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# Justice and authority in the global order

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Abstract. The global justice debate has largely ignored law. But that debate presupposes a legal order within which principles of justice could be implemented. Paying attention to law alters our understanding of global justice by requiring us to distinguish principles that are properly prescribed and enforced within a legal order from those that are not. Given that theories of global governance depreciate law and that cosmopolitan and confederal theories are utopian, the most promising context for a realistic global justice discourse is one that is focused on strengthening, not transcending, the international legal order.

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## Introduction

The global justice debate has largely ignored the place of law in a just global order. It has focused instead on the issues of human rights, economic inequality, and cultural diversity. These are, in essence, issues of the modern liberal state transferred to the global level. But resolving them requires institutions that are absent or weak outside states of that kind. To argue about achieving justice while ignoring institutions seems optimistic, even naïve. Given the challenges to global order, it would make sense for those concerned with global justice to give more attention to how the ideals and principles that have shaped that debate might be realised in circumstances quite unlike those of modern liberal states. Threats to order, domestic and international, invite a more pessimistic, more 'realistic', approach to global justice. Such an approach would focus on the requirements of *legal* order under the conditions created by globalisation, which include an erosion of government in favour of governance that globalisation has brought about. Some think effective policymaking is more important than legality, but in taking that position they commit themselves to a kind of realism in which expediency trumps justice. That is not the kind of realism I will be defending here.

A just global legal order would be, at a minimum, one in which the rule of law is observed within and between states. Globalisation, which involves powerful forces and rapid change, can threaten legal order by undermining constitutional government and the rule of law. Increasingly, those concerned with global order have come to see that both international and domestic law are threatened by



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transnational governance as a response to problems generated by globalisation. 'Governance' is an ambiguous term, but as commonly used it implies a process in which private as well as public organisations make public policy. It implies the dispersal and even disappearance of public authority in decision-making networks that operate partly or entirely beyond the reach of government. It seems evident that although governance can sometimes be an effective way of meeting global challenges, it poses challenges of its own. Governance networks can be less transparent and less democratic than governments and they easily escape public oversight. How, then, can the rule of law be preserved when public authority is eroding internally and internationally? How, under the conditions created by globalisation, can international law continue as a system of 'inter-public law'[1] or be transformed into a system of global public law?

My aim in this article is to sketch a way of thinking about global justice that responds to these concerns by illuminating the connection between justice and authority. Law is the basis of those non-voluntary associations we call political. It defines not only the state but also the international system and its subsystems of regional and functional law. These are all structures of authority even if, as in the international case, the structure is decentralised. I argue that justice is best understood as a criterion for judging these structures – the laws that constitute them and the laws that they create and administer. Justice must be distinguished from legal authority, on the one hand, and moral legitimacy, on the other. These distinctions are important not only within a state but at the international and supranational levels as well. Discussions of global justice often miss an important aspect of the topic by obscuring the differences between justice, authority, and legitimacy or by ignoring the legal context in which principles of justice are invoked. Theories of global governance go even further towards neglecting or depreciating law. Against such theories, I argue that *global justice requires not 'governance' but a system of international or global public law*. The global justice debate could become more coherent as well as more realistic than it now is if it were to concern itself with the justice of international law or with the laws, actual or potential, of an emerging multilevel global polity.

The argument of this article is compressed and refers to arguments I've made more fully in other papers. I hope the reader will charitably overlook gaps in the argument for the sake of getting an overview of an approach to global justice that takes the need for legal order more seriously than does much of the writing on international ethics in recent years. The revival of legal thought in the context of global politics that is evident in the writings of Jürgen Habermas, Otfried Höffe, Jean Cohen, and others (including the contributors to this symposium) suggests that we are leaving a period in which philosophers treated international relations as 'applied ethics' and entering a period of inquiry into global justice as a question for legal and political theory.

[1] Benedict Kingsbury, 'International Law as Inter-Public Law', in Henry S. Richardson and Melissa S. Williams (eds), *Moral Universalism and Pluralism*, NOMOS 49 (New York: New York University Press, 2009), pp. 167–204.

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## Justice and law

A commonly accepted view of law is that it consists of rules enacted by public authority. These authoritative rules are 'law' in the sense that they are valid or authentic rules within a particular legal system. They prescribe obligations and those obligations can if necessary be coercively enforced. But rules, even if authoritative in this sense, may be unacceptable for other reasons. They may be at odds with prevailing opinion, religious, or moral duties, or with criteria of genuine legality. The concern, in such cases, is not whether a given law has been authoritatively enacted but whether it is proper for those in authority to have enacted it.[2] Justice, in the context of a debate about existing or proposed laws, involves principles for evaluating enacted law and guiding legal change. A theory of justice, so understood, would be concerned with those principles.

