

The Impact of AI on the Law

Rethinking the public-private dichotomy in the age of algorithms

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We are now more than half a century into the digital revolution. However, in recent years, our societies have made rapid progress toward a higher level of digital maturity, particularly with regard to the developments of Artificial Intelligence (AI)¹, one of the most pivotal phenomena of digital advancement. Thus, any serious long-term prognosis concerning the future shape of societies and their legal framework runs the risk of becoming whimsical². However, some thoughts might be of interest.

In this context, this paper aims to examine how AI might blur the already murky boundary line separating the public and private powers within the legal system, thus making most legal systems relatively inadequate to the reality they aim to apprehend. Qualms about the mounting confusion surrounding the public-private divide are not novel. In 1957 already, scholars were wondering what legal factors impeded a reassessment of the relation between the State and group power³. Nowadays, similar concerns are voiced, for instance about the growing influence exerted by private entities without being subjected to some

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¹ Ryan Calo, 'Artificial Intelligence Policy: A Primer and Roadmap' (2017) 51 UC Davis Law Review 399, 404–35, *ici* 405. Whereas AI can be regarded as an umbrella term entailing many technologies, it will nevertheless be referred to within this paper for clarity purposes.

² Gudula Deipenbrock, 'Is the Law Ready to Face the Progressing Digital Revolution? – General Policy Issues and Selected Aspects in the Realm of Financial Markets from the International, European Union and German Perspective' (2019) 118 *Zeitschrift für Vergleichende Rechtswissenschaft* 285, 286.

³ Wolfgang G Friedmann, 'Corporate Power, Government by Private Groups, and the Law' (1957) 57 *Columbia Law Review* 155.

guarantees regarded as proper to the State⁴, or about the incremental tendency of the State to allow public domain to land in private hands⁵. Expressions of this confusion may be found under various question marks. Should healthcare be public or private? Should human rights generate obligations for private entities? Should, and more specifically *how* should transnational corporations be made accountable, considering the enormous impact they have on individuals⁶? Should the role of the State be redefined⁷? The list goes on.

Interestingly, those interrogations all seem to arise from the fact our legal system strongly and structurally revolves around the divide between public and private entities, each endorsing specific right and duties, to the point where this model is hardly ever challenged *per se*. However, beyond legal roles attributed in accordance with this basic legal dichotomy, shouldn't also the dichotomy in itself be examined more closely, as well as the impact AI will have on it? In effect, AI and the prospects it brings might exacerbate the fragmented character of the division and lead to the emergence of new forms of centralized entities, ultimately deeply disrupting our legal landscape.

After concisely examining the notion of the State as a central public entity, its history, role, as well as the evolution of the influence of private entities (1), it will be interesting to delve into the specificities of AI as a technology and the peculiar impact they may have on the relation between public and private entities (2). Then, some specific angles from which the

⁴ Gary Younge, 'Who's in Control – Nation States or Global Corporations?' *The Guardian* (London, 2 June 2014) <<https://www.theguardian.com/commentisfree/2014/jun/02/control-nation-states-corporations-autonomy-neoliberalism>> accessed 17 January 2021.

⁵ There is indeed a growing phenomenon of privatization, which will be briefly discussed further in this paper.

⁶ Michael Goodhart, 'Democratic Accountability in Global Politics: Norms, not Agents' (2011) 73 *The Journal of Politics* 45.

⁷ Jean-Pierre Raffarin, Emmanuelle Auriol and Augustin de Romanet, '« 2019, la fin d'un monde ? » : faut-il redéfinir le rôle de l'Etat ?' *Le Monde* (Paris, 23 March 2019) <https://www.lemonde.fr/economie/video/2019/03/23/2019-la-fin-d-un-monde-faut-il-redefinir-le-role-de-l-etat_5440198_3234.html> accessed 17 January 2021; Lukas van den Berge, 'Rethinking the Public-Private Law Divide in the Age of Governmentality and Network Governance: A Comparative Analysis of French, English and Dutch Law' (2018) 5 *European Journal of Comparative Law and Governance* 119, 122.

figure of the State may be weakened, thus increasing the inadequate character of the public-private dichotomy, will be discussed (3). Further on, this paper will consider how the possible fragmentation of this segregation might be the mere expression of the erosion of the rule of law as a whole, or prove to be part of a distinct phenomenon (4). Some critics and perspectives will be explored (5), before allowing for a brief conclusion.

