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Framing Entangled Legalities beyond the State

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1.1 Introduction

Law tends to make its appearance in the singular. We think of a legal order as a relatively integrated whole, as a system in which the different parts play a defined role and display a certain amount of coherence, if only because there are rules that regulate what happens when different norms conflict and because there are judges to decide unclear cases. We also expect law to be coherent and orderly as a matter of normative judgement – under the rule of law, we need to be able to know what the law requires from us. The unitary legal system then appears as both an analytical frame and an evolutionary achievement.

Yet in many contexts, law does not actually appear in the singular but in the plural. Norms from different origins become relevant in the same situation, and they often come with divergent prescriptions or at least orientations. Their relations are not predefined but remain to be determined through the social interplay of actors. State law interacts with local, Indigenous and religious law; norms from international and transnational law are used alongside domestic law and national regulation. These norms are not limited to neatly separated spheres but instead often address, directly or indirectly, the same set of actors and the same kind of behaviour. Yet they do not form part of a common legal order – they are entangled rather than integrated.

Such entanglement is the focus of the present volume. We regard entanglement as a common state of affairs in law – and likely a more common one than legal 'systems' with aspirations of hierarchy, order and coherence, as depicted in the standard image of law in the context of the modern, Western nation state. Legal entanglement was typical before the modern state arose, has been present within many states throughout, and

has arguably increased with the rise in importance of transnational and international rules.

In this volume, we focus primarily on contemporary forms of entanglement, with a particular eye on encounters 'beyond' the state, both in the relation of state law with non-state law (especially of an Indigenous or religious kind) as well as the relation of different legalities in the transnational sphere. We inquire into the contexts in which entanglement occurs: the different bodies of norms, institutions and actors involved, as well as the dynamics they create. We also inquire into the legal forms it generates: the ways in which actors construe the relations between different norms, which are increasingly central to defining the shape of the overall order. And we are interested in the consequences entanglement has for conceptions of legal order more broadly – how do we need to adjust our understanding of 'law' if it is entangled rather than systemic?

This framing chapter sets the scene for the volume by defining key concepts, developing the theoretical frame and setting out the questions and *problématiques* animating the volume while highlighting the contributions of the different chapters. It begins by clarifying the concept of 'entanglement' in law (Section 1.2) and then explores some historical instantiations to generate a backdrop against which to theorize its contemporary forms (Section 1.3). The chapter then develops expectations as to where we can observe entanglement and what the actors and dynamics behind it are (Section 1.4). It outlines a typology of the legal forms in which we can expect entanglement to be reflected (Section 1.5), and then lays out some implications of entangled legalities for our conceptualization of legal order (Section 1.6).

1.2 Legal Entanglement

The notion of entanglement is not typically used in the legal context. It is common in quantum physics where it denotes a phenomenon in which different particles relate to one another in such a way that the 'state of each of them cannot be described independently of the state of the other(s)'.[1] In a related vein, in the study of history the notion of 'entangled histories' has come to emphasize the importance of relations between interconnected societies. This approach was originally driven

[1] See Wikipedia entry on 'quantum entanglement', https://en.wikipedia.org/wiki/Quantum_entanglement.

by the insight that the histories of European and extra-European societies cannot be understood without taking into account the continuous connections between them.[2] Unlike comparative approaches which inquire into similarities and differences, entangled histories are interested 'in processes of mutual influencing, in reciprocal or asymmetric perceptions, in entangled processes of constituting one another',[3] and especially in 'the constitutive role which the interaction between Europe and the extra-European world has played for the specificities of modernity in the different societies'.[4]

Similarly, the idea of *histoire croisée* focuses on intercrossings between different objects of inquiry – intercrossings that potentially transform these objects themselves.[5] In cultural studies more broadly (and well beyond the particular focus on postcoloniality), the notion of cultural entanglements has been used to highlight 'the aspects of agency, processuality and the creation of something new which is more than just an addition of its origins' from different contexts, and the importance of liminal spaces in which different cultures come into particularly close encounters.[6]

In the study of law, proponents of legal pluralism have done most to trace 'entanglements' between different legal orders, even if they have not always called them thus.[7] The first phase of legal pluralism often focused on the simultaneous, parallel existence of different legal systems in the same social field, often with an eye on the relationship of formal and informal law, state law and custom, particularly in traditional societies. This gave way over time to a broader appreciation of similar phenomena in other contexts, including states in the Global North. Later pluralist scholarship also moved away from an image of separate legalities and

[2] S. Randeria, 'Geteilte Geschichte und verwobene Moderne', in N. Jegelka, H. Leitgeb, and J. Rüsen (eds), *Zukunftsentwürfe: Ideen für eine Kultur der Veränderung* (Campus Verlag, 1999), pp. 87–96.

