Legality Bound[♣]

A comment on Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*, (Oxford University Press 2013) ISBN 978-0-19-960168-4

Emmanuel Melissaris
London School of Economics and Political Science

Much of modern political and legal philosophy –and certainly its liberal strands– tries to grapple with the question of how it may be possible for embodied beings with the capacity to reason to be allocated in space and time without clashing and without coercing one another. Surprisingly, however, those who attempt to answer this question too frequently readily jettison or implicitly disregard one of its central premises: that of embodiment and the spatial and temporal dimensions of humans and their communities. Space, time, the body are subordinated to reason and ideas, which are trusted as independent and able to constrain our untrustworthy and volatile materiality. It is in this superiority of reason that most modern political and legal philosophers find the routes of law's normativity as well as its legitimacy. Many have of course been critical of this sort of idealism. Even these critical takes, however, largely maintain the radical separation between situatedness in space and time on the one hand and reason in its universality and diachronicity on the other. The difference is that this time they prioritise the former over the latter and deny the very possibility of normativity or, indeed, legitimacy.

That this opposition between contingent situatedness and universal and diachronic reason may be artificial is lately beginning to be noticed by a growing number of political and legal theorists. I think that Hans Lindahl's *Fault Lines of Globalization* belongs in this strand of thinking about law and I have no doubt that it will occupy a central place in the literature.

Lindahl gives a complex yet clear and lucid account of legal order as an experienced phenomenon with very real spatial and temporal dimensions, which are central to a legal order's ability to guide the actions of the legal community. Inspired largely, though not exclusively, by phenomenological literature, Lindahl argues that every legal order is "a form of joint action in which authorities mediate and uphold who ought to do what, where, and when with a view to realizing the normative point of acting together" (p.8). The upshot of this is that legal orders are necessarily closed and necessarily separate between an inside and an outside (which are not just spatial metaphors but in fact assignations of real space).

[♣] Forthcoming in *Jurisprudence*, 7 (2016) 1.

Lindahl goes further to draw some more distinctions. Because legal orders are structured in the framework of reference of the dimensions of a situated collective engaging in joint action, certain things will fall outside the realm of joint action, therefore also the specific legal order, in different ways. Legal orders, Lindahl argues, erect boundaries and whatever falls outside them belongs in the realm of *illegality*. Illegal acts are, the claim goes, subjective and irrational not because they cannot be justified propositionally –such propositional expression and defence or rebuttal of normative commitments comes later– but because they are out-of-line with shared perceptions of who ought to do what, where and when. According to Lindahl, illegal acts are not endorsed by the legal collective as its own. At the same time, however, illegality reaffirms legality; it enhances the boundaries of the legal order.

While *il-legality* is situated outside the boundaries of the legal order, *a-legality* is not simply unordered by the legal order; it is entirely unorderable. A-legal behaviour falls outside the field of vision of a legal order, beyond its *limits*. And when an a-legal normative claim is raised (such as when a group of activists act in a way that defies private property in a department store), a *fault line* is revealed in the legal order.

Now, all this is not simply to engage in conceptual and ontological analysis for the sake of it. Lindahl is motivated by something very specific, namely his frustration with the proliferating accounts of 'global', 'transnational', 'post-national', or however else one wants to call it, law. He takes issue with the fundamental assumption underpinning these accounts, which is that the only boundaries of law were those of the nation state and that, as soon as these boundaries were weakened, law also became diffuse and boundless and therefore capable of governing legitimately and transparently the lives of people across national boundaries. Lindahl wants to maintain that because law always orders specific communities with specific experienced reference frameworks, *all* legal orders potentially and unconsciously cross the limits of other legal orders. It follows that 'transnational' law's claims to pure universality are false.

This very sketchy outline of some basic claims is not meant to summarise the book's complex and nuanced argument. It is, however, a necessary introduction to some comments I would like to make on the three configurations of legal claims that Lindahl singles out, i.e. legality, illegality and a-legality. Finally I will also say a few things about the ramifications that Lindahl's conception of legal order has, or not, for a theory of legal pluralism.

