

A CRYPTO-LIBERALISM OF COLLECTIVE SELF-RESTRAINT? ON LINDAHL'S *AUTHORITY AND THE GLOBALISATION OF INCLUSION AND EXCLUSION*

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ABSTRACT

The author argues that in Lindahl's *Authority and the Globalisation of Inclusion and Exclusion*, and also in his *Julius Stone Address "Inside and Outside Global Law"*, one can find a) a great rebuttal to the once fashionable deconstructionist fantasies about "multitudes" (Hardt and Negri) and to a variously termed "community of difference" (Nancy, Blanchot, Esposito, Agamben) that excludes nothing and no one; b) an interesting concept of law as linked with collective action; c) an ingenious questioning of the vexed binary of *representative* and *direct* democracy. At the same time, Lindahl's theory is argued to be susceptible of significant improvement if the central notion of *a-legality* were to be defined in a non-ambiguous way, if the presently unclear relation of his guiding principle of the "dutiful restraint of majorities" to political liberalism were to be spelled out, and if his counterintuitive blessing of a-legal conduct with the insignia of constituent power were to be backed up by a stronger justification.

KEYWORDS

Legality; constituent power; community; liberalism; collective self-restraint

It is a great pleasure to comment on Hans Lindahl's thought-provoking book *Authority and the Globalisation of Inclusion and Exclusion*. It is a very rich text, with so many distinct points that it is impossible to do justice to even a significant number of them. I will then have to be selective and focus on what from my angle – as a political philosopher schooled in Rawls's "political liberalism" and Habermas's deliberative democracy – seems most challenging and ground-breaking. I'll focus on three points: 1. Lindahl's sobering message to the philosophies of multitude and difference; 2. the notion of a-legality 3. the imperative of restraining the self-assertion of majorities and preserving the strange in our midst.

NO TRANSCENDING OF EXCLUSION IS POSSIBLE

The book battles on many fronts. The overall message is a very sobering one in the end. To radical, cosmopolitan-revolutionary critics of the present form of globalization, like Hardt and Negri, who long for a cosmopolis of the multitude, antagonistic to the global capitalist economy and integrated by a form of law that includes everyone and excludes no one, Lindahl breaks the news that “no such legal order is possible”¹ and that “if the multitude is to overturn global capitalism, it can only do so by way of a taking place that includes and excludes”.² All legal orders, not just the global one emerging before our eyes, are predicated on some kind of exclusion. Domestic legal orders exclude what is territorially foreign, relative to some physical border. Global regimes of law (for example, WTO and HR) misleadingly seem to exclude no one because they recognize no territorially external domain, but they also exclude, by way of marginalizing the “strange”. Alien practices within their midst, to the extent that they are “un-ruly” or “im-proper”, coalesce as an *internal* limit. “Not all legal orders are *bordered*”, but all certainly are “spatially *limited*”.³ Indeed, as Lindahl argues, “it makes no sense to discern literal and metaphorical forms of legal inclusion and exclusion. The WTO’s enactment of a global market, and the contestation thereof by the KRRS [Karnataka State Farmers’ Association], suggests that legal obligations, to the extent that they presuppose a reference to the *limited* (rather than bordered) unity a collective calls its own space”.⁴

The roots of such inwardly-directed, as opposed to outwardly-directed, exclusion reach much deeper than the political will of powerful stakeholders or the logic of capitalism. These roots reach all the way down to the “basic function” of a legal order. According to Lindahl, if considered from an angle different from legal positivism, a legal order is a “pragmatic order” that coordinates the consociates’ actions by determining “who ought to do what, where, and when”.⁵ As all pragmatic structures, also a legal order has a *point*, a *finalité* (to use the language of the EU): the point of the WTO is to bring about “free global trade”, the point of the ICC is to prosecute “the most serious crimes of concern to the international community”.⁶ (6). This “point” determines “what is important to joint action” and thus worth including. When such point is contested, the protesters appear “as

¹ H. Lindahl, “Inside and Outside Global Law”, *Julius Stone Address*, in *Sydney Law Review*, 2019, 41/1, 2.

