

ENTANGLED LEGALITIES BEYOND THE STATE

Law is usually understood as an orderly, coherent system, but this volume shows that it is often better understood as an entangled web. Bringing together eminent contributors from law, political science, sociology, anthropology, history and political theory, it also suggests that entanglement has been characteristic of law for much of its history. The book shifts the focus to the ways in which actors create connections and distance between different legalities in domestic, transnational and international law. It examines a wide range of issue areas, from the relationship of state and indigenous orders to the regulation of global financial markets, from corporate social responsibility to struggles over human rights. The book uses these empirical insights to inform new theoretical approaches to law, and by placing the entanglements between norms from different origins at the centre of the study of law, it opens up new avenues for future legal research.

NICO KRISCH is a professor of international law at the Graduate Institute for International and Development Studies in Geneva.

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PREFACE

Entanglement may appear a strange term for an inquiry in law. Many will think it does not have anything to do with law at all, but rather with threads, nets or wire. Some may think it has to do with relationships – especially complicated ones – but not the kinds of relationships that help us to make sense of legal structures. Both views have a point, and paradoxically pursuing legal entanglements is attractive in part because they have a point. What we try to do with this volume is to take us away from the familiar, to break with some traditional frames, and thus to pave the way for thinking afresh about law, especially law beyond the confines of the state.

In this endeavour, ‘entanglement’ helps not only to unsettle but also to reconstruct. By pointing us towards relationships, it helps to shift our gaze to the ways in which legal norms and legal systems are not self-standing entities but are instead tied up in relationships with others (other norms and legal systems) that often are crucial to understanding the identity of each part as well as the character of the whole. In many contexts of legal practice, litigants draw on norms from a wide variety of origins – domestic and international, sub-state and transnational, public and private – to persuade courts of their cases. Law, whether in finance, environment, human rights, trade, sports or corporate accountability, is not one law but is pieced together out of a great many layers by skilled attorneys, civil society actors, business representatives and government lawyers. In the end, law is the product of the ways in which the relationships of its different parts are construed.

Using the notion of entanglement is a way of highlighting the interwoven character of much of law, and it urges us to understand better on which terms such an entanglement takes place. This is what the present volume hopes to achieve. Bringing together a stellar group of scholars – from law, political science, sociology, anthropology and history – it shows us how actors entangle and disentangle law in a variety of contexts, and how this forces us to change the way we should think about law

and legal order more broadly. It takes into view a highly diverse set of issues – ranging from family law disputes in Bangladesh to the Chinese Belt and Road Initiative and the making of global standards by the Financial Stability Board – and it uses insights about legal practices in these contexts to advance our theorization of law. In all of this, law appears neither as one nor as many, but as somewhere in-between. Entanglement points to this in-between character and highlights the challenge we face when trying to square such practices into the frame of unitary, well-ordered legal systems we are accustomed to as a result of the legal theories of the twentieth century.

The volume has been a long time in the making. The idea of entanglements was born in the discussions Francesco Corradini, Lucy Lu Reimers and I had on our ‘Interface Law’ project – a project that was itself part of a broader, interdisciplinary research group in which we were trying to understand ‘Overlapping Spheres of Authority and Interface Conflicts in the Global Order’ (OSAIC, because everything these days needs an acronym). In our project, we were trying to reconstruct the norms actors use to structure the relations between different legal orders, but we soon realized that we could not capture much of what we were seeing with the typical vocabulary of conflict and reception norms. We thus needed to look elsewhere and began to draw more widely from legal anthropology and sociology, from historical studies and from legal theories long outside the mainstream. Students of legal pluralism, of postmodern interlegalities or of historical legal entanglements had begun to describe aspects of the phenomenon we were interested in, and we built on their findings in order to generate a broader account of how law was shaped by interactions between norms from different contexts beyond the typical frame of legal systems.

In the spring of 2018, we gathered a group of colleagues in Geneva for a workshop exploring further the entanglements we began to see. Many of these colleagues, and a few new members of the group, have taken our discussions further and contributed to this volume. We presented some of our work collectively at the Hong Kong annual conference of the International Society of Public Law, and also at a conference on ‘Multiple Legalities: Conflict and Entanglement in the Global Legal Order’, which I convened with Hannah Birkenkötter from Humboldt University of Berlin as part of the OSAIC group. I am grateful to the participants in these different events for their intense engagement with our ideas and papers.

Entangled Legalities is the product of many minds and hands – most obviously the minds and hands of the contributors to whom I owe much gratitude. My special thanks go to our Interface Law team – Lucy and Francesco from the beginning, and later also Tomáš Morochovič, who not only moved us forward in substance but also handled many of the practical aspects of editing the volume with great professionalism and efficiency. The Graduate Institute of International and Development Studies, and especially Camila Morais Silva, provided excellent practical and logistical support throughout. And all this was rendered possible by generous funding from the Swiss National Science Foundation through project grant 100011E-170996, as well as the Deutsche Forschungsgemeinschaft which supported the overall OSAIC research group with project grant no. 277531170.

