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Borders: A Cross-Disciplinary Journey Through Non-Legal Lexicon

Matteo Nicolini [*]

Abstract

The paper engages in a cross-disciplinary examination of the concept of borders. After considering its several connotations in law, geography, and linguistics, it focuses on their interrelations with territory. It then considers how their meaning has evolved over time, thus reflecting the cognitive way whereby political power has tried to superimpose on them its own conception on the world. It then discusses the impact of cross-disciplinary research on comparative-law taxonomies (such as territorial constitution and litigation, territorial demarcation, and alteration), as well of how non-legal variables have some bearing on the operational rule of bordering processes.

Keywords

comparative law; cross-disciplinary research; territory; maritime spaces; borders; frontier; boundary

1. Cross-disciplinary Connections: Borders Between Land and Sea

When engaging in cross-disciplinary investigations, comparative scholars navigate unexplored stretches of open water. In some cases, the navigation merely entails refashioning our legal approach after an interdisciplinary allure. But it might be both methodological and substantive, and cross-disciplinary investigations may also chart topics usually explored within a single academic discipline.

The maritime metaphor is particularly fitting when it comes to borders. Not only is the topic well-charted in legal, political, ang geographical research, but it also has *politico-legal* implications. As Roberto Toniatti puts it, 'Over time, power has constantly changed its spatial scope and material reach over land, resources and populations.' Legal-political implications unavoidably entail cross-

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disciplinary investigation: bordering and re-bordering processes 'might be linked to war and military conquest,' or take place 'by means of the various connections between and among social groups, ruling elites and royal dynasties.' Changes in the spatial scope of political power might also be a 'consequence of the discovery of new lands or of expanded opportunities for economic exploitation, or as a sacred mission of religious or ideological proselytization.' In Ethnocentric parlance, this points to disputes that take place at the margins of the Western geopolitical scenario. Again, there are secessions and annexations, whose refashioning of spatial spaces is the outcome of 'rebellions and struggles for independence, or the severance by a people of former ties with another people, or collective social and political emancipation and sovereign self-determination.'[1]

Bordering and re-bordering processes have percolated geopolitical disputes throughout history. At the same time, they have supplemented delimitation cases before international courts and tribunals.[2] The marine metaphor warns us of the most recent maritime disputes: the *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, whose history stretches back to the Portuguese, Dutch, and English colonial rules.[3] The *Somalia v. Kenya* case[4] is also related the delimitation of the 'Earth's water surface areas,' i.e. the *exclusive economic zone* (EEZ) and the *continental shelf* using 'physiographic or geopolitical criteria.'[5]

Maritime and territorial disputes are intertwined.[6] According to Art. 121(3) of the United Nations Convention on the Law of the Sea (UNCLOS), islands are tracts of land which can be the stage of some human activity. In terms of borders, Art. 121(3) of UNCLOS has twofold consequences. On the one hand, islands' location is paired with their geographical demarcation; surrounded by water, their 'boundaries are narrow and firmly defined.'[7] On the other hand, Art. 121(3) of UNCLOS distinguishes islands from rocks, i.e. features that 'cannot sustain human habitation or economic life of their own.' Turning a feature into an island is beneficial; states expand their sovereign rights by increasing their exclusive economic zone (EEZ) and, at the same time, reduce the extent of the International Seabed Area.

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[1] R. Toniatti, 'Federalism and Regionalism,' in *Annual Review of Constitution Building Processes*, ed. S. Bisarya (Stockholm: International IDEA, 2014): 89–103, 89.
[2] *See* T. Scovazzi, 'Maritime Delimitation Cases before International Courts and Tribunals', *Max Planck Encyclopedia of Public International Law* [MPEPIL], 2006 (accessed on 8 September 2020).
[3] Judgment, *I.C.J. Reports* 2008, at 12. *See* J.L. Gaynor, 'Liquid Territory, Shifting Lands. Property, Sovereignty, and Space in Southeast Asia's Tristate Maritime Boundary Zone,' in *Blue Legalities. The Life and Laws of the Sea*, eds. I. Braverman *et al.* (Durham and London; Duke UP, 2020): 108–127, 116.
[4] Judgment on Preliminary Objections (2 February 2017), paras 18–19.
[5] M. Hasan *et al*., 'Protracted maritime boundary disputes and maritime laws,' *Journal of International Maritime Safety, Environmental Affairs, and Shipping* 2:2 (2019): 89–96.
[6] S. Faccio, '"Human Habitation or Economic Life of their Own." The definition of an island between history, technology and the law,' *Liverpool Law Review* 42:1 (2021).
[7] R. Lovegrove, *Islands Beyond the Horizon. The Life of Twenty of the World's Most Remote Places* (Oxford: OUP, 2012), 3.

This triggers further maritime border disputes. Whereas several coastal States have used their quasi-insular features to broaden their own EEZ, China, for example, 'has turned seven reefs in the Spratlys into artificial islands;' it has then 'occupied the islands it built, erected structures, paved runways, and installed military defenses.'[8] It is a "veritable process of 'islandization' … in the attempt to satisfy the requisites established by article 121(3) of UNCLOS."[9]

2. Locating Borders. From international Law to Interdisciplinary Research

Whatever their nature (maritime or territorial), border disputes have never been set in a legal vacuum. International law and international relations have revolved around the sanctity of borders.[10] They have also elaborated their own lexicon (such as the concepts of territorial acquisition, cession, and annexation) and practices, which have subsequently been epitomised in the seminal case *Burkina Faso v. Mali*.[11]

International-law research, though, is not able to grasp the manifold implications of the concept of border. Take, for example, territorial integrity. Evidently, the UN Charter contains a patent contradiction, inasmuch as it encourages 'self-determination of people' (Art. 1), but, at the same time, considers territorial integrity as a cardinal principle of international law (Art. 2.4). To mention just a few, Russia's annexation of Crimea, the independence of Kosovo, the ongoing Israeli-Palestinian conflict, East Timor, and South Sudan are some major examples of how disputed areas are 'intractable' in international law.[12]

It is not my purpose to undertake any sort of detailed analysis of the international legal devices revolving around border disputes, which have been (and no doubt continue to be) subject to scholarly examination. It is my intention to consider some common assumptions we usually make about borders by locating them in an interdisciplinary 'environment.'

