Entangled legalities in the postnational space

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Law is typically conceived on the model of the modern, Western state of the twentieth century—as a relatively self-contained system which establishes clear relations between its own norms and the norms of other legal systems. Yet this model stands in contrast to how law has been practiced for much of its history, and how it is practiced today, in particular in contexts in which transnational and international norms have gained significant weight. This article argues that, in order to account for such practices, we better frame law in terms of entanglement rather than system—as an order in which the multiplicity and interaction of legalities is often constitutive and in which the relations between norms from different origins are construed in more complex and fluid ways than the systemic image suggests. The article traces recent theoretical engagements with legal multiplicity and puts forward the concept of entanglement—borrowed from scholarship in history and cultural studies—to capture the broader forms of interaction visible in historical and contemporary studies with an empirical focus. It then develops a typology of these forms and analyzes the varying dynamics behind and consequences of entangled legalities. Charting different responses to multiplicity in contemporary law, the article shows how entanglement reflects and structures today's complex institutional and normative landscape, characterized by a diffusion of authority and competing forces of integration and distancing. Oscillating between these forces, entangled legalities emerge as a key element of the contemporary postnational legal order.

1. Introduction: Law, singular and plural

Law is typically thought of in the singular, but in most places, most of the time, it has been lived in the plural. Secular and religious laws, imperial and local laws, federal

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and regional laws, state and tribal laws have coexisted for centuries—often harmoniously, but often enough also with frictions.

Throughout the twentieth century, this plural nature of law has been forgotten, or at least pushed to the margins in standard accounts of legal order. With the consolidation of the modern state in Europe, state law became the defining model of law and legal theorizing, and other normative orders were increasingly seen either as being not law properly so-called, or as deriving their force from state law as a matter of delegation. Within state law, competing layers of law—for example in federal orders—came to be regarded as part of one legal order, governed by rules of hierarchy and subordination and ultimately flowing from one source. Multiplicity made its appearance in the form of foreign law and international law, but these operated in their own (territorial and functional) domains, with occasional interactions channeled through conflict and reception rules.

In recent years, this neat, unitary picture of law has come under pressure from denationalization, privatization, and globalization, and multiplicity has increasingly become accepted as a condition of law. In many contexts—from finance to human rights, from the environment to sports—an account of law that focuses solely on one legal system, be it national, subnational. or international, would today appear as utterly deficient. Without consideration of the many layers of law pertaining to the issue, such an account would not properly reflect the rules that govern it—the rules that matter for actors in the field. In many contexts, law has become "postnational."[1] Yet in most of these contexts, the different layers of law have not amalgamated into one legal order. Their relations are often not fully defined, they do not have a common source of validity, and they are often created, monitored, and practiced by different institutions and actors.

In this image, law is not one, but it is also not just many. It is not properly described as a monist system à la Kelsen, but also not simply as dualist or even pluralist, if pluralism is understood as the coexistence of different legal systems with claims on the same addressees. Instead, law is both one and many at the same time.[2] It is characterized by the connections and interactions between its different parts—connections that are key to defining the structure, shape, and content of the overall legal order. Yet we do not have a proper instrumentarium for describing or analyzing this kind of law—most of our conceptual apparatus has been produced on the backdrop, and during the heyday, of the modern state.

In this article I suggest that we use "entanglement," a concept well introduced in other disciplines, to capture this phenomenon of a legal universe of interlinked yet not integrated norms and legal systems. Historically, entanglement is a common state of law, more common probably than the coexistence of largely separate, closed

[1] On this notion, see the longer discussion in Nico Krisch, Beyond Constitutionalism: The Pluralist Structure of Postnational Law 5–14 (2010).

[2] *See also* Ralf Michaels, *Law and Recognition: Towards a Relational Concept of Law*, *in* In Pursuit of Pluralist Jurisprudence 90 (Nicole Roughan & Andrew Halpin eds., 2017); Ralf Michaels, *Tertiary Rules*, *in* Entangled Legalities Beyond the State 424 (Nico Krisch ed., 2021).

legal systems we have come to associate with the idea of law in the twentieth century. However, in order to trace, describe, and theorize entangled legalities, we require categories that allow us to understand how the connections between the entangled parts are construed and how their centrality—the "centrality of the margins"[3]—alters core aspects of the practice of law and legal order.

