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# Legal Order and the 'Globality' of Global Law

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**Abstract**
The aim of this paper is to develop a concept of legal order that is capable of accommodating several distinctive features of global law, as well as features which are traditionally associated to state law. To this effect, it sketches out the bold lines of a general concept of legal order, which draws on contemporary philosophical accounts of collective action. A legal order, it is argued, is an authoritatively mediated and upheld form of joint action. This general model of legal order explains (i) why global legal orders typically overlap or overlay each other; (ii) why these orders are organized as networks of places; and (iii) why they necessarily are organized as a spatial inside in contrast to an outside. That the inside/outside contrast remains constitutive for global legal orders suggests that globalization marks the emergence of new fault lines between legal orders, not the suppression of spatial boundaries.

**Keywords**
legal order; inside/outside; plural subjectivity; global law

## 1. Introduction

How are we to understand the 'globality' of global law? More generally, what concept of legal order is sufficiently capacious to account for the globality of global law, while also sufficiently flexible to accommodate state law and its distinctive features? In addressing this pair of questions, I will focus on three features that are widely held to be distinctive for the emergence of global law, and which stand in sharp contrast to distinctive features of states, or so it seems.

First, and in contrast to the claim of states to regulate all comportment within their territory, global legal orders typically overlap or overlay each other in crisscrossing patches of normativity. Second, and closely related to the former, the globalization of law by no means entails that place has ceased to be a distinctive feature of global legal orders; what we see emerging are webs or networks of places which are both sub-national and


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transnational. Third, whereas states have borders that separate the domestic legal order from foreign legal orders, this distinction is no longer meaningful for global law, which has no outside in the sense of a foreign legal order.

These three features by no means exhaust what might be defining characteristics of global law; but they do articulate quite well, I think, the preponderantly *spatial* dimension of 'global' law. In other words, although my claim is that although these spatial features do not fully capture the concept of global law, one does well to begin by making sense of them before moving on to consider its other distinctive characteristics.

This paper falls into four sections. The first briefly describes the three distinctive features of global law indicated above, contrasting them to the correlative features of state law. The second outlines the contours of a general concept of legal order. In the third section I show why this model of legal order allows for the explaining of each of the three features of global law, whilst also accommodating the correlative features of state law. Finally, the fourth section debunks a widely endorsed assumption about how global law might be different to state law.

## 2. The 'Globality' of Global Law

Although the concept of globalization remains highly contested, there is reasonable agreement among sociologists and legal theorists of globalization about the features that define the emergence of global law as a properly spatial transformation of law. The first of these concerns the concept of territoriality, which has traditionally been a distinctive feature of the state. According to the canonical definition, which is as empty as it is ubiquitous, a state is the kind of legal order in which sovereign power is exercised over a population in a given territory. On this reading, the state claims, on principle if not necessarily in fact, a monopoly on regulative power over its territory.

Certainly, this monopoly can be suspended or mitigated, as in the case of international human rights regimes. But defenders of state sovereignty will counter that the state commits itself to respecting human rights regimes and, to that extent, the validity of such regimes in its territories continues to presuppose that it exercises sovereign power over its territory. Be it as it may, global law seems to introduce a fundamental difference into this state of affairs. Indeed, *lex mercatoria*, cyberlaw, multinationals, international standards regimes, *lex sportiva*, and the like mark the emergence of *overlapping* legal orders.

On the one hand, each of these global legal orders claims to be narrow in scope, regulating only a particular kind of comportment; on the other, these orders claim to regulate comportment in the same physical space and time. This feature is the cornerstone of contemporary accounts of legal pluralism. As Twining puts it, legal pluralism entails that 'normative and legal orders co-exist *in the same time-space context*'.[1] Crucially, overlapping legal orders are inimical to state monism, which seeks to monopolize regulatory power over all comportment within 'the same time-space context.'

A second feature that merits attention is the shift whereby global law becomes both sub-national and transnational. Saskia Sassen, the well-known sociologist of globalization, has shown that the emergence of global normative orders remains strongly anchored in localities or places. Whereas 'the global is generally conceptualized as overriding or neutralizing place and as operating on a self-evidently global scale,' Sassen argues, drawing on a wide range of rich empirical material, that global normative orders bypass national states by giving rise to 'particular cross-border circuits connecting specific localities,' such that 'the vague notion of the global' acquires concretion when viewed as 'networks of places'.[2]

This insight amounts to a critique of the notion of the 'glocal,' to the extent that this neologism articulates the global and the local. Sassen effectively shows that *global law is itself a form of the local*, of localization, rather than something that is added or superimposed onto the local. Accordingly, locality and place are not distinctive features of state law nor of global law; what is distinctive of the latter is that global law locates itself in a way that is both subnational and transnational.