1. The State: history, role and powershifts

1.1 Emergence of the State and modern role

The divide between public and private within the law seems difficult to apprehend properly without examining the notion of the State in which it is rooted. However, since this paper does not aim to discuss historical or societal questions, it will be succinct on this – fascinating – topic. Moreover, given that the concept of public and private is traditionally regarded as being antagonistic, any reflection on the role of the State necessary mirrors the aforementioned dichotomy. This angle of approach has thus mainly been chosen for this analysis.

Intriguingly, even though we seem to live in a ‘*world of states*’⁸, it has not always been the case. The dominant institutional forms have evolved over time, successively taking various shapes and colours, and such a shift may be happening again. Indeed, the contemporary governance structure might be undergoing some transformation, as it already has in the past – one might think of central powers embodied in the figures of empires, feudal states or cities – or even revolutionised.

Broadly speaking, public law was developed as a response to the feudal system, in which public and private law were not differentiated. The *State* was thus incrementally considered as an entity having to pursue general interest instead of individual ones, and thus guided by principles serving the common good. While the State is far from being the only actor within the legal system, and, *a fortiori* politics, his role is largely recognised as having an enormous impact

⁸ Idiom notably used by J. D. B. Miller in his book, JDB Miller, *The World of States: Connected Essays* (Croom Helm 1981).

on individuals living under its yoke. While public law was envisioned as vertical, handling the relations between an individual and the State, private law was depicted as horizontal, that is, regulating the relations between individuals⁹. Consequently, the bodies of public and private law have developed with their own principles and procedures. Gradually, the State has assumed more and more tasks and responsibilities¹⁰.

Nowadays, the notion of the State can be defined in many ways. One commonly accepted definition within the field of political sciences is that given by *Max Weber* who refers to the State as a human community that successfully claims the monopoly of the legitimate use of force within a given territory¹¹. The legal field mainly addresses this delicate definition through the lens of international law, which apprehends the State as an entity presenting the following features: it should possess a permanent population, a defined territory, a government, and have the capacity to enter into relations with other States¹². Both of these definitions of the State, and as a result the corresponding notion of private entities, may have become unsuitable for the reality of our structures, and *a fortiori* of their influence and power.

1.2 Balance of power and legitimacy: the end of Rousseau contrat social?

To express these powershifts more concretely, it is worthwhile to consider some facts. Google's parent company, *Alphabet*, out-earned Puerto Rico in 2017,

⁹ van Den Berge (n 7) 121 ff.

¹⁰ Indeed, the State has incrementally penetrated into society, mostly during the 19th and 20th century, because of economic and social developments, progressively becoming the 'welfare state', Chris Renwick, 'Why We Need the Welfare State More Than Ever' *The Guardian* (London, 21 September 2017) <<https://www.theguardian.com/news/2017/sep/21/why-we-need-the-welfare-state-more-than-ever>> accessed 17 January 2021.

¹¹ *Encyclopedia of Power* (2011) 400 ff.

¹² When defining the State within international law, the Montevideo Convention is usually referred to. Montevideo Convention on the Rights and Duties of States, signed at Montevideo, 26 December 1934.