[3] J. Kocka, 'Comparison and Beyond' (2003) 42 *History and Theory* 39–44, at 42.

[4] S. Conrad and S. Randeria, 'Einleitung: Geteilte Geschichten - Europa in einer postkolonialen Welt', in S. Conrad, S. Randeria and R. Roemhild (eds), *Jenseits des Eurozentrismus* (Campus Verlag, 2013), pp. 32–70, at p. 40.

[5] M. Werner and B. Zimmermann, 'Beyond Comparison: *Histoire Croisée* and the Challenge of Reflexivity' (2006) 45 *History and Theory* 30–50, at 38.

[6] P. W. Stockhammer, 'Conceptualizing Cultural Hybridization in Archaeology', in P. W. Stockhammer (ed.), *Conceptualizing Cultural Hybridization: A Transdisciplinary Approach* (Springer, 2011), pp. 43–58, at pp. 47–8.

[7] K. Günther and S. Randeria, *Recht, Kultur und Gesellschaft im Prozess der Globalisierung* (Programmbeirat der Werner Reimers Konferenzen, 2001), p. 85.

came to stress the 'complex and interactive relationship' between different forms of ordering and their intertwined nature.[8] Some authors have found intersecting legalities, or 'interlegality', to be the condition of postmodern law.[9]

In recent years, in a 'third phase' of legal pluralism, these approaches have found broader application to law under conditions of globalization, taking into more direct view relations between domestic, international and transnational law.[10] The connections between these three phases, or approaches, are not always clear-cut, and in Chapter 17 Brian Z. Tamanaha highlights the discontinuities as well as the problems in borrowing from the two former to inform the latter approach. Legal historians, too, have begun to inquire more closely into legal entanglements. Inspired by frames from the study of history, the emphasis of this historical work is on openness, entanglement being seen as characterized by 'complex intertwined networks, with no beginning and no end, and a difficulty to fix the own point of departure'.[11]

This passage suggests, as in much of legal pluralist writing and works on interlegality, that the entanglements that come into focus here are primarily about mutual de facto influences and the travelling content of legal norms. Legal transplants and the substantive reception of legal forms and institutions are recurring themes,[12] in a somewhat similar way to archaeologists studying the material entanglement of objects that are created in imitation of, and borrowing from, foreign examples.[13] The perspective tends to be that of an outside observer tracing such influences, even if the participants in legal discourse (or the different legal

[8] S. E. Merry, 'Legal Pluralism' (1988) 22 *Law & Society Review* 869–96, at 873; J. Griffiths, 'What Is Legal Pluralism?' (1986) 18 *The Journal of Legal Pluralism and Unofficial Law* 1–55, at 17–18.

[9] B. de Sousa Santos, 'Law: A Map of Misreading – Toward a Postmodern Conception of Law' (1987) 14 *Journal of Law and Society* 1279–302; B. de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (Cambridge University Press, 2002).

[10] Günther and Randeria, *Recht, Kultur und Gesellschaft im Prozess der Globalisierung*; R. Michaels, 'Global Legal Pluralism' (2009) 5 *Annual Review of Law & Social Science* 1–35; P. Zumbansen, 'Transnational Legal Pluralism' (2010) 1 *Transnational Legal Theory* 141–89; P. S. Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge University Press, 2012).

[11] T. Duve, 'Entanglements in Legal History: Introductory Remarks', in T. Duve (ed.), *Entanglements in Legal History: Conceptual Approaches* (Max Planck Institute for European Legal History, 2014), pp. 3–25, at p. 8.

[12] Duve (ed.), *Entanglements in Legal History*.

[13] Stockhammer, 'Conceptualizing Cultural Hybridization in Archaeology', p. 50.

discourses intersecting here) continue to emphasize traditional frames.[14] Many pluralists have long lamented the fact that legal discourse ignored such growing mutual influences and remained wedded to ideas of closed, unitary legal orders.[15]

Yet also from the perspective of the actors involved in them, legal orders have always had aspects defining their relations with other bodies of norms. Conflict-of-law norms for foreign law and norms about the reception of international law in domestic legal orders are the most prominent examples.[16] If anything, globalization has enhanced the pressure on defining and developing these interface norms further – the global universe of norms is ever more populated, with overlapping norms and authority spheres in many, if not most, issue areas. Participants in legal discourses can choose to ignore this multiplicity and merely focus on their own legal order, but when other norms have strong social backing ignoring them can be costly in terms of legitimacy and often also compliance. In a context of multiplicity, defining relations becomes central for actors to stake out their positions.[17]

