. In other words, it is difficult to start a discussion about what law is, or how it differs for instance from other social practice or from religious or ethical precepts, without some kind of reference to method. Methodologies in law can mean many things. As a form of knowledge about method, methodology may refer to the formal processes and protocols which set law apart from political decision-making and thereby justify its claim to political neutrality. Alternatively, it may mean specific modes of (largely judicial) reasoning which in turn set it apart from forms of rationality understood to be properly scientific; in this perception it has strong links to epistemology. These two perceptions are to a large extent entwined (law’s neutrality is often seen as linked to scientificity, for instance).

Methods do not appear naturally, of course (any more so than methodologies); they correspond to complex understandings of what law is, where its legitimacy comes from, how power is distributed among various branches of government, etc. Methodological knowledge is «shot with metaphysical understandings». These shape the complex lens through which the world is viewed from the standpoint of the law. The assumptions, fictions, concepts, theories, distinctions, constraints and understandings constitutive of the modern Western legal paradigm, take the law to be a self-contained, stable and coherent system and design its processes, protocols, forms of rationality and styles of argument accordingly. Thus, methodological nationalism expresses the idea that the state presents the ultimate point of reference for both domestic and international law, excludes from law’s purview certain forms of community or certain actors, in the same way as it focuses on certain types of relationship or certain forms of accountability.

### **Power Struggles under Cover of Method in Private International Law: How Legal Method-as-Knowledge Disembeds**

Outside the realm of public law, its institutions and processes, but equally beyond the tunnel vision of private law still focused on individuals and their domestic relationships, the expressions of private power in the global arena continue to take place outside formal legal discourse. In conditions of advanced capitalism, private actors acceding to “regulatory lift-off” and de facto jurisdictional immunity, have structured finance and production through value chains and markets, ensuring the autonomy of these economic processes from more public or collective concerns. Capital has moreover organised its own forms of authority, which arbitrate, enforce and legitimize these structures. In order to understand the ways in which this has taken place, however, the methodological dimensions of private international law which have been central to these processes, now require closer scrutiny.



On the one hand, the private international legal framework has worked negatively to exclude certain forms of power from the legal realm. Thus, rather than contributing to improve the transparency and accountability of the various practices of post-national benchmarking and rulemaking, the law shelters and nurtures private authority by persistent denial of its existence. It is to a large extent through denial that states have been complicit in the development of informal empire, which now threatens to overwhelm them. The explanation lies in the genealogy of the discipline and its subsequent subordinate or mimetic relationship with public international law. The subjects of public and private international law were supposedly distinct, but state sovereignty—in its double external and internal dimension—maintained a prescriptive monopoly in either sphere. Meanwhile, this denial of private authority and law-making in the global arena, while designed to ensure the supremacy of state sovereignty, leaves private power supreme.

On the other hand, beyond the denial that any displacement of sovereign authority is taking place, private international law has, more actively, made available tools for certain non-state actors which work to empower them so as to rise above state regulation, all the while stifling mechanisms which might ensure a correlative form of accountability. This second idea refers, therefore, to the discipline's more positive complicity in enfranchising the most powerful private economic actors, whose quasi-law-making activities across borders are certainly a central part of the question of new global forms of authority.

### **Emergence of a Global Paradigm**

Arguably, however, a « global legal paradigm » (Michaels, 2013) is emerging (in terms of thought processes, modes of reasoning, patterns of argument, schemes of intelligibility, or indeed linguistics). Competing, diffuse, post-Westphalian forms of authority and correlative displacements of power to non-state actors are difficult to capture – whether to legitimize, challenge, or govern – within traditional forms of legal knowledge, or through familiar methods of legal reasoning. Global law's "intimations" (Walker 2015) are linked to the emergence of unruly normative phenomena which can no longer be contained or ignored through the use of the traditional methodology. Law's role, foundations, structure and content are in question, correlative to the "loss of control" of state. This shift is linked in turn to changing understandings of society, nature, science, politics, subjectivity and perhaps humanity itself.

Global processes, indeed, seem either to have left law behind, or to have broken its conceptual framework. Law is challenged in its traditional functions by competing, diffuse (post-Westphalian) forms of authority and diluted public power; struggles for legitimacy in the wake of such displacements of power to non-state actors; subsequent inversions and subversions of sovereignty, investing in private actors or indeed signifying obligations rather than supremacy. It can no longer provide an overall scheme through which to understand other social spheres, by defining authority, allocating responsibilities, or guiding conduct outside structuring legal fictions of state sovereignty and autonomous legal systems.

