JURISDICTION

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Jurisdiction can mean many things in international law and even more in domestic law. In general international law, however, jurisdiction is commonly understood to refer to the legal authority of States to set and enforce rules with respect to acts that may, or may not, take place on their territory. While State jurisdiction is perceived as a unitary phenomenon, doctrine on State jurisdiction typically distinguishes between three modalities of the exercise of State authority: prescriptive/legislative, enforcement, and adjudicatory jurisdiction. These modalities are interrelated, and even sequential, as ultimately one can expect that a State wishes for the rules it prescribes to also be enforced and adjudicated in specific cases (although, admittedly, States may exceptionally satisfy themselves with mere symbolic prescription).

This entry focuses primarily on the international law of prescriptive jurisdiction, which is concerned with the permissible reach of a State's laws, in particular beyond its borders. It addresses how, from early modern history onwards, jurisdiction came to be seen as almost inevitably wed to the concept of territory – articulated well in Baldus's metaphor that jurisdiction and territory go together as mist to a swamp (1). The entry proceeds to examine the place it occupies in various modern traditions of liberal thought (2), and emphasize how the foundations of jurisdiction are currently shifting (3). The gist of the argument is that whereas in the modern period, jurisdiction has been conceived as a concept allocating competences, in postmodern times it is becoming an instrument to realize international community goals of substantive justice.

1. Jurisdiction as the mist above the swamp of territory

The law of jurisdiction may appear to be a rather technical subfield of international law, concerned as it seems with procedural obstacles to the application of substantive law and with the delimitation of competences between various international actors. However, the law of jurisdiction is more than just a body of international 'traffic' rules: it concerns the extent of the normative power and authority of the law itself. In reality, jurisdiction is a site for political

struggle regarding the allocation of power among the participants in the international society. The extent to which the law of jurisdiction facilitates or restricts participants' authority is influenced by the preferences of various actors looking to maximise their own political power.

The law of jurisdiction has traditionally revolved around the power of *States*. In international law indeed, States are considered as the main subjects of international law, and the primary lens through which to describe the world. The concept of jurisdiction reinforces this epistemological view, even if the diminishing power of the State has led the concept of jurisdiction to be applied to non-State actors, such as regional intergovernmental organizations and even private actors, as well.

In the classic view, the projection of a State's power and the exercise of jurisdiction emanating from it, then become a concern for the *international law of jurisdiction* when they pertain to activities abroad, *i.e.*, outside of the State's territory. This is because such 'extraterritorial' jurisdiction may lead to international conflict, 'activities abroad' usually being subject to another State's territorial authority. Participants in international affairs, as well as international lawyers, have perceived the law of jurisdiction to operate on the basis of the binary code territorial/extraterritorial, with territorial jurisdiction being seen as valid, and extraterritorial as suspect, if not outright unlawful.

The binary code territorial/extraterritorial has over the years come to be viewed as natural, reflecting the cartographic carving up of the world in distinct territorial entities (States) which are constitutionally autonomous *vis-à-vis* their peers. In reality, this carving up of the world, as notably sanctioned by the Peace of Westphalia (1648), is historically contingent and politically constructed, and may therefore be subject to change in light of contemporary understandings of international law and society. As argued in Section 3, such change is currently taking place.

It is crucial to understand that territoriality only became dominant in the 16th century, when cartographic detail allowed modern rulers to establish efficient bureaucracies, and as a result of changes in various other material and epistemic conditions in the late Middle Ages, *e.g.*, as the rediscovery of Roman law by the *(post-)glossatores* and the application of the private law concept of property to the notion of sovereignty. Notably the view of Baldus de Ubaldis (1327-1400) that territory and jurisdiction go together 'as mist to a swamp' have proved particularly influential.[1] Contemporary political geographer Stuart Elden observed that these

[1] Baldus, 'on Codex' VI.24.1 in *Iurisconsulti Omnium*, vol. 7, *fol* 70v cited in Stuart Elden, *The Birth of Territory* (University of Chicago Press, 2013) 231, fn 148.

words implied that '[t]erritory is … not just the limit of the jurisdiction but its very definition'.[2] The concept of jurisdiction accordingly became closely associated with territory, the latter being not only the description of a material reality but also a legal concept in itself.

