

A-legality or Jus Politicum?

A Critical Appraisal of Lindahl's Fault Lines of Globalization

Martin Loughlin

Department of Law

London School of Economics & Political Science

m.loughlin@lse.ac.uk

ABSTRACT

This paper contends that, notwithstanding the impressive philosophical argument Lindahl presents in his book, his essential point does not extend to the plurality of normative orders that operate throughout the social world. Rather, his argument demonstrates precisely what is special about the political domain within which the modern idea of public law is situated. Lindahl's novel concept of a-legality is therefore best grasped as a reformulation of the modern concept of *jus politicum*, *droit politique*, political jurisprudence.

KEYWORDS

A-legality, Jus Politicum, legal ordering, Lindahl

Over several years, Hans Lindahl has been writing about some of the most fundamental questions in contemporary jurisprudence and politico-legal philosophy. Through a series of rigorous papers, he has drawn on his insightful reading of continental philosophy to offer an original contribution that advances understanding of the first principles of legal ordering. This programme of work has now been brought into definitive form in his recent monograph. *Fault Lines of Globalization* is a work of considerable philosophical sophistication.¹ In this short comment, I do not propose to offer an assessment of the contribution he has made to legal philosophy; that is not something I am qualified to undertake. In that respect, I can do nothing other than simply acknowledge my admiration for the clarity and rigour of his argument. My intention is more modest. I want only to highlight one aspect of his argument with which I remain unconvinced and, by building on this, I want to suggest that, rather than treat-

¹ Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-legality* (Oxford: Oxford University Press, 2013). I should place on record the fact that this book appears in a series, Oxford Constitutional Theory, of which I am a co-editor.

ing Lindahl's argument as a contribution to general legal philosophy, it might best be appreciated as providing a philosophical account of the foundation of public law.

The argument I make maps directly on to the structure of the book. The book is divided into two distinct parts, respectively called Legal Order and Legal Ordering. In Part I, Lindahl presents a pluralistic account of legal order with which, in significant aspects, I disagree. I then build on this disagreement with respect to his analysis in Part II, arguing that there is an apparent disjuncture in the pluralist conception of law he promotes in Part I (on legal order) and in a more obviously state-founded conception in Part II (on legal ordering). On the basis of this disjuncture, I suggest that the species Lindahl identifies as a-legality is more appropriately labeled *jus politicum*.

1. Lindahl's primary objective in Part I is to develop a structural account of the critical importance of boundary construction to the task of making sense of legal order. Law, he explains, 'orders space by differentiating ought-places and interconnecting them normatively' and it 'orders time by differentiating and interconnecting behaviour in specific normative articulations of past, present and future' (19-20). Through this analysis he aims to show the significance of something beyond the boundary distinction between legality and illegality. This he calls 'a-legality' and he argues that 'whereas illegality is the privative manifestation of legality, a-legality denotes behaviour that calls into question the distinction itself between legality and illegality' (30-31). A-legality refers to action that seeks to 'interrupt the material boundaries of legal acts' (34). Whereas illegality is indicative of legal disorder, a-legal behaviour 'intimates *another* [possible] legal order' (37).

The most obvious manifestation of a-legality is found in the action of a political movement to disrupt the institutionalized conditions of legal intelligibility for the purpose of postulating an alternative account of legal order. The concept is therefore most easily grasped with respect to state law. But Lindahl seeks to show that legal order extends beyond state law. Through accounts in chapter 2 of such topics as *lex mercatoria*, Roman law, the law of multinationals and the law of cyberspace, Lindahl argues that legal order is not confined to the order of state law; just as there were 'at least three different and partially competing normative orders – feudalism, church, and empire – in the Middle Ages, our contemporary global setting shows even greater legal pluralism' (70).