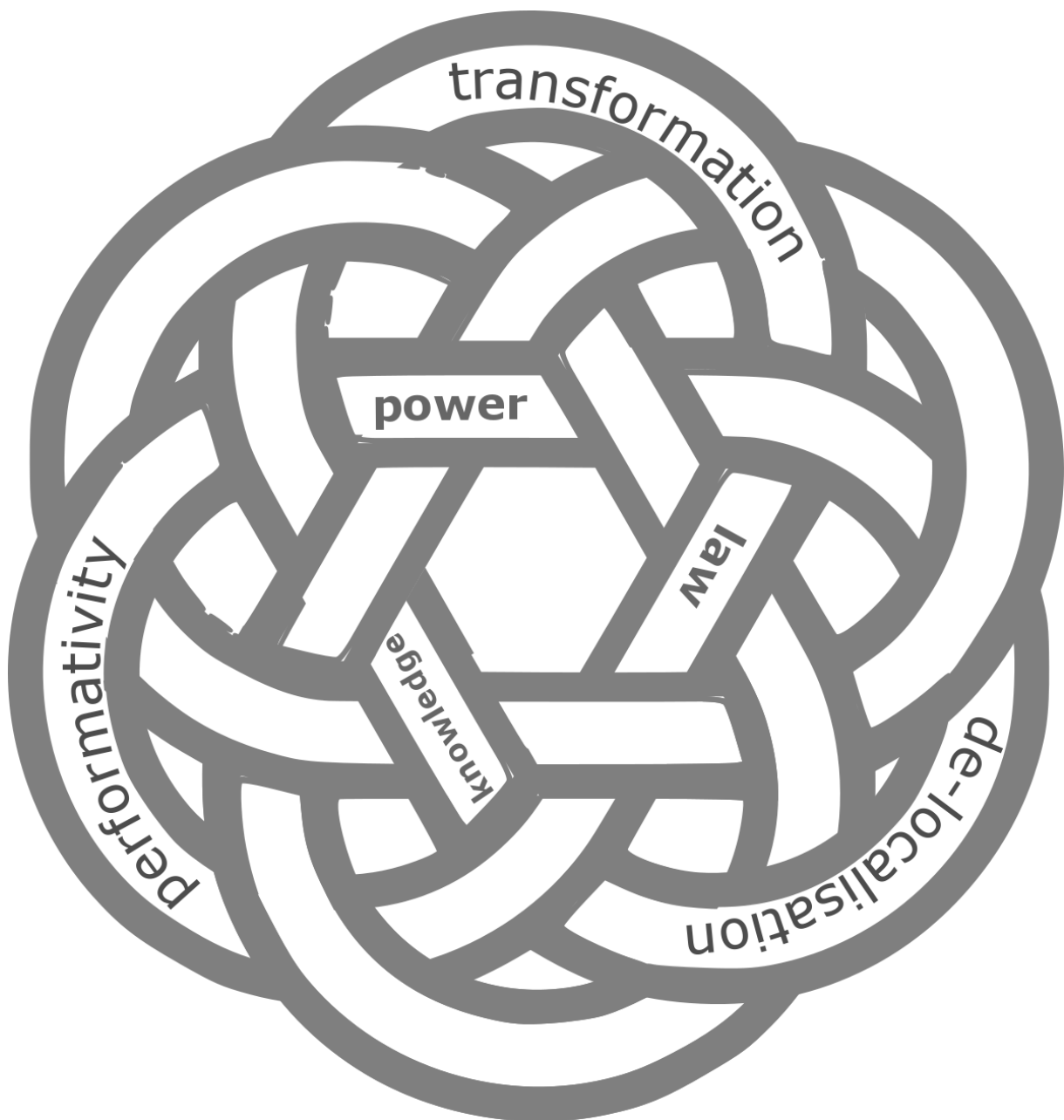
### **An Example of the Political Stakes of Methodology: A Judicial Attempt to Re-Embed**

One example can be found in a child slavery case involving cocoa farms in the Ivory Coast. Here a court (US Court of Appeals for the 9th Circuit) refers (for jurisdictional purposes, under the Alien Tort Statute) to the economic leverage exercised by a particular brand in the world commodity

market, from which it then draws legal inferences. In *Doe v. Nestle USA, Inc.* (filed September 4, 2014), the Court asserts "... the defendants had enough control over the Ivorian cocoa market that they could have stopped or limited the use of child slave labor by their suppliers. The defendants did not use their control to stop the use of child slavery, however, but instead offered support that facilitated it. Viewed alongside the allegation that the defendants benefitted from the use of child slavery, the defendants' failure to stop or limit child slavery supports the inference that they intended to keep that system in place. The defendants had the means to stop or limit the use of child slavery, and had they wanted the slave labor to end, they could have used their leverage in the cocoa market to stop it. (...) the defendants participated in lobbying efforts designed to defeat federal legislation that would have required chocolate importers and manufacturers to certify and label their chocolate as "slave free." As an alternative to the proposed legislation, the defendants, along with others from the chocolate industry, supported a voluntary mechanism through which the chocolate industry would police itself".

The legal response can be understood in terms of social responsibility, jurisdictional touchdown, victim access to justice (rather than territorial jurisdiction, contract, corporate form, market) and a political horizon in which the pursuit of profit or market efficiency is balanced against other values. Remarkably, neither territory, nor sovereignty, nor the requirements of foreign policy are part of the legal reasoning used by the court, although they been the focus of law's more familiar approach to the governance of corporate conduct abroad. What the Court is clearly attempting to do, within the formal confines of a determination of jurisdiction, is to bring the pressure of the legal system on a point (in various vocabularies, a "hub", weakest link or "pressure point", or a point of "jurisdictional touchdown") in a global production chain. Methodologically, its reasoning does not fit the usual patterns. None of these are legal categories. Furthermore, this passage draws attention to other normative phenomena involving private power, self-regulation, reputational pressure and certification of compliance to moral standards. The leverage of private actors within the market, through their brands, is acknowledged, as are their power of regulatory capture through lobbying, and the questionable results of self-regulation. The question to be asked is whether there is a new methodology at work here and whether its adjustment to global economic processes marks a political shift?

# TRANSFORMATION OF LAW



## 8. THE DISEMBEDDING OF LAW BEYOND THE NATION STATE

By Hans-W. Micklitz

The power of law and legal certainty is built on knowledge of, and accessibility to, the law. This is the lesson to be drawn from the Code of Hammurabi 1800 BC. The Code is carved into a diorite stele in the shape of a huge index finger 2.25-metre (7.4 ft) tall. 1800 or so years AD, the French Revolution left us with the legacy of the Code Civil. Both provide the same message: the law is condensed in rules, and each and every citizen can look into the rules in order to know and to understand what is required from her when it comes to commercial transactions. A large part of the Code of Hammurabi is devoted to contracts, so is the French Civil Code.

