

SENSING POSSIBILITY IN INTERNATIONAL LAW – CONCEPTS AND CATEGORIES FOR THE 21ST CENTURY: A RESPONSE TO FLEUR JOHNS

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[Fleur Johns](#) raises the alarm regarding the potential for algorithmic analysis of big data to change fundamentally the way international lawyers and their allies gather and interpret facts to which international law is applied. Johns invites her readers to join her in seeking ways to save the aspirations of law on the “global plane” from these disruptive forces.¹ In what follows I take up Johns’ invitation, in the spirit of its advancing claims “in a speculative or polemical mode,” asking the reader to withhold for a moment demands for completeness, instead joining in exploration of how the world of international law might be viewed differently if a larger version of Johns’ argument holds.²

Technological Disruption of International Law

Johns develops and deploys an intriguing analytical vocabulary as she explores what she presents as “two illustrative snapshots of changing technical practice: those surrounding the global movement of weapons (through the work of the International Atomic Energy Agency (IAEA)) and the mass movement of refugees (through the work of the UNHCR).”³ Johns offers a “meso-level redescription of quite mundane techniques of legal argument, practice, and analysis” as they are increasingly disrupted by technological mediation, as devices such as application of statistical techniques and inference from samples displace direct, “ocular” observation.⁴ What Johns calls “sensing practice”⁵ captures the way lawyers and allies acquire and understand facts in the world, developing a shared common denominator, or “global sensorium,” of facts salient to the operation of international legal institutions and application of international law.⁶ While acknowledging the imperfections of existing sensing practices as means to constitution and use of international law, Johns sees novel technological mediation as redistributing “power, competence and, resources” in poorly understood ways creating new inequities in the use and experience of international law.⁷

My response to Johns begins with explanation of my starting point in analytical jurisprudence, indicating both the source of my stance and some of its limitations. From that starting point I offer remarks on two of Johns’ central claims, asking whether her redescriptive activity might generate conclusions other than those she has drawn. I point in particular to the possibility that her redescription reveals a gap between the aspirations of international law to govern “activity on the global plane” and what I shall provisionally call regionality in international

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¹ Fleur Johns, [Data, Detection and the Redistribution of the Sensible in International Law](#), 111 AJIL 57, 59 (2017).

² *Id.* at 102.

³ *Id.* at 59.

⁴ *Id.* at 66.

⁵ *Id.* at 59.

⁶ *Id.* at 67.

⁷ *Id.* at 102.

law's actual instantiation—the social fact that law's claims on social life are increasingly experienced in regional contexts such as major cities, whose use of law and response to law constitutes a regional “sensorium” of shared facts and interpretive practices.⁸ In that gap lie reasons for supposing that technological threats to the international law-legal operator may be less serious than Johns suggests, and may even be opportunities for creative co-option of technological mediation in regional legality.

Analytical Jurisprudence and International Law as Social Phenomena

Mirroring in a speedy and limited way Johns' attention to definition of terms and articulation of her perspective, let me explain my starting point in analytical jurisprudence. I am an inheritor of the morally neutral, descriptive-explanatory approach most famously advanced by Hart in *The Concept of Law*,⁹ and extended in various ways by Raz and MacCormick amongst many others. I am however, a somewhat dissatisfied inheritor. I am convinced of the importance of the analytical approach's phenomena-responsive account of legality, which tries to explain and enact what Johns calls “[t]he work of trying to detect and verify certain worldly phenomena.”¹⁰ Yet I am skeptical of descriptive-explanatory analytical approaches which presume the centrality of hierarchically-organized systems of law as the central instances of law and sources of standards of measurement of legality of other instances of law. I hold this view as a consequence of the shortcomings of the stock analytical answer to questions Johns raises regarding the way operators of institutions of law identify facts about the world as relevant to law, then organize and depict those facts in a global common sensibility addressed by international law. The shortcomings of the analytical view are worth rehearsing, in significant part because they raise fresh questions usefully informed by and informing Johns' analysis.

