

# In Pursuit of the Global within: A Structure for the Global Law Project

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## Abstract

This short essay takes as its point of departure the truism that ‘the global’ is omnipresent. ‘Intimations of the global’, to borrow from Neil Walker, are therefore as likely to be uncovered by studying domestic legal systems most familiar to us, as they are by pointing our lens at what is alien. If the global is understood in this way, i.e. as referring to the basic building blocks common to all legal systems, then two settings appear to offer *prima facie* fertile ground for unraveling the global. First, if laws employ open terminology or otherwise afford considerable discretion (e.g. as in the case of ‘procedural autonomy’), it may be premised that when in such cases it is (empirically) established that in reality certain rules act to further constrain such freedom, those rules could be of a ‘global’ character. Obversely, when legal rules claim an absolute status, in the sense that they tolerate not exception (as in the case of the supremacy of EU law), factual departures from that absolute rule again may be regarded as intimations of the global.

## Keywords

global law; EU law; procedural autonomy; supremacy of EU law

As the success of any journey of discovery worthy of the name obviously cannot be guaranteed in advance, it appears somewhat futile at this stage to speculate about the future contributions of the global law project to legal scholarship. This is particularly so because the vehicle that is to take us on our travels, ‘global law’, has yet to be put to the test, and moreover is set to remain imperfectly understood for quite some time to come. Any suggestion, therefore, that we can accurately predict how the uncharted territory of global law is set to enrich our understandings of the legal world we inhabit smacks of a lack of humility unworthy of the serious academic endeavour that the global law project represents.

Rather than to deny this charge, I hence plead guilty from the outset, and forfeit any claim that this short essay represents serious legal scholarship. Should what I have to say nonetheless turn out to be of use, then this

is likely to be so due to the fact that these are the ponderings of an EU lawyer who, on a daily basis, must come to terms with complex interactions between different legal cultures represented at different levels of governance (global, regional, national and sub-national). I indeed presume that, whatever we may ultimately find global law precisely to add to our understanding of this contemporary legal universe, it will surely similarly concern the ways in which different legal realities coexist and relate. In our quest for answers to the challenges which those different realities increasingly generate, we should first unravel and then try to understand the DNA of our common legal heritage. This, I imagine, captures the justification for and general direction of the global law project. Let me try to explain.

Boundless curiosity apart - to my old-fashioned mind still the oxygen for a serious academic community - the practical use of the global law project insisted on by those representing the vocational element within law schools is found in the ramifications of globalization. Put simply: increasing globalization means that we are more frequently exposed to different legal realities, and that it does so in ways that we can no longer simply choose to ignore. It would be manifestly folly to infer from widespread nationalistic mutterings of parliaments across the globe that globalization is on its way out, if only because the essence of globalization is precisely the increasing irrelevance of those parliaments. As globalization is therefore most definitely here to stay, we need not worry about the shelf-time of the global law project.

As to the crucial question *how* global law can assist legal practitioners and scholars in engaging with globalization and its consequences, as a starter I posit that the lens of global law should help us understand both 'the self' and 'the other', and thereby ultimately should enlighten us as to how the self relates to the other and *vice versa*. Thus perceived, the global law project essentially is an existentialist endeavour.

At the beginning of the 17<sup>th</sup> century, in a similar attempt to make sense of the relation between his world and the surrounding universe, Galileo trained his telescope *outwards* towards the planets and the stars. The upshot of Galileo's pioneering observations and calculations is that we now realize that, in the bigger scheme of things, our earth is not central and quite possibly not even all that unique. Notwithstanding the passage of some four hundred years since Galileo's findings, humankind yet has to come fully to grips with this sobering truth, and we still stubbornly speak of 'sunset' and 'sunrise'. On the positive side, it has also allowed us to travel to other planets, to dream about forever expanding our horizons, and to start realizing that it is unlikely that we are on our own in this universe.

It was a contemporary of Galileo, Hugo Grotius, who almost simultaneously pulled off a comparable feat for the law, again by extending his focus outwards. Grotius' *De iure belli ac pacis* has laid the foundations for modern public international law and, on the occasion of this special issue devoted to the launch of Tilburg's global law project, it is warranted to lift one particularly fitting quote from this monumental work: 'Fully convinced (...) that there is a common law among nations, which is valid alike for war and in war, I have had many and weighty reasons for undertaking to write upon the subject'.<sup>1</sup>

Like Galileo's discoveries concerning the solar system, Grotius' conceptions of war and natural justice have forced us to give up claims of uniqueness, of belonging to some pre-conceived privileged inner-circle, or of being destined to be elevated above the other. But if humankind already has embraced the fact that 'there is a common law among nations', albeit perhaps imperfectly and inconsistently so, what remaining role can we foresee for global law?

I venture to suggest that the answer to this pertinent question is to be found in our understanding of 'the global'. Because the global law project is a response to *globalization* it is intuitive to presume that, like Galileo and Grotius, it will seek for its answers predominantly by peering into the distant expanse of the legal universe. This indeed has already been done by Grotius and by others who have followed in his footsteps. Legal disciplines such as public international law, comparative law and transnational law are fruits of their efforts.

Although the global law project obviously cannot exist in isolation from these disciplines, and indeed is to build on it, I am confident that it will make a discrete, fundamental and original contribution to legal scholarship and legal education. Earlier in this essay, despite a great deal of reluctance, I have used the worn and cliché metaphor of unraveling the DNA of our common heritage in an attempt to underline the attraction of adopting an internal perspective on the global.