The post-nation state arena, the transformation of the nation state into a market state at the end of the 20th century, is about to separate law – what the law is – from knowledge of and accessibility to the law. We understand the European Union, the huge laboratory of new forms of governance, new forms of law-making and law enforcement, its quasi statutory character as the blueprint of the new state, where the disembedding of the law and the separation of what the law is and who has access to the law can be studied paradigmatically. I will first sketch out the European phenomenon and then formulate tentative ideas on the reason behind the development and where it might lead to.

It seems appropriate to distinguish between three forms of disembedding: institutional, substantive and procedural, each yielding its particular ambiguity in knowledge. The EU is the sole supranational organisation with law-making powers. Three powers are involved, the European Commission which possesses the monopoly of initiative, the European Parliament and the Council of Ministers. Secondary community law has to be implemented through the Member States, via national parliaments and/or via national administrative regulations. When it comes to enforcement, it has to be recalled that the EU is conceived of as a true federation. In principle, enforcement lies in the hands of the Member States. They have to decide who is in charge, the shape of the procedure and what kind of rights are granted to the parties concerned. The European Commission holds enforcement powers in competition law, agriculture and to a growing extent more indirectly through what has been termed the ‘agentification’, the mushrooming of European agencies, more or less independent, more or less empowered to take regulatory action, but all ‘guided’ by the European Commission. The European Court of Justice enjoys the sole authority to interpret primary and secondary EU law, but it remains for Member States courts to decide concrete cases. Law making and law enforcement has been disembedded from its nation state context to a transnational polity, with all the widely analysed consequences for the opaque boundaries between European and national responsibilities. For the citizen it is no longer clear who has made the rules she has to obey, who is enforcing the rules ‘really’ (and not symbolically) and who to address in case of conflict. This is what U. Beck once termed ‘organised irresponsibility’. In the 21st century there is no ‘index finger’ anymore which the citizen can consult.

Substantive disembedding refers to the changing character of the law itself. The ‘law’ produced through these new intermingled institutions contains fewer ‘rules’ and more ‘standards’. It then remains for those who have to apply the law, to transform standards into rules. Institutionally, the changing character goes hand in hand with the transfer of power from the legislature to the executive, in the EU context the rise of the EU as an administrative state. The executive turns

into a law maker and, then, enforces the self-made rules. The courts are more often than not required to determine whether 'standards' contain enforceable rights. By way of example, it might suffice to refer to the way in which the Banking Union is built. The 'machinery' can be characterized by the following mechanisms a) the sheer quantity of rules (by now more than 1000 pages already), b) the outstanding use of delegation powers in regulations and directives to the European Banking Authority (EBA), c) the broad discretion which is left to the EBA in shaping of technical standards, meaning 'law' making without law.

On the supervisory mechanism there are 2 major EU Regulation and 2 ECB Regulation, 5 major Decisions and 1 Guideline of the ECB, 1 Recommendation of the Council, 1 Interinstitutional Agreement between the EP and the ECB and 1 MOU between the ECB and the Council for a total of 310 pages of rules and regulations directly affecting banks and interested parties.

On the resolution mechanism there are 2 major EU Regulation and 1 Intergovernmental Agreement for a total of 120 pages of rules and regulations directly affecting banks and interested parties.

The single rulebook is made up of 1 EU Regulation and 2 Directives for a total of 595 pages of rules and regulations directly affecting banks and interested parties. In addition, one has to add the binding technical standards for the implementation of the CRD IV package and the CRR, issued by the Commission on the proposals of the EBA. Up to 8 Implementing technical standards decisions and 17 Regulatory Technical Standards decisions have been taken.

Can we call this 'law'? Is the distinction between rules and standards or the distinction between 'law' (in the old traditional meaning) and non-law (politics?) simply outdated? Who is able and competent to overlook and democratically monitor the law(?) making process? Where is the 'law' going? Is it simply vanishing? Or is simply changing its locus vivendi? Is it generated in 'regulatory silos', in which those who belong to the silo, those who participate in the making and the enforcement are the only ones who know what the 'law' is that governs the silo? What happens to courts if conflicts are increasingly decided out of courts, through Alternative Dispute Resolution Mechanisms in b2c and through arbitration in b2b?

Procedural disembedding focuses on the mechanisms that are needed in the making and the enforcement of the 'law', to co-ordinate the various levels, the local, the national, the European and beyond the international. Highlighting procedures brings legitimacy issues to the forefront. The abundant literature on legitimacy of transnational law can be broken down into two camps, on one side are those who measure transnational legitimacy against established standards of Western democracies, meaning against the standards of the nation state as it has developed over the last two hundred years prior to its silent dissolution. The second unites all those who are in the search for new forms of legitimacy outside and beyond the nation state. They stress the potential of weaker forms of legitimacy, of accountability, transparency and (societal) participation. What matters in our context is the question of 'knowledge'. In a nation state, the parliament is supposed to have the 'knowledge' to take responsible and accountable decision, in a transnational environment, such as the EU, the knowledge is more and more first outsourced to the executive and then to private parties, on which the formal institutions have to rely on in order to be able to concretise technical standards.

Again the Banking Union might serve as an example. There is a move from technicality to technocracy, in the field of banking from technocracy to financialisation. Why speak of technocracy in the Banking Union? The shift is due to what is discussed as the ‘financialization’ of the economy, which disconnected banking and finance from the market for goods and services. We may observe a new stage in the development of law making and law enforcement, a new stage in the society itself, the ‘society of networks’. The knowledge is to be found in the network itself. It might very well be that there is no single authority anymore which holds the ‘knowledge’ in its hands. Knowledge might be spread between different public and private actors – provided the distinction still holds true, over different levels of governance.

