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Law and polity: Contingency, fiction, loss

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We often conceive of law and polity as closely linked: law appears as an expression of the customs, values, and choices of a given polity. As a result, many of the transnational normative structures in today's globalized world appear suspicious—detached from any meaningful polity, they seem to fall short of a core promise of legality. But, as this article argues, the image of a law–polity nexus is mistaken, or at least only part of a broader picture. Historically, law has often followed authority, not polity, and in many cases it has been detached from the societies it was supposed to govern. Even for the law of the modern state, the nexus of law and polity is often fictitious. Through notions such as that of constituent power, we construe an imagery of agency which, for most polities, hardly corresponds with real political processes. The link with a polity may be important for the legitimation of law, but it is often tenuous, and we may not lose that much if we conceive of "law" in broader terms.

In our imagination, law is tightly linked to a polity—it gives expression to the ties that bind the polity, to the values that define it, and to the political processes that take place within the polity. If we understand polity to embody a certain degree of political cohesion, community, and identity, it is law that gives formal shape to the obligations of members of a polity toward each other.[1]

In light of this ideal, the internationalization/transnationalization of law creates trouble—it unhinges the law from its grounding in a polity. Some aspects of this development appear less as a challenge than others: public international law, for example, may be understood as a form of external commitment and contracting of a given polity with others. But such a rationalization is unavailable for more openly transnational bodies of norms. Public actors produce transgovernmental regulation—such as the rules for global banking developed in the Basel Committee on Banking Supervision—but because of their regulatory rather than political character, their links with the polities behind them become thinner. No such links exist for privately produced norms,

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1 *See* Ronald Dworkin, Law's Empire (1986).

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such as the *lex mercatoria* or many codes of conduct for corporate social responsibility. And links are tenuous for norms emanating from multi-stakeholder initiatives in which political representatives typically do not have more than "input" into a norm-making process in which business and civil society representatives are at least equally important. The rules resulting from the Kimberley Process on conflict diamonds, or those created by the Forest Stewardship Council on sustainable forestry, are good examples. A particularly impressive piece of transnational lawmaking is the Accord on Fire and Building Safety in Bangladesh, in which trade unions and multinational companies agree to establish a monitoring and inspection mechanism for safety norms in garment factories. Concluded in 2013 in response to the Rana Plaza building collapse in which more than 1000 people lost their lives, binding arbitration can enforce this Accord, which has been accepted by more than 200 companies from over 20 countries.[2] Covering over 1500 factories and close to 2 million workers, it effectively replaces domestic building safety legislation for significant parts of the Bangladeshi garment industry, and it gives teeth to international safety standards—even though Bangladesh has not ratified the relevant International Labour Organization (ILO) conventions. The links to a polity in a meaningful sense are elusive here.

All these are examples of attempts at transboundary lawmaking, which create norms only for a certain, limited range of actors and claim varying degrees of binding force. Whether they should be called law is of course heavily disputed. In this short article, I do not enter the broader conceptual debate in which this dispute is inscribed.[3] My aim is merely to begin thinking about whether and how it should matter for our categorization that this "transnational law" is created and operates outside of any recognizable polity.

1. Contingency

The trajectory of legal evolution is often depicted schematically as a move from a primitive, custom-based order to an advanced, institutionalized legal system. H. L. A. Hart's account, contrasting orders with and without secondary rules, is one of the most prominent examples.[4] In both the "primitive" and the "advanced" image, however, law is tied to a polity with clear boundaries, be it a tribe or a society of the Western, modern kind. We see a "legal collective" as the basis on which a legal order rests, and we depict law as a joint practice of the members of this collective.[5]

[2] http://bangladeshaccord.org. *See also* Juliane Reinecke & Jimmy Donaghey, *The "Accord for Fire and Building Safety in Bangladesh" in Response to the Rana Plaza Disaster*, *in* Global Governance of Labour Rights 257 (Axel Marx et al. eds., 2015).

