This is an Author Accepted Manuscript (AAM) version. The final version has been published in "A Contract Law for the Age of Digital Platforms?" Elena Bargelli & Valentina Calderai (Eds.), Pacini Giuridica, 2021.

SOME LIGHT REMARKS ON METHODOLOGY OF LAW & TECHNOLOGY

Przemysław Pałka[1]

1. Introduction

Legal scholarship has a (partly deserved) reputation for being boring. Legal articles and treatises, especially in the long-established fields like contract, admin or tax, seldom spark interest outside the narrow circles of experts. As we're among ourselves, lawyers, let's admit it: when we write, in our Twitter or LinkedIn bios, that we're "passionate" about the regulation of certain specific markets, we don't really mean it. We just signal that we're experts and not (yet) burned out. And if you ever went on a Tinder date and opened with "for work I read and write about the role of formal mistakes in contract formation," chances are high that you never had a chance to get into the details on the second date.

Now, law & technology is different. Who isn't excited or concerned about the platforms? Facebook & Google spy on us, influence our preferences through targeted ads, and possibly play a part in ruining the democracy. And "privacy!" Whether the amount of data stored about you by the platforms scares you or not, few people find the subject uninteresting. So, if you open by "you know how we met on Tinder? They have data about all your swipes, know your preferences, use it to show you ads and maybe even sell it to some shady companies; I study the law that makes it happen and the ways to render it less creepy," you've got your date's attention. Personally, I still usually ruin in (being a nerd after all – come on, we're among ourselves, scholars) but you get my point.

More seriously, though – law & technology is exciting not only subject-wise, but also methodology- and theory-wise. It's a largely uncharted territory not only because the rules are new or non-existent, not only because few people have written about these topics, but also because we don't really know *how* exactly to write about it. We're learning law & technology by doing it. This

[1] Assistant Professor of Law at the Jagiellonian University in Krakow. The research leading to these results has received funding from the Norwegian Financial Mechanism 2014-2021, Project "Private Law of Data: Concepts, Practices, Principles & Politics," project no. 2020/37/K/HS5/02769.

circumstance makes the field thrilling, innovative & potent; but it also makes it much harder to navigate. Traditionally, legal scholars have not been thinking along the lines we currently do – we lack libraries filled with classic tomes of exemplary work to learn from.

This short essay contains some preliminary reflections on methodology in the field of law & technology. First, I discuss what I believe law & tech scholars *should not* be doing, for legitimacy reasons – namely to present the regulatory goals, in nature political, as necessary consequences of what the legal system is now. Second, I survey the various functions that, I believe, law & tech scholars, are well suited to fulfill. Two caveats: first, these are very preliminary thoughts – it's more an expression of my intuitions rather than a systematic account of a long-lasting research project. For this reason, I'd ask the Reader to be critical – I might not be right; I highlight the areas I believe are important. Second, I have deliberately written this in a provocative style. My purpose is spark thinking and pushback – both to advance my own arguments, and to contribute to the overall reflection.

2. The "Courtroom Bias," or: Law, Technology & Politics

Lawyers are used to thinking like judges and practitioners; we're trained to decide and/or argue cases based on the valid law. This, arguably, is what the lawyers are for: to know the law, and to know how to apply it, especially in hard cases, where a conflict of values or principles arises. "Does a platform blocking an account of a controversial politician violate their fundamental right to freedom of expression?",[2] "Is a clause allowing a platform to unilaterally modify users' virtual content an unfair contractual term under the 93/13 Directive?"[3] – those are the kinds of questions we feel comfortable with. Why?

Notice that when it comes to arguing or deciding a case, the whole set of normative reasons that must be taken into account is given. We know what the statutes say, we know what the constitutionally protected values are (in these cases: freedom of enterprise, freedom of expression, public safety, democratic process, etc.) and we work with past cases determining the hierarchies

[2] At least in the EU, see: E. Frantziou, *The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality*, 21 EUROPEAN LAW JOURNAL, 2015, p. 657.
[3] For the discussion of the 93/13 Directive in connection to online platforms, see: M. Loos & J. Luzak, *Wanted: A Bigger Stick. On Unfair Terms in Consumer Contracts with Online Service Providers*, 39 JOURNAL OF CONSUMER POLICY, 2016, 39, p. 63.

of values in different circumstances. Of course, this does not mean that there's necessarily one, correct legal answer (as Dworkin would have it).[4] But the role of the lawyer/judge is to provide convincing and coherent arguments/justifications, in the light of the law as it is.[5] We will disagree, and the character of the disagreement will be legal. However, these are not the kinds of paradigmatic questions arising in law & tech scholarship.