Therefore, it is necessary to 'pluralise the debate' through cross-disciplinary research[13] and allow comparative lawyers to join geographers and social scientists in exploring areas across frontier lines. Conceiving of, experimenting, and deploying innovative cross-disciplinary methodologies will shed

[8] Gaynor, 'Liquid Territory,' 109.
[9] Faccio, 'Human Habitation.'
[10] *See*, among others, G. Abraham, 'Lines upon Maps: Africa and the Sanctity of African Boundaries,' *African Journal of International and Comparative Law*, 15.1 (2007): 61-84; A. Tancredi, 'In Search of a Fair Balance between the Inviolability of Borders, Self-determination and Secession in International Law,' *Law, Territory and Conflict Resolution. Law as a Problem and Law as a Solution*, eds. M. Nicolini *et al.* (Leiden & Boston: Brill, 2016), 90–104.
[11] *Frontier Dispute, Burkina Faso v Mali*, Merits, Judgment, [1986] ICJ Rep 554.
[12] E. Milano, 'The Intractable Case of Northern Kosovo in the Light of the 2013 Brussels Agreement', in, *Law, Territory and Conflict Resolution. Law as a Problem and Law as a Solution*, eds. M. Nicolini *et al.* (Leiden & Boston: Brill, 2016).
[13] A. Baldwin, 'Pluralising climate change and migration: an argument in favour of open futures,' *Geography Compass*, 8 (2014): 516–528, 516.

new light on the politico-legal (and cultural) implications of the relation between law and geography. This essay contributes to this conversation. It discards a purely positivistic approach applied to borders and goes beyond the limits marked by legal studies. Through the potentials of comparative law, it engages in cross-disciplinary investigations, which provide scholars with new 'possibilities' and renovated 'perspectives' within the field of borderland studies.

3. Defining Borders. Between Law, Territories, and Politics

The term 'Border' is related to the concept of territoriality. Within the field of social sciences, the dominant paradigm is the territorial one. Associated with the Westphalian system, borders are not 'natural', but politico-legal artefacts.[14] Territoriality is 'the spatial expression of the idea of exclusive sovereignty,' and the state is the 'organizing principle of political and social life.'[15]

Not only, however, do human beings divide the earth's surface into nation states,[16] but they also attempt to outline bounded spaces on oceans. This process, which has been facilitated by UNCLOS, favours the creation of artificial imaginaries of the sea: in Parts V and VI of UNCLOS, 'nature is represented as passive and instrumentalized,' and 'the ocean is abstracted and flattened, and life-forms with no immediate commercial value are blindsided and discursively partitioned.'[17]

Maritime demarcation confirms that borders, as political artefacts, entail a dialogue between law, geography, and social sciences. Furthermore, the term points to a composite of several distinct, albeit interlocked, forms of connection: the physical, the imaginative, and the politico legal.

Focusing on territorial borders, the *physical* connection points to the 'line' separating 'one country from another', 'two jurisdictions or territories,' as well as the part laying 'along its boundary' or at 'the edge of a country or territory.' These definitions are shared by linguists and geographers, as the *Oxford English Dictionary* and the *Oxford Dictionary of Human Geography* uphold.[18]

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[14] KR Johnson, 'Open Borders,' *UCLA Law Review*, 51 (2003) 193–265, 195.
[15] See, respectively, D. Delaney, *Territory. A Short Introduction* (Oxford: Blackwell, 2005), 3; J. Anderson, and L. O'Dowd, 'Borders, Border Regions and Territoriality: Contradictory Meanings, Changing Significance', *Regional Studies* 33.7 (1999), 593–604, 594.
[16] AC Diener, and J. Hagen, *Borders. A Very Short Introduction* (Oxford: OUP 2012), 1–4.
[17] KG Sammler, 'Kauri and the Whale. Oceanic Matter and Meaning in New Zealand,' in *Blue Legalities. The Life and Laws of the Sea*, ed. Irus Braverman *et al.* (Durham, NC; Duke UP, 2020): 63–84, 64. On the partitioning of the sea see also L. Campling, A. Cojás, *Capitalism and the Sea* (London and New York: Verso, 2021), 67 *et seq*.
[18] s.v., 'Border' n., in *The Oxford English Dictionary*, available at https://www.oed.com/view/Entry/21617?rskey=aNIiHX&result=1#eid (Accessed on 4 March 2021); 'Border', in *Oxford Dictionary of Human Geography*, eds by N. Castree *et al.* (Oxford: OUP, 2013), 38–39.

The term is then interchangeably used with 'frontier', 'margin', and 'boundary.' 'Limit' and 'boundary' refer to the line marking the border.[19] 'Margin' designates the outcome of bordering processes; but border has a broader meaning which comprises both the line and the bordering areas.[20]

As far imaginative connections are concerned, border is usually replaced by 'frontier,' i.e. the line and the lands laying on both of its sides.[21] The Great Wall of China and the Hadrian's Wall, for example, were the imagined lines 'between the occupied and unoccupied parts of the country.' During the eighteenth century, the U.S. frontier stimulated the forging of the U.S. constitutional identity.[22] And the Scottish border designates the line, and its adjoining districts, suppressed by the *Union with Scotland Act 1706* (in force from 1707) and reinstated by the *Scotland Act 1998*.[23] From this it did not follow that Scots ceased to narrate their own constitutional identity within the framework delineated by the *Act of Union*. The framers of Scottish constitutional identity deliberately preserved the ideal frontier with England. In the fourteenth century, Johannes of Fordun's *Chronica Gentis Scotorum* (1363-1385) had already depicted 'an almost immemorial Scotland which stretched from the Tweed, or even a more southerly river, to the Orkneys.'[24] The renovation of Scottish constitutional identity now rests on several imaginative materials: Scots law, the National Church of Scotland (the Kirk), and Scots, which is one of the longest-attested varieties derived from Old English.[25]

As already said, borders have geopolitical – and, to some, extent, Ethnocentric – implications. As frontiers of civilisation, they allowed colonial powers to imagine the geographies of the colonised lands, thus making them functional to their own interests and trading companies. Furthermore, they denote the 'frontier of constitutional civilisation'. The U.S. Constitution, for example, employs the term 'territory' in relation to those tracts of land laying beyond the borders and 'over which the United States exercise jurisdiction' (see Art. IV s 3 of the US Constitution, which is called the 'Territorial

[19] 'Boundary', in *Oxford Dictionary of Human Geography*, 39–40; LJ Boucher, 'The Fixing of Boundaries in International Boundary Rivers,' *International and Comparative Law Quarterly* 12 (1963) 789–818; P. Munge Sone, 'Interstate border disputes in Africa: Their resolution and implications for human rights and peace' *African Security Review*, 26.3 (2017): 325–339, 326.

