INTERVIEW

A Theory of Global Law and its Fault Lines

Japanese Scholars in Dialogue with Hans Lindahl

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Introduction

The following pages summarise a dialogue that took place online in June and July 2021 between Professor Hans Lindahl and us, a group of Japanese professors specialised in constitutional law, international law, political science, international relations, and legal philosophy.[1] Why and for what purpose did this conversation take place? This is a question which most readers, whether European or Japanese, will naturally hold in mind when looking at the title of this text. However, the question itself presents an answer. Under conditions of globalization, the question about what might count as a global perspective, as well as the phenomena and issues it calls forth, are of central importance. However, addressing these issues is no easy task, as we cannot be genuinely free from all local biases. In other words, our ideas are under the influence of our locality, such as a local history, culture, religion and political systems. Despite such situatedness, how can we reach a universal understanding about globalising legal orders? The only feasible option, we think, is for legal scholars with different backgrounds to get together, discuss together and think together. Through such a process, we hope to strengthen mutual understanding and the conditions for inter-subjectivity across cultural and historical differences. All of this explains why, in April 2020, we carefully studied Professor Lindahl's works, in particular his seminal book, *Fault Lines of Globalization*.[2] Afterwards, Lindahl was asked to directly discuss it with us, putting forward a series of questions about his approach to legal orders in a global context, and to which he responded. The dialogue between Lindahl and us as non-Western scholars will be advantageous for the purpose of polishing – and reconsidering – his ideas. In the dialogue, Japanese scholars came up with questions which are

1 The following Japanese scholars participated in this discussion: Yusuke Ohno (Shimonoseki City University), Hajime Yamamoto (Keio University), Yota Negishi (Seinangakuin University), Keisuke Kondo (Kyoto University), Akiko Ejima (Meiji University), Ryuya Daidouji (Aoyama Gakuin University), Akio Shimizu (Waseda University), Kosuke Koide (Meiji University) and Takao Suami (Waseda University). This discussion is part of achievements of a scientific research project funded by the Japan Society for the Promotion of Science (Grant No. 18H03617). On this occasion, we express our sincere thanks to the JSPS.

2 Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (Oxford: Oxford University Press, 2013. Translation forthcoming in Japanese (Fukosha 2023); earlier translations in Italian (Mimesis 2017) and in Spanish (Editorial Siglo del Hombre 2018).

Netherlands Journal of Legal Philosophy 2022 (51) 2
doi: 10.5553/NJLP/221307132022051002011

quite different from questions of European scholars regarding the development of particular arguments. Both sets of questions will contribute to the improvement of Lindahl's theorization of law and globalization processes. We hope that this exchange will have an added value for cross-cultural discussions by the international academic society concerning the relation – and tension – between universalization and globalization in law and politics.

I. Theory

1. *The Context of Lindahl's Theory*

(a) Relationship with Schmitt and Kelsen

Ohno: Let me begin by asking a question about the position that Professor Lindahl's theory occupies, because we Japanese scholars usually have a huge interest in the theoretical contexts in which a particular theory is located.

First, I would like to mention Hans Kelsen and Carl Schmitt. Are there any differences between your theory on the one hand and Carl Schmitt's and Hans Kelsen's on the other? In *Fault Lines of Globalization* and in 'Law as concrete order'[3] you frequently employ Carl Schmitt's and Hans Kelsen's ideas. And it seems to me that you favour Schmitt over Kelsen, but, at the same time, that you do not completely agree with Schmitt and not completely disagree with Kelsen. So, I would like to know your position towards Schmitt and Kelsen.

Lindahl: Schmitt's and Kelsen's critical debate about the democratic *Rechtsstaat* and its foundational concepts is the most interesting and sharp encounter on the topic I have come across. But whereas you would typically have legal philosophers who are staunchly Schmittian or thoroughly Kelsenian, I engage with both philosophers to articulate a stance alternative to both. Allow me to refer to three of the main issues I have focused on.

The first is the problem of unity and plurality. Schmitt defends a political, substantive notion of unity that precedes and conditions the possibility of legal unity. His writings on the notion of concrete order and of a constitution are of central importance here. Schmitt's account of political unity evokes – without ever properly conceptualising – the first-person plural perspective of a 'we'. To borrow Margaret Gilbert's expression, unity, in law and politics, is the unity presupposed in 'we together', rather than 'we each'. Unity is 'presupposed' because it is always a *represented* unity. No group, *qua* unity, can act or speak for itself; someone claims to speak and act on its behalf, even when those who speak and act are participant agents. Whoever represents a polity, *e.g.*, by enacting a constitution, attributes its enactment to the polity as a unity: the representation *of* a polity. Moreover, the constitution must spell out, at least minimally, the point of joint action, what 'we'

3 Hans Lindahl, 'Law as concrete order: Schmitt and problem of collective freedom', in *Law, Liberty and State*, ed. David Dyzenhaus and Thomas Poole (Cambridge: Cambridge University Press, 2015), 38-64.

are deemed to hold in common: representation *as* this or that unity. Because lawmaking represents a polity as this *rather* than that unity, it cannot unify without also pluralising, *i.e.*, without marginalising other possible configurations of legal unity. There is no representation of collective unity without the *de-presentation* of collective unity and, to a lesser or greater extent, without its *misrepresentation:* 'Not in our name!' This, as I see it, is why Kelsen insists that, sociologically speaking, the people are irreducibly heterogeneous, hence that unity is only the putative unity of a legal order. With and against Schmitt and Kelsen, I draw on the (post-) phenomenological notion of intentionality to defend a paradoxical reading of representation that explains this ambiguous dynamic: legal ordering originates a polity by representing an original unity to which it has no direct access.

A second, closely related, issue concerns how Schmitt and Kelsen envisage constituent power. Schmitt, in the *Verfassungslehre*, refers to constituent power as the 'formless forming' from which ever new legal forms emerge; constituent power marks a passage from chaos as inexhaustible possibility to order as actuality. Even if Schmitt himself is a conservative thinker, this notion of constituent power has been embraced by left-wing thinkers such as Cornelius Castoriadis and Antonio Negri. Like Schmitt, they argue that law, as a constituted order, is not self-grounding; it refers beyond itself to societal processes which are themselves extra- and pre-legal in character. Like Schmitt, Kelsen insists that a legal order is not and cannot be self-grounding. But whereas Schmitt posits a pre-existent people as the constituent subject of a legal order, Kelsen points to a problem operative in the notion of the *Grundnorm*. As my colleague, Bert van Roermund, has pointed out in his reading of Kelsen, the idea of a first constitution is an oxymoron: because legal norms can only be derived from higher legal norms, a constitution can only be such if it is not the first constitution, but if it is the first norm, then it cannot be a constitution.[4] The *Grundnorm* is Kelsen's solution to this oxymoron. In contrast to Kelsen and Schmitt, I propose a paradoxical reading of constituent power that acknowledges that legal orders are not self-grounding. By doing so, I avoid the impasses in their thinking. On the one hand, the group that would constitute itself as a legal collective by enacting a new legal order is in fact *constituted* as a group. Whoever seizes the initiative to represent a putative 'we', inviting a manifold of individuals to identify themselves as a unity, is the constituent power of a legal order. On the other, this act of identification and empowerment only works as a *constituent* act if its addressees retroactively identify themselves as the members of the collective by exercising the practical possibilities made available to them by the order. Hence,

