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BOOK REVIEW

Justice Digitale: Révolution Graphique et Rupture Anthropologique

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Justice Digitale: Révolution graphique et rupture anthropologique by Antonie Garapon[1] and Jean Lassègue explores the ongoing and profound upheaval of law and justice. The authors clearly show how information technology (IT), as a new phase of written communication, introduces anthropological mutations, particularly in the legal field, since the law is an essential regulator of social relations. In order to understand the revolution introduced by new technologies, the authors prioritise the diverse perspectives of jurists and epistemologists. Law and justice are undergoing a radical transformation with multilevel implications. Justice is influenced by the centrality of *big data*, which determines that all decisions – factual elements, legal arguments, the judge's determinations – are entered into *databases*, where the archived information is used and elaborated for predictive purposes.

We are not facing a dystopic fictional imagery, but an ongoing mutation. This transformation, which is taking place particularly in the US, is defined by the two authors as an actual *revolution*. Lawyers and judges can clearly see how the use of databases has radically changed their professional activities. The sensitivity of the matter is reaffirmed through the institution, by the Council of Europe, of the European Commission for the Efficiency of Justice. The commission has the task of examining the performative conditions of justice systems, promoting a responsible use of technologies in the judicial field. This book deals with the broader topics of predictive justice and the impact technologies have on law and justice, which are not spared the consequential mutation of technological innovation.

Digital justice is a multi-faceted reality, both captivating and worrisome, which has already pervaded the jurisdictional machine far beyond the US.[2]

The approach taken by the authors is constructive: they recognise the necessity for ongoing developments and the contribution technologies can provide to law and justice. However, at the same time, one should not lose sight of those elements that exclude the jurist's participation and replace it with a dialogue between technicians. This would certainly prove more efficient but lacks the essential components that inform a case-by-case ethical evaluation.

Numerous revolutions mark the contemporary legal landscape, inaugurating an unprecedented relationship between citizens and authority. In the face of these dynamics stemming from the digital revolution, the authors choose not to foster an oppositional perspective of "pros" and "cons". Instead, they aim to provide a positive contribution to the debate by considering the complexity of the ongoing processes. The revolution *numérique* is characterised by a symbolic, sociological and cognitive structure.

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[2]For an overview on the American experience, see Simmons (2016); referencing the use of predictive algorithms in American so-called *drug courts*, see Marlowe *et al.* (2012); for European perspectives, see Sicurella and Scalia (2013).

First, a symbolic revolution redesigns the media through which social meanings are construed. IT and the digitalisation of the law not only modify the media used to circulate legal knowledge, but have a deeper impact on the elaboration of the law and the influence the law has on the world. Numerical writing becomes part of the production of norms, requiring a new social organisation and a new order of meaning. If it is true that – as stated in the often-cited phrase by the jurist, Lawrence Lessig – "Code is law", predictive justice (or digital justice) must be understood as an alternative source of juridical normativity. If Lessig identifies the code as the law, in the digital age, the code is cyberspace. The (digital) code revolutionised the (criminal, civil) code.

Hence follows the second postulate. The symbolic revolution is also a graphic revolution, connected to the appearance of a new writing system, which partly lacks linguistic properties due to its mute and opaque nature. If the law is in the code, it is this graphic revolution that should be studied. The digitalisation inaugurates a new normative regime that risks eradicating the word.

Finally, there follows a third fundamental question. Not only must the transformation of the law through IT routines and algorithms be highlighted, but also the charm of the machines, resulting in more power being progressively awarded to them. Why all of this trust in technology? Why is the temptation to delegate to machines so appealing?

The performative aspect of mechanical writing stands out, as it creates a new graphic order. Digital writing will not be limited to passively assimilating our laws, but will open up the possibility for a reorganisation of human co-existence. More is expected from the judiciary than ever before: not only the implementation of certain procedures, but the perfection of an instrument of truth, a "trust machine", a representation of ourselves.

Legal tech's ambition is to become justice itself through a numerical evolution that makes heterogeneous worlds mutually compatible by facilitating communication between the law and the changing factual reality. The secret dream is to create a world where social relations will not be administered by politics or the law, but rather by technology, since public opinion feels more reassured by a technical decision than a human one. Human-made justice risks being considered arbitrary, fallacious, an outdated historical fact. Indeed, a process of desymbolisation of the frail humanity of the law and the judge, and a scientific re-symbolisation have already been initiated.