Law & tech scholars tend to frame the problem around the question: "should we regulate a new socio-technological phenomenon [for example, online platforms], and if yes, how?" On its face, this question seems similar. There are some facts, for example: platforms gather huge amounts of data about their users, or enable peer-to-peer credit, or issue virtual "money," thereby potentially violating users' privacy, or mis-assessing their creditworthiness, or threatening the stability of the financial system. And then there are some legally protected values: freedom of enterprise, right to protection of personal data, consumer protection, etc. A legal scholar approaching the problem might be tempted to present the facts in the light of their impact on the various values, engage in some balancing exercise, and conclude that "yes, we should regulate; in such and such way." Deep down, however, the nature of the normative judgement is profoundly different.

The question on if and how to regulate some phenomenon is a question about the shape of the society we want to live in. And that question is political, not legal. Constitutionally protected rights and values determine the borderlines that must not be crossed (minimum obligations and prohibitions) but do not determine answers to particular policy questions. That's why the political process exists in the first place. Consider some examples.

Think of targeted advertising. The business model of platforms like Facebook or Google relies on extensive data collection and displaying ads tailored to preferences of particular users, determined based on this data. From the social point of view – even though it's currently unpopular to say so – this model has some significant advantages. Everyone in the society – if only they have access to internet[6] – can connect with people from all around the world, and can access incredible amounts of knowledge amassed by humanity, without paying money for these services. Sure, these

---

[4] For the original exposition of this view, see: R. Dworkin, TAKING RIGHTS SERIOUSLY, Harvard University Press, 1977; For an in-depth discussion, see: J.R. Geller, *Truth, Objectivity, and Dworkin's Right Answer Thesis*, in UCL JURISPRUDENCE REVIEW, 1999, p. 83.

[5] For an amazing account of philosophical and psychological components in legal reasoning, see: B. Brożek, THE LEGAL MIND: A NEW INTRODUCTION TO LEGAL EPISTEMOLOGY, Cambridge University Press, 2019.

[6] For the theoretical and empirical analysis, see: E.J. Helsper, *The Social Relativity of Digital Exclusion: Applying Relative Deprivation Theory to Digital Inequalities*, 27 COMMUNICATION THEORY, 2017, p. 223.

services are not "free" – we "pay" for them with our data and attention[7] – but having money to spend is not a prerequisite to access them. We're currently so used to this fact that we sometimes forget how extraordinary this is. On the other hand, obviously, there are downsides to this model. Privacy is a clear example.[8] But more subtle problems emerge as well. Companies making their money through ads have an incentive to addict their users, and to show them emotional content, generating a lot "engagement".[9] This is bad for users' mental health, and for the democratic process itself. Hence, the growing consensus that we should regulate targeted ads somehow. How exactly to regulate them, however, is a political question.

One can make an argument that targeted ads should be prohibited. This would have direct positive effects on users' privacy (as there would be a much weaker incentive to collect all the data) and indirect positive effects on the users' behavior (as the character of displayed content would change, and the incentive to addict go away). At the same time, the platforms forced to change their business model would need to finance themselves differently. Maybe it's possible to generate enough revenue through non-targeted ads. But maybe Google and Facebook would begin charging their users a subscription fee, like Netflix. Meaning: suddenly some people would not be able to afford these; especially younger and poorer ones. Now, maybe such a society would still be better than the one we have today. Or maybe not. There is a legitimate disagreement to be had.

My point is that this disagreement – on whether we want to live in a world with less data collection and no free search engines, or more data collection and such services free in monetary terms[10] – is a *political* disagreement, not a legal one. A debate about it does not resemble a courtroom; it resembles a political debate. And yet – when reading scholarship in law & technology – one often sees such questions treated as if they were legal problems to be solved by expert lawyers. The reason behind that is innocent – that's what we're trained to do. But the consequence is dangerous. When scholars start writing in a way that suggests that certain political outcome is necessary, we have a problem.

---

[7] For the reconstruction and critique of this conventional wisdom, see: P. Pałka, *The World of Fifty (Interoperable) Facebooks*, SETON HALL LAW REVIEW, 2021.

[8] For an analysis of the problem, see: Dan Patterson on July 30, 2020, 'Facebook Data Privacy Scandal: A Cheat Sheet' https:// www.techrepublic.com/article/facebook-data-privacy-scandal-a-cheat-sheet/.