Inquiry into the justice of laws is not, however, a purely moral inquiry. Deciding whether a proposed law should be adopted involves judging not only whether the law is morally acceptable but also whether it is appropriate as part of the legal system it would alter. That judgment depends in part on considerations arising from the requirement that a new law must be compatible with existing laws. It can amend or replace those laws but it must also conform to their underlying principles. Beyond meeting the test of technical consistency, it must not contradict the integrity and coherence of the legal order to which it belongs. Such considerations may be mutable, uncertain, and contested, but these are the problems of any interpretive and evaluative discourse. There will, then, always be some space between moral and legal rights and obligations. Liberal moralists often go straight from moral principles to political conclusions, ignoring considerations of this kind and erasing the distinction between moral legitimacy and political right.

The claim that a state or international institution cannot be 'legitimate' unless it meets a certain standard of justice may, then, be correct as a moral proposition. But it is false as a political claim because it fails to distinguish moral from political legitimacy. An 'unjust' state can be politically legitimate if it provides basic political order. It may be able to provide a measure of economic security and personal freedom even if its laws impose limits on civil rights, and its laws may be consistent with widely held moral beliefs even if its constitution is undemocratic. In a pluralist international order, sovereignty cannot be divorced from legal and political facts and made solely a matter of abstract, non-contextual moral judgment. Bhutan, China, Singapore, Thailand, and Vietnam all ranked low in a recent Freedom House survey.[3] Are these illegitimate states? The claim that because such states are open to moral criticism they are without moral legitimacy,

[2] Michael Oakeshott, 'The Rule of Law', in *On History and Other Essays* (Oxford: Basil Blackwell, 1983), pp. 140–1. What Oakeshott calls 'civil association' is a non-voluntary mode of association, in the sense that non-instrumental laws prescribe obligations and are not merely recommendations or advice, but it is not inherently coercive. Coercion enters the picture only because a state cannot work if its laws are not observed, and enforcement may be required to secure that observance. Coercion is one of the contingent conditions for the existence of civil association, but it is not itself part of the civil mode.

[3] Arch Puddington, 'The 2008 Freedom House Survey: A Third Year of Decline', *Journal of Democracy*, 20 (2009), pp. 93–107. On Rwanda, see Philip Gourevitch, 'The Life After', *The New Yorker* (4 May 2009), pp. 36–49.

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and that lacking moral legitimacy their governments are not justified in exercising political authority, moves from morality to politics without taking account of law, history, or the conditions of legal order. Making political authority contingent on moral legitimacy would not, as liberal moralists imagine, result in a more just world. Such 'political moralism', as Bernard Williams calls it,[4] can lead to simplistic judgments, moralistic intolerance, and imperial delusions. It has resulted in costly unjustified wars to overthrow offensive regimes in situations that fail (as in Iraq) to meet recognised criteria for humanitarian intervention. International law, despite its flaws, constitutes a reasonable response to moral, cultural, and political diversity, and a theory of global justice should start by accepting rather than rejecting its basic principles.

Discussion of whether a law or a set of laws is 'just' is most intelligible in relation to the legal order it might alter when it is sensitive to the circumstances of justice, that is, to the contingent conditions for achieving justice in a particular community.[5] One of these is certainly that a community should have laws, even if those laws fall short when judged by a standard of moral legitimacy. For there to be a point to political deliberation on the justice of its laws, a community must enjoy a reasonable level of accord on what the law is. There cannot be irresolvable disagreement over procedures for determining legal (and therefore political) authority, and the legal system must be reasonably effective. If these conditions are not met there is civil war, not civil order. A modern legal order is an autonomous order of rules. It must operate according to its own procedures and enjoy an authority that is independent of religious, moral, or other non-legal criteria of legitimacy. Its rationale is to provide the basis for coexistence in circumstances of religious and moral disagreement. Citizens must be related as subjects of a common law, not as adherents to a common faith or stakeholders in an economic enterprise. This means that citizens and, especially, public officials must regard the laws as autonomous and authoritative. Law cannot be treated solely as an instrument for pursuing shared purposes, for this would mean that those associated were associated on the basis of those purposes, not on the basis of law as a framework for association independent of particular purposes. Nor can laws be said to be authoritative only if they correspond to a higher religious or moral law. Laws cannot be made, interpreted, or enforced according to standards outside the legal system (unless the system has incorporated them) or by persons other than those authorised to exercise legal powers. The claim that only substantively desirable or morally legitimate laws can have authority and prescribe duties implies that undesirable or illegitimate laws can be ignored or violated. It fails to grasp that legal authority is needed most when people differ about what is desirable or morally legitimate. These are obvious points about the limits of 'justice' as a constraint on law.