4 See Bert van Roermund, 'Kelsen under the Low Skies. Recognition Theory Revisited and Revised', in *Hans Kelsen anderswo / Hans Kelsen Abroad. Der Einfluss der Reinen Rechtslehre auf die Rechtstheorie in verschiedenen Ländern, Teil III*, ed. Robert Walter, Clemens Jabloner, and Klaus Zeleny (Vienna: Manz Verlag, 2010), 259-279, 27ff; Bert van Roermund, 'Norm-Claims, Validity and Self-Reference', in *Kelsen Revisited. New Essays on the Pure Theory of Law*, ed. Luis Duarte d'Almeida, John Gardner and Leslie Green (Oxford: Hart Publishing, 2013), 11-42.

Netherlands Journal of Legal Philosophy 2022 (51) 2
doi: 10.5553/NJLP/221307132022051002011

and this is the paradox, an act only succeeds as the exercise of *constituent* power if, in hindsight, it appears to be the act of a *constituted* power.[5]

The third point of interest is the notion of a legal order. For Schmitt, law is a 'concrete order', a *nomos*, which he elaborates in the sense of a taking, distributing, and cultivating. I take up the notion of a *nomos*, giving it a Kelsenian twist. Kelsen approaches a legal order as a system of norms which have spatial, temporal, subjective, and material spheres of validity. If one appropriates Kelsen's insight from a first-person perspective, both plural and singular, then legal norms operate as markers that orient participants in collective action in space, time, subjectivity, and act contents. A legal order is never only a system of norms; it is always also a pragmatic order, an order of collective action. In that sense a *nomos*, that establishes, from a first-person plural perspective, who ought to do what, where, and when.

(b) Relationship with Hauriou and Romano

Ohno: Next, I would like to ask your treatment of Maurice Hauriou, a French public law scholar and one of the main advocates of institutionalism. How do you understand Hauriou's theory of institution? Especially, I wonder if there is any difference between your 'point of joint action' or 'normative point' and Hauriou's *idée d'œuvre*. In 'Law as concrete order' you mention Hariou's theory of 'institution', but you did not discuss it in detail. Hauriou argues that institutions have *idée d'œuvre*, *pouvoirs*, and *les manifestations de communion*. I find similarities between the function of *idée d'œuvre* and that of 'the point of joint action' or 'normative point'. And, if possible, please let us know what you think of Santi Romano, another main institutionalist in Italy.

Lindahl: Yes, there certainly are connections between my account of legal order as institutionalised and authoritatively mediated collective action (IACA) and the work of Hauriou and Santi Romano.

The idea of a directing or working idea, in Hauriou, stands close to what I call the point of joint action, and which, in my view, does not necessarily involve a purpose, as would be the case for, say, Dworkin's concept of a practice. Point is what collective action is *about*, that which bestows meaning on our activity as members of a collective. Moreover, the point of joint action is always to a certain extent opaque. We can never fully explain what it is that joins us together. Insofar as the point of joint action is opaque, it opens a space for institutional transformation. There is also a certain analogy between what Hauriou calls the separation of powers and representational processes and my insistence on the centrality of representation to collective action. Finally, what Hauriou calls 'manifestations of communion' bears some resemblance to the notion of collective action.

But there are also important differences, the first being that I articulate a notion of a legal order from the first-person plural perspective. Its focus is the conditions

5 Hans Lindahl, 'Possibility, Actuality, Rupture: Constituent Power and the Ontology of Change', *Constellations* 22 (2015): 163-174.

under which a manifold of individuals can refer to themselves as a group – as 'we together'. This involves the representation of collective unity, but not in the simple conceptualization endorsed by Hauriou, which runs the risk of reifying collectivity into a pre-given unity. Moreover, Hauriou does not adequately account for what I would call the 'logic of boundaries'. Whereas for Hauriou the boundaries of an institution are given, I submit that law is a process of setting legal boundaries. Thus, Hauriou does not have the conceptual tools to engage directly with the notion of law as a transformable pragmatic order that structures the space, time, subjectivities, and act contents of collective action. Finally, I take issue with Hariou's assumption that acclamation is the immediate self-presence of a people as the basis for the legitimacy of a legal order, a view that Schmitt, in the *Verfassungslehre*, also takes up when opposing representation to identity. Against Schmitt and Hauriou, I would argue that self-identification and self-differentiation – *i.e.*, that a collective becomes different to itself in the very process of identifying itself as the same – are the two sides of the single process of representation, which precludes that a collective can ever be either fully identical to itself or fully different from its others.

Like Santi Romano, I take legal plurality to be a core theme of legal theory, meaning by such that institutions are not simply organised in a hierarchical relationship within a state, which, in turn, is subordinated to international law as the law that governs relationships between states (and international organizations). But here again there is an important difference. His understanding of legal plurality is in fact monistic: here is one institution, as a unity, there another, also a unity, and which interact with each other. He does not deal with plurality in a strong sense, namely, as the Other in ourselves who resists assimilation into the 'we', as is the case with indigenous peoples who resist colonization and claim sovereignty for themselves. His account of legal plurality can accommodate the limits but not the fault lines of legal orders.

Ohno: I have a question to your answer. You said that in your theory collective action is about dynamic ordering boundaries, whereas Hauriou's institution is a static legal boundary. But, as far as I understand, Hauriou also said that his institution has a dynamic balance. So, I think his institution is also about ordering boundaries, like yours. Is this understanding incorrect?

Lindahl: Perhaps I am being too harsh. Insofar as the directing idea is underdetermined, there is space for institutional transformation; to that extent an institution is a process for Hauriou. That boundaries are given for Hauriou does not mean that they cannot change, but rather that Hauriou does not have a theory of legal ordering as the creation and transformation of boundaries, nor of how these are internally connected to representation as a process of collective self-identification and self-differentiation. My bone of contention with Hauriou, as with Santi Romano, is that the representation of unity is always also its de-presentation and misrepresentation, hence that the very conditions that make unity/identity possible are also the conditions for plurality/difference.

(c) Relationship with Anglophone legal philosophers

Kondo: Then, as you just mentioned Ronald Dworkin, I would like you to clarify your evaluation of Anglophone legal philosophies. How do you see the analytical ones especially, such as Joseph Raz's?