[20] S. Gadal and R. Jeansoulin, 'Borders, frontiers and limits: some computational concepts beyond words', *Cybergeo: European Journal of Geography* (2000) DOI : https://doi.org/10.4000/cybergeo.4349 (Accessed on 1 September 2020).

[21] 'Boundary', in *Oxford Dictionary of Human Geography*, 166.

[22] G. Delledonne, 'Depicting the End of the American Frontier: Some Thoughts on Larry McMurtry's *Lonesome Dove* Series', in R Mullender, M Nicolini, TDC Bennet, and E Mickiewicz (eds.), *Law and Imagination in Troubled Times: A Legal and Literary Discourse* (Abingdon and New York: Routledge, 2020): 195–205.

[23] M. Nicolini, 'Narrators of Fables or Framers of the Constitution? The *Acallam na Senórach* Beyond Time, Place, and Law', in *Fables of the Law. Fairy Tales in a Legal Context*, eds D. Carpi M. Leibhoff (Berlin: de Gruyter, 2016): 137–168, 156–157.

[24] R.R. Davies, 'Presidential Address: The Peoples of Britain and Ireland 1100-1400. II. Names, Boundaries and Regnal Solidarities,' *Transactions of the Royal Historical Society* 5 (1995): 1-20, 8.

[25] JJ Smith, *Essential of Early English. An Introduction to Old, Middle and Early Modern English* (London and New York: Routledge, 2005), 9–10.

Clause').[26] When it comes to the 'well bounded order of politics',[27] 'territory' is replaced by 'land:' under the U.S. Constitution '"Law of the Land" is synonymous with "due process of law".'[28]

Finally, border is a synonym of borderland. Borderlands coincide with 'state borders;' in the USA, it points to the states bordering on Canada.[29] Borderland regions usually belong to a state but are inhabited by people identifying with 'rival political communities.'[30] This is the case of Northern Ireland, which the Irish Border severs from the Republic of Ireland. Undermined, as they are, by the *United Kingdom Internal Market Bill 2019-21*, its relations with the EU are regulated by the *EU (Withdrawal Agreement) Act 2020*, whose Ireland/Northern Ireland Protocol prevents a backstop as a result of the UK leaving the EU.[31] The way in which these borderlands have been handled so far is being addressed in legalistic terms, as if borderland areas were in watertight compartments and their borders lines and figures grounded in 'firm frontiers', which are in turn bound up with the existence of 'assertive states.' It appears to me that, conversant in lines and figures, this imagined border does not exactly know where each country could assert its identity and 'create [their] first line of defence.[32]

4. Borders at the Crossroads: Law, Linguistics, and Cartography

It is difficult to draw a clear divide between the law and the non-legal variables (such as the geographical ones) affecting bordering processes. Borders embed the relationship between a community and its territory. The connection between land, community, and law highlights the manifold interactions between territory and institutionalised communities.

In our cross-disciplinary journey, the study of 'legal' borders overlaps with international relations. Bordering practices assert states' exclusive sovereignty over a territory often formalised by international treaties. Borders are also part of human geography; concepts such as 'place', 'space,' and 'landscape' supplement lawyers with the material scenario for bordering processes. Sociology, ethnology, and anthropology also consider the connections between ethnic groups, boundary-making, and cultural spaces.[33]

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[26] S. Bacon, 'Territory and the Constitution', *The Yale Law Journal*, 10 (1901): 99-117, 101.
[27] R. Ashley 'Untying the Sovereign State: A Double Reading of The Anarchy Problematique' 17 Millennium 227–262, 238.
[28] J.M. Mullen, 'The Supreme Law of the Land', *Virginia Law Review*, 39 (1953) 729-751, 736-737.
[29] J Blocher, 'Selling State Borders,' *University of Pennsylvania Law Review*, 162.2 (2014): 241–306, 243.
[30] M. Moore, *A Political Theory of Territory* (Oxford: OUP 2015), 123.
[31] See S. de Mars *et al.*, *Bordering Two Unions: Northern Ireland and Brexit* (Bristol: Policy Press 2018); S. De Mars, and C. Murray, 'With or Without EU? The Common Travel Area After Brexit,' *German Law Journal*, 21.5 (2020): 815–837.
[32] J. Black, *Maps and Politics* (Chicago: University of Chicago Press 1988), 123.
[33] See Delaney, *Territory*, 39–49.

'Legal' borders share fields of research with linguistics. This is manifest in the linguistic studies of place names, i.e. an intriguing research into both the remnants of former communities and the merging of different identities.[34] Geographical linguistics draws boundaries in dialectology, *isoglosses* may be preconditions upon which borders may be demarcated. In England and in the USA, several linguistic atlases related to word geography 'delimit the main speech areas […] by finding the boundaries of particular words and expressions' and therefore by detecting clear isoglosses.[35] As for Scottish identity, a people whose linguistic and geographic features frequently overlap. Besides severing Scots from English, the geo-linguistic Scottish frontier is related to the formation of the Scottish nation, which was shaped over time: 'the freeholders and whole community of the realm of Scotland were [thus] associated […] with the struggle of independence' fostered by the Scots' folklore and literary works.[36]

There are also overlaps between placenames and borders. Not only do 'America' and 'Europe' designate two continents, but they act as shorthand for the USA and the EU respectively. Indeed, *America* "serves as [a] potent label for one nation that occupies only the middle reaches of the northern part of the Americas", whereas *Europe* has now 'an additional sense that brought it into line with *America*: it now means not only the whole continent, but also the EU.[37]

