Book review – Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*, Oxford, OUP, 2013, 286pp.[♣]

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In his book about 'Who owns Scotland and how they got it', Andy Wightman tells the story of a miner walking home one night with a couple of pheasants in his jacket when he gets stopped by the landowner. This is my land, the laird tells him, and my pheasants, so hand them back. The miner says, Your land - how did you get it? I inherited it from my father, says the laird. And who did he get it from? From his father; this land has been in our family for four hundred years. And how did they get it then, four hundred years ago? Well, says the laird, they fought for it. 'Fine', replies the miner. 'Take your jacket off and I'll fight you for it now.'[1]

Sometimes situations or events rupture the routine expectations we have and which we behave in accordance with. In doing so they can expose the grounds on which these expectations rest, and they may force us to consider in a new light what has been extensively taken for granted. In responding to such an experience it is sometimes a matter of re-adjusting, of shifting the cognitive framework, of re-interpreting. Other times, the jolt is more serious and cannot be readily assimilated. In the shock it produces, there is a sense of unease, a sense of strangeness – which is sometimes registered in uneasy laughter – that will not easily go away. The story of the miner and the landowner might work in this way.

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[1] Andy Wightman, *The Poor Had No Lawyers*, Edinburgh: Birlinn, 2013, 4-5.

Landholding is not something we take our jackets off and fight for. It is regulated by the laws of property, inheritance, title registration and the like. Except, that at some point it isn't, or wasn't. That property in land is gained, at some time in the past, by violence or theft is not likely to be disputed; but it does commonly have to be forgotten. This goes as much for continents – Australia in 1788, for example – as it does for landed estates (and the birds that just happen to live on them). To be too-reminded of this however provokes a sense of disorientation. And precisely because of this, it feels like something must be done about it by way of response. But what exactly? Even that greatest of philosophers of consistency, Immanuel Kant, in noting the same problem about theft and property, was forced to respond in a most unphilosophical way: 'Best not to dwell on it', he said, 'just start from where we are and what we've got now.' (Perhaps someone should have asked Mr Kant to take his jacket off …)

Where exactly the boundary between property and theft is drawn – between what is a legal gain and what an illegal one – seems to have a degree of contingency to it. But that there *is* such a boundary, which must be established if we are to have settled – or ordered – ways of acting with respect to each other and things in our society, appears however, to be necessary. Yet this very necessity seems, in turn, to have something of the contingent about it - in the origins of landed property, a *taking*, say, that is, from the perspective of the order it brings into being, itself neither legal nor illegal: in Australia, a non-justiciable act of sovereignty that 'founds' the nation and its law; or in the case of the laird's ancestor, the founding of right on the basis of might.

To leave it at that gives some inkling of the difficult, even paradoxical, foundation

problems of legal systems which have pushed theorists ultimately towards postulating some kind of conceptual presupposition or acknowledged circularity or theoretical amnesia; a grundnorm say, or a rule of recognition. But Hans Lindahl's book does not leave it at that. Taking its lead from the concrete conditions and experience of legal order and ordering and pursuing without relent what it means to bear witness to the ruptures, shocks, and disorientations experienced in the face of what is strange or alien, the analysis pushes far further than most contemporary legal theorizing. It is a sophisticated and genuinely thought-provoking account of legal order and ordering and it challenges readers to think hard about what he identifies as 'a-legality' and the politics thereof. It is not for the theoretically faint-hearted and, we might say, it gives a shock to the unintended complacency of much conceptual as well as normative strands in contemporary jurisprudence.

It is important to keep in mind that while the sense of disorientation adverted to above is in one sense exceptional, though not straightforwardly so, it is not as rare as the examples of property in land might suggest. Modern western societies, or to be more accurate, modern western legal collectives, are constantly being challenged by new (and sometimes old) normative claims which have to be responded to. Many states and populations, for example, are challenged by terrorist groups who combine normative justifications with violence; some states challenge other states and populations by invading them with a combination of different normative justifications and violence. States themselves are likewise challenged by supra- and sub-state normative orders and claims in ways which may threaten to fragment or reconfigure their authority, as in the case of the European Union, or even break them apart, as was possible in the recent

referendum on Scottish independence. Ruptures may not be predictable or regular – that is in part why they disturb – but they are not infrequent. And since legal collectives are multiple and extensive, the state being only one among a wide range, the challenges and threats to legal orders are potentially numerous, complex, and varied.

