

Legal Thinking Inside and Outside the Box

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ABSTRACT

This paper commends Lindahl for his expansive and fluid conception of the defining and therefore delimiting terms of legal jurisdiction, as encompassing not only spatial, but also temporal, material and subjective criteria. It proceeds to challenge Lindahl to develop his philosophical insight in such a way that allows for the intensified porosity of the contemporary postnational or ‘globalising’ legal condition of late modernity to be adequately distinguished from the State-centred Westphalian condition of high modernity.

KEYWORDS

Law, globalization, boundaries, a-legality, Lindahl

Introduction

Hans Lindahl presents us with such a rich, challenging and multi-faced contribution to contemporary legal theory in his formidably argued and beautifully presented *Fault Lines of Globalization (FLG)* that a review much fuller than my own short comment would struggle to do it justice. The true measure of the book will lie not in its early responses – affirmative though they promise to be – but in how it infiltrates the word of legal theory in the longer run, adjusting how we think about the subject in its broadest terms and in its deepest premises. For, make no mistake, this is a path-breaking study. It offers a fresh lens through which to ask questions both about the general part of legal theory – the examination of the basic structure of law and of legal order – and about its perhaps most topical special part - the changing nature of law under conditions of globalisation. But just *how* fresh is *FLG*’s fresh lens, and where do existing perspectives stand once that fresh perspective is introduced?

Let me confine my brief remarks to that very question, as directed at Lindahl’s contribution both to general legal theory and to the study of law and globalisation. The aim in each case is to tease out from a presentational style that, for all its considerable eloquence, remains admirably light on *self-*

presentation, the extent to which *FLG* offers something novel, and to examine some of the implications of that novelty for future lines of research.

1. Lindahl's fundamental aim is to develop a first person plural conception of legal order. In so doing he draws upon insights from analytical theories of collective action, but also, and of greater epistemological centrality to his project, from phenomenology - in particular, as he puts it, "a phenomenology of the alien or strange" (4). To use a Kantian distinction, the basic commitment Lindahl brings from phenomenology is an attention to *phenomena* (i.e. objects as interpreted by human sensibility and understanding) rather than to *noumena* (i.e. objects as things-in-themselves, which humans cannot directly experience) as the basis for understanding how law works. He believes, in other words, that we best grasp the character of law by attending to how it is comprehended and treated from the shared horizon or world-view and through the mutual adjustments of those whose behaviour is regulated by the law.

It is this phenomenological perspective that lies at the root of his depiction of legal order as involving the specification of the boundaries of behaviour in each of spatial, temporal, material and subjective terms. For only by including all four spheres of validity of the legal norm - where, when, what and who - and by treating them as inextricably connected, he argues, can we do full justice to a sense of legal order as it is experienced - as a "concrete order". (24) And it is just this commitment to a multi-dimensional conception of legal order that underpins much of the book's fresh insight. In particular, and of special significance for the study of globalisation and non-state legal orders, that commitment stands behind *FLG*'s dexterous reconceptualization of the frontiers of legal order in terms that go beyond mere territorial borders, or even spatial boundaries more generally, so as to embrace all the internal "boundaries that join and separate places times, subjects and act-contents within the concrete unity of a legal order"(3); and, more broadly, so as to include the external "*limits* [that] distinguish [such] a legal order from the domain of what remains largely unordered for it." (3)

Of this conceptual architecture, and of its relationship to the phenomenology of the alien or the strange in the context of law's response to globalisation, more in due course, but for now let us remain within the general part of legal theory. How does Lindahl's phenomenological perspective position itself in relation to the main schools of legal theory? The short answer is that he stands as a critical witness to much of what we find in our legal theory primers, but that many of his criticisms are developed *en passant* as he declines to deviate from the pursuit of his own line of inquiry. For example, positivism, both in its Kelsenian and in its Hartian variants, is viewed as concerned

only or primarily with the unity of the abstract order of norms or rules, with the focus on the internal coherence and systematicity of the legal order in question (13-16). Likewise the constructivism of Dworkin, with its extension of the furniture of the normative order to include not only rules but also principles shaped by community morality, and apt to be measured against a thicker standard of integrity. For all the received understanding of the Dworkinian canon as locked in deep opposition to positivism, it is treated in *FLG* as just as narrowly focused on internal normative order. (16) Similarly viewed by Lindahl, in its own much more sociologically sensitive way, is the systems-theoretical position of Teubner. His idea of legal order as mapping on to a diversity of functionally specific and self-coded areas of specialist regulation, such as *lex constructionis* and *lex digitalis*, in an increasingly fragmented world of political authority, assumes a self-regulatory normative and institutional closure that reinforces the autonomy of the relevant epistemic or practical community.(58-69)