reporting earnings that surpassed the entire GDP of the country¹³. In the context of our postmodern world where policy making and implementation powers shift ever faster from single states to larger supranational entities and global regulatory apparatuses, the financial power of those tech giants is even magnified. Indeed, it is simpler and more affordable than ever for those companies to extend their reach globally, as facing a more centralized legislative framework implies fewer expansion costs. Scandals like ‘*Cambridge analytica*’ which is not unheard of but unprecedented both in its scope, its reach and the depth of its influence, have also emphasized the enormous influence large corporations have on individuals’ daily lives and caused considerable turmoil among civil society, shedding light on the inadequacy of the current system. While the State remains *the* primary democratic entity on paper, due to globalisation and the power of financial capital lying in the hands of private entities, it would no longer be up to this role¹⁴. Governments struggle more and more to pursue and enforce national agendas, which haven’t been endorsed by international capital first. It has been argued that the recent nationalist wave spreading across Europe and reflected by the European parliamentary elections would be an expression of this situation. Whereas it has readily and willingly been described as xenophobic, it would rather incarnate the fear that the system we evolve in is shaped and controlled by diffuse and fuzzy private forces¹⁵. Thus, concern has been expressed about the way our legal system currently (*does not*) reflect(s) those developments in a satisfying manner, notably with regard to accountability of private action, as mentioned, but also with regard to the potentially insufficient transparency and efficiency of the public one. Regarding this last point, the lack of action taken and resources mobilized by governments to tackle the climate crises provides a clear example of the critic according to which the current model of the State is not the best to address global challenges. In addition to climate change, terrorism or pandemics could also be mentioned. All these phenomena raise the question of private and public entities’ legitimacy; power does not seem to be correlated

¹³ Fernando Belinchón and Qayyah, ‘25 Companies That Are Bigger Than Entire Countries’ (*Business Insider*, 25 July 2018) <<https://www.businessinsider.com/25-giant-companies-that-earn-more-than-entire-countries-2018-7>> accessed 17 January 2021.

¹⁴ Younge (n 4).

¹⁵ *ibid.*

with the will of the greatest number of people anymore¹⁶, and the current legal structures and apparatus seem not to have been able to keep pace with an increasingly global and digitalized environment.

2. General impact of AI peculiarities on the existing legal landscape

2.1 A fear of the unknown like any other? Mind the gap

While those concerns and challenges have been brought to light a while ago, the magnitude of the effects brought about by the stupendous development of AI for our legal system might be unprecedented, and thus, highlight the unsuitability of the structural distinction between public and private fields. In other words, as if the fine line between public and private powers was not blurry enough, AI's peculiarities as a technology may exacerbate this confusion.

One could argue that other technologies regarded as revolutionary, like electricity or nuclear power also brought about profound societal and legal changes without affecting the fundamental division between private and public powers. They may have contributed to the blurring surrounding this division, notably by exacerbating the powershifts mentioned above¹⁷, but only relatively, and in any case not sufficiently to question legal structures. The fundamental division between public and private powers has been challenged in the past. However, the control private corporations have nowadays over the information and communication systems is unprecedented. Thus, AI could potentially lead to a certain reconfiguration of this dichotomy, without challenging it entirely. However, this comes down to assuming AI does not significantly differ from those technologies, whereas its specific traits may potentially generate a particularly important impact on the legal landscape. Therefore, it might be useful to consider some distinctive characteristics of AI with regard to other

¹⁶ This conception of legitimacy largely impregnated our legal culture: one might think of the influence of '*Le contrat social*' de Rousseau.

¹⁷ Without entering into any specifics, this is notably due to the more powerful role thus endorsed by private entities mastering those technologies.

technological developments, and see how they may underline the inadequacy of the public-private distinction in order to apprehend the influence and power shift at stake.

First, it could be noted that there is a considerable technology gap governments should mind. It will be difficult to pass laws without the necessary knowledge bound to it¹⁸, as discussed further in this paper. Although it is common practice for legislative bodies to involve the private sector in the process of establishing a legal and regulatory framework, the broad and complex nature of AI further restrains the ability of central powers to make informed policy decisions and elaborate corresponding regulation. As a result, the ability for the central power to make informed policy decisions and elaborate corresponding regulation might be restrained. While a certain lack of expertise from the government is not exclusive to AI as a technology, the complexity of such systems may be unmatched. Delegating some policy-making tasks and responsibilities might compensate some lack of technical knowledge. Such an outsourcing is not something that has never been done before. However, the extent of this externalisation may be unprecedented in the case of AI. This reality will seemingly require from the public sector to rely on the expertise of the private one¹⁹, far more than what was the case for other technical advancements, since the involvement of the State in the case of AI may incrementally evaporate. Such a degree of dependence, in addition to its regulatory implications as discussed below, raises serious questions about the figure of the public institution, and therefore, about the divide between public and private within the law.