Whatever the exact origins of territoriality as the main principle of jurisdictional order may be, its very ascendancy nevertheless points to the existence of prior, alternative systems of jurisdiction – in particular those based on personality or community, which subject members of communities or tribes to the writ of community or tribal law wherever they may spatially find themselves. Such models were notably dominant before the Modern Age, when strong States with clearly defined borders had not yet come into being. Even the feudal system was, although seemingly land-based, ultimately rooted in obligations of personal loyalty between vassals and suzerains. In spite of territoriality becoming dominant, jurisdictional systems based on personal loyalty or community bonds survived well into the Modern Age, *e.g.*, the system of the merchant guilds and the Church.

From the historical understanding of jurisdiction, it could be gleaned that the mode of exercising jurisdiction depends on which model of social organization or governance one prefers. In modern times, dominant forces may have propelled territory to victory, and side-lined community, but this victory is a precarious one. In fact, the development of the Internet as a virtual world may, and even should, cause us to question the relevance of territory as the jurisdictional linchpin. More generally, the technology-driven expansion of transnational information and communication links may lead individuals to identify less with their fellow countrymen but rather with foreign-based individuals that belong to the same ethnic, religious, or functionally differentiated community. These changes in social identification may undermine the supremacy of the regulatory claims of territoriality or, more fundamentally, of 'the State'. It is not unreasonable to expect that in the course of this century, as stakeholders strengthen their allegiance to private – and often virtual – communities, non-State regulatory systems will considerably expand their jurisdictional remit, and rival, and even outmanoeuvre the State as the locus of prescriptive, adjudicatory, and enforcement jurisdiction. A great deal of work on transnational private regulation either describes, or normatively defends this evolution. Seen from this perspective, the law of jurisdiction is closely associated with theories of international legal personality or subjectivity (State/non-State).

[2] Elden (n 1) 232.

2. The place of jurisdiction within various traditions of thought

The concept of jurisdiction is part and parcel of classic international legal theory. It reflects and at the same time constitutes the division of the world in discreet territorial units called States. Jurisdiction is also a manifestation of the liberal project of distinguishing between law and politics, by virtue of which politics is subordinated to legal rules that allocate, distribute, and discipline power. In that sense, jurisdiction is a very modern notion.

Historically speaking, in spite of the term's Latin origins, jurisdiction only gained currency in legal theory in the late Middle Ages, notably in the work of Baldus, already cited above, who laid the theoretical groundwork for the convergence of jurisdiction with the territorial boundaries of the State in the modern period.[3] In the late 19th century, theoretical inroads were made into this restrictive, territorial model of jurisdiction (which in essence *prohibits* States from exercising their jurisdiction beyond their borders), reflecting the ideological rise of a *laissez-faire* view of world, which held *freedom*, including the freedom of the State, in high regard. The jurisdictional high watermark of this liberal approach to international law and relations was the Permanent Court of International Justice's judgment in the 1927 *Lotus* case, in which the Court affirmed the positive jurisdictional freedom of states when ruling that a State's exercise of prescriptive jurisdiction is presumptively lawful absent a prohibitive rule to the contrary.[4]

Lotus may at first sight appear to be the very denial of the idea of jurisdiction, and thus the idea that international law distributes competences and powers between States. However, as the Court simultaneously affirmed states' right not to be subject to regulation without their consent,[5] it threw into stark relief the classic paradox of liberalism: how can a positive freedom (the right to act) and negative freedom (the right to be free from outside interference) be simultaneously guaranteed? Inevitably, such freedoms will have to be balanced against each other. In the dominant positivist approach, this balance is created on the basis of an action/reaction mode towards practice, specifically through States' law-informed responses (affirmation/rejection/acquiescence) to other States' jurisdictional assertions. These actions and reactions – and hence the norms of jurisdiction – are not carved in stone, but they can evolve over time, depending on new societal or technological challenges or changing political preferences. A State's actions – jurisdictionally speaking the extension of the geographical