What are the reasons behind this development? I see them in the changing character of the nation state, driven by globalization (economics), technology and societal changes. If we accept the credo of systems theory, there is no way back from differentiation of society. However, a society with a state in the current form, this is part of the credo, provides for new opportunities.

## 9. STATECRAFT, LEGITIMACY AND THE EVOLVING STATE

**By Dennis Patterson and Ari Afilalo**

Over the past few hundred years, Europe produced fundamental principles of international law and theory that are today widely accepted and adopted. Much as the Arab world invented universally-recognized numbers with which we still count, Europe has invented essential language and points of reference broadly used in mainstream international practice. In this essay, we review Europe’s contributions to basic assumptions made in international law and governance with respect to doctrines affecting commerce, investment, mergers and acquisitions, intellectual property, and other subject matter areas central to economic and business life. We focus on both internal legal models that Europe framed and that became established structures for modern liberal democracies (redistributive justice in one form or another, State interventionist expectations to shore up economic borders, the right to elect a government, etc.), and international arrangements that were consistent with the modern liberal democratic European model (e.g. liberalization of trade, legal protections for foreign investors, or uniform codes of commercial law for international transactions).

Europe invented and exported a modern liberal democratic model that the French have aptly called the *Etat Providence*. That State’s job is indeed to provide, and it has done so freely throughout the Western World since 1945. The *Etat Providence* redistributes assets. It grants its nationals a package of entitlements to collective resources. The bundle of rights includes instruments that range from transportation vouchers to complex health insurance schemes, all designed to further the overarching State commitment to provide a safety net for its subjects.

The victors of World War II squarely embraced this worldview. The United States, while slower to develop its administrative State and less interventionist than Europe overall, nevertheless subscribed to the European model and even surpassed Europe in many tactical aspects of its modern liberal democratic strategy. America allowed its common law roots to flourish into an astonishingly complex judicial system dedicated to protecting its markets, people and resources.

The post-World War II regulation of commerce and livelihood in the European Statecraft model came hand-in-hand with the protection of personal rights. The modern liberal democratic State derived legitimacy from its management of a social and political structure that bettered the material lot of its nationals. The State protected personal autonomy in numerous forms.

The European model has been a failure. The failure is the result of its insistence on treating constitutional systems of Statecraft as timeless and universal, instead of recognizing that they are rooted in a specific historical epoch that has a certain shelf expiration date. European-born Statecraft treats a system that rejects the right to vote, the separation of religion and State, or a commitment to some form of redistributive justice, as heresy.

Endless protest movements, coupled with gut wrenching anxiety over the decline of State financial welfare commitment, have created a negative image of freedom of economic activities associating the unprecedented liberalization and expansion of commerce through social strata and groups with inequalities and oppression. The imagery and arguments used in the European marketplace of ideas are the same as last century. The Left wants more entitlements. The Right wants more free markets. Both deconstruct and reconstruct each other and, in the end, they make the same mistake of searching for a single and timeless truth that would transcend time and subject matter to provide the ideal mode of government. The “single truth habit,” traceable to the Church’s and the Kings’ appropriation of legitimacy from a single heavenly voice, led Europe to retain obsolete systems, impose them as others by force or persuasion, and change only after great damage has been wrought. This happened in the 20th century, in the entre-guerre age of darkness after euphoria, and it is happening now.

It was no less difficult for the Statesmen and Stateswomen of the 20th century to reject the notion that the “business of America is business,” that isolationism was the true protector of American values, or that commerce was a game to win by selling more than the neighbour rather than specializing. We have reified the system that followed the mercantilist, consolidating world with a timeless understanding of comparative advantage, non-discrimination against foreigners’ economic interest, voting for one’s own government, and the Provider State. It will be difficult to reject those principles, in part because of how lofty and constitutionally sound they have been for so long. However, this choice must be made and, unless we do so proactively now, we will be thinking again about the issues in 5 or 10 years, at the end of the first globalized conflict of the age when fractured democracies will learn in blood the lessons that they could already draw from our past with experience and common sense.

## 10. ECOSPACE AND CONSTITUTIONALISM AS A WAY TO COUNTER THE THREAT OF HEGEMONY AND SECURITIZATION

**By Joyeeta Gupta**

This two page essay argues that (a) in the context of the Anthropocene, there is a real threat that countries and actors will try to monopolize access to resources. (b) Although international law provides a way to generate treaties that can manage these resources, it is more than likely that only fragmented and issue-by-issue governance may emerge. (c) Such fragmented governance will inevitably (i) marginalize and exclude those who are more vulnerable in the system as well as (ii) postpone decision-making on environmental issues with high political and economic

stakes. (d) Hence there is need for some kind of global constitutionalism that will try to set some ecological limits to our behaviour as well as protect the most vulnerable.

In the context of the Anthropocene, human society faces the challenges of, real or policy induced, reduced per capita availability of resources and sinks; real in terms of for example actual physical shortages of clean fresh water in spatially defined locations and policy induced when efforts to control greenhouse gas emissions lead to policies to reduce and/ or ban the extraction of the available oil and gas resources. This reduced access to resources and sinks is referred to as 'ecospace'. This 'ecospace' is vital for the economic wealth of a nation state as these are the raw ingredients used for all aspects of life ranging from food, shelter, to the technologies we have come to depend upon. The need for conventional 'growth' in the Anthropocene will lead actors and nations to either maximize their own access to ecospace by privatization of the resources and sinks (e.g. through land and water grabbing); demanding hegemonic control of these resources and sinks (e.g. through demanding expansion of the political and economic borders into the oceans); and/or through polycentric governance approaches where more proactive governance actors gain control over these resources. This is likely to both marginalize the most vulnerable and weak actors in the system whether they are least developed countries, small island developing states or vulnerable peoples – such as indigenous peoples as well as those dwelling in informal settlements; and externalization of ecological impacts for as long as possible – such as climate change.