Let me conclude this section by pointing to a third and decisive feature of the 'globality' of global law. Indeed, classical international law is predicated on the existence of borders which allow each of the states to distinguish between its internal affairs and its external relations. In other words, the distinction between inside and outside, interpreted as the distinction between domestic and foreign legal orders, is the indispensable presupposition absent which no sense could be made of *inter*national law, even—and especially—in those situations in which international law allows for intervention in the internal affairs of a state. By contrast, it makes no sense to understand the spatiality of global legal orders by appealing to the

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[1] William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press, 2009) 70 (emphasis added).

[2] Saskia Sassen, *A Sociology of Globalization* (WW Norton & Co 2007) 11, 13. See also Boaventura de Sousa Santos' discussion of 'localized globalisms', in his *Toward a New Legal Common Sense*, (2nd edn, Butterworths 2002) 179.

inside/outside distinction, at least when interpreted as the domestic/foreign divide. After all, its geographical scale is *global*.

Although *lex mercatoria*, cyberlaw and the other modes of global law we see emerging before our eyes are limited in the scope of comportment they seek to regulate, theirs is a claim to global validity. And while there is of course always the latent possibility of conflicts of jurisdiction between these manifestations of global law, such conflicts are not unleashed by the violation of borders that differentiate between domestic and foreign places.

## 3. Law in the First-Person Plural

What concept of legal order would allow us to make sense of the spatial transformations leading from state law to global law, while also revealing the continuities between the two? My hunch is that a theory of legal order that draws on analytical studies of collective action and on a phenomenology of strangeness can do the trick. Borrowing an expression coined by my colleague, Bert van Roermund, let me call this a theory of 'law in the first-person plural'.[3]

To get a hang of what I mean by this, compare the following two situations. Here is the first: several persons who happen to be in the same place, see a stork fly by. This is rather unusual in that place, say Tilburg, and so all follow the majestic bird in its flight till it moves beyond their visual domain. And now the second: a group of birdwatchers are out on an expedition and they happen to chance on a stork. The birdwatchers happily point it out to each other, and make notes about the bird in their logbooks. Suppose that someone were to ask 'what are you doing?' in each of the situations. In each case, the answer might run, 'we are looking at a bird fly by.' But the use of the word 'we' is quite different in each scenario.

In the first, 'we' functions as an *aggregative* term: each of a number of individuals happens to be watching the stork fly by, independently of what the others are doing. Margaret Gilbert deftly characterizes this use of the term 'we' as 'we, each'. In the second, 'we' functions as an *integrative* term:

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[3] Van Roermund has taken decisive steps to develop such a theory in the following papers: Bert van Roermund, 'First-Person Plural Legislature: Political Reflexivity and Representation' (2003) 6 Philosophical Explorations 235; Bert van Roermund, 'Kelsen under the Low Skies. Recognition Theory Revisited and Revised' in Robert Walter, Clemens Jabloner and Klaus Zeleny (eds), *Hans Kelsen anderswo. Hans Kelsen Abroad* (Manz Verlag 2010) 259-279; and Bert van Roermund, 'Objectifying Legal Norm Claims: Validity and Self-Reference' in John Gardner, Leslie Green & Luis Duarte de Almeida, (eds), *The Pure Theory of Law Revisited: The Jurisprudence of Hans Kelsen* (forthcoming, Oxford University Press 2012).

a manifold of individuals functions as a group of bird-watchers; they act together, such that, for example, one of the members, who was distracted, hadn't noticed the bird, and another group member points it out to her, 'look, there goes a stork!' In such cases, notes Gilbert, 'we' functions as in 'we, together'.[4] When acting together, the members of a group take up a first-person plural perspective: it is we who act as a *unit*, even though there can be no act by a group, absent a set of interlocking acts by its members or participant agents.

To see the difference between the two, imagine that, in the first case, one of the persons who happened to be at the place where the bird was spotted hadn't noted that the stork was flying by; no one alerted her to the bird, and she simply remained absorbed in what she was doing. As things have it, she had been hoping for many years to see a stork and would surely be hugely disappointed at having let the opportunity to see one slip by. But she would have no standing to rebuke the other persons who had looked at the stork fly by; they had no *obligation* to alert her to the bird. In the second situation, the bird-watcher would certainly be entitled to rebuke her fellow bird-watchers. After all, looking for birds is something they were doing *together*; what was the point of going out to look at birds together unless they were prepared to help each other out to realize their joint aim? See here the elementary structure of entitlements between members which attaches to collective action.[5]

Now, my claim is that legal orders are a species of collective actions, as described above. In other words, legal orders take on the form of collectives whereby a manifold of individuals act together over time. By the same token, legal obligations and sanctions are a species of the entitlements and rebukes which emerge between participant agents in the course of collective action. The nature and scope of legal comportment, namely what we ought to do together, is internally related to the normative point of joint action: that which our joint act ought to be *about*.