Analytical legal theory is notorious for its long inattention to the phenomena of international law. When Hart concluded in *The Concept of Law* that international law exists but does not yet have a systemic form, analytical legal theorists' attention followed, taking state systems of law to be the most significant instances of law, most worth investigation because of their maturity. The special, systemic mark of such systems is said to be the presence of a “rule of recognition,” which is the shared practice of officials of the system—and consequently a rule—that recognizes what is to be counted amongst the valid norms of the system and in that way contributes to the constitution of the system. Subsequent debate over the nature of the rule of recognition has included Raz's suggestion that there might be a plurality of rules of recognition, defeating Hart's use of the idea as a means to explaining the unity and identity of a legal system. The resolution of this debate is of less interest here than its focus on questions of identity and continuity of state legal systems, with nonsystemic international law left aside as relatively uninteresting. Analytical focus on the identity of legal system has relied on an account of the nature and operations of the officials of the system, serving a vital role as validators of law and operators of rules of change, variation, and elimination. Within this account there is a largely presumed, only partly articulated account that parallels Johns' preoccupation with “sensing” as attribution of salience to particular facts of the world given attention by wielders of legal categories. The most readily cited officials apart from legislators are judges, who sit at an important junction between law and fact. At that junction, attributions of salience to facts are mediated by system-specific rules of, for example, civil procedure and evidence. Much can be said about the analytical approach, its relation to international law, and its means of salience-ascription to fact; but it is a virtue at least that it seeks to be responsive to social phenomena and has a way of being so.

⁸ *Id.* at 68.

⁹ H.L.A. HART, *THE CONCEPT OF LAW* (1961).

¹⁰ Johns, *supra* note 1, at 59.

There are of course serious shortcomings to the analytic approach's near-indifference to novel prima facie legal phenomena whose explanation via state-centered presumptions is at best strained. [Michael Giudice and I](#) have explored these shortcomings at length in the context of these official-focused approaches' capacity to ascribe salience to and take up phenomena such as infrastate legal orders in the form of indigenous peoples' law, or the supra-state legal order found in the European Union.¹¹ Such explanatory approaches are strained to the breaking point, [we have argued further](#), when asked to reach beyond the problem of the identity of legal system and on to characterizations of the continuity of legal system—and along the way, to explain the possibility of transitions from one form of legal order to another, influenced by factors including law's relation to environment, security, and technology.¹² We have offered various remedies to these defects, most notably an account of institutions of law assembled into legal institutions carrying out legal functions in legal orders which may or may not be systemic—an account which notably takes the character of institutions of law as the mark of law, jettisoning the explanatory role of officials¹³ in much the same way as Johns “calls into question a claim . . . that experts' global authority depends most crucially on ruling nonexperts out, and on struggling with other experts over terms, techniques, and terrain.”¹⁴

Technology and the Global Sensorium—Can Disruption Bring Opportunity?

Let me turn now to Johns' summary of her first claim: “that international law and policy work entails struggle to sustain a sensory economy capable of being experienced in common, a prospect that is important for the discipline's maintenance of authority and efficacy.”¹⁵ This claim is, crucially, both about the nature of international law and about the situation of its operators – whether “international lawyers” as Johns sometimes identifies them, or more broadly, officials in Hart's sense or operators of an international legal order whether systemic or otherwise. The “struggle” is for operators to provide “maintenance of authority and efficacy” in a co-constitutive relation with international law via sensing practices generating a common picture of law's lifeworld.¹⁶ We have arrived at the heightened state of struggle in significant part because of the displacement of the operator-driven “ocular” and “tactile” components of the sensory economy by algorithmically-addressed Big Data. Following Johns' example, weapons inspectors' “intensely human . . . intuitions, stylized dispositions, and multisensory capacities of the body”¹⁷ are displaced by “instruments and other measuring and control equipment, 'tamper-indicating devices,' surveillance technology, [and] 'radiation detection and measurement devices.’”¹⁸ This technological displacement further displaces legal operators from their engagement with the common global sensorium to which international law is applied, and puts capacity to inquire into assessments of factual salience beyond operators' reach, into processes of algorithms penetrable by only a few, leaving code where once there were human champions of international law's aspirations.