² H. Lindahl, *Authority and the Globalisation of Inclusion and Exclusion* (Cambridge: Cambridge University Press, 2018), 193.

³ Lindahl, “Inside and Outside Global Law”, cit., 5.

⁴ Lindahl, *Authority and the Globalisation of Inclusion and Exclusion*, cit., 29.

⁵ *Ibid.*, 65.

⁶ Lindahl, “Inside and Outside Global Law”, cit., 6.

strange, that is, as resisting intelligibility on the basis of how the collective structures reality".⁷

As Lindahl rightly suggests, this pragmatic approach to law – dubbed IACA by him, an acronym standing for “institutionalized and authoritatively mediated collective action” – sinks its roots in a narrative view of collective identity, or “difference”, “in the process of telling a story about ourselves ‘as’ being about this or about that”. Drawing on Benedict Anderson – but the same could have been said with reference to Cover’s “nomos and narrative”⁸ – “narrativity explains why *all* groups are *imagined* communities, even a group of two persons: to imagine a community is to tell a story that creates/recreates a collective by answering the question: What is/ought our joint action to be about?”⁹

This is a point of broad philosophical interest. Not just Hardt and Negri romanticize a multitude, structured as a centerless network, set against and eventually victorious over the one-willed “people” typical of the domestic rule of law, and victorious over the neoliberal global Empire as an equally centerless network – the world as the stage of a gigantic, if unseemly, epic “battle of the networks”: multitude against empire. Lindahl’s point efficaciously rebuts an entire philosophical tradition originating in Derrida’s, and later in post-Derridean deconstructionism à la-Nancy, as well as in their poor relation, so-called “Italian-theory” of Esposito and Agamben. Within this variegated tradition, the “irreducible plurality of the multitude” is renamed “difference”. *Communitas* and the “coming community”, the “inoperative community” and the “inavowable community” may replace Negri’s multitude,¹⁰ but the blind spot is the same: no awareness that agency, including the collective agency coalescing in legal systems, requires a “point”, and legal regimes exclude competing “points” but also the “pointlessness” of pure difference. Community without a “point” becomes a self-defeating notion, haunted by two interrelated problems. First, when defined through the shared exposure to finitude of its members, community paradoxically loses its *difference* and becomes synonymous with the human condition, with *humanity*. There is no way of rescuing any sense in which this community is different from any other, or its existence now differs from its existence one thousand years ago. Second, also the lower threshold that separates the inoperative, inavowable, coming, unconnected community from random and transient human groupings can hardly

⁷ Lindahl, “Inside and Outside Global Law”, cit., 7.

⁸ R. Cover, *The Supreme Court 1982 Term – Foreword: Nomos and Narrative*, (1983) *Faculty Scholarship Series*. Paper n. 2705.

⁹ Lindahl, *Authority and the Globalisation of Inclusion and Exclusion*, cit., 69.

¹⁰ See M. Blanchot, *The Inavowable Community* (1983) (Minneapolis: University of Minnesota Press, 1988); J.L. Nancy, *The Inoperative Community* (1986) (Minneapolis: University of Minnesota Press, 1991); G. Agamben, *The Coming Community* (1990) (Minneapolis: University of Minnesota Press, 1993); R. Esposito, *Communitas. The Origin and Destiny of Community*, (1998) (Stanford: Stanford University Press, 2010).

be intelligible without reference to a “unity of purpose” all-too-hurriedly jettisoned by these deconstructionist thinkers. “Gate 22” is the nightmare of *communitas*. For at Gate 22 the crowd of people waiting to board the plane is all difference and no unity. The challenge for any notion of community that wishes to dispense with a sense of purposive unity – regardless how pluralistic and thin as its underlying “purpose” could be, like in Dworkin’s “liberal community” or in the political values invoked by the preambles of liberal-democratic constitutions – is to demarcate how its sense of community is different from both humanity as such and the people at Gate 22.¹¹ Also to these philosophers, so representative of the deconstructionist mainstream, Lindahl soberingly reminds that no transcending of exclusion is possible, unless we are prepared to altogether renounce the ability of law to steer action.

