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# The Boundaries of Legal Orders in a Postnational Setting: Conceptual, Normative and Institutional Issues\*

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The boundaries of state legal orders are becoming increasingly irrelevant in the era of postnationalism. This paper argues that postnational legal orders don't overcome boundaries; instead, they set new (spatial) boundaries that include and exclude. Discussing how legal boundaries do their work of including and excluding, I argue that a central normative challenge confronting law in the future is how to make sense of freedom, justice, and security if we can neither rely on the communitarian assumption that these values can only be achieved in a bounded community, nor on the cosmopolitan assumption that these values can only be realised in an all-encompassing legal order. Institutionally, the challenge is to devise arrangements that can foster boundary negotiations between legal orders in a way that neither assumes that those negotiations should aim to join together the orders into a single, all-encompassing global order nor that they should safeguard those legal orders as simply separate and distinct units.

### 1. Legal Boundaries in the Postnational Era

Legal boundaries are becoming increasingly irrelevant in the era of postnationalism – or so we are often told. This means, spatially speaking, that law has become more global, more local and more transversal than the nation-state. The World Trade Organisation, for example, purports to be global in range. In contrast, the informal legal orders of squatter settlements illustrate local forms of law that are not simply derived from, nor

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\* My contribution is written from the perspective of a legal philosopher, and as such, is as of much an attempt to ponder which legal developments in the coming decennia pose a renewed task for philosophical thinking, as an attempt to outline a philosophical interpretation of issues that will play an important role in legal developments into the coming two decades. The boundaries of legal orders in a postnational setting are one such theme.

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authorised by, the state order. In yet another example of the disintegration of borders, multinational corporations are governed internally by new forms of transnationally formulated rules through disparate processes of the various legal orders. A related process of fragmentation is taking place that affects the boundaries and content of such legal orders. Whereas state law and international law have largely exhausted the scope of positive law, or so it has been taken for granted, we now witness a plethora of more or less autonomous cross-border legal orders which claim to regulate specific kinds of human activity. Think of codes of professional self-regulation, *lex mercatoria*, technical standardisation and ICANN (the Internet Corporation for Assigned Names and Numbers). The temporal boundaries of the nation-state also seem to be coming under sustained pressure, as we have become acutely aware that a manifold of histories can be told about collectives. For example, the laws of indigenous peoples within and across nation states evoke histories that liberate ways of living in common; yet they are stifled by official accounts of collective time. Finally, the civic boundaries of the state are also becoming blurred. The massive distinction between citizenship and alienage cannot capture a multitude of contemporary forms of political membership and affiliation. The notion of a ‘denizen’ attests to the in-between status of individuals on the move around the world, a status which is not derivative or merely privative with respect to citizenship.

The fourfold legal boundaries of the nation-state – its spatial, temporal, material and subjective boundaries – are undoubtedly forfeiting at least some of their traction on human behaviour. Indeed, it has become somewhat platitudinous to assert that contemporary social relations are inadequately described and explained as taking place within – and to some extent between – sovereign states with mutually exclusive territories, populations and governments. In the same way, it is generally accepted that the doctrinal framework that took for granted a largely complementary relation between municipal and international law is incapable of affording sufficient conceptual and normative orientation in the face of globalisation. In particular, the process by which the nation-state’s legal boundaries lose some of their hold on human behaviour is celebrated as marking the passage from a monistic understanding of social life to the consolidation of pluralism in law and politics. If the thought patterns that underpinned the nation-state sought to protect the integrity of its legal boundaries, often at the cost of diversity, the advent of postnationalism

opens up the possibility of a pluralistic politics less mindful of securing legal boundaries and more respectful of difference – or so we are told.

Yet there is a question which has received little if any systematic and sustained attention in the legal and political theory of postnationalism, perhaps because globalisation tends to evoke the image of an unrelenting process of transcending or overcoming boundaries. The question is this: are these four kinds of boundaries as such becoming irrelevant for legal orders in a postnational setting? This question is particularly apposite with respect to spatial boundaries: does the deterritorialisation of law amount to its ‘delocalisation’? More pointedly, does postnationalism offer hope of moving beyond the logic of inclusion and exclusion that animates the bounded nation-state? Or does that logic continue to hold sway, even though postnationalism perhaps transforms how it does its work?