Significantly, what it is that we ought to do together—the normative point of joint action under law—may itself be open to discussion and transformation over time. However, and in contrast to other modes of collective action, legal orders involve second-level authorities which, acting on behalf of the group, monitor and uphold participant agency with a view to realizing the (transformable) normative point of joint action. Notice, to conclude, that this is an extremely capacious concept of legal order, which

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[4] Margaret Gilbert, *On Social Facts* (2nd edn, Princeton University Press 1992) 168.

[5] Margaret Gilbert, *A Theory of Political Obligation* (Oxford University Press 2006) 189ff.

easily accommodates not only state law but also all and sundry varieties of global law, such as *lex mercatoria*, cyberlaw, and *lex sportiva*, as well as other forms of law, including indigenous law, religious law, and the like.

Let me take a further and final step in fleshing out the concept of law in the first person. Indeed, modern legal theory, particularly legal positivism and normative theories of law, have taken for granted that a legal order is a (putative) unity of a specific kind of norms of action. This is, however, an extremely reductive understanding of legal orders and their (putative) unity. For what legal orders do is to regulate four dimensions of human comportment: its material dimension, indicating *what* comportment is called for; its subjective dimension, indicating *who* ought to engage in certain forms of comportment; its temporal dimension, establishing *when* certain comportment ought to take place; its spatial dimension, laying down *where* certain comportment ought to come about. Here, ought can mean comportment which is demanded, prohibited or permitted. In short, legal orders establish who ought to do what, where, and when with a view to realizing the normative point of joint action. This entails that legal orders are never only (putative) unities of legal norms; this abstracts from the concreteness of legal collectives, which order themselves as a four-dimensional (putative) unity of ought-places, ought-times, ought-subjects and ought-contents of comportment. Again, this four-dimensional (putative) unity of legal orders holds for state law no less than for global law, in all its forms, as well as for other forms of law.[6]

## 4. The 'Globality' of Global Law Revisited

How can this general, albeit highly abridged, account of legal order help us to make sense of the three features which, on the reading I have defended, determine the 'globality' of global law? More generally, in what way does a theory of law in the first-person plural explain both the deeper unity of and the difference between state law and global law?

Let us first turn to the notion of global law as comprising overlapping legal orders. The upshot of our foregoing analyses is that the unity of ought-places that comprises the legal space of a collective is never only a geographical surface, never only the material support of one or more legal systems, but rather a concrete articulation of normative and physical dimensions. As a result, the metaphor of overlapping legal orders tends to

[6] See my paper: Hans Lindahl, 'Boundaries and the Concept of Legal Order' (2011) 2 Jurisprudence 73.

conceal that even if two distinct legal orders cover precisely the same geographical extension, human comportment that is relevant to one of these orders, in terms of its normative point, might be entirely immaterial to the other.

The spatial unity of a legal order is subject-relative, such that different collectives with different normative points can organize themselves as spatial unities in different ways, while sharing all or part of a geographical extension. Accordingly, the mutually exclusive territoriality of states is but a *limiting case* of a far broader spectrum of possibilities available to law.[7] Overlapping legal orders have always been the rule, rather than the exception—even when state law was at its acme.

Consider, now, the second of the defining features of the globality of law. As noted, the emergent globalization of law does not mean that law ceases to be anchored in concrete places; what happens is that global law takes on the form of what Sassen calls a 'network of places' that is both subnational and transnational. The abridged theory of law in the first-person plural outlined heretofore easily accounts for this feature of global law, too. In effect, all law, to be law, must regulate the *where* of comportment, and it does so by setting up *ought-places* in which certain kinds of comportment by certain kinds of individual (and at certain times) are permitted, prohibited or demanded.

To the extent that the normative point of collective action requires a variety of interlocking acts, it follows that different kinds of ought-places will be required to realize this normative point, and that these ought-places appear as a *unity* in light of their normative point. It is precisely for this reason that global law has the structure of a 'network of ought-places', to slightly modify Sassen's apt expression. This need not mean, of course, that a global legal order must paper over, as it were, the entire globe with ought-places; while the scale of the 'networks of ought-places' of *lex mercatoria*, *cyberlaw* or *lex sportiva* is global, they may be quite selective in the number and kinds of ought-places which they require to realize their normative point.