The present article seeks to make a step in this direction. Drawing on a growing body of scholarship with related observations, it makes a case for "entanglement" as a guiding concept in our analysis of the changing order we inhabit, and it seeks to trace the forms and implications of such entanglement. The article begins with two vignettes—historical and contemporary—that help to sharpen our understanding of the phenomenon (Section 2). It then analyzes how these practices sit with the systemic frames so common in modern jurisprudence, traces ways in which observers have sought to use and adapt them, and stakes out how the concept of entanglement can help us to better respond to the particularities of the challenge (Section 3). The article then charts different forms of legal entanglement, seeking to provide a structure and typology through which we can understand the ways in which interactions between different legalities are construed (Section 4). I use this exploration in a next step to outline the broader implications of entanglement and its relation with today's complex institutional and normative order as well as its consequences for legal interpretation and transformation (Section 5). Reflecting competing forces of integration and distancing in the contemporary global order, entangled legalities emerge from this inquiry as a key—and likely durable—element of (postnational) law.

2. Legal multiplicity: Two vignettes

The concurrent existence, and interaction, of different legal orders has not played an important role in most standard textbooks of law since World War II, but it was commonplace in earlier periods and has come into greater focus again in the past two decades. Two vignettes can help us to sharpen the contours of what legal multiplicity meant and means in practice.

2.1. Piecing medieval law together

The historical centrality of legal multiplicity can perhaps be glanced best in the strength of efforts to reject it. William Blackstone devoted the entire first section of his legendary *Commentaries on the Laws of England* to an argument for the irrelevance of civil and canon laws—thereby precisely seeking to counteract the influence that these laws, being taught in the universities, continued to have on the practice of law in England in the eighteenth century.[4] Intent on placing the study of the common law at the center of attention, he nevertheless made space for the influence of natural and

[3] Neil Walker, *Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders*, 6 Int'l J. Const. L. 373, 376 (2008).

[4] 1 William Blackstone, Commentaries on the Laws of England (Oxford, 1765).

divine law as well as the *ius gentium*, derived as it was for him from the laws of nature. And the municipal law of England, as he saw it, was again not uniform but a composite product of common, local, and particular customs—among the latter the *lex mercatoria*, but also civil and canon law where custom established them as relevant.[5] The common law itself he traced back to the codification by Edward the Confessor, an eleventh-century attempt to tie together customs from various origins—a codification resulting from the fact that, as Blackstone put it, the rules in the earlier compilation by King Alfred, the ninth-century *Doom Book*, were challenged by new customs brought in by the Danes and were thus "mixed and debased with other laws of a coarser alloy."[6]

The need to tie together many disparate, coexisting practices and customs characterized the law across much of medieval and late medieval Europe. From the eleventh century onwards, law—and especially canon law—became increasingly codified, but the *corpus iuris* of much secular law was made up of rules drawn ("received") from a wide variety of sources, including Roman law and customary usages. The twelfth-century *Usatges de Barcelona*, for example, used rules of Visigothic and Roman origin just as well as secular and ecclesiastical ones, but even though they sought to tie the different bodies of norms into a more coherent whole, they may not have succeeded in practice. Evidence of the period suggests that the *Usages* were used scarcely in disputes, and less so than earlier codes, such as the Visigothic *Liber iudiciorum*.[7] In the following centuries, local rules and customs across Europe were increasingly supplemented by the *ius commune*, but both on the continent and in England, common laws did not operate as a unifying body of law but rather as an "ongoing option" for legal actors, constantly in flux and being redefined through the interaction and collaboration with the particular *iura propria*.[8]

Scholars have described the resulting structure as a "patchwork of accommodations," in stark contrast with the idea of an integrated order or system.[9] Judges could not merely rely on one set of rules but had to navigate between norms from a wide variety of contexts, with greater emphasis on the substantive appropriateness of the rule finally chosen than on its pedigree.[10] This structure slowly gave way to a more integrated law, but the challenge of multiplicity persisted well into the era of modern statehood in Europe and beyond.[11]

[5] *Id.* at 3.

[6] *Id.* at 65. On the English law of the period, see Patrick Wormald, The Making of English Law: King Alfred to the Twelfth Century, Legislation and its Limits (2001); Tom Lambert, Law and Order in Anglo-Saxon England (2017).