These preliminary considerations suggest that the conceptual, normative, and institutional stakes of the question about legal boundaries are considerable, and, in my opinion, will become increasingly acute during the coming decennia:

- The central *conceptual* problem raised by the uncoupling of law and state turns on the relation between boundaries and legal order, namely whether postnational legal orders can be *orders* at all, unless they involve spatial, temporal, subjective and material boundaries of some sort. If not, and so I will argue hereinafter, then one of the main tasks for legal theory during the coming years will be to develop a notion of legal order that is sufficiently general to accommodate both the nation-state and postnational legal orders as species of a single genus, while also being flexible enough to concretely explain the differences between these kinds of legal orders.
- This set of conceptual problems is intimately linked to a circle of normative issues. In particular, the question arises whether in the future we will be able to make legal and political sense of fundamental values such as freedom, justice and security, both severally and in conjunction with each other, if it can no longer be assumed that the boundaries of nation-states will remain the sole or even primary condition for, and the object of, lawmaking. The background issue here is the more general debate concerning practical rationality as it impinges on the problem of inclusion and exclusion. Indeed, what renders the boundaries of legal orders a particularly

urgent theme is that their task is to include and to exclude. In particular, at stake is whether normative conceptions of freedom, justice and security presuppose that the realisation of an all-inclusive legal order is the cardinal injunction driving the rationality of political action. This is of course the basic stance of cosmopolitanism, a stance that sets it at loggerheads with various strands of communitarianism, which assert that freedom, security and justice are only possible within bounded communities.

- Finally, the emergence of postnationalism also brings institutional questions to the fore. In particular, the question arises whether and how postnationalism introduces new ways of institutionalising the process of drawing the boundaries of legal orders, not least in the face of their political contestation.

## **2. A Thought Experiment**

The remainder of my contribution is dedicated to sharpening these questions, rather than attempting to resolve them. Or more precisely, I want to provide what I hope is at least a plausible, albeit highly abridged, argument for why boundaries are ingredient to any imaginable legal order and why, if this argument holds, the normative and institutional questions posed above will become particularly urgent in the coming decennia. This section lays out the core of the argument by reflecting on a thought experiment, namely, the foundation of a world polity. This case is interesting because, on the face of it, a world polity would have no boundaries, or at least no spatial boundaries (in the form of an inside and an outside), nor subjective boundaries (everyone would be included). What, then, would it take to found a world polity as a legal order, regardless of the specific mode of political organisation that were to be chosen for it?

First and foremost, it would be necessary to determine, at least minimally, a common or shared interest. In other words, it would be necessary to positively indicate at least some values and interests that are deemed to be shared, and which the legal order of the world polity is called upon to protect and foster. Needless to say, these values and interests can change through time. Closer consideration suggests that if no world polity could get off the ground without at least a minimal determination of what its members share in the way of interests, values, projects and the like, this also means that no world polity is possible that is not

bounded materially (that is, in terms of the kind of behaviour that is allowed or disallowed), subjectively (that is: in terms of who is a member of the polity and, more generally, who ought to behave in the ways prescribed by the legal order), temporally (that is: in terms of a shared or collective understanding of time), and spatially (that is: in terms of the inside/outside distinction). Let's consider each of these aspects in the order I presented them.

First, in the process of articulating what is deemed to be the collective interest, it would be necessary to establish, however provisionally, who ought to do what. The key here is the reference to a determined common interest: it would be necessary to select some interests as worthy of legal protection, and discard others, usually implicitly, as legally irrelevant. See here, then, a first way in which a world polity would be bounded: it would make available a determined schedule of rights and obligations, in which certain kinds of activities are allowed and disallowed, and a host of other kinds of activities would not even be considered, as they are simply deemed irrelevant from a legal point of view.

If a world polity would have to determine, and thereby delimit, the 'what' of behaviour, it would also have to delimit the 'who' of behaviour, beginning with membership in the world polity. This may sound odd, at first sight, for by definition it seems, everyone would count as a member. But who counts as part of 'everyone'? Would membership be limited to all *humans*? If so, what about those collectives which include non-humans in the circle of law, in fact for whom the very distinction between human and non-human may not only seem unintelligible but even horrific, and which Western thinking dismisses as 'animistic' or 'primitive'? Moreover, and focusing on human beings, the possibility of identifying members of a world polity entails, as its correlate, the possibility of stripping individuals of membership if they radically contest what is deemed to be the common interest of the collective. No less than in a regional, national or sub-national community, a world polity would demand bounded membership, even if its civic boundaries remain initially latent.