In all these cases, Lindahl wants to re-orient the focus of analysis away from the norms themselves and their internal coherence and towards the various “*normative dimensions of behaviour regulated by the law.*” (16). In so doing he re-introduces into the picture the various ways in which all legal orders, including those national and postnational legal orders that purport to produce complete and gapless normative coverage, or that profess to include universal and boundless principles, as well as the functional legal orders of systems theory with their claim to regulate a material practice regardless of jurisdictional boundaries, are instead *experienced* as excluding as much as including, and indeed as excluding *by* including and as including *by* excluding. From the perspective of the audience, legal orders of all stripes instead routinely articulate and impose particular and highly selective jurisdictional limits, including territorial limits, and are often seen or experienced as subject to challenge or otherwise interfered with by other phenomenal forms, including the appearance of other normative and legal orders each with their own structure of spatial and non-spatial connections and limits.

A similar picture emerges from Lindahl’s treatment of a catalogue of theories, situated at various points along the communitarian/cosmopolitan continuum, which is concerned with relationship between the bond of political membership and the quality of constitutional authority. (Ch. 7) Whether we are dealing with the prior-affinity-based theories of Walzer or Miller, or the forward-looking process-based theories of Rawls, Habermas, Young or Benhabib, the fly in the ointment, according to *FLG*, is “the non-reciprocal origins of reciprocity” (234). The basic factor qualifying the acceptability of each theory remains the inevitability of exclusionary limits as understood from the standpoint of law’s audience - the arbitrariness of the opening cut

and of the continuing cut-off point in the specification of the community and of the material jurisdiction in whose terms legally accredited relations of reciprocity are cultivated.

Lindahl's position as general critic of the field may be radical, but it is also somewhat underspecified. It is radical in the range of its critique. Positivists and post-positivists alike, cosmopolitans and communitarians alike, process-based universalists and ethical particularistic alike, speculative philosophers of law and grounded sociologists of law alike, are all in his view liable to neglect, obscure, deny or otherwise discount the arbitrary closure that make the very operation of legal order possible, and in so doing they inevitably compromise the explanatory power or normative force of their various theses. Yet, whether due to Lindahl's desire not to be distracted by critical side-plots in the construction of his own theoretical narrative, or to a more general distaste for academic prize-fighting, he tends not to dwell on his targets. In short, he comes to build rather than to conquer.

It therefore remains unclear how far he intends to take his reframing of the subject. Few could deny the value of his phenomenological perspective as an informative supplement and in some measure also a complement to the canon of legal theory. But is that all it is? Or is it intended as more than that, as the first chapter of what - certainly in the phenomenology-lite, Anglo-American world of legal scholarship which serves as one important target audience - would be a quite 'new book' of legal theory rather than simply the latest chapter of the existing book? If it is not so intended, what further sympathetic connections can be made with existing lines of research and methodological standpoints? Conversely, if *FLG* is intended as a fresh start, what, if anything, might be lost in the neglect of the 'noumenal', or at least, in the absence of the kind of heuristic emphasis on the 'out there' objectivity of certain forces of history or the context-independence of certain candidate legal-institutional qualities that we would associate with a less phenomenologically focused conception of the social nature of law? Might the Marxist, for example, or the feminist, be frustrated by the relentless context-nuanced emphasis on the phenomenal at the expense of the deep and general structural conditions of any possible collective world-view? Or might the general theorist of law, whether an 'essential' law for all the ages, or at least the extended arc of modern state-centred law, feel that something important in our understanding of the constancy and resilience of the institution of law might be lost in an insistent stress on the fluidity of the interface between rule production and the various "normative dimensions of behaviour regulated by law"?

