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Law Unbounded?*

1 Of Law and Boundaries¹

Historically, boundaries, and in modern history the particular boundaries associated with states have been vital framing devices for law. They have been so not just in the literal sense of encasing and enclosing legal authority – of delimiting legal jurisdiction. More broadly, they invite and enable a whole way of thinking about and of realizing law, one that involves a broad set of benefits and opportunities on the one hand and of limitations and dangers on the other. Today with the increasing globalization of trade, capital markets, human mobility, information systems, political structures and cultural forms and the development of forms of order that escape established patterns of public authority,² it is widely accepted that legal boundaries, though very far from irrelevant, are not what they once were. The aim of this discussion is to investigate some of the normative implications of this shift, with particular reference to the trans-boundary movement and reception of law.

Both the general idea of boundedness and a particular way of specifying boundaries figure large in the construction of law in the so-called Westphalian system of sovereign states of the fading age of high modernity. In the received and stylized version of the Westphalian model,

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¹ For a fuller treatment of some of these themes, see Walker (2015). For an insightful philosophical meditation on the 'bounded' condition of law, see Lindahl (2013).

² According to Dieter Grimm, adopting similar language, these various developments involve the erosion of the two 'constitutive borders' (Grimm, 2010:12) of modern constitutional statehood; namely, those lying between the state territorial 'inside' and 'outside' and those lying between the realm of general public power and private entitlement.

constitutional law registers as the highest and encompassing law of the sovereign state, understood as a coincidence of people, territory and government arranged into a monopolistic authority system which stands distinct from and independent of other such coincidences of people, territory and government and their monopolistic authority systems. Considered globally, the various state constitutional sites established a pattern of mutually exclusive frameworks of original authority. International law – on this version at least, although there are more robust readings of its modern development – was very much a secondary order of law, parasitic upon state constitutional authority. It was little more than the law *between* sovereign states, and as such it both acknowledged these sovereign states as its presumptive authors and understood its threshold purpose to be the very preservation of the very system of sovereign states.

The idea of boundaries enters into this picture in various ways, and this has a number of implications for the overall character of law in the Westphalian system of states. Let us examine this step by step. First, one of the key defining characteristic of the legal-normative order of the modern state is that it refers to something discrete, singular and holistic, possessing an identity and integrity of its parts that distinguishes it from other legal systems; and, therefore, that it presupposes an idea of boundedness. That is to say, whatever it is that provides a discrete legal order with whatever coherence it has *qua* legal order must also incorporate a demarcating element, something that allows us to differentiate between what is internal and what is external to the legal order. Secondly, however, the two more particular defining characteristics of sovereign states – namely that, looking inwards, they possess an internally monopolistic character and that, looking outwards, they be independent of and so non-dependent upon other state normative orders – necessarily imply that the specification of the boundaries of these state normative orders, and so of their limits, can in the perspective of the state sovereigns only ultimately be an exercise in *self*-limitation. But thirdly, then, how can the possession of these twin characteristics by *each* sovereign order – monopoly and independence – be made consistent with the retention of these same characteristics by *all* sovereign orders? Do the pursuit of monopolistic authority and the refusal to defer to any external constraint by some sovereigns not undermine the capacity of other sovereigns to enjoy internally monopolistic and externally unconstrained authority?

It is in answer to that question – the old question of the possibility of anything properly and stably legally-normative arising and subsisting

between sovereigns – that the idea of territory becomes so important in fleshing out the notion of legal and political boundaries under the state system. The organizing principle of the territorialization of authority is one of spatial demarcation. Its suitability to the Westphalian system of sovereignty is a function of three factors. One, it has an unconditional and so absolute quality – jurisdiction is presumptively possessed over just whoever is physically in the territorial area without exception of person or subject-matter except what might be specified in themselves *sovereign-consented* rules of public or private international law. Two, the absolute character of the demarcation is consistent with an idea of mutual exclusivity and so mutual possibility; sovereignty, therefore, is not a zero-sum attribute but one that may be reciprocally accomplished. Three, such reciprocity is encouraged by the symmetry of the territorial condition – the conditions of sovereignty under the basic territorial principle are not just mutually possible but also identical for all parties.