Lindahl: William Twining argues that the philosophy of law engages with three core questions: the identity, individuation, and taxonomy of legal orders. Putting aside the last of these, whereas analytical philosophies of law take the first question to concern the distinctive normativity of law vis-à-vis other normative orders, they view individuation as pertaining to how a given legal order can be picked out as this or that specific legal order (*e.g.*, WTO law or Japanese law). Analytical philosophies of law have obsessed over the first of these questions, relegating the second to the domain of legal sociology. Against this reductive move, my approach, which I characterise as a phenomenologically inspired account of legal ordering as a mode of collective action, holds that individuation is a process of responsive collective self-identification (and differentiation), hence of setting the boundaries between collective self and the Other as articulated in a pragmatic order; law orders by determining who ought to do what, where, and when. Clarifying this process sheds light on the normativity of legal orders, hence on the identity question in the sense privileged by analytical philosophies of law. By granting pride of place to the individuation question I attempt to conceptualise the structure and emergence of a range of putative legal orders, transnational, indigenous, and otherwise, that fall beyond the purview of a philosophy of state law. In brief, the individuation question is, in my view, the royal gate to a general theory of legal ordering.

2. Collectives and Individuals

Yamamoto: I would like to ask a question regarding your stimulating book, *Authority and the Globalisation of Inclusion and Exclusion*.[6] I wonder how the individual, the self, or each individual person as actor in society is conceived in your model of law. I have the impression that your methodology requires that individuals should be theoretically put out of a reflection from a *normative* point of view.

I am very interested in this question because, in an Asian society like Japan, conflicts or gaps between Western legal culture(s) and Asian conventional legal conscience(s) often raise serious problems in various fields of law. For example, the concept of 'subjective right' imported after the Meiji Restauration in 1868 was completely foreign to traditional Japanese legal culture. On such an occasion, the abstract question of how an individual should act vis-à-vis legal rules in general constitutes an important subject of Japanese legal studies.

From your perspective, put simply, the individual is reduced to the contingent relationship between stimulations and reactions. On this point, Alexander Somek

6 Hans Lindahl, *Authority and the Globalisation of Inclusion and Exclusion* (Cambridge: Cambridge University Press, 2018). Translations forthcoming in Portuguese (Editora Contracorrente 2023) and Spanish (Editorial Herder, 2023).

has already remarked that a 'beautiful soul finds that there is no "core" to himself'.[7] In a society like Japan, to build 'an autonomous individual' against the collectivistic tendency of society is still an important issue to some extent.

Lindahl: Is there a place for the individual when legal ordering, as I describe it, is a modality of collective action? The short answer is 'yes', although this answer does not yet address what you are getting at. Collective action theory has fought a long war with methodological individualism, which holds that the personal pronoun 'we' boils down to an aggregate of individuals: 'we each', in Gilbert's idiolect. Collective action theory, on the contrary, argues for a social ontology in which 'we together' is irreducible to 'we each'. Collectives have a distinct existence, even though they cannot exist independently of and depend on the participants in joint action. This explains, among other things, why collectives can make promises and can be held responsible for keeping them, even though all participant agents at the time of the promise have been replaced by others when, later, the collective is called on to keep its promise. Yet the critical thrust of methodological individualism is to highlight what Kelsen calls deep societal heterogeneity. While endorsing the social ontology propounded by collective action theorists (note, however, that there are significant differences between these theorists), my account of legal ordering also accommodates methodological individualism's concern: 'we each', I argue, is and remains ever ensconced in 'we together'. This follows from the structure of representation, which is always also a depresentation and, to a lesser or greater extent, a misrepresentation: whoever is represented is more and other than how they are represented, and in this sense never fully appropriable by any collective.

But your question cuts deeper: it concerns the liberal assumption that individuals are given in advance of collectivity as autonomous beings. While I work from within the horizon of Western modernity and the central role it assigns to selfhood, it seems to me that understanding representation as *responsive* representation offers a way out of the conundrums accruing to the notion of the autonomous subject, whether individual or collective. In effect, the first-person (plural) perspective is not 'first'; it comes second. Prior to being a 'we' there is an 'us': a primordial de-centration of the self is constitutive for individual *and* collective self-affirmation, not merely in the negative sense that the self cannot overcome its de-centration but rather that, paradoxically, the collective self *emerges* as a response to a summons, a solicitation, by the Other. It is not enough to assert that selfhood is a relational concept; the self is *adventitious*, the outcome of a *heterogenesis*, and, in this strong sense, *dependent:* heteronomy is inscribed in autonomy.

If I may return the question to you: How do Asian cultures, and what you call conventional legal conscience, interpret the Western notion of subjectivity, and what kinds of critiques would they offer to that notion?

7 Alexander Somek, 'The Global Flock and the Beautiful Soul', in CLSGC Book Symposium on Authority and the Globalisation of Inclusion and Exclusion, *Duke Journal of Comparative and International Law* 29 (2019): 361.

Yamamoto: It is very difficult to answer the question in a few words. Perhaps, in general our position is very contradictory. Why? Because we are fascinated by the way of thinking about individualism, or methodological individualism. We – I am talking about Japanese lawyers and scholars, not about ordinary Japanese people – are totally dominated by Western ideas and thus very Westernised. I do not mean that we have a very different image of the self. But I asked the question because I wanted to inform you about the Japanese legal or cultural background. The reason why we are so interested in the self and in individuals, derives from a historical background of Japanese modernization as modernization without individualization.

Lindahl: This is, indeed, a fundamental challenge to Western understandings of politics and law, one which I cannot even begin to address here. Just let me say that I aspire to work out a *general* jurisprudence, not a universal jurisprudence. I do not think that a universal jurisprudence is at all possible.

3. 'A-Legality'

(a) The ontology of a-legality

Ohno: I would like to pose a question about the ontological status of 'a-legality'. My question is a complicated one: is 'a-legality' a substance, like 'people in unordered world', or just a theoretical premise of the collective self as *identité narrative*? In addition, can we consider 'a-legality', the 'strange', and the 'alien' as identical or similar concepts? In *Fault Lines of Globalization*, you use the concept of *identité narrative* by Paul Ricoeur when referring to collective identity. In my opinion, according to your theory, the collective self exists in a semi-permanent process of transformation, and 'a-legality' is the theoretical moment that continues to drive the process. In other words, 'a-legality' is a questioning that functions as the theoretical premise of the 'problems to be addressed as legal or illegal'. So, I think 'a-legality' is a function, but not a substance, about which we can say that 'this is an a-legal existence'. Additionally, you refer to 'a-legality' and 'strange' in *Fault Lines of Globalization*, whereas you refer to 'alien' and 'strange' in 'Law as concrete order'. I wonder if these notions have the same or a similar meaning.