2.2 Volatility or versatility

Another peculiarity of AI systems rests in the fact that the players in the global technology industry which constitute the main driving force behind AI advancements spread across the globe, since one single person does not require the same amount of resources and infrastructure a large company would in order

¹⁸ Matthew U Scherer, 'Regulating Artificial Intelligence Systems: Risks, Challenges, Competencies and Strategies' (2016) 29 *Harvard Journal of Law and Technology* 353, 380.

¹⁹ Namely to elaborate appropriate laws.

to write computer code and engage in the AI-related venture²⁰. These individual actors may not even be part of any kind of organization and their activities may prove to be very delicate for a central institution to regulate. Progressively, it might lead to a considerable loss of influence of governments.

Plus, the actors mastering this technology may be more difficult to identify than the ones mastering previous ones. For instance, nuclear weapons are expensive to elaborate and demand components that are difficult to obtain. In other words, private entities dealing with such technology have to be large enough in order to do so, and thus are easily identifiable. Consequently, they are also more likely to be apprehended, controlled and regulated. By comparison, AI applications may be relatively inexpensive and affordable to produce, even mass-produced. The loss of governments' central power thus induced by the creation and use of AI might be tremendous because of this expanded affordability. What is more, the impact of an actor may be inversely proportional to its size: sophisticated software can be designed as much from a slum as from the golden glasshouse of a billionaire corporate. Consequently, AI can be regarded as a technology with a different and far broader impact than the technologies that have emerged so far.

In addition to this, even if the State manages to identify the players, any rule may be hard to enforce, since any software may be developed in any country worldwide without difficulty. This may pose a supplementary challenge for the notion of jurisdiction and for the laws a State traditionally enforces within its own territory and boundaries²¹. In addition to this, participants in the AI-related venture may easily relocate in another country with more lax laws. Considering the relatively low cost of infrastructure discussed above, and the tiny physical footprint needed to develop such a technology²², attempts by States to regulate and embrace their citizens' activities may prove to be ineffective. As a result, central institutions will probably be deeply challenged by the specific nature of AI as a technology, due to its volatile nature.

²⁰ Scherer (n 18) 370.

²¹ *ibid* 372.

²² *ibid*.

3. The State figure – concrete flaws and illustration of an incremental fragmentation

3.1 Data as a precious resource, jeopardizing of security systems and use of ‘legitimate violence’

After having discussed a few reasons why AI may impact the law and regulatory environment in general, it may be of interest to delve deeper into the question of how the very notion of “State” might be specifically challenged by AI. Once viewed as omnipotent, the concept and relevance of the State today may be undermined in some particular ways. Is the *Leviathan* as *Hobbes* described it disappearing? According to the renowned futurist *Yuval Noah Harari*, the mere idea of a coherent nation-state is now threatened²³, and this is only one voice among others.

First, attention should be paid to one fundamental feature of AI in this conversation: *data*. Indeed, artificial intelligence is ultimately tied to and thrives on data. What started as a discussion about the control of individuals over their personal data translated into a discussion about the power of data and private data collection in general.²⁴ Citizens seem to be bound to become consumers, giving up their data in order to access whatever they need to, be it a public service, a pharmaceutical product or a leisure service. The increasingly fuzzy distinction between citizens and consumers seems to match the growing confusion surrounding the dichotomy of public and private within the law. As a result, citizen-consumers may not fully understand the implications related to the sharing of their personal data. This can become especially tricky when considering the relatively recent measures on data-sharing imposed by both national and supranational authorities in response to emerging security threats. Due to this growing confusion, citizen-consumers may encounter some difficulty to realize the consequences of them sharing personal information in

²³ Helen Lewis, '21 Lessons for the 21st Century by Yuval Noah Harari review – A Guru for Our Times?' *The Guardian* (London, 15 August 2018) <<https://www.theguardian.com/books/2018/aug/15/21-lessons-for-the-21st-century-by-yuval-noah-harari-review>> accessed 17 January 2021.