[7] Adam J. Kosto, *The Limited Impact of the Usages de Barcelona in Twelfth-Century Catalonia*, 56 Traditio 53, 73 (2001).

[8] *See* H. Patrick Glenn, On Common Laws 1 (2007); R.C. van Caenegem, An Historical Introduction to Private Law 45–85 (1992).

[9] Seán Patrick Donlan & Dirk Heirbaut, *"A Patchwork of Accommodations": Reflections on European Legal Hybridity and Jurisdictional Complexity*, *in* The Law's Many Bodies: Studies in Legal Hybridity and Jurisdictional Complexity, c.1600–1900 at 9 (Dirk Heirbaut & Seán Patrick Donlan eds., 2015).

[10] *Id.* at 21.

[11] *See, e.g.*, Sally Engle Merry, *Legal Pluralism*, 22 Law & Soc'y Rev. 869 (1988).

2.2. Tying together a law of corporate social responsibility

Today's world is radically different from the medieval one, and we should be careful with facile analogies, as in diagnoses of neo-medievalism.[12] Yet we should also not lose sight of the fact that, in terms of political authority and law, the predominance of a single structure—the state and its legal order—has historically (and geographically) been the exception rather than the norm. The diffusion of power we have witnessed over the past decades returns us to a decentered landscape in which political and legal multiplicity is again a key feature.

Such multiplicity is perhaps most on display when it comes to some of the new powerholders in the global order, multinational corporations.[13] Straddling national boundaries by definition, they have been subject to efforts at transnational regulation for half a century, yet at accelerating speed since the 1990s. The result is a densely populated space of national laws and regulation, self-regulation codes of companies and industry associations, non-governmental organization (NGO)-driven standards and certification mechanisms, intergovernmental frameworks—especially in the Organisation for Economic Co-operation and Development (OECD) and the International Labour Organization (ILO)—as well as public international law rules, sometimes deemed applicable to corporations themselves, sometimes merely to states regulating corporations.[14]

Most remarkable is the way in which bodies of norms from different origins interact to create the overall structure. The recent decision of the Canadian Supreme Court in *Nevsun* gives a particularly vivid expression of the linkages thus created.[15] The case concerned workers who alleged breaches of international human rights in the construction of a mine in Eritrea. The Supreme Court, in a preliminary decision, found that customary international law may indeed provide a basis for the workers' claims—that it formed automatically part of Canadian law and was potentially applicable not only to states but also to corporations themselves. In a revealing glimpse into the court's self-understanding, the majority opinion argued that "[u]nderstanding and embracing our role in implementing and advancing customary international law allows Canadian courts to meaningfully contribute. . . to the 'choir' of domestic court judgments around the world shaping the 'substance of international law.'"[16] Not all domestic courts share this approach.[17] Yet the Canadian stance reflects a conviction that the law on human rights obligations of corporations is shaped by interventions

[12] Jörg Friedrichs, *The Meaning of New Medievalism*, 7 Eur. J. Int'l Rel. 475 (2001).

[13] *See* John Gerard Ruggie, *Multinationals as Global Institution: Power, Authority and Relative Autonomy*, 12 Regul. & Governance 317 (2018).

[14] For an overview, see Jennifer A. Zerk, Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law (2006).

[15] Nevsun Resources Ltd. v. Araya, (2020) S.C.C. 5 (Can.).

[16] *Id.* ¶ 72.

[17] *See, e.g.*, Edward T. Swaine, *Kiobel and Extraterritoriality: Here, (Not) There, (Not Even) Everywhere*, 69 Okla. L. Rev. 23, 23 (2016); Elise Groulx Diggs, Mitt Regan, & Beatrice Parance, *Business and Human Rights as a Galaxy of Norms*, 50 Geo. J. Int'l L. 309, 355–8 (2018).

from various actors and legal orders in a way that is interactive rather than conducted in "splendid isolation."[18]