2. The question of generality versus specificity of account has a direct bearing on the special part of Hans Lindahl's thesis. What are the distinctive characteristics of law under those contemporary conditions of the rescaling of many forms of economic, cultural and political activity in planetary or otherwise expansively transnational terms that trade under the name of globalisation? *FLG* eschews the obvious but, under Lindahl's theoretical gaze, just as obviously flawed answer to this question. The territorial border between domestic and foreign place that is so central to conventional understandings of state law is revealed not as the unique, or even paradigmatic, means of drawing a distinction between the legal inside and outside, as is the point of departure of so many law and globalisation studies. Rather, it is just one of many ways of specifying the boundaries of legal order and the separations and connections these boundaries imply. And in a brilliant *tour d'horizon* of historically, geographically and functionally diverse forms of normative order from nomadism to the contemporary multinational enterprise, from *lex mercatoria* to the European Union and the WTO, and from Roman law to the law of cyberspace, Lindahl applies his conceptualisation of legal order as a concrete, multi-dimensional accomplishment to demonstrate the fluid boundedness of any and *all* normative systems. (ch.2)

But, however persuasive his approach, where does Lindahl's rejection of a state-centred template of legal order as the basis for understanding post-state legal forms leave him in terms of positive explanatory resources? It certainly allows him to argue, against some strains of state-centred positivism, that bounded legal order remains eminently imaginable even beyond the territorial borders of the state, and equally, against forms of legal universalism with planetary ambitions, that any legal order other than a bounded order remains *unimaginable* even outside the territorial borders of the state (264-66). Beyond this, however, the emphasis on the permeability and variability of (bounded) legal forms carries a warning that Lindahl may struggle to say anything *in general* about the thrust and shape of law under globalization, What is more, given his stress on the versatility of legal form as something that has subsisted through pre-modern and modern ages, might the threshold provision of even the most basic and broadest formula for distinguishing law under conditions of globalisation from earlier waves of law pose a difficult challenge?

Certainly, Lindahl the phenomenologist is not so interested in some of the more 'objective' generalities and regularities that occupy others. He hardly concerns himself with the deep historical structure of globalisation or the broad pattern of forces beyond our variously collective control, and sometimes even beyond the ken of our conscious imagining, that propels the rescaling of our communities of practice and of belonging. But that by no

means implies that he lacks insight into the ways in which globalisation makes a patterned difference to law, or rather, to how we receive law. In a highly suggestive concluding passage in which he draws together his most innovative ideas, Lindahl puts forward a view of “*globalization as emergent intertwinement*” (267). The focus of that approach is upon the entangling of home and strange worlds in which law-significant claims emerge that are unorderable within the range of practicable possibilities of the home world, and to that extent are neither legal nor illegal but, in Lindahl’s striking new coinage, “a-legal.”(3) It is here, in the realm of incommensurable normative claims, that the normative fault-lines of Lindahl’s title manifest themselves, and where what he calls a politics of a legality emerges.

Lindahl offers a number of examples of how and where alegal political spaces appear in a multipolar world. These range from the famous *Grogan* case on abortion information services before the Irish High Court and the ECJ, and the equally famous reference before the Canadian Supreme Court on Quebec’s claimed right to unilateral secession, to the notorious recent Breivik trial in Norway and the much less well-known challenge of the U’wa indigenous people before the Colombian Constitution Court against oil drilling activities contiguous to their land (256-260). What these highly disparate cases have in common is the articulation of claims from a particular normative perspective - from a strange place - that are incapable of accommodation within the boundaries of the normative system to which they are referred but which nevertheless continue to register in their own terms, and which, typically also elicit some kind of reaction and acknowledgement of their extraordinary nature on the part of the referent system. This reaction, unable to take the form of a reduction of what is irreducible to the own-terms of the referent system, may instead involve some forms of collective self-restraint, some measure of reflexive awareness of the system’s limits and a conscious “holding back” (255) in the face of finitude.

In all of this, there is a treasure-trove of insights of which I have offered only the merest of glimpses. What remains somewhat underspecified, however, and what, in conclusion, may be offered as a vital, and fruitful area of future research, is once again how Lindahl’s novel perspective relates and should relate to existing lines of inquiry on law under conditions of globalisation. Two such lines in particular stand out, on both of which *LFG* offers insightful views.