The temporality of a collective would also be bounded. By this I don't mean the trivial point that a world polity would be founded on a given date that could be fixed on any of the multiple calendars in circulation. What I mean is that part of what goes into being a collective is a shared understanding of past, present and future. To be sure, this temporal arc need not be linear; nor, consequently, need the polity be temporally

oriented towards the future, as we have become accustomed to taking for granted in modernity. But precisely because time can be lived through collectively in a variety of ways, the collective temporality of a world polity would be common in the twofold sense of a time that is shared by, and distinguishes the members of that collective. For this reason, a world polity would unfold a bounded temporality.

Yet would not the distinction between inside and outside disappear in a world polity? No. The spatial articulation of a common interest for the world polity would require a distribution of places determining where behaviour ought or ought not to take place. Although a world polity would have no outside in the sense of *foreign* places, or at least not initially, the inclusion and exclusion of interests articulated by the spatial boundaries that carve up the face of the earth into a distribution of places entail that the polity's foundation would give rise, at least latently, to places that do not fit in the distribution of places made available by the world polity, and which are intimated by behaviour that contests the claim to commonality raised on behalf of the global distribution of places. To the extent that a world polity, if it is to be a legal order, must in some way organise the face of the earth as a common distribution of places, any of the boundaries that mark off a single legal place from other legal places in the world polity also appears, when contested, as marking off the whole distribution of legal places as an inside *vis-à-vis* a strange outside. More precisely, a world polity would harbour an outside *within*. While the distinction between domestic and foreign places would disappear in a world polity, the inside/outside distinction would remain in the form of the distinction between the world polity's own, familiar space and places that are, in the twofold sense of the term, 'outlandish'.<sup>1</sup>

This is, of course, only one example. But my general claim, one that can be supported on the basis of careful empirical descriptions of a wide variety of forms of law, is that all law is bounded in these four ways. Let me summarise the upshot of this thought experiment in the following thesis: while the kinds of boundaries to which we have become accustomed in the municipal/international law paradigm are certainly contingent features of law, law would not be law unless it establishes, in one way or

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<sup>1</sup> I have developed these ideas at greater length in my article. See Hans Lindahl, "A-Legality: Postnationalism and the Question of Legal Boundaries", in *The Modern Law Review*, 2010, vol. 73, no. 1, pp. 30-56.

another, the appropriate times and places for the appropriate subjects to engage in appropriate forms of behaviour. In this minimal sense, all law is bounded law.

I need to take a second step to complete the minimal conceptual framework that will allow me to turn and discuss the normative and institutional questions posed in section 1. This second step focuses on the two functions of boundaries: separating and joining. How do boundaries separate and join? A concrete example is far better than an abstract exposé. Consider the European Union, in particular the consideration of the Preamble to the Treaty that reappears in all later treaties, up to and including the Treaty of Lisbon: “determined to lay the foundations of an ever closer union among the peoples of Europe”.<sup>2</sup> While the European Union has considerably widened the scope of its activities since its inception in the Treaty of Rome, the EU remains fundamentally a project of economic integration centred on the realisation of a common or internal market. As the Preamble to the Treaty of Lisbon puts it, the EU’s Member States are:

Determined to promote economic and social progress for their peoples, taking into account the principle of sustainable development and within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields ...<sup>3</sup>

These two considerations, when read in conjunction, reveal how boundaries do their work of joining and separating. Notice, in effect, that the Treaties do not only distribute space by separating and opposing an inside (the European internal market) and an outside (the external market); in the same movement by which the Treaties close off the European polity from the rest of the world, they also include the EU and what it is excluded there from in an encompassing spatial unity – a world market,

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<sup>2</sup> Consolidated Version of the Treaty on the Functioning of the European Union as amended by the Treaty of Lisbon, 1 December 2009, Recital 2 of the Preamble, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:EN:PDF>, last accessed 25 March 2011.