2 The Territorial Principle and the Constitutional State

The territorial principle, in short, is vital in guaranteeing both the internal monopolistic dimension of state sovereignty and also the external dimension – the framework of mutual accommodation through which the variety of sovereign authorities can co-exist without the (sovereignty-denying) imposition of a higher global sovereign. Yet the territorial conception of boundaries has other significant effects upon the modern development of law within the state. To begin with, the quality of law that the territorial state nurtures is quite different from that associated with pre-territorial conceptions of rule. In pre-state forms, legal and political authority tended to be status-based and embedded within the existing hierarchy of social relations. Such status, whether derived from charisma, dynastic descent, divine endowment, or military or other virtue, and whether or not labeled ‘sovereign’, tended to be understood in a relational and multi-layered fashion, as involving a network of connections of loyalty and allegiance between social inferiors and superiors. By comparison, under the rubric of a territorial sovereignty involving a singular and abstract title to rule and a comprehensive scoping of persons and things within the territory, law becomes impersonal in its relations, clear and economical in the assumption and communication of its jurisdic-

tion, and standardized in its method of rule. In turn, these various factors have an ambivalent significance. They serve to increase the social power of law – rule *by* law, but also to encourage the kind of generalization of legal coverage of the state and society and formal equality and uniformity of treatment we associate with the rule *of* law.

In the second place, even though the state of territorial sovereignty predates the constitutional state founded on popular sovereignty, the former supplied some of the structural and cultural conditions that made the latter possible. Structurally, the internally monopolistic and externally non-dependent quality of the container of territorial sovereignty may initially serve the pattern of top-down absolutist rule. Yet in its refusal of limits other than *self*-limits it can equally serve the ideal of collective self-rule, with the acted-upon ‘multitude’ of the absolute state transformed into the self-acting ‘people’ of the constitutional state. What is more, at a deep cultural level, the development of law’s generalizing and standardizing qualities helps feed the core notions of individual freedom and equality, from which the high modern aspiration – and variable achievement – of the constitutional self-government of a single-status community emerges.

When the constitutional state does so emerge, this second incarnation of the territorial state has three key distinguishing features. First, there is originality of collective agency, referring to the idea of such constitutional self-government as the product of an irreducible *pouvoir constituant* or constituent power – a power that resides in ‘the people’ conceived of as a non-derivative and unencumbered source. Indeed, in the tradition of foundational, documentary constitutionalism, this original power is not simply a retrospective construction, a popular homologation of non-popular origins, but through the work of constituent assemblies, popular conventions or other constitution-making devices, may inform a process of active collective authorship. Secondly, there is the equiprimordiality and symbiosis of public and private autonomy, with political voice and civic freedom each the condition of the other and each equally crucial to the realization of the core underlying values of freedom and equality. Thirdly, there is primacy of political identity, referring to a deep aspect of political culture – to the idea that the governing political persona of the individual subject is that of citizenship of the state polity, and that such citizenship announces the general associative bond in terms of which particular interests and beliefs are articulated and negotiated and other commitments and loyalties are circumscribed. In other words, the constitutional state

contains and cultivates the three desiderata of popular self-authorization, a balance between public and private freedom, and the development of a governing form of legal and political identity *qua* citizen which provides both a key status of membership and the sense of affinity and commonality that helps make the polity an effective engine of power. In so configuring itself, the constitutional state, we should stress, is just as dependent on territorial boundaries as its predecessor. Territory is instrumental in defining and confining the people as subject, the citizenry as object, and the relevant sphere of public autonomy. (Walker, 2017)

So, to recap, the notion of boundaries is important under the Westphalian order in developing the idea of the sovereign state with monopolistic and exclusive authority, in nurturing the rudiments of the *Rechtsstaat* or Rule of Law, and in providing an amenable juridical environment for the movement from absolutism to constitutionalism, complete with popular sovereignty, a mix of private and public autonomy, and an idea of citizenship as an earnest of political agency and equality and a key part of the motivational glue of effective political community. In such a vision, boundaries, or at least the key legal boundaries, tend to be state-wide and so sparsely distributed within a territorially coded global 'map' of law; they tend to be relatively settled; they tend to be mutually exclusive and reinforcing; and the exclusivity of their location of the legal subject inside or outside a particular polity tends to be deeply consequential for that legal subject and her life-chances.