VARIETIES OF “A-LEGALITY”

Second, let me focus on the notion of *a-legality*, central for Lindahl’s project. Fresh insight into the nature of authority is offered here. In order to coordinate action, someone has to outline the general point of joint action, establish whether our present conduct favors or hampers the attainment of that “point”, and must deal with deviant action.¹² Authority does precisely what the romantic extollers of centerless multitude and *communitas* are bound to miss: it monitors and reinterprets the “limit between collective self and other-than-self”.¹³ Inevitably, for Lindahl to represent who we are always amounts to including or excluding someone from joint action or, in other words, with establishing what is *legal, illegal or a-legal*.

Authority so conceived is integral to the “IACA model” of law as institutionalized and authoritatively mediated collective action. Furthermore, authority and law closely relate to *representation*, insofar as “the unity implied in the group perspective of a ‘we together’ is always and necessarily a *represented* unity”,¹⁴ to which no *direct* access is possible. Interestingly, in a move reminiscent of Mead’s intersubjective theory of the subject, Lindahl suggests that a “we” never has direct access to its constitutive unity, that which makes it *that collectivity*. Representation is relevant in that such access is mediated by representations that others form about

¹¹ On this point, see A. Ferrara “The Dual Paradox of Authenticity in the 21st Century”, in Th. Claviez, K. Imesch, B. Sweers (eds.), *Critique of Authenticity* (Wilmington, Delaware: Vernon Press, 2019, forthcoming).

¹² Lindahl, *Authority and the Globalisation of Inclusion and Exclusion*, cit., 2-3.

¹³ Lindahl, “Inside and Outside Global Law”, cit., 8.

¹⁴ *Ibid.*, 11.

“us”. There is a priority of the “us” over the “we” – like a priority of the “me” over the “I” is presupposed by Mead. As Mead famously put it, “the individual experiences himself as such, not directly, but only indirectly, from the particular standpoints of other individual members of the same social group, or from the generalized standpoint of the social group as a whole to which he belongs. For he enters his own experience as a self or individual, not directly or immediately, not by becoming a subject to himself, but only in so far as he first becomes an object to himself and he becomes an object to himself only by taking the attitudes of other individuals toward himself”.¹⁵

An important consequence of this approach to law and agency is that because there is no essentialized unity to provide a touchstone, representations of “us” are contestable. Questionability (and actual questioning by “a-legal” groups) then leads collectivities to respond ever anew to challenges about the point of being together, regardless whether these challenges arise from within or without. In a sense, collective selves are never prior to the other-than self and are always ex-centric, in that “they begin elsewhere than in themselves”. Even the “first act” that gets a collective going has a responsive structure: it “must come second if it is to be the first act”.¹⁶ Constituent power, Lindahl convincingly argues, cannot be conceived as an absolute Prime Mover without causing us “fall prey to political Cartesianism”.¹⁷ However, if constituent power is indeed “always under law”, to put it with Michelman,¹⁸ rather than above the law – as a long tradition from Sieyès to Schmitt has understood it – there remains to be determined *which* law constituent power is under. It seems to me that in order to avoid both “political Cartesianism” and the self-contradictory subjection of constituent power to a “law” that constitutes it, one could understand the responsiveness of constituent power as responsiveness to an exemplary normativity, unique to the political subject but, like any external law, *not at the subject's disposal*. In the tradition of political philosophy, that unique and exemplary normativity has taken the form of what Rousseau's legislator should track and convince his fellow citizens to pursue or what Rawls has identified as a view of justice being “most reasonable for us”.¹⁹

¹⁵ G.H. Mead, *Mind, Self, and Society from the Standpoint of a Social Behaviorist* (1934), edited and with an introduction by Ch. Morris (Chicago: University of Chicago Press, 1974), 138.