A theory of justice must distinguish principles that could properly be enacted as law from those that could not. A principle might have moral force yet be unsuitable as law because the state has no business prescribing or enforcing it.

[4] Bernard Williams, *In the Beginning Was the Deed: Realism and Moralism in Political Argument* (Princeton: Princeton University Press, 2005), pp. 1–17.

[5] By 'circumstances of justice' I mean, following Rawls, the existence of different and possibly incompatible beliefs and values in a situation in which collective decisions need to be made. John Rawls, *A Theory of Justice*, rev. ed. (Cambridge: Harvard University Press, 1999), p. 110.

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What distinguishes the idea of justice from other moral ideas is that it is concerned with prescriptions a government could make legally obligatory without unreasonably limiting liberty, invading privacy, or contradicting other laws. At the international level, the claims of political sovereignty and self-determination must also be considered. Understood in this way, the scope of 'justice' is narrower than that of utility (that is, of instrumental desirability) or divine, customary, or rational 'morality' (non-instrumental propriety). A just law must be morally defensible, but it does not follow that every moral ideal or principle should be prescribed as law. So, for example, marital fidelity or personal sobriety may be defensible as moral ideals, but it is not the business of law to enforce them unless the failure to live up to them violates someone's rights. In liberal political thought, principles of justice are grounded on the idea of equal liberty. A moral argument becomes political when it is about whether a principle could reasonably be adopted in particular circumstances. This involves practical concerns as well as those based on abstract moral or philosophical arguments. Political deliberation, like adjudication and administration, requires choosing rules and interpreting them, and it requires exercising judgment and prudence in doing so.

A theory of justice, then, is a theory of politics as well as morality.[6] It identifies the kinds of obligations that law can properly prescribe and enforce. One can argue that these obligations rest on the moral principle that human beings must not coercively obstruct one another's actions. If one person does obstruct another, the latter may rightly use force to resist it if force is necessary to thwart the interference.[7] A legal order that builds on this principle protects the freedom of its members from unwarranted coercive interference. A primary task of government is to protect the rights of legal subjects against 'violence' (in the strict sense of wrongful coercion) from one another and from outsiders. The rationale of the state is not simply that people are better off in civil society than in a state of nature but also that the civil condition is morally required. The moral right to be free presupposes laws that protect one from being used, against one's will, to satisfy someone else's desires. The basic moral rationale of law is to prevent persons or governments from interfering improperly with freedom. A just law is, at a minimum, one that is consistent with this rationale. The rules of a private association may restrict freedom in other ways because people are free not to be members of such an association. But law must respect freedom because a state is not a voluntary association.

Instead of developing or defending this understanding of justice, however, I want to focus on how the conception of legal order it implies might work at the international level.[8] At that level, as in a state, we can ask what purposes governments should pursue and what these purposes imply for the responsibilities of officials and citizens. And as supranational institutions develop, similar

[6] Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999), p. 3. Arthur Ripstein develops a Kantian argument along these lines in *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge: Harvard University Press, 2009).

[7] Immanuel Kant, *Political Writings*, ed. Hans Reiss, trans. H. B. Nisbet (Cambridge: Cambridge University Press, 1970), pp. 132–5.

[8] For further consideration of these themes in the context of international relations, see Terry Nardin, 'Justice and Coercion', in Alex J. Bellamy (ed.), *International Society and its Critics* (Oxford: Oxford University Press, 2005), pp. 247–63, and 'International Political Theory and the Question of Justice', *International Affairs*, 82 (2006), pp. 449–65.

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questions can be asked about the purposes and responsibilities of such institutions as well. These include questions about the justice of international and global law. Arguments about global justice must be concerned with the public institutions through which principles of justice will be realised and with the proper purposes of those institutions. Such arguments have the potential to reinvigorate the global justice debate. That debate has become a repetitive one in which questions of distributive justice, cultural pluralism, and national versus cosmopolitan imperatives are endlessly canvassed while the question whether any of the principles advanced in those discussions could properly be enforced as law is neglected.[9] Efforts to restore a concern with law –with the potential and limitations of legal institutions and the importance of maintaining legality in the circumstances of globalisation – might prove theoretically illuminating as well as practically valuable.