Lindahl: My aim is to develop a legal phenomenology of the strange. Clearly, the notion of strangeness, as discussed by, say, Edmund Husserl or Bernhard Waldenfels, is not directly a legal notion. I characterise a-legality as the legal manifestation of the general phenomenon of the strange or alien (I use these two terms synonymously). A-legality speaks to situations that challenge *both* legality and illegality, as drawn by a specific legal order, disrupting the capacity of its rules to take hold on the real. On the one hand, a-*legality* refers to a situation that in principle can be qualified as either legal or illegal. On the other hand, *a*-legality speaks to that situation as resisting qualification as either legal or illegal by defying, eluding, and exceeding the order's norms. This is important because a-legal behaviour need not be action intentionally oriented to oppose the application of legal norms to the situation at hand, as is the case with civil disobedience or direct action. A-legality concerns, more generally, what *withdraws* from a legal order in

the very process of *appearing* in it with one or the other legal meaning; what eludes the grasp of a legal norm *because* of how the norm grasps it. Thus, an a-legal situation is both inside and outside a legal order: something is excluded by how the legal order includes it. Whereas the qualification of an event as (il)legal presupposes and reaffirms legal unity, a-legality is the central manifestation of the *political* in legal orders. It calls into question how a legal order orders – unifies – by drawing boundaries that include and exclude. Thus, a-legality is not in itself an ontological category, although it has ontological implications. It is, phenomenologically speaking, a specific mode of experience.

Let me give you two concrete examples. The first concerns the *Rote Armee Fraktion*, the members of which refused to accept the authority of the German legal order. This was particularly patent when, during his trial, Klaus Jünschke, a member of the RAF, lunged at the judge, knocked him down, and screamed '*Für Ulrike, du Schwein*' – For Ulrike, you pig! Perhaps even worse than being called a 'pig' was that someone who was being prosecuted interpellated a judge as 'du', rather than 'Sie', the formal mode of addressing an authority in German. By so doing, Jünschke denied the authority of the legal order to judge his actions as legal or illegal. Here is a second example: a group of Aboriginal activists pitched a tent on the lawns contiguous to Parliament House in Canberra on January 26, 1972, taking advantage of the fact that no municipal ordinance prohibited doing so. They dubbed the tent the 'Aboriginal Tent Embassy' because, as Gary Foley, an Aboriginal activist, explained it, 'The government had declared us aliens in our land and so we need an Embassy just like all other aliens'. Their act was and is a-legal (the Tent Embassy is still there) because it challenges the authority of the Australian legal order as the result of acts of conquest to which those Aboriginal activists refuse to submit.[8] These and other cases of a-legality point to situations in which inclusion in a legal order is the *problem* a-legality exposes, rather than the solution thereto. This poses formidable problems for understanding how legal ordering might be authoritative in such situations.

(b) A-legality and Contingency

Suami: I remember that, when you discuss the nature of a-legality, you put an emphasis on 'contingency'. Could you clarify what you mean by this?

Lindahl: A-legality lays bare the contingency of a legal order in a double sense of the term contingency: *that* 'we' are a legal order and *what* 'we' are as a legal order could be otherwise. As Blumenberg shows in *The Legitimacy of the Modern Age*, modernity inherits the problem of radical contingency, hence the problem of the *ground* of polities and of their legal boundaries, from the crisis of Scholastic philosophy.[9] Leibniz's famous question – 'Why is there something, rather than

8 Hans Lindahl, 'Intentionality, Representation, Recognition: Phenomenology and the Politics of A-Legality', in *Political Phenomenology: Experience, Ontology, Episteme*, ed. Thomas Bedorf and Steffen Herrmann (Abingdon: Routledge, 2019), 256-276.

9 Hans Blumenberg, *The Legitimacy of the Modern Age*, trans. Robert M. Wallace (Cambridge, MA: The MIT Press, 1983).

nothing?' – is its most extreme formulation. When the appeal to a natural or divine ground of order loses credibility, modernity seeks to overcome the contingency of social orders through a *self*-grounding. For modern constitutionalism, binding is a collective *self*-binding in the mode of a discursive self-grounding. Here is where multiple models of practical rationality developed by Western theorists, whether universalist or particularist, find their homeland. This self-binding is what modern constitutionalism calls authoritative lawmaking: a legal order as the expression of collective autonomy. There is, however, a second reading of modernity, the one I favour, namely, rationality as dealing with contingency, rather than overcoming it. This allows for emancipations in the plural, for human emancipations, but not for emancipation in the singular, *i.e.*, the emancipation of humanity.

(c) A-Legality and Civil Disobedience

Yamamoto: The first time I read *Fault Lines of Globalisation*, I had an example in my mind. When someone sets a national flag on fire, and if this is prohibited in that country, it is considered a criminal act. As constitutional lawyers we might think it is an expressive act, and that it should be protected as such by constitutional law. If I see an illegal act of this kind, I will try to do something to help or remedy the problem in a constitutional way. In other words, I do not necessarily see it as an act of a-legality, but as a act of illegally, nevertheless constitutionally protectable. What do you think about this?

Lindahl: Civil disobedience falls within the ambit of a-legality but does not exhaust it. As defined by Rawls, acts of civil disobedience are overtly illegal acts, but their aim is to contest how the law draws the distinction between legality and illegality. In that minimal sense, they are a-legal acts. Importantly, however, acts of civil disobedience are acts which, despite being illegal, presuppose fidelity to the constitutional order. In these acts a minority attempts to persuade the majority that the distinction between legality and illegality, as drawn in the extant legal order, challenges what Rawls calls the 'common sense of justice'. They seek to transform the illegal into legality, or what has been legal into illegality. Fair enough. But what about those cases in which resistance is not about securing inclusion in the legal order but rather exclusion therefrom, such as the Aboriginal Tent Embassy in Canberra? The question is whether reciprocity is sufficient to give normative meaning to authority. What falls beyond the theorization of civil disobedience is that every collective has a blind spot in the form of normative claims that resist integration into the circle of reciprocity and mutual recognition, yet which the collective cannot simply shrug off as specious, other than at the price of falling prey to a *petitio principii*. This means that acts of instituting relations of reciprocity in response to acts of civil disobedience are always also exposed to being a form of domination *because* they bring about and enforce relations of reciprocity.

So, returning to the act of setting fire to a national flag we should ask the question: who does so and why? Is it an act of disenchanted citizens who wish to express their disagreement at being deprived of certain rights? Or is it an act of those who

resist being qualified as a citizen? In the former, we are looking at a weak modality of a-legality; in the second, a strong version thereof.

(d) A-legality and Morality

Kondo: I am interested in the treatment of morality in Professor Lindahl's legal theory. It seems that you have made no detailed examination of its relation to law, one of the central issues in legal philosophy, although there are some brief but notable mentions.[10] So I dare to ask questions about this point by proposing some possible readings that relate morality to a-legality.

First, your work can be read to mean that all exclusions involve a moral wrong that must be corrected. But then, what makes these exclusions wrong? If this reading is incorrect and instead you argue that some exclusions are wrong while others are not, how can they be differentiated? Or, if it supposes that no wrong occurs with the exclusions, why do we need to be concerned about a-legality?