Hans Lindahl seeks to make sense of all this complexity by developing an analysis of how legal collectives operate on a distinction between inclusion and exclusion that relies on boundaries, limits, and fault lines. The phenomenological account of legal order he develops stresses the experience of law-oriented behaviour that is regulated according to four dimensions: that is, 'by setting its subjective, material, spatial and temporal boundaries'. (3) A legal order, according to Lindahl, is 'a form of joint action in which authorities mediate and uphold who ought to do what, where, and when with a view to realizing the normative point of acting together.' (8) Lindahl uses a series of examples to help understand these conceptual claims. They are more or less mundane, and that is their point. When we go to the supermarket – to choose a key example used throughout the book – we are positioned by legal norms in terms of space and time and with respect to who ought to do when and to what end. Action may be taken, judged or learned according to these boundaries which will include certain kinds of behaviour and exclude others. The distinction between legal and illegal behaviour is therefore premised on these boundaries that in turn set limits on the appropriateness or otherwise of certain kinds of behaviour and ways of reasoning. So, for example, paying cash going through the checkout is fine; leaving without paying for goods is not. Other kinds of behaviour are more ambiguous: leaving the cash, for example, in a fridge or outside the shop will likely be deemed the incorrect legal

space to carry out the transaction successfully. Offering to pay with other goods of yours or even with your own labour next week may be deemed a failure to understand the point of the transaction and its timing; purchasing through monetary exchange is what this legal regime is about, it's not about barter or promised labour. Importantly, understanding all this activity requires the existence of a 'first-person plural perspective' as crucial: legal actors don't just operate in a purely abstract legal order; they live in one that is seen by the collective as '*our* legal order, as the legal order *we* live by'. (29, original emphasis) Illegal behaviour – theft, say – makes this point clear: this is not how 'we' do things here.

We can imagine the examples multiplying, but Lindahl's general point is that 'Whereas boundaries join and separate places, times, subjects and act-contents within the concrete unity of a legal order, *limits* distinguish a legal order from the domain of what remains legally unordered for it.' (3, original emphasis) Legal orders then enclose modes of acting and reasoning, necessarily setting limits that operate to include some and exclude other possible modes of acting and reasoning. And what distinguishes legal collectives from other forms of collective or group joint activities is that they are 'characterized by structures of authority that monitor and uphold the consistency over time of what should count as joint action.' (96) Such structures 'are a necessary condition for resilient legal boundaries and for sustaining collective identity over time.' (99)

This phenomenological analysis of the deployment of the categories of legal and illegal is developed in an interesting way, but it is not until the introduction of a third category – a-legality – that the theoretical account offered really begins to

take off. Lindahl's example of the supermarket as a law-place where boundaries establish ought-standards – who ought to do what, where and to what end – concretized in legal form as rights, obligations, capacities and so on, is extended into the realm of a-legality by exploring the actions of a real group of French *chomeurs* – 'a movement of the unemployed and vulnerable engaged in struggle'. Before Christmas 2008, around thirty *chomeurs* entered the upmarket Galeries Lafayette supermarket in Rennes with a view to getting food, without paying for it, and distributing it to those vulnerable and in need. They filled trolleys with provisions and when it came time to pay, which they all did at the same time, they asked the shop manager to authorize them to leave without paying, publicly explaining their justification. There was no threatening behaviour towards any staff, but in the confusion that followed, the queues built up and shopping essentially ceased. After initially refusing to negotiate, yet concerned by the sales blockage, the manager agreed to allow the *chomeurs* to leave with ten trolleys of food which they then distributed as they had planned and according to the rationale they had explained.