The “struggle” is no doubt difficult, if we presuppose a legal world in which state systems of law and system-aspiring international law are the central forms of legality needing the attention of legal operators and subject to the displacing effects of technological mediation. Yet for those who find the presumptions wanting, a different picture of the effects and possibilities of technological displacement of legal operators emerges. Consider the implications

¹¹ KEITH CULVER & MICHAEL GIUDICE, [LEGALITY'S BORDERS](#) (2010).

¹² KEITH CULVER & MICHAEL GIUDICE, [THE UNSTEADY STATE](#) (2017).

¹³ See especially, [id.](#) at ch. 4 (“The Elements of Legal Order”).

¹⁴ Johns, [supra note 1](#), at 64.

¹⁵ [Id.](#) at 102.

¹⁶ [Id.](#) at 102.

¹⁷ [Id.](#) at 74.

¹⁸ [Id.](#) at 75.

of following the argument of *Legality's Borders* and *The Unsteady State*, where my co-author and I suggest that the concept of a legal system is better understood as a political ideal or an aspiration rather than a description,¹⁹ as particular state systems have highly specific forms bearing only dim family resemblance to one another as they jostle increasingly with adjacent legal orders giving them their shape – whether internal indigenous peoples' recognition-seeking or transboundary or regional agglomerations. Under such circumstances of variation and constant change, we argue, "it is now credible to be skeptical of the notion of global legality as a set of structurally near-identical and limitedly operationally varied legal systems."²⁰ The international legal order is if anything more variegated than state systems striving to assert their identity and continuity whilst in constant interaction with other legal orders.

We arrive at a rather different picture of international law if we understand it as system-aspiring yet in practice non-systemic with a range of key concepts instantiated in regionally-specific forms at the level of what Johns variously characterizes as proto-jurisdictions or situations of soft law where clear identification of legal operators or officials becomes extraordinarily difficult if not beyond ready explanatory reach. In this picture, the demands for an operator-produced global sensorium enabling a common sense of the application space of international law are pulled back by recognition that international law is not a comprehensive, supreme system. Rather, it is an ideal variably realized in various situations, context-dependent in ways which leave its claims fundamentally particular in their application to specific sensoria reported to international legal institutions by a wide range of formal legal officials and less formal legal operators in soft law situations.

We may recognize that international law asserts quite broad claims realized in particular ways in particular circumstances. Specific instantiations of international law are made particular by a combination of tools and analysis. New technologies make peculiarities of specific circumstances observable (e.g., remote detection of population movement), and improved legal analysis enables recognition that particular law-fact situations may be subjects of state systems of law, or other forms of legal order poorly characterized if tracked by the actions of legal operators and the normative aspirations of an international legal system. In this picture, where international legal concepts are instantiated in regional conceptions within and without state systems of law, the potential for normatively positive "human-nonhuman interaction"²¹ seems very high and the problems of "redistributions of competence and authority"²² may be problems of equitable access to powerful alliances rather than technological displacement of a broad class of legal operators within and without the historic class of legal officials in state systems of law. The rise of global cities with special legal powers, [Greater London](#)²³ and [Greater Paris](#),²⁴ for example, may offer opportunities for constructive use of algorithmic approaches to big data alongside human-scale, ocular attention to the tactile and its expression in a rich regional sensorium.

Rising Regions May Turn Technological Disruption into Identity and Advantage

These insights enable at least the beginnings of response to another of Johns' central claims, "that the capacity of international law and policy to sustain such a sensory economy, and to confront some hierarchies endemic in that

¹⁹ See especially, CULVER & GIUDICE, [supra note 12](#), at 171–176.

²⁰ *Id.* at 175.

²¹ Johns, [supra note 1](#), at 72.

²² *Id.* at 75.

