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Law, Polity and the Legacy of Statehood: An Introduction

Our aim in this Symposium marking the launch of the Law and Polity Project¹ is simple yet far-reaching. It is to identify certain key background assumptions that shape contemporary debate and controversy over the relationship between legal normativity and political architecture, and it is to bring these assumptions to the forefront of inquiry. In particular, we want to shed light upon the different suppositions and conjectures that inform analysis of the place of law within the global political configuration in an age in which the position of the state is undergoing significant change. And, in so doing, we want to bring the tensions between these framing assumptions centre-stage in a way that does not simply reflect the entrenchment of contending positions, but which encourages their mutual challenge and interrogation.

‘Polity’ is a term with a varied etymology, but its contemporary meaning is well captured by Yale Ferguson and Richard Mansbach. For these authors, ‘(p)olities are collectivities with a measure of identity, hierarchy and capacity to mobilize followers for political purposes’.² As it is intended to do, this definition embraces a range of forms of political organisation in addition to that of the state. Clearly, the basic political form, and by all these measures – identity, hierarchy and capacity – the most developed political form of the modern age has been the state. But, since the middle of the 20th century, while the number of states has expanded considerably, various other polities - global, supranational, transnational and infranational - have also come to figure more prominently in the global architecture. By coupling ‘Law’ with ‘Polity’, we seek to focus on the contribution of law in any account of how, why, and to what extent that shift is occurring, and to ask what that shift implies for the future of law and of political organisation alike.

Modern law and the modern state, as we will see, are closely linked in many narratives of the modern age. But has the law-state connection been altered, either in character or in prominence, by the proliferation of forms of polity beyond the state? What

¹ For details, see <http://www.lawandpolity.law.ed.ac.uk>

² Y.H. Ferguson and R.W. Mansbach, *Remapping Global Politics: History's Revenge and Future Shock* (Cambridge: CUP, 2004) 24.

role has law played in the development of these new non-state forms? In what ways are the relationships between law and non-state polities distinct from the relationship between law and state? Is the relationship of law to a more differentiated global political environment less polity-specific and less polity-dependent in general than under a state-centred pattern? And most basically and importantly of all, what do the various changes in the relationship between law and polity imply for the ways in which, for the ends towards which, and for the success with which common interests and values may be identified, nurtured and pursued across today's world?

These are all questions that provoke considerable debate and disagreement. And these are the debates and disagreements that, at least in some measure, reflect the different background framing assumptions to which we made initial reference. It is just these background assumptions, therefore, that we seek to expose to critical scrutiny, and to subject to a new exercise in common engagement and re-evaluation.

Let us start, then, on familiar ground, by recalling the framing assumption that has traditionally united rather than divided many schools of legal and political thought. This assumption holds that the standing of the state as the key organising framework of people, territory and government both presupposes and supports a mature form of legal order. That is to say, the achievement of the modern legal system is widely regarded as heavily dependent upon and shaped by the modern state, just as the achievement of the modern state is widely regarded as heavily dependent upon and shaped by modern law. This state-centric perspective, it should be stressed, applies to modern law and to modern legal systems broadly conceived. It applies not only to public law, but also to the expanses of private law and international law as they are organised and located respectively *within* and *between* states in accordance with the state-centred co-ordinates of public law. What is more, within the state-centred narrative the very closeness of the law-polity embrace is typically deemed to have been a key factor in promoting the state as the dominant form of legal and political ordering in the modern age.³

The importance of law to the state polity and the strength and resilience of the state polity so conceived can be traced to various features of modern statehood. The modern state comprises both a material framework of political capacity and a cultural framework of

³ The most influential source of this thesis about legal modernity remains Max Weber; see, in particular, *Max Weber on Law in Economy and Society*, transl. Edward Shils and ed. Max Rheinstein (Cambridge, Mass: Harvard University Press, 1954).

political community. Law is closely associated with each. The authority of law depends on these material and cultural frameworks being in place, just as law helps to sustain and reinforce these very same frameworks. With regard to the material framework, law – public law in particular - performs a design function, specifying the basic institutional organisation of the state. Yet law also relies on that architecture being in place for its own effective everyday operation. With regard to the cultural framework, law performs an expressive function. The doctrines law exalts, the institutions it dignifies, the texts it solemnifies, the rituals it celebrates, the traditions it embraces and the self-commemorating narrative of progress and resilience it adopts and adapts, supply an important part of the symbolic arsenal of shared national belonging. Yet law also draws upon prior affective bonds of community in representing itself and its various outputs as a common accomplishment. Additionally, at the intersection of its design and expressive functions, the law performs a vital reflexive function within the state. It supplies a working code according to which collective purpose can be articulated, pursued and revised over time through media such as constitutional provisions, legislation and judicial decision. Indeed, it is principally through law that the state speaks and acts in ‘our’ name. Law, therefore, also becomes central to the epistemic achievement through which the state comprehends itself and apprehends the world as a distinct collective agent.