As a result, bodies of norms become 'entangled' not only as a matter of fact, but also in discursive construction. It is such connections which we, unlike much of the classical pluralist literature, take into focus in this volume. Actors – litigants, judges, dispute settlers, observers, addressees – make claims about the relation of norms from different backgrounds, and they thus define and redefine the relative weights and interconnection between the norms at play. They also define the extent to which norms are perceived to form part of broader assemblages – in the relatively stable and firm mode of modern state legal orders, or in more porous ways, with a more open interplay of norms and characterized more through their linkages across boundaries than any strong form of belonging to an order as such.[18] The production of tertiary

[14] Günther and Randeria, *Recht, Kultur und Gesellschaft im Prozess der Globalisierung*.

[15] See, e.g., G. Teubner, 'The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy' (1997) 31 *Law & Society Review* 763–88.

[16] See Chapter 16 by Michaels.

[17] See also M. Delmas-Marty, *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World* (Bloomsbury, 2009); N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press, 2010), chapter 8.

[18] The notion of 'bodies of norms' is meant to capture this possibility of looser assemblages, the boundaries and strength of which are themselves produced through discourses in and around law. It is also meant to capture that norms tend to come in clusters or patterns, especially when they are institutionally produced.

norms – norms about the recognition of one legal order by another, as in Ralf Michaels' chapter – is one example here. The different contributions to the volume trace the ways in which relations between norms from different origins are construed in social practice – thus taking a primarily external perspective, though interested in the forms participants in legal discourses have at their disposal.

When we focus on legal entanglement here, we mean such discursive entanglement: the universe of statements that link different bodies of norms with one another. This is similar to the 'relational' (as opposed to 'material') entanglement in cultural studies: an entanglement in which the difference in origin remains visible even if the object is embedded in a different practice.[19] In a context of growing multiplicity, this entanglement becomes stronger – where various norms are seen to apply to the same situation, actors will often be forced to clarify the relation they see between them, and we move towards a greater 'centrality of the margins'.[20] As actors engage in this practice, they also redefine the overall order as such: they construe the weight of different norms in that order, the relative strength of their claims over behaviour or institutions. And through this, they remake the law. If we understand law as ultimately socially constructed,[21] a shift in the ways in which actors relate different parts of the legal order to one another reshapes the law itself.

Where entanglement is particularly pronounced, we might even end up in a situation in which – just as in quantum physics – 'the state of each [body of norms] cannot be described independently of the state of the other(s)';[22] a situation of enmeshment, or even the creation of a new, hybrid form. But entanglement, in the way we use it here, remains distinct from full integration into a new form. Where norms are widely accepted as part of a common legal order, they are integrated rather than entangled. Likewise, when one body of norms is not linked with another by relevant actors, they remain separate. Entanglement comes in different degrees, but it sits between, and is distinct from, both separation and integration.

[19] Stockhammer, 'Conceptualizing Cultural Hybridization in Archaeology', p. 50.
[20] N. Walker, 'Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders' (2008) 6 *International Journal of Constitutional Law* 373–96.
[21] See, e.g., B. Z. Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press, 2001).
[22] See Wikipedia entry on 'quantum entanglement', https://en.wikipedia.org/wiki/Quantum_entanglement.

1.3 Entanglement before and around the State

Entanglement was, by all accounts, a defining feature of many legal orders before the emergence and consolidation of the modern state. Even Roman law, often associated with system and coherence, is an impressive example of multiple fora, rules and practices, between which litigants and dispute settlers navigated their way. In Chapter 13, Caroline Humfress gives a vivid account of this complex interplay, tracing how actors reasoned out the application of different norms and, especially at the margins of the late Roman Empire, generated connected, but not integrated, legal orderings of their own.