This is an instance, according to Lindahl, of 'an interruption of legal order' (32) in that the behaviour of the *chomeurs* challenges the distinction between legal and illegal in this situation by transgressing all four boundaries of legal order: who ought to do what, where and when. For if these acts were not obviously legal, nor were they obviously illegal: they left with the assent of the manager and offered no threats that would make it a case of extortion or straightforward criminal duress. The *chomeurs*' normative claim was rather that 'their act is called forth by and responds to the duress to which the needy are exposed, a duress to which they *ought not* to be exposed by the legal order … In effect, the law orders

behaviour in such a way that the conditions that make it possible to shop in Lafayette are also the conditions that place the needy in a situation of unjust duress.' (32, original emphasis)

The boundaries of il/legality limit here what counts as appropriate behaviour and it is part of the *chomeurs*' intention to engage with what this appropriateness means and requires (including by engaging the other confused, irritated or amused shoppers) but not by simply breaking the law. In transgressing the il/legal boundary they want to show that shopping involves the legal ordering of a concrete kind of subjectivity and way of acting, and a concrete way of including and excluding acts and people. Given the legal boundaries in play, the *chomeurs* highlight that 'the point of shopping is to buy' not to address needs; and that it is financial 'means, not need, [which is] the criterion for distribution, both quantitative and qualitative.' (34) All participants are included by this principle, but some are also excluded by being included in it. That is, the unemployed and needy are included in the same principle – 'each according to their means' – but in so being they are excluded from being a client in upmarket stores. The normative point of the *chomeurs*' actions then is to 'call into question the commonality of the principles that order their interpersonal relationships as clients, employees, self-employed professionals, unemployed, etc., and by requesting the solidarity of the clients with the needy, evoke other ways of differentiating and interconnecting legal subjectivities.' (35)

It is this invocation of 'other', or 'strange', ways of acting that the politics of a-legality will engage with. As Lindahl explains, if straightforwardly illegal action (theft, say) 'serves to re-affirm the primacy of boundaries over behaviour' it is

also the case that 'legal boundaries depend on behaviour'. The significance of transgressive action – of a-legality – in relation to legal ordering thus 'reveals the capacity of behaviour to draw boundaries otherwise' and it does so by raising 'a normative claim that resists *both* terms of the disjunction [il/legal] as defined by extant law.'(37-38, original emphasis) Lindahl argues that much jurisprudential analysis, and particularly that which is rooted in working with legal doctrine, misses the complexity and relevance of such experiences to legal practice. But while this may be true, are such observations not in fact a description in other terms of a more familiar problem of how legal norms relate or not to other sets of alternative norms, such as political or moral claims? What, then, does it mean to describe these as a-*legal*?

Such questions take us to the heart of the category of the a-legal, and Lindahl's answers are instructive for general legal theory. To understand behaviour as a-legal requires assessing it in relation to a particular concrete legal order and its boundaries and limits; there is no behaviour that is a-legal as such. It is precisely this 'relational character of a-legality that is captured in the reference to a-*legality*' (159, original emphasis). And this relationality further explains the other side of the term; what is registered is 'an incompatibility between, on the one hand, practical possibilities as actualized in a legal order (a-*legality*), and, on the other, practical possibilities the actualization of which are demanded by certain behaviour and situations (*a*-legality)' (163, original emphasis) Behaviour is therefore *a*-legal in that 'it speaks to other ways of ordering behaviour as being important and relevant, *despite* having been leveled down to what is unimportant and irrelevant for the legal collective.' (160, original emphasis) The boundaries and limits that are necessary to maintain legal order specify, as we have seen,

what ought to be done where, when and by whom, and establish modes of reasoning and authorization consonant with this. But behaviour which ruptures these does so because it registers *both* within the il/legal distinction but *also* as outside it because it is 'inaccessible in terms of that behaviour's normative point.' (161) In this sense, 'The normative claim raised by a-legality is complex' Lindahl argues, 'because it *conjoins what is practically possible and impossible* for a collective.' (163, original emphasis) A blind-spot appears therefore in what the legal order can acknowledge. But it seems to differ from the blind-spot as described by systems theory – when not only can a system not see something but it cannot see that it cannot see this – since there *is* a recognition of some sort: a jolt or shock is registered which 'interferes' with the il/legal distinction but which *also* transgresses it in ways that cannot readily be comprehended. And this has the curious but crucial effect of disempowering the legal order. 'A-legality forces (what thereby becomes) us, the legal collective, to establish what counts as *our* boundaries. But if 'we' are forced to do this, in response to a-legality, then 'our' boundaries are something we never fully have under our control or own: *we owe our boundaries to others*.' (162, original emphasis)