²⁴ Calo (n 1) 420.

function of the context: public requirements or private ones. Even considering the existence of culturally different perspectives on the concept of privacy and personal data, an increasing amount of private information is given away beyond the full awareness of their theoretical owners. As a matter of fact, the mere purpose of AI is to spot and detect patterns a single person cannot distinguish²⁵. Consequently, a dizzying and ever-increasing amount of data is being handed to private entities, offering them a fundamental resource and advantage as compared to a State in the landscape of AI. Thus, beyond possession of financial means, which already offers an enormous power in setting the various policies through lobbying as briefly examined earlier, the possession of data might *de facto* place private actors in a position where they exert even more influence on policies and rule-making, to the point where one could wonder which side actually exerts influence on which (see 4.1). Even though this phenomenon is not novel *per se*, the shift in the balance of power between the public and private sectors is expected to accelerate, driven by AI's developments. It is difficult to see how the central power could not lose at least some legitimacy without denying the importance of such resources in setting agendas.

Furthermore, the possible weakening of the State might be due to security issues. Indeed, not only might it be more than delicate for a government to control the players of this new game, but it might also prove to be extremely challenging to play and defend against them if they breach the rules. While challenges posed by private entities to the central power are certainly not something new, their dimension and scale risks being of a different magnitude. In fact, non-state actors playing in the AI field will probably also be able to conduct more attacks against the central power, with less time, funds, or manpower. Plus, those possible nefarious actions may be precisely targeted, very effective and almost impossible to assign to someone because of their volatility²⁶. In addition to this, they can also effortlessly be performed anonymously²⁷. This technology is thus very different from previous ones in the sense that it can

²⁵ *ibid* 421.

²⁶ Paige Young, 'Artificial Intelligence: A Non-State Actor's New Best Friend' (*Over the Horizon*, 1 May 2019) <<https://othjournal.com/2019/05/01/artificial-intelligence-a-non-state-actors-new-best-friend/>> accessed 24 January 2021.

²⁷ Scherer (n 18) 370.

directly be used to hack and seriously affect the central institution. Even without any actual threat of cyber attack paralyzing central institutions, the vulnerability to which they are exposed may weaken the model of an omnipotent State and further undermine the dual model most legal systems revolve around.

3.2 Privatization and ‘de facto regaliam function’

Another issue to be addressed has to do with the growing privatization taking place in our societies, and as a result, in our legal systems. While already occurring in the past, the gradual shift from the fulfillment of tasks considered as public from the government to private entities made the legal distinction between public and private law more and more difficult given the complex nature of AI²⁸. This phenomenon may prove even more difficult to address in our ever-growing technological world. However, the privatization of tasks that were historically considered to be the responsibility of some public authority should not be confused with the public sector using AI itself. This might pose a different set of difficulties. Thus, after briefly discussing the use of AI within the public sector, the privatization of the public sector in general will be examined.

Regarding the use of AI within the public sector, it should be noted that an increasing number of public tasks are automatized. While theoretically remaining in public hands, automation is shaking up the State to its core, challenging some basic assumptions we make when considering the guarantees offered by the State. Examples of the use of AI in public administrations stem from diverse areas, for instance in the fields of predictive policing, court proceedings or control of traffic²⁹. Specificities of the use of AI in the public sector³⁰ may challenge some public guarantees, such as the right to a fair process,

²⁸ van den Berge (n 7) 133.

²⁹ Such are the suggestions put forward by Nadja Braun Binder. Nadja Braun Binder, ‘Künstliche Intelligenz und automatisierte Entscheidungen in der öffentlichen Verwaltung’ [2019] Schweizerische Juristen-Zeitung 467, 470 ff.