[3] Baldus, 'on Codex' VI.24.1 in *Iurisconsulti Omnium*, vol. 7, *fol* 70v cited in Elden (n 1) 231, fn 148.
[4] PCIJ, *SS Lotus* (Merits) PCIJ Reports Series A No. 10, 18-19.
[5] PCIJ, *SS Lotus* (Merits) PCIJ Reports Series A No. 10, 20.

reach of a State's law – are normally a function of the substantive interest to be protected by the law. In the dominant neo-realist view, when foreign-based activities are seen to threaten the interests of the State and its subjects, or to undermine the integrity of domestic regulation, States may have an incentive to geographically extend the writ of their laws to address the foreign source of this threat. The level of foreign protest against the reach of a State's laws will depend on a variety of factors, such as whether there is an international consensus regarding the object and goal of regulation, the existence of safety-valves allowing equivalent foreign regulation to be taken into account, and obviously the political and economic costs of acceptance or protest. To obtain legal relevance with the positivist tradition, foreign protest will normally use a discourse of jurisdictional overreaching, violation of sovereignty, or undue intervention in domestic affairs. If foreign protest is sufficiently intense (pointing to quasi-uniformity of State practice) and informed by legal considerations (*opinio juris*), it can legally invalidate a jurisdictional assertion under customary international law. In this sense, foreign protest is indeed the test for the legality of a State's jurisdictional claim.

Through this process of action/reaction, jurisdictional claims have appeared in variegated forms and have at times been shrouded in extreme technicalities. The upshot of this process may be a *tableau* of chaos, and even irrationality. Still, over the years, in the interest of legal certainty, a number of jurisdictional categories have emerged which subsume and legitimize particular assertions of jurisdiction. These permissive principles of jurisdiction - territoriality, personality, security, and universality – enunciated in a draft drawn up by scholars at Harvard Law School in 1935,[6] function as limited entitlements for States to extend the reach of their laws, and are meant to bring some order to the liberal chaos to which the *Lotus* judgment gave rise. They signal a return to the modern notion that politics is subject to law, and that only those political projects that survive the legality challenge can claim legitimacy.

The Harvard draft continues to give territoriality pride of place, while treating principles of extraterritorial jurisdiction as anomalies in need of specific justification. In the history of legal ideas, it can be said to take its roots from a 'negative liberal view' that emphasizes the exclusive character of territorial sovereignty (bar some limited exceptions) in a quest to bring order to an unruly world. In practice, however, the various permissive principles have been construed liberally, and their interpretations have been contested. Accordingly, somewhat ironically, the approach taken by the Harvard draft, in turns of practical outcomes, eerily resembles the *Lotus* approach. This serves as an explanation as to why the international

[6] *Introductory Comment to the Harvard Draft Convention on Jurisdiction with Respect to Crim*e *1935*, 29 Supp Am J Int'l L443, 445 (1935).

community has resorted to post-realist, second-level principles of jurisdiction, such as ‘reasonableness’, or ‘subsidiarity’, to limit jurisdictional overlap. It is doubtful whether these principles currently rise to the level of international law. Legal pluralists, however, have embraced them wholeheartedly as enabling debate between various jurisdictional centres, observing that jurisdiction is not a stable category with a fixed meaning, but rather ‘the locus for debates about the appropriate definition of community and the articulation of norms’.[7]

3. Shifting foundations of the law of jurisdiction

As argued earlier, the law of jurisdiction has traditionally sought to identify principles of restraint, so as to prevent normative conflicts. It has done so by allocating competences to States on the basis of legitimate jurisdictional connections, territorial links in particular. Even though the existing permissive principles are unstable and open to multiple interpretations, one has to concede that the jurisdictional project has brought at least some order and predictability to the conduct of international relations. The territorial bias of the law of jurisdiction has hemmed in rather than facilitated the exercise of jurisdiction, and thus it has ensured that rival claims are rather exceptional.

