

CONTEXTUALIZING HANS LINDAHL'S LEGAL-PHILOSOPHICAL *OEUVRE*

FERDINANDO G. MENGA

Dipartimento di Giurisprudenza, Università della Campania "Luigi Vanvitelli"

ferdinandogiuseppe.menga@unicampania.it

ABSTRACT

This introduction to the Symposium devoted to Hans Lindahl's book *Authority and the Globalisation of Inclusion and Exclusion* aims at delivering an overview of his legal-philosophical theory by picking out some of its structural features, orienting and guiding readers who are interested in in what way his scholarship innovates in the debate on the constitution of legal orders in a global setting.

KEYWORDS

Legal orders, Globalization, Contingency, Limits/Borders, Lindahl.

I

In 2014 *Etica & Politica / Ethics & Politics* hosted a first critical exchange section¹ to Hans Lindahl's work by discussing his inaugural and important monograph, *Fault Lines of Globalization. Legal Order and the Politics of A-Legality*.² This conceptually dense and critically well received book,³ which was even defined – following Neil Walker's phrasing – as «a pathbreaking study [...] in the world of legal theory»,⁴ was to be understood, however, as a provisional and unclosed – although large and extremely detailed – conceptual attempt to analyze how legal orders are structured and manifest themselves in a global setting.

¹ Cf. *Etica & Politica / Ethics & Politics* 16, 2, 2014, pp. 919-1025.

² H. Lindahl, *Fault Lines of Globalization. Legal Order and the Politics of A-Legality*, Oxford, Oxford University Press 2013.

³ Besides the Symposium in E&P, other critical exchange sections to the book have been published in: *Contemporary Political Theory* (Dec. 2015) and *Jurisprudence. An International Journal of Legal and Political Thought* (7, 2, 2016).

⁴ H. Lindahl, *Authority and the Globalisation of Inclusion and Exclusion*, Cambridge, Cambridge University Press 2018.

Indeed, according to Lindahl's explicit comments in the concluding chapter of the book, his investigation was «a tentative exploration that demands further development in a later study»,⁵ hence an endeavor that needed to be brought further and more fully articulated in several respects.

Authority and the Globalisation of Inclusion and Exclusion, published in 2018,⁶ represents precisely such a development. In his new book, Lindahl indeed keeps the promise of such a completion by devoting a new comprehensive analysis which does not only hark back to the structural premises and analyses laid out in *Fault Lines*, but also, and more importantly, probes his theory from a more legally concrete perspective, while also slightly shifting its theoretical framework. Accordingly, *E&P* was interested in closely following this new and decisive continuation and reconfiguration of the thrust of Lindahl's work.

The Symposium published in this Issue brings together two vibrant sets of discussions to the book which took place at the University of Hamburg and Roma Tre in 2019. I therefore would like to thank the organizers of these events - Peter Niesen (Hamburg), and Fiona MacMillan, Giorgio Pino, Enrica Rigo (Rome) - for generously agreeing to publish the extended and final versions of the commentators' papers in *E&P*. My profound gratitude goes also to the commentators themselves, who have devoted extra work and effort for the benefit of this Symposium: Alessandro Ferrara (Roma Tor Vergata), Thomas Fossen (Leiden), David Owen (Southampton), Markus Patberg (Hamburg), and Gianfrancesco Zanetti (Modena-Reggio Emilia). Finally, I am grateful to Hans Lindahl for granting *E&P* the privilege to host such an extended *Response to Commentators*, which undoubtedly represents, besides the documentation of a vivid philosophical interlocution, a true and proper continuation of the conceptual project laid out in *Authority and the Globalisation of Inclusion and Exclusion*.

II

The wide range of responses to the book gathered hereafter - affirmative or critical as they are -, make manifest how multifarious and rich the debate around Lindahl's work can become, thereby making a further comment of mine of only additive nature. I, therefore, see as much more fruitful to deliver in what follows a short overview, picking out some structural features of Lindahl's legal-philosophical theory so to guide readers in picking out the features that define his novel contribution to scholarship on the constitution of legal orders in a global setting.

⁵ N. Walker, "Legal Thinking Inside and Outside the Box", in: *Etica & Politica / Ethics & Politics* 16, 2, 2014, p. 993.

⁶ H. Lindahl, *Fault Lines of Globalization*, cit., p. 248.