I. *Il-legality*

In the running example to which Lindahl helpfully refers back throughout the book, some activists steal cans of foie gras from a busy department store. Lindahl believes that this act of stealing is radically subjective and irrational because it does not refer to the intentional structure of joint action as the legal collective experience it. It stands apart from the kind of behaviour that the collective considers to be its own; "it is an act, but ought not to be viewed as a participant act; this, concretely, is what it means that legal irrationality involves the *breakdown of intersubjectivity*" (p.138; emphasis in the original). It also stands out alone because it "does not reiterate what are deemed to be mutual expectations about who ought to do what, where and when in the given circumstances" (ibid.). Finally, it is subjective and irrational "because it ought not to take place if the normative point of joint action is to be realized" (p. 139).

It is of course true that the act of stealing is illegal in the most common sense of illegality: stealing authorises the state to treat the thief in a way that would otherwise not be allowed. It is also illegal in the sense that it will be frowned upon by most members of the legal community as a wrong, as illegal *qua* impermissible, as a threat to them.

However, I doubt whether either of these senses of illegality are sufficiently basic for Lindahl's purposes, i.e. basic enough to serve as building blocks of an account of legal orders in terms of experienced reference frameworks. Before the act of stealing can be considered as illegal in the above senses, it must already be part of law in that it must fall within the joint action scheme of the collective. It may not be an act which the majority of the community will be prepared substantively to endorse but it will be an act which they must consider their own (not in the sense of responsibility but in the sense of ownership of the ontology of the legal act of stealing) for them to be able to place it in the substantive legality/illegality spectrum. In other words, theft is a legal act in the sense that it can only be recognised as a distinctive act with a distinctive meaning if it falls within the joint intentionality of the community.

How, then, can the wheat be separated from the chaff? How does a legal community tell the difference between theft on the one hand and a contract transferring property over a chattel on the other? I should think that the only such way is propositional. Once an act falls within the experiential framework of reference of the community, then the community goes on to express it propositionally and justify it or declare it unwanted and subsequently justify a collective reaction to it. At this point a community is already employing the language of reasons.

Should all this be true, is it a problem for Lindahl? I think it is for two reasons. First, if it is the case that illegality is a matter of propositional justification, then it is not a boundary of legality any longer but a pathway *into* legality. Declaring an act as illegal amounts to dragging

it into the realm of joint intentionality and opening it up to reasoned scrutiny. Lindahl accepts so much when he argues that illegality in a way reaffirms legality. The difference is that illegality is not a transgression of any boundaries, it is always well within the boundaries of the legal.

Secondly, and more importantly, the very category of illegality seems to lose its independence as a basic category of understanding law. The only true boundary of legality is what Lindahl terms a limit, where a-legality begins and which is manifested as a fault line as soon as an a-legal normative claim is raised penetrating the realm of legality.

II. Legality

What I said about illegality already paves the way for my comments on legality.

Lindahl describes legality as the sense of who ought to do what where and when shared by the participants in a legal collective. He also gives a thorough account of how legal collectives are identified and re-identified when "someone take[s] up the *reflexive stance* of a participant agent *qua* participant agent; someone must see him or herself and other agents as participating in joint action" (p. 192).

Once again, I wonder whether this is sufficiently basic. I specifically wonder how it may be possible for a legal collective to be identified through the attribution of an act to the collective and within its fourfold framework of reference in the absence of a pre-existing substratum making this identification possible. Such a substratum will have to operate on two levels of generality. First, the members of the legal collective must share the ability to see the world in its normative meaning, i.e. not only who ought to do what where and when but also the possibility of attaching the *ought* property to the world. Secondly, at least mature legal communities, i.e. those at a later stage of their development rather than those at the cosmogonic stage of first appearance, will already have developed a range of possibilities of who ought to do what and so on. A wide range of normative connections between facts and events in the world will already be imaginable by members of the collective.