This leads our cultural journey across borders to geopolitics and cartography. Whereas the former offer insights on how 'the relationship of geographical space to politics' influences the making of boundaries,[38] its interactions with cartography trigger the triad of 'bordering, ordering and othering.'[39] Modern cartography has been servient to the dissemination and establishment of Western legal geopolitics. This usually makes the demarcated areas 'depopulated, often void of human traces, visually "empty".'[40] With the complicity of legal scholars, politicians filled the void: their

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[34] Remnants characterise, for example, the Celtic substrate in the geography of Anglo-Saxon England: see M.O. Townend, 'Contacts and Conflicts: Latin, Norse and French', in *The Oxford History of English*, ed. L. Mugglestone (Oxford: OUP, 2012) 75–105, 80. On diatopic variation in English word geography, see A. McIntosh, 'Word Geography in the Lexicography of Mediaeval English,' *Annals of the New York Academy of Sciences*, 211 (1973): 55–66.

[35] See H. Orton *et al.*, *The Linguistic Atlas of England* (London: Routledge, 1978); H. Kurath *et al*., *Handbook of the Linguistic Geography of New England* (2nd edn., Providence: Brown University for the American Council of Learned Societies, 1973); H. Kurath, *A Word Geography of the Eastern United States* (Ann Arbor: University of Michigan Press, 1941); H. Kurath *et al.*, *Linguistic Atlas of New England,* 6 vols. (Providence: Brown University for the American Council of Learned Societies, *1939-1943*); H. Kurath and R.I. McDavid, Jr., *The Pronunciation of English in the Atlantic States* (Ann Arbor: University of Michigan Press, 1961; Reprint, University of Alabama Press, 1983).

[36] R.R. Davies, 'Presidential Address: The Peoples of Britain and Ireland 1100-1400. I. Identities', *Transactions of the Royal Historical Society*, 4 (1994) 1–20, 5.

[37] T. McArthur, 'English World-wide in the Twentieth Century,' in *The Oxford History of English*, ed L. Mugglestone (Oxford, Oxford University Press 2012), pp. 446-487, 471.

[38] S. Cohen, 'Geopolitics in the New World Order: A New Perspective on an Old Discipline', in *Reordering the World. Geopolitical Perspectives on The 21st Century*, ed. Demko, G (Routledge 1999) 17.

[39] D. Tripathi and S. Chaturvedi S, 'South Asia: Boundaries, Borders and Beyond,' *Journal of Borderlands Studies*, 35.2 (2020): 173–181, 173.

[40] A. Gordon and B. Klein, 'Introduction', *Literature, Mapping, and the Politics of Space in Early Modern Britain*, eds. A. Gordon and B. Klein (Cambridge: CUP, 2001): 1–12, 2.

cartography dispossesses 'the colonized,' whose 'cartographies [and] understanding of territory and boundaries' are thus neglected.[41]

Cartographic representation of borders encouraged abandoning traditional bordering processes based on natural features. In providing states with new, powerful, tools,[42] maps allowed states to select only natural features functional to their geopolitical goals.[43] For example, African territories were mainly delimited after 'astronomic' and 'mathematical lines,' whereas 'geographical features' made up 'a mere twenty-six percent'.[44] This allowed Western countries to establish 'legal' and cultural control over the less-developed, i.e. inferior, groups, which were both 'dispossessed by established Western cartography,' and their 'understanding of territory and boundaries' neglected.[45]

5. A matter of evolution and representation

Although it refers to what we consider as permanent human artefacts, our current conception of borders is a contingent one, which is the outcome of processes of evolution and representation. Not only has their meaning evolved over time, but they have also manifested themselves diatopically. They served serving different functions among nomadic people, hunter-gatherers, ancient civilisations; in modern times, they unveiled a 'particular cognitive mode of gaining control over the world, of synthesising cultural and geographical information.'[46]

Bordering processes are indeed form of spatial and legal visualisation; borders visualise how the law is conceived and enforced. To this extent, Schmitt reminds us that 'nomos' derives from ancient Greek νέμειν ('to divide'), thus referring to 'the immediate form in which the political and social order of a people becomes spatially visible'.[47] In *Township and Borough*, Maitland defined 'legal geography' the relationship between community and *its* territory: Maitland defined this 'territorialised' paradigm 'legal geography';[48] it is a spatial relationship, legally relevant, that Maitland terms as 'belongs of public law.'[49]

Such belongs are apparent in how human civilisations projected, synthesised, and conveyed their legal-geographical conceptions of the world. The Great Wall of China and Rome's *limes* separated

[41] Black, *Maps*, 19.
[42] R. Thompson Ford, 'Law and Borders,' *Alabama Law Review*, 64.1 (2012): 123–139, 135.
[43] Diener and Hagen, *Borders*, 42.
[44] Abraham, 'Lines upon Maps,' 163.
[45] Black, *Maps*, 19.
[46] Black, Maps, 18; J. Brotton, *A History of the World in Twelve Maps* (London: Penguin, 2013); Diener and Hagen, *Borders*, 20–27.
[47] C. Schmitt, *The* Nomos *of the Earth in the International Law of the* Jus Public Europaeum (trans. Ulmen, GL; Telos 2006), 70.
[48] FW Maitland, *Township and Borough: The Ford Lectures 1897* (Cambridge: CUP, 1964), 6.
[49] Maitland, *Township and Borough*, 11 and 29.

internal and outer spaces; but neither of them was formally a border. Their outer parts were 'floating' zones without specifiable boundaries.[50] During the Middle Ages, feudalism was more familiar with 'areas' rather than with lines.[51] Borders were still floating zones 'which, rather than having clear boundaries,' had 'somewhat vague borderlands.'[52] Take, for example, the 878 Treaty of Wedmore between Guthrum, the Danish King, and Alfred, King of Wessex, asserted their respective 'belongs of public laws' on a specific territory, and established a closer connection between land, community, and law. It is the so-called Danelaw, i.e., the territory subject to Danish law[53] and demarcated through a boundary running roughly from Chester to London. The Danelaw as a legal-geographic relationship between territory and community corresponds to the 'area to the north and east of the old Roman road known as Watling Street.'[54] The Danish 'belongs of public law' defined the legal relationship between the territory and the community and comprised the single constitutive parts of the legal-linguistic geography of Danish rule: place-name politics,[55] linguistic borrowings, a legal system and boundaries delimiting the area of the same Danelaw. These noticeable examples of Maitland's 'belongs of public law' reveal the performativity of the border, which not only demarcated the Danelaw, but was also a boundary, i.e. the visible expression of a territorial divide on ethnic grounds.