Second, your theory seems to seek the basis for the authority of a legal order in part in the implementation of certain ways of responding to a-legality, including the mode of collective self-restraint. Then how would a legal collective be evaluated that does not make any morally appropriate response? Is it deprived of its legal quality, or is it still qualified as legal but supposedly imperfect?

Lindahl: In his first question, Professor Kondo is concerned that I consider all exclusions to be incorrect and therefore they would require appropriate remedies.

A main thesis of my work is that no legal order is possible that does not include and exclude. If that is the case, then both exclusion *and* inclusion are ambiguous achievements. If exclusion is a constitutive feature of legal ordering, it cannot only have a negative meaning: it also has a positive meaning, because without exclusion no legal order would be possible. But exclusion also marginalises, more or less violently, leading to resistance to the way a legal order structures society. Political liberalism has focused primarily on this aspect of exclusion with the aim of securing a greater inclusiveness of the law. But, as I noted earlier, what political liberalism has hardly considered are situations where inclusion is the problem, rather than its solution. So, inclusion in a legal order is also ambiguous; it too marginalises to a lesser or greater extent. In the idiolect of phenomenology, legal orders cannot but disclose by closing and close by disclosing.

As to your second question, and as mentioned earlier, I have sought to deal with it in a different way than mainstream philosophies of law have done, namely, through an indirect strategy that starts with the individuation question to then address the question of the normativity of legal orders, hence the question about *authoritative* lawmaking. How should we deal *authoritatively* with inclusion and exclusion considering the struggle for recognition sparked by the boundaries of legal orders, global or otherwise?

10 See, for example, Lindahl, *Fault Lines of Globalization*, 249 fn 64.

Netherlands Journal of Legal Philosophy 2022 (51) 2
doi: 10.5553/NJLP/221307132022051002011

I examine two competing approaches to the authoritativeness of a politics of boundaries. The first is based on the view that the setting of boundaries is authoritative if it aims to enable the reciprocal recognition of all affected parties as free and equal participants in collective action. In the face of an initial situation of marginalization, an act of setting boundaries is authoritative if it includes the *Other*, recognising the Other as one of us. Ultimately, this is a theory of authoritative lawmaking as a totalising process that seeks to overcome political plurality to the benefit of an all-encompassing legal unity: an order with an inside but no outside. This is the core of legal and political universalism.

While agreeing with universalism in terms of the need to parry relativism, I reject the possibility of realising an all-encompassing legal order, arguing that the demands for recognition always exceed, to a lesser or greater extent, the practical possibilities of a collective when the Other is recognised as one of us. This insight is by no means an argument against recognition. Instead, I argue for a second interpretation of recognition, which I dub asymmetrical recognition. This expression captures the idea that a politics of boundaries is authoritative if it recognises the Other (in ourselves) as one of us *and* as other than us. To give legal form to the aspiration to represent humanity as a unity, and to acknowledge the irreducible contingency of that enterprise because humanity exceeds any of its representations; such, in my view, is the democratic ethos informing the authoritativeness of a politics of boundaries in a global setting. I call it restrained collective self-assertion.

II. Applications

1. The Constitution

Yamamoto: My questions concern the definition of the constitution. It is an old maxim that *ubi societas, ibi ius*. I am wondering whether, according to your theory, every corporation in a state has its own constitution and its proper legal order. I think one could criticise an overgeneralization of what is a constitution. In this context, can or should we make a theoretical distinction between constitutions of governing bodies on the one hand, and those of non-governing bodies on the other? Besides, I would like to know a particularity of the state constitution vis-à-vis the other forms of constitutions. In other words, is there something very particular to the state constitution, or are these differences just relative?

Lindahl: I want to distinguish between a constitution in a narrow political sense and in a broad, organization sense. As to the latter, a corporation will have bylaws that establish how decision-making takes place and identify decision-making organs, shareholders and, more generally, interested parties. To this extent, corporations, like all organizations, have a constitution, that is, a master rule of collective self-rule.

However, a more restrictive, political concept of a constitution is called for, as Professor Yamamoto rightly suggests. This raises the question about what counts

as 'political', when referring to a political constitution. For if by 'politics' one means the ongoing articulation and contestation of what counts as common to a collective, then we are back at square one: *all* organizations engage in politics and have, thus, a constitution (something that staff members of universities are keenly aware of). In this broad sense, corporations, states, and international and transnational legal orders have a constitution.

In a narrower sense, state constitutions are considered a paradigm for a political conception of the constitution. In the tradition of state public law, sovereign self-rule, based on acts of constituent power, is key to political authority. In turn, sovereign self-rule manifests itself in the capacity of a people to physically enforce the terms of inclusion in and exclusion from joint action, both internally and externally. However, this ability to physically enforce bounded joint action can be turned *against* the move to confine constituent power and a political concept of a constitution to states. It includes emerging global legal orders that, due to the functional fragmentation of authority across legal orders, can appeal to the state enforcement of their boundaries. Certainly, this is a *dependent* sense of constituent power; there is no formal declaration of independence comparable to that of the enactment of a constitution that leads to the creation of a state, nor do these orders dispose of their own means of physical force to uphold the jointness of joint action. But it is nonetheless a form of constituent power because it displays the key *effect* associated with constituent power regarding peoplehood: the ability to engage in a process of (forceful) unification and normalization of behaviour. Conversely, states have surrendered regulatory autonomy to emerging global legal orders across wide swaths of social relations previously under their sovereign jurisdiction. Their claim to sovereign self-rule also exhibits modalities of dependency. I would argue, therefore, that extending the political concept of a constitution beyond the state is not to depoliticise it. On the contrary: extending its scope acknowledges that the politics of inclusion and exclusion are no longer exclusively the task of states. That way, institutionalising the struggle for representation and recognition in a global setting is what a *political* constitution is all about.

2. *Human Rights*

(a) Assessment of international human rights law

Ejima: Human rights measures under the UN system (the individual communications and views of the treaty bodies, the State reports and concluding observations, the UPR of the Human Rights Council, special rapporteurs etc.) are not legally binding and can be easily ignored by the member states. Do you think the current unsatisfactory practice of the international and domestic implementation of international human rights treaties can be considered a failure of global law (or the globalisation of law)?

Lindahl: Yes and no. Habermas, among others, has made a strong case for a global order of human rights that would be enforceable by global authorities – *e.g.*, a much more representative Security Council than is currently the case. This would be a

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charter of human rights with universal moral content; economic human rights would best be spelled out and enforced by regional collectives, and cultural rights by national polities. His proposal responds to situations of massive human rights abuses that go unpunished, due to the principle of state sovereignty undergirding international law. To that extent, you can certainly say that such situations expose the failure of the globalisation of human rights law.