[3] *See, e.g.*, William Twining, General Jurisprudence: Understanding Law from a Global Perspective (2009); Keith Culver & Michael Giudice, Legality's Borders: An Essay in General Jurisprudence (2010); Thomas Schultz, Transnational Legality: Stateless Law and International Arbitration (2014).

[4] H. L. A. Hart, The Concept of Law (2d ed. 1994).

[5] Dworkin, *supra* note 1; Hans Lindahl, Fault Lines of Globalization: Legal Order and the Politics of A-legality (2013).

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Yet the strong connection we now tend to make between law and polity is of recent vintage, and rather exceptional if seen in a broader perspective. It is tightly linked to the emergence of the modern nation state with exclusive sovereignty over its territory, initiated in early modernity but completed only (if at all) in the nineteenth century in Europe. In earlier times and other places, the connection between law and polity—and the exclusive character of that link—was far weaker. This is most obvious for those bodies of law without a grounding in human action, especially divine and natural law, both escaping the confines of a political community. Universal laws on the basis of reason or nature clearly knew no such bounds, and even where divine law was thought to apply to a particular faith, such as Christianity, it provided a link with a community that radically transcended political boundaries and attachments, and in any event it had its origin outside this (human) community.

Much positive law, too, operated without a connection to a polity or, certainly, to only one particular polity. While from the sixteenth century on, writers such as Bodin or Hobbes increasingly advocated a unitary legal and political order with sovereign power concentrated at the top, the world they lived in—and which they sought to change—was characterized by a multiplicity of legal norms from various sources. These included principles of Roman and customary laws as well as norms emanating from municipalities, feudal lords, provinces, and merchant communities.[6] We could fruitfully describe some of these as linked to "polities" in their own right, but for others, this would stretch this picture too far. Sovereigntist authors increasingly depicted these different forms of law as deriving their force from royal authorization, but for many contemporary commentators, they continued to rest, at least in part, on independent grounds. Johannes Althusius, for example, understood them as deriving from compacts of varying extent between those (families) that made up the body politic. Central authority, insofar as it existed, depended on lower units, and these lower units also had a right to judge whether it had exceeded its bounds.[7] In the complex interplay of legal orders, the *lex mercatoria*—the law merchant, today often held up as an exceptional example of early pluralism in action—may have been closer to the norm rather than to the exception. Transjurisdictional in nature, employed by mercantile courts, and thus largely self-constituting, the *lex mercatoria* was one among many bodies of norms that economic actors had to navigate.[8] In many places, a dizzying array of interlocking layers of law—carried over by tradition, recognized as appropriate by those applying the law, or created through political acts of different rulers—characterized legal practices well into the nineteenth century.[9]

6 *See* Richard J. Ross & Philip J. Stern, *Reconstructing Early Modern Notions of Legal Pluralism*, *in* Legal Pluralism and Empires, 1500–1850, 109 (Lauren Benton & Richard J. Ross eds., 2013). On the complexities of medieval law, *see* Harold J. Berman, Law and Revolution, the Formation of the Western Legal Tradition (1983).

7 *See* Ross & Stern, *supra* note 6, at 115–116.

8 Mary Elizabeth Basile et al., Lex Mercatoria and Legal Pluralism: A Late Thirteenth-Century Treatise and Its Afterlife (1998). On related controversies, *see also* Emily Kadens, *The Myth of the Customary Law Merchant*, 90 Tex. L. Rev. 1153 (2012).

9 *See* Nils Jansen, *Law and Political Domination: Observations, Conceptual Reflections, and Some Questions for Discussion*, in this issue, 1176.

