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The Legal Subject in the Society of Singularities: Prolegomena to the Legal Type of Personalized Law

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Abstract: The essay takes the construction of the legal subject within personalized law as an impetus to outline the development of legal subjectivity in the post-modern era. The various discourses that produce norms and knowledge, and finally the subject itself, are particularly evident here. By placing these construction processes within the framework of extra-legal discourses, with particular reference to the mechanisms of online marketing, we learn that in the context of both personalized law and online marketing, individuals are no longer perceived as predefined entities, but rather as a result of performative acts of compositional possibilities. Just as online marketing creates consumers based on their detailed online behavior, personalized law aims to tailor legal norms to individuals by creating a digital (dividual) subject through computerized analysis of distinct data nodes. Finally, these insights also allow conclusions to be drawn about the individual nature of the modern subject in modern law and its entanglement in extra-legal discourses.

Keywords: personalized law; legal subjectivity; Reckwitz; dividual; Deleuze

1 Introduction

> No one else could gain admittance here, because this entrance was meant solely for you.[1]

Personalized law is not yet a living reality, but a powerful idea. This idea is so powerful because it promises something that previously seemed unattainable,

1 Franz Kafka, *The Trial*, trans. Breon Mitchell (New York: Schocken Books, 1914/1998), 215f.

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namely to address the individual human being as they really are, i.e. in their irreducible uniqueness. Furthermore, it claims to satisfy the individual's innate hunger for legal norms with legal offers tailored to them. The fact that the law used to employ abstract constructs such as the anaemic legal subject, or reduced people to meaningless formulas such as the "rational and free subject", was not due to the legal system's ignorance of its human environment. On the contrary, it was solely due to the lack of appropriate information. Despite mountains of files, human beings remained for a long time the great unknown for law. Today, however, the situation is changing radically with the advent of big data and data analytics. For the first time in the evolutionary history of law, AI and big data offer the opportunity to help the ancient idea of *suum cuique* achieve a breakthrough and finally do justice to the human subject. This is, roughly speaking, the vision of the supporters of personalized law.[2]

However, the critics of personalized law see things differently.[3] For them, the use of abstract concepts is not due to an information deficit on the part of modern law, but is programmatic, as it thus realizes the noble idea of legal equality. Although the modern legal subject is a construction of the legal system, an anaemic artefact, it is due to this empty form that the modern individual was able to free themself from the personalized reciprocity relationships and fixed role attributions of the guild-based societies of the Middle Ages and unleash their productive powers. In modernity,

2 See Omri Ben-Shahar & Ariel Porat, *Personalized Law: Different Rules for Different People* (New York: Oxford University Press, 2021); Christoph Busch & Alberto De Franceschi, "Granular legal norms: Big Data and the personalization of private law" in *Research Handbook in Data Science and Law,* eds. Vanessa Mak, Eric Tjong Tjin Tai & Anna Berlee (Edward Elgar Publishing, 2018), 408–424; Cass R. Sunstein, "Deciding by default," *U. Pa. L. Rev*. 162.1 (2013): 1–57; Anthony J. Casey & Anthony Niblett, "Framework for the new personalization of law," *University of Chicago Law Review* 86.2 (2019): 333–358; Omri Ben-Shahar & Ariel Porat, "Personalizing mandatory rules in contract law," *University of Chicago Law Review* 86.2 (2019): 255–282; Ariel Porat & Jacob Lior Strahilevitz, "Personalizing Default Rules and Disclosure with Big Data" in *Algorithmic Regulation and Personalized Law,* eds. Christoph Busch & Alberto De Franceschi (München: C.H.Beck, 2021), 5–53; Omri Ben-Shahar & Ariel Porat, "Personalizing Negligence Law" in *Algorithmic Regulation and Personalized Law,* eds. Christoph Busch & Alberto De Franceschi (München: C.H.Beck, 2021), 627–688.

3 See Marietta Auer, *Zum Erkenntnisziel der Rechtstheorie: Philosophische Grundlagen multidisziplinärer Rechtswissenschaft* (Nomos Verlag, 2018), 61f; Philip Maximilian Bender, *Grenzen der Personalisierung des Rechts* (Tübingen, Mohr Siebeck, 2023); Hans Christoph Grigoleit & Philip Maximilian Bender, "The Law between Generality and Particularity: Chances and Limits of Personalized Law" in *Algorithmic Regulation and Personalized Law,* eds. Christoph Busch & Alberto De Franceschi (München: C.H.Beck, 2021), 115–136; Marietta Auer, "Granular Norms and the Concept of Law: A Critique" in *Algorithmic Regulation and Personalized Law,* eds. Christoph Busch & Alberto De Franceschi (München: C.H.Beck, 2021), 137–154.

individuals are recognized as equal because – as the word implies – they are recognized as in-dividuals, i.e. as indivisible elements of a set consisting of identical elements. By granting them equal scope for autonomy in the form of subjective rights, it is also hoped that they will prove themselves in a decentralized competition among equals, in full confidence of their self-regulating and self-healing powers. It is precisely this indivisible quality of the individual that forms the basis of their autonomy and which is now being challenged by the digital framework. As one prominent critic notes: "This premise, however, is put to the test when the indivisible quality of the person disappears behind algorithmically generated type profiles. The individual person might then no longer be conceived as indivisible, equal and free, but rather as divisible, calculable, predictable and unfree."[4]