This stage of his argument is drawn together in a typography of legal order consisting of a spatial unity involving a form of closure (inside-outside) that remains linked to the first-person plural perspective of a community (we-together). In this systematic presentation, the idea that such arrangements constitute normative orders seems entirely non-contentious. But would we agree that all such normative orders deserve the epithet 'law'? As I understand his argument, Lindahl recognizes that

group agency is a necessary but not sufficient condition for existence of legal order since a collective legal agent 'involves a structure of authority whereby certain individuals, acting on behalf of the group, (i) monitor joint action as concerns its normative point and consistency over time, and (ii) take steps to uphold joint action when its normative point is breached' (87). This structure of authority is generally recognized in a constitution, understood 'not in the sense of empowerment by a collective self but rather the empowerment *of* a collective self' (100). Lindahl thus contends that a legal order appears 'as a concrete normative order that is (i) organized as a spatial, temporal, subjective and material unity and (ii) limited in space, time, subjectivity, and content' (96).

Lindahl acknowledges that this account 'casts a very wide net'; it is not limited to state legal orders (97) and his concept of constitution is 'by no means limited to state constitutions' (101). He emphasizes that 'a number of legal orders can come to co-exist – in fact, have always co-existed – in a given socio-temporal context' (102). Again, this is non-contentious if the example is the interaction between, say, the EU legal order and the legal orders of member-states. But can the analysis sensibly be extended – to use one of his examples – to the legal order of a multi-national corporation? Using the illustration of Shell as a multinational corporation that contains an elaborate normative structure amounting to a legal order, Lindahl seeks to demonstrate how Greenpeace's occupation of the (Shell-operated) Brent Spar North Sea oil platform in 1995 was a boundary-transgressing action indicative of the concept of a-legality (56-8). Is this justified?

I see a point in referring to normative orders in general as legal orders if one were engaged in a sociological investigation into patterns of social behaviour and seeking to understand the ways in which overlapping normative orders interact. But I struggle to grasp the significance of this radical pluralizing of legal orders when the objective is phenomenological or ontological. The fact is that although some might wish to portray Shell as a 'global legal order', Shell UK is a corporation that acquires its status as a legal person by operation of state law, is subject to detailed regulation by the laws of the state in which it presumes to operate, and that if it wishes to bring action to sanction Greenpeace protestors occupying its property, it is obliged to use the agencies of state law. This in fact is what happened in this case: Shell UK had applied to the UK government for a licence to dispose of the platform and it was obliged to apply to the British judicial authorities to seek authority to evict Greenpeace protestors from the platform. We might also note that Shell subsequently obtained permission from the Norwegian government to de-commission the platform in Norway. If we are seeking to understand normative order as legal order, we cannot avoid the question of authority. To suggest that the 'legal' order of Shell and of a nation-state merely 'overlaps' is, to my mind, rather strained. Notwithstanding the great econom-

ic power exercised by a large multinational corporation like Shell, from a juristic perspective Shell is an entity whose existence is created by state law and whose operations are regulated by state law. From a legal perspective, the arrangement is not one of mere overlap: it is one of dependency. It is on this tendency to equate normative order and legal order, then, that I find myself disagreeing with the account Lindahl presents in Part I.

2. Part I is structural, whereas Part II is genetic; that is, whereas Part I examines legal order as constituted power, Part II addresses the processes of constituent power. It signifies the move from boundaries to boundary-setting and thence to the issue of ‘fault lines’. It is at this stage of his argument that the concept of a-legality fully comes into play. Also, the significance of the pluralistic approach taken in Part I is clarified: pluralization, Lindahl maintains, ‘is the key to a concrete, non-reductive account of the disruption of legal (ir)rationality by a-legal behaviour and situations’ (141). Simply stated, a-legal behaviour exists when ‘we-together’ action is made strange as a result of the appearance of ‘*mutually interfering* ways of organizing the time, space, subjectivity, and content of joint action under law’ (141). A-legal action interrupts and calls into question collective identity over time but, by virtue of it raising the question of what counts as rationality/legality, it cannot simply be classified as irrationality/illegality. A-legality calls into question the objectivity of the very distinction that is drawn between legality and illegality. Legal normality, Lindahl contends, ‘is the outcome of a process of normalization that has its inception in the abnormal. *In the beginning was a-legality*’ (155).

Lindahl introduces this novel category in order to explain why ‘the three way division between boundaries, limits, and ... fault lines is constitutive for legal orders and legal ordering’ (157). His account is systematic and, so far as I understand it, compelling. The challenge I want to put is, in these circumstances, rather mundane. It rests primarily on the three main illustrations he uses in Chapter 5 to demonstrate the significance of the concept of a-legality for legal thought.