The case for global justice is often premised on the factual or moral liabilities of the state in an age of globalisation. Some argue that states are becoming less important as sovereignty erodes, transnational relationships flourish, and problems requiring global solutions multiply. Others argue that national boundaries are becoming morally irrelevant. They see states as an obstacle to a just world order based on respect for human rights and an equitable distribution of wealth. But the judgment that globalisation has made states obsolete, actually or morally, is wildly off the mark. States have not vanished, nor have they lost political legitimacy even when they are ineffective or unjust. It is myopic to focus on the travails of contemporary states while ignoring those of the past. Citizens and public officials have legal rights and responsibilities that cannot be overlooked, and international law remains important and legitimate in regulating transactions between states. Thinking clearly about justice and authority above the state level means thinking about international as well as global law and politics.

It follows from the general understanding of justice defined as legitimate coercion that a theory of international justice must say when one state can rightly use force against another. But questions about the legitimate use of military force are not limited to the use of force by states. As international institutions acquire authority and power, such questions will arise for them as well. Focusing on the justice of international institutions connects arguments about international justice with those about civil society, creating a new context for theorising global justice. A theory of justice beyond the state will need to clarify the relationship between civil, international, and supranational justice to address the proper aims, powers, and responsibilities of international institutions.

Political and legal theorists have long debated the implications of shifting political authority from states to supranational institutions and have puzzled over the constitutional structure of those institutions. Kant thought that the most reasonable supranational order would be a confederal union of republican states. By 'republic' he meant a state in which executive and legislative powers are constitutionally separate, in contrast to one in which these powers are united in a single office, which he called despotic. Republics are more likely than despotisms

[9] An exception is Thomas Nagel, who defends what he calls a 'political conception' of justice as arising from the fact that because the state imposes obligations on its citizens, those obligations must respond to basic considerations of fairness and equality. Thomas Nagel, 'The Problem of Global Justice', *Philosophy and Public Affairs*, 33 (2005), p. 120.

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to conduct their affairs according to the rule of law and to respect and ensure civil liberty.[10] The Kantian union is a loose confederal one in which each member state remains independent. This is important not only because (as almost every commentator observes) a single world state might turn out to be despotic but also because republican states have a right to independence. Only a republican state can secure justice on the basis of the rule of law, which means that it cannot be legitimately replaced by any state or confederation of states that is not itself republican. For Kant, a confederation of republican states, united in a way that preserved the republican character of its members, is consistent with the idea of the state as a system of public right. The question is whether there are other arrangements that are consistent with this idea.

These Kantian themes permeate discussions of the EU and the UN. Globalisation, however, has moved current debates about world order away from the idea of confederation to consider alternative kinds of legal order. These are evident in international human rights law, the application of foreign, transnational, international, and supranational law in national courts, and the proliferation of specialised tribunals to settle disputes arising under legal regimes governing international and transnational activities. Taken together, some argue, these changes suggest the emergence of a global legal order that must be distinguished from classical international law, even if the shape of that order is not yet clear. Theorists disagree about the content, authority, and justice of the rules of this order. They also disagree about what constitutionalism means and how it might work at the global level. Because the idea of constitutional government is contested even in its original context, the modern state, we can expect disagreements to multiply when the idea is brought into debates about global law. One might argue, for example, that the word 'constitution' connotes at least a minimum of coherence and that global law, if it exists at all, fails to achieve that coherence.

## Models of global legal order

If justice presupposes the idea of legitimate coercion, global justice needs to be related to that idea. One way to do this is to treat global justice as an aspect of the rule of law. The expression 'rule of law', when it is more than merely an empty phrase or partisan slogan, identifies a distinct type of human relationship. It is a relationship premised on the idea of equal liberty, not one in which the purposes of some are imposed on others.[11] Whatever its uses in political debate, the idea of the rule of law is useful to theorists as a criterion for identifying different kinds of political association. Assuming for the sake of argument that the rule of law entails respect for equal liberty, we can ask how a global legal order could be constituted to ensure it and, in particular, whether the constitution of that order should be unitary, international, or confederal. This inquiry suggests alternative

[10] Kant, *Political Writings*, p. 100.