Regardless of these various pros and cons, how can we explain today's quest for personalization? At this point, one might think that the call for a personalization of law is another case in the long history of the materialization of law.[5] However, such an equation would miss a decisive distinguishing feature of personalized law. Although the materialization of law propagates a turning away from the universalistic orientation of modern formal law, the particularism it promotes is of a completely different nature to that of personalized law. The former continues to be oriented towards highly standardized and uniform role relations,[6] while the latter claims to capture the particularity of each individual legal addressee beyond such role ascriptions. If we want to properly understand the will to personalize the law and the accompanying change in legal subjectivity, we have to leave familiar explanatory patterns behind and trace seismic shifts at the level of the prevailing social logic.[7]

In this article, we take personalized law as an opportunity to talk about changes in legal subjectivity in (post)modernity. In our understanding, legal subjectivity – as Ladeur rightly states – cannot be reduced "to a mere address within the legal system to which rights and duties are attributed."[8] On the contrary, if one wishes to grasp the concept of legal subjectivity as a whole, one must abandon a purely internal legal perspective and consider social norms as well as social knowledge. This is because

4 See Marietta Auer, *Autonomy by Algorithm? A Paradox,* in: https://blogs.law.ox.ac.uk/business-law-blog/blog/2022/06/autonomy-algorithm-paradox-0 (last access on January 18, 2024).

5 Max Weber, *Economy and Society: An Outline of Interpretative Sociology* (Vol. II) (New York: Bedminster Press, 1968).

6 See Gunther Teubner, "Reflexives Recht: Entwicklungsmodelle Des Rechts in Vergleichender Perspektive," *Archives for Philosophy of Law and Social Philosophy* 68. 1 (1982): 13–59, 25.

7 See part III below.

8 Karl-Heinz Ladeur, *Recht – Wissen – Kultur. Die fragmentierte Ordnung* (Berlin: Duncker & Humblot, 2016), 14 ff; See further Thomas Vesting, *Gentleman, Manager, Homo Digitalis. Der Wandel der Rechtssubjetivität in der Moderne* (Weilerswist: Velbrück Wissenschaft, 2021), 32 ff.

legal subjectivity is not an achievement of the legal system itself, but a phenomenon of the co-production of various discourses. Based on this fundamental premise, in the following we will examine how the legal system imagines and fabricates its subject in connection with other discourses in each respective epoch. To this end, we begin with a brief description of personalized law (II) and its social embedding (III), before moving on to the construction process of the post-modern legal subject (IV). As already mentioned, we place these construction processes in a larger context of extra-legal discourses. In doing so, we operate with the distinction between control and disciplinary societies, whereby personalized law and the corresponding conception of the subject belong to the former (V) and modern law to the latter social description (VI). We conclude the essay with some reflections on the risks and opportunities of personalized law (VII).

2 Personalized Law: Chicago's Best Idea

Even though the authors of the book Personalized Law, Ben-Shahar and Porat, claim that the titular idea is old, it is to their credit that they have revived it. Chicago, incidentally, is not just the place to which one of the two authors has a biographical connection. Chicago, or more precisely the Chicago School, is an important point of reference for both authors. A cursory glance at their book suffices to see that their proposal for a personalized law is the logical continuation of this economic school of thought. More on this later.

Personalized law is a law that strives for the greatest possible concretization. According to the definition given by Ben-Shahar and Porat: "Personalized law is precision law characterized by two primary features: individualization and machine-sorted information."[9] In their view, personalized law is therefore first and foremost a precision law. By this they mean a law whose provisions are the result of internal reflection on all relevant circumstances of the field to be regulated. However, personalized law is not limited to capturing the particularities of the regulatory field and thus implicitly its difference from all other regulatory fields. Rather, its precision drive is also geared towards intersubjective differences, which – to return to Kafka's doorkeeper parable – determine the (legal) entry point specific to each legal subject. In the words of Ben-Shahar and Porat: "People differ in many respects, and the key challenge for personalized law is to identify these variations, measure them, and build a model to determine how the legal commands should fit them."[10] In order to work out these differences, personalized law is dependent on "good

9 Ben-Shahar & Porat, *Personalized Law*, 1.

10 Ben-Shahar & Porat, *Personalized Law*, 24.

predictive information". However, as the authors immediately note: "Precision is valuable, but costly."[11] While this axiom is still valid for the offline world, which is characterized by incomplete information, it has drastically lost its validity with the advent of digital media. According to Ben-Shahar and Porat: "The costs of information have been shattered. Information that was costly for the law to collect or distribute in the world of cluttered unsorted knowledge is cheaply available in the new world of digitally searchable databases and AI. New methods for analyzing data make it possible to reach levels of descriptive and diagnostic accuracy previously unattainable for human cognition. Laws that existed in environments of eyeballed, hand-collected, intuition-sorted, and cranium-stored information had to tolerate rough commands, which resulted in bias, waste, suboptimal behavior, and unnecessary losses. These laws are now ripe, with the advent of Big Data, to be redesigned and reflect the large amounts of data that computers can sort and classify."[12] In other words, the developments in the digital sphere described here make it necessary to fundamentally rethink all previously applicable axioms. The legal type of personalized law can be considered the result of such a process of reflection.