If this is the case, then the legal collective already pre-exists the act attribution not a matter of metaphysical necessity or as a matter of non-normative identification. The legal collective is defined by the, implicit or explicit, perceptions of normative possibility shared by the members of the collective, that is perceptions of how it is possible to change the world guided by the *ought* (which is different to the speculative perceptions of how the world can in fact be changed).

What the act attribution therefore does is to narrow down the range of legal possibilities rather than identify the legal collective afresh. It reduces the complexity of the range of legal possibilities. The legal collective then manifests itself and is steered in a certain direction –in a sense it is externally identified, i.e. becomes observable, but it is not identified in any strong sense. This direction is legality in the narrower sense, as we customarily understand it. What stays outwith it is the legally irrelevant in the narrow sense (what is often called the social or associational) and the legally irrelevant in the wider sense, i.e. what does not fall within the shared conceptions of normative possibility.

The manifestation and reduction of the legal collective happens propositionally and in the language of reasons. At the point of act attribution, the claim raised is that the collective is better off acting in a certain way than in another. Anyone who is already a participant in the shared scheme of legal possibilities is in a position to enter to discourse regarding the direction in which legal action should take.

The crucial question then is who is a participant in that scheme. I do not think that this is a question that admits a philosophical answer. This is because I do not believe –and it does not seem to me that Lindahl believes so either– that humans are hard-wired to recognise law when they see it as it exists independently of the way in which they experience the world. The emergence of legality is co-extant with the development of communities of people, who attach the same normative meaning to the world. We should therefore be asking which is the cohort of people who, at this stage of development, share certain conceptions of the normative possibilities available in the world. Who, to put it in Lindahl's terms, believes that it is possible for one to ought to act in a certain way in a specific time-space framework.

It is here, I think, that the process of globalisation may have forestalled Lindahl. Although I can offer no empirical evidence to that end –such evidence may be collected with wide ranging anthropological studies– I would speculate that the horizon of normative possibilities has become largely uniform over the largest part of the world through the homogenisation of people's real experiences (how this may have happened is again far too complex an issue but I would suspect that the growth and expansion of world markets has played a significant part).

If, then, it is true that legal collectives are defined by the shared tacit beliefs about normative/legal possibilities in the world and if it is also true that such beliefs are shared by people across national boundaries, then the sphere of legality is much wider than Lindahl thinks. It follows that the specific and contingent direction that legality will take can be negotiated propositionally and in terms of reasons on a universal scale. This makes an argument available to proponents of 'transnational', 'global' and so forth law. They can argue *contra* Lindahl that there are in fact no fault lines to be transcended.

Nevertheless, I do believe that there is an available counterargument to this. I believe that Lindahl successfully shows that legality's closure is a philosophical possibility, which cannot be eliminated with contingent empirical evidence. One therefore must always be prepared to deal with the *risk* of a-legality.[1] In the next section I will discuss what the normative significance, if any, of this risk may be.

III. A-Legality

In the book's last chapter Lindahl deals with the normative question of the politics of a-legality (a question so important as to lend the book its subtitle): how may it be possible for legal orders to deal with a-legality and how ought they to do so? As I suggested earlier on, that the problem caused by fault lines may be much less urgent than Lindahl thinks. Nevertheless, with a-legality being a philosophical possibility, the normative problem still persists.

Lindahl clearly sees that the key liberal answers to the question are not serviceable in light of his argument regarding the closure of legal orders. Reciprocity, for example, can do too little too late, when the outside of a legal order has already been assimilated. But the rejection of reciprocity, discourse and so forth could bring the argument to an impasse. How to maintain some openness without violently including what cannot be included?