<sup>3</sup> Consolidated Version of the Treaty on European Union as amended by the Treaty of Lisbon, 1 December 2009, Recital 10 of the Preamble, available at [http://www.uchastings.edu/faculty-administration/faculty/memelink/class-website/docs/Preamble\\_of\\_The\\_Treaty\\_on\\_European\\_Union.pdf](http://www.uchastings.edu/faculty-administration/faculty/memelink/class-website/docs/Preamble_of_The_Treaty_on_European_Union.pdf), last accessed 25 March 2011.

the denizens of which are viewed as economic actors subject to the rules of market exchange. What one might call the ‘logic of boundaries’ is at work here: boundaries don’t simply join ‘and’ separate – they join by separating. Indeed, the separation of an internal and an external market also joins them together as parts of a single world market. But the work of boundaries does not stop here. Rather, the Treaties distribute space by separating Europe from itself; they split Europe, including it as a common market and excluding other possible interpretations of what constitutes Europe as a common space, such that contestation of the common market can erupt in the name of ‘another Europe’. This is what occurred, for example, in the European Social Forum, which took place in Malmö, Sweden, in September 2008. The homepage of the event begins with the caption “Another Europe is possible!”, and the site goes on to invite participants to submit initiatives that could flesh out the contours of an alternative to the neo-liberalism animating the European integration project.<sup>4</sup> The closure that gives rise to the common market cannot represent Europe as the common space of a community without folding a strange Europe into what is claimed to be the EC’s own place. Whence the second leg of the logic of boundaries: boundaries don’t only separate and join; they separate by joining. Concretely, boundaries join the EU’s Member States into a common market by separating the latter from another Europe. Moreover, the Treaties also distribute space by separating the world from itself. In the same movement by which they split Europe, they also split the world, representing it as a market. The cry, “Another world is possible”, uttered in places such as Porto Alegre, reveals that the EU cannot take its place in a world market without folding a strange world into the world it calls its own. The logic of boundaries kicks in yet a third time: the boundaries of the internal market join it to the external market by separating the world market from other worlds.

There is no space here to offer a justification of why this is a recurrent pattern in all legal orders, rather than a pattern that simply holds for the EU. Such a justification would lead to discussing the conditions that govern the genesis or emergence of legal orders. Rather than broaching this difficult topic, I content myself with advancing a second thesis:

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<sup>4</sup> See European Social Forum, available at <http://esf2008.org/>, last accessed 25 March 2011.

boundaries don't simply join and separate; the crucial point is that they cannot separate without joining, nor join without separating.

### 3. Beyond Cosmopolitanism and Communitarianism

I would now like to consider how the two theses I have advanced about legal boundaries in the foregoing section impinge on the normative and institutional issues outlined at the outset of this paper. I will concentrate primarily on the normative aspects, reserving a few remarks for the institutional aspects in the closing remarks of the paper.

I noted that the reason for which legal boundaries are such an urgent issue is that boundaries include and exclude. This has an immediate bearing on fundamental values such as freedom, justice, and security. Indeed, the territorial nation-state has to a great extent been the locus of these values during the heydays of the municipal/international law paradigm. Succinctly, freedom has been institutionalised as a bounded freedom, justice as a bounded justice, and security as a bounded justice. This situation has been the object of extended and conflicting normative scrutiny by communitarianism and cosmopolitanism. Communitarianism has been largely sympathetic to this situation, defending the view that a bounded community is the *conditio sine qua non* of these and related values. Referring to justice, Michael Walzer, for example, argues that “the idea of distributive justice presupposes a bounded world within which distributions take place: a group of people committed to dividing, exchanging, and sharing social goods, first among themselves. That world ... is the political community”.<sup>5</sup> On this view, a right to inclusion and exclusion is ingredient to the very concept of distributive justice. This means that, subject to certain limitations, it is up to a political community to determine who and what may enter the community. As he candidly puts it, “no one on the outside has a right to be inside”.<sup>6</sup>

The communitarian position has been strongly critiqued from a cosmopolitan perspective. There are at least two central tenets that govern cosmopolitanism's stance with respect to legal boundaries. The first is that the boundaries, especially the territorial and civic boundaries of any concrete politico-legal community, are contingent. Jürgen Habermas, for

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<sup>5</sup> Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality*, Basic Books, New York, 1983, p. 31.

<sup>6</sup> Walzer, 1983, p. 41, see *supra* note 5.

example, avers that “from a normative point of view, the social boundaries of an association of free and equal consociates under law are perfectly contingent”.<sup>7</sup> As a result, there is no such thing as a ‘right’ to inclusion and exclusion that can be derived from the mere fact that the legal boundaries of a given community have been drawn in a certain way. To the extent that contingent boundaries determine the scope of freedom, justice and security, to that extent the normative content of freedom, justice and security are also undermined. What is the alternative to contingent boundaries? This brings us to the second tenet of cosmopolitanism. Boundaries are valid in a strong sense of the term to the extent that they are taken up in an all-inclusive legal order. And this means a legal order, the boundaries of which could obtain the consent of all those whose behaviour is limited thereby. An all-inclusive legal order, in the cosmopolitan reading, would be the order of freedom, justice and security.

