



Introduction

Globalisation processes are lived as the globalisation of inclusion and exclusion. That they are lived and experienced in this way means that they are not processes that take place elsewhere; they take place here, locally, and as a transformation of the local. This holds also for emergent global legal orders. They are not something different to what goes by the name of ‘local’ law; global law is local law because it involves a spatial closure that separates and joins an inside and an outside. Inclusion in and exclusion from rights and obligations go hand in hand with inclusion in and exclusion from the spaces of action over which emergent global legal orders claim authority. As protracted and bitter resistance by alter- and anti-globalisation movements around the world makes increasingly clear, humanity is inside and outside global law.

How is this possible? How must legal orders be structured such that, even if we can now speak of law beyond state borders, no emergent global legal order is in sight that includes without excluding? More pointedly: is this a necessary state of affairs? Yes, or so I argue in what follows. But then: can one avoid advocating relativism in global affairs, a relativism that entrenches exclusionary processes and condemns emergent global legal orders to be instruments of imperial inclusion? Is an authoritative politics of boundaries possible that neither postulates the possibility of realising an all-inclusive global legal order nor accepts resignation or political paralysis in the face of the globalisation of inclusion and exclusion?

These are the pressing questions that guide this book. They open up a vast domain of enquiry that I approach from conceptual, empirical and normative perspectives.

Conceptually, I unveil a model of law that shows how and why inclusion and exclusion are the key operation of legal ordering – and of authority. I call it the IACA model of law: institutionalised and authoritatively mediated collective action. Most importantly, and in light of widespread doctrinal scepticism about the very concept of global law, the

IACA model of law explains why we can properly speak of emergent global legal orders, while also rejecting the idea that a global legal order would be possible that could include without excluding. A global order of legally binding and enforceable human rights, were it ever to be enacted, would be no exception. No global legal order is universal or universalisable because unification and pluralisation are the two faces of the single, ongoing process of setting the boundaries of legal orders, global or otherwise.

Empirically, this book examines a clutch of normative orders to establish whether they can be understood as forms of emergent global law. While the empirical analysis kicks off, in Chapter 1, with that most obvious of candidates, the World Trade Organization, the following chapters engage with the new *lex mercatoria*, the Basel Committee for Banking Supervision, the Accounting Standards Board (IASB), the Clean Clothes Campaign (CCC) the International Organization for Standardization, the Codex Alimentarius, the international human rights regime, the global commons and, perhaps to the reader's surprise, eBay. In each case, my aim is to reconstruct the deep structure of the corresponding normative orders as variations on the common theme of institutionalised and authoritatively mediated collective action. And in each case I am concerned to explore how their boundaries call forth resistance – to inclusion as much as to exclusion – by a range of actors and movements, such as the Zapatistas, the *Vía Campesina*, the Indian Karnataka State Farmers' Association, Occupy Wall Street and hacktivism.

Normatively, the central question addressed by this book is whether a rich concept of authority is available to the IACA model of law if, as I argue, authorities cannot but set the boundaries of (global) legal orders by including and excluding. Rejecting both universalism and relativism, the book outlines the contours of an alternative concept of authority in a global context, which I dub 'restrained collective self-assertion'. Its core is a radicalisation of the concept of recognition. With theories of reciprocal recognition, I argue that the contestation of the boundaries of emergent global legal orders and the responses thereto by these orders are political struggles for recognition. Against theories of reciprocal recognition, I hold that the legal recognition of an identity/difference threatened or violated by joint action has an asymmetrical structure which precludes understanding an authoritative politics of boundaries as a process of rendering legal orders ever more inclusive, with an all-inclusive legal order as its regulative idea. Instead, restrained collective self-assertion

involves setting the boundaries of collectives, in response to their contestation, in a way that recognises the other (in ourselves) as one of us *and* as other than us. This philosophical, rather abstract, account of authority cries for concretisation. The final chapter of the book bites the bullet by reconstructing a range of institutional initiatives to negotiate struggles for recognition as modulations of restrained collective self-assertion, even if such initiatives cannot exhaust the responsive ethics animating an authoritative politics of boundaries. These institutional modulations include the doctrine of the national margin of appreciation as developed by the European Court of Human Rights, limited autonomy regimes, the reciprocal recognition principle in global trade law, the principle of complementarity in the Rome Statute, global administrative law and the initiative to take constitutionalism beyond the state.