Despite of all differences in structure and scope, Lindahl's both monographs – *Fault Lines of Globalization* and *Authority and the Globalization of Inclusion and Exclusion* – revolve around one and the same major thesis that gives rise to a large range of implications, while simultaneously opposing some widely endorsed assumptions fostered by mainstream positions in the field of legal studies. Unlike many widely shared views, the mainstay of Lindahl's approach is that any kind of legal order, far from displaying its structural core in its mere normative character, should be primarily understood as the result of joint action,⁷ i.e. as an acting together which institutes and shapes collective behaviour. Lindahl does not suggest, however, that the normative dimension is simply derivative, but rather that it can be fully seized in its structural reach only if one considers its constitutive «pragmatic»⁸ provenance as rooted in the same collective action it is meant to regulate.⁹

In this respect, Lindahl pointedly indicates that the theme of a thorough legal-philosophical investigation on the structural configuration of legal orders cannot limit itself to address the sole feature of their identity and unity,¹⁰ climaxing in a merely normative analysis. Rather, it should much more importantly tackle the question of individuation and unification of legal orders,¹¹ thereby looking into the dynamical and genealogical dimension which lies at the basis of all imaginable legal orders.¹² If one focuses on this genealogical layer, the following fundamental state of affairs arises: all normative orders are the derivation of the contingent and plural action of their own institution and, consequently, cannot but bear throughout their life the mark of limitedness. Otherwise said: any imaginable legal order, insofar as *instituted – ordo ordinatus*¹³ –, can never relinquish or sublimate the originary fact that it is the very product of an *instituting* and *representative* process – *ordo ordinans*¹⁴ – articulating itself as a *setting of boundaries* which

⁷ Cf. H. Lindahl, *Fault Lines of Globalization*, cit., chapt. 1.

⁸ H. Lindahl, *Authority and the Globalisation of Inclusion and Exclusion*, cit., pp. 137ff.

⁹ In this respect, Lindahl's overall reading of the constitutive structure of legal orders – as expressively developed in *Authority and the Globalisation of Inclusion and Exclusion* (cf. chapt. 3) – is based on the co-operating of three intertwined dimensions: collective, pragmatic and normative, whereby the latter represents – with some license of simplification – the never accomplished crystallization of the former two dimensions.

¹⁰ Cf. H. Lindahl, *Fault Lines of Globalization*, cit., pp. 77ff.

¹¹ Cf. *ibid.*, pp. 80ss. and *Authority and the Globalisation of Inclusion and Exclusion*, cit., pp. 137s.

¹² Cf. H. Lindahl, *Fault Lines of Globalization*, cit., p. 234.

¹³ *Ibid.*, p. 115.

¹⁴ *Ibidem.*

includes something by excluding something else, thereby rendering some sets of possibilities its “own” and others “strange”.¹⁵

Resisting the temptation to delve into the specific aspects of constituent power and representation entailed in all instituting processes,¹⁶ I shall pick out here three more general implications which, according to Lindahl, follow from the fact that all legal orders, included emergent global legal orders, are structurally bounded or, more precisely, *limited*.

III

As concerns the first line of implications, Lindahl thoroughly analyzes the feature of *contingency* constitutive of any imaginable legal order by connecting it to its political insurgence. In extremely simplified terms, what Lindahl conveys here is the fundamental fact that all orders are and will always remain insuperably contingent because they are none other than the product of always historical and creative joint action – the action of a putative We¹⁷ – which institutes them.

No possible normative mechanism or functionally-based proceduralization¹⁸ will ever be sufficiently capacious to fully cover over or sublimate, in terms of an instituted stabilization, such a dynamical articulation of the instituting We. And this immediately implies: contingent orders, insofar as they are limited, will always be transformable.¹⁹

IV

A second line of implications follows from the first: if legal orders are irreducibly contingent, limited, and modifiable, then this calls for a more precise specification as to how legal orders are limited and transformable. Lindahl investigation shows two things in this respect: firstly, it shows that the limitedness of any given order specifically means the insuperable limitedness in membership, content, space, and time. To put it otherwise: any imaginable order cannot avoid

¹⁵ In the use of the semantic of ownness and strangeness clearly transpires Lindahl’s reference to Bernhard Waldenfels’ phenomenological doctrine as one of the major sources of philosophical inspiration for his work.

¹⁶ These issues are extremely well developed by Lindahl in his *Reply to Critics*.

¹⁷ Cf. H. Lindahl, *Authority and the Globalisation of Inclusion and Exclusion*, cit., p. 108.

¹⁸ Cf. H. Lindahl, *Fault Lines of Globalization*, cit., p. 30 and *Authority and the Globalisation of Inclusion and Exclusion*, cit., p. 47.

