

Rule by List, Governance by Data and the Limits of Transparency

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Abstract

The contemporary international legal landscape is marked by the proliferation of the list as a regulatory device: from the UN 1373 targeted sanctions list to US Department of Homeland Security No-Fly lists; from privately compiled lists of risky banking clients, to intelligence 'watch lists'; from lists of 'safe third countries' used in many nations' immigration laws to lists of protected species: lists are everywhere. In connection with this turn to list, the exercise of public authority globally seems increasingly devolved to semi-automated processes of algorithmic analysis, alongside an open embrace of uncertainty. Analytical possibility in the future often stands in for predictive or explanatory power in the present. 'We don't know, but the data might yet tell us': experts and public leaders continually aver. Collectively, data are attributed with, or have come to acquire, something approximating agency. Case-by-case deliberation gives way, frequently, to the definition of algorithmic instructions followed by a getting-out-of-the-algorithm's-way.

These developments are met by an endless championing of transparency. But precisely what degree of oversight or 'seeing through' accumulated data and lists might be attainable? What might the making public of listing practices entail? Is it, indeed, in the direction of transparency (or, in Bentham's terms, 'publicity') that public international lawyers should direct their efforts to engage these various listed formulations and deployments of authority? How might we yet come to live with the list, otherwise? This paper will reflect upon these questions with reference to a range of practices across the international legal field.

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