What happens to the law in a society that delegates to the machines? The graphic revolution transforms every aspect of social life. Different from previous juridical revolutions – such as the introduction of a Civil Code or of constitutionalism – this transformation is not led by jurists, the legislator or other public subjects, but by different actors: young businessmen, mathematicians, geeks who, after health care (nethealth), education (mooks), urban development (smart cities) and civic life (civic tech), now regard the judicial system as the last untapped terrain. Their aim is the technological expansion and application of their models and reasoning. In this perspective, legal tech start-ups created by engineers and businessmen are blossoming, following a profit-oriented logic. Hence, a cultural shock follows: predictive justice and legal tech rise from the injection of a capitalistic logic into the legal profession, which was still, until recently, reluctant to reduce their relations with clients to a mere matter of money. On the one hand, the announced goal of these start-ups is to render lawyers unnecessary; on the other, these legal professionals entrench themselves through their status and their deontology. In this way, a conflict between a capitalistic and an artisanal logic of justice is triggered. The more general objective is to lead judges, lawyers and clients towards a more tech-relying justice, thereby achieving the maximisation of results with the minimum employment of means, as well as a wider use of technologies. Optimisation becomes the main value of this new dimension.

Moreover, the promise to citizens is a more accessible justice, which would empower them. Behind the will to restore the power of individuals subjected to justice – by granting them direct access to legal knowledge, previously monopolised by institutions and by the law – lies the idea that everything can be modelled and inserted into a mathematical equation. Interest-oriented mindsets are prioritised over rights. This creates a law market-place. Throughout the book, the authors highlight the bond between predictive justice and the "revolution" carried out by economic actors guided by economic objectives, with a progressive disappearance of words and of the symbolic space. In this regard, these dynamics

could give life to new forms of transitional justice and allow the law to focus on more complex cases. The system is built by new actors so that subjects will prioritise their interests over their rights, leading them to calculations and therefore rational choices, more predictable even for the authorities. Individuals are pressured into giving up their rights.[3]

A new calculus-based and neutral normative dimension is introduced, which does not rely on the subjective evaluation or inner conviction of the judge. Justice would thus be better secured by neutral algorithms rather than by humans, who are characterised by subjective and unforeseeable perceptions and variables.[4] In the US, algorithmic risk assessments have been used to decide whether to grant bail. As pointed out by many, this might open the way to new discriminatory and mass-incarceration channels[5] that inevitably and predominantly affect weaker and poorer social groups. Another relevant transformation is observed at the cognitive level: predictive knowledge, the basis of the digital revolution, is a complete stranger to the law. Even better, the concept of predictability is intrinsic to primary legislation, but practical application is always characterised by a certain margin of flexibility. Statistics fit in this margin. However, legal tech makes a qualitative leap: not only does it formalise the applicability – blind but not less ideologically oriented – of the norm, but it also aspires to foresee the treatment reserved by specific institutions in specific cases.

Big data should provide mathematical rather than juridical substance, and they seek to do so by combining three types of data – juridical data, essential characteristics pertaining to the facts and ulterior relevant contextual elements. Based on precedents, they build model decisions, identify probabilities and indicate more or less convincing arguments. This stands even for the arguments of all parties involved in the judicial proceedings, which are nevertheless affected by big data. All elements, juridical or factual, are of equal importance in reaching the decision. The risk is that this might standardise decisions and that these might be devoid of any creative interpretation of the law.[6]

Legal causation is abandoned or pushed aside in favour of a practical correlation, since reality matters more than fiction. Therefore, the law is not part of the information determining a judgment. The law becomes a fact and facts, legitimate or not, become the law. Juridical science in this new context will not disappear, but it will come second: creation and interpretation of the law are not part of a self-referential formal structure, but become the subjects of examination. Judgments do not build a jurisprudence; they feed a database. By citing Hobbes, the authors stress how it is not for the authorities to define the law's application anymore, but rather the amount of information.

The ongoing upheaval is particularly deep: the code is not consulted anymore; instead, a dynamic of illiteracy and loss of control is favoured, which relocates the reading and interpretation of data to computer scientists. Juridical culture falls to artificial intelligence (AI).

Legal tech confers transparency to a level of reality until now inaccessible: the unconsciousness of judicial production establishes itself with scientific authority. Therefore, there is a new theoretical compass, which is, however, not judicial – at least until the law, probabilistic sciences and IT find a new balance, which will only be possible if jurists are able to constructively contribute to these transformations.

The political, sociological and cognitive revolutions converge towards a more horizontal and freer universe, without an intermediary a sort of de-symbolised and de-spacialised post-political world, devoid of a governing power.[7] As a result, the sacred dimension, typical of every institution, is weakened. These revolutions exclude the sacred – be it republican, religious or ritual – from the factual dimension. According to the authors, the symbolic revolution we are witnessing establishes itself as "a-symbolic" and "a-human". Nevertheless, one could object, the sacred dimension could not fully

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[3]The same considerations were developed by Garapon and Servan-Scheriber (2013).