This is Lindahl's answer to this: "[c]ollectives *ought* to acknowledge that they have a normative blind spot which they can neither fully justify nor remove, and they *ought* to take this into account when responding to a-legality in the process of setting legal boundaries. What, concretely, is the normative content of this 'ought'? *Collective self-restraint* […]" (p. 249)

On a constitutional level, self-restraint "in the form of the suspension or violation of (constitutional) norms, is the kind of respons*a*bility by which a legal collective can take respons*i*bility, albeit indirectly, for the conditions that govern its emergence". (p.254)

Lindahl helpfully concretises this with the use of examples, central among which is the case of *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others*. Here is a very brief history of the case, which should however suffice for our purposes. In 1986 student organisations in Ireland were making publically available the details of abortion clinics in other European Member States. On the application of the SPUC, the Irish High Court imposed an injunction on the grounds that disseminating such

[1] I argue something along these lines in E. Melissaris, 'From Legal Pluralism to Public Justification', *Erasmus Law Review* special issue on 'Law as a Plural Phenomenon', Wibo van Rossum & Sanne Taekema eds., 3/4 December 2013, pp. 173-180.

information is contrary to Art. 40.3.3 of the Irish Constitution, which protects the rights of the Unborn. At the same time, however, it referred the case to the ECJ for a preliminary ruling as to whether such a prohibition would be in contravention with European Law. The Irish Supreme Court upheld the injunction but also the referral to the ECJ. The ECJ in turn ruled the following on the substantive matter:

"The provision of information on an economic activity is not to be regarded as a provision of services within the meaning of Article 60 of the Treaty where the information is not distributed on behalf of an economic operator but constitutes merely a manifestation of freedom of expression.

[I]t is not contrary to Community law for a Member State in which medical termination of pregnancy is forbidden to prohibit students associations from distributing information about the identity and location of clinics in another Member State where voluntary termination of pregnancy is lawfully carried out and the means of communicating with those clinics, where the clinics in question have no involvement in the distribution of the said information".[2]

Lindahl interprets this in terms of the constitutional self-restraint that legal orders must show once they acknowledge their fault lines that claims from a-legality expose. He believes that the Irish Supreme Court "held back to hold out" by upholding the request for an ECJ preliminary hearing. Similarly, the ECJ "held back to hold out" by departing from its own case law considering abortion to be a service for the purposes of European Law on the one hand while, on the other, ruling that the publication of the details of abortion clinics by non-economic operators was not covered by the freedom to supply thus referring the issue back to the self-identification of the Irish legal collective in order to maintain the unity of European law. Without suggesting that Lindahl is wrong about all this, I would like to invite answers to some further questions.

First, I do not quite see why the best possible interpretation of *Grogan* is the one suggested by Lindahl. It would seem to me that it is at least as plausible an interpretation that in referring the case to the ECJ the Irish courts looked for grounds internal to Irish law (in the form of EU law) to support the prohibition of abortion, which appears to be a fundamental commitment of the Irish legal order. Similarly, the ECJ does not seem to hold back as a matter of constitutional self-restraint by departing from its prescribed role but rather by re-situating the case within its own terrain. In particular, it distinguished from *GB-INNO-BM*[3] on the grounds that in *Grogan* the information was not distributed by economic operators thus excluding them from the scope of freedom

[2] Case C-159/90 The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others.
[3] Case C-362/88 GB-INNO-BM v Confédération du Commerce Luxembourgeois [1990] I-667

of movement of goods. In doing so, the ECJ stays well within the realm of its own legality and does so explicitly with the standard language of interpretation, which is designed precisely to guard the boundaries of legality.

Secondly, even if we accept that the Irish courts exercised self-restraint, we should also be asking *why* they did so. There may be all sorts of answers to this (for example, the judges hearing the case may have yearned for the ECJ to introduce a rupture to the legal scheme of the prohibition of abortion motivated by their own liberal views) but Lindahl would need one that stems from within legality as he understands it. Otherwise, it would just be a matter of keeping one's fingers crossed that legal orders will display constitutional self-restraint.