This traditional approach the role of the law of jurisdiction has turned a blind eye to certain *goals of justice*, however. Rooted as it is in a ‘negative community’ of common practices rather than common goals, the law of jurisdiction has not concerned itself with the potential under-regulation of global governance challenges, such as the fight against impunity for gross human rights violations, foreign corrupt practices, cyber-criminality, or the mitigation of climate change. This failure to engage with substantive issues is not unique to the law of jurisdiction. It is characteristic of a modern international law that delimits sovereign powers and emphasizes State consent but ‘defer[s] substantive resolution elsewhere’.[8] Global justice has never been the goal of the international law project, even if many international norms may be considered to be globally just (if only applying a thin version of justice).[9]

Recent engagement with global public goods theory may possibly change this position, however. As such goods tend to be undersupplied owing to a lack of international cooperation, it can be argued that formalist international legal restrictions may have to yield to innovative,

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[7] Paul Schiff Berman, ‘Conflict of Laws, Globalization, and Cosmopolitan Pluralism’ (2005) 51 Wayne L Rev 1105
[8] Martti Koskenniemi, ´The Politics of International Law´ (1990) 1 Eur J Int'l L 4.
[9] Steven Ratner, *The Thin Justice of International Law* (OUP 2015).

goal-oriented substantive solutions. Against this backdrop, for the concept of jurisdiction to remain sufficiently alive to contemporary governance problems - characterized by the absence of adequate regulation rather than overlapping regulation - its *foundations may have to shift*. Formal, binary approaches to jurisdiction pursuant to which the presumptive legality of an assertion hinges on the presence of sufficient connecting factors, in particular territorial links, may have to give way to substantive justice approaches, which employ (State) jurisdiction as an instrument to bring about a more just world.

A number of criminal law conventions have already attempted to add a more substantive flavour to this lax jurisdictional paradigm by requiring, in respect of specific crimes, that States establish and exercise their jurisdiction over an alleged offender present on its territory, whatever the individual's nationality or wherever they may have committed the crime.[10] More recently, regulatory law has followed suit by seemingly tying the legitimacy of a jurisdictional assertion to substantive projects of the international community, such as combating climate change, while paying lip-service to a weak territorial nexus.[11] Such jurisdiction is often exercised via trade or market-based mechanisms, *e.g.*, where States impose import restrictions on foreign goods and services produced in a manner adversely affecting a global public good. Since these measures impose a condition to obtain territorial access, they are nominally premised on the territorial principle, although one cannot gainsay that they aspire to protect global public goods rather than territorial interests alone. Global public goods-inspired unilateral jurisdiction may pose one of the most formidable challenges to the positivist and formal structure of the international legal order, as it operates on a non-consensual and non-compliant basis to realize the international community's (purported) commonly-held goals.[12] In philosophical terms, such jurisdiction could be termed 'a-legal', revealing a 'tension between law as an *actual* or posited distribution of ought-places and *possible* law', evincing the domain of possibility and heralding the transformation of the legal order.[13]

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[10] See on the shift from permission to obligation in the law of jurisdiction also Alex Mills, Rethinking Jurisdiction in International Law', (2014) Brit Yb Int'l L 187.

[11] *E.g.*, *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change ('ATA')* Case C-366/10 (judgment of 21 December 2011) O.J. (C49/07 18 February 2012) para. 125 (holding that application of the Emissions Trading Scheme to foreign aircraft operators, on the basis of the EU Aviation Directive infringes neither the principle of territoriality nor the sovereignty of third states, formally basing this position on the limitation of the scheme to aircraft landing at, or departing from EU aerodromes, but substantively basing it on multilateral failures to reduce greenhouse gas emissions from aircraft).