To address these three aims, a concept of legal order is needed that is general, flexible and discriminating. It should be general by dint of highlighting the basic features that identify emergent global legal orders as *law*, hence features they share with other putative legal orders. It should be flexible in the sense of being able to pick out and accommodate what differentiates emergent *global law* from other legal orders. Because doing so demands reconsidering what it is that we want to call a *legal order*, our concept of law also needs to discriminate between law and other normative orders.

Yet from the very outset this endeavour faces three related difficulties. As each of them is important for understanding and justifying the scope and ambitions of this book, a methodological prolegomenon is indispensable before we can get started.

The first difficulty concerns the historicity of the endeavour to articulate a concept of legal order. The difficulty I have in mind is reflected in both terms of the composite expression 'legal order'. On the one hand, the move to pick out what is proper to *legal orders*, in contrast to other forms of normativity, presupposes the differentiation of normativity into the domains of law, morality and religion, amongst others. Only against the historical background of this differentiation, which Niklas Luhmann and others have been at pains to theorise, does an enquiry into the continuities and discontinuities between state law and emergent global legal orders make any sense.¹ On the other hand, I raise the question about legal *order* from within the horizon of the experience of

¹ Niklas Luhmann, *Law as a Social System*, translated by Klaus A. Ziegert (Oxford: Oxford University Press, 2004), esp. 230ff.

contingency characteristic of Western modernity. Hans Blumenberg, the great German historian of ideas, compellingly argues that, at the end of the Middle Ages, the theological sharpening of the problem of contingency – the problem *that* there is a world and *what* it is as a world – overburdens Western humanity's interpretation of itself and its relation to the world, such that the Scholastic solution of the 'transitive' conservation of the world in being by an omnipotent and arbitrary God is no longer either plausible or acceptable, giving way to 'intransitive' conservation: self-preservation as a principle of rationality. As a result of this epochal transformation, the ordering of society comes to be interpreted as a *self-ordering*.² Crucially, the problem of the *ground* of legal orders and of their boundaries becomes urgent in light of the contingency of social orders: how can a legal order justify that it includes this, while excluding that? The question about the relation between authority and the globalisation of inclusion and exclusion that drives this book presupposes this historical horizon, even though the book aims to critically interrogate certain features of this horizon and its way of conceptualising (legal) order. This historical situatedness cannot be bracketed by methodological vigilance, however refined; it is the unavoidable background condition for an enquiry into the concept of legal order that aspires to meet the aforementioned desiderata, in particular the desideratum of generality. And it is also a topographical situatedness, as Chakrabarty knows all too well, when noting that even 'critical thought . . . remains related to places'.³ No enquiry into global law can be global in the sense of being everywhere and 'everywhen'.

The historicity and placiality of an enquiry into the concept of (global) legal order is linked to a second, related problem: there is no independent criterion by which to establish whether the model to be outlined herein-after satisfies the three desiderata indicated earlier. Consider generality: there is no predetermined range of normative orders that count as legal orders prior to their conceptualisation as such, and which it would be the task of legal theory to merely pick out and reproduce in their constitutive

² Hans Blumenberg, *The Legitimacy of the Modern Age*, translated by Robert Wallace (Cambridge, MA: MIT Press, 1985), 137–138; Hans Blumenberg, 'Ordnungswund und Selbsterhaltung: Über Weltverstehen und Weltverhalten im Werden der technische Epoche', in H. Kuhn and F. Wiedmann (eds.), *Das Problem der Ordnung. Verhandlungen des VI deutschen Kongresses für Philosophie* (Meisenheim: Anton Hain Verlag, 1962), 37–57.

³ Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton, NJ: Princeton University Press, 2000), xvi.

features. This difficulty spills over into the second and third desiderata: discriminating between law and non-law is not independent of the process of establishing the scope of what is to count as law; the same holds for the process of identifying significant differences between kinds of legal orders. Most importantly, any attempt to establish the general features shared by all legal orders inevitably brings into play normative presuppositions which no amount of methodological dexterity can neutralise.⁴ So, even though the desiderata of generality, discriminatory capacity and flexibility are not simply spurious or illusory, they can never be fully detached from a *politics of conceptualisation*.