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The situation was yet more complex in the imperial constellations of the time. Already in the European empires, spanning different kingdoms and with a claim to superior authority, there was hardly a link to a particular polity, and the various local laws of the territories under imperial control coexisted with imperial law in an uneasy relationship, subject to renegotiation as power relations evolved. Formally, the law of a given polity—whether customary or statutory—tended to be subject to the supremacy of imperial rules, unrelated to the polity in question.[10] As Karen Barkey has noted for the Ottoman Empire, the legal order was a "carefully choreographed legal pluralism coordinated by the center."[11] The challenges for choreography, however, grew with the distance of the metropolis from its colonies, and various intermediaries emerged to negotiate this distance.[12] Claims for a colony to form a joint polity with the imperial center were, as in the case of French Algeria, rare; they had greater resonance in the settler colonies of the Americas and Oceania. Otherwise, empires found different ways of relating local laws to imperial rules, sometimes in ways that undercut territorial schemes. Especially the trading companies—in retrospect often depicted as extensions of, and authorized by, metropolitan sovereigns—operated in many ways as functional sovereigns in the spheres they controlled and traded with.[13] From the perspective of the colonies, and well into the mid-twentieth century, most lives were governed by multiple laws, many of which were imposed from the outside and without any connection to their polity.

The exclusive link between law and state is, in this broader perspective, a contingent—and rather recent—phenomenon.[14] For long, laws were plural, emanating from different sources, many of which unconnected with a self-governing collective—an idea that, in any event, rose to prominence only with the rise of democratic and nationalist discourses from the late eighteenth century onward. Most of the time, law followed authority, not polity—and was linked to the idea of a polity mainly when, as in the modern nation state, authority and polity emerged as aligned.

2. Fiction

Even if we accept the historical contingency of the law–polity nexus, we might still be tempted to celebrate the fact that, with the advent of the territorial nation state, the earlier disconnect has been overcome. Law, in this image, has reached a stage of development that it would be unwise to surrender. Yet, upon closer inspection, the actual links between law and polity in our current context are weaker and more fictitious than the typical image suggests.

[10] On the Russian empire, *see* Jane Burbank, *An Imperial Rights Regime: Law and Citizenship in the Russian Empire*, 7 Krit. Explor. Russ. Eurasian Hist. 397, 400–403 (2006).

[11] Karen Barkey, *Aspects of Legal Pluralism in the Ottoman Empire*, *in* Legal Pluralism and Empires, 1500–1850, 83, 84 (Laura Benton & Richard J. Ross eds., 2013).

[12] Lauren Benton, Law and Colonial Cultures: Legal Regimes in World History, 1400–1900 (2002).

[13] Philip J. Stern, *"Bundles of Hyphens": Corporations as Legal Communities in the Early Modern British Empire*, *in* Legal Pluralism and Empires, 1500–1850, 21 (Laura Benton & Richard J. Ross eds., 2013).

[14] *See also* Culver & Giudice, *supra* note 3, at 2.

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This emerges perhaps most clearly from one of the most prominent elements in the law—polity nexus, the idea of constituent power. Central to modern constitutional democracies, this notion embodies the promise that the constitution is created by, and lies in the hands of, the people—and that it is for the people to decide when to enact a new constitution.[15] In this way, legislation through elected representatives in parliament—constituted powers—can be traced back, and made subject, to popular decision. Despite its appeal in political practice, however, the idea of constituent power has raised doubts from early on, largely because of the difficulty of identifying its collective subject and of figuring out when and how this subject has expressed itself. According to a recent reconstruction of the idea, constituent power represents in many ways a fiction, a retroactive ascription of political acts to a source in a socially constructed unity, "the people."[16] Grounding a political order in the constituent power of the people is often at least to some extent hypocritical—many modern constitutions have had little actual basis in popular processes, and some even lack popular ratification. Often enough, the concept has been invoked abusively by rulers seeking to shore up their legitimacy. But just like many hypocrisies and fictions, the idea of constituent power may also have a "civilizing force"[17]—it can provide a yardstick, a regulative ideal—and the more a political order strays from it, the more vulnerable it becomes.[18] Still, the linkage between law and polity that the notion of constituent power provides is bound to be a thin one.