The second example goes beyond courts and draws our attention to the many other actors involved in defining the relations between different bodies of norms. In the area of business and human rights, a significant push towards stronger linkages resulted from the adoption of the UN Guiding Principles on Business and Human Rights by the Human Rights Council in 2011 (UNGPs or "Guiding Principles").[19] The Guiding Principles soon became a central point of reference for most other corporate social responsibility instruments. For example, the 2011 update to the OECD Guidelines for Multinational Enterprises ("OECD Guidelines") explicitly sought to create consistency with the Guiding Principles and included a new human rights chapter.[20] Many other corporate social responsibility frameworks, including those created by businesses and business associations, equally tied themselves to the Guiding Principles in the following years, establishing them as the core of a network of norms.[21] The workings of this weaving exercise are also on display in the operation of the National Contact Points (NCPs), established under the OECD Guidelines to contribute to the resolution of implementation issues. Many NCPs liberally use not only the Guiding Principles but also a variety of other instruments—whether legally binding or not, directed at states or at companies—if these instruments provide specialized guidance for concrete issues.[22]

The resulting law of corporate social responsibility is not a coherent whole—it continues to consist of a multitude of codes, instruments, and norms with different weights and formal status. But it is not merely fragmented or disjointed; instead, its different parts are closely linked by the actors in the field, making it difficult to understand any of the codes independently.[23]

3. From coexistence to entanglement

These vignettes, historical and contemporary, do not sit easily with the imagery of modern law developed throughout the twentieth century. Yet it is typically through that imagery—one of legal systems with unity and closure, coherence, and predictability—that we approach and make sense of the new realities. We use the tools

[18] *See also* René Provost, *Judging in Splendid Isolation*, 56 Am. J. Comp. L. 125 (2008).

[19] UN Hum. Rts. Off. High Comm'r, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, UN Doc. HR/PUB/11/04 (2011), https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf [hereinafter UNGP].

[20] *See* Org. for Econ. Co-operation & Dev., OECD Guidelines for Multinational Enterprises (2011), www.oecd.org/daf/inv/mne/48004323.pdf [hereinafter OECD Guidelines].

[21] Tomáš Morochovič & Lucy Lu Reimers, *Hidden in the Shades: Patterns of Entanglement within the Web of Corporate Social Responsibility Law*, *in* Entangled Legalities Beyond the State, *supra* note 2, at 318. On the "gravitational force" of the UNGPs, see also Diggs, Regan, & Parance, *supra* note 17, at 340–5.

[22] *See* Morochovič & Reimers, *supra* note 21.

[23] *See also* Larry Catá Backer, *Governance Polycentrism or Regulated Self-Regulation: Rule Systems for Human Rights Impacts of Economic Activity Where National, Private and International Regimes Collide*, *in* Contested Regime Collisions: Norm Fragmentation in World Society 198 (Kerstin Blome et al. eds., 2016).

developed for the context of the modern state and its law and adapt them as we can to analyze and understand the newly emerging fabric of law. Inevitably, this runs into limitations, and it has provoked attempts to develop new frames and categories, all with their own blind spots and biases. In order to build a broader account of legal multiplicity, we need to transcend these limitations, or at least be aware of them.

3.1. Legal systems and their outsides

Most of the analytical legal philosophy of the twentieth century did not pay much attention to multiplicity, and when it did, it downplayed its structural relevance. This is perhaps best exemplified in the work of Hans Kelsen for whom international and domestic laws formed part of one, monist legal system, united under an international *Grundnorm* and subject to a clear hierarchy, a *Stufenbau*.[24] Whatever multiplicity existed here, it was theoretically tamed.

Most other theorists focused more narrowly on the law of the modern state, without much regard for other legalities. H.L.A. Hart's efforts were primarily geared towards "providing an improved analysis of the distinctive structure of a municipal legal system," with a clear view towards the municipal legal systems of mid-twentieth-century Western Europe and North America.[25] His emphasis on an institutionalized legal order, characterized by the union of primary and secondary rules, and held together by a rule of recognition, very much reflected the particular experience of law in this, rather unique, historical and geographical context. In his vision, as in Kelsen's, most other layers of law have only derivative standing: they depend on an authorization by higher (state) law. This applies for him to a by-law of the Oxford City Council and the law of a British colony alike.[26] True multiplicity arises only when a colony becomes independent and replaces the old with a new, local rule of recognition. Yet this multiplicity also becomes uninteresting because now British law is formally just the law of another state.[27] For Hart, different bodies of law are either hierarchically integrated or exist in parallel, but Hart has little to say about the relation of these parallel orders, except that each legal system decides for itself whether and how it recognizes and applies rules from other systems.[28]

Multiple legalities play a stronger role in Joseph Raz's work. Raz accepts that there is not necessarily just one legal system in place, even in the same space: "two legal systems can coexist, can both be practised by one community,"[29] and a "society may be governed by two legal systems, for example, one religious, the other a state legal system, which, even if sometimes conflicting, are compatible."[30] When there is a more general conflict or competition of legal systems, "the one that comes out best [on the

[24] Hans Kelsen, Reine Rechtslehre (2d ed. 1960).