How does the framework of law and state respond to a new age of economic and political globalisation? Is the coupling of state and law still so close, and still so dominant? We can identify three categories of response to this core question, based upon different underlying assumptions or explanatory priorities. In the first place, it may be supposed that the law-state coupling is a deeply resilient one, whose tight institutional, cultural and epistemic connections are not significantly threatened by movements in the global economic and political environment. From this perspective, other emergent normative orders and political systems tend, according to a further menu of assumptions and theoretical commitments, to be defined in a manner that reduces them to secondary elements within the law-state configuration; perhaps as an *ersatz*, or less developed, version of the paradigm of state law and legal system, as in some readings of European Union law, or of public international law and its ‘international community’ more generally; perhaps as a delegated form of legal and political authority, still dependent upon the sovereign prerogatives of the state, as again in some versions of EU law or public international law; perhaps as contained and conditioned by the general framing capacity of the legal and political order of a

particular state, as in conventional understandings of the boundaries of many ‘disciplines’ of modern law - including the public law disciplines of constitutional law and administrative law and the private law disciplines of family law, property law, contract, tort etc.; perhaps as dependent upon the extension of the legal and political jurisdiction of a particular state, as in the treatment by imperial states of the claims of subaltern legal orders; or perhaps as relatively autonomous of any particular state in jurisgenerative terms, but still reliant for recognition and enforcement on the operation of state legal orders in general, as, for example, in the case of the transnational *lex mercatoria*.

In the second place, and, in stark contrast, the very idea of a symbiotic coupling between modern law and the modern state as supplying the dominant model of political organisation may be queried or downplayed, and viewed as the wrong point of departure for thinking about contemporary global trends. From this state-sceptical perspective, the state, and state law, were never as dominant a material or cultural factor as much contemporary wisdom would suggest. The emergence and spread of the modern state should be seen not in terms of the refinement and completion of a process of subordination of wider societal forces to a centralizing legal and political imperative. Rather, it should be viewed as a way of managing a social formation in which the division of labour and life forms becomes ever greater and more complex. In a nutshell, the defining assumption of this perspective holds that the modern state, far from creating and consolidating a unified social order, was a response to a secular pattern of differentiation, and that the development of new legal and political forms beyond the state is best viewed as an extension of this pattern of differentiation rather than a clean break from the high modern age.

A third line of approach – one that will receive particular attention in this Symposium - leaves behind the deep roots of legal and political modernity and concentrates more on the significance of emergent tendencies for the legacy of statehood. Inasmuch as it is maintained either - against the first and second assumptions - that under contemporary conditions the state legal order has moved from a dominant position to a less dominant position, or - consistent with the second assumption - that the decentring of the state and its legal order is merely the extension of a historical pattern, various factors, together with their own distinct grounding assumptions, are offered in explanation of this. These factors, which would all challenge the appropriateness to contemporary conditions of the narrative of the centrality of the state-law paradigm, may be grouped under three not necessarily mutually exclusive headings; namely *polity nesting*, *domain specialization* and *legal disembedding*.

The challenge of polity nesting is concerned with the compound quality of many contemporary legal and political assemblages. Federal thought and other subsidiarity-centred and sub-state focused conceptions of political community and institutional authority have traditionally, if far from uncontroversially, assumed a bottom-up model of the state as a kind of political community of communities and a legal authority of authorities. Does the recent rise not only of sub-state nationalism but also of supranationalism - in global organisations such as the United Nations as well as in regional polities such as the EU, Mercosur, the African Union and NAFTA - contribute to a more layered global institutional architecture? Does it indicate the emergence of a pattern in which the state fits as just one level of political community and institutional authority among many, both nesting smaller polities and nested within larger polities?