[11] I defend this understanding of the rule of law in Terry Nardin, 'Emergency Logic: Prudence, Morality, and the Rule of Law', in Victor V. Ramraj (ed.), *Emergencies and the Limits of Legality* (Cambridge: Cambridge University Press, 2008), pp. 97–117, and 'Theorizing the International Rule of Law', *Review of International Studies*, 34 (2008), pp. 385–401.

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models of global law, blending into one another at the margins but nevertheless distinguishable.

The first of these alternatives is a single, global, civil order. According to what might be called 'the cosmopolitan model', global justice presupposes either a centralised institution of authority (a world state) or a looser order that is nevertheless in important ways supranational, not international.[12] Those who shy away from the idea of a world state prefer expressions like 'global covenant' or 'global commonwealth'.[13] Perhaps a key element – one implied by the word 'civil' – is that natural persons would have rights and duties under its legal regime. This global order would protect civil freedom and ensure economic and social conditions under which people are reasonably able to exercise that freedom. At a minimum, it would have to prevent situations in which many people were systematically excluded from citizenship and therefore from the rights and liberties that go with it, including the protection of law.[14] Government may cede much to 'governance' in some versions of this model but it remains a model of legal order to the degree that governance operates within a framework of law. Because the model is cosmopolitan institutionally as well as morally, it is concerned with supranational authority as well as with justice. It is concerned with the constitutional structure or 'architecture' of the global regime within which principles of justice are pursued, and with the proper purposes of that regime. These are fundamental concerns of political and legal order, and theorists of global justice cannot ignore them.

The second alternative is an association of states on the basis of international law. In this 'international model' states retain their independence and interact within the limits of public international law, understood as the 'classical' system that existed before the incorporation of human rights and individual responsibility. This classical system was concerned with the rights and responsibilities of states – not citizens, whose interests were protected only indirectly. If, for example, a state was found to be responsible for injuries to citizens of another state, it owed redress not to them but to their government. Political officials could not be held personally liable for crimes, including crimes against humanity, committed while they were in office. The international model is 'civil' only in the sense that states are the 'citizens' of the community constituted by classical international law. That law did not confer rights or impose duties on individuals or require states to respect principles of civil liberty or constitutional government internally. If we acknowledge that the freedom it postulates is the freedom of states, not of their subjects, and ignore its defects as a system of law, international law can be said to represent the rule of law in a society of states because it does respect the liberties of *its* subjects, that is, states.

[12] Many theorists who identify themselves as cosmopolitans, such as Charles Beitz and Thomas Pogge, distinguish moral from institutional cosmopolitanism. The former is simply one version or another of moral universalism and entails no commitment to the idea of a world state or any other system of political authority. For a full discussion, see Brian Barry, 'International Society from a Cosmopolitan Perspective', in David R. Mapel and Terry Nardin (eds), *International Society: Diverse Ethical Perspectives* (Princeton: Princeton University Press, 1998), pp. 144–63.

[13] Robert Jackson, *The Global Covenant: Human Conduct in a World of States* (Oxford: Oxford University Press, 2000); David Held, *Global Covenant: The Social Democratic Alternative to the Washington Consensus* (Cambridge: Polity Press, 2004); Daniele Archibugi, *The Global Commonwealth of Citizens: Toward Cosmopolitan Democracy* (Princeton: Princeton University Press, 2008).

[14] Hauke Brunkhorst, *Solidarity: From Civic Friendship to a Global Legal Community*, trans. Jeffrey Flynn (Cambridge: MIT Press, 2005), p. 122.

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The third model, which I will call the 'civil-confederal', responds to the objection that the international model is civil only by analogy by postulating an association of states whose members adhere to republican principles internally as well as in their relations with one another. Its advocates include Kant, Rawls, and theorists of European unity who see the EU as a model for the world as a whole.[15] Such a confederation would require not only that member states interact with one another on the basis of the rule of law but also that each state be governed according to the rule of law internally. The civil-confederal model has global relevance because a civil confederation of civil states could become universal. But the model has a dark side because it sets up an opposition between a civil confederation, whose members meet the criteria for membership, and other states, which do not. In the context of real-world politics, it can be misappropriated to support an ideology according to which the members of a 'league' or 'concert' of democracies, confident of their moral superiority, see themselves as justified in 'spreading democracy' by means of military intervention.[16] As noted earlier, the claim that grounds this interventionist ideology is that a state cannot be politically sovereign unless it is morally legitimate. It is permissible for states to establish a confederation to govern their relations with one another, but they cannot rewrite the rules by which other states are governed.[17] Until it becomes universal, members of the civil confederation must conduct their relations with other states on the basis of international law. An advantage of the international model is that it allows room for diversity by prohibiting aggression and imperial domination. Its disadvantage is that it must tolerate injustices within states unless they rise to a level that justifies humanitarian intervention.