This raises a number of major normative challenges. First, just because they *are* so consequential, much turns on the precise specification of state boundaries. Yet this is a specification which is logically prior to any of the social and political cues – a constitutional expression of popular sovereignty, a sense of common citizenship, which might serve to justify its terms, even if these cues often reinforce the original specification once in place. There is something inevitably and irreducibly arbitrary, therefore, about the initial cut, an arbitrariness that is exacerbated by the self-reinforcing tendency. Secondly, in pluri-ethnic or pluri-national communities or communities otherwise divided in terms of the ingredients of active collective identity and affinity, the wider political community of the state may fail the common legitimation and motivation test and be vulnerable to fracture. Conversely, in the name of integration the political community of the wider state may be insufficiently accommodating of difference for minorities located within the boundaries.

Thirdly, and of more immediate relevance to the present discussion, there is a reverse problem for the outsiders. Just as it may be difficult to justify the structural tendency of the territorially-coded Westphalian system to treat all insiders equally, it is quite as difficult to justify the corresponding structural tendency both for the 'inside' or 'own' legal order to treat all outsiders (non-citizens) unequally to insiders, and, more broadly and even more profoundly, for our own legal order to treat its insiders in a manner that is non-equivalent to how all other legal orders treat all 'our' outsiders as 'their' insiders (Shachar, 2009). For, of course, if the legal rights and obligations of free and equal individuals flow from membership of a particular and bounded political community, there can be no guarantee of equivalence of legal treatment of equally free and equal individuals who happen to be citizens of other particular and bounded political communities. Here, we encounter perhaps the most vivid paradox of the modern legal global architecture and its treatment of boundaries. *The very background modern premise of the moral primacy of the free and equal individual, which premise justifies their collective agency through popular sovereignty with its strong self-determining particularity, also has universalist or cosmopolitan implications – a sense of being tied to the human condition itself rather than to some special status or situation in the order of things*³. *And these implications in turn suggest the kind of equivalence or commonality of treatment across boundaries which the prevalence of just that model of popular sovereignty is likely to frustrate.* Common treatment across sovereign boundaries is instead dependent upon the contingency of international legislation, again in the gift of state sovereigns and so effectively inter-particular law, and upon a modest range of claimed global standards under the category of *ius cogens*, general principles of international law, international customary law etc. But how can such a stark distinction between insiders and outsiders, with only limited exceptions for inter-particular law and a narrow band of shared global norms or standards, be justified?

³ This is evident in the very foundations of modern constitutionalism. In the settlement of the first French republic, the 'rights of (universal) man' precede the rights of Frenchmen. Similarly, the 'self-evident' equality of the independent Americans of the 1776 Declaration of Independence is reduced to the unstated minor premise of a syllogism whose major premise holds that that 'all men are created equal.'

3 Globalization and the Mutation of Legal Boundaries

If these are the vexed questions of the Westphalian order, today there is some shift in focus, and so in focal questions. Under conditions of globalization legal boundaries mutate. They become more frequent and more porous, are less often territorially coded, and less strongly so when they are. State legal orders are now joined in the global picture by new legal orders comprising subnational actors, regional supranational actors, global actors, functionally-specific transnational actors and private or hybrid private—public actors. These normative orders may be only incidentally territorially delimited, as in the case of functionally defined global communities such as World Trade Organisation or the hybrid public/private Internet Corporation for Assigned Names and Numbers. Alternatively, even where territory remains significant as a boundary criterion, as it is in the regional multi-purpose legal orders such as the EU, it is neither the only such boundary criterion (e.g. under the EU's differentiated integration arrangement some member states are 'inside' for some purposes and 'outside' for others, as indicated by the development of selective membership domains such as the Schengen-zone and the Euro-zone), nor one that is unique to that legal order, but is instead shared with its member states. Territory, in these cases, stands as a necessary condition rather than a sufficient condition of the jurisdiction of a particular normative order, which is also defined and delimited in terms of purpose. Territory, then, becomes an outer and residual boundary rather than a singular and decisive boundary of the non-state legal order. And just because of the emergence of these new types of non-state order, states, too, become more like the newcomers in terms of relying on a mix of territorial and functional boundaries. They gradually lose the monopolistic territorial jurisdictional claim which was one of the hallmarks of Westphalian sovereignty, while retaining the independence or autonomy of authority in relation to external entities which was the other hallmark.