[12] Also Nico Krisch, 'The Decay of Consent: International Law in an Era of Global Public Goods, (2014) 108 Am J Int L 1.

[13] Hans Lindahl, 'A-Legality: Postnationalism and the Question of Legal Boundaries' (2010) 73 Modern L Rev 30, 43-44.

For jurisdictional theory, these evolutions raise the question as to whether a novel, ‘positive community’-based jurisdictional principle may be on the horizon. Such a principle could be a sword in the hands of the international community to realize particular global justice projects, rather than a shield in the hands of sovereign States to fend off unwelcome transgressions by other States. What pleads in favour of such a principle is that global public goods-based jurisdictional assertions can derive their legitimacy from the substantive interests which they promote, much like the manner in which the exercise of universal jurisdiction derives its legitimacy from the gravity of the crimes amenable to such jurisdiction. This argument ties in with a more general strand in jurisdictional theory which premises the legitimacy of an exercise of jurisdiction not just on the existence of (territorial or personal) links but also on the existence of an international consensus regarding the proscription or undesirability of certain activities, even in the absence of links. The existence of an international consensus would arguably prevent international jurisdictional conflict from arising, or at least delegitimize international protest. The exercise of such ‘false conflict’, or consensus-based jurisdiction could be limited to acts proscribed by international law, in which case the State acts as a decentralized enforcer of international law.[14] However, one could also contemplate the exercise of jurisdiction over acts which the international community has not deemed internationally unlawful, but at least *globally undesirable*, in *more or less formal documents* attracting widespread support.[15] This combination of substantive and procedural legitimacy may appear to further strengthen the case for global public goods-based unilateralism – although one cannot deny that such unilateral action has distributive effects that may *a priori* not have been agreed on internationally.

In sum, in the 21st century, formal approaches of the law of jurisdiction are giving way to more substantive approaches, signalling a epochal shift in how we perceive the structure of global governance. The modern period has witnessed the law of jurisdiction being centred on the principle of territoriality, reflecting the community of States’ concern with territorial sovereignty, State consent, and non-interference. Our post-modern period has however highlighted the historical contingency of this model, with doubts being raised about the viability of territoriality in our interconnected world. A shift in the law of jurisdiction towards

[14] Anthony J Colangelo, ‘Universal Jurisdiction as an International False Conflict Of Laws’, (2008) 30 Mich J Int'l L 881.

[15] *E.g.*, the Kyoto Protocol (1997), and its successor the Paris Treaty (2015), aiming at the global reduction of greenhouse gas emissions.

objectivism and instrumentalization can be discerned: jurisdiction is on a path to become just a tool used to realize predefined goals of the international community.

4. Concluding remarks

This entry has shown that it is the aim, and the very *raison d'être* of the law of jurisdiction, has historically been to legally delimit spheres of State power and prevent international conflict from arising. In the classic view, the international law of jurisdiction aspires to prevent global chaos flowing from different States applying their own laws to one and the same situation. For a good number of international lawyers, this prevention of chaos is, not coincidentally, the goal of international law itself. In a world characterized by increasing interdependence and multiple identities, the normative force of this ordering goal may not have run out of breath. Concurrently, however, a law of jurisdiction that limits itself to keeping States at arm's length from each other may fail to address the major problems of our time. It may fail to recognize that States have adopted common substantive norms and have set joint goals, for the actual realization of which the international community may crucially depend on unilateral action. Identifying the exact legal parameters for such action in the global interest are a key challenge for a modern law of jurisdiction.

Ultimately, one is left wonder whether in this new project of justice and substantive unity, we are still in need of the classic concept of jurisdiction which expressed the allocation of powers between discreet territorial units. Instead, would a concept of allocation of responsibility and burdens not better articulate the regulatory role played by sub-global actors in the realization of common projects?

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