Regarding the areas of application of this new type of law, there are no limits to the institutional imagination. They range from personalized duties of care and personalized liability provisions in tort law to personalized norms in road traffic, transplantation medicine, tenancy law, employment law, etc. In inheritance law, for example, analyses of testamentary dispositions have shown that the wish regarding how the inheritance is divided varies depending on personal characteristics such as the age, gender, religious affiliation and profession of the testator. This data could be used for a personalized inheritance.[13] Another example is criminal law, where some jurisdictions use the instrument of personalized sanctions to promote a fairer system of sanctions. Ben-Shahar and Porat mention in this regard the example of Finland who already uses income and wealth in order to personalize sanctions.[14] Algorithmic personalization can also further improve law enforcement by assessing the individual risk of offenders. However, the most promising field of application are default rules in contract law and, more specifically, sales law, where customer data obtained with the help of empirical studies and modern behavioral research can be used to tailor dispositive regulations to the individual contractual partner in the best possible way.[15] Porat and Strahivelitz cite as an example the default rule provided in the U.S. Uniform Commercial Code, according to

11 Ben-Shahar & Porat, *Personalized Law*, 53.
12 Ben-Shahar & Porat, *Personalized Law*, 56.
13 Ben-Shahar & Porat, *Personalized Law*, 88f.
14 Ben-Shahar & Porat, *Personalized Law*, 77f.
15 Ben-Shahar & Porat, *Personalized Law*, 86. Unlike in normal business transactions, most consumer contracts are standardized and contain general terms and conditions that apply equally to all consumers and are non-negotiable.

which the place of delivery of goods is the seller's place of business or, if there is none, the seller's residence (Section 2-308 Uniform Commercial Code). Accordingly, they question whether such a default rule makes sense in the case of a physically disabled buyer, since the buyer would be required to pick up the goods from the seller unless otherwise agreed, whereas under a personalized default rule, the goods would automatically be delivered to the buyer's residence.[16]

Efficiency arguments, which clearly originate in law and economics thinking, are cited as justifications for a personalization of law. For example, it is argued that if the general dispositive provisions do not match the individual preferences of the contracting parties, the parties would opt for a different contractual agreement, which in turn would result in transaction costs. In the worst case scenario, the higher transaction costs could further lead to the termination or even non-conclusion of a contractual relationship. A personalized law could, in contrast, banish the devil of reduced efficiency qua increased transaction costs,[17] by taking into account in advance the preferences of the contracting parties.

However, the attractiveness of personalized law cannot be explained solely by the economic motives of seemingly rational actors, especially since humans as social beings cannot be reduced to profit-maximizing market participants. Rather, the analysis must adopt an overall social perspective that is capable of grasping shifts at the level of the social logic prevailing in a particular epoch. Only against such a background can the attractiveness of this idea be assessed more precisely.

3 A Shift at the Level of Social Logic

Andreas Reckwitz has dedicated his study "The Society of Singularities" to analyzing such a shift. According to Reckwitz, we are experiencing a structural shift from a social logic of the general to a social logic of the particular. While the logic of the general means the fabrication of general, i.e. interchangeable social units, standardization and universalization, and thus engages in *doing generality*, the social logic of the particular produces unique, individual and non-interchangeable units, such as unique objects or singular subjects.

The aforementioned shift began in the 1970s and is characterized by drastic social changes. These include the search for the self, intensive identity politics, the advent of the personal computer and new techniques of self-formation.[18] The logic of

16 Porat & Strahilevitz, "Personalizing Default Rules," 12.

17 Porat & Strahilevitz, "Personalizing Default Rules," 9.

18 See also Philipp Sarasin, *1977: Eine kurze Geschichte der Gegenwart* (Zürich: Suhrkamp Verlag, 2021).

the general does not disappear completely, but mainly forms an infrastructure for singularization processes. Whereas in industrial modernity the social logic of the particular was still a niche phenomenon, today the particular is available "en masse". This development is favoured by three factors:[19] first, by a cultural change in values that emphasize the unique and authentic instead of the general and functional; second, by an economic focus on unique goods; and third, by the technological support of these processes.

The central unit, starting point and *product* of the social development described above is the subject itself. According to Reckwitz, the confrontation with self-determination and self-development has led to people gradually perceiving, demanding and living out their otherness. For the subject of the postmodern era, this development means that beyond all typifications "the subject achieves an acknowledged degree of inherent complexity," which – as Reckwitz continues – cannot be reduced to the attribution of functional roles or to belonging to groups of origin.[20]

The resulting inherent complexity of the postmodern subject is expressed above all in the urge for an authentic and singular lifestyle, which is to be achieved in the real world through unique travel destinations, individual home furnishings, personalized diet plans or work in the creative sector, for example, but which is simultaneously expanded through further practices in the digital world.[21] This new way of caring for oneself essentially consists of bringing together the most diverse elements in such a way that a unique profile emerges. The uniqueness of the post-modern subject is thus of a modular or compositional nature. Moreover, its value lies more in the combination of mundane elements than in the composite elements themselves.

The role of technology can hardly be emphasized enough here. However, a change in function is striking. While in the past, technological infrastructures were inscribed in the logic of the general, today the digital infrastructure functions as an infrastructure of the particular. According to Reckwitz, digital technologies enable a double form of digital singularization of the subject: on the one hand, a cultural singularization of the public representation of the subject across the various social media and platforms and, on the other, a *automated singularization* that takes place behind the subject's back.[22] As part of this latter form of singularization, personal characteristics, needs and behavioural traits of the individual are analysed, combined and anticipated using computer-aided measurements, tracking analyses and

19 Reckwitz, *The Society of Singularities* (Cambridge: Polity Press, 2020), 72ff.
20 Reckwitz, *The Society of Singularities*, 40.
21 Reckwitz, *Subjekt* (Bielefeld: transcript, 2021), 182.
22 Reckwitz, *The Society of Singularities*, 177f.

evaluations of mass data. This involves taking into account specific, individual elements such as browsing history, cookies, IP addresses and, in general, traces that an individual leaves on the internet. In our opinion, the personalization of law is related to this latter development and can only be explained against the background of this shift in social logic towards the particular.