In a nutshell, the differences between the role of legal boundaries in the new globalizing order and in the Westphalian order of high modernity are quite stark. The key legal boundaries under the globalizing order tend to be no longer exclusively state-based, but are now both state-based and non-state-based. They tend to be no longer primarily territorial, but are now either both territorial and functional or primarily functional. They tend to be more densely distributed within the global map of law

and no longer mutually exclusive, but are now overlapping and interlocking. What is more, in their potential for locating the individual subject within a diversity of polities while the state remains the *primus inter pares* of legal and political communities, any particular such legal boundaries – even state boundaries – tend in some cases (especially in the uniquely strong supranational context of the EU) to be somewhat less profoundly consequential for that legal subject and his life-chances.

This changing significance of boundaries has clear implications for the shape of the three normative challenges set out above. First, in a context of multiple-polity membership and multiple boundaries, the co-ordinates of any particulate boundary may not always be so significant, albeit the specification of these co-ordinates in the absence of singular forms of political identity may be even more problematic than under the Westphalian system. (e.g. who are the ‘Europeans’ of the EU political community when no-one is primarily European – a puzzle which helps account for the frequency with which the EU has extended its boundaries and the potential for further enlargement) Secondly, where boundaries are multiple and layered, the problem of structural minorities within particular communities becomes amenable to partially external and so multi-level solutions rather than purely internal ones.

Thirdly, and most pertinent to us, the problem of common treatment across legal boundaries takes on a new significance. As noted, this is in part a question about the differential treatment of insiders and outsiders within the boundaries of a particular legal order, but it is also, more broadly, about comparability of legal treatment, and so transferability of legal ideas and doctrines across different orders. Partly this is an urgent practical question, and partly it is a deeper ethical question, again with important long-term practical consequences.

In the first place, the practical question. More frequent boundaries and more overlapping boundaries implies more boundary disputes involving judicial and other actors. Therefore, as the recent intensification of debate over constitutional pluralism has shown, there is a growing demand for trans-systemic and so non-hierarchically ordered principles (or pragmatics) to resolve issue arising between normative orders. (Walker, 2016) Then, the deeper ethical question. Where the claims of popular sovereignty and common citizenship no longer sound so comprehensively in their highly particular justification of the authority and content of a normative order, and where there are instead more and more overlapping and functionally limited orders and more and more overlapping mem-

berships of such overlapping orders, the sense of the inherent connectedness of peoples and their legal and political orders, always latent within the modernist vision of free and equal people, and so of the amenability of legal norms to migration across borders, becomes more palpable. In turn, this has cumulative and self-reinforcing effects on legal practice, as with the development of EU citizenship as a compulsory complement to member state citizenship, or the acceptance of state citizens as direct subjects of international human rights treaties, or the immediate jurisdiction of the International Criminal Court, or, more generally, the growing practice of recognition of foreign law or legal judgments or international law or legal judgments in national courts.

4 The Migration of Legal ideas: The Justificatory Burden

This gathering trend towards the trans-systemic connection of legal statuses and positions and the more intense migration of legal ideas, and so towards the increasing porosity of normative borders, increases the justificatory burden. That justification cannot simply be negative – that the high modern idea of collective self-determination of a particular, holistic political community has lost some of its traction due to powerful economic and cultural forces and needs to be accommodated as an inexorable fact of global political life. There must also be a positive justification for how we treat the new blurring of legal orders and interdependence of forums of authority – something beyond a mere recognition that we cannot avoid their closer interconnectedness. Such positive justifications of the trans-systemic reception of legal ideas can be *particular*, *universal* or *modular* in nature. Let us look at these three forms briefly in turn, with particular reference to where the justificatory burden is most palpable; namely the invocation of foreign or international law in national courts.