The civil-confederal model is based on European thinking and experience. An issue in debates on Europe's future is the degree to which supranational law has emerged within the Union. It seems evident that a new legal order of some kind is emerging, even if it is hard to pin down its identity, and giving rise to discussions of the justice of its laws. From the standpoint of cosmopolitanism, however, a civil-confederal association is not a civil order because member states retain their independence. Even if its membership were universal, such a confederation would fall short of being a world state. It would remain a hybrid of domestic and international law.[18] For (institutional) cosmopolitans, a global polity implies a single legal order, no matter how complex and multilayered. What cosmopolitans

[15] John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999). Though he confines his argument to a potential European federation, Friedrich Hayek makes the interesting argument that confederal government is more suited than a unitary state to protecting individual liberty. See F. A. Hayek 'The Economic Conditions of Interstate Federalism', in *Individualism and Economic Order* (London: Routledge and Kegan Paul, 1949), pp. 255–72.

[16] See Beate Jahn, 'Kant, Mill, and Illiberal Legacies in International Affairs', *International Organization*, 59 (2005), pp. 177–207; Kishore Mahbubani, 'The Dangers of Democratic Delusions', *Ethics & International Affairs*, 23 (2009), pp, 19–25.

[17] Chandran Kukathas, 'The Mirage of Global Justice', *Social Philosophy and Policy*, 23 (2006), pp. 1–28. Kukathas is criticising the reform interventionist arguments of Thomas Pogge and Allen Buchanan, among others: Thomas Pogge, *World Poverty and Human Rights* (Cambridge: Polity Press, 2002); and Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004).

[18] Jürgen Habermas, 'A Political Constitution for the Pluralist World Society', in Ciaran Cronin, trans., *Between Naturalism and Religion* (Cambridge: Polity, 2008), pp. 312–52, and 'The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society', *Constellations*, 15 (2008), pp, 444–55.

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fail to see, however, is that international law is in fact a single legal order and that confederation simply strengthens it. So long as an arrangement is 'confederal' it is also 'international'. So even if a civil confederation were to become universal, in the sense that all states were members, the world would still be one whose institutions were significantly international.

In contrast to theories of transnational or global governance, all three models give a central place to *public* law. They postulate government according to law, not network governance. Denying this postulate generates a fourth, 'global governance' model. Governance relies on professional or commercial self-regulation, technical standard setting, arbitration, and other arrangements for making rules and settling disputes outside the framework of public deliberation. Some see transnational governance as the modern equivalent of the medieval *lex mercatoria*, merchant law, a system of customary private commercial law that favoured speedy and equitable settlement of disputes over procedural regularity and public accountability.[19] Many who are attracted to the idea of global governance argue that private or mixed public-private networks are more effective than governmental or intergovernmental institutions in managing policy. They imagine a benign 'new world order' constituted by these networks rather than by public international law, confederal institutions, or a global public law.[20] But the worldwide financial crisis that began in 2008 reminds us that network policymaking can be dangerous if not properly regulated.

In my view, the idea of governance obscures the distinction between law and non-law, between the public and private realms, and between non-instrumental and instrumental considerations in policymaking.[21] Those who regard law as an instrument of policy fail to appreciate not only its importance as a procedural constraint on policymaking but also the role of public law in integrating separate regulatory regimes into a coherent legal order. Relying on 'private authority' – which means giving legal responsibilities to corporations, interest groups, and professional societies – weakens public authority by putting important activities beyond the reach of public oversight. A unified system of public international law is replaced by a patchwork of instrumental public-private international regimes, each devoted to furthering the goals and interests of its most influential participants. The idea of legal sovereignty, which was invented in early modern Europe as a response to conflicting claims by many different secular and ecclesiastical authorities, may need to be reinvented in response to the equally anarchic contests of current international affairs.

To avoid the problems that critics see in the practices of global governance, public law models allow for public control not by assigning all functions to public agencies but by subjecting the performance of those functions to public regulation. Therefore, to assert the importance of public law is not to deny a place for 'governance' in an emerging system of global law. Governance practices can move the world towards public legal order indirectly by increasing the density of transactions and relationships over which legal control must eventually be asserted.