Quentin Skinner makes a similar point when dismissing the assumption that it would be possible to conceptualise the state from a neutral vantage point: ‘As the genealogy of the state unfolds, what it reveals is the contingent and contestable character of the concept, the impossibility of showing that it has any essence or natural boundaries.’⁵ Skinner’s assertion reads as a muted and urbane echo of Carl Schmitt’s trenchant thesis that ‘all political concepts, images, and terms have a polemical meaning. They are focused on a specific conflict and are bound to a concrete situation.’⁶ I share both authors’ conviction that there is no neutral position from which to conceptualise the law. What is particularly instructive for this preliminary note on method is, nonetheless, the reason for which the endeavour to conceptualise legal order cannot rise above the fray.

Indeed, the inevitability of a politics of conceptualisation stems from the fact that models of law have a representational – or, if you wish, interpretative – structure: they disclose something *as* something. Some represent law *as* a system of rules posited by a sovereign, others *as* the commands of nature, others *as* a convention, and so forth. Like all accounts of law, the model of legal order I sketch out opens up a domain for practical involvement and theoretical enquiry by revealing phenomena in a certain light. There is no alternative to this way of

⁴ A case in point is nominalism, as its response to this problem ends up reintroducing implicit normative presuppositions in the very attempt to bracket them, usually in the form of a liberal defence of legal pluralism. See, for example, Tamanaha’s attempt to move beyond a functionalist approach to law by embracing what I take to be a nominalist approach thereto. Brian Tamanaha, *A General Jurisprudence of Law and Society* (Oxford: Oxford University Press, 2001), 194.

⁵ Quentin Skinner, ‘A Genealogy of the Modern State’, in *Proceedings of the British Academy*, 162 (2009), 325–370, 326.

⁶ Carl Schmitt, *The Concept of the Political*, translated by George Schwab (Chicago, IL: University of Chicago Press, 2007), 30.

gaining conceptual access to law; it is the necessary implication of the insight that our practical and theoretical engagement with reality is mediate or indirect. But the price to be paid for this mediated relation to law is that representation cannot open up a domain for enquiry without also closing down other ways of accessing it. Representation discloses something as *this*, rather than as *that*, which entails that it is not possible to include without excluding when conceptualising a range of phenomena as law.

If I speak of a politics of conceptualisation with regard to models of legal order it is because the marginalisation they bring about is never merely conceptual; it is also – and even primarily – *practical* in nature, prescribing certain ways of dealing with behaviour that has been excluded from the domain of law. This is what William Twining has eloquently shown when, resisting the methodological nationalism that has informed legal positivism during the past centuries, he outlines a concept of law that renders visible a plethora of candidates to the status of legal orders which have been systematically excluded from the purview of legal theory, thereby contributing to their domestication by state-centred politics. Yet, no less than the restrictive brand of legal positivism he resists, so also Twining's general jurisprudence is informed by normative presuppositions that govern what he is prepared to call law, and that speak to a certain politics of conceptualisation.

There is no reason to expect that the IACA model of law can extricate itself from this double movement of inclusion and exclusion and its attendant politics of conceptualisation. I argue hereinafter that legal order can best be represented *as* a kind of collective action; but what is elided and perhaps traduced when law is so construed? This question has a political bite. For if, as a range of scholars have argued, the emergence of global legal orders partakes of the globalisation of imperialism, can a theory of legal globalisations which draws predominantly on strands of 'Western' philosophical thinking about law and politics avoid becoming part of that imperial project, even though it seeks to critically examine the globalisation of inclusion and exclusion? More pointedly, insofar as this book argues that collective agency remains crucial to the concept of (global) law, the question arises whether it is not itself a manifestation of the metaphysics of (collective) subjectivity that many take to be at the heart of imperialism. I cannot parry this objection at this stage of the argument, and I don't know whether I can parry it at all. In any case, a key to dealing with this objection lies with those who resist the globalisation of inclusion and exclusion, for perhaps their struggles also resist models

of legal order such as mine, and the kinds of inclusion and exclusion to which they give rise. In Chapter 4 we have the opportunity to examine some of these forms of resistance, as well as their theoretical underpinnings, including the concepts of multitude and social movements, even though I cannot do so in a way that is not already coloured, in one way or another, by my conjecture that legal order should be represented as a kind of collective action.