But is the absence of a global order of human rights only failure? Does it not also point to a certain ambiguity at the core of human rights, which is precisely why a human rights dialogue is indispensable? A global order of human rights would, like all legal orders, involve a representation of what constitutes this order as a unity; it would have to concretely define what counts as humanity for the purpose of enacting a global charter of human rights. As such, it cannot include humanity as committed to *this* set of rights, without also excluding *other* rights. I fear that when a global charter of human rights is equated with a universal charter of human rights, we forget that there are first-person plural perspectives *on* humanity, but not the first-person plural perspective *of* humanity.[11]

Please note that this is not a defence of relativism. What I am arguing for is an alternative account of the normativity of human rights that is not based on reciprocity, that is, on those rights that we owe each other 'merely' because we are all human beings. Because strangeness is an enduring phenomenon of social life, whoever endorses the postulate that 'nothing human is strange', in the famous words of Terence's play, *The Self-Tormentor*, ends up endorsing its inverted form: *what is strange is inhuman*. The political consequence is predictable: why should a collective restrain itself when confronted with inhuman behaviour? Against the claim that nothing human is strange, and against the assumption that what is strange is inhuman, the normativity of human rights turns, I submit, on acknowledging that *the strange is human*. In this vein, human rights are ultimately *inhuman* rights: the rights of those who elude the normative grasp and control of a legal order and who ought to be preserved in their strangeness rather than reduced to a modulation of what 'we' call humanity. In this reading, human rights appeal to dialogue as a *dia-logos*, that is, a rationality of the in-between.

(b) First-person plural perspective and human rights

Yamamoto: I also have a question regarding the international human rights regime. Chris Thornhill remarks that 'in recent democratic transitions, the classical concept of democracy has been supplanted by a cyclical, three-point model of democratic formation. First, the people formalise their will against the existing government by demanding human rights, largely based on and recognised by international law. Second, governments respond to such demands by recognising the existence of the people, in their capacity as rights holders, in accordance with international norms. Third, international human rights organizations and judicial bodies provide constructions of legitimacy for the state in question, based on an

11 Hans Lindahl, 'Inside and Outside Global Law', *Sydney Law Review* 41 (2019): 1-34.

acknowledgement of persons as holders of rights'.[12] As for your book, you remark that 'a global order of human rights, like any other legal order, would adopt a first-person plural perspective'.[13] However, in a society where an overwhelming majority identify themselves as 'us' and oppressed minorities are fragmentated, and consequently have great difficulty to identify themselves as 'us', it would be helpful to invoke international human rights law to solve the problem. I think that part of the problem of discrimination is that it has just this kind of structure. In certain problems, it is not easy to form a 'we' composed of persons who are discriminated against.

As an example, in 2013 the Japanese Supreme Court declared the discriminatory treatment of the inherited property of a child born out of wedlock under civil law unconstitutional.[14] In this case, the court took into consideration the content of two treaties, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, both of which have been ratified by Japan, as well as the criticisms given by the committees that were set up under these treaties. Thus, the court looked not merely at domestic changes related to the Japanese family but also at significant changes of family law and its attitude to discrimination in foreign countries and the international human rights norms ratified by Japan. I wonder whether 'a first-person plural concept' of human rights was applied in the case. Rather, I think a simple classical concept of equality – 'prohibition of discrimination by birth' – *from above* played a very significant role to eliminate a discrimination problem in contemporary Japanese law. I agree with you that a first-person plural perspective is crucial in relation to a legal collective. However, I wonder whether it is necessarily the case with human rights law.

Lindahl: This is a penetrating rejoinder! I would like to make three observations here. The first is that both conventions were enacted by the 'international community' as binding legal instruments, and thus are collective self-representations of what constitutes the international community as a unity. As such, they imply a first-person plural perspective that includes and excludes from what counts as 'our' unity. As a result, and this is my second remark, what we get is a case of *nested* first-person plural perspectives, *i.e.*, of a 'we' that acts as a participant agent in a higher order 'we': Japanese human rights law and its attendant first-person plural perspective is nested in the first-person plural perspectives accruing to these conventions. Nesting has two implications. On the one hand, it allows for *decentralised* forms of authoritative decisions about what counts as 'discrimination' in national human rights law, in which case national authorities – *in casu* the Japanese Supreme Court – are authorised to assess whether national law is in accordance with international human rights law. In other words, whether Japan is

12 Chris Thornhill, *The Sociology of Law and the Global Transformation of Democracy* (Cambridge: Cambridge University Press, 2018), 216.

13 Lindahl, *Authority and the Globalisation of Inclusion and Exclusion*, 222.

14 Decision concerning whether the provision of the first sentence of the proviso to Article 900, item (iv) of the Civil Code, is in violation of Article 14, paragraph (1) of the Constitution, Minshu Vol. 67, no. 6, 1320 (2013), https://www.courts.go.jp/app/hanrei_en/detail?id=1203.

doing what it takes to realise the point of joint action to which it has committed as a participant agent in the international community that ratified the conventions. On the other hand, and this is my third point, nesting always has as its counterpart the possibility of *de*-nesting, whereby authorities of the allegedly subordinate order decide that international norms, whether human rights or not, are in breach of that order and declare them inapplicable. Such is the case in the well-known *Kadi* ruling of the European Court of Justice, which dealt with the hierarchy between international law and the general principles of EU law. It is also the case in various of the rulings of the German Constitutional Court, most recently the ruling of the Second Senate on May 5, 2020, concerning the competence of the European Central Bank to purchase government bonds. The more fundamental point here is that the hierarchy between 'higher' and 'lower' legal orders can be challenged when nested collectives become estranged from higher-order collectives. And this estrangement is possible because the higher-level legal order cannot include without also excluding from what counts as 'our' unity.

Suami: Is the so-called judicial dialogue part of your concept of nesting?

Lindahl: Yes! Let me briefly comment on another European example, the famous *Grogan* case on abortion that pitted the Irish Supreme Court against the European Court of Justice. While the right to life of the unborn child was anchored in the Irish constitution and abortion was criminalised in Irish statutory law, in European law abortion is a service and as such it falls under one of the four freedoms underlying the internal market. I cannot enter the details here of the *indirect* dialogue that the two courts engaged in with each other to address the ensuing constitutional conflict.[15] What is interesting is that their dialogue exemplified what I earlier called a *dia-logos*, a rationality of the in-between, whereby both courts played for time: each of them postponed a decision about what counts as the unity of their constitutional order so that the other could take measures to protect the integrity of its own constitutional order.

3. Immigration

Daidouji: I will present an empirical question to you. What do you think about the exclusive practices of EU external immigration policy, such as the so-called 'pushback' of refugees in the Mediterranean? What does this kind of exclusion mean for the creation and maintenance of the EU's collective identity in general, and in the Area of Freedom, Security and Justice (AFSJ) in particular?