The provocation of a-legality has the potential to disrupt a legal order in a profound way. It not only troubles the meaning and placing of boundaries, but establishes that legal order and all that it involves – the normative dimensions of who is authorized to do what, where and when – is fundamentally vulnerable to something other than that which it can order or account for. It forces us to see that legality in fact *relies* on a-legality, not just differs from it; likewise, that legal security, say, relies on insecurity, that what is familiar or homely or conventional relies on what is strange or foreign or unconventional; that order is built *on* –

rather than *it* controlling or having dealt with and superseded – the unordered.

Lindahl argues that there are two forms or dimensions of a-legality that may be distinguished. In its 'weak' form, a legal order is confronted by a-legal behaviour that provisionally interferes with it but which is 'in principle *orderable* by it … the interference or obstruction of joint action under law manifests itself as temporary: a-legality is the-not-yet-(il)legal.' (164, original emphasis) In responding, the legal order *is* capable of addressing the threat posed to it on its own terms, but this involves shifting or transforming and re-setting its boundaries and limits.

The other, 'strong' form of a-legality involves something more radical. Here a-legality 'denotes a normative claim that resists apportionment under *both* terms of the legality/illegality disjunction … [It] concerns a normative challenge that a legal collective cannot accommodate either as legal or as illegal by reformulating the terms of joint action under law.' (165, original emphasis) It is at this point that we reach a key term of the book's title, the fault line: 'The distinctive feature of fault lines', according to Lindahl, 'is that, unlike limits, they cannot be shifted; they must be *overstepped*, and in being overstepped lead over from one legal collective into another.' (175, original emphasis) The strong form of a-legality, signaled by that normative disorientation noted earlier, exposes the limits of what can possibly be done according to legal rationality: 'this far and no further'. But if this is so, there are two important implications. First, to preserve the legal collective and its order is to acknowledge a constitutive inability or inaccessibility. This is the case because fault lines are themselves 'constitutive elements of legal order [and hence] a collective never has at its disposition which

possibilities are its own and which possibilities exceed the compass of what its members can do jointly.' (177) Secondly, this condition means that ultimately legal order and rationality can never be justified all the way down, so to speak. The necessary closure that legal order operates according to cannot secure itself sufficiently and is always vulnerable to claims of a-legality. And where legal order has an un-orderable non-rational foundation, the closed limits of its rationality can only attest to 'a circular reasoning [that] marks the *end* of reason-giving, of justification, of dialogue, of rational grounding.' (177, original emphasis)

The radical implications of this conceptual analysis play out across a wide range of legal practices, including those associated with legal pluralism and globalization. There is not space to do justice to Lindahl's detailed critique of various theoretical accounts of these here, so let me briefly outline the thrust of the claims he makes with respect to human rights as a 'global phenomenon'. According to Lindahl, particularist or communitarian approaches to legal order – be they nation-state, ethnic, or ethical – that seek to defend the integrity of communities by postulating an exclusive internal relation between law and community norms are, it should be clear from the above reading, always going to be problematic in the face of the category of the a-legal and the implications it has for the limitations of (and on) legal closure. By contrast, universalist approaches may seem to offer a way beyond the problems of boundaries and limits associated with overly state-centered accounts of contemporary global legal ordering. The emergence of human rights as universal norms, as pertaining to all humans everywhere regardless of nationality, ethnicity, gender, and so on operate like a dynamic motor that may propel multiple and diverse legal collectives towards the recognition and instantiation of a common humanity. In

this sense the contingent nature of current boundaries locating who ought to do what, where and when may be transcended insofar as the universality of human rights may seem to offer a borderless application for all human beings.