¹⁶ Lindahl, “Inside and Outside Global Law”, cit., 13.

¹⁷ Lindahl, *Authority and the Globalisation of Inclusion and Exclusion*, cit., 408.

¹⁸ F. Michelman, “Always Under Law?”, *Constitutional Commentary*, 1995, 12, 2, 227-47.

¹⁹ See J.J. Rousseau, *The Social Contract* (1762), in *The Social Contract and Discourse on the Origin of Inequality*, edited by L.G. Crocker (New York: Simon & Schuster, 1967), 46; J. Rawls, “Kantian Constructivism in Moral Theory”, *Journal of Philosophy*, 1980, 88, 519. On exemplary normativity as it applies in the public realm, see A. Ferrara, *The Force of the Example. Explorations in the Paradigm of Judgment* (New York: Columbia University Press, 2008), 62-79, and “Exemplarity in the Public Realm”, *Law & Literature*, 2018, 30, 3, 387-399.

Democracy then for Lindahl is basically *self-definition*: rules of inclusion and exclusion being drafted by those who will then submit to these rules. Another sobering message coming from Lindahl is then his relativizing of the overly-dramatized binary of representative and participatory democracy: “participation is representation”, as shown by the militants of the Solidarity Health Clinic in Thessaloniki who claim “we want to represent *ourselves*”.²⁰ Participation can’t work the miracle of exempting us from representing ourselves *in a way, rather than in another*, thereby excluding certain ways of representing ourselves as inappropriate. Nothing could be more misleading than the call for “direct democracy”, coming from radical quarters: representation, rightly reminds Lindahl, is a *condicio sine qua non* of democracy. Immediate self-rule, direct democracy, is misleading in that it obscures that the seemingly inaugural self-reflection that sets democracy in motion actually confronts something even prior, an “a-legal challenge to which the representation of collective unity is a response”. Suggestively, “at the beginning and *as* the beginning was a-legality”.²¹

In spite of its centrality, however, the notion of a-legality appears to be in need of further clarification. It seems that quite different facts of the matter get lumped into it. The first example of a-legality comes from the opening paragraph of Lindahl’s book *Fault Lines of Globalization*. A vagrant unexpectedly enters an upscale restaurant:

All eyes turned on the man when he walked up to the waiter and demanded a dinner. It was clear he would brook no nonsense; it was equally clear that he would not be paying for the dinner. A tense silence settled over the room. The waiter hesitated and, presumably worried about the ruckus that would ensue if he called the police, quickly ushered him to a table close to the kitchen—as it happened the table next to ours. The vagrant was quickly forgotten and his unexpected arrival gave way, once again, to animated conversation. And then something extraordinary happened, even though only a handful of guests noticed it: when the man was brought his dinner, he looked up at the waiter and, with an angelical smile, invited him to sit down and share the meal. The waiter was stunned (and so were we); he fidgeted a bit, awkwardly declined the invitation, and walked back quickly into the kitchen.²²

In the case of this vagrant’s entering a restaurant, demanding a meal for which he would never pay, and inviting the waiter to share it with him, we can imagine a threefold but convergent critique of Lindahl’s analysis, coming from as diverse philosophers as Searle, Wittgenstein and Husserl. Law as institutionalized collective action is a human practice. Like any other human practice, it unfolds against

²⁰ Lindahl, “Inside and Outside Global Law”, cit., 16. See also *Authority and the Globalisation of Inclusion and Exclusion*, cit., 109-110.

²¹ Lindahl, “Inside and Outside Global Law”, cit., 17.