This Mediaeval 'areal' order was superseded by inaugurated by the 1649 Treaty of Westphalia, whose order was based on the equation between sovereignty and territory: 'borderland or border regions … became boundaries or frontiers.'[56]

This territorial order reached its heights during the colonial enterprises, which projected linear borders onto America, Africa, and Asia. Such a 'linear' system disregarded borderless communities, which were divided among different states with the aim of creating political entities based on territorial jurisdictions. The Berlin West Africa Conference (1884–85) led to the partition of Africa and the establishment of borders across the continent. In Asia, the India-Nepal border was consolidated between 1814 and 1857; and the Durand line between Pakistan and Afghanistan was servient to consolidate British control over India. The 1869 Treaty of Peking established Russian and Chinese areas of influence in Central Asia; the border remained fuzzy until 1949, when China formally extended its sovereignty to the Sinkiang region.

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[50] F. Kratochwil, 'Of Systems, Boundaries, and Territoriality: An Inquiry into the Formation of the State System', *World Politics*, 39.1 (1986): 27–52, 35–36.
[51] Black, *Maps*, 19.
[52] Brunet-Jailly, 'Theorizing Borders.' 635.
[53] A.C. Baugh and T. Cable, *A History of the English Language* (6th edn., London: Routledge, 2013), 89.
[54] M.O. Townend, 'Contacts and Conflicts: Latin, Norse and French,' *The Oxford History of English*, ed. L Mugglestone (Oxford: OUP, 2012): 75-105, 81.
[55] F.M. Stenton, 'Presidential Address: The Historical Bearing of Place-Name Studies. The Danish Settlement of Eastern England', *Transactions of the Royal Historical Society*, 24 (1942): 1-24, 14-15.
[56] Brunet-Jailly, 'Theorizing Borders,' 635.

In the aftermath of the WWII, decolonialisation confirmed the 'territorial trap' into which European powers had led the world during the colonial era.[57] Former colonial empires, such as the British Raj, split into several nation states; groups started claiming the creation of territorial states based on ethnic grounds. Odd as it may seem, when the representatives of the newly independent African states met in Addis Ababa in 1963 in order to create the OAU, they immediately conformed to the status quo.[58]

Neo-colonial geopolitics are also apparent in how Western countries advocate for the policing of several weak states. Western interventions are aimed at 'preserving and deepening' Western 'geolegalities', i.e. 'the dominance of the Global North over the Global South'. This is a legacy of the colonial attitude in the realm of politics and law. Such interventions tend to make borders fit into Global-North geopolitics, but, at the same time, borders are being blurred.[59]

6. Crossing Borders: From Interdisciplinary Investigations to the Territorial Constitution …

Besides international law, the relation between borders and comparative constitutional law is still partly unchartered. Comparative constitutional scholars have mainly focused on whether constitutions enshrine (or constitutionalise) secession or some forms of annexation, such as in the case of the Russian Constitution, whose Art. 65(2) contains procedures to annex territories, such as in the case of Crimea in 2014.

When they enshrine references to state territory, constitutional texts outline the *constitutional regime* of territory. This ranges from territorial borders and boundaries (Art. 2 of Nepal Constitution, Art. 1(2) of the Eritrea Constitution; Art. 2 of the Constitution of Cambodia), from demarcation processes (Art. 75 of the Constitution of Argentina) to surveys of its main geographical features (Art. 1 of the Constitution of Namibia). Finally, Art. 52 of the TFEU merely considers member states' territory as the territorial scope of the Treaties.

Geographers extend the concept of border so as to encompass lines 'separating jurisdictions or territories' of 'subnational administrative districts.'[60] Human geography also contributes to the legally relevant concept of borders. Suffice to consider the 'territorial constitution', which points to the geographical feature of federal constitutions, i.e. the governance through constituent units. Within federal contexts, authority is distributed both *vertically* and *geographically*. Whereas the former

[57] J. Agnew, 'The Territorial Trap: The Geographical Assumptions of International Relations Theory,' *Review of International Political Economy* 1 (1994): 53–80.
[58] Art. 4.b of the 2000 Constitutive Act of the African Union does the same.
[59] M.D. Smith, 'States That Come and Go: Mapping the Geolegalities of the Afghanistan Intervention', in *The Expanding Spaces of Law: A Timely Legal Geography*,' eds. I. Braverman *et al.* (Stanford: Stanford UP, 2014): 142–166, 149-150.
[60] 'Border' (in Castree), 38.

denotes the allotment of powers between the different orders of government, the latter means that both units' constitutive elements (people, government, and territory), and boundaries are demarcated on a geographical basis.[61] In multi-ethnic federations, the territorial constitution provides arrangements establishing multi- or bi-ethnic constitutional frameworks. Ethnic-based units enhance consociational participation and geographical cohesion, and complement power sharing, i.e. political and legal arrangements that allow divided groups to share responsibilities in the governments of their respective federations.