[19] On *lex mercatoria* as a model for global legal order, see the essays in Gunther Teubner (ed.), *Global Law without a State* (Brookfield: Dartmouth Publishing Company, 1997).
[20] Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004).
[21] Terry Nardin, 'Globalization and the Public Realm', *Critical Review of International Social and Political Philosophy*, 12 (2009), pp. 297–312.

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It is on grounds like these that some legal theorists have suggested that global legal order can grow from informal rule-making and dispute settlement within private functional regimes or networks. There is a Kantian teleology here: what needs to happen will eventually happen because human beings are driven to overcome obstacles to realising their potential as moral beings who must live together according to law, not on the basis of relative power. Different functional regimes will need to be made consistent. Systems of private authority and rule making will have to become transparent and accountable, not only in functional or regional regimes but also throughout the emerging 'polycentric system' of global governance. Informal, quasi-legal processes may replace legislation and treaty making as sources of global law, but the new sources they generate must eventually be reshaped into a coherent juridical order.[22]

This optimistic view of global governance may be overly deterministic, but at least it recognises the problems of fragmentation and deformalisation that critics of the current system of international law see as evidence of its disintegration.[23] It acknowledges that private authority is not a new form of authority but a repetition of old patterns such as feudalism, syndicalism, and organised crime. The only way to assure the rule of law and public accountability as elements of a just global order is to bring informal and extra-legal ways of settling disputes and distributing benefits under the jurisdiction of public law. This does not mean suppressing self-regulation but it does mean subjecting it to public oversight and, in doing so, asserting the normative priority of public over private rules. The activities regulated and even a degree of oversight can remain in private hands, for industry associations, human rights NGOs, and other extra-governmental agencies can sometimes regulate transactions, deliver services, and settle disputes more efficiently than governments. But these activities and the regimes through which they are managed must be compatible with general public law and subject to public regulation.

## Global law and justice

Besides public accountability, a global legal order requires a degree of formal unity and coherence. There must be a constitutional framework within which the laws of different regional and functional regimes are made reasonably consistent. But consistency does not require a single office of sovereign authority. Sovereignty can be dispersed, as is the case in modern states and, arguably, international law. What is constituted, however, must be a system of *public* law that identifies and allocates legislative, judicial, and administrative powers.

[22] Gunther Teubner, 'Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?', in Christian Joerges, Inger-Johanne Sand and Gunther Teubner (eds), *Transnational Governance and Constitutionalism* (Oxford: Hart Publishing, 2004), pp. 3–28. Teubner repeats an argument made David Mitrany in 1932 and by others after 1945 with respect to European integration. 'The transfer of functions from the domestic to the international field has been apt to run further and faster than the corresponding change in legal doctrine'. David Mitrany, 'The Progress of International Government', in *The Functional Theory of Politics* (London: Martin Robertson, 1975), p. 96. The implication is that law can and must catch up.

[23] Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics', *Modern Law Review*, 70 (2007), pp. 1–30.

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If we see global governance as a precursor of global law, rather than an alternative to it, the cosmopolitan and civil-confederal models may seem unduly rigid. They require arrangements that can only be established in moments of constitutional choice. The global governance model allows for a messier process in which law is first displaced by private regulation, mixed decision-making, 'soft law', and other quasi-legal practices and norms, but subsequently restored as they are gradually juridified. But these practices and norms cannot contribute to the emergence of global law unless juridification occurs. It cannot be claimed that governance networks constitute a legal order unless that order distinguishes spheres of public and private activity, defines and allocates public authority, and secures the superiority of public over private offices.[24] This is the basic rationale for public law, a rationale that is at issue not only in governance debates but also in disagreements between legal and political constitutionalists. The issue here is whether limits on public authority are best established legally, through judicial review, or politically, by asserting legislative powers against administrative and judicial rule. Political constitutionalism is an effort to defend democracy against those who identify constitutional government with civil liberty and the rule of law.[25] Democratic government, however, must operate in a way that does not transgress limits set by rule-of-law criteria, which not only forbid secret or retroactive laws, penalties beyond those provided for by law, arbitrary exemptions from law, and the like but that also, at a deeper level, ensure across-the-board respect for the rights of legal subjects.

Even in the absence of a universal state or confederation, a global legal order can be said to have its constitution in public international law, which since the UN was established has not only acquired institutional shape but is changing from a system of interstate law into one that includes elements of civil law. This transformation can be seen in several emerging practices. First, in contrast to the classical system, international law today recognises and enforces individual rights and holds individuals responsible for crimes against humanity and other wrongs. Second, international law is increasingly a system in which courts and tribunals apply not only international but also transnational and foreign law. Whatever the merits or otherwise of this practice, the result is to connect different legal systems in ways that go beyond those of classical international law.[26] And third, as some defenders of the global governance model recognise needs to happen, international law is reasserting public control over transnational networks and institutions.