The second challenge - that of functional domain specialization - is addressed to the general and encompassing character of state law. It questions the strength of the claim of the contemporary state to make integrated provision for a broad range of specialist legal disciplines and capacities. For some, the proper units of legal order - and of associated spheres and modes of social integration - are not the states and their constitutional law, but the special systems of private law, social law, enterprise law, mercantile law, family law etc. As the state-sceptical position considered above would stress, such functional specialisation has always pushed beyond the boundaries of the state – think, again, of the history of the *lex mercatoria* or the *ius commune* – but this has become all the more pronounced in an age of segmented global regimes in matters as diverse as trade law, environmental law and criminal law. In the trans-nationalisation of functional specialisation we see the rise of new forms of non-state polity. These may exhibit a traditional pedigree as publicly constituted organisations, as in the case of the World Trade Organisation or the emergent global climate change regime. Equally, driven as they are by functional imperatives rather than formal protocols, such polities may also arise out of private or hybrid private/public initiative, as, for example, in the influential global organisational clusters at the centre of the new *lex sportive* or *lex digitalis*. Is this process of polity differentiation inexorable, and does it require us to reassess the limits of the integrative capacity of the state polity? To what extent and with what consequences can these new domain-specific regimes, including the forms of transnational social movements more or less associated with them, be conceived of as polities as familiarly understood, with material, cultural and epistemic attributes resembling those of statehood?

Unlike the first two challenges, the third challenge of legal disembedding does not relate to the emergence or enhanced profile of polities alternative to the state and of the development of corresponding forms of new legal ordering. Rather, it focuses on the other side of the coin of the process of state-decentring – not on the new coupling but on the *decoupling* of legal and political forces attendant upon polity differentiation. It is concerned with the detachment of law from any and all particular polity settings and with its capacity to move between and stand over a range of polity settings. Modern precedent for this challenge can be found in the development of public international law over the 19th and 20th centuries, which, as noted above, has traditionally been only tenuously linked to an ‘international community’. But there is a broader contemporary movement of ‘cosmopolitan law’⁴ or ‘global law’⁵ in which law is treated as increasingly detachable from its cultural and institutional setting, and so no longer as polity-specific, or, in some versions, as no longer even necessarily cohering as an ordered whole. Going further back, we can also find pre-modern examples of such deracinated and even disaggregated law in the tradition of *ius gentium* and its links to natural law, with specialist legal actors here much to the fore. But this type of internal juristic impetus towards a boundary-transcending understanding of legal authority has also developed exponentially, with the rise of a ‘global’ legal consciousness amongst academic, judicial and broader professional and political elites and a renewed vocabulary of legal universalism and doctrinal mobility in human rights and other areas.

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The Law and Polity Project will be concerned with all these questions we have raised, and so with the broadest implications of world-historical shifts in the relationship between the legal and the political realms. In this Symposium, the contributions are organised under four broad headings, reflecting the thematic concerns we want to highlight and the underlying assumptions we want to explore. A first group of contributions addresses the pivotal question of the continuing relevance of the law-state tradition today. In the three other sections, the themes of nested polities, functional specialization and legal disembedding – the three key contemporary challenges to the centrality of the law-state polity today - are addressed.

The endurance of the state/law/polity nexus is the focus of Martin Loughlin’s contribution within the first category of responses. He argues for the persistent centrality of the state by seeking to dispel some confusion over what precisely the essential properties of the state are,

⁴ See e.g. N. Feldman, ‘Cosmopolitan Law?’ (2007) 116 *Yale Law Journal*, 1022

⁵ See e.g. N. Walker, *Intimations of Global Law* (Cambridge: Cambridge University Press, 2015)

and by distinguishing them from other merely accidental properties it might possess. For Loughlin, the state, understood not as the surface institutions of government but, following the German *Staatslehre* tradition, as a complex of three deep elements - territory, ruling authority, and people - is nothing less than *the* indispensable concept that allows us to imagine and engage coherently to engage with questions of political authority. In his paper, Kaarlo Tuori discusses the resilience of the state not so much as an institutional form or material structure, but rather as a central element of our *Vorverständnis* - our default assumptions - as we investigate both state law and non-state law. Nils Jansen delves into law's pre-modern and early modern background to deliver a less state-centric message. He looks at the ways in which European political communities handled a plurality of sites of legal production in the past to find lessons for our reflection on the tensions between law and polity that may be generated by new patterns of fragmentation in the sites of law-production. Chris Thornhill also looks to the past, but in so doing draws a somewhat different conclusion about the significance of the state. He argues not simply that it is not the case that states are a declining form of political organization (a point also made with different emphases, and in different registers, in the contributions by Martin Loughlin, Kaarlo Tuori and Bardo Fassbender) but that the state has only truly become the dominant form of political organization in the past 70 years. The claim is that we have mistaken the dawn of the state for its decline.