Strains on the law–polity nexus also arise from the notion of a polity itself. "Polity" is easiest understood when framed in national terms, as grounded in a preexisting common identity (or at least as represented in this way[19]). Greater problems emerge in diverse polities, especially when minority groups of a religious, cultural, or ethnic kind experience a structural disadvantage compared to the majority population. Even if such groups are granted protections against discrimination, they will often see themselves as second-class citizens, as not fully belonging to the "polity," and sometimes taking refuge in special, personal legal orders, especially religious ones which coexist (often uneasily) with the territorial legal order.[20] Where minorities are territorially concentrated, they may seek territorial autonomy or even independence, as a host of recent secession attempts in nominally democratic states has shown.[21] Whatever their success, they signal that the idea of a polity, and a law linked with it, cannot be taken

[15] *See* Andreas Kalyvas, *Popular Sovereignty, Democracy, and the Constituent Power*, 12 Constellations 223 (2005); Martin Loughlin & Neil Walker, The Paradox of Constitutionalism: Constituent Power and Constitutional Form (2007).

[16] *See* Hans Lindahl, *Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood*, *in* The Paradox of Constitutionalism 9 (Martin Loughlin & Neil Walker eds., 2007). On fictions in democratic theory and practice more broadly, *see* Yaron Ezrahi, Imagined Democracies: Necessary Political Fictions (2012).

[17] Jon Elster, Deliberative Democracy 111 (1998).

[18] *See also* Nico Krisch, *Pouvoir constituant and pouvoir irritant in the Postnational Order*, 14 Int'l J. Const. Law 657 (2016).

[19] Benedict Anderson, Imagined Communities: Reflections on the Origin and Spread of Nationalism (2006).

[20] *See, e.g.*, Ayelet Shachar, Multicultural Jurisdictions: Cultural Differences and Women's Rights (2001).

[21] *See generally* Michael Keating, Plurinational Democracy: Stateless Nations in a Post-Sovereignty Era (2001); Neus Torbisco Casals, Group rights as Human Rights: A Liberal Approach to Multiculturalism (2006).

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for granted in diverse societies where polities may come in the plural, or in fragmented ways. This is visible also in federal systems where the relation between the whole and the parts is often contested precisely because of an indecision, or contestation, over the extent of the polity.[22]

The diversity challenge could be further radicalized on postmodern grounds—perhaps modern societies are characterized by so many disconnected identities that we should wonder whether it makes sense to speak of a meaningfully cohesive polity at all. In an increasingly liquid modernity,[23] the idea of a "polity" may be seen to hark back to a more traditional form of society. But even if one does not buy the postmodern diagnosis, or at least does not buy all of it, it is important to remain aware of the cleavages that characterize modern societies—even those that are not multiethnic or multireligious. Marxists have long stressed the ties between law and dominant social classes, and even in neo-Marxist accounts, with their acceptance of a certain autonomy of the legal system, the role of law in the class struggle continues to be prominent.[24] If Foucault is even a little bit right in claiming that the "system of right and the judiciary field are permanent vehicles for relations of domination, and for polymorphous techniques of subjugation,"[25] we will have significant doubts as to whether it makes sense to think of law as linked to a polity as a whole, or even to a collective more broadly understood. Once we have freed the image of law from the appearance of neutrality and impartiality and have recognized that every legal order privileges the ideas and interests of certain parts of society over those of others, the law–polity nexus loses much of its plausibility and appeal.

This nexus may then appear less as a reality than as a "necessary fiction"[26] for modern law. Just as in the notion of constituent power, it is a fiction of authorship—the ascription of the legal order to an origin in the polity—that works if it finds resonance in societal discourses. In a similar way to impartiality and neutrality, this fiction idealizes modern legal orders and plays an important part in the legitimization of institutionalized power differentials. That it is a fiction does not mean that it does not have "real" effects—if successful, it can shape ideas and discourses in such a way as to make us see the world in a different way.[27] Yet this ideational power should not blind us to the fact that, for most people, law is a heteronomous order, not one of their (or their polity's) creation.

3. What is lost?

The foregoing seems to suggest that we should not overestimate the importance of the law–polity nexus. If we see it not only as historically and geographically contingent

[22] Olivier Beaud, Théorie de la Fédération (2007).

[23] Zygmunt Bauman, Liquid modernity (2000).

[24] Nicos Poulantzas, State, Power, Socialism (2000).