Yet perhaps the most prominent expression of entangled legalities is to be found in medieval Europe. From the eleventh century onwards, law became increasingly systematized through legislation and codification, but the *corpus iuris* of much secular law was still made up of rules drawn ('received') from a wide variety of sources, including Roman law and customary usages. These rules retained their character as Roman law, *ius commune*, etc., but they were transformed through the reception process in a way that made them more compatible than they might have otherwise been.[23] Codifications, reflections of the law applied on the ground, consequently contained elements from many different bodies of norms. The eleventh-century *Usatges de Barcelona* used rules of Visigoth and Roman origin just as well as secular and ecclesiastical ones; the German *Sachsenspiegel* of the early thirteenth century meshed an account of local custom with rules from imperial legislation and some from canon law. In the French law of the period, multiple local customs stood alongside royal law, with royal courts applying only those customs they deemed 'reasonable', often taking as guidance canon law or the learned Roman law taught at universities.[24]

Scholars have described the resulting structure as a 'patchwork of accommodations', in stark contrast with the idea of an integrated order or system.[25] Judges in this structure could not merely rely on one set of rules but had to navigate between norms from a wide variety of contexts,

[23] H. J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, 1983), p. 2.
[24] Ibid., pp. 470–1, 504, 511.
[25] S. P. Donlan and D. Heirbaut, '"A Patchwork of Accommodations": Reflections on European Legal Hybridity and Jurisdictional Complexity', in S. P. Donlan and D. Heirbaut (eds), *The Laws' Many Bodies: Studies in Legal Hybridity and Jurisdictional Complexity, c1600–1900* (Duncker & Humblot, 2015), p. 9.

with greater emphasis on the substantive appropriateness of the rule finally chosen than on its pedigree.[26] In their pragmatic ways, these judges inevitably entangled the multiple bodies of norms at play. This structure slowly gave way, with the emergence and consolidation of the modern nation state, to a focus on one, national law and the attempt to shape it through binding codifications. But the transition was winding and protracted, with many pockets of entanglement persisting for a long time.[27] In Germany, for example, legal plurality continued to be prominent until the late nineteenth century. Judges based their decisions on a confluence of local laws, *ius commune* and various other sets of norms until the legislative and judicial unification of many areas of law after the creation of the German state.[28]

Entanglements remained particularly strong in borderlands in which different authorities and legal traditions intersected. French Flanders and the Roussillon, acquired by France from the Netherlands and Spain in the seventeenth century, experienced long periods of interwoven application of French laws, local customs and previously governing rules, thereby pursuing accommodation and avoiding clashes of authority.[29] Yet more pronounced was multiplicity in imperial structures, inside and outside Europe.[30] In the Holy Roman Empire, a prime example of jurisdictional complexity, the law applied was 'a mixture' of a variety of legal sources, meshing Roman and canon law with imperial prescriptions and

[26] Donlan and Heirbaut, '"A Patchwork of Accommodations"', p. 21.
[27] See the contributions in Donlan and Heirbaut (eds), *The Laws' Many Bodies*.
[28] See N. Jansen, 'Law and Political Domination: Historical Observations, Conceptual Reflections, and Some Questions for Discussion' (2018) 16 *International Journal of Constitutional Law* 1176–85; M. Löhnig, 'Killing Legal Complexity: The Jurisprudence of the German Reichsgericht in the First Years of its Existence', in S. P. Donlan and D. Heirbaut (eds), *The Laws' Many Bodies: Studies in Legal Hybridity and Jurisdictional Complexity, c1600–1900* (Duncker & Humblot, 2015), pp. 249–70.
[29] A. Wijffels, 'Ancien Régime France: Legal Particularism under the Absolute Monarchy', in S. P. Donlan and D. Heirbaut (eds), *The Laws' Many Bodies: Studies in Legal Hybridity and Jurisdictional Complexity, c1600–1900* (Duncker & Humblot, 2015), pp. 81–108; B. Durand, 'Pluralism in France in the Modern Era – Between the "Quest for Justice" and "Uniformity Through the Law": The Case of Roussillon', in S. P. Donlan and D. Heirbaut (eds), *The Laws' Many Bodies: Studies in Legal Hybridity and Jurisdictional Complexity, c1600–1900* (Duncker & Humblot, 2015), pp. 169–92.
[30] See L. Benton and R. J. Ross (eds), *Legal Pluralism and Empires, 1500–1850* (New York University Press, 2013); J. Duindam, J. D. Harries, C. Humfress and H. Nimrod (eds), *Law and Empire: Ideas, Practices, Actors* (Brill, 2013).

territorial and local rules.[31] In the British Empire, jurists in England and abroad 'liberally mixed sources of common, civil, and natural law, principles of equity, and the law of nations' when grappling with colonial situations.[32] Here and elsewhere, imperial and local legalities overlapped, and imperial subjects navigated the different bodies of norms and jurisdictions, often choosing sites and norms beneficial for them individually and creating 'relational fields' of law along the way.[33]