²³ See generally, the [Greater London Authority Act 2007](#) and House of Commons Communities and Local Government Committee, [Post-legislative scrutiny of the Greater London Authority Act 2007 and the London Assembly](#), Fourth Report of Session 2013–14.

²⁴ See generally on the January 1, 2016 launch of Grand Paris, a new entity regrouping Paris and 130 previously independent municipal entities: [MÉTROPOLE DU GRAND PARIS](#) and [La métropole du Grand Paris](#), VIE PUBLIQUE (in French). See also the enabling legislation, [LOI n° 2014–58 du 27 janvier 2014 de modernisation de l'action publique territoriale et d'affirmation des métropoles](#) (fr.).

economy, may be adversely affected by growing recourse to automated data analysis.”²⁵ The need for a global sensorium accompanied by expert operators is diminished and displaced to more regional loci of operation if we accept that the orderly conduct of human affairs enabled by law is a situation in which international law aspires to a universalizing force which it does not and perhaps cannot realize in a legal lifeworld where multiple legal orders instantiate even shared concepts in locally varied ways. In this displacement the effects of automated data analysis may also be displaced from the realm of international law at the “global plane” toward regional sense making of regionally-experienced facts. If there is a struggle to be had to put automated data analysis in its place, that struggle is then at the scale of maintenance of a regional sensorium—a rather less daunting task for reasons of reduced size and increased opportunity for interregional comparison of strategies and success criteria. To be sure, the regional struggle is in principle just as liable as the global struggle to disruption of legal operators’ roles by automated data analysis. The role of the international lawyer is rendered uncertain as we see in Johns’ explanation of “soft law” emerging alongside “hard law” the formation of what I have called “legal operators” capturing both legal officials as we have known them and the subject-matter experts grappling with facts, ascribing legal salience to them, and bringing them to the attention of institutions of law and legal institutions.

In sketching this set of possibilities arising from assessment of Johns’ meso-level redescription, I may be viewed as advocating a kind of abandonment of the aspirations of international law and its class of international lawyers. Yet I would prefer to be read as advocating reorientation of attention from preservation of a global sensorium supporting an international legal order toward inclusion of a complementary concern with regional sensoria. There the claims of international law are played out, as new regional sensoria challenge the capacity of international legal imagination to specify the extent to which its terms may be universal. The regional sensoria equally challenge international law and operators to specify their relation to other legal orders beyond state orders, whether found in familiar entities such as cities or unions of climate-vulnerable peoples, or in novel forms such as blockchain technology enabling Bitcoin and other virtual currencies to create nonstate normative realms supporting novel forms of financial transaction which might yet amount to financial regions.

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My remarks in sum amount to acceptance that technological mediation of the sensory economy may well hamper international lawyers’ capacity to maintain a global sensorium supporting a common sense of the facts addressed by international law’s claims to authority. I harbour hope, however, that this effect may be less negative than feared and potentially more productive than has been realized. Analysis of the role of legal officials in the constitution of state systems of law has resulted in recognition, at length, that such systems are accompanied by other forms of legal order in which officials matter less—so assessing legality demands other indicators of forms and operations of legality. So too, attention to the way international law interacts with “soft law” and protojurisdictions with nontraditional legal operators reveals the claims of international law and its interactions with adjacent forms of normative order to be more complex and localized than has been recognized in formulae driven by presumptions of hierarchy and centrality taking state and international law and their operators as the key determinants of legality’s role in social order. The role of international lawyers in contributing to legality is simultaneously less crucial than had been worried—because international law’s capacities are as much aspirational as a fully-realized system of definite effective jurisdiction—and richer in possibility. They are poised to take up collaborative opportunities in regional forms of international aspiration. There human-technical collaborations hold the prospect of regionally- and locally-sensitive implementation of global aspiration in ways benefiting from comprehensive algorithmic analysis reaching more deeply into experience than historic, necessarily partial insights from the exclusively ocular, tactile-privileging approach.

²⁵ Johns, *supra* note 1, at 102.