[9] *See* J. M. Balkin, *Fixing Social Media's Grand Bargain*, https://www.hoover.org/research/ fixing-social-medias-grand-bargain.

[10] One can obviously observe that this trade-off is not necessary – for the sake of the argument, let us assume it.

This is an Author Accepted Manuscript (AAM) version. The final version has been published in "A Contract Law for the Age of Digital Platforms?" Elena Bargelli & Valentina Calderai (Eds.), Pacini Giuridica, 2021.

In an ideal version of a rule-of-law liberal democracy, the process of *lawmaking* is political, and the process of law application is expertise-driven. It's the elected representative bodies (parliaments) that decide on the goals to be pursued via law & regulation; and it's the experts (judges) applying these laws in concrete cases, taking into account the requirements of the legal system as a whole (with its constitutional guarantees, etc.). Any coalition that secures the majority in a parliament can choose whatever policy goals they please (subject to constitutional constraints); the judge applying them must strictly follow the law, whether she likes it or not, regardless of whether she agrees with it or not. As lawyers, we're trained to legislate (transform the policy goals into legal text), argue cases and adjudicate, but *not* to choose the policy goals to be pursued.

Obviously, this is just an "ideal" setting; one can point to numerous examples of judges acting politically (especially on the highest levels of courts), just as well as one can demonstrate that the contents of the majority of policies are determined not by the elected officials but by the experts working in the ministries, or for the European Commission.[11] But ideals matter. That they can't be achieved is fact about human condition, or the reality of social life. But that we strive towards them is a reflection of our aspirations. And legal experts taking the place of politicians gives up on that ideal. Now, where do these considerations leave us, law & technology scholars?

To put it bluntly: it's not our job to sell policy goals (usually closely corresponding to our own political convictions) as scholarly judgments. It's not our job to claim that a certain phenomenon should (not) be regulated under the guise of "scientific" arguments. We are not trained to be policymakers, and we do not have the normative standing to act as if we were policymakers.

Such a formulation will, without a doubt, spark opposition. First of all, doesn't everyone make policy recommendations? Law & technology scholars constantly deliver claims about what goals should be pursued by potential regulation.[12] This objection is granted. Note, however, what I begun with, namely that the field is young and confused – simply because the majority acts in a certain way, it does not yet mean that this is the correct way.

The second objection – a much stronger one – is to say that when the legal scholars make claims about the desired policy goals, they in fact do not communicate their own preferences but rely on the law as it is. They derive certain general principles from the totality of the legal system,

---

[11] See the critique in: A. Somek, INDIVIDUALISM: AN ESSAY ON THE AUTHORITY OF THE EUROPEAN UNION, Oxford University Press, 2008.

[12] I am, myself, definitely guilty of that. See: P. Pałka, *Data Management Law for the 2020s: The Lost Origins and the New Needs*, 68 BUFFALO LAW REVIEW, 2020, p. 559.

or directly from constitutions/international treatises. That consumers must be protected in the EU, or that intellectual property deserves legal protection, or that privacy & data protection are fundamental rights of persons, is not anyone's political opinion, it's a legal fact. Hence, it is precisely the role of legal scholars to point out that some of these values are threatened by the changes in technology, and suggest ways to mitigate these threats.

The problem with this objection is that it fails to acknowledge that – from the legal point of view – several *equally correct* ways to respond are available. Come back to the targeted ads example. Does any constitution/international treaty *demand* that we ban targeted ads, or that we regulate them, or that we leave them alone? By no means! One of these outcomes will be closer to a certain political viewpoint, another to an opposing viewpoint, but for the lawyers each of these outcomes is defendable. Hence, the problem with the tendency to write articles in a way that suggest that there's one, best, regulatory solution is that a tacit political judgement passes as a quasi-expert judgment.

What should we do about it? I don't know, that's a political question in itself. But what I do know is that we should be painfully aware of this problem. Consider a few examples discussed during the marvelous workshop which led to this edited volume.

Think of the peer-to-peer credit. This new, technologically assisted phenomenon, comes with many benefits – creates business opportunities for the individuals, inserts more liquidity into the market, challenges the dominant position of several banks, etc. It also comes with risks – that individuals unable to pay back will end up defaulting, that the banks' role as drivers of economic growth (as banks are allowed to lend more than they have, essentially "betting" on future value generation) will be challenged, etc. It's a legitimate question to ask, whether – if we want to regulate this market – the existing paradigms are the ones we should expand, or whether a specific, sectoral regulation is necessary. But the "if" is crucial here!