The first example he introduces is that of the movement for land reform in Brazil promoted by the MST (the landless workers movement) who have pioneered the occupation of unused land to establish agricultural and housing co-operatives. Lindahl explains their actions, such as occupying the offices of public institutions and multinationals and blockades of roads and railroads, as examples of a-legality. He argues that the MST challenges the legal/illegal distinction by ‘demands that the Brazilian authorities recognize the land rights of its members’ (167).

Lindahl next refers to the ruling of the Canadian Supreme Court in its Quebec Secession Reference [1998] 2 SCR 217. The Court here rejected the claim of a unilateral

right of secession on the ground that such a claim is incompatible with the reciprocity that must be supposed in the act of claiming a right. That claim could only be recognized as illegal. Lindahl's aim is to show how this judgment produces a stalemate: the Quebecois claim may 'fall prey to a performative contradiction' but 'Canadians beg the question when they demand that Quebec present its claims as a constitutional claim' (172). The unilateral claim made by Quebec, he explains, is exemplary of 'the strong dimension of a-legality' (172).

The third instance concerns the claim of Anders Breivik who, when prosecuted in 2011 for the Oslo and Utøya killings, conceded the deeds but denied guilt and refused to recognize the legitimacy of the court. Lindahl comments that 'Breivik offers a justification of his deed by appealing to the normative point of an emergent collective [his self-styled 'Norwegian Resistance Movement'] which is impossible with the liberal Norwegian collective on whose behalf the judges will decide about the (il)legality of his deed' (173). Breivik had constructed a 'strange' world that challenged the authority of the Norwegian court; it is, Lindahl argues, an extreme illustration of a-legality.

These three examples – of insurrection, secession, and terrorism – are presented in order to highlight the significance of fault lines. They reveal that 'a-legality has a complex normative structure that conjoins possibilities that a collective could realize and other possibilities that exceed its compass' (177). Lindahl distinguishes between a weak claim, such as that of the MST, which might be accommodated, and strong claims – in the cases of Quebec and Breivik – which could not. This argument is analogous to Carl Schmitt's view about the norm-exception distinction, though Lindahl maintains that sovereignty is a fault line, rather than a boundary, concept (179-80). Nevertheless, a-legality is – to adopt another phrase of Schmitt's - a 'formless forming', the 'irruption of social magma into a legal order' (186).

I have sketched each of Lindahl's illustrations in order to highlight a critical point. This is that all these examples involve claims made against the authority of state law. Notwithstanding the pluralist argument presented in Part I, the concept of a-legality developed in Part II presents itself as an irruption with respect to the legal ordering of the state. In this respect, it can be recognized as making a contribution to political jurisprudence. Lindahl amplifies this point when he explains the manner in which boundary-setting can transform legal collectives. Using the example of 'Occupy Wall Street', he argues that the movement fails because, 'unless an emergent collective manages to emplace itself in a space it claims as its own, and which is irreducible to the places of extant collectives ... it cannot identify itself as a novel collective' (195). Closure, then, is recognized to be an act of conquest. That is clear. But this is an argument recognizable in public law as involving the exercise of constituent pow-

er. This is an argument about a broad conception of public law which might be labelled *jus politicum*.²

Lindahl's argument in Part II can readily be grasped as one that presents a robust philosophical foundation for this notion of *jus politicum*, the struggle made in the language of 'political right' to irritate and challenge the norms of 'constituted power'. Where Lindahl goes wrong, it seems to me, is in then seeking to extend his argument to normative orders in general. He states that his general argument remains whether we are referring to 'the conquest that gave rise to Canada' or 'to the element of conquest involved in the emergence of multinationals and all other manifestations of "global law"' (196). With this last extension of the argument, Lindahl loses me; I cannot see how the general argument he makes about political struggle against a constituted political power can do the same juristic work with respect to the material power of multinational corporations.