While the international legal system is trying to address the issues concerning the vulnerable, legally binding treaties to help developing countries have been reduced to soft law commitments, many of which have never been implemented, such as the instruments of the New International Economic Order and the Right to Development. Instruments to help indigenous peoples are fragmented in nature and their ratification is so spatially diverse that it is unclear to what extent their rights have actually been recognized in a legally binding manner. The Climate Convention does make some provision for adaptation, but the funds are far below what is required for adaptation to the impacts of climate change.

At the same time, the legal system has scarcely been able to deal with the manifold fresh and ocean water challenges, air pollution and climate change or with land-based challenges such as deforestation, the impacts of mining and the use of pesticides and fertilizers for agriculture. Instruments are being developed in a highly fragmented manner, with complex implications for policy-makers, building on the few areas where there is political agreement. This occurs despite the overwhelming scientific (and social science) evidence regarding the challenges facing both ecological issues as well as those facing the poor and under-privileged.

Given that fragmentation is thus inevitable, especially in the context of governance in the Anthropocene, I argue that we have reached a constitutional moment! It is time for global constitutionalism because (a) we have reached the era of the Anthropocene and this is going to have serious impacts on countries and peoples such that those who cause the problem should be held responsible, even if they are the most powerful on earth; otherwise the Earth may become uninhabitable for animals and humans alike – there is already evidence that we have entered the 6th extinction event on Earth since its creation. (b) We need to find ways to reach out to the vulnerable and weak and empower them to both live in dignity but also to participate in the process of defining our politics. (c) We have also reached a point of changing geo-politics; as



economic and market power slowly moves to Asia and political power to the BRIC countries. There is a window of opportunity for old and new powers to pursue this new constitutionalism!

We can already see some elements of global constitutionalism emerging. The Charter of the UN perhaps gave this process a kick-start. The Rio Declaration on Environment and Development provides key principles that could be critical for such a constitution. The human rights declarations also provide other key elements. Finally, the Paris Declaration on Aid Effectiveness and its follow-up declarations provide key elements as to how global cooperation can take shape in terms of the principles that such a global constitution could embrace. In terms of goals, the Millennium Development Goals and their follow-up Sustainable Development Goals, despite their inherent shortcomings, provide a story line for the goals that the global community could embrace. The global constitutional project is beginning; but needs support.

Clearly, constitutionalism poses a threat to the most powerful actors and states by suggesting that their powers are not unlimited and that they can be held accountable for their actions in relation to collective action problems, externalized impacts and the provision of (global) public and merit goods. However, the European Union appears to be committed to this approach; China and the G77 have long asked for global rule of law where they mean both procedural and substantive rule of law and constitutionalism is only an additional step. The question is whether the US and Russia would support global constitutionalism. While there is staunch support for constitutionalism within the US, there is skepticism about constitutionalism globally. However, in the context of changing geo-politics, there may be a window of opportunity here.

Constitutionalism is also arguably a threat to pluralism which makes space for multiple visions of how society should be constructed. In particular, the question is often raised as to whether constitutionalism at global level could be a threat to, for example, indigenous peoples who are guided by very different value systems. In other words, if some values are institutionalized in a global constitution, these may impose values on others; i.e. there is a certain threat of hegemony in globalized constitutionalism. I think the threat of hegemony in constitutionalism in the Anthropocene should be visualized more as a threat to the powerful, rather than to the powerless. Constitutionalism should aim at both conserving our ecospace capital and allowing the functioning of ecospace services which is, for example, critical to the beliefs of not only indigenous peoples world-wide but also small farmers, craftsmen and micro enterprises that are so directly dependent on the locally available natural resources. Constitutionalism should also aim at ensuring responsibility and liability for externalized harm; thereby aiming at protecting the most vulnerable to global change. In fact, many national constitutions make very specific provisions to allow for and recognize the diverse values of specific indigenous peoples within their territory. But it is not our intention that the global constitution prescribes detailed rules – it should allow for flexibility in implementation. One could argue that the anthropocentric nature of the Rio Principles as well as the ecosystem service concept goes against the holistic understandings of indigenous peoples; on the other hand, I would argue that the anthropocentric nature of those principles are a first step towards moving to a more holistic understanding of our place within the ecosystem. They are not necessarily incompatible, and the new constitutionalism should emphasize that. What should be clear is that the new constitutionalism should make space for multiple knowledge systems and approaches, but should not itself make the rules.

The biggest threat to the constitutionalization project is that it gets captured by vested interests and, thus, leads to an institutionalization of values that protect the rich at the cost of the poor – values such as the privatization and concentration of resources and sinks; and that actors promoting development processes which are not per se illegal cannot be held accountable afterwards for the damage they have caused to others. This implies that the constitutionalization project needs both statesmanship at global level, constitutional entrepreneurs at multiple levels of governance and global social movements to make this a reality.

## 11. RESISTING THE HIERARCHICAL REALITY

**By Damjan Kukovec**

Relationship between power, law and knowledge is fundamental for thinking about the transformative possibilities in the present moment. How do we think about law, governance and social transformation, reproduction of hierarchies and resistance to it? I argue that analytical clarity and vision of social transformation are needed for social change.

Despite the crucial role of analytical clarity for social change, contemporary legal argument still too often relies on theories and on conceptual thinking. Alternatives are sought in contradiction and in conceptual oppositions. Alternatives are presented as anti-neoliberal, anti-capitalist, anti-efficiency, anti-free-movement, anti-autonomy, anti-economics, and anti-law.