³⁰ According to Nadja Braun Binder, specificities that would challenge traditional public guarantees are mainly three. Decisions resulting from algorithms are not easily comprehensible (at least with regard to machine learning procedures), machine-learning procedures must be trained before they can be used, and a huge amount of data is processed.

and thus call into question public law as an exceptional set of rules within the legal system. Some argue that the State could still be able to perform its tasks properly by following certain rules and standards. However, these concerns seem to attest to the fact that the use of AI in the public sector may indeed challenge its mere nature. Not only are private actors incrementally assuming public tasks, but the public one also seems to function more and more like a private entity³¹, fuelling confusion and interdependence. An illustration of the will to mitigate risks associated with the use of AI in the public sector is the *European Ethical Charter in the Use of Artificial Intelligence in Judicial Systems and their environment*, elaborated in 2018³².

Regarding the privatization of the public sector in general, one should note that the public sector largely relies on the private one for the use of AI. Thus, the question of privatization, while having been discussed since decades, may take another dimension in the coming years. Indeed, as the industry is assuming a leading role in the development of AI³³, the State is increasingly forced to rely on their services. While privatization has been considered as a mean of rendering the State more efficient, it may now become an absolute necessity, leaving the realm of convenience.

However, even more noteworthy are the somewhat insidious effects this trend may have. As a matter of fact, often, with sovereign tasks come sovereign rights. Anecdotally speaking, as Facebook announced its intention to issue its own digital currency, it was interesting to note that, despite an initial surprise coming with such a statement, most of the reactions were then focussed on security issues and soon translated into (legitimate) concerns of possible

³¹ An interesting light is shed on some '*private practices*' of the State by Mariana Mazzucato: Mariana Mazzucato, *The Entrepreneurial State: Debunking Public vs. Private Sector Myths* (Anthem Press 2013).

³² European Commission for the Efficiency of Justice (CEPEJ), 'European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and Their Environment' (3–4 December 2018) 14 <<https://bit.ly/2G18u8x>> accessed 24 January 2021.

³³ Calo (n 1) 406.

hacking³⁴. However, the fact that a private entity is practically about to endorse a role once thought to be *regalian* does not appear to be shocking. Or at least, not as shocking as it used to be. More generally, one could argue that *regalian* privileges and rights are progressively given to private entities without causing a tremendous turmoil, because they enjoy *de facto* an enormous financial and technological power. With this trend probably increasing with AI, the confusion surrounding the question of who should endorse which role might considerably intensify.

4. Erosion of the State, or erosion of the law?

4.1 Solely some old-fashioned lobbying

Until now, critics have voiced concerns about the influence private entities have on regulation and policy setting in general. As a matter of fact, it is pretty safe to assume that the access to greater financial resources translates into a growing capability to influence policy and law-making altogether³⁵. This issue is neither foreign nor recent and the increasing influence exerted by lobbyists over national and international governing bodies is generating entirely legitimate concerns. In the case of the emergence and rapid development of AI, this phenomenon may intensify, with the private sector exercising its openly large influence to impact the regulation. However, once again, the paradigm might be sifting. With AI, the risk may not materialize in an intensive lobbying from the private sector to influence existing rules or standards, but rather in the mere absence of regulation coming from the public one.

There are many reasons why the State may not assume its role of rule-maker and leave regulation behind. One may think of a definite lack of expertise, but also of the incredibly smaller amount of resources injected by central governments into AI research, development and formation. Until now, the

³⁴ Mike Orcutt, 'Critics Say Facebook's Libra Threatens America's Power. Zuck Says They've Got It All Wrong' (*MIT Technology Review*, 24 October 2019) <<https://www.technologyreview.com/f/614621/critics-say-facebooks-libra-threatens-americas-power-zuck-says-theyve-got-it-all-wrong/>> accessed 24 January 2021.