3. It seems to me that the concept of a-legality expresses a fault line in legal ordering which exposes it as a political exercise related to a power-building process. The challenge of the MST, the Quebecois, the so-called 'Norwegian Resistance Movement', and the Occupy movement is all of a piece. That challenge was presented many years ago by Sieyès in his influential pamphlet, *What is the Third Estate?*:

What is the third estate? *Everything*.

What has it been until now in the political order? *Nothing*.

What does it want to be? *Something*.³

When Lindahl argues that the basic claim 'of dialectical theories of collective transformation boils down to this: *to change is to become who we already are, albeit potentially*' (213), is this not what Sieyès was identifying? When Lindahl says 'there can be no gathering together of a multitude into a collective subject without acts that seize the initiative to include and exclude' (216), this too is an expression of constituent power. He argues that the politics of a-legality 'indirectly acknowledges, in the process of setting boundaries, that every legal collective has a blind spot in the form of normative claims that resist integration into the circle of reciprocity and mutual

² See Martin Loughlin, *The Idea of Public Law* (Oxford: Oxford University Press, 2003); Id., *Foundations of Public Law* (Oxford: Oxford University Press, 2010).

³ Emmanuel Joseph Sieyès, 'What is the Third Estate? [1789]' in his *Political Writings*, ed. Michael Sonnenscher (Indianapolis: Hackett, 2003), 92-162, at 94.

recognition, yet which the collective cannot simply shrug off as specious' (222). But can this not be fully grasped within the modern framework of political jurisprudence?

The argument Lindahl makes can be readily accommodated once we recognize, first, that the modern form that law takes is as an expression of political power and, secondly, that the political struggle has involved an inclusionary/exclusionary dynamic concerning the attempt to institutionalize authority. A-legality thus finds its synonym in *jus politicum*, *droit politique* – or public law understood as the exercise of political jurisprudence. When Lindahl states that the politics of a-legality 'evinces the internal connection between the operation of inclusion/exclusion and the central categories which govern so much of normative thinking about legal order and legal ordering: equality, (distributive) justice, freedom, and security' (222-3), he is not addressing the question of the plurality of normative orders: he is referring directly to a discourse of collective self-rule that has been developed in modern political thought.

This point is thrown into relief in his final chapter on the politics of a-legality. His analyses of David Miller on nationalism, John Rawls, Michael Walzer and Iris Marion Young on justice, and Jürgen Habermas and Frank Michelman on constitutional democracy all indicate that he is working within the frame of modern political jurisprudence. The common theme is the on-going struggle over the character of political association. Most significantly, he explicitly acknowledges the sense of Hannah Arendt's claim that we are not born equal but that 'we become equal as members of a group on the strength of our decision to guarantee ourselves mutually equal rights' (238). Lindahl contributes to – indeed, advances – this debate by offering an insightful analysis of reciprocity and non-reciprocity in political relations. But the point is that it remains a discussion within the frame of political authority. It is, in short, a debate over the conditions of legitimacy of state law.

If further evidence is needed, then it is supplied by Lindahl's powerful critique of the nature and status of human rights (239-48). When he argues that 'the moment human rights are positivized as fundamental rights, they are inevitably linked to a limited normative point of joint action under law' (242), and that its moral dialogue must at that stage become political (245), he is acknowledging the point that this discourse involves the struggle for recognition within the legal order of the state.

4. Lindahl's account of a-legality and its associated notion of relationality, or what he calls *dia-logos* (248-60), offers a compelling philosophical foundation for addressing the question of the constitution of political authority in the contemporary world. But his analysis of these foundational issues - of 'collective self-restraint' (254), of sovereignty as a fault line concept (254), or of secessionist claims to 'political independence' (257) - is not one that applies to my tennis club, to the Shell corporation, or even to

lex mercatoria. It stems from the appeal to principles of equality and liberty with respect to a special type of (compulsory) association that we know as the state. It is for this reason that I can gratefully adopt the impressive philosophical argument Lindahl here presents, but would maintain that its essential point does apply to the plurality of normative orders that operate throughout the social world. Lindahl's argument demonstrates precisely what is special about the political domain within which the modern idea of public law is situated. Lindahl's novel concept of a-legality is therefore best grasped as a reformulation of the modern concept of *jus politicum*, *droit politique*, political jurisprudence.