4 Online Marketing as a Driving Force

In the context of automated singularization processes, the differences between people are, as noted earlier, being worked out; differences that, as Ben-Shahar and Porat note, relate to a person's physical, mental, cognitive and emotional characteristics as well as their preferences and habits. This information is also obtained from big data, which is currently held by two players: the state and commercial platforms. All this makes clear that the advocates of the idea of personalized law start from an equation of the flesh-and-blood human being with their data, in the firm conviction that the truth of the modern subject lies deep in the data traces they leave behind. In doing so, however, these advocates remain stuck in a paradigm of representation, as they understand the individual's data as their virtual duplicate in the online world. However, as will be shown, this virtual duplicate is not a pre-existing and certainly not a stable entity to which the legal offers of personalized law refer, but an artefact that is constantly being reconstructed depending on the context. No other field can illustrate this idea better than the world of online marketing.

In online marketing today, consumers are reached through targeted advertising based on a detailed analysis of their consumer behavior. With the help of ad servers, ad networks and ad exchanges – tools used to bring people and products together – advertisers can create personalized ads and adapt them in real time to the personal interests and idiosyncratic behaviour of consumers.[23] However, the tools mentioned above are not used with the aim of reaching masses of consumers. Today, marketing is not understood as a form of mass, niche or even individual advertising. Rather, marketing is understood as a practice of creating differences. Accordingly, market segmentation no longer takes place along the lines of existing categories such as men, women, dog owners, etc., but is the product of a differential practice that no longer has a fixed point of reference.

23 For a detailed analysis of online advertizing see: Donald MacKenzie, Koray Caliskan & Charlotte Rommerskirchen, "The longest second: Header bidding and the material politics of online advertising," *Economy and Society* 52.3 (2023): 554–578; Donald MacKenzie, "Blink, Bid, Buy," *London Review of Books* 44.9 (2022); Donald MacKenzie, "Cookies, Pixels, and Fingerprints," *London Review of Books* 43.7 (2021); Detlev Zwick & Janice Denegri Knott, "Manufacturing customers: The database as new means of production," *Journal of Consumer Culture* 9.2 (2009): 221–247.

However, all of this has an impact on the concept of the consumer. In the past, the consumer was understood as a clearly defined entity that supposedly already existed before contact with the market and which could be assigned predefined consumer masks.[24] More recent marketing theories, however, are based on a different understanding, according to which the consumer is only constituted as such at the moment when the data traces are brought together. Cluley and Brown relate this performative act of subjectivation as follows: "Applied to marketing, the performative approach […] allows us to suspend the idea of there being a clearly defined entity of 'the consumer' who preexists their engagement with markets. For example, when a person enters into a supermarket to make a purchase, they become part of an extensive network of relations that 'qualify' the value of products through processes of design, placement, production, pricing etc. The person becomes performed as a 'consumer' within these relations. This does not, of course, mean that the person is a blank slate who brings nothing to the encounter. They bring their own experiences and resources that assist in the activity, ranging from shopping lists and media recommendations to socially-formed tastes and preferences. However, the tying together of these experiences and resources as a complex socio-cognitive performance occurs within the consumption activity itself, as part of the engagement with the network of qualifying devices. The idea of a 'consumer' is an effect rather than condition of the activity."[25]

The idea expressed in this quote is simple and says nothing other than that the consumer is the product of a series of activities. When the reader of a news website clicks on a particular newspaper article, not only does the article itself appear, but also selected advertisements in the advertising blocks provided. These ads are not usually predetermined. Rather, shortly after the website is accessed, an automated auction of advertising space takes place behind the scenes, which determines which ads are displayed. As soon as the advertising content is uploaded, the user is brought to life as a potential consumer for the advertised products or services. If the reader then purchases the product that was suggested to them via the popped-up advertisement, this is not because they are a consumer on the market from the outset. Rather, the reader follows an invitation (which is not based on arbitrary premises, but on the contrary is a result of the evaluated traces on the Internet) to constitute themself as a consumer for this product. This is what Cluley and Brown have in mind when they describe the consumer as the effect of an action (the click). They are, moreover, quite right when they end their essay accordingly with the observation that "[w]e are what we click."[26]

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24 Robert Cluley & Stephen D. Brown, "The dividualised consumer: sketching the new mask of the consumer," *Journal of Marketing Management* 31.1-2 (2015): 107–122, 115.