³⁵ Scherer (n 18) 377.

private sector has been using AI way more frequently and intensively than the public one. Even though many governments embrace the idea of progressively introducing this technology to facilitate a broad set of tasks, this is happening at a much slower pace and a more confined scale than in the private sector³⁶. In addition to this, regulatory competition among States may contribute to the reluctance to regulate. In fact, despite the fact that various States have set AI as a priority within their policy agenda, they are also conscious that investors won't be attracted to their jurisdiction if they put sharp regulation forward³⁷. As a result, regulation, when elaborated, may still be kept to a minimum. Therefore, the centre of gravity of the conversation would not be limited to lobbying: private entities might well be led to regulate this field themselves.

4.2 Expansion of self-regulation

This phenomenon could eventually result in the expansion of self-regulation. Indeed, the non-government sector dramatically needs some predictability and legal framework to embrace the use of AI. In fact, the regulatory power might *de facto* change hands, since the private sector will need to set rules. Many leaders from this industry have indeed voiced concerns and called for more regulation. Beyond tech entrepreneurs and futurists, various academics also seem to agree that *ex ante* action is highly needed to ensure that AI remains under human control and aligned with people's interests³⁸. According to them, difficulties regarding supervision and control of AI are likely to materialize and the legal system should be able to mitigate them.

Consequently, our traditional view of regulation stemming from governments might not be adapted to the rapid evolution of AI and its use. Growing self-regulation may also be induced by the State incrementally relying on the private sector's expertise to do so. Thus, the regulatory power might

³⁶ Tod Newcombe, 'Is Government Ready for AI?' (*Government Technology*, July/August 2018) <<https://www.govtech.com/products/Is-Government-Ready-for-AI.html>> accessed 24 January 2021.

³⁷ John Armour and Horst Eidenmüller, 'Selbstfahrende Kapitalgesellschaften?' (2019) 183 *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* 169, 186.

³⁸ Scherer (n 18) 368.

progressively shift from the public to the private sector. This has already happened in some fields: for example, the financial sector in Switzerland is largely regulated through its actors (mostly banks, but also private insurance institutions) themselves. Once again, this phenomenon is not new *per se*. It proves to be quite known in industries such as finance, financial services, and banking. In that case, it has been regarded as pretty successful. Indeed, this method seems to allow more flexibility and technical knowledge necessary to draft such rules. However, the reach and scope of self-regulation in the case of AI combined with the tremendous impact on individuals' daily lives of such a technology might provide enormous power to the private sector. A power that used to be conceived as having to lie in public hands.

To sum up, while an erosion of the rule of law might be witnessed due to the use of AI, one could also argue that a shift of the regulatory power will rather be observed, illustrated by the thrive of self-regulation.

5. Critics and perspectives

5.1 Need for the figure of the State

It could be argued that the importance of the State as a legal model will outweigh its - in some aspects at least - desuetude and prevent the complete blur of the public-private dichotomy. In effect, the State appears to embody fundamental features and guarantees. Certainly, some public tasks could be assumed by private entities in the future, and common good policies might even stem from the greater influence, which the private sector exerts on our society. Such a possibility seems worthy of discussion, and AI might well emphasize and underline the need for such a global conversation. However, one of the essential characteristics of public entities as they are framed in our legal systems is the notion of territoriality. It appears to remain one of the fundamental features of the notion of the State and of traditional public law, according to both international law and political science, as previously discussed, and this trait seems a hard one to transfer to large global corporations. The State as a figure of proximity gives room for differentiation, experimentation, diversity, cultures and habits. The probable legal homogeneity possibly induced by growing self-

regulation may lead to a backlash and a valorisation of the State as a central power with a strong local dimension. As mentioned earlier, political colours of recent elections in many European States have emphasized the will for a strong central institution. Consequently, the divide between public and private law may even be strengthened, with public entities eventually acting as a shield against globalization and paying tribute to local voices. The question whether the State as conceived today is able to fulfill these tasks nowadays, and thus if a whole rethinking of our legal system would not be preferable, remains open.