Among the legal devices that allow the territorial constitution to work, there are regional demarcation and territorial alteration. Both are legal taxonomies comparative scholars work out when devising law-based analyses of federal systems. Whereas demarcation presides the division of a country's internal territory into two or more territorial constituent units,[62] alteration entails either the total or the partial reconfiguration of a country's territorial constitution. Both assume create 'regionally defined constituent units to respond to the demands of a territorially concentrated population'.[63]

Such geographical configuration is traditionally examined within the legal geography of aggregative (and multi-ethnic) federations. In aggregative federations, demarcation usually overlaps with the boundaries of pre-existing units, which have come together and created a new federation. This process can also be a 'work in progress'. Demarcation usually overlaps with the boundaries of pre-existing units, which have come together and created a new federation. The USA, Australia, and Canada accrued their territory by admitting new states carved out of former federal territories (Art. IV s 3 cl 1 U.S. Constitution; s 146 Constitution Act of Canada, 1867 and Newfoundland Act 1949; s 121 Commonwealth of Australia Constitution Act 1900). The same occurred when former independent polities within a colonial empire may be gradually admitted as units into a new federation, as in Malaysia and India.[64] The drawing of boundaries also played a pivotal role in

[61] Among others, see Walker, N., 'The Territorial Constitution and the Future of Scotland' in *The Scottish Independence Referendum: Constitutional and Political Implications*, eds. A. McHarg *et al*. (Oxford: OUP, 2016): 247–277; P. Leyland, 'Referendums, Popular Sovereignty, and the Territorial Constitution', in *Sovereignty and the Law: Domestic, European and International Perspectives*, eds. R. Rawlings *et al.* (Oxford: OUP, 2013): 47–164; M. Nicolini, 'Reforming the territorial constitution in Italy: some reflections on durability and change', in *Regional Governance in the EU: Regions and the Future of Europe*, eds. G. Abels and J Battke (Cheltenham: Edward Elgar, 2019): 106–123.

[62] MF Ramutsindela and D. Simon, 'The Politics of Territory and Place in Post-Apartheid South Africa: The Disputed Area of Bushbuckridge', *Journal of Southern Africa Studies*, 25.2 (1999), 479–481.

[63] G. Anderson, *Federalism: An Introduction* (Oxford: OUP, 2008), 72–73. See also Toniatti, 'Federalism,' 91.

[64] s 2(a) of the Constitution of Malaysia 1957. On the admission on Sabah, Sarawak, and Singapore in 1963 see S. Jayakumar, 'Admission of New States: *The Government of the State of Kelantan v. The Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj*', *Malaya Law Review*, 6.1 (1964): 181–188. Singapore seceded in 1964.

processes of quasi-federalisation usually not included among 'genuine' federations, such as Italy, which has *a* territorial constitution.[65]

In devolutionary federations, units' borders were drawn up by Constituent Assemblies, which were carved out of the map of former unitary states or colonies, as in Italy, India, and South Africa. Legal research on regional demarcation and territorial alteration is indebted to the debates that took place in the Constituent Assembly of Italy, India, and South Africa. The proceedings of the debates encompass all the most relevant issues in regional demarcation: the choice of federal-regional design; the role played by demarcation in governing diversity; recourse to economic, ethnic, linguistic, and religious factors in order to draw sub-national boundaries.[66]

Alteration entails that, whilst securing units' territorial identity, federal constitutions lay down the procedures for altering units' borders. These are 'indestructible states' but, at the same time, the territorial constitution outlines a union of 'destructible' units. Mechanisms of territorial alteration require the consent of the legislatures of affected units;[67] a territorial referendum may be held, which counts as the will of the units.[68] The same holds true for the recently created Indian Union Territories of 'Jammu and Kashmir' and 'Ladakh' carved out of the former State of Jammu and Kashmir in 2019 (see Schedules I and II of the Constitution of the Republic of India, amended by the *Jammu and Kashmir Reorganisation Act, 2019*).

Bordering and re-bordering processes have twofold consequences. Firstly, when it comes to changing the criteria on which the original regional demarcation is drawn, territorial alteration gives rise to relevant questions. This is the 'coherence test': should the criteria enabling territorial alteration to be consistent with those applied to the original demarcation? The answer to the question depends on whether federal and regional constitutions exhibit a neutral attitude toward the 'territorial identity' of constituent units. Constitutions may allow only those territorial alterations that are consistent with the economic, political, ethnic, religious, and linguistic criteria that were used for the original demarcation; but they can also allow alteration without imposing any criteria. If this were the case,

[65] Nicolini, 'Reforming'; M. Nicolini, 'Litigating Regionalism in Italy: The Constitutional Court and the Dynamics of the Territorial Constitution', *Jahrbuch des Föderalismus*, Band 21 (2020): 91–103.

[66] See H. Bhattacharyya, 'Federalism and Competing Nations in India', in *Multinational Federations*, eds. M. Burgess and J. Pinder (London, New York: Routledge, 2008): 50–67; YG Muthien and MM Khosa, 'The Kingdom, the *Volkstaat* and the New South Africa: Drawing South Africa's New Regional Boundaries', *Journal of Southern African Studies*, 21.2 (1995): 303–322); M. Pedrazza Gorlero, *Le Variazioni Territoriali delle Regioni. Contributo allo Studio dell'art. 132 della Costituzione, I, Regioni Storiche e Regionalismo Politico nelle scelte dell'Assemblea Costituente* (Padua: Cedam, 1979).

[67] Such as in the USA (Art. IV s 3 of the U.S Constitution), Malaysia (s 2.a), India (s 2), South Africa (s 74.3), and Canada (s 3 of the Constitution Act of Canada).

[68] See Art. 29 of the German Basic Law, Art. 132 of the Italian Constitution; Art. 53 of the Swiss Constitution, s 124 of the Australian Constitution. The constitutions of Australia (s 123) and Switzerland (Art. 53.4) contain ad hoc provisions for altering limits of States.

the coherence test should then ascertain whether territorial readjustments should be achieved in accordance with the procedures enshrined in the constitution.

Secondly, such territorial constitutional arrangements may trigger 'territorial' constitutional litigation, which is usually settled by national constitutional adjudicators. Disputes arise when it comes to drawing boundaries on the watershed of mountain chains: in Italy a dispute between the Veneto and the Trentino-Alto Adige/Südtirol regions concerning the border running through the Marmolada Glacier was settled by the Constitutional Court.[69] The U.S. Supreme Court also settled disputes related to the Michigan-Wisconsin borders (*Michigan v. Wisconsin*, 270 U.S. 295 (1926)), and the New Jersey-Delaware river boundaries (*New Jersey v. Delaware*, 295 U.S. 694 (1934); *New Jersey v. Delaware*, 552 U.S. 597 (2008)).