The analysis I have offered of legal boundaries takes issue with both views. It shares the conviction that legal orders are bounded orders with communitarianism, albeit not necessarily in the way taken for granted by communitarianism. Whereas the latter would view a world polity as an unbounded community, my argument is that it is also bounded. But I take strong issue with communitarianism on a key point. Communitarianism takes for granted that boundaries draw a clean distinction between ‘our own’ community and ‘alien’ communities. If, as I have argued, boundaries include what they exclude, and exclude what they include, then what is strange is not simply outside – it is also within. And what is outside is not simply strange – it is also to a lesser or greater extent our own. Europe is an illustration of why communitarianism is dead-end; there is ‘another Europe’ that radically contests the claim to commonality raised on behalf of the European Union. Conversely, the EU is not only inside: it is also outside in that it views itself as part of a world market, in the same way that calls for ‘another Europe’ to go hand in hand with calls for ‘another world’.

But my account of how legal boundaries do their work also takes issue with cosmopolitanism. To be sure, it shares with cosmopolitanism the conviction that boundaries are porous and amenable to transformation, such that a certain integration of what has been excluded is possible. In

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<sup>7</sup> Jürgen Habermas, *The Inclusion of the Other: Studies in Political Theory*, Ciaran Cronin and Pablo de Greiff (eds./trans.), Polity Press, Cambridge, 2005, p. 116.

other words, it shares the conviction that boundaries include what they exclude. But cosmopolitanism takes for granted that an all-inclusive legal order is possible. Although its realisation may have to be indefinitely postponed, boundaries can be overcome in a historical process in which, if all goes well, legal orders become ever more inclusive. If time, on a cosmopolitan reading, is a linear history in which the future marks the vanishing point at which humanity actualises itself as a world community, space, on that reading, manifests itself as an ever-expanding series of concentric circles. And, as we know, circles, even if they expand, have a centre and a periphery. The problem with this approach is that it overlooks the second feature of what I earlier called the ‘logic of boundaries’; boundaries don’t only include what they exclude – boundaries also exclude what they include. To return to the example of Europe, the EU does not only include itself and what it excludes as parts of a world market; it also excludes other Europeans and other worlds in the process of including them as parts of the world market. It would not be otherwise if the path the European integration project had taken were different. Because legal boundaries include by excluding, and exclude by including, there can be no all-inclusive legal order, not even an order of human rights.

This argument amounts to a strong defence of political pluralism. Cosmopolitanism often presents itself as a pluralistic theory of politics and law. But the plurality it envisages is, as we have seen, plurality within the unity of an all-inclusive legal order, which is highest, normatively speaking. To this extent, cosmopolitanism is thoroughly monistic. Communitarianism also presents itself as pluralistic, arguing that freedom, justice and security can only flourish in bounded communities. Yet, to the extent that communitarian defences of political pluralism rest on the assumption that boundaries include those who belong to the community and exclude the others, they defend a monistic project of politics and law. By contrast, a strong form of political pluralism emerges when one recognises that boundaries cannot exclude without including, nor include without excluding. For it entails that legal orders are neither parts of a whole nor well-demarked units that co-exist in isolation from each other. The appropriate image here is not separate ‘billiard balls’, as in communitarianism, nor expanding ‘concentric circles’, as in cosmopolitanism, but rather variable intertwinements. My hypothesis is that the era of postnationalism into which we have entered is the era of pluralism in this strong sense of the term.

If so, then at least two issues will require considerable attention in the coming decennia. The first, what normative sense we can make of freedom, justice, and security in a postnational setting if we can neither rely on the communitarian assumption that these values can only be achieved in a bounded community, nor on the cosmopolitan assumption that these values can only be realised in an all-encompassing legal order? The second, what institutional arrangements in the postnational era could foster boundary negotiations between legal orders in a way that neither takes for granted that the task of those negotiations is to join the orders together into parts of a single, all-encompassing global order, nor that their aim is to safeguard those legal orders as separate and distinct units?