The *particular* refers to a justification which is couched entirely in terms of its utility to the receiving or borrowing system conceived of as a self-interested monad, without reference to any broader conception of an extra-systemic or trans-systemic source, resource or other ethical consideration. Such an approach need hardly detain us, since it simply avoids or ignores, and so begs the relevant question. Why borrow, why connect? If the outside legal system is just one part of the factual environment – a mere datum from which the inside system draws when making its own

self-interested calculations, then any link is merely contingent, the knot of connected legality just incidental. If we have nothing to learn from the other, and not even anything to gain from displaying consideration of the other beyond what is necessary to serve our immediate needs, then there is no need to mention the legal other as normatively relevant. But of course, this is not the case. There is a regular and growing practice of the conscious borrowing or transfer of legal ideas, and, at least implicitly, this invokes some connection between the trans-boundary giving and receiving of the norm which is thicker than the utility of the moment and of the particular transaction. As Waldron suggests in his discussion of the evolving idea of *ius gentium*, legal systems always take from other legal systems either on the basis that there is something to learn from the other order just in view of its being a species of the one 'law' genus, or because the other law is somehow authoritative or of special persuasive value to us, again in view of its being a species (all the more so if it is the same or a similar species) of the one 'law' genus. (Waldron, 2005)

Does that mean, then, that the epistemic or authoritative value must rest on some notion of a realm of *universal* normativity – of a set of moral norms that properly apply to all of us regardless of legal boundary constructions? After all, to recall our earlier discussion of the foundations of modern state-centred constitutionalism, is the deep tension or paradox of the modern legal and political imaginary not precisely about the competing claims of the universal and the particular from one and the same deep moral source of ideas of (both individual and collective) freedom and equality, so justifying a strong investment in universal norms to balance the particularity of the bounded sovereign state and its post-state analogues? And, supporting that conclusion, do we not see this tension played out in many contexts of discussion of law in the age of globalization, whether in the debate over unity versus fragmentation (i.e. a single general order versus multiple 'self-contained systems') in international law, or in the discussion about universality versus cultural particularity in human rights law, or in the debate over the self-evident content and status of crimes against humanity in international criminal law? Do we not best conceive of both the epistemic and the authoritative dimensions underpinning the mobility of constitutional ideas in terms of a contribution to some kind of universalism? In learning from each other when addressing our own problems, or in recognizing that there is something authoritative about the laws of others just in view of the weight of the argument that like cases should be treated alike across legal orders, each of which

places freedom and equality at its moral centre, are we not committing to some form of universalism? Granted, this may be what Michael Walzer would call an 'iterative' rather than a 'covering law' universalism, where we are both informed by previous provisional iterations of the universal norm in resolving our own context specific and culturally specific cases, and in turn feed these solutions back into the reiterated universal. (Walzer, 2007) Under such a model, the global is conceding something to the local, but does that not simply make it a more attractive model, one that recognizes and seeks to resolve the tension between the universal and the particular in its own terms? In this way, can the universal not fill the gap left by the inadequacy of the sovereign particular – an inadequacy, to recall, that has been aggravated under conditions of globalization?