25 Cluley & Brown, "The dividualised consumer," 110.

26 Cluley & Brown, "The dividualised consumer," 120.

A similar mechanism is also at work in the case of personalized law. When advocates of personalized law think about personalized norms in contract law, for example, be they of a mandatory or dispositive nature, they are ostensibly concerned with the law taking into account the characteristics, needs and behavioural peculiarities of the individual. In reality, however, their offers are not aimed at an existing subject, but at a digital subject that – similar to online marketing – has yet to be created through computational measurements, tracking analyses and evaluations of mass data. It is furthermore the algorithmic assignment of the countless data traces (which incidentally represent nothing more than mere intersections of interests and characteristics of individuals) that contributes to the emergence of a digital "consciousness" of the digital subject, albeit a very limited one.[27]

However, some clarifications are necessary here. The legal addressee of personalized law, i.e. the subject that emerges from the sociometric procedures mentioned earlier, does not represent the end point of the legal operations made possible by personalized law, but rather functions as an instrument for carrying them out. Similar to online marketing, which aims to create the subject required for its operations, personalized law also creates the subject it needs. This in turn means that the relevant promise of personalized law, that it can do justice to the singular subject, turns out to be a mere internal legal attribution function that can only be secured under the condition of a new social requirement for the real existing individual, namely the requirement expressed in the following command: Identify with your data! And at this point a further remark: While the legal subject of modern law, apart from its specific deployment within the various types of law (formal, substantive, reflexive law), was a relatively unchanging entity, the legal subject of personalized law – similar to the concept of the consumer in the new marketing theory – appears to be highly variable, since its materialization takes place from case to case through a different weighting of data and other factors. Finally, in both online advertising and personalized law, it is one and the same act that simultaneously produces both the consumer or legal addressee and the marketing product or personalized norm.

5 The Divisible (Legal) Subject in the Control Society

While modern law based its concept of person on concrete ontological characteristics, such as the quality of being a *persona moralis* (a quality which, incidentally, was

27 Olga Goriunova, "The digital subject: People as data as persons," *Theory, Culture & Society* 36.6 (2019): 125–145, 8.

underpinned by other essential characteristics such as freedom, will, reason, etc.),[28] personalized law dispenses entirely with ontological attributions of this kind and bases its legal subject on a new empiricism. According to this digital empiricism, the legal subject of personalized law is a subject *of* data, *of* associative combinations of digital traces and nodes that promise to contain insights into secret drives. In the process, the human being becomes something empirically analyzable and thus divisible in parts.[29] The individual, traditionally understood as a unified whole, degenerates through digitalization into a calculable artefact of the data economy.[30] Or to use a term coined by Deleuze: The individual becomes a *dividual*.[31] Unlike the legal subject of modern law, the legal subject of personalized law does not owe its emergence to cultural decisions that define the individual as free and autonomous, but rather to technological decisions, the aforementioned processes of automated singularization, which define the subject as a relational field or as "a process of selecting, incorporating and unifying disparate and 'exterior' elements."[32]

However, the empiricism invoked in this way contains two dangers. First, associative combinations of digital traces help algorithms to make anticipatory statements. The correlations of such fragmented traces in the digital world thus serve to predict the behavior and interests of individuals,[33] thereby conflating the temporal dimension between what an individual is and what an individual should be.[34] Second, as Reigeluth notes, "compliance and conformity are achieved not through the direct imposition of coercive norms"[35] but through the "implicit necessity for individuals to correspond, without gap or contrast, to their digital traces."[36] If previously the outcast was the one who did not fit into the social norms, "[t]he new social

28 Marietta Auer, "Die Substanz der Freiheit: Pufendorfs Begriff der moralischen Person" in *Person und Rechtsperson. Zur Ideengeschichte der Personalität,* ed. Rolf Gröschner, Stephan Kirste & Oliver W. Lembcke (Tübingen: Mohr Siebeck, 2015), 81–100, 91, not least as a defense against the emerging empiricism of the 19th century; see further Suad Salihu, "Recht als abstrakte Kunst" in *Neue Adressaten des Rechts: Junge Rechtswissenschaft Luzern,* eds. Suad Salihu & Rüya Tuna Toparlak (Zürich: Schulthess, 2023), 3–18, 4ff.

29 So Marietta Auer, "Granular norms and the Concept of Law," 140.

30 See in particular Marietta Auer, *Autonomy by Algorithm? A Paradox* and *Zum Erkenntnisziel der Rechtstheorie*.

31 See Gilles Deleuze, "Postscript on the Societies of Control," *October* 59 (1992): 3–7; For another genealogy of the term "dividual" see Karl Smith, "From dividual and individual selves to porous subjects," *The Australian Journal of Anthropology* 23.1 (2012): 50–64.

32 Tyler Butler Reigeluth, "Why data is not enough: Digital traces as control of self and self-control," *Surveillance & Society* 12.2 (2014): 243–254, 247.

33 This makes it clear that the digital subject is not a neutral concept, but a biopolitical instrument with which demands are directed at the "real" subject.

34 Reigeluth, "Why data is not enough," 249f.

35 Reigeluth, "Why data is not enough," 250.

36 Reigeluth, "Why data is not enough," 251.

outcast could very well become the one who is unable or unwilling to be 'oneself,' and who by denying the 'objectivity' or 'undeniability' of one's traces, is denying one's 'self'."[37] The practice of a repeated, constantly updating identification with the digital subject is the result of a divisive subjectivation and becomes the actual asceticism of the late modern individual.