On the one hand, the rescaling upwards of political authority, as we have already noted, also leads to new types of *assertive universalism*. What we are concerned with here is the claim - monological where the politics of a legality are at least primitively dialogical, impervious to system limits where a legality connotes a certain collective self-awareness of boundedness - to colonise the entire global field of ought-relations within a single normative purview. Per-

haps most obviously associated with human rights, but also a potent presence in areas such as trade law, these are normative orders which do not recognise themselves *as* orders, and, critically, do not recognise themselves as circumscribed in the way orders inevitably are. Their point of closure and “blind spot”(248) threatens to be just that, not just a necessary presupposition of authority without which a limited order cannot come into being, but a form of denial that fails to guard against the conceit of order *unlimited*.

On the other hand, the rescaling upwards of political authority can also lead to new frameworks of what we might call *structured pluralism*. What we are instead concerned with here are the ways in which legal orders in the emerging global configuration increasingly ‘open’ themselves to other orders of normativity in a more systematic manner than previously. Taking his cue from some of my own work,¹ Lindahl discusses how “by means of ‘institutional incorporation’ and ‘system recognition’ a collective institutionalises a relation to alterity in the ongoing process of referring to itself as a concrete normative unity.” (113) Paradigmatic examples would include member state legal systems’ recognition of the primacy of EU law and the facilitation of that recognition through the preliminary reference mechanism, or the acknowledgement by the Council of Europe members of the general authority of the ECHR and the Strasbourg court in matter of human rights. But beyond these well-known cases, we see countless other instances in which contemporary legal systems have adjusted their sites so as to receive and translate normative messages from elsewhere in a way that “integrates concern for the identity” of others as a normal part of their “practice of collective self-identification.” (113)

Lindahl, to repeat, is far from discounting the significance of these developments. Intriguingly, indeed, he goes as far to say that it remains “an open question whether this [practice of integration] is the decisive innovation which justifies the use of terms such as “postnationalism’, ‘transnationalism’, or ‘denationalization’“. (113) Yet Lindahl seems committed to a broader and ultimately more revealing perspective. For his views on pluralism, as also his views on universalism, can only be fully grasped if we appreciate their connection and interaction with the type of normative intertwinement he associates with his central theme of alegality.

That connection can be understood as significant in both explanatory and normative terms. In explanatory terms, alegality is what stands beyond the integration of structured pluralism or the repression of assertive universalism. Both pluralism and universalism involve a successful reduction on the part of the host order, in the first case one that incorporates the other in the

¹ See N. Walker “Beyond boundary disputes and basic grids: Mapping the global disorder of normative orders”, *International Journal of Constitutional Law* (2008) 6: 373-396.

host's terms and in the second case, by contrast, one in which the host order is simply oblivious to otherness or dismissive of the other. A legality signals the limits to both of these forms of reduction. It represents the middle or in-between that is no longer excluded when released from the internal binary logic of the legal order. It is the sound that is heard as more than mere noise but less than legible internal code. It is also the way in which an order is infiltrated by that which it cannot comprehend or control in ways that nevertheless become somehow acknowledged within the order as such. Equally, then, just as a legality is what irreducibly remains after and notwithstanding the practices of universalism or pluralism, so too it can also recondition these pluralist or universalist regimes, its resistance serving to promote new accommodations and pose new challenges. In a nutshell, the causal connections between the politics of universalism, pluralism and a legality are dense, fertile and multi-directional, each the condition and consequence of the others.

In normative terms, too, the links are close. What Lindahl offers us is a way to go beyond the often rather satisfied pragmatism of structured pluralism on the one hand, and either the triumphalism of assertive universalism or the negativism that attends its wholesale critique as a normative imperialism destined only to serve particular interests in the name of the global good. Instead, a politics of a legality, and our awareness of the existence of a space for a politics of a legality, can disturb complacency, can check triumphalism, or can offer a chink of light that escapes the hegemonic cover.

Of course, once we begin to develop these various connections we see that there is much work that remains to be done. Lindahl's abstract scheme and rich but scattered examples need to be supplemented by a widely drawn legal and political sociology prepared to examine in a more systematic fashion the kinds of circumstances in which a politics of a legality – of self-restraint and resistance in the face of the reductions of law - is more or less likely to challenge the excesses of universalism or limit the ambitious containments of structured pluralism, and how, in particular, economic, institutional and cultural power operate as key variables in all of this. In other words, we *do* need to hear more from the other, 'objective' side of social and legal theory. But this kind of research agenda, one that promises to give better and rounder shape to our critical understanding of how law works and does not work under conditions of globalization, would simply not be possible without the kind of intrepid and insightful philosophical framework that Hans Lindahl has supplied us.