The answer to these questions rather depends upon what we mean by universalism. It may be a context-specific universalism rather than a rigidly 'top-down' universalism we are referring to, but that is not the only spectrum along which we can differentiate between different degrees of universalism. We may, in addition, conceive of a range between a universalism of the whole and one of the parts. By a universalism of the whole, or a holistic universalism, I mean a universalism not just of individual legal concepts and precepts but of the entire joined-up model of the legal order. On this view, any particular legal order should not simply utilize the same general ingredients (albeit with some local seasoning), but, to pursue the cooking metaphor, should follow the same basic recipe. Or to switch metaphors, not just the individual body parts but the overall anatomy should conform to a particular template. To the extent, for example, that the universal reception and application across legal systems is advocated of a model of constitutional structure that places an overall type of legal norm categorically at the top of the normative hierarchy, such as classical first-generation individual rights provisions always trumping the democratic preference of the legislature, this would be of a system-shaping quality sufficient to occupy the holistic end of the spectrum. But trans-boundary migration at this level of intensity does not in practice take place, or where it does it tends to be viewed as a quasi-imperial imposition or attempt – a particular masquerading as universal: and in any case in principle it does seem to redress the balance too far, encroaching too much upon the remaining legitimate domain of the collective particular.

If, on the other hand, we contemplate a universalism of the parts, we seem to be on more promising ground in accounting for the legitimate scope of trans-boundary migration, and indeed for the burgeoning

practice of the trans-boundary migration of ideas and doctrines. Some writers have suggested models of legal mobility along these lines. Klaus Gunther, for example, has recently discussed the idea of a universal code of legality which transcends borders, and which, it follows, can provide the general context of shared meaning for the movement of legal ideas between systems. (Gunther, 2008) The idea of a code suggests something like a language, a general set of discursive and normative resources which can be drawn upon differently in different legal orders, from very broad categories of legal architecture such as ‘competence’ or ‘sanction’, to more operationally focused but still general concepts and principles, such as ‘fair procedure’, ‘proportionality/balancing’, ‘strict liability’ or the idea of special status relationship giving rise to special duties (in contract, tort, criminal liability etc).

The universal code is a suggestive idea. Yet it carries with it an obvious whiff of danger – a threat that it might collapse into the very opposite of holistic universalism. For rather than the ‘imperial’ imposition of a template, we may end up with a purely demand-led eclecticism, one that threatens again to beg the question of why we invoke the intelligence or authority of other law when the aim is exclusively to improve one’s own.

But that would be to miss the potential of a code. Rather than thinking of a purely demand-led eclectic borrowing from a general arsenal as the only alternative to holistic universalism, we can conceive of something in between these two extremes. This is where, to invoke a final metaphor, the idea of *modularity* enters the picture. A modular system, say, in education or – more vividly – in furniture design, is one where the parts exhibit a certain degree of standardization. If you like, they have certain universal features – whose (normative) properties can be adapted to a broad but finite range of environments or external purposes (both within the same house and in other houses), in so doing combining with other standard or universal parts, again in various but finite ways.⁴ Similarly in law. If we look at the transnational career of concepts such as proportionality, or subsidiarity, or fair procedures, what we see is neither a universal rolling out of the same idea in the same context nor a purely opportunistic and path-independent redeployment of an old idea for new purposes. Rather, we observe a series of incremental adaptations of standard forms to new purposes and new design scenarios which retain much of the nor-

⁴ For a rather different deployment of the furniture metaphor to connect legal systems, see Frankenberg (2010).

mative purpose of the old (e.g. the movement of proportionality between criminal law and administrative law; or the development of the idea of subsidiarity from one of the relative autonomy of associations *from* the state to the relative autonomy of levels *within* the state or *between* the state and other levels of polity; or the movement of a duty to give reasons from public authorities to private authorities also implicated in the provision of public goods), and do so in ways that can rely upon trans-systemic ‘fit’ with other basic and standard or universal elements of legal furniture (such as the justiciability of disputes, or the recognition of a legitimate core of executive discretion)

In this manner legal systems do connect, and, indeed, harbour an open-ended potential to connect. We do learn from the other, and can even indeed ascribe some authority to the other, by reference to the adaptability and new combination of standard forms which store and convey certain basic normative purposes. It is neither ‘top-down’ holistic universalism nor ‘bottom-up’ eclecticism, therefore, but something in between, in the inherent modularity of law, which allows legal systems to continually reconnect across borders. They make these connections in ways that simultaneously underline their unique individual design while demonstrating – and hopefully stressing and refining the best features of their deep family resemblance.

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