Lindahl: The AFSJ rests on the EU's claim to a right to inclusion and exclusion. But what justifies this alleged right? A famous consideration in the Preamble to the Treaty of Rome, repeated incessantly with slight variations ever since, offers the clue: 'determined to lay the foundations of an ever closer union among the peoples of Europe…' Although the passage speaks about a plurality of peoples, it also

15 Hans Lindahl, 'Discretion and Public Policy: Timing the Unity and Diversity of Legal Orders', in *Binding Unity and Divergent Concepts in the European Union*, ed. Sacha Prechal and Bert van Roermund (Oxford: Oxford University Press, 2008).

speaks, although more discretely, about unity: the peoples of *Europe*. While the six founding Member States claimed to represent European unity, they had received no legal mandate to this effect from all possibly affected parties, whether states or individuals. The founding states are the self-proclaimed representatives of European unity. By taking the initiative of founding the European Community, they *seized* Europe, disclosing it as a common market. The objective of 'establish[ing] progressively an area of freedom, security and justice' in Europe, as per the Treaty on European Union, is only intelligible as the continuation and realization of an act that *takes* the land. See here an illustration of the threefold sequence of *nomos* alluded to by Schmitt: 'freedom', 'security', and 'justice', in the sense of rights to be enjoyed by citizens and legally resident third country nationals (exploitation), presupposes an act of allotting rights and obligations (distribution), which, in turn, presupposes a land-appropriation (taking). In other words, an initial taking in the form of a closure of Europe into a common/internal market (*nehmen*) creates the conditions for allocating rights and obligations to market agents (*teilen*), itself the condition for engaging in economic activities in the market (*weiden*). A circularity governs European immigration policy: exclusion from (and inclusion in) the European Union is considered justified because this bounded region is the own place of European citizens. Yet, to begin with, exclusion (and its attendant inclusion) leads to European citizens and the place claimed as their 'own'.[16]

This is not to say that this circularity can be overcome, and thus that no boundaries need be drawn: no polity is possible without a closure that takes the land by claiming to *retake* the land, as illustrated by the Preamble: the Treaty of Rome claims to do no more than to give legal form to the unity of Europe, which emerged with a cut that included its peoples and excluded the rest. But when did this cut take place – literally? The Treaty of Rome originates the EU by claiming to represent an original spatial unity to which it has no direct access. The possibility of using the indexicals 'here' and 'now', as in 'you don't belong here' or 'now you must leave', presupposes a reference to a past that was never a 'now' and to a place that was never 'here'.

Returning to your empirical question, the empirical place and time staked out by the AFSJ presuppose a place and time that are nowhere and 'nowhen', *i.e.*, not in empirical space or time. So even if the circularity cannot be overcome, it need not be vicious. Because the original boundaries that joined and separated inside and outside are not directly accessible, an irreducible residue of groundlessness dwells in acts of setting boundaries that determine who gets to enter and who does not. This residual groundlessness of inclusion and exclusion undercuts any definitive claim to the right to inclusion and exclusion, while also opening the possibility of a responsive ethics and politics of immigration.

16 Hans Lindahl, 'Breaking Promises to Keep Them: Immigration and the Boundaries of Distributive Justice, in *A Right to Inclusion and Exclusion? Normative Fault Lines of the EU's Area of Freedom, Security and Justice*, ed. Hans Lindahl (Oxford: Hart Publishing, 2009).

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4. *Public International Law*

(a) Outside of international law

Suami: What should international lawyers learn from your theory? I got the following impression from your theory. International law presupposes its application all over the globe. In terms of geographical application, international law has no limitation. Therefore, we tend to assume that everything, namely all actors and subjects are subjected to international law. If this assumption is not always true as you suggested by stating that '[a]lthough international law covers the whole face of the earth, it is not "everywhere", and it has an outside',[17] we will have to take a more modest view of international law. For example, we will have to be careful not to automatically consider all violations of international law as merely illegal. This conclusion makes sense because labelling violations under international law claims does not always solve a problem. What do you think of my impression?

Let me outline the background of my question. I believe that your theoretical framework of 'inclusion and exclusion' appeals to East Asian international lawyers' intuitions. East Asian history shows that East Asian states have been forcefully incorporated into the modern international legal order.[18] Although it is unclear how important this process is to their attitudes toward international law, not a few East Asians have either a sense of discomfort with international law or an insufficient feeling of our own international law. It seems, therefore, that the inclusion/exclusion formula may give us a clue to explore East Asian attitudes toward international law. If international law, as part of global laws, continues to have an outside, how are East Asian countries or peoples been included in or excluded from international law? This is still an important question to us.

Lindahl: Let me note, straightaway, that international law is a form, perhaps the first form, of global law as we know it today. In fact, international law also extends to space law, and, in that sense, is more than only global law. It is tempting to assume, therefore, that it has an inside but no outside. Yet, clearly, international law is contested, not least by post-colonial scholars, but also by activists. The crux of the matter is that international law cannot be understood independently of its colonial origins, hence of the specific sort of commonality that attaches to the notion of a state and of inter-state law. Accordingly, there are two ways to draw the inside/outside distinction. First, there is the distinction between the foreign and the domestic. Second, between the own and the strange. Importantly, they are irreducible to each other: what is foreign need not be strange; what is strange need not be foreign. The domestic/foreign distinction is contingent: international law is

17 Lindahl, *Fault Lines of Globalization*, 43, 54-55 and 77.

18 Masaharu Yanagihara, *'"Shioki (Control)," "Fuyo (Dependency)," and Sovereignty, The Status of the Ryukyu Kingdom in Early-Modern and Modern Times'*, in *Comparative International Law*, ed. Anthea Roberts, Paul B. Stephan, Pierre-Hugues Verdier and Mila Versteeg (Oxford: Oxford University Press, 2018), 141-157; Felix Lange, 'Coercion, Internalization, Decolonization, A Contextual Reading of the Rise of European International Law Since the Seventeenth Century', in *The International Rule of Law: Rise or Decline?*, ed. Heike Krieger, Georg Nolte and Andreas Zimmermann (Oxford: Oxford University Press, 2019), 66, 81-84.

doi: 10.5553/NJLP/221307132022051002011

not organised in terms of this distinction; but resistance to international law reminds us that it has a strange outside, even when it claims to cover the whole face of the earth.

While I have discussed indigenous peoples in earlier work, it seems to me that the discomfort and sense of alienation you mention is a further and apposite example of what I have in mind when referring to a strange exteriority. I would add, however, that it is important to resist the temptation to either posit a simple opposition between inside and outside or to attempt to efface these terms. I would argue that the sense of discomfort and alienation you refer to precisely captures the experience of being inside and outside an order because its boundaries cannot include without excluding, nor exclude without including. East Asians, like all peoples, are inside and outside international law, albeit in ways that are different to others.