With the consolidation of the modern state, complexity and entanglement were reduced but not entirely suppressed. The 'cuts' between different elements of modern, liberal law, highlighted by Julia Eckert in Chapter 15, have also always been contested. 'Negotiations' between state and non-state law, traced in pluralist scholarship, persisted both in Europe and elsewhere, albeit with major variations.[34] In recent decades, increasing societal diversity has sparked renewed interest in the relation of state and religious jurisdictions, especially on issues of family law.[35] Such issues are often dealt with in a conflict-of-laws frame, with special attention to public policy exceptions, but they evoke larger issues of primacy between state law, human rights and religious precepts, as reflected in Tobias Berger's chapter on Bangladesh. The greater salience of these issues, especially in Western countries, stems in part from the rise of multicultural claims over the past decades. These claims have also directed renewed attention to the relation between state and Indigenous legal orders.[36] In this collection, the contributions by Kirsten Anker

[31] P. Oestmann, 'The Law of the Holy Roman Empire of the German Nation', in H. Pihlajamäki, M.D. Dubber, and M. Godfrey (eds), *The Oxford Handbook of European Legal History* (2018), pp. 731–59.

[32] R. J. Ross and P. J. Stern, 'Reconstructing Early Modern Notions of Legal Pluralism', in L. Benton and R. J. Ross (eds), *Legal Pluralism and Empires, 1500–1850* (New York University Press, 2013), pp. 109–42, at p. 130.

[33] K. Barkey, 'Aspects of Legal Pluralism in the Ottoman Empire', in L. Benton and R. J. Ross (eds), *Legal Pluralism and Empires, 1500–1850* (New York University Press, 2013), pp. 83–107, at pp. 94–103. See also S. E. Merry, 'Colonial Law and Its Uncertainties Forum: Maneuvering the Personal Law System in Colonial India: Comment' (2010) 28 *Law and History Review* 1067–72, at 1068.

[34] Merry, 'Legal Pluralism'; M. A. Helfand (ed.), *Negotiating State and Non-state Law: The Challenge of Global and Local Legal Pluralism* (Cambridge University Press, 2015).

[35] See, e.g., M. A. Helfand, 'Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders' (2011) 86 *NYU Law Review* 1231; M. Maclean and J. Eekelaar (eds), *Managing Family Justice in Diverse Societies* (Bloomsbury, 2013).

[36] See, e.g., J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, 1995); K. Gover, *Tribal Constitutionalism: States, Tribes, and the Governance of Membership* (Oxford University Press, 2010).

(Chapter 3) and by Keith Culver and Michael Giudice (Chapter 14) draw on this latter debate. They use the example of relations between the Canadian state and First Nations and trace how traditional, hierarchical legal conceptualizations can be, and are being, transformed into ones of entanglement.

The rise of transnational and international legalities over the past few decades has exacerbated the perceived multiplicity of legal orders and has helped to remove legal pluralism from the obscurity it long suffered in many mainstream accounts of law.[37] One important driver for this development, especially for European scholars, has been the constitutional indeterminacy of the European Union. Protracted conflict between national constitutional courts and the European Court of Justice led many to diagnose a form of (constitutional) pluralism in Europe.[38] For international lawyers, the long debate on fragmentation within the international legal order as well as the increasingly dense relations between domestic and international layers of law generated greater interest in the construction of these relations.[39] Both as concerns the EU and international law, 'entanglement' is probably a better descriptor of complex realities than (integrated or separate) legal systems.

One important aspect of the new 'global legal pluralism' has been the broader focus on different kinds of legalities – formal and informal, public and private.[40] The concept of law used in this debate typically goes beyond a traditional, Hartian frame and borrows from understandings used by legal pluralists with more anthropological backgrounds. The boundaries of the concept remain contested, and are often blurred,[41] but they tend to include as a minimum 'institutional normative

[37] See, e.g., Berman, *Global Legal Pluralism*.

[38] N. MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford University Press, 1999); N. Krisch, 'Europe's Constitutional Monstrosity' (2005) 25 *Oxford Journal of Legal Studies* 321–34; G. De Búrca and J. H. Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge University Press, 2011).

[39] M. Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 *The Modern Law Review* 1–30; J. E. Nijman and A. Nollkaemper (eds), *New Perspectives on the Divide between National and International Law* (Oxford University Press, 2007); Krisch, *Beyond Constitutionalism*.

[40] See, e.g., Berman, *Global Legal Pluralism*; N. Krisch, 'Pluralism in International Law and Beyond', in J. d'Aspremont and S. Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar, 2019), pp. 691–707.

[41] See B. Z. Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 *Sydney Law Review* 375–411.