[25] H. L. A. Hart, The Concept of Law 17 (3d ed. 2012).

[26] *Id.* at 120–1, 221–2.

[27] *Id.* at 120.

[28] *See* H. L. A. Hart, Essays in Jurisprudence and Philosophy 340–2 (1983). *See also* Hart, *supra* note 25, at 119–20 (on the recognition of Soviet law).

[29] Joseph Raz, The Authority of Law: Essays on Law and Morality 118 (1979).

[30] Joseph Raz, The Concept of a Legal System: An Introduction to the Theory of Legal System 206 (1980).

test of exclusion] is the existing one. In certain cases two competing systems may have roughly equal claim and the case must be judged unsettled."[31] Still, the systems appear as unconnected—they merely coexist, but typically at a distance.

Similar theoretical frames continue to dominate today. In much of his discussion of law beyond the state, Liam Murphy also focuses on system boundaries: on whether and when international legal norms form *one* system, and what the relations are between the different legal systems occupying the postnational space.[32] Scott Shapiro, in his take on the concept of law, seeks to move a step away from the model of the modern state and broaden the view to other forms of law, but he also introduces, as a mark of legality, the notion of "self-certification"—the ability of an organization "to enforce its rules without first demonstrating to a superior (if one exists) that its rules are valid."[33] Raz has started questioning whether the state ought to remain the central model for legal theorizing, and he has outlined a broader conception in which legal systems may encompass those created by international organizations, universities, indigenous groups, or voluntary associations.[34] Yet the system remains the organizing principle here, just as for many theorists from different theoretical backgrounds, even those coming from a socio-legal angle. Brian Tamanaha, for example, still portrays contemporary legal pluralism as one of co-existing normative systems, with interactions primarily framed as clashes between them.[35] Gunther Teubner, one of the strongest voices for revising traditional accounts of legal hierarchy and integration, also maintains a systems frame—and a particularly strong one, given his debt to Luhmannian systems theory.[36]

System-based approaches generate particular expectations about the norms and practices that govern the relation of different bodies of norms in the postnational realm. These norms will track the boundaries of the respective systems, either operating *from within* one system in the mode of conflict-of-laws, or *across one system* in an internal, conflict-of-norms approach.[37] In both cases, the resulting image is one of internally coherent orders: either of one integrated order, or of many orders which, in a self-contained way, regulate their relations with the others autonomously. This dichotomy is well visible throughout different legal settings. Federal arrangements tend to construe the relation between federal and unit laws typically as hierarchical *within* one legal system, while relations between state and non-state norms, such as

[31] *Id.* at 207.

[32] Liam Murphy, What Makes Law: An Introduction to the Philosophy of Law 145–57 (2014).

[33] Scott J. Shapiro, Legality 221 (2011).

[34] Joseph Raz, *Why the State?*, *in* In Pursuit of Pluralist Jurisprudence, *supra* note 2, at 136. See id, 146: "A legal system may acknowledge the normative powers of some institutions of another legal system over some aspects of its affairs."

[35] Brian Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 30 Sydney L. Rev. 375 (2008).

[36] Gunther Teubner, Constitutional fragments: Societal Constitutionalism and Globalization (2012); *see also* Andreas Fischer-Lescano & Gunther Teubner, Regime-Kollisionen: Zur Fragmentierung des globalen Rechts (2006).