(b) International lawyers and the outside of international law

Suami: In my view, even if full inclusion is logically impossible, international lawyers should not stop making efforts to achieve greater inclusion of international law than is currently the case. After all, this impossibility does not mean that a legal order cannot become more inclusive than the current state of inclusion. Do you agree with me? I understand that you are a critical of the all-encompassing realization of constitutional principles, as you discuss 'there is no common core shared by all of these orders, no common normative standard for universal reciprocity in an all-inclusive legal order'.[19] It seems that, arguably, this conclusion comes from your focus on 'a collective' (for example, nationals of a country), and not on individuals. If we take an individual-based approach to international law, we may reach a different conclusion in this respect. This point is related to the question posed by Professor Yamamoto.

Lindahl: I certainly agree that legal orders, including international law, aspire to unify and that inclusiveness is therefore a desideratum of legal ordering. This corresponds to what I call the self-affirmation of a legal order: recognising the Other (in ourselves) as one of us. Inclusion, here, has two modalities. First, it qualifies as (il)legal what was previously irrelevant and unimportant from the first-person plural perspective of a given legal order. Second, it qualifies as legal what had been illegal or vice versa. In both cases, legal orders are transformed, offering a novel, more inclusive response to the question 'who are we?' The normativity of this response lies in the fact that the self-affirmation of a collective is also the affirmation of the Other in its difference, albeit difference *within* unity. Universalising theories of normativity build on this modality of recognition, positing an all-encompassing legal order as the regulative idea of lawmaking. The hitch to this approach is that it neglects the double asymmetry that occurs in the struggle for representation and recognition: legal orders frame demands for recognition, when including the Other, as demands that allow for the *self*-recognition of the collective, hence that respond to the question 'who are we?' The answer to

19 Lindahl, *Fault Lines of Globalization*, 267.

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this question is assimilatory insofar as the Other's question is more and other than the question to which a collective responds.

For this reason, I have insisted on introducing a second, *indirect* form of recognition as part and parcel of the authoritativeness of lawmaking: recognition of the Other (in ourselves) as *other* than us – *restrained* collective self-affirmation. I explore several techniques by which this is possible, such as *dépeçage* in private international law.[20] There is, however, an irreducible tension between recognising the Other (in ourselves) as one of us *and* as other than us that cannot be neutralised. Collective *self*-affirmation is the ineluctable presupposition of authority, such that restraint ultimately gives way to collective self-affirmation. Pushing a normative theory of legal authority to its limits reveals an ineluctably tragic dimension of authoritative lawmaking.

5. The Anthropocene

Negishi: In responding to Gianfrancesco Zanetti's question about bio-cultural rights, Professor Lindahl distances himself from either a simple unity or duality of *nómos* and *phúsis*.[21] Instead, Professor Lindahl introduces a phenomenological exploration of human embodiment, embodied intentionality (Van Roermund),[22] as the locus of the entwinement or chiasm of *nómos* and *phúsis* (Merleau-Ponty).[23] The triad of *bíos-nómos-phúsis*, captured by embodied intentionality, helps to orient further thinking about authority and a politics of a-legality in the Anthropocene, Professor Lindahl contends. How then should we evaluate the emerging jurisprudence that links *the right to life* with *dignity* to include the *alterity* such as vulnerable people, animals and natures who have been excluded from the juridical orders of human rights?[24]

Lindahl: Thank you for this question, which is too extensive for me to adequately address here. Let me just flag a couple of elements as a response. Thus far, I have

20 Hans Lindahl, 'Conflict of Laws: Asymmetrical Recognition of the Stranger (in Ourselves)', in *Philosophical Foundations of Private International Law*, ed. Ralf Michaels, Roxanna Banu, Michael Green (Oxford: Oxford University Press, forthcoming in 2023).

21 Hans Lindahl, 'A-Legality, Representation, Constituent Power: Reply to Critics', in 'Symposium: Hans Lindahl, Authority and the Globalisation of Inclusion and Exclusion', *Etica & Politica* 21 (2019): 417-501, 493-501.

22 Hans Lindahl, 'Authority and the Globalisation of Inclusion and Exclusion: Author Meets Readers', *Indiana Journal of Global Legal Studies* 27 (2020): 33-128, 117-128; Bert van Roermund, *Law in the First Person Plural: Roots, Concepts, Topics* (Cheltenham: Edward Elgar, 2020).

23 Maurice Merleau-Ponty, 'L'entrelacs – le chiasme', in *Le visible et l'invisible* (Gallimard, 1964), 170-201. Negishi is elaborating on the concept of embodied intentionality in international law. Yota Negishi, 'The Phenomenological Embodiment of International Lawyers: Gazing at People Living "In This Corner of the Beautiful World"', in *International Law for Constructive Resistance: A Festschrift in Honor of Professor Toshiki Mogami*, ed. Makoto Seta and Yota Negishi, (unpublished manuscript; on file with author).

24 *E.g.* Corte Suprema de Colombia, STC4360-2018 Radicación n.°11001-22-03-000-2018-00319-01, Sentencia de 5 de abril de 2018, par. 5.2 (El 'prójimo', es *alteridad*; su esencia, las demás personas que habitan el planeta, abarcando también a las otras especies animales y vegetales) [emphasis added].

approached legal ordering as a process of setting boundaries that include and exclude. But in so doing, there is one boundary – the decisive boundary – that I have taken for granted in my earlier account of legal ordering: the boundary that connects and separates human subjects, individual and collective, from nonhuman objects. The Other, in my earlier work, is the human Other; I have disregarded that a nonhuman being might be Other in the strong normative sense of raising a demand or summons to which I/we must respond in one way or another. The quote you include from the Colombian Supreme Court – 'The "neighbour" is alterity; its essence, the other people that inhabit the planet, including other animal and plant species' – is a radical challenge to the modern presupposition that there are *human* legal orders located in a nonhuman *environment*. Economic law and environmental law are the two sides of this foundational disjunction. The Colombian Court's ruling destabilises the distinction between human subject/nonhuman object that underpins modern constitutionalism and its conception of authoritative lawmaking, raising the question about what authoritative lawmaking can mean for more-than-human polities or, as I prefer to phrase it, for geopolities. And it raises the problem of *care* (perhaps better than dignity) in a way that breaks with the anthropocentrism of modern constitutionalism. My new line of philosophical inquiry problematises the boundary between the human and the nonhuman as the focus of a theory of authoritative lawmaking in the Anthropocene.

Conclusion

What are the outcomes of this dialogue with Hans Lindahl? From our perspective, a Japanese one, our dialogue helps to clarify the theoretical background and concepts of the legal theory that Lindahl is developing, as well as its scope of application. This latter dimension deserves special attention, because our legal experiences and perspectives may lead Lindahl to reconsider the insights gained through his Western eyes. In other words: conversations with 'strangers' such as the one portrayed above illuminate one's own legal cultural borders.

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doi: 10.5553/NJLP/221307132022051002011