²² H. Lindahl, *Fault Lines of Globalization. Legal Order and the Politics of A-Legality* (New York: Oxford University Press, 2013), 1.

the backdrop of a *background*, a *lifeworld*, a *lifeworld*. That backdrop includes expectations that everybody knows that everybody knows to be shared. These expectations share interesting properties. They cannot be enumerated piecemeal in propositional form, they amount to a non-propositional holistic habitus, and they cannot be changed at will. They are not rules, but what makes it intelligible whether a rule has been followed. Consequently, by violating them, you violate something much larger than the law. Law cannot remedy unintelligibility nor is it a sensible request that law should operate without depending, like *any* other practice, on a background, a lifeworld, a lifeworld, or that it should repair the fractures of that background, lifeworld or lifeworld, as if such restoration could be done at will. When understood along these lines, “a-legality” cannot be a legal concept because it reaches deeper down than law: it is a breach of the presuppositions of the social union whose life is regulated by law.

On the other hand, the KRRS Farmers occupying and destroying fields of GMO's owned by Monsanto in India point to a different kind of a-legality. What prima facie seems *illegal* conduct (occupying and damaging private property), similar to the vagrant's extorting a meal by threatening to destroy a commercially valuable convivial atmosphere, takes on the semblance of *a-legality* when considered in less narrow terms. However, my point is that the Indian farmers do not violate the lifeworld in the same way as the vagrant. Their action resembles the civil disobedience of African-American Homer Plessy who in 1892 refused to sit in the segregated section of a public transport in Louisiana and led to the 1896 Supreme Court opinion (*Plessy v. Ferguson*) pronouncing such act unlawful and thereby sanctioning the doctrine of “separate but equal”.²³ Every party to the action knew full well what they were doing and understood the conflicting interpretations of the “Equal Protection” Clause of the Fourteenth Amendment. So did Rosa Parks when in a Montgomery, Alabama public bus on 1st Dec 1955 refused to give up her seat to a white person and was convicted for “disorderly conduct” by a local court 4 days later, with a sentence then reversed by a Federal Court in June 1956 (*Browder v. Gayle*) and by the Supreme Court in Nov. 1956. These actors all acted within the parameters of a *shared* lifeworld with opposite intentions - defending *formal* or *substantive* equality - and yet according to Lindahl these acts count as a-legality as well. By the cultural parameters of the 1890's and 1950's in the South, Homer Plessy's and Rosa Parks' conduct *was* strange. Yet why should the preservation of *that* strangeness be a value, as opposed to turning it into a new norm?

A-legality thus seems to cover two phenomena difficult to reconcile: a) idiosyncratic violation of the background assumptions on which law, like any other practice in a given society, rests; and b) intentional violation of legal provisions per-

²³ *Plessy v. Ferguson*, 163 U.S. 551 (1896).

ceived as inconsistent with higher norms or worth reconsidering. Furthermore, while a-legality in the first sense hardly seems to possess legal significance, a-legality in the second sense is at the core of liberal constitutional theory. Ackerman's theory of constitutional moments pivots around "unconventional adaptation", namely constitutional transformations that occupy an intermediate point between "legality as usual" (the legal) and total revolution from *tabula rasa*. "Unconventional adaptation" is a limited breach of legality - or, actually, a "combination of legal and extra-legal elements"²⁴ - in the service of creatively transforming "the point" of living together. The variants of unconventional adaptation or a-legality observable in the constitutional moments of the United States, India, South Africa, France, Italy, Poland, Israel, Iran relate to dimensions of *authorization, interpretation, representation, political intimidation, formal innovation*, and show different *gradients* of unconventionality.²⁵ However, underneath these variants and gradients, as a common denominator, we find precisely the kind of discontinuity with established legal, political, social patterns that Lindahl captures under a-legality *in its second meaning*.

Let me mention just one significant example: the convening of the Constitutional Convention in Philadelphia by the Continental Congress in 1787 authorized the delegates to deliberate "for the sole and express purpose" of revising the 1781 Articles of Confederation. The subversion of the Articles towards a federal scheme of government exceeded such mandate. Furthermore, the gravest breach consisted in subverting the rule for amending the Articles - from the unanimity of the State *legislatures* to a majority of $\frac{3}{4}$ of the States as represented by *conventions*. Ratification *après coup* - as Derrida would call it - legitimized what was beyond legality, yet fell short of a total subversive intention.