Another interesting perspective is offered by the legal transformations taking place in China. Without delving into details, one can argue that this example stands at odds with the one given by the US, where the approach to AI is rather driven by the industry, and not by the government as it is in the Chinese case³⁹. In such circumstances, far from incarnating the figure of a State promoting proximity and individualization within the collective, it also shows how a coercive State figure may be reinforced by AI, also standing far from its original features and duties. More generally, it should be noted that, whereas the elusion of the divide between public and private notably and largely stems from globalization, and might be intensified through AI development, a powerful counter-current might on the contrary reinforce the State, and, as a result, the divide between public and private within the law.

5.2 Alternative perspective: a merge

The reality is that only few corporations have the resources, such as financial means and data, to take the lead in the AI industry. It seems that this technology might thus lead to some kind of centralization and monopoly, public or private⁴⁰. For instance, large companies generate a huge amount of data themselves, and thus have an important strategic advantage in comparison with smaller platforms, or even with some States⁴¹. Some smaller firms may even encounter growing difficulties to enter the market. Since the use of AI

³⁹ Børge Lindberg and others, *An AI Nation: Harnessing the Opportunity of Artificial Intelligence in Denmark* (McKinsey & Company and Innovationsfonden 2019) 17.

⁴⁰ Calo (n 1) 424.

⁴¹ Armour and Eidenmüller (n 37) 175.

progressively spreads across fields and sectors, it is likely that the control of those important entities will largely exceed the borders of AI and challenge the legal system more broadly.

Nevertheless, the scenario of mastodons playing above the rules might not materialize as such. As previously suggested, there will most likely be a need for rules, and any central entity, government or company, is likely to require some to function properly, even in the hegemonic way AI may open. Rather than disperse power, AI may centralize it, but neither in the form of the State as currently conceived, neither in the form of a purely private company as we envisage it today. For example, an entity could work like a company, but have a goal set for and pursued by the algorithms to suit better the interests of the shareholders, thus being more representative, even, in a sense, *democratic*. Thus, it could lead to new legal models simply not fitting the legal categories generally referred to as models at this point. As a comparison, the field of international law, whose models and actors were once more defined, has seen the birth of new entities which did more or less break into its once pretty rigid framework; international organisations are taking a major role on the international scene, especially the European Union, which is considered to be '*sui generis*': neither a State, nor an international organisation *stricto sensu*, and nevertheless influencing the international scene more and more.

So, why not imagine the emergence of some kind of Corpo-government, or even of Govern-oration, as a response to the possible obsolescence of the public-private divide in the AI era?

6. Conclusion

It should be noted that public interest, as a legal concept, does not seem to have lost of its value. It is still a valid point of reference⁴². Indeed, even if the fine lines between public and private have been and will be challenged by the development of AI, it does not mean that this differentiation has lost its value *per se*. However, the conception of public law as an exceptional regime within the legal system might prove to be obsolete. More specifically, the peculiar duties it involves

⁴² van den Berge (n 7) 135.

should not be the sole remit of the State, but also bind private entities, at least to some extent. Similarly, public actors should eventually be bound to pursuing public purposes in a strict(er) manner.

Even if prognosis do seem ambitious, as mentioned in the early lines of this paper, it seems worthwhile to question the segregation between public and private within the legal landscape, exacerbated by the fundamental transformations induced by AI. Indeed, the answer to some current difficulties might not be solved by asking how to regulate private or public entities, but rather by asking how to create the legal conditions to embrace the fundamental transformation of the actors and power structures the law traditionally aims to regulate. Since most legal systems currently revolve around the progressively fading dichotomy between public and private law, entities and sectors, our legal system might ultimately be profoundly disrupted, in its most ancient and intimate confines.

A final remark might touch upon the fact that this paper was written before the COVID-19 pandemic. Interestingly, from several angles, this health crisis has highlighted various difficulties in distinguishing between public and private within the law, for example with regard to health resources or tracing applications, particularly concerning the collection of personal data. These complicated discussions may prove to be an illustration of this delicate distinction. Thus and finally, AI may also provide a much needed and unique opportunity to rethink the public-private dichotomy as just one way of conceiving the legal landscape among others, perhaps better suited to the era of algorithms.