We hope the volume will inspire many to new explorations of law – and help them to look at the law in a different way. We believe that many of our insights are true not only for today’s globalized world but reflect relatively common features of law throughout history – perhaps with the (limited) exception of the twentieth-century modern state. That law is characterized by multiplicity, and by interconnections between its multiple parts, is neither good nor bad; it is just normal. Focusing on this normality, and tracing how law is created out of entanglement, should open up many fruitful avenues for future work. With this volume we have tried to make a beginning.

ABBREVIATIONS

ACHPR	African Charter on Human and People's Rights
AI	artificial intelligence
AIDCP	Agreement on the International Dolphin Conservation Program
AML	anti-money laundering
AML/CFT	anti-money laundering and countering the financing of terrorism
ANSI	American National Standards Institute
BCBS	Basel Committee on Banking Supervision
BIS	Bank for International Settlements
BITs	bilateral investment treaties
BLA	Baloch Liberation Army
BRI	Belt and Road Initiative
CAC	Codex Alimentarius Commission
CAS	Court of Arbitration for Sport
CAT	Committee against Torture
CBD	Convention on Biodiversity
CCSI	Columbia Center on Sustainable Investment
CED	Committee on Enforced Disappearances
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CETA	Comprehensive Economic and Trade Agreement
CFT	countering the financing of terrorism
CIEL	The Centre for International Environmental Law
CITES	Convention on International Trade in Endangered Species
CJEU	Court of Justice of the European Union
CMW	Committee on Migrant Workers
CPC	Communist Party of China
CPF	counter-proliferation finance
CPSS	Committee on Payment and Settlements Systems
CRC	Committee on the Rights of the Child
CRPD	Committee on the Rights of Persons with Disabilities

LIST OF ABBREVIATIONS

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CSR	corporate social responsibility
DPRK	Democratic People's Republic of Korea
DSU	Dispute Settlement Understanding
EC	European Communities
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EIA	Environmental Impact Assessment
EO	Executive Order
ESIA	environmental and social impact assessment
ETP	Eastern Tropical Pacific
FATF	Financial Action Task Force
FET	fair and equitable treatment
FIFA	Fédération Internationale de Football Association
FIFA RSTP	FIFA Regulations on the Status and Transfer of Players
FNLMA	First Nations Land Management Act
FPIC	free, prior and informed consent
FRF	Romanian Football Federation
FSAP	Financial Sector Assessment Program
FSB	Financial Stability Board
FSF	Financial Stability Forum
FTA	Free Trade Agreement
G7	Group of Seven
G10	Group of Ten
G20	Group of Twenty
G2G	government-to-government
GATT	General Agreement on Tariffs and Trade
GMOs	genetically modified organisms
HRC	UN Human Rights Committee
IACrtHR	Inter-American Court of Human Rights
IAEA	the International Atomic Energy Agency
IAIS	International Association of Insurance Supervisors
IASC	International Accounting Standards Committee
IBS	international banking standard
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IFC	International Finance Corporation
IIA	international investment agreement
ILA	International Law Association
ILC	International Law Commission
ILO	International Labour Organization
IMF	International Monetary Fund

IOSCO	International Organization of Securities Commission
ISDS	investor–state dispute settlement
ISEAL	International Social and Environmental Accreditation and Labelling
ISO	International Organization for Standardization
JCPOA	the Joint Comprehensive Plan of Action
MEAs	multilateral environmental agreements
MFLO	Muslim Family Law Ordinance
MOFCOM	China’s Ministry of Commerce
MOU	memorandum of understanding
NAFTA	North American Free Trade Agreement
NCPs	National Contact Points
NGO	non-governmental organization
OBOR	One Belt One Road
OECD	Organisation for Economic Co-operation and Development
OFAC	Office of Foreign Assets Control
OHCHR	Office of the United Nations High Commissioner for Human Rights
OIC Agreement	The Agreement on Promotion, Protection and Guarantee of Investments among member States of the Organization of the Islamic Conference
PCA	Permanent Court of Arbitration
PoE	panel of experts
PPMs	processing and production methods
PRC	People’s Republic of China
RSPO	Roundtable for Sustainable Palm Oil
SASF	semi-autonomous social field
SFT	Swiss Federal Tribunal
SGBs	sports governing bodies
SPS Agreement	Agreement on Sanitary and Phytosanitary Measures
SR	Special Representative
SWIFT	Society for Worldwide Interbank Financial Telecommunication
TBT Agreement	Agreement on Technical Barriers to Trade
TEDs	turtle excluder devices
TPP	Trans-Pacific Partnership
TTIP	Transatlantic Trade and Investment Partnership
UDHR	Universal Declaration of Human Rights
UEFA	Union Européenne de Football Association
UEFA FFP	UEFA Club Licensing and Financial Fair Play Regulations
UN	United Nations

LIST OF ABBREVIATIONS

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UNCED	United Nations Conference on Environment and Development
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNFCCC	United Nations Framework Convention on Climate Change
UNGPs	United Nations Guiding Principles on Business and Human Rights
UNSC	United Nations Security Council
UNSCR	United Nations Security Council Resolution
VCLT	Vienna Convention on the Law of Treaties
WADA	World Anti-Doping Agency
WADC	World Anti-Doping Code
WTO	World Trade Organization
WTO DSB	WTO Dispute Settlement Body

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