The recent work of Jurgen Habermas offers one of the most sophisticated accounts of this cosmopolitan approach, and Lindahl therefore concentrates his critique on his work. For Habermas (as indeed for Rawls) the binding quality of norms derives from their reciprocal formulation and legitimation, and the 'key to reciprocity is the capacity of individuals to take up each other's perspectives with a view to reaching agreement on the norms of (joint) action'. But unlike Rawls, Habermas 'stresses that reciprocity deploys an ever greater inclusiveness.' (231) This means that the dynamo of human rights works to bring within its domain that which was formerly and improperly excluded. Even if conceptually, there must be boundaries, these can be pushed further and further; quoting Habermas: 'solidarity with the other *as one of us* refers to the flexible "we" of a community that resists all substantial determinations and extends its permeable boundaries even further.' (231, original emphasis) To the provocation of a-legality then, for Habermas a rational legal response *is* possible, and indeed desirable and, as Lindahl succinctly expresses it, it has this logic: 'To respond is to reciprocate, and to reciprocate is to include the other.' (231)

In line with the general analysis of a-legality outlined earlier, Lindahl however finds this approach problematic. He is careful to point out at several places that this should not be read as a negation of the value of human rights, the rule of law, equality and so on. Rather it shows up the necessary limits of cosmopolitanism and political and legal action premised on its claimed potential. The problem is

that despite the desire to sustain pluralism, the logic of universal human rights remains inescapably less pluralist than it seems. Indeed, Lindahl argues, 'a reciprocity-driven politics of boundary-setting, whether premised on particularism or universalism, advocates what I would like to call the *reducibility thesis*: reasonable political plurality is reducible to – and *ought* to be reduced to – the unity of a legal order.' (234, original emphasis) Not only will this fail to acknowledge the significance of the fault lines exposed by the theory of a-legality, it will, in political and legal practice, potentially produce results that are in fact the opposite of pluralism, since 'To deny, with universalism, that globalization gives rise to fault lines is to endorse, however unwittingly, *globalization as imperialism*.' (267, original emphasis)

By contrast, the politics of a-legality must engage directly with the reality – 'in principle and not merely in fact' (234) – that any and all relations of legal reciprocity are, and can only be, founded on *non*-reciprocity. The possibility of collective action, and indeed of reciprocity is, in other words, always premised on 'an occupation, a unilateral seizure, that is never innocent.' (235) Here we observe therefore the fundamental fault lines of any putative universalist, human rights or globalization claims: 'acts of boundary-setting which institute relations of reciprocity are also always exposed to being a form of domination *because* they bring about and enforce relations of reciprocity.' (239, original emphasis) Lindahl works through this theoretical insight in the context of numerous problems facing contemporary legal collectives in a global setting – the EU, immigration laws, the legal treatment of asylum seekers, the regulation of the internet and so on. Each of these proves to be insightfully developed by showing their susceptibility to the problems of inclusion and exclusion exposed by his general

analysis.

Together what they suggest in terms of a future 'politics' of a-legality is left to the very end of the book, and it will be interesting to see this worked through further in promised future work. In essence the normative claim Lindahl makes for such politics is that *collective self-restraint* is the appropriate response to the problems and limits of legal ordering in light of its boundaries, limits and fault lines. But what could be the source of such self-restraint, what can its normative underpinning be given the limits of reciprocity we have just noted? It is characterized, according to Lindahl, by what he terms a 'non-relational obligation'; that is, 'an obligation towards what resists integration into the circle of relations of reciprocity and mutual recognition made available by joint action under law.' (249) This obligation, attuned to the fault line conditions of a-legality, is premised on a kind of humanized inversion of the Schmittian insight about sovereignty; it demands a 'Collective self-restraint, in the form of exceptional measures aimed at preserving the normatively unorderable as normatively unorderable', where such measures seek, contra Schmitt, 'to sustain rather than destroy the strange as strange.' (254)