[25] Michel Foucault, *Society Must Be Defended.*: Lectures at the Collège de France 27 (David Macey trans. 2003).

[26] Ezrahi, *supra* note 16.

[27] *See, e.g.*, Michael Freeden, Ideology: A Very Short Introduction (2003).

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but also as in many ways fictitious, we will find it easier to follow some of the theorists of legal pluralism who broaden the notion of law to a wider range of normative phenomena.[28] The boundary between law and other kinds of institutional norms is then increasingly blurred.[29] This makes law more multifaceted: when it comes to *norms*, we have no problem accepting that they can be created by any set of actors or emerge within any kind of social group, that they can be formal or informal, and that they may or may not be part of a broader system. In the broader universe of norms, we find shades of gray rather than binary distinctions: some norms will be more encompassing than others, some come with stronger claims to bindingness, and some will have greater authority over certain actors than over others. Norms, like authority, are more "liquid" than law in its traditional image.[30]

If we thus extend our notion of law further into the universe of norms, what do we lose? Three sets of issues stand out. The first concerns aspects of the rule of law, mostly as regards the idea of a legal system, and in particular coherence and legal certainty.[31] How should actors navigate in the sea of norms, especially when different norms stand in tension or open conflict? How can a decision-maker, such as a judge, make sense of contrasting orientations of bodies of norms originating from different sites? We should not exaggerate the degree of coherence and predictability in the state law context, but legal reasoning (as well as practical decision-making) certainly faces distinct challenges arising from this kind of pluralism.[32]

The second set of issues has to do with questions of ownership. Especially in democratic contexts, law belongs to a particular society not only as regards its content but also as regards the claim to authorship. However fictitious this authorship may actually be, the claim to it provides a resource for mobilization, critique, and moral argument. The associated sense of citizenship is difficult to replicate for norms that are clearly detached from the polity, even if claims to procedural input and responsiveness continue to provide a basis for critique. The latter aspects cannot sustain a strong idea of collective self-determination that comes with deliberation over the rules that bind everyone in a given community, and potential compensations, such as a "global public" or an "international community,"remain abstractions for the time being.[33]

The third set of issues concerns the link with legitimacy. Even if theoretically we may reject a direct link between law and legitimacy, the modern focus on law as state law has always been connected with the idea that state-produced law, while not perfect, was nevertheless normatively superior to other bodies of norms. This link was strongest for less positivistically inclined theorists—for example, Lon Fuller's ingredients of the internal morality of law were tightly connected with the state as a

[28] *See* Twining, *supra* note 3; Brian Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 30 Sydney L. Rev. 375 (2008).

[29] Where this boundary should lie exactly, and whether it can be drawn at all, are questions I cannot tackle here. *See* Culver & Giudice, *supra* note 3, at 143–148, for discussion.

[30] *See* Nico Krisch, *Liquid Authority in Global Governance*, 9 Int'l Theory 237 (2017).

[31] *See, e.g.*, Pavlos Eleftheriadis, *Pluralism and Integrity*, 23 Ratio Juris 365 (2010).

[32] *See* Nico Krisch, Beyond Constitutionalism: The Pluralist Structure of Postnational Law 8 (2010).

[33] *See* Alexander Somek, The Cosmopolitan Constitution (2014).

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monopolistic law-maker. "Legality" then provided a shortcut to legitimacy—if norms had legal quality, they seemed to come with a stronger social expectation (for some, even with a moral duty) of compliance.[34] The more we broaden our notion of law, the less this shortcut is likely to work—the multiple legalities of global governance do not necessarily come with a presumption of legitimacy at all.

The scope of the law is, of course, not just determined by theorists. It depends in the first place on social practices, and as they change—and produce new kinds of authorities—choosing one or the other notion of law may not make much of a difference. If authorities and norms become increasingly detached from polities, it is not obvious that a restrictive understanding of *law* is going to be very consequential; it might simply serve to isolate law from social and political reality. At worst, it might resemble the melancholic clinging to an old order long after the revolution has taken place.