To sum up, the affinity of *a-legality* and *unconventional adaptation* only holds for the second meaning - and indeed broad implications follow if we understand a-legality along these lines - while the first meaning remains of dubious use in legal theory and in my opinion should be discarded.

²⁴ B. Ackerman, *We the People*. Volume 2: *Transformations* (Cambridge, MA: Harvard University Press, 1998) 154; see also *ibidem*, 9 and 22-23; and "The Living Constitution", *Harvard Law Review*, Vol. 120, No. 7 (May, 2007), pp. 1737-1812. More recently, Ackerman has again made use of this key-concept in *Revolutionary Constitutions. Charismatic Leadership and the Rule of Law* (Cambridge, MA: Harvard University Press, 2019), 34.

²⁵ For a discussion of the various meanings and gradients of "unconventional adaptation", see A. Ferrara, "Unconventional Adaptation and the Authenticity of a Constitution", in R. Albert (ed.), *xxx* (Oxford: Hart, 2019, forthcoming).

CRYPTO-LIBERALISM OF SELF-RESTRAINT AND CONSTITUENT STRANGENESS

My third point concerns Lindahl's suggestion that, within a IACA understanding of law, *proper recognition of the other* is best understood as "collective self-restraint", where self-restraint basically means not just as "the collective recognition of the other (in ourselves) as one of us", but also "recognising the other (in ourselves) as *other than us*".²⁶ This general precept is then further spelled out as implying three directives. First, proper collective self-restraint implies a deferral of collective self-assertion, namely "the postponement of acts that posit the limits of what is to count as the unity of the collective". As we reconstructed above, for Lindahl ultimately no collective can escape the fate of determining what lies within or without the range of collective, legally institutionalized, purposiveness, but time is a crucial factor. When shall this closure take place? "Staying collective self-assertion amounts to allowing both dimensions of struggles for recognition and representation to come out into the open, prior to positing the limits of collective unity, creating a space for the emergence of *another* collective".²⁷ Concretely, deferral then is specified by Lindahl as including recourse to judicial review or democratic experimentalism for testing alternatives within legality.²⁸

The second directive for implementing collective self-restraint orients us to prefer a kind of *checkerboard legal order* with a plurality of sub-domains regulated by alternative regimes: "for example, the WTO could establish that certain kinds of activities henceforth fall beyond the scope of what counts as 'free global trade', seeking to liberate the KRRS and other peasant collectivities around the world from directed obligations pursuant to the global trade of seeds... Instead of incorporating a demand for recognition into relations of reciprocity, collective self-restraint releases certain forms of action from the constraints of reciprocity".²⁹ Spaces of alterity *qua* alterity are thus opened up and protected.

Third, a regime of collective self-restraint could be implemented through a system of exemptions from otherwise generally holding provisions. That system could take the form of a "*suspension* of the default setting of joint action, that is, the non-application of rules that are not only applicable but ought in principle to be applied to the situation at hand. The suspension is therefore also the *violation* of a legal rule and, in that sense, an act of non-application that is in breach of the law, in light of the exceptional nature of a demand for recognition".³⁰ Lindahl understands this move as inverting the significance of Schmitt's notion of "excep-

²⁶ Lindahl, *Authority and the Globalisation of Inclusion and Exclusion*, cit., 341.

²⁷ *Ibid.*, 342.

²⁸ Lindahl, "Inside and Outside Global Law", cit., 26.

²⁹ Lindahl, *Authority and the Globalisation of Inclusion and Exclusion*, cit., 344.

³⁰ *Ibid.*, 344.

tion”: differently than for Schmitt, for Lindahl “the exception radically questions a rule by raising a normative claim that registers as legal or illegal within the order, yet resists inclusion whether as legal or illegal. In a word, the exception is what manifests itself as *strange* to a legal order: the strong dimension of a-legality”.³¹ While for Schmitt the exceptional measure aims at drawing a line that *excludes* the strange as enemy, for Lindahl the exception is aimed at *including* the other without assimilating her to one of us.