The potential, in my view, for such a politics remains to be seen. Certainly Lindahl's relatively brief analysis here suggests something far more productive than many approaches to law which refer to some of the same foundational problems, particularly those associated with deconstruction. Although not thematised as such, there is something of the tragic running through Lindahl's account – in how we are forced to respond to impossible conditions, and in the ways in which necessities at once preclude possibilities and make their demands

urgent – and I will conclude by making two short observations about this. First, Lindahl makes a suggestive point about the historical contingency of the necessary conditions of legal order and ordering being specific to the context of western modernity. Although left to a long footnote (96-97), this is a major claim that would be worth paying more extensive attention to. What may be identified as the tragic element of this is the way in which the *necessary* conditions of legal order operate at once to limit and make freedom possible. This is more profound than the important observation that, for example, constitutions establish freedoms through binding actors; that good government is limited government. Rather it goes to the heart of what it means to have obligations, or more precisely what obligation means in relation to necessity. This was given its most extreme, and its most troubling, formulation by Nietzsche in what Camus described as the former's 'most intimate concept: that the necessity of phenomena, if it is absolute, does not imply any kind of restraint. Total acceptance of total necessity is [Nietzsche's] paradoxical definition of freedom.'[2] Whether Lindahl's notion of non-reciprocal obligation provides a plausible way to work with such a paradox is, as it stands, still unverified. Bearing witness to the existence of such a paradox and any attendant normative injunctions it suggests, is one thing. But whether modern legal ordering can, politically, or as a matter of legal politics, enduringly bear such a tragic injunction is another. A more fully historicized account of modernity would be required, it seems to me, to assess whether legal modernity's predicament is just to be stuck with its necessary conditions and disempowerments, or whether, alternatively, the paradigm of modernity has exhausted its potential and radically new ways of ordering will, or must, at some

[2] Albert Camus, *The Rebel* (transl Anthony Bower), Harmondsworth, Penguin, 1962, 64.

point emerge in response to it.

This leads to a final observation. Lindahl is certainly correct to note that legal ordering currently relies on boundaries that define behaviour. But the other side of this, as we have seen in the analysis earlier, is that boundaries depend on behaviour. But when collective human behaviour globally has the capacity to destroy, or at least severely impair, the physical conditions of any such behaviour there emerges something radically dangerous and new about contemporary conditions that may in fact offer an important challenge to the account Lindahl has developed. And the dangers here are not fanciful, or overstated.

With respect to global ecological disaster, natural, including of course human, life is threatened by humanly-produced physical conditions that are no respecter of boundaries, borders and limits; pollution, as we know, knows no boundaries. As the work of Ulrich Beck among others has shown with respect to environmental as well as nuclear threats, the ability of legal ordering to enclose and supposedly regulate these activities and their consequences in environmental laws or the legality of nuclear weapons certainly puts something very strange, not to say tragic, at the heart of a global legal order. But in producing conditions that simply cannot be controlled in their *physical* consequences – no matter how strong the boundaries are – the threats associated with a 'global catastrophic society' seem, as they come ever closer, to suggest a shock too far. For these consequences *are* universal or at least global. That modern society has produced conditions that it can no longer control, and, that these collapse the boundary potential of modern legal orders, is something that may be worth thinking more about in the context of a politics of a-legality for which self-constraint is central, but is far from being

the reality. For it is indeed a measure of the tragic nature of modern legal ordering that Lindahl so aptly describes that such devastating consequences cannot be foreclosed by the theoretical insight that what is strange and what familiar remain in relation as such, but that there are now conditions where this boundary could be irreversibly collapsed in consequence of 'our', all too human, behaviour.

It is worth pointing out in closing that there is a great deal in this book that I have not mentioned in this brief synopsis, from analyses or Roman Law to the internet, from European Union legal doctrine to Latin American justice movements, as well as a wide range of theoretical engagements. Overall, it displays an admiral breadth of learning and, precisely by expanding the jurisprudential range of reference, moves jurisprudential analysis on in way that could be – should be – inspiring to new generations of scholars.