¹⁹ Cf. H. Lindahl, *Fault Lines of Globalization*, cit., pp. 153ff.

establishing, qua order, who ought to do what, where, and when.²⁰ Secondly, the transformation of any given order takes place exactly under the condition that a *demand* for its modification to take place, thereby calling it into question and intimating a new organization or shaping of its extant boundaries.²¹

According to Lindahl, however, the fundamental element that emerges here is represented by the fact that such a demand can by no means be seized if one simply remains within the legal/illegal bi-partition typical of the way in which legal orders are usually conceived. Indeed, a demand for transformation cannot be merely understood as only “within” the order, or only “outside” it. Instead – as the author puts it –, this demand is to be conceived of as «a-legal»,²² i.e. as deriving from a normative claim that registers in the legal order as legal or illegal (and is in that sense “inside” the order), yet also questions both poles of the distinction between the legal and illegal. In this other sense it is “outside” order, thereby opening up possibilities of the legal order which it could realize while also intimating possibilities that lie beyond its scope of transformation.

In the context of a comprehensive definition, Lindahl delineates a-legality as follows:

Legal orders structure the real as either legal or illegal. I dub “strange” behavior or situations the domain of a-legality, where the “a” of a-legality does not refer to legal disorder, which is intelligible in the form of illegality, hence as a negative determination of legality. Instead, it refers to another legal order that organizes the legal/illegal distinction differently, hence structures reality in a way that is unintelligible for the order it questions. A-legality refers to an emergent normative order that is strange by dint of challenging how a given legal order draws the spatial, temporal, subjective, and material boundaries through which it configures what counts as (il)legal behavior.²³

Given the central role that the transgression of boundaries plays for the understanding of the phenomenon of a legal order’s alteration, an accurate phenomenological inquiry becomes necessary for Lindahl, such that one cannot be theoretically appeased by the simple attestation that challenges generally lead to a modification of order. To seize the transformative drives taking place along the boundaries of order requires, instead, a careful analysis as to the ways and intensities whereby boundaries are accessed and challenged.

This gives rise, in Lindahl’s investigation, to a structural differentiation as to how boundaries manifest themselves and can be transgressed. According to this

²⁰ Cf. *ibid.*, esp. Part 1.

²¹ Cf. *ibid.*, p. 37.

²² *Ibidem.*

²³ H. Lindahl, “Inside and Outside Global Law (Julius Stone Address)” in: *Sydney Law Review* 41, 1, 2019, pp. 8-9.

differentiation, boundaries may appear as *borders*, *limits* and also as *fault lines*. In order to not transcend the space appropriate to a short introduction, I cannot comment here on the typology of “fault lines”.²⁴ What can be said on borders and limits boils down to this: while borders are necessary elements of territorial states, they are not fundamental features of all legal orders. Borders therefore may be possibly overcome, thereby giving rise to a borderless legal order. Yet the same does not hold for limits.²⁵ Limits are, instead, a fundamental trait of any imaginable legal order, such that all legal orders cannot institute themselves absent the performing of an inclusion and exclusion, whereby an inside and an outside – the realm of an “own” and of a “strange” – is produced. This entails that legal orders may be borderless but not unlimited.²⁶

Regardless of the forms through which they manifest themselves or are challenged, and even though they may be transformed, the boundaries of legal orders can never be surpassed or incorporated into a «all-inclusive»²⁷ formation, whereby limits are erased permanently: the cleavage into an inside and an outside is a constitutive feature of legal orders as such.

V

A third and final consideration follows from this if one draws on Lindahl’s trajectory of thinking: a universal, global or total order in its claim to finally or prospectively overcome the inside/outside distinction is not a viable option.²⁸ It is only under the false premise that state borders, and not limits, are the fundamental feature of legal orders that one may come to the conclusion that globalized legal orders can appear to have an inside without an outside. Yet, this is indeed a false premise since limits, not borders, constitute the «ingredient feature of *all*/legal orders».²⁹

As one can easily grasp, Lindahl’s phenomenological thrust displays here all its deconstructive potential, especially in opposition to the current broadly endorsed assumption in political and legal studies, according to which, in a global setting, we are nowadays moving towards a configuration of an all-encompassing legal order, e.g. a global regime of human rights. In opposition to this more or less unquestioned assumption, Lindahl’s analysis seeks to show how any universal

²⁴ On this point see H. Lindahl, *Fault Lines of Globalization*, cit., pp. 174 ss.

²⁵ Cf. H. Lindahl, *Authority and the Globalisation of Inclusion and Exclusion*, cit., pp. 25 ss.

²⁶ Cf. *ibid.*, p. 32.

²⁷ *Ibid.*, p. 43.

²⁸ Cf. *ibid.*, chapt. 4-7.

²⁹ *Ibid.*, p. 26.

claim entailed in emergent global legal orders remains exactly what it is, i.e. only a claim which cannot be actualized.

Therefore, all kinds of global law, qua law, must have – as Lindahl puts it in the title of the annual *Julius Stone Address* delivered in 2018 at the Sydney School of Law – an «inside vis-à-vis an outside».³⁰

³⁰ H. Lindahl, “Inside and Outside Global Law”, cit., p. 6.