It seems to me that as far as the overarching principle of “collective self-restraint”, and two of these directives, are concerned, we are on a plain liberal ground. Even the third directive could be reconciled with liberalism, if we only think of the institution of “pardon”, which falls entirely under the heading of what Locke used to call “the prerogative”, or a discretionary exercise of political judgment aimed at filling the gaps that necessarily all humanly imperfect rule of law leaves open. Accommodating the other translates into classic limits to the power of majorities, with a sprinkle of multicultural “exemptions”, in order to preserve a plural society. As John Rawls, famously put it, “the zeal to embody the whole truth in politics is incompatible with an idea of public reason that belongs with democratic citizenship”.³² However, in the index of *Authority and the Globalisation of Inclusion and Exclusion* surprisingly there is no entry for liberalism, and all the entry for “rights” mentions, is “see human rights”, as if human rights were the alpha and the omega of limiting the collective self-assertion of majorities. In my opinion, such neglect of properly locating his effort in relation to *political*, as opposed to classical atomistic and “comprehensive”, liberalism is one of the main lacunae of Lindahl’s argument, alongside a somewhat dubious romanticizing of strangeness. Lindahl adds: “even when exercising self-restraint ... a (global) collective continues to have an outside”. The principle that should inspire a non-oppressive legal regime then is: “set collective boundaries in such a way that they do not eliminate the strange (in ourselves)”³³ – as though the strange always conveyed a positive message. No one is stranger and more disquieting than Steve Bannon.

Finally, the “strange” obtains a surprising extra-bonus: namely, the glorious label of “constituent power”. No constitution, according to Lindahl, can miraculously neutralize the struggles for representation and recognition and exorcise the “strange” within the legal order. To this “internal outside”, Lindahl offers the illustrious qualification of being “the *constituent power* available to alter- and anti-globalization movements”. Constituent power *qua* “primordial manifestation of collective self-assertion” belongs in a collective’s inception, but it is also “a-legal

³¹ Ibid., 344.

³² J. Rawls, “The Idea of Public Reason Revisited”, in *Political Liberalism* (1993). *Expanded edition* (New York: Columbia University Press, 2005), 442.

³³ Lindahl, “Inside and Outside Global Law”, *cit.*, 28.

behavior, that, catching an extant collective by surprise, is capable of convoking *another way of being and acting together*".³⁴ Two objections come immediately to mind. First, such qualification only applies to a-legal behavior *in the second sense*, not in the first, and thus not to all instances of a-legal conduct: the vagrant of Lindahl's first example, in so far as he represents a *legal* challenge at all, exerts no constituent power whatsoever. Second, one wonders why the transition, in half a century, from a merely formal to a substantive interpretation of "equal protection of the laws" - which is what separates *Plessy v. Ferguson* (1896) from *Brown v. Board of Education* (1954) - should count as an instance of constituent power rather than of constitutional *interpretation*.

CONCLUSION

To sum up, in Lindahl's *Authority and the Globalisation of Inclusion and Exclusion* and in his *Julius Stone Address "Inside and Outside Global Law"*, one can find a) a great rebuttal to once-fashionable deconstructionist fantasies about "multitudes" and to a variously termed "community of difference" that excludes nothing and no one; b) an interesting concept of law as linked with collective action; c) a fabulous questioning of the vexed binary of *representative* and *direct* democracy. At the same time, Lindahl's argument would be significantly improved if his central notion of *a-legality* were to be defined in a non-ambiguous way, if the presently unclear relation of his guiding principle of the "dutiful restraint of majorities" to political liberalism were to be spelled out, and if his counterintuitive blessing of a-legal conduct with the insignia of constituent power were to be backed up by a stronger justification.

³⁴ *Ibid.*, 32.