[4]Thus the contraposition made by the authors between justice "as fairness" and justice "as fitness"; see pp. 316 *et seq.*

[5]In "The newest Jim Crow", Michelle Alexander, highlighting the use of algorithms in criminal law in the US, observes how those evaluations determine who will remain in jail and who will be released. Thus, the choice of some states to end the cash bail system for a free-of-charge one, through a system accompanied by the use of probability-based algorithms, shows us that however free-of-charge, the system is not really free; Alexander (2018).

[6]On the figure of the "scientist-judge", see Nussbaum (1995).

[7]The authors particularly insist on the process of decentralisation.

disappear and, instead, had to be substituted by the imperium of algorithms and the esotericism of the underlying knowledge. Think, for example, of Apple's logic: the average user does not need to know how the registry settings work or why a certain command must be written in a specific way rather than any other. For the average user, it is enough to know that pressing "A" will give you "B". And it is this logic that allowed Apple to build a closed and exclusive proprietary world, where the user does not control anything and only trusts the geek and the whole chain up to the "high priest". The latter is none other than who owns the company, the software and the contents, including the content each of us uploads on iCloud.

These transformations, the authors argue, significantly influence the legal professions of the lawyer and the judge. Algorithms could replace the judge, freeing the law from its imperfections, emotions and conflicts. The "liturgy of the word", the judging,[8] but not the decision-making, would cease.

The digital world does not need a physical space to congregate people and make them communicate. Judges can avoid meeting in person and proceedings can therefore be conducted more rapidly.

This rupture introduced by digitalisation is certainly more incisive than other more recent transformations experienced by justice: from international criminal justice, to restorative justice or global law. It is a multilevel revolution that can question the human component of the *ius dicere*.

The digital revolution therefore acts as an element that disrupts the space and time of justice, both by eliminating the sense of the duration of the proceedings and by focusing on the present, in which predictive justice is strategically functional. Predictive justice deeply transforms the idea of the trial as a place of catharsis – as a theatre. It accelerates procedures, modifies judicial ascertainment of truth with practices of correlation that replace interpretation. Even if, seemingly, there is no modification of the space-time framework, the symbolic efficacy of the trial is revolutionised, resulting in a series of discontinuities from the essential elements of the classic procedure. This is why there is a clear need, as jurists, to look for legal answers to these transformations. However, what are the real implications of this inevitable process?

Obviously, technology is not per se evil. In fact, it can support those familiar with it and favour a more general access to information. However, a critical use is advised, finding a balance between the positive reduction of subjectivity and a dramatic elimination of guaranteed freedoms. Producing regulations sufficiently precise to orient our behaviour is an intrinsic characteristic of the law, which, however, coincidentally elaborates and crystalises general rules that, when applied, leave interpretative discretion. The paradigm evolves from a universal and general law to a rule applicable to the specific case, losing its general element, so that the distinction between law and fact completely vanishes.

A courtroom is the physical space in which to share a difficult and complex human dimension, where the parties – victim and perpetrator, plaintiff and defendant – face one another, allowing the judge to reach a decision. The digital world brings with it the risk of trivialising that space, due to the lack of in-person confrontation between the counterparts, allowing online conferences or the possibility to tweet during a court hearing. There is no more shared space.

The transformations also involve the protagonists of justice.

The increasingly more frequent requests of IT competence in the legal profession risk neglecting, without, however, fully excluding, legal competence. The lawyer, when faced with a statistically negative prediction, will always be pushed to look for a solution on the transactive level. There is therefore the risk that legal proceedings will become a luxury for winning cases and that they will be overshadowed by a "commercial" solution. What are the deontological responsibilities for the operators of these devices? The question is not just about when algorithms should be used, but also about how to make them transparent. The duty to disclose the data-processing methods, other than contributing to the respect for the principle of due process, would exclude – or confirm – the existence of possible discriminatory parameters.[9]

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[8]On the processual ritual, see Garapon (1997).

[9]Many authors believe that algorithms are often characterised by discriminatory biases. However, it must be considered that data are recorded by law enforcement and it is therefore impossible to attribute a discriminatory intent to AI, which merely processes the recorded data. On the transparency necessity, see John (2017); Gable Cino (2018); Simonite (2017).

In addition to this transformation of the legal profession, the authors clearly prove how this revolution radically changes the role of the judge. On the latter weighs an enormous media pressure, particularly in terrorism proceedings, typical of the era of counter-factual law and of the "what if law". Through big data, the judge knows beforehand how other colleagues have decided similar cases.

Therefore, judges will be expected to perform their role coherently, releasing a reassuring message to public opinion, to narrate the story univocally, to avoid upsetting financial markets or misaligning their decisions from those of the political system.

Sufferings, hopes and wounds of the individuals involved are more and more frequently pushed aside. Predictive justice can undertake a normative importance, leading to a "sheep effect" – "*effet moutonnier*" – in decision-making.