South Africa was also affected by constitutional (and geopolitical) transitions. After the dismantlement of the apartheid regime, the Transkei, Bophuthatswana, Ciskei and Venda *Bantunstans* were reincorporated into the country. However, the creation of a federal-regional state led to a fierce disagreement between political parties within the Constituent Assembly. The African National Congress (ANC) advocated a strong unitary state, whereas the National Party (NP) and the Inkatha Freedom Party (IFP) supported the establishment of a strictly federal system, as well as the devolution of substantial powers to sub-national units. The ANC initially rejected the federal solution, since it feared that a federal structure would undermine the newly created central government. The compromise reached by the political parties led to the establishment of a feeble form of regionalism. The outcome of the demarcation process undertaken by *Commission on the Demarcation-Delimitation of States, Provinces and Regions*, appointed on May 28, 1993, led to the creation of nine provinces that were then embedded in the 1996 Constitution (s. 103(2) and Schedule 1A).

The Demarcation Commission was entrusted with a difficult – albeit crucial – task: it had to redraw the geographical configuration of South Africa by taking into account the delimitation criteria proposed by the political parties. The Commission was able to reduce the criteria into four categories: economic features; geographic coherence (the boundaries of the *development regions* and the *magisterial and district boundaries* created under apartheid rule); sociocultural issues; and institutional capacity. On the basis of such mixed criteria, it demarcated provincial boundaries. It also detected 14 *affected areas*, whose incorporation within a province was supposed to be extremely contentious. Hence, South Africa demarcated provincial boundaries in accordance with non-ethnic-oriented criteria: provincial boundaries were drawn in order to promote integrated development without taking into account the fragmentation of the population.

[69] Italian Constitutional Court, judgment No 743 of 1988. See E. Rossi, 'I Giuristi alla Conquista della Marmolada', *Foro Italiano*, I (1988): 3184–3191.

Litigation proceeded from these affected areas, which were entitled to a petition for a *referendum* under s 124 of the 1993 Interim Constitution, but the territorial alteration process was not activated. The *affected area* of Bushbuckridge – aiming to separate from Limpopo and to join Mpumalanga – filed a case before the High Court in Pretoria.[70] In order to resolve such disputes, the national parliament passed the *Constitution Twelfth Amendment Act of 2005*, which disregarded both territorial identity and affected areas' requests. As a result, local communities challenged the validity of the *Amendment Act* before the Constitutional Court, which held that the amendment was unconstitutional. Although alterations were consistent with the procedure set forth in s. 74(8) of the 1996 Constitution, the National Parliament did not meet the levels of public participation required by the constitution while altering provincial boundaries.[71]

7. … And Back Again to Cross-Disciplinary Research: Illegal Borders

The relevance of a cross-disciplinary approach to borders is apparent when we consider that, in several cases, there are several flaws between the black-letter of the territorial constitution and the operational rules that actually govern such constitutional regime. These flaws usually draw discrepancies between the *law in the books* and the *law in action* of the territorial constitution.

Firstly, discrepancies may cause constitutional regimes to be completely disregarded. Territorial disputes and geopolitical changes may indeed affect state territorial integrity. For example, two or more states may consider a territory as *the* constitutive feature of their constitutional legal systems. Territories are thus contended: part of a state territory may be conquered, annexed, occupied or claimed by other states.[72] It is also possible that territories may separate from a state by virtue of secession, and therefore be incorporated into another state.

A new *operational regime* thus replaces the constitutional one, which generates a new relationship between space, law, and territory. These territories 'reflect and incorporate features of the [new] social order that creates them', and 'are fundamentally *constitutive* of [such] orders'.[73] There are Maitland's 'belongs of public law': two organised communities that are separated politically and territorially claim *dominium* over their respective territorial space – and perhaps over the whole state territory. The most vivid example is Cyprus. The 1974 Turkish invasion split the island into two parts; the

[70] High Court of South Africa, *Judgment in the High Court of South Africa, in the matter between Bushbuckridge border committee, Michael Mangisi Mnisi and the Government of Northern Province, the Government of Mpumalanga, the Government of the Republic of South Africa, the African National Congress*, Case No. 15607/97.
[71] Constitutional Court of South Africa, Matatiele Municipality and Others v. President of the Republic of South Africa and Others CCT 477/07 [2006] ZACC 12.
[72] On the relations between states, nationalism, law and territory, see A. Stilz, 'Nations, States, and Territory', *Ethics*, 121 (2011) 572-601.
[73] Delaney, *Territory*, 10.

north fell under a new operational rule that superseded the regime enshrined in the 1960 Constitution; the 1975 and 1983 Turkish Republics in Northern Cyprus created 'an indivisible whole with its territory and people' (Arts. 2.1 and 11.2 of the 1985 Constitution of the Turkish Republic of Northern Cyprus 1985). The same occurs in Taiwan, whose 1947 Constitution still refers to the pre-1949 territorial arrangements (Art. 4). The establishment of the People's Republic of China (1949) made these claims 'illusory' and 'fictional.' Adapting the constitutional borders to the current situation, however, would entail 'renouncing the 'One China' legacy by claiming independence from China.[74]

The operational rule creates different borders: besides the *de jure* one, there is also a *de facto* border running along the 'Green Line' (in Cyprus) and the Taiwan Strait (in Taiwan), which express the flaw between the territorial constitutional regime and its operational rule. The flaw generates 'illegal' spaces and borders (the north occupied by Turkey; mainland China), and, odd as it may seem, it draws an illegal-albeit-legally-relevant space: interferences, influences, and remnants of the original demarcation cross the illegal borders, which are not in themselves obstacles to communication. The same holds true for the Israeli-Palestinian situation, which is a 'legal' geography of 'illegal' spaces, and where the relations between community and territory and the process of redrawing borders are extremely controversial.[75]

8. Be-bordering Processes: Melting and Walled Borders

Discrepancies between the territorial constitutional regimes and its operational rules may also be due to de-bordering processes.