In the Laval and Viking discussion and arguing for the interests of the European periphery, my work has often been described as neoliberal or as a testament to overpowering capitalism. Similarly, it has been argued that the dividing line between normalcy and abnormalcy in the international trade regime is along the lines of the neoliberal economic policies (private) and their opposite (public). The private is said to be perceived as normal and the public as abnormal. However, our reality and normalcy cannot be described by a theory or by a distinction between private and public regimes.

Economic theories, neoliberalism and capitalism are mere signifiers for the (hierarchical) reality that needs to be constantly constructed and reconstructed. Theories are not mirror images of reality. Theories are timeless abstractions, rationalizations that can never adequately describe reality but as a partial ex post facto rationalization. The danger of challenging reality with a theory is that it is challenged within the existing ideology. Theories are tools, bricks for a change of reality, not authorities to be merely applied. Their usage is selective and tied to existing ideology of a particular time. Mere application of a different theory of causation cannot promise to destabilize the existing ideology.

Reliance on false distinctions is too often a part of scholarly endeavour. Several scholars make a mistake of relying on Karl Polanyi's distinction between politics and economics and on a search for the political. Karl Polanyi's followers are looking for a separation of political freedom from the brutality of our daily lives and our own daily actions—in their understanding, a separation from economics. In other words, they are looking for a liberal ideal of political freedom outside power, coercion, and struggle. The focus on either “the economic” or on “the political” aspect of our society is a typical example of conceptualism of Contemporary legal thought that distinguishes between social/altruist/protectionist and autonomy/individualist/laissez-faire claims, considerations, doctrines, and theories.

Furthermore, switching between domains of thought in view of social transformation is based on the artificiality of intellectual boundaries between economics, politics, and law. Law is often understood as the problem, and political capacity and contestation as the solution to social problems. David Kennedy's project of expertise, for example, mistakenly perceives political incapacity as the central problem of global governance. However, the problem of today's globalized society are not "economic interests", nor is the central problem the lack of the political. Nor can critique be the goal of our work. Instead of a pursuit of "the political" or challenging "the economic", we need to challenge the existing reality. We need to constantly construct and reconstruct the ever-changing reality of subordination. In other words, what needs resistance is not one or the other economic or social theory, but ***unjust -hierarchical -reality***.

How do we construct and reconstruct reality? Our knowledge is permanently incomplete. Our life and global governance are chaotic and unpredictable, and things never repeat exactly as they happened in the past. Hence, we will never know exactly how the world "works," or its "mechanics". As Hume has taught us, our knowledge will always be partial. As Wittgenstein said, we will never have a total grasp. But the inevitable partiality of our vision does not mean that we should delight in "not knowing" and in the "ubiquity of unknowing" and in the unforeseen circumstances of our work. We know injury, abuse, and exploitation, at least when we consciously see it and feel it.

What is the role of law in the construction of reality and in resistance to it? Lawyers often consider that economists or social scientists do not have a very good idea about law. However, we, lawyers fail in our articulation of the legal structure. Power and law are too often misrepresented in contemporary legal scholarship, in critical legal thought as in constitutional theory.

In order to portray reality, power struggles should be integrated into legal analysis. The analysis of domination is not merely a story of orientalism, as has been too often asserted by post-colonial theory. The domination is also much more banal than overt imperialism or the dynamics of difference. Domination is perpetuated independently of the question of cultural difference, of the overt or intentional construction and deployment of doctrines or of the rhetoric of exclusion from law. There is more to the way we all argue and reason in our daily work. In order to understand the reproduction of hierarchies, structures of our daily lives and legal work need to be addressed.

In order to understand the self-perpetuation of hierarchies, we need an account of law that accounts for our daily lives, work and hierarchies. If the phenomenon of law is misrepresented, reality and our daily work are misrepresented. Law in action should be understood hierarchically, as the interplay of injuries and recognitions constituting us in every moment in time and putting each of us in a particular hierarchical position in the global legal - hierarchical - structure. There are three elements of the legal structure: hierarchies (constituted by injury and recognition), ideology and tools.

Injury and recognition are the lowest common denominator of the legal structure and of global governance. Social change should be understood as a reversal of the existing global hierarchical structure, of existing injuries and recognitions. Legal analysis should consist of reasoning through particular hierarchical relations in contemplation of hierarchical struggle among people

in every moment in time. Those in a hierarchically privileged position have more privileges to injure those in a hierarchically unprivileged situation. The former constantly appropriate the work, labour and experience of those in a structurally subordinate position, which contributes to the reproduction of hierarchies in the global society. It is the constant hierarchical reality that forms the centre-periphery relationships, not an economic theory, and if we wish to resist subordination in any context, it is the hierarchical reality that needs to be constructed and resisted. Tools need to be constructed that reflect and resist the injuries we have not yet unearthed or those we simply disregard. There is no theory or body of knowledge without a potential for positive social change from any particular perspective and we constantly need to use existing tools and construct new ones to address the hierarchical reality.

Analytical clarity is an important predisposition of social change. But in order to address the global hierarchical reality, a vision is needed. Without a vision from a particular hierarchical angle, there is a constant risk of playing with knowledge for the sake of it. No amount of knowledge can substitute true experience and its fundamental potential for social transformation.

# CRITIQUE AND CONCLUSION



## 12. RE-LOCALIZING LAW

**By Geoff Gordon**

This collective chapter explores the de-localization of knowledge in its entanglements with law and power, thus by implication also the de-localization of law. There are aspects of this inquiry of ours that I will push back against here. First, I will want to be clearer about what law or laws we might mean. In part, because our discussion of the de-localization of a generalized law appears at points to suggest an absencing from the scene, a distance between a generalized realm of law and any or all particular places. This conforms to a tendency of lawyers—a tendency that will remain wholly anecdotal here—to minimize the role of law, to insist that the legal enterprise is a technical and subordinate one, secondary at best to other actors (like clients), interests (like security), exigencies (like crises) or technologies (like computer networks). Likewise, the terms of the inquiry are reminiscent of something Fleur Johns has explored in terms of non-law, namely, a practice of delimiting the legal space and exercising power within it by defining what exists outside or beyond its ostensible scope. (Johns 2013) From this perspective, a perspective that is wary of the image of a diminished and remote law, our inquiry, trained on the de-localization of knowledge, law and power, runs the danger of reinforcing the turn to expertise, rather than resisting it.