In order to better understand the forms of this coercion, the new mechanisms of subjugation under which the personalized right emerges must be grasped more precisely beyond the terms of Reckwitz's analysis. Deleuze's postscript on the societies of control could offer a point of reference for this. For the social orientation towards the individual, the emphasis on the particular, the orientation towards (partial) interests and (partial) characteristics all fall under the banner of the societies of control, which are in the process of gradually replacing the disciplinary society. In societies of control, violence is exercised through the constant collection and processing of data and information about individuals who have become divided.[38] This new technique of subjugation can be seen in three aspects in particular. First, in the instruments used by the new form of society: "the societies of control operate with machines of a third type, computers […]."[39] Second, in the emphasis on marketing and new marketing technologies as a means of social control.[40] It is therefore no coincidence that the digital subject of personalized law is best described by developments in new marketing technologies. Third, in the replacement of the individual by "the code of a 'dividual' material to be controlled."[41] The division of people into data, which is broken down by corresponding analyses and constantly reassembled,[42] and the use of technologies that intervene in these data traces in order to create new combinations of "persons" are part of the identification imperative in societies of control. The point is to reconnect these persons with the preferences and actions elaborated from the dividing process, whereby the dividual subject becomes nothing less than an object of control seemingly based on itself.[43]

However, these critical remarks should not obscure the fact that the collection and processing of ever larger amounts of data simultaneously enables the generation of even more knowledge, with the individual subject acting as a functionary of this process of knowledge advancement. The transformation of people into data and numbers has been used since the nineteenth century to recognize, regulate and

37 Reigeluth, "Why data is not enough," 251.

38 Deleuze, "Postscript on the Societies of Control," 5.

39 Deleuze, "Postscript on the Societies of Control," 6.

40 Deleuze, "Postscript on the Societies of Control," 6.

41 Deleuze, "Postscript on the Societies of Control," 7.

42 See Susanne Baer, *"Der Bürger" im Verwaltungsrecht: Subjektkonstruktion durch Leitbilder vom Staat* (Tübingen, Mohr Siebeck, 2006), 16.

43 Cluley & Brown, "The dividualised consumer," 117.

control human behaviour on the basis of patterns.[44] In this sense, personalized law and its dividual data subject merely tie in with the expectations of today's knowledge-based society and thus have an impact on digitalization and knowledge generation.

6 The Indivisible (Legal) Subject in the Disciplinary Society

Against the background of the developments described above, it would be pointless to invoke the fiction of the indivisibility of human beings guaranteed by modern law. This is partly because the effects of the digital society of control cannot be reversed by such a recourse, and partly because – as will be shown – the recognition of the indivisibility of human beings by law has a price. First of all, it should simply be noted that indivisibility is not an inherent characteristic of human beings that is represented and guaranteed by the legal system in the figure of legal subjectivity. On the contrary, with the help of a second-order observation, it can be established that the designation of the human being as indivisible is closely linked to a *doing generality* in modernity. More on this later, but first a few further comments on the aforementioned "price".

The designation of the human subject as indivisible in the modern age is associated with a paradoxical achievement, which manifests itself in the fact that the individual is at the same time empowered and enslaved. On the one hand, human beings are empowered because they are recognized as having an indivisible sphere of free reign. This sphere belongs only to them and no one else. Furthermore, they do not have to account to anyone for how they use their free will.[45] Empowerment therefore also means release from the social structure or asociality.[46]

On the other hand, they are enslaved because their recognition as indivisible, free and autonomous comes at the price of their disciplining. For the formation of the subject, and in particular the legal subject, presupposes a process of double appropriation, "the appropriation of inner nature and the appropriation of social

44 Armin Nassehi, *Muster: Theorie der digitalen Gesellschaft* (München: C.H.BeckCH Beck, 2019).

45 See Christoph Menke, "Critique of Rights," *Polity Press* 29.3 (2020): 395–397, on the productive effects of subjective right see idem, *Theorie der Befreiung* (Berlin: Suhrkamp Verlag, 2022), 125ff.

46 See on this point Vagias Karavas, "Die Beste aller möglichen Welten: Gunther Teubners Theodizee (Ein Lektüreversuch von Gunther Teubners „Die Verfassung gesellschaftlicher Mehrwerte")," *Zeitschrift für Rechtssoziologie* 42.2 (2022): 1–31, 6 with further references to Niklas Luhmann, "Subjektive Rechte: Zum Umbau des Rechtsbewusstseins in der modernen Gesellschaft" in *Gesellschaftsstruktur und Semantik*, 2., ed. idem (Frankfurt: Suhrkamp, 1981), 45–104 and Gunther Teubner, "Von 'Wirtschaftsverfassung I, II' zum 'selbstgerechten Rechtsverfassungsrecht'. Zur Kritizität von Rudolf Wiethölters kritischer Systemtheorie," *Ancilla Iuris* (2020): 1–33, 3.

normativity."[47] Christoph Menke aptly describes this "work of subjectivity" as follows: "To appropriate one's somatic-psychic nature, one's body and soul, and to transform it into the mental capacity of purpose and purpose realization means to make oneself an instance of the socially defined good; subjectivation means socialization. And conversely, to appropriate social normativity and make it one's own measure and purpose, to transform one's body and soul into the seat and medium of practical abilities; socialization means subjectification."[48] Thus, in order to be recognized as indivisible, free and autonomous, or in short, to be recognized as a fully-fledged legal subject, "man must have learned to sit up straight at school and in the office, to be punctual for appointments and to brush his teeth in the morning."[49] This is a process in which, according to Nietzsche, man is made "uniform, like among his like, regular, and consequently calculable"[50] through discipline and habituation.

There is no better place to observe this work of legal subjectification than in Eugen Huber's book *Recht und Rechtsverwirkung*, in which he reflects on the ideas of law that he had brought to life a few years earlier with the adoption of the Swiss Civil Code. In it, he also lays the foundation for his (legislative and legal) philosophy, which is committed to the goal of bringing "actual and active life in the legal community into harmony with the idea of law."[51] According to his philosophy, each legislator has to start from the fact that the existing realities – or "realia" as he calls them – represent the "indispensable external precondition"[52] of all legislation and the application of law. One of these existing realities for Huber is the human being which, for the purposes pursued here, is particularly relevant.