Besides this, several factors currently undermine the concept of borders. Firstly, globalisation and its derivatives, such as free movement of goods, capital, and workers, favour border fluidity; processes of supranational integration do the same. The principle example is cross-border cooperation within, for example, the EU, which makes member states' borders 'soft,' and their political-legal relevance fade away.[76]

The impact of climate change also has several consequences on borders. It is indeed altering the organising themes within political communities and triggering a "transformation *of* the political."[77]

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[74] JCH Liu, 'The Taiwan Question: Border Consciousness Intervened, Inverted and Sideplaced', in Liu, JCH et al. (eds.), *European-East Asian Borders in Translation* (Routledge 2014), 52.

[75] Sahadžić, M, 'Can Asymmetrical Constitutional Arrangements Provide an Alternative Answer for the Disputed? Bringing Constitutional Asymmetries into Play in the Middle East Peace Process' (2020) 12 *Perspectives on Federalism* 1.

[76] See R. Toniatti, 'How soft is and ought to be the law of interregional transborder cooperation?', in *Changing borders: legal and economic aspects of European enlargement*, eds. R. Kicker *et al.* (Bern et al.: Lang, 1998): 43-45.

[77] Geoff Mann and Joel Wainwright, *Climate Leviathan: A Political Theory of Our Planetary Future* (London and New York: Verso, 2018), 28.

As for border issues, it will unavoidably trigger their melting away.[78] Owing to rising sea levels, state 'face the risk of becoming practically uninhabitable,' and of being 'entirely underwater.' This means their submersion and 'loss of territory," as well as rights to their marine territory.[79] The process of oceanic territorialisation mentioned above has raised several issues and renovated bordering processes; among them, whether the submersion of islands would unleash their former EEZ to pillaging by economic transnational actors. This will affect states' rights on their EEZ and trigger maritime border disputes under Arts. 55 and 56 of UNCLOS. We still do not know, however, whether UNCLOS considers the boundaries of EEZs as permanent. To put it another way, it is disputed whether the submersion of islands would unleash their former seabed to pillaging by economic transnational actors, who may try again to convince us of unceasing economic growth.

The human-related consequences are even more distressing. The loss of territories will trigger considerable migrations. Rising sea levels would indeed "ma[k]e [them] to err from" their lands (*Is* 63:17). These events will probably boost the 'movement of people across territorial borders, the mixing of bodies and places, and the reconfiguration of labour markets.'[80] This would also increase the threats of war: in "a global future […] climate-displaced people will be both numerous and threatening to global security."[81] In several areas of the world, this has compelled nation states to an increasing securitisation of their external borders. Israel built a wall in the Occupied Palestinian Territory on grounds of national security reasons; India fenced its border with ; a U.S.-Mexican border wall is being erected. The U.S. Supreme Court granted President Trump the petition for a writ of certiorari. In the Court's reasoning, public-finance concerns are ranked as superior as regards solidarity issues. The barrier may 'cause irreparable harm to the environment and to individuals;' however, if the federal government were 'unable to finalize the contracts [for the wall] then the funds at issue will be returned to the Treasury' – and costs borne by the U.S. taxpayers.[82]

Likewise, EU policies related to migration and refugeeism exhibit such concerns related to securitisation. EU policies are undoubtedly inclusive; but EU Treaties and legislation are overpopulated with references to 'external borders.' Securitisation of EU external borders encompasses several methods of 'border checks and surveillance,' which make it hard for migrants to access the EU. Evidently, the 'principle of solidarity and fair sharing of responsibility,' which

[78] G. White *Climate Change and Migration: Security and Borders in a Warming World* (Oxford: OUP 2011).
[79] Rafael Leal-Arcas, *Climate Change and International Trade* (Cheltenham and Northampton, MA: Edward Elgar, 2013), 46.
[80] Baldwin, "Pluralising,' 516. See Mathias Risse, "The Right to Relocation: Disappearing Island Nations and Common Ownership of the Earth," *Ethics & International Affairs* 23. 3 (2009): 281–300.
[81] C. Farbotko *et al.*, 'Climate Migrants and New Identities? The Geopolitics of Embracing or Rejecting Mobility', *Social & Cultural Geography* 17.4 (2016): 533–552; 534.
[82] Supreme Court, *Donald J. Trump, President of the United States, et al. v Sierra Club, et al.* on application for stay 588 U.S. (2019) 1, 26 July 2019.

underpins the 'Area of Freedom, Security and Justice' laid down by the Treaty on the Functioning of the EU, is a privilege reserved for the EU Member States, whereas third-country nationals must merely be treated fairly when they try to access the EU.[83]

9. Concluding Remarks

As this cross-cultural journey through the concept of borders has tried to demonstrate, the study of legal borders unavoidably engages in a dialogue with different disciplines. In the case of borders, such methodological turn in comparative law is imposed by the very topic into which we have been delving. Human beings have been drawing lines dividing the οἰκουμένη since the onset of ancient civilisations, projecting onto the earth's surface (and oceans) a variety of contingent conceptions of borders.

Despite the territorialisation of the sea, the territorially related conception of border is still the dominant one: as the concept of territorial constitution confirms, 'state territories have been reified as set or fixed units of sovereign space'. Although borders are now constantly blurred by geopolitical, economic, environmental, and migration-related variables, the prevailing conception still reflects what we, in our traditional parlance, terms as Western 'geolegalities'. Securitisation corroborates, then, that states have 'continuing strengths within its borders.'[84]

From this, however, it does not follow that, conversant in lines and figures, borders only favour practices of exclusion. It is the duty of the comparative scholars to call back to the fore the non-legal reasons underpinning changes in the spatial scope of the political powers. These reasons, evidently, cannot be demarcated as if they were in watertight compartments. Borders have, indeed, a variety of semantic denotations, the majority of which point to a performative, relational function, and shape the territorial identities of those who are inside and outside them.

As comparative lawyers doing research in times of troubles, migration, and climate change, we should recover the pristine meaning of 'borders,' i.e. the 'floating' zones with non-specifiable boundaries where groups and ethnicities aimed to introduce their own operational rules and therefore assert their legal spaces and belongs of public law.

[83] Moreno-Lax, L, *Accessing Asylum in Europe. Extraterritorial Border Controls and Refugee Rights under EU Law* (OUP 2017), 31 and 34.
[84] Agnew, 'The Territorial Trap,' 74–75.