Why would we want to regulate this market? Doesn't it increase consumer choice? Consumers now can decide whether they want to invest in regulated areas (place their money in the banks, or buy some financial instruments). They can also decide to either borrow from regulated actors, or the unregulated ones. The simple fact that new risks emerge (conditional upon new, potential, benefits) does not yet mean that the law must step in to mitigate them. Maybe people are well-positioned to themselves decide whether they want to enter into much riskier relations or not.

This is an Author Accepted Manuscript (AAM) version. The final version has been published in "A Contract Law for the Age of Digital Platforms?" Elena Bargelli & Valentina Calderai (Eds.), Pacini Giuridica, 2021.

Notice that I'm *not* saying that the lawmaker should not regulate in this area – all I'm saying is that it's not obvious (from the legal viewpoint) that a new regulation is needed, simply because none of the existing regulations applies. From the fact that in the "older" areas of credit consumer protection statues have been passed it does not yet follow that in all new areas such regulations are a must. Both an affirmative, and a negative, proposition needs to be *argued for*. And not simply assumed.

This scales up to all the other areas discussed. From the fact that we have protected intellectual property rights in a certain way, it does not yet follow that – when technology has changed – we should continue to pursue the same goals. Maybe we already protected them way above the level that people actually wanted, and this has driven the innovation? From the fact that we regulate "money" creation and supply, it does not yet follow that we must try to secure the same values when new types of virtual money are emerging. Maybe the reason that they're emerging is because we over- or mis-regulated before? From the fact that we have been protecting interests in personal information in a certain way, it does not yet follow that we should continue to do so. If the pervasive data collection and monetization were so bad, wouldn't people refrain from consciously loading all the information about their private lives onto social media and dating apps?

This is the "courtroom bias." This tendency – to extrapolate regulatory goals from the past regulation and "apply" them to new phenomena – is our lawyerly *déformation professionnelle*. And to say in once again, loud and clear: I'm the first who's guilty of this tendency. Hence, this stream of thoughts that – for a while now – has been boiling in the back of my mind, and happily – thanks to the kind invitation of the Editors to submit this short essay – finally found a way out.

3. So, what should legal scholars do? A couple of useful distinctions

I would like to posit that there are five functions that legal scholars are well-positioned to fulfill in the area of law & tech. Let me discuss each of them.

Describe the reality with the legal sensitivity. In other words: spell out what the problems and positive developments are, without immediately jumping to solutions. One thing we lawyers are good at is noticing how certain socio-technological values affect a myriad of legally protected values. This is because the legal system – seen as a whole – pursues, simultaneously, all the goals that the society deemed worthy of collective support. And these goals are often in conflict! Now,

when a conflict arises in a courtroom, it needs to be solved, based on the law as it is. But when it arises as a regulatory issue (whether to regulate, or how to regulate), we legal scholars should get much more comfortable with not having answers, with not bringing order, but instead with complicating the picture.

Social media and other platforms collect tons of data about its users. Is that a good thing or a bad thing? Well, both. Privacy might be negatively affected. But the efficiency in the market might be positively affected. The "perfect competition" ideal of the market economy assumes "perfect information" as one of its ideals, including the state where all the producers have access to knowledge about the preferences of all the consumers, and the consumers have full information on the available products. So, from the efficiency point of view, the fact that a "almost perfect" ad-delivery-system is being developed, is actually a good thing. Nowadays we tend to focus on the former, also because in the past we overemphasized the latter. But the truth about this normative space is that – given the law as it is now – both aspects are important. So, the first function of the law and tech scholars is precisely this: to show how the problem is more complicated.

Closely connected: **spell out where the boundary between legal and political disagreement lies**. Another thing that we, lawyers, are good at, is knowing what the law demands and what the law allows. In the EU, the protection of personal data has been deemed a fundamental right.[13] In the US is has not. In this sense, there's some type of positive constitutional obligation on the European lawmaker to enact laws that protect personal data. It might be that, if the GDPR continues to fail at achieving any meaningful changes, the CJEU will strike some of its provisions down on such grounds. But the American lawmakers do not face such a fear – their problem is actually the opposite, namely the fear that a too far-reaching regulation of online privacy would be deemed unconstitutional by encroaching too far on the freedom of speech. This is just an example; but the same issue can be observed in all the other areas.