There is a profound difference between an 'external' notion of the global, referring to some all encompassing legal system or principle spanning the globe, and an 'internal' understanding of the global denoting the basic building blocks of which all legal systems are made up. The former requires looking outward for something big enough to register on our radar, the latter can be pursued equally effectively by looking within ourselves for

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<sup>1</sup> Hugo Grotius, *The Law of War and Peace* (Francis Kelsey tran, Carnegie edition 1925) Prologue, pt 28.

something small but elementary. ‘The self’, in this context, can refer to any polity (arguably even to any source of regulation), because we are in search of the basic building blocks that hence are common to the laws of all those different polities. We have gazed through binoculars and telescopes at foreign legal landscapes for over four hundred years now, and we have done so with a degree of success. The global law project amounts to a new phase, however, in that we and our soul mates shall now peek through our microscopes in a systematic search for evidence of the global within ourselves.

Lest we think that such an exercise lacks in cosmopolitan glamour and promise, we do well to wonder why the most ground breaking discoveries were made by Nobel prize laureates such as Watson and Crick, Binning and Rohrer, or Kroto, Smalley and Curl, or why states are ready to invest some 4.5 billion Euros to build the Large Hadron Collider operated by CERN. The reason, I venture to suggest, is that the answers to the fundamental questions faced by humankind are found not by pointing our lens at what is alien and at a distance, but instead by directing it inwards, focusing on the familiar in pursuit of basic building blocks common to all and everything. The global law project, thus, seeks to unearth the global within.

So far so good, but how do we translate these possible lessons from the natural sciences into a concrete global law research agenda? If we are to take heed of our hunch that there is much to be gained from adopting an internal perspective on the global, at what do we actually point our lens? I do not sufficiently lack in modesty to claim to have the final answer here. Indeed, the most crucial and challenging part of the global law project is likely to consist of determining its focus.

Yet, using EU law as an example, as a first necessity we must identify spaces within the EU legal order that are presumed to represent legal voids, or no go areas; in the context of what I have said thus far the metaphor of black holes springs to mind, or of CERN’s quest to find the Higgs-boson particle. Translated to the EU law context, we could say that global law scholars will have a hard and intense look at instances in which actors (individuals, Member States, and the institutions) claim unfettered discretion, simply because global law scholars are skeptical about the existence of such a state of lawlessness.

It flows from the internal perspective of the global, which I advocate here, that we premise that even black holes conceal rudimentary legal building blocks, which in turn act to discipline discretion. The flip side of the same coin, of course, is that global law scholars are equally dubious about claims pertaining to the absoluteness of rules, i.e. that certain rules tolerate no exceptions and exclude any discretion on the part of actors confronted with them.

To fend off predictable charges that my ideas are too general to be of use (which, mercifully, in universities is not synonymous for *practical* use), I should like to finish with two random examples of global law research topics that I considered for this essay, before I decided to discard them in favour of a more general and conceptual discourse.

### *The Myth of Procedural Autonomy in EU law*

Conventional EU law wisdom holds that there is such a thing as ‘procedural autonomy’. This simply means that, to the extent there are no applicable provisions of EU law, Member States are free to design their own systems of remedies that apply to the enforcement of rights derived from EU law, subject only to two open-ended and somewhat contradictory conditions:

1. The principle of equivalence;
2. The principle of effectiveness.

According to Oxford English Dictionary, ‘autonomy’ means ‘the ability to act and make decisions without being controlled by anyone else’. Global lawyers are *prima facie* skeptical about the existence of such a black hole, and therefore critically query the existence of procedural autonomy.<sup>2</sup>

### *Principles of Judicial Review of Scientific Expertise in EU Risk Regulation*

A second conventional wisdom inviting scrutiny by global law scholarship holds that EU institutions are free to base decisions aimed at regulating risks on the scientific expertise of their liking, subject only to review by the Court of manifest errors of judgment and misuse of power.<sup>3</sup> But does the freedom of EU regulators really extend this far, or is it possible to identify principles of global law that further curtail this freedom and, as a corollary, put greater demands on our courts?

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<sup>2</sup> And rightly so, according to scholars who have confirmed our suspicion. For EU environmental law see in particular Pal Wenneras, *Enforcement of EC Environmental Law* (Oxford University Press 2007). More generally see Michal Bobek, ‘Why There is No Principle of Procedural Autonomy of the Member States’ in Bruno de Witte and Hans Micklitz (eds), *The European Court of Justice and the Autonomy of the Member States* (Intersentia 2011).

<sup>3</sup> See Case C-79/09, *Gowan Comércio Internacional e Serviços Lda v. Ministero della Salute* [Judgment of the Court (Second Chamber) of 22 December 2010]. The Court stipulated that Courts must assess ‘whether the relevant procedural rules have been complied with, whether the facts admitted by the Commission have been accurately stated and whether there has been a manifest error of appraisal or a misuse of power.’

Countless other intriguing examples of possible future global law research of EU law spring to mind. Frequently, such examples involve seemingly absolute rules which, upon closer inspection, do not stand up to scrutiny. What to think of the EU principle of supremacy, for example, which surely should attract the attention of global law scholarship.

As this final example pointedly illustrates, the absoluteness of rules invariably denotes a very high position in hierarchies of norms. By querying the absoluteness of rules, the global law project is thereby set to shake legal orders at their foundations. Undisputedly, these are therefore immensely exciting and privileged times to be a scholar or student at Tilburg Law School.