According to Huber, human beings represent a tangible reality for legislation both in their pure anthropological existence, in the sense of their physical and mental characteristics, as well as in their collectivist existence, in the sense of sexual connection, common descent, common residence as well as common tasks and economic activities. As far as their "anthropological existence" is concerned, this is determined by their physical powers and characteristics, but also defined in more detail by "natural" differences such as youth versus adulthood, male versus female, healthy versus sick. Mental conditions, such as the capacity for judgment, etc., also come into consideration. Apart from such psycho-somatic characteristics, Huber

47 Christoph Menke, *Theorie der Befreiung*, 63.

48 Christoph Menke, *Theorie der Befreiung*, 63.

49 Daniel Loick, "Römische Subjekte. Nietzsches Genealogie der Rechtssubjektivität," *Archiv für Rechts-und Sozialphilosophie* 100.1 (2014): 53–76, 60.

50 Friedrich Nietzsche, *The Genealogy of Morals: A polemic*, trans. Horace B. Samuel (Edinburgh and London, T.N. Foulis, 1913), 63.

51 Eugen Huber, *Recht und Rechtsverwirklichung: Probleme der Gesetzgebung und der Rechtsphilosophie* (Basel: Helbing & Lichtenhahn, 1921), IX.

52 Huber, *Recht und Rechtsverwirklichung*, 283.

further raises the quasi theological question of the qualification of human nature by the legislator. In this regard, he contrasts the two prevailing views of the perfection of human nature and its depravity with a third, according to which the human subject should be assumed by legislation to be completely neutral – neither good nor evil. However, Huber does not have the average human being with their simultaneously good and evil qualities in mind here: "Rather, legislation must conceive of man in such a way that he can be harmoniously integrated into the community."[53] Huber does not write how "he should", but how "he *can* be harmoniously integrated." And rightly so! Because this is not about an abstract, ethical imperative, but about the ability of human beings. "How man can" therefore means how the individual can muster the necessary strength or has the ability to be harmoniously integrated into the community. But from where should human beings draw this strength? It is the task of education and socialization to fabricate human beings in such a way that they can muster this strength themselves.

According to Reckwitz, the subject is one of the five units of the social, alongside objects, spatialities, temporalities and collectives, which are formatted in modernity by the logic of the general.[54] As we saw earlier, the social logic of the general has developed in Western Europe since the eighteenth century and manifests itself in different variants, namely as technical, cognitive and normative generalization, that "encouraged the standardization, formalization, and generalization of all entities of society."[55] But what does this mean for people in concrete terms? As Reckwitz again notes, the human being in this period is fabricated as a subject "who developed an extreme sensitivity to the social expectations of his peers, to which he adapted accordingly."[56] They are also a "'socially adjusted person', who strives to meet intersubjective expectations and to be 'normal' or 'average' (in the non-pejorative sense)."[57] Subjects are formatted in this era "as unending replicas of the same thing",[58] similar to the mass products of industrial assembly line production. Without the synchronization of subjects, therefore, there is no "society of equals, of equality before the law and of social uniformity."[59] In other words, in order to be accepted into a differentiated society, the subject must learn to repeatedly muster the strength to adapt to social expectations. Admittedly, this is a Sisyphean task.

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53 Huber, *Recht und Rechtsverwirklichung*, 295.
54 Reckwitz, *The Society of Singularities*, 25ff.
55 Reckwitz, *The Society of Singularities*, 19.
56 Reckwitz, *The Society of Singularities*, 30.
57 Reckwitz, *The Society of Singularities*, 26.
58 Reckwitz, *The Society of Singularities*, 25.
59 Reckwitz, *The Society of Singularities*, 30. This is how Reckwitz characterizes organized modernity.

Huber deals with society's expectations of the individual above all in those passages of his work in which he speaks of the individual's collective existence, i.e. their "connections with others that are given by his nature or by natural conditions."[60] As such collective elements of human existence, Huber mentions for example the heterosexual sexual community, kinship, domestic life obviously under a pater familias, life in a local community or in the workplace. Huber does not speak here of social expectations, let alone standards of normality, but uses the philosophical term "rational consciousness". On the one hand, he understands by this term a regulator of human behavior, pointing out "that actions receive a standard through rational consciousness according to which they are judged and evaluated."[61] On the other hand, the term refers to the inner attitude of the legal subject towards social expectations: "The reasonable person cannot act in any other way than by taking with his action a position in relation to the rational consciousness."[62] So when Huber claims that law is realized in human actions, which in turn arise from the human will, he also sees it as a necessary condition that the human will corresponds to rational consciousness. Otherwise it is to be qualified as legally irrelevant. Using a different vocabulary, one could therefore claim that the validity of the legal acts of the free and autonomous legal subject depends on a socialization programme that aims to transform the human subject into a creature of habit. Or in short: the flip side of the legal indivisibility of the subject is habit, without which the construction of modern legal subjectivity cannot achieve what it promises to achieve.