But before proceeding with those concerns, there is a second hazard that animates my counter-project here. The focus of our critical attention on de-localization comes at the risk of making uncritical assumptions about the local, or romanticizing it. But what is the local and what is so good about it? What are its limits, and how is it limited? How do we know it, and how particular is it? I frankly don't know and can't imagine an unambiguously pure or transcendental local-ness. But if we cannot say what the local is, or if it is an impossible category, what do we mean to suggest is lost when we add the prefix and speak of de-localization? I will pursue this further in a moment. In any event, a related concern is that, at some point, the embrace of particularity must have its limits. If this collective paper is to be an essay in resistance, there must remain something like universal grounds capable of uniting or embracing the many points and places we mean to open up to contestation. Without at least the possibility of some meaningful commonality or solidarity, ours threatens to become another empty gesture.

To carry these concerns forward, I would like to offer in brief a simple conceptualization of the local. I proceed on the basis of the local as a point of contact between any two people or things capable of taking or channelling action in a network. But this creates a problem in speaking of de-localization, which cannot helpfully mean the end of such points of contact, just their change. Accordingly, de-localization comes to mean something more like re-localization. Simply enough, old points of connection are being replaced by new ones, as part of a new order, defined by new networks. In this light, I return to my first question. What law or laws are we talking about when we speak of de-localization? Our title gives thrust to this question, because there has always been law beyond the state, namely public international law, and that law represents prototypical anti-local violence and alienation in its colonial history. (Anghie 2007) But the relationship between international law and the local has long been something other than simple opposition, if it ever was that. As Arnulf Becker Lorca has made clear, the colonial European 'center' never really maintained an exclusive control over the terms of international law. (Lorca 2015) The international law that emanated from Europe in conjunction with colonial violence was locally appropriated by elites in the so-called periphery and semi-periphery, for purposes that they

identified with their local communities, according to particular rationalities. That appropriation in turn entered and changed the discourse of international law, making local appropriations part of the general body of international law.

The example of public international law underscores that there can be no easy separation between the extra-local and the local. As much is borne out in the contemporary ethnographic work of Luis Eslava, among others, his images from Istanbul and Colombia demonstrating the degree to which the local is defined by the international. (Eslava 2014, 2015) Likewise, the TWAIL school of activist scholarship, throughout its different generations, has made clear how the international can redeem as well as repress the particular or 'local' identity. A simple way to put the matter is to ask whether the famous Algerian jurist Mohammed Bedjaoui would cease to act locally when making a phone call from an office in Algeria, but with another international lawyer in a remote part of the world, concerning the New International Economic Order. Umut Özsu has helpfully explored the contradictions in the character and practices of Bedjaoui, and they reinforce the sense of entanglement among normative orders. (Özsu 2015)

Most of the other contributors to this paper, however, are not writing about public international law. I've raised it, for the purposes of my reflexive intervention here, as an example to illustrate why our idea of de-localization is also helpfully understood as re-localization. Altogether, these different orders, despite differences in scale and situation, are not so easily or cleanly separated. They are, rather, installed along a continuum. Returning to my earlier point, we can always burrow deeper into particularities to find the more local identity. Working in the other direction, in any given case, it is not clear at what point something ceases to be local. The lack of clarity in practice gives away the basic point in theory: the separation is untenable. The so-called local is contingent on that which is described beyond it, and vice versa—and, crucially, both will be variously defined by changing networks capable of dominating or setting the terms by which their theoretical interrelationship is ordered and realized. Those networks, in turn, will themselves comprise and be articulated by so many particular relationships, connected by any number of practices, knowledge and technologies. This collective paper is driven by the shared understanding that those networks are changing, re-localizing in the terms I've introduced here. How? Other contributors have offered helpful answers with a variety of examples. I limit mine to the broad and familiar supposition most recently explored in historical context by Chris Tomlins, among others. (Tomlins 2015) Liberalism (as identified and critiqued by E. H. Carr, among others) and its neo-liberal successors (as identified and critiqued by David Harvey, among others) have changed and continue to change legal orders internationally. (Carr 1939; Harvey 2005) Staying with my selective reliance here on the discourse of public international law, that change has seen a turn away from sovereignty and towards institutions; away from dogma and towards eclecticism; away from positivism and towards pragmatism; and away from rationalities of formalism and towards the rationalities of markets and efficiency. (Kennedy 1987; Koskenniemi 2006 [1989])

But this brings us back around to my first concern. Has international law and the legal continuum of which it is a part simply disappeared into the economic rationalities of neo-liberalism today? No: laws all along that continuum continue to structure the connections where neo-liberal networks and rationalities are articulated. The lawyer's modesty that I raised with skepticism above, however, is not entirely false. Law does not hold the centre in theory, because law as we commonly know it has no centre in theory. It is torn between fact and norm, between naturalism and positivism. Borrowing from Kennedy and Koskenniemi, its structures oscillate

indeterminately between apology and utopia. Rather, as Duncan Kennedy and others working in legal realism have made clear, law consistently operates at the margins. (Kennedy 1991) Law constrains the scope and horizon of possibility for any given party at any given time. Especially but not exclusively in the distributions of property rights, conventional and contractual prerogatives and constraints, standards of responsibility and negligence, and the exceptions to those regimes, laws structure acts and relations by containing the scope of possible alternatives. In short, law limits—but within those limits, laws enable. Some relations will be hindered, others facilitated. And if that is correct, it also opens up strategic opportunities in projects of resistance. Contest the limits, occupy the margins. A seemingly-modest but noteworthy challenge, for example, to the privatization of information on the internet, was the innovation in copyright law represented by the GNU general public license. That license provides that end users of software are able to access, modify and redistribute the underlying code, in changed or unchanged form, without the possibility of blocking future users from the same. It exploits contractual terms of copyright to maintain open access to otherwise proprietary material. Its developers and users have called the scheme copyleft.