[37] Ralf Michaels & Joost Pauwelyn, *Conflict of Norms or Conflict of Laws? Different Techniques in the Fragmentation of Public International Law*, 22 Duke J. Comp. Int'l L. 349 (2012).

indigenous or religious law, tend to oscillate between the supremacy of state law and a recognition of non-state laws in a conflict-of-laws frame, for example with respect to religious arbitration.[38] In a global context, international law is usually understood as one, with internal conflict norms organizing relations between its parts,[39] and proponents of a "global law" take this approach further to relations between international law and other (e.g. domestic) norms.[40] Global legal pluralists, in contrast, emphasize the distance between different bodies of norms in the global order, usually understanding them as separate systems that calibrate their relations with one another in a conflict-of-laws mode.[41]

3.2. Transcending systems frames

When using these dominant frames, we assume that law appears either in the singular or in the plural, either as one system or many. But such a binary view may well be inadequate: perhaps law sometimes, or even oftentimes, appears in both the singular and the plural, as *both* one and many. Ralf Michaels has highlighted this possibility and drawn attention to the fact that rules controlling the recognition of norms from other systems may be far more consequential for the operation of legal orders than typically assumed. They appear, in his view, not merely as minor elements but instead as "tertiary norms," equally constitutive of a legal system as the secondary and primary norms that have been in focus since Hart.[42]

While this approach centers on systems and their boundaries, the vignettes presented earlier seem to suggest that different legalities, rather than merely coexisting, interlock in such a way as to constitute a new, hybrid reality.[43] Legal pluralists, though starting from an imagery of relatively unconnected legalities, have over time come to emphasize their interactions and interwovenness.[44] In a similar vein, legal historians have stressed the "layered and composite legal arrangements in empires" in which the relations of different sites were constantly restructured through practice and resulted in "fluid jurisdictions" and "jurisdictional webs."[45] Observers of contemporary

[38] Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y. U. L. Rev. 1231 (2011); Managing Family Justice in Diverse Societies (Mavis Maclean & John Eekelaar eds., 2013).

[39] *See, e.g.*, Int'l L. Comm'n, Report of the Study Group, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Conclusions*, UN Doc. A/CN.4/L.702 (July 18, 2006).

[40] *See, e.g.*, Rafael Domingo, The New Global Law (2010); Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law*, 20 Ind. J. Glob. Legal Stud. 605 (2013).

[41] *See* Mireille Delmas-Marty, Ordering Pluralism: A conceptual Framework for Understanding the Transnational Legal World (2009); Krisch, *supra* note 1; Paul Schiff Berman, Global Legal Pluralism: A Jurisprudence of Law Beyond Borders (2012).

[42] Michaels, *supra* note 2.

[43] Poul F. Kjaer, *Global Law as Inter-contextuality and as Inter-legality*, *in* The Challenge of Inter-Legality 302 (Jan Klabbers & Gianluigi Palombella eds., 2019).

[44] Merry, *supra* note 11, at 879–86.

[45] Lauren Benton & Richard J. Ross, *Empires and Legal Pluralism: Jurisdiction, Sovereignty, and Political Imagination in the Early Modern World*, *in* Legal Pluralism and Empires, 1500–1850 at 1, 4–5 (Lauren Benton & Richard J. Ross, eds., 2013); Nurfadzilah Yahaya, Fluid Jurisdictions: Colonial Law and Arabs in Southeast Asia (2020).

transnational law have highlighted practices of "infiltration, mingling and coalescence of disparate cultural ingredients" leading to a variety of legal *métissages.*[46] And scholars of the interaction of state and religious laws have also pointed to the dense mutual influences between them.[47]

Confronted with such phenomena, theorists have begun to adjust their instrumentarium—some with caution, others more radically. Raz now sees the "independence" of the state legal system as a matter of degree, and Shapiro equally conceives of the self-certification of a legal organization as operating on a continuum, thus allowing for greater openness and permeability.[48] "Constitutional" pluralists have sought to bridge unitary and pluralist accounts by an emphasis on the legally protected norms and values through which the overall order, made up of multiple parts, is held together[49]—typically, though, by relying eventually on a (thin) unitary system.[50]

If we take a further step away from the system-driven imagery, broader possibilities arise and "in-between places"[51] become more recognizable. Keith Culver and Michael Giudice, for example, pursue an inter-institutional view of legality which explicitly straddles the boundaries between systems by acknowledging that "relations of mutual reference can arise between institutions within and across legal orders."[52] The web spun by such references has led to broader uses of a network metaphor, for example by Teubner and rhetorically perhaps most visibly in François