The EU law demands that we protect IP somehow; yet access to knowledge and culture is a legally protected value as well. What are the borderline cases that can never be lawful, and what are the various possible ways for the lawmaker to react to the platform-enabled tension in the access-to-content sphere? The EU law demands that we protect consumers somehow; yet access

[13] *See* Fuster, G. G. (2014). The emergence of personal data protection as a fundamental right of the EU (Vol. 16). Springer Science & Business.

to goods and services, especially transnationally, and freedom of enterprise are protected values too. With a new phenomenon like peer-to-peer lending, what are the extreme situations where one of these values would be endangered in an unacceptable way, and what are the various solutions available in between? Answering such questions is what we are well-placed to do. In a political process, often emotion driven, politicians don't have time or incentive to get into the messy nitty-gritty of such considerations. But we do.

Discuss various possible means of achieving some goals, learning from the past experience. A distinction fundamental to policy, though somehow unobvious for lawyers, is that between the goals and the means of regulation. As I've argued above, what goals exactly should be pursued by a regulatory intervention is very often a political question, not a legal one. However, what are the optimal means of achieving these goals is a different question whatsoever – that is an expert question. Now, legal scholars are not necessarily the best suited to give the ultimate answer to such questions (as such an answer assumes the ability to engage in empirical analysis, and modelling of the predicted outcomes, something economists are much better at). But we are well positioned to survey what the options are, and discuss how these options have fared in the past. If we want to protect privacy/ consumer autonomy/stability of the financial system/ content creators and access to knowledge, etc., what are the tools in the toolbox? How could such goals be achieved via private law (mandatory contract rules, consumer rights, liability/ property rules)? How could it be achieved via administrative regulation, with public enforcement? If we go for public enforcement, should be the national agencies, or the European one, that exercise the ultimate power? Or maybe it's sufficient to rely on the information duties and trust that competition and consumer choice will suffice? What institutional choices have we made in the past, and what the results have been?

Notice the liberating moment when we admit that it's not our role to choose the best tool for realizing a policy objective (again, that is a political choice that the elected officials are tasked with, and will be held accountable for) but to map, or survey, the various available options. "You're thinking of choosing setting XYZ, we actually did that ten years ago in this field, while we went for another setting in that other field, maybe consider both" – that's what we're good at writing. If the goals are given (or assumed, with a clear indication of whether they are necessary or not) law & tech scholar are well placed to discuss the possible tools for pursuing them.

This is an Author Accepted Manuscript (AAM) version. The final version has been published in "A Contract Law for the Age of Digital Platforms?" Elena Bargelli & Valentina Calderai (Eds.), Pacini Giuridica, 2021.

Ask other types of questions. It's interesting to see how the "should we regulate, and if yes, how?" form of question became paradigmatic in the law & tech sphere. It definitely did not have to be that way. Other types of questions are possible. For example, we might take the technological developments as opportunities to critically reflect about the law as it is. For examples, platforms make decentralized speech extremely easy – this leads to the democratization of online commentary, but also the widespread of fake news. One way to go about this is to ask: is the law sufficient, or should amend it? But another way is to ask: well, has the regulation of speech till now been optimal? Maybe – what we thought was the necessary/the best set of regulations – has actually been lacking all the time?

Another possible kind of question is to ask how the existing law led to the emergence of a certain socio-technological development. We sometimes tend to assume that the technological development is legally independent, and that the law's function is to react to the exogenous changes. However, as the law stipulates what is allowed, it plays an active role in shaping the direction of the technological development. Maybe one of the reasons why data collection is so pervasive stems from the law's reliance on consent as the always-acceptable legalizing basis for data processing? How could have this been regulated differently, if we wanted the society to look differently nowadays. This is, obviously, a speculation – but an interesting speculation, nevertheless. And, methodologically, not much more far-fetched than the speculation about how changing the law in a particular way will affect the future society.

Beware of hypes and see past the dominant narrative. Finally, law & tech scholars should become much more critical of hypes and the orthodox ways of thinking about the intersection of law & technology. The dominant view, at least in Europe, seems currently to be the following: "if a new technology emerges, we should probably regulate it; ideally in a horizontal, uniform way." But why? Why not allow the Member States to go their own ways, and in 5 years see what the effects are? This, again, is a political choice. And it's our role to make that clear.

4. Conclusion

Let me end with the same reservation with which I started: all written above is a series of preliminary thoughts, aimed at sparking a debate rather than defending a well-though-through position. The Reader's obviously welcome to disagree – and it's through that disagreement that

the field will move forward. What I will be defensive about, though, is the meta-proposition that as of today, law & tech scholars do not give enough space to critical reflections about the methodology. The kinds of questions we approach are very different from the ones are predecessors were used to dealing with. And our reflections will deliver best fruit if we admit this, and assume the responsibility for figuring out what to do instead.