In the third part of the book, the authors return, on the one hand, to their original theoretical and multidisciplinary premise and, on the other, to a political approach. The worth of the digital revolution must therefore be assessed not only in terms of efficacy, comfort and preference, but also in terms of freedom, utility and humanity.

Predictive justice might prove counterproductive: the biggest freedom could turn into a possibility of social control. One can think of biometrics, as well as the full trackability of financial operations. Justice requires that digital justice respects the humanity of the individual. The latter, on the contrary, establishes itself as a form of justice that questions the humanity of ordinary justice, with the presumption of offering a more efficacious, fast and just institution. Thanks to AI, justice may be able to decide without a cognitive medium. However, it would be naive to think that machines are devoid of principles: they can incorporate these in the form of parameters. If some of the criteria are contrary to fundamental human rights, such as ethnic background, it is enough to delete them. Nevertheless, differently from human beings, once deleted, we will be certain that that parameter will not be considered in indirect forms – place of residency, education, working conditions and other indicators revealing the same discriminatory criterion formally abandoned.[10]

Diffidence towards human judges derives from the need for faster proceedings, more impartial judgments, a more efficient judicial governance and shared decision-making. Human decision-making results in several possible outcomes, while technology gives certainty and automatism, indicating the myth of a purely objective justice.

Profiling and classifying data allows us to reach new general rules. A new natural law is rising.

Predictive justice captivates because it can create a law without the state, which coincides with machines and technology. It eliminates the inaccessible and mysterious element of the decision – a necessary component of the symbolic sphere to do justice.

However, the promise of a full intelligibility of technologies is contradicted by the complexity of a form of writing obscure to most: there is a digital black box, opaque and mysterious.

For example, in the US,[11] computer-science techniques are used to measure the risk of recidivism of convicts to determine the extent of the punishment or alternative measures to imprisonment. Consider the New Jersey case, where court hearings for the granting of bail were substituted with algorithmic risk evaluations. It certainly is an evaluation that for now serves as a guide and does not replace the decision of the judge. In a bail-based system, often accused of spreading prejudice based on ethnicity and social class, the goal of algorithmic implementation is to render the evaluation of risk more neutral, while it should be purely based on evidence. Such measures seem to implicitly ask us: Should

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It is, however, true that the data processed through algorithms store information on pre-existing case-law, reinforcing majority opinions and prejudices.

[10]On the elimination of prima facie and indirect discriminatory parameters in risk assessment tools in the bail and pretrial detention systems in the US, Barkow (2019).

[11]See *Wisconsin S.C., State v. Loomis*, 881, Wis. 2016 Indiana S.C., *Malenchick v. State*, 928, Ind. 2010. The case includes the theme of transparency of algorithms. The court, despite believing that the use of risk-evaluation algorithms by tribunals respects the principle of due process, attempts to warn about the dangers of these models, giving guidelines on these tools employment (pp. 65, 66). However, the critique of the court was not conveyed with enough strength. It ignored the limitations of the judge in balancing said tools and did not consider the pressure on judges to rely on these instruments.

we fear more: the judge or algorithms? The judge can at least face critiques over a decision, without the presumption that the decision is the result of an inevitable and objective mathematical calculation. Does not predictive justice risk inverting the reasoning so that, instead of pursuing data research, the objective is achieved only through already available data? The central question of this age is whether a highly technological justice – not relying either on what is prescribed by the law or established by the facts, but on a mathematical model – is still a human justice that admits freedom of judgment, uncertainty of the outcome and interpretative discretion based on the inner conviction of the judge.

Algorithms hold the risk of replacing the symbolic ritual and the oral communication of the trial. In front of this anthropologic transformation, the authors stress that we should ask ourselves how to exist in this space, how to use these applications while remembering the specialty (specificity?) of law and justice, as well as the human element of justice.

Predictive justice aspires to foresee the future by assigning a fundamental role to the past. The result is an intensification of the present, since the past and the future are represented in an encoded way, in the form of projections and predictions. The future is based on the past, foreseeing the future – an individual risk of committing a crime on the basis of family history, social context or environment, resulting in self-fulfilling prophecies.

The stakes are high: imagining an inhabitable world for humankind through the perspective of modern technologies, with norms regulating its existence and survival.[12]

In conclusion, *Justice Digitale: Révolution graphique et rupture anthropologique* is an invaluable and versatile publication for academics and practitioners. It has the potential to influence law-makers and practitioners by providing accessible insights into the relationship between law, justice and technologies. The book constitutes also a solid syllabus for postgraduate courses. Finally, it establishes the foundations for further academic research by clearly identifying the changes and the challenges introduced by the technologies within the legal and judicial context. For that reason, I believe the book makes an important contribution and should be read by everyone on the field.

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[12]This picks up the conclusions by Garapon (2017).