But it would be a mistake to assume that the inevitability of inclusion and exclusion proper to the conceptualisation of law should lead us to accept that law is nothing more or nothing other than its interpretations. This purely constructivist view is untenable because there is a *difference*, both conceptual and normative, between the interpreted and the interpretation – between, respectively, something and its disclosure *as* something (else) – which is not at the disposition of the legal theorist or of whoever engages in political practice. As concerns law, this difference manifests itself, amongst others, in the difficulties encountered by state-centred theories of law to render comprehensible certain transformations which nonetheless appear increasingly relevant and important to the theory and practice of law. What is required is to revise the conceptual framework of legal theory in a way that brings to light what is relevant and important in disclosing something as law, in particular as global law. What I take to be important – in fact of capital importance – is a model that helps to explain why legal orders cannot but include and exclude, and to elucidate the normative consequences that follow therefrom for an authoritative politics of boundaries in a global context.

These ideas about legal theory as an exercise in representation sound very much like the political dynamic of inclusion and exclusion I have announced as being the subject matter of this book. Indeed. They suggest that the epistemology underpinning my approach to global law on the one hand, and the ontology of legal orders endorsed by the IACA model of law on the other, are isomorphic. In other words, there is a structural similarity between the process of conceptualising the law and the mode of being of legal orders as conceptualised in that model. The *trait d'union* between the two domains is representation. If representation, as a cognitive process, involves disclosing something as something, so also, as we shall see at great length, representation is the dynamic which drives legal ordering as a species of collective action.

These considerations lead over into a third problem, which subtends a key methodological tenet that governs the entire structure of the book. If one rejects nominalist and essentialist approaches to the concept of

law, as I do, then what is required is an approach that moves back and forth between the globality and the law of global law, such that a certain pre-comprehension of what counts as law opens up a domain of enquiry as *global* law and, conversely, emergent manifestations of the global lead to a transformed understanding of the *law* of global law. By resolutely staying within this circular relation – a circularity which need not be vicious – it becomes possible to test the generality, discriminating capacity and flexibility of the concept of legal order to be built up in the course of the book, even though this circularity cannot lead to a conclusive result. What we need to do, couching the point in a way that is less hermeneutically freighted, is to begin by sketching out a preliminary concept of law which can then be modulated in different ways, or perhaps even revised more or less drastically in the course of this book, to make sense of a range of features accruing to putative global legal orders.

Here, then, is the way I have structured the book to deal with these methodological issues. Chapter 1 deploys a preliminary meditation on what might be meant by the globality of law. Pointing to the distinction between borders and limits, this inaugural meditation discerns two senses of what counts as the outside of a legal order: the foreign and the strange. I then move to the second pole of the circularity in the first part of Chapter 2, unveiling a concept of *law* that could explain that distinction: legal order as institutionalised and authoritatively mediated collective action. Having outlined the contours of the IACA model of law, I return to the circularity's first pole, the globality of global law, in the remainder of Chapter 2 and in Chapters 3 and 4. Drawing on the IACA model of law, these chapters approach the globalisation of legal inclusion and exclusion from several perspectives: the fragmentation, privatisation, marketisation and compression of space and time manifested by legal globalisations; the problem of unity that remains virulent in the concepts of global governance, global networks and global regimes; the inclusion and exclusion wrought by a motley collection of efflorescent global legal orders and by the legal globalities intimated by alter-globalisation movements. The largely descriptive focus of Chapters 1 through 4 gives way to a normative approach in Chapters 5 and 6: how to deal with inclusion and exclusion in the course of legal ordering? This question takes us back from the first to the second pole of our circular approach: from legal (alter-)globalisations to the concept of *law* at work in global law. By clarifying the relation between recognition and authority I seek to reveal the normative import of the IACA model of law. More precisely, the competing accounts of recognition deployed in Chapters 5 and 6 offer

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the opportunity to reconstruct and assess two ways of interpreting the authoritativeness of the politics of boundaries whereby collectives respond to challenges to what they include and exclude. To be sure, my defence of restrained collective self-assertion outlines a general concept of the law's authoritativeness, abstracting from the specificities of globalisation processes. So, having begun our meditation on global law with the pole of globality, it seems appropriate to bring our enquiry to a close, in Chapter 7, by returning to that pole. If a legal order's authoritativeness consists in restrained collective self-assertion, what does this tell us about the institutional preconditions of an authoritative politics of boundaries in a *global* context?