Although most advocates of global governance challenge the distinction between law and non-law and regard public international law as irrelevant, others defend its autonomy and continued importance. They understand that strengthening *global* law will require bringing transnational self-regulation and dispute settlement under the jurisdiction of *international* law. It will require subjecting those practices to international regulation. To the objection that they exaggerate its unity and coherence, those who see international law as being transformed into a global legal order respond that the theorist's job is to find the coherence implicit in the complexity of actual practices. Whether transnational private commercial

[24] Martin Loughlin, *The Idea of Public Law* (Oxford: Oxford University Press, 2003).
[25] For example, Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2007).
[26] Cass R. Sunstein, *A Constitution of Many Minds* (Princeton: Princeton University Press, 2009), pp. 187–209.

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law or other quasi-legal practices will acquire the marks of genuine legality is a contingent question that cannot be answered by a theory. But theory can require that a legal order display at least a degree of consistency and hierarchy, no matter how complex and decentralised that order may be, if it is to qualify as a legal *system*. A legal system is more than an aggregate of independent, unrelated regional and functional regimes. It must unite these regimes into a coherent system on the basis of agreed criteria and procedures for reconciling their different rules and decisions. One may doubt that anything more than a metaphorical global constitution has yet emerged, but it is hard to dispute the conclusion that the global order that exists is substantially constituted by public international law.

A theory of global public law must identify the rules and institutions at various levels that are related hierarchically according to its 'constitutional' principles. These are found in customary international law and in treaties that codify that law. They are also found in the UN Charter, in the Charter of the International Criminal Court, and in widely acknowledged principles of human rights (even if their acknowledgement is sometimes hypocritical). The result is international law understood in a less state-centric way than in the classical system. As that system has been modified by transnational and supranational principles, what has emerged is a global legal order in which not only states but also other legal persons, including natural persons, have legal rights and duties. The law of the EU provides clues to understanding its character, problems, and potential, but a theory of global public law will have to consider the experience of other legal orders as well.[27]

Law, I began by arguing, entails the possibility of coercion because it prescribes obligations and must therefore provide ways to ensure compliance when those obligations are not fulfilled. To discuss the justice of a community's laws is to discuss the kinds of obligations that could appropriately be prescribed and enforced as law in that community. The propriety of enforcing particular obligations within a community depends, however, on its character as a community and the purposes ascribed to its governing institutions. This applies to the international community as much as to any other. The question, here, is not the constitutional form of the international community or the authority or effectiveness of its institutions but their proper purpose. Is that purpose to regulate relations between states and transactions between the subjects of different states? Or is it to pursue policies affecting the good of the international community? If both, how should these purposes be reconciled? Political theorists have long debated whether the modern state should provide a framework of non-instrumental laws enabling people to pursue their own ends, or should instead pursue collective religious, economic, or other ends by enacting laws designed to achieve them. As institutions develop at the international level, we can expect similar disagreements about the purposes of those institutions and the views of global community those purposes imply.[28]

[27] Examples of an emerging literature on global law include Jan Klabbers, Anne Peters, and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2009); Jeffrey L. Dunoff and Joel P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge: Cambridge University Press, 2009); and Jean L. Cohen, *Rethinking Legitimacy and Legality in the Epoch of Globalization* (Cambridge University Press, 2011).

[28] The long-running dispute between 'pluralists' and 'solidarists' within the English School illustrates this disagreement. For a discussion, see William Bain, 'The Pluralist-Solidarist Debate in the English School', in Robert A. Denemark (ed.), *The International Studies Encyclopedia*, vol. 9 (Hoboken: Wiley-Blackwell, 2010), pp. 5646–66.

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The global justice debate has been preoccupied with policy issues and hampered by the fact that the word 'justice' is often used loosely and uncritically. The debate could be improved by linking it, as Rawls and Habermas have done, to a discussion of principles for a pluralistic global legal community. Adopting this suggestion would help to focus the discussion of global justice by connecting questions of economic equality and cultural identity with the question of how to secure individual rights and limited government within a system of global law. Preventing injustices will require a well-ordered world in which individuals and communities can coexist in a condition of genuine legality. The question of global justice is best discussed in relation to how public authority in such a world should be allocated and the purposes for which that authority should be used.

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