On the challenge of polity-nesting, the respective contributions by Olivier Beaud, Bardo Fassbender, and Nicole Roughan investigate the hypothesis that the state relates to other sites of law production as one layer in multi-layered legal-political structures. Olivier Beaud presents two alternative ways (in fact two ideal-types) in which states might 'come together': either through a Federation (a concept that, for him, transcends the federal state) or as an Empire. Focussing on the similarities and differences between them, he claims, is crucial in the analysis of the range of modern legal and political relations both between and within states. In his contribution, Bardo Fassbender argues that the appearance of a subtle and significant layering between states, supra-state, and infra-state sites of law production and political organization does not correspond to legal and political reality, which remains remarkably state-centred. In her paper, Nicole Roughan is concerned with a problem that underlies political nesting: even if institutional structures might offer opportunities for linkages between states and other non-state *loci* of legal production, they are not able to solve the problems of the overall coherence of the resulting law's normativity and authority.

In terms of the question of domain specialization, however differentiated particular aspects of state law might be in terms of function, the discrete parts of a national legal system are often assumed to ‘hang together’ in a formal holism that is normally warranted by their connection to a particular polity. That sort of warrant is not available for a specialized body of norms produced in ways unconnected to any particular polity: their *raison d’être* is not their role in a more general conception of political life, but their ability to fulfil certain relatively particular functions. The contributions by Nico Krisch and Euan MacDonald investigate some of the consequences of this form of detachment between normative sites and the political community. Nico Krisch’s contribution identifies three issues raised by functional specialization: the impact on our conceptions of legal coherence and legal certainty, questions of law’s authorship and legitimacy; and the opportunities allowed to rethink the ways in which we conceive of law and law-production. The legitimacy of non-state institutions is also at the core of Euan MacDonald’s contribution, as he attempts to explain another fault line between some domain-specific organizations and holistic organizations such as the modern state, namely the divergent effects of constitutionalization in the context of states as compared to constitutionalization within the context of supra-state entities: whereas in the former constitutionalization often has the effect of enhancing legitimacy, in the latter, it may result in the creation of new reasons why these bodies are *illegitimate*.

A subplot within the narrative of the nation state as an exclusive site for the legal expression of political community concerns whether law need be embedded within *any* particular polity site, still less that of the state. For the emergence and proliferation of open-ended legal regimes beyond the state invites further reflection on whether law can (or should) be conceived as being detached from any and all political communities. That is the central concern of the contributions by George Letsas, Antony Duff, and Christiane Wendehorst. George Letsas argues that there is insufficient reason for us to postulate the existence of a necessary connection between Law and Polity. His argumentative strategy is built around drawing and then testing the limits of an analogy between, on the one hand, the Law/Polity pairing and, on the other, the Law/Critical Morality pairing. Antony Duff partly disagrees, at least as far as criminal law is concerned. He argues that one cannot make adequate sense of criminal law, without identifying “a political community in whose voice the criminal law claims to speak, and to whom criminal defendants are called to answer”. Christiane Wendehorst, in turn, proposes a multi-perspectival tool which allows us to appreciate how

the polity-embeddedness of legal reasoning (and, more broadly, of the culture of legal interactions between judges, academics, and lawmakers, etc.) depends upon the general strength of an ‘internal’ jurisdiction-specific perspective in comparison to – and in some tension with - what she calls ‘external’ and ‘sovereign’ perspectives. This prompts the speculation that the decentring of the state and the weakened magnetic pull of its jurisdiction in an age of globalisation may be accompanied by a gradual decline in the overall influence of the internal perspective.

Taken together, the contributions to this Symposium provide a rounded, if brief, snapshot, of the myriad issues, positions, assumptions and challenges thrown up by the contemporary legal and political world when viewed through the lens of the connection between Law and Polity. The hope is that under a net cast as widely as ours, further research will engage with these multiple perspectives and challenges in a manner that supplies more informed, contextual and ‘joined-up’ contributions to the resolution of the complex puzzle of common living within our ever evolving legal multiverse.