If we broaden our notion of law and emphasize the law–authority nexus over that between law and polity, questions about legitimacy and justification move into new sites. Rather than operating in the background of legal practice—with a presumption in favor of law's legitimacy—they move to the foreground. When navigating the "law mesh" that emerges from the multiplicity of sites and bodies of norms, those interpreting and applying the law will often have to come to conclusions about the relative weight of those norms. From a normative perspective, the extent and quality of the connections with a given polity will often feature centrally in this weighing exercise, but they should operate alongside other criteria.[35] Especially on issues of a transboundary nature, connections with one polity may not be enough, and the weight of certain norms—for example, on transboundary environmental problems—will depend on their responsiveness to different polities.[36] Moreover, in some contexts, substantive considerations may outweigh the lack, or weakness, of polity ties. Greater output—the effective provision of public goods, for example—might sometimes counterbalance deficiencies on the input side.[37]

I cannot take these questions further here, but the above notes already suggest that from a normative perspective also, state law has little claim to exclusiveness, and that we may not lose that much if we move beyond the law–polity nexus. In fact, we may gain useful critical distance. If we have to evaluate the weight of different bodies of norms, we can bring into view the deficiencies not only of the new, transnational forms of regulation but also those of the state legal order—an order which, in most countries, raises important doubts as regards its responsiveness to the whole polity, or the different polities, it affects.

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[34] *See* Schultz, *supra* note 3, at 20–31.

[35] Krisch, *supra* note 32.

[36] *See, e.g.*, Mattias Kumm, *Sovereignty and the Right to Be Left Alone: Subsidiarity, Justice-Sensitive Externalities, and the Proper Domain of the Consent Requirement in International Law*, 79 Law & Contemp. Probs. 239 (2016).

[37] *See* Jens Steffek, *The Output Legitimacy of International Organizations and the Global Public Interest*, 7 Int'l Theory 263(2015).

This means, of course, that in this new mesh, law no longer *settles* societal disagreement[38] but often serves to *express* it: different bodies of norms may reflect different sides in a social struggle. This may be a loss, but only one of great weight if we assume that the law that provided settlement—state law—did so in a justified way. For many contentious issues these days, this is not a highly plausible assumption. We would not think, for example, that the weak fire and building safety regime under Bangladeshi law, conditioned as it is by the prominent influence of factory owners in the domestic political process, has a good claim to settling this issue. Instead, the transnational Accord that I mentioned at the outset may usefully challenge and unsettle the situation. Likewise, the immigration and refugee law of many European countries could benefit from some unsettling by international law and its interpretation by the UN High Commissioner on Refugees.[39]

Transnational norms do not, of course, always favor progressive causes—often enough, disadvantaged actors will indeed find it more difficult to pursue their goals at the transnational level.[40] And the *actual* weight of different bodies of norms will also typically differ from the weight they should have as a result of normative reflection—powerful actors will seek to push norms more favorable to their own positions. As Boaventura de Sousa Santos has pointed out, it is difficult to assess whether such a pluralism is always, or even generally, better than the dominance of state law.[41]

Yet the multiplication of legalities and the increasing disconnect between law and polity are hardly avoidable today unless authority is scaled back radically and is realigned with polity boundaries. Failing that, the struggles over the law will have to be fought out also as struggles over the many laws, their relations with one another, and their (weaker or stronger) links with a given polity. But then, as we have seen, this has been the case most of the time, and in most places.

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[38] Jeremy Waldron, Law and Disagreement (1999).

[39] For an insightful discussion of the principle of subsidiarity in this light, *see* Peer Zumbansen, *Happy Spells? Constructing and Deconstructing a Private Law Perspective on Subsidiarity*, 79 Law & Contemp. Probs. 215 (2016).

[40] *See* Martin Höpner & Armin Schäfer, *Embeddedness and Regional Integration: Waiting for Polanyi in a Hayekian Setting*, 66(3) Int'l Org. 429 (2012).

[41] Boaventura de Sousa Santos, Toward a new Legal Common Sense: Law, Globalization, and Emancipation 89 (2002).