



PROBLEMA

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LEGALITY'S EDGES: SEARCHING FOR IDENTITY  
CONDITIONS OF LEGAL SYSTEMS  
IN AN ERA OF POROUS BORDERS

INTRODUCTION

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The papers collected here are the result of a workshop on “Legality’s Edges” held in Krakow, Poland, in August, 2007 at the 23rd congress of the International Association for Social and Legal Philosophy. In our call for submissions to the workshop we asked participants to reflect on the interaction between legal theory, legal system, and the forces of globalization. Our focus on this topic was partly inspired by William Twining’s remarks that the era of “black box” legal theories may be coming to an end. International agreements, economic, and social dimensions of globalization increasingly bind modern societies in complex relations of interdependence. What are the consequences of these developments for legal theory? Is positivism’s “rule of recognition” still a viable means to identification of discrete legal systems? Are theories of autopoietic systems of law more or less viable in situations of interdependence as seen in the European Union? What theory of law best represents conditions of interdependence in the EU, NAFTA, and Mercosur? Or are all available accounts insufficient, and new appoa-

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ches are needed to explain the waning of relatively discrete legal systems?

There is perhaps more than meets the eye in the fact that we asked these questions and received varied answers to them. These papers may be contributing weight to the sense that legal theory is now shifting in its focus and methods, now meeting the challenge of explaining phenomena previously left relatively untouched. Not long ago, the most prominent thinking about legal system was often restricted to consideration of the interaction between sovereign states and the operations of public and private international law, and even that work was sometimes nearly an afterthought. While Kelsen, for example, took the question of the possibility of international law quite seriously, Hart's 1961 consideration of international law in the closing chapter of *The Concept of Law* is rumoured to have been written largely in response to a request from the Oxford University Press that Hart stretch beyond the usual range of discussion. It now seems somewhat remarkable that the intervening years have not seen an outpouring of effort to understand "non-standard" instances of legality outside the familiar intellectual territory of the law-state. This situation, it must be said, has dragged on even while theoretical attention ought to have followed changes in the phenomena of prima facie legal orders. We have observed and lived with the large-scale interdependence relations of the EU, and experienced a range of smaller-scale yet no less legally and philosophically interesting changes to life under law. We have seen the first trials for crimes against humanity since the 1939-1945 global conflict, halting steps toward an international criminal court, and disintegration of the Union of Soviet Socialist Republics resulting in wobbling quasi-states such as Trans-Dneister. We have heard calls from within Quebec for a mode of "sovereignty association" with Canada, witnessed actual devolution of powers from the Westminster Parliament to a Scottish Parliament, and so on. Indeed, once one looks past the range of enduringly difficult

jurisprudential issues within the various forms of the law-state, the way is opened to a fresh conception of the object of jurisprudence. As Neil MacCormick said in his commentary on the set of papers presented, it is time to escape “the tyrannical grip of geo-centric jurisprudence”. What, exactly, we are escaping toward is less clear, yet some of the first steps are taken in the papers collected here.

Introductions to collections of papers often rehearse abstracts and arguments. It seems more helpful here to point to the differences between the approaches taken by our authors: differences which point to the difficulty of navigating legality’s landscape using the old notions of the law-state, legal system, and sovereignty, while opening the way to further exploration of post-sovereign states and non-systemic legal orders. Perhaps unsurprisingly, our authors embody quite different approaches to legal theory and have quite different goals. Julie Dickson encounters the question of the nature of the European Union and its members, examining the identity of states and the way identity might change. The European Union is changing member states’ relations to one another, changing the union which hovers above them all, and possibly changing the way member states conceive of themselves in relation to non-member states. Notably, Dickson’s approach takes legal system and state as core, important ideas needing theoretical attention, as does Sanne Taekema. Her paper investigates the extent to which a positivist, official-based account of legal system can aid analysis of legal situations increasingly populated by actors whose significance does not seem to be usefully captured by the official-based approach. These state-focused papers are perhaps not at variance with our other authors’ papers, yet there are important contrasts. Burkhard Schafer examines the way evidence moves between states with varying effect upon arrival in a new state, effectively beginning his argument in interstitial space between cores of legal systems, whose claims to systematic quality are perhaps threatened by demonstrations that they are much

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less closed than their formal claims might admit, and to that extent usefully conceived as members of a family of systems whose differences are increasingly counterbalanced by webs of interconnection. The theme of interconnection is taken up by Maksimilian Del Mar, whose observations about the basic spatio-temporality of legal borders leads him into exploration of the theoretical value of a style of conceptual pluralism about the concept of law. Del Mar's argument takes us far from this introductory discussion's beginning with Dickson's inquiry into the identity conditions of legal systems within or of the European Union, all within what appears to at least the editors to be a unitary conception of the concept of law, perhaps no longer avowedly geocentric yet certainly comfortably explained in spatial metaphors associated with hierarchy, from the European Union's place "above" states to the flow of evidence "between" states.

What can we conclude safely about this collection of articles? If nothing else, it seems that the days of state-focused legal theory are over if by that we mean a kind of legal theory —and range of metaphors— which supposes the whole job is done once the typical state is understood. There is no longer any typical state, as the European Union rises, and the states of other continents hold back from that mode of union. Old stories of sovereignty are increasingly difficult to tell, as Schafer shows us in the quiet penetration of criminal norms across systems as different as American common law and German civil law. Those stories may be so difficult to tell that prior ways of theorising law may need to be abandoned in favour of conceptual pluralism of the sort Del Mar advocates, resulting in a view of legality in which the concept of law is something like the lens of a prism, seeing many reflections of only partially related experiences. Or, as the editors argue in their contribution, we may need to seek the way to an improved understanding by ceasing focus on borders and system, inquiring more into the constellation of legal institutions large and small whose in-

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terconnection across old geographic and cultural boundaries increasingly determines the nature of normative orders claiming to be legal, something like a “polycentric” view on the old hierarchical view and its preferred range of spatial metaphors. We look forward to legal theory’s next steps as the state and globalization grow together, working toward theories whose philosophical progress toward better understanding is marked by what Isaiah Berlin famously called “less pervertible metaphors”.\*

\* Berlin, Isaiah, “The Purpose of Philosophy”, in Hardy, H. (ed.), *Concepts and Categories: Philosophical Essays*, London, Pimlico, 1999, p. 11.