Finally, then, this also brings me back to problematizing the scope of our investment in particularity. Copyleft aimed to turn the limiting power of contractual terms to support an open distribution of values—not to do away with the limits, but to capitalize on them, so to speak, for a common good. Likewise, because we cannot conceive of order and orders without limits, we are obliged to contest and occupy them—but if doing so has any redemptive potential, it seems unlikely to be realized if we are only ultimately reinforcing borders, boundaries, and divisions of values, and isolating one locality from another, however these localities will be defined. For that reason, I want to close my brief contribution here with a simple observation: a common sensibility animates our paper, and forms part of our normative project.

## RESPONSE AND CONCLUSION

We are extremely thankful to Geoff Gordon, whose contribution allows us to conclude by bringing together some of the premises and common shoals on which the project has built. So much has been said about knowledge, power and law over many centuries that it is easy to fall into the traps of commonplaces and misconceptions. Therefore, it is indispensable to explicate some of the waters that this project had to navigate.

The most important question that Geoff raises is ‘Is locality the right way to conceptualise the current challenges?’ There are different, perhaps descriptively more accurate and normatively more desirable axes around which we may articulate the current global conditions, such as the shifts away from sovereignty to institutions, away from rationalities of formalism toward the rationalities of market and efficiency. Concentrating on the local raises both problems of definition (what is local?) and it may be ultimately politically undesirable to reinforce the local boundaries.

Indeed, the ‘international’ has been running away from the ‘local’ for decades, or better centuries: from all the horrors of the local with its nationalisms, wars, and irrationality. The entire move of governance from holistic national politics to international functionalist regimes is animated by



those concerns - accelerating the shift from sovereignty to institutions, from politics to knowledge or from formalism to market and efficiency.

Yet after all this effort, did we manage to escape the local? Golden Dawn in Greece, Law and Justice in Poland, Front National in France or UKIP in the UK are just few examples that the local may be 'striking back'. What have we forgotten in the processes of de-localisation that enables the local to show us its less appealing face today?

We have admittedly animated the hope that this 'something' that we have forgotten may also be normatively desirable. Perhaps this something, which has been lost in the escape from the local, has contributed to the proliferation of new horrors, domination and exploitations - while at the same time not allowing us to get the local under control.

There are many reasons why lawyers need to be concerned with expertise in this regard. Expertise has become one of the main governance tools beyond the state. It has also underscored the majority of governance shifts identified by Geoff - from sovereignty to institutions, away from rationalities of formalism toward the rationalities of market and efficiency. Yet law has been very weak in controlling expertise: not because it is not able to control it (the precautionary principle is an excellent example of how law can frame the use of science), but because expertise has acquired the prime legitimating force beyond the state, where law has drawn its legitimacy on expertise more than the other way around.

An important anchor that we have identified in the 'local' is the political, social and cultural contexts of the (somewhat idealised) liberal democratic state, which have embedded expertise and provided certain accountability frameworks (in the form of a reality check). The contributors to this volume have identified all sorts of biases, which may emerge if expertise fails to perceive the 'dirt' on the ground. To be clear, monetarism is not only far more appealing but also far more 'true' in Frankfurt than in Athens. The truths of experts then in turn allow numerous 'legitimate' exploitations to take place. It is this lack of responsiveness to local suffering, which we are concerned with both in its own right as well as a potential spring board to nationalism.

Geoff raises a number of other interesting questions. For instance, he suggests that when we explore the de-localisation of knowledge in its entanglements with law and power we talk by implication about *de-localisation of law*. The contributions to this volume suggest, however, that this is not necessarily the case. While at times the de-localisation of knowledge may go hand in hand with the de-localisation of law, it is in the relations of dependence - rather than conceptually equalisation of the two - where the power is buried (Farrand, Micklitz). But even more often, de-localised knowledge transforms national/local laws and orders, re-distributing gains and losses (Everson, Christodoulidis, Lixinski, Muir Watt, Patterson). The contributions to this collective paper illustrate however that the eventual grievances on the ground may be often difficult to translate in the language of expertise and globalised law in a way that would enable an effective 'feedback loop' into this de-localised knowledge and law (Gupta, Patterson).

Finally, what are the dangers of focusing on the role played by expertise in law-making process for the emancipatory capacity of law? Indeed, since law-making is importantly an exercise in the construction of authority, it could be counterproductive to over-stress the role of expertise. Yet, what are the implications to draw from a similar line of argument? Descriptively, if we were to construct law's authority entirely without reliance on expertise, the deference that experts are

given in the formal adoption process would belie our construction. Normatively, however, one may wonder whether our common political enterprise would be served by abandoning critique, hoping that some inner quality of law - if only left intact by the critique of legitimacy sources on which it draws - would guard us against domination through such law.

We believe that the contributions to this collective paper have elucidated some of the reasons why we need to engage in the critical enterprise of examining the inter-relations between power, knowledge and law. We hope that this collective volume will become a starting point for a fruitful discussion of how this Gordian knot might be confronted.