*Lex constructionis*, as a form of *lex mercatoria*, is a case in point, to the extent that it largely focuses on the sites for international (often turn-key) construction projects, such as airports, hydroelectric dams, bridges, etc., as well as the places in which arbitration commissions are located, such as the International Chamber of Commerce. While this spatial configuration of

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[7] See Hans Lindahl, 'A-Legality: Postnationalism and the Question of Legal Boundaries' (2010) 73 Modern Law Review 30, 36-37.

global law differs in important ways from the territoriality of state law, nonetheless it shares with the latter the basic characterization of law as a (putative) unity of ought-places. By these lights, also state law has the structure of a 'network of ought-places'.

There is, finally, what many commentators take to be the decisive difference between global law and state law. Whereas the latter is organized according to the spatial distinction between inside and outside, the former no longer is bounded in space because the distinction between domestic and foreign legal orders ceases to apply. A case in point is Teubner's systems-theoretical approach to global law, which he defines as a 'self-reproducing, worldwide legal discourse which closes its meaning boundaries by the use of the legal/illegal binary code and reproduces itself by processing a symbol of global (not national) validity'.[8]

We can easily concede that the domestic/foreign distinction, as a specification of the inside/outside distinction, is historically contingent. We would reify the modern nation state, making of its peculiar features an a-historical constant, if we took for granted that legal orders must be bounded in space according to the distinction between domestic and foreign spaces. Here again, the model of legal order I have developed can account for state law, organized according to the divide between domestic/foreign spaces, and global law, in which its spatial configuration as a (putative) unity of ought-places in no way requires that divide.

## 5. Fault Lines of Globalization

But we need to take a step further. Granting that the domestic/foreign distinction is historically contingent, need we also grant that the emergence of global legal orders marks the end of the inside/outside distinction? In other words, need we accept that the state form of territoriality, hence the domestic/foreign distinction, exhausts how a legal collective closes itself into an inside vis-à-vis an outside? Or would the emergence of a global legal order only be possible on the basis of a self-closure, whereby a legal collective organizes itself as an inside that stands in contrast to an outside?

Consider the hypothetical case of a world polity, as an extreme case of global law. Whatever else might be required, its officials would need to posit a distribution of places determining where comportment ought or ought

[8] Gunther Teubner, '"Global Bukowina": Legal Pluralism in the World Society' in Gunther Teubner (ed), *Global Law Without a State* (Dartmouth 1997) 14.

not to take place. Although a world polity would have no outside in the sense of foreign places, or at least not initially, the inclusion and exclusion of interests articulated by the spatial boundaries that give shape to its normative point entail that the polity's foundation would give rise, at least latently, to *strange* places—places that do not fit in the distribution of ought-places deemed to be the collective's *own* legal space. Strange places are, in the twofold sense of the term, 'outlandish'.

What a world polity could not avoid is to posit boundaries that close it off as an inside—as a *familiar* distribution of places—in contrast to an indeterminate outside. This outside manifests itself through comportment and situations that, contesting the claim to commonality raised on behalf of a global distribution of ought-places, intimate ought-places that have no place within that (putative) unity of global ought-places. Accordingly, the emergence of global legal orders reveals that the inside/outside distinction, when construed as the distinction between domestic/foreign territories, is historically contingent; legal orders are certainly conceivable that do not require fixed territorial borders like those of a nation-state. But to the extent that a world polity, if it is to be a legal order, must in some way organize the face of the earth as a common distribution of ought-places, any of the boundaries that mark off a *single* ought-place from other ought-places in the world polity also appears, when contested, as marking off the *whole* distribution of ought-places as an inside vis-à-vis a strange outside.

The model of legal order I have developed entails that no legal order, global or otherwise, is possible absent the divide between an own legal space inside, and strange places outside. Call this divide a *fault line*, in contrast to borders or boundaries. Succinctly, and as contemporary developments show all too clearly, the emergence of globalization goes hand in hand with the emergence of fault lines: in its fundamental significance for our times, the inside/outside distinction speaks to the *fault lines of globalization*. It would take us too far afield to discuss the normative implications of this insight.[9] It may suffice to note, in conclusion, that, contrary to Jürgen Habermas' assumption that postnationalism introduces the possibility of a *Weltinnenpolitik*, i.e. a world internal politics, the emergence of global law marks the genesis of a *Weltaußenpolitik*—a world external politics.

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[9] The empirical, conceptual and normative dimensions of this insight are developed at length in my forthcoming monograph: Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (forthcoming, Oxford University Press 2013).