7 Algorithm-Based Recommendation Services as a "Trap" and an Opportunity

On closer inspection, personalized law – leaving aside the specific question of its binding force – is a normative recommendation service, a kind of *Spotify* of the legal system. Such recommendation services are widespread on the internet today. Their primary goal is to provide algorithm-based recommendations relying on big data. To do this, however, they must first set a trap for the potential customer. As an employee of one such company puts it: "In the beginning, I'm just trying to get you hooked."[63] It was precisely this statement that prompted the American anthropologist Nick Seaver

60 Huber, *Recht und Rechtsverwirklichung*, 303.

61 Huber, *Recht und Rechtsverwirklichung*, 210.

62 Huber, *Recht und Rechtsverwirklichung*, 210.

63 Nick Seaver, "Captivating algorithms: Recommender systems as traps," *Journal of Material Culture*, 24.4 (2018): 1–16, 2; see further: Nick Seaver, *Computing Taste. Algorithms and the Makers of Music Recommendations* (Chicago: The University of Chicago Press, 2022).

to take up the metaphor of comparing algorithm-based recommendation services with animal traps, and to spin this further.

We may, as Seaver notes, think of traps as blunt and materially simple devices targeted at vulnerable animal bodies; bodies that are thereby mutilated, crushed, slashed or poisoned. However, this does not take into account the crucial feature that characterizes traps, namely that they are primarily aimed at the animal's spirit. In this context, Seaver refers to older anthropological literature that points precisely to this cognitive dimension of traps. Specifically, he cites an older study by Otis Mason on Native American animal traps, in which traps are described as follows: "The trap itself is an invention in which are embodied most careful studies in animal mentation and habits – the hunter must know for each species its food, its likes and dislikes, its weaknesses and foibles. A trap in this connection is an ambuscade, a deceit, a temptation, an irresistible allurement: it is strategy."[64]

From this, Seaver concludes that traps are persuasive technologies that embody a complicated mental interaction between hunter and prey. Following the work of another great anthropologist, traps are also compared to so-called "technologies of enchantment" such as advertising, artworks or other psychotechnologies that aim to capture the viewer's mind and reshape their personality. Incidentally, these examples are not so far removed from what Niklas Luhmann says about court proceedings, which also conceal the dimension of a captivity ritual aimed at the psyche of those involved. "Presumably," Luhmann writes, "this is the secret theory of the proceedings: that personality can be captured, reshaped and motivated to accept decisions through entanglement in a role play."[65] And at another point he remarks: "The scene and ceremonial of the trial thus become the norm, if not a trap for those involved."[66]

However, traps have another dimension that goes beyond the mere fact of (physical or psychological) captivity. Traps are also a means of enviromentalization.[67] In Seaver's own words again: "Returning to the time structure of trapping makes the continuity between traps and infrastructures more visible: an infrastructure is a trap in slow motion. Slowed down and spread out, we can see how traps are not just devices of momentary violence, but agents of 'environmentalization',

64 Otis Mason, "Traps of the Amerinds: A Study in Psychology and Invention," *American Anthropologist* 2.4 (1900): 657–675, 659 cited from Nick Seaver, *Computing Taste*, 63.

65 Niklas Luhmann, *Legitimation durch Verfahren* (Frankfurt a. M.: suhrkamp, 1983), 87.

66 Niklas Luhmann, *Legitimation durch Verfahren*, 93.

67 This is an argument made by Alberto Corsín Jiménez, "Spider web anthropologies: Ecologies, infrastructures, entanglements" in *Indigenous Cosmopolitics: Dialogues for the Reconstitution of Worlds*, eds. Marisol de la Cadena & Mario Blaser (Durham and London: Duke University Press, forthcoming), online preprint at http://digital.csic.es/bitstream/10261/134351/1/spiderweb%20anthros_160209.pdf. (last access on January 18, 2024).

making worlds for the entities they trap."[68] The quote begins by explaining the interrelationship between animal traps and their landscape environment as a prerequisite for the traps' effectiveness. For a trap to be effective, it must not only be well integrated into the surrounding landscape. Rather, the entire landscape must be appropriately reshaped and transformed into a trap. As we have shown above, in our case there is also an interdependence between the normative recommendation services and our society of control. In other words, one could argue that the trap par excellence is the control society itself. Personalized law can only be effective against the backdrop of such a society. However, the above quote also refers to the world-forming function of traps. Traps are not only effects of the environment, but also means of creating it. Likewise, personalized law is not only an effect of the society of control, but one of the various instruments that contribute to the formation of such a society.

But one last question remains. Is it possible to escape a trap? Or to put it another way: what survival strategies do we have in such an ecosystem? Seaver ends his text with an appeal that we should perhaps take seriously: "Having identified algorithmic recommendation as a kind of trap, noting how it draws together ecologies of knowledge and technology with theories about prey and value, we might move beyond denouncing entrapment and toward reconfiguring our captivating social infrastructures. […] The question to ask of traps may not be how to escape from them, but rather how to recapture them and turn them to new ends in the service of new worlds."[69]

As we established right at the beginning, personalized law is a powerful idea with a future that may soon capture us mentally and psychologically. Like Kafka's law, personalized law awakens in the subject "the compulsive need for resolution and clarification,"[70] which it in turn promises to satisfy by relying on a digital empiricism. The question we should ask ourselves, however, is not how we can escape this trap, but how we can recapture it and use it for new purposes and the creation of new worlds.

Bionotes

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68 Nick Seaver, "Captivating algorithms," 12.
69 Nick Seaver, "Captivating algorithms," 12f.
70 Aage A. Hansen-Löve, "Vor dem Gesetz," *Interpretationen. Franz Kafka. Romane und Erzählungen* (1994): 146–157, 154f.

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