So, does Lindahl's legality offer any reasons for openness? I should think that if it did, then it would not need to be open because those to whom openness is offered would already be part of the scheme of the legal order. In other words, in order to show the care required to not do some form of violence to those who occupy the space of a-legality (always from the perspective of a closed legal order), a legal order must already recognise them as bearers of some rights, which must stem from within a legal order. This, however, would amount to falling back to the liberal positions of reciprocity, discourse and so forth or to concede to those who believe in the existence (not simply possibility) of a global normative order.

Thirdly, so far as I understand the idea of constitutional self-restraint, it is meant to be exercised when a legal order hits a fault line with a normative claim being raised from the perspective of a-legality. In those cases, self-restraint entails suspending constitutional commitments in order to revise them. I should think, however, that in order to maintain its integrity and continuity a legal order would be compelled to constitutionalise this self-restraint through some clause that would allow for exceptional departures. But once self-restraint is constitutionalised then it either ceases to be exceptional and the kind of self-restraint that Lindahl imagines (it will have to be subjected to the imperatives of certainty and closure) or it will result in absolute openness, which will turn the politics of a-legality into a politics of inertia.

IV. A brief note on legal pluralism

Lindahl takes issue with the idea of 'overlapping legal orders', an idea central to the greatest part of legal pluralist thinking. Although he grants legal pluralist theory that it is right in its insight that different legal orders, most of which are state-independent, occupy the same geographical area, he believes that the metaphor of overlap is misleading for two reasons. First, because "human behaviour that is

relevant to any one of those orders, in terms of the normative point that governs its spatial configuration, might be entirely irrelevant to the other(s). Accordingly […] it is depending on their respective normative points, it is possible that someone or something enters or exits one of these overlapping legal orders *without entering or leaving the other orders(s)*". (p. 72). Secondly, for Lindahl the way in which legal pluralist theory employs the metaphors of overlap and layered legalities fail to capture that the space that legal orders occupy is at once physical and normative.

I would agree that these critiques apply to the more recent wave of legal pluralist theories, which I believe are best described as theories of legal institutional pluralism. It is true that these accounts rely heavily on the unreflective assumption that legal orders are absolutely normatively open and that disagreements or issues of distribution of jurisdiction and allocation of competences can be resolved on the level of reasons while many of these theories fail to give an account, either formal or substantive, of such reasons.

Nevertheless, Lindahl's critique is slightly unfair on most other accounts of legal pluralism. To deal with the first one first, I take it that the objection is directed at the tendency to identify legal orders with closed, comprehensive communities, which implies that membership of one legal order amounted to comprehensive membership of a cultural, religious and so forth community. It is perhaps easy to misread early legal pluralist theory, and especially its anthropological strands, as failing to see that belonging in a legal community is not necessarily co-extensive with the entirety of a person's memberships or that participating in one legal order does not preclude participation in a variety of legal orders. However, to raise this objection against such legal pluralist accounts disregards that they largely described the perspective of the legal order and not that of each participant in it. Their focus was on practices within communities and how these constituted a legal order distinct to that of the state. In any case, the critique certainly does not apply to the later wave of legal pluralist theories, which explicitly conceptually distinguishes between legal orders on the one hand and cultures on the other.

Lindahl's second objection is perhaps even more unfair. What has always animated legal pluralist theory, although it was not always explicitly so voiced, was that there is a *normative* closure about legal orders. From early on, the worry was that predominantly state law (or any other dominant legal order) tended to be blind to claims raised from within non-state legal orders. It is true that legal pluralist theory has generally not dealt with how these blind spots may be dealt with or with whether they ought to, although substantive as well as formal suggestions on the possibility of normative communication between legal orders are available. Nevertheless, what I think brings most accounts of legal pluralism together is exactly what animates Lindahl's analysis, namely the closure of situated legal orders, which at the very

least complicates any attempt at simply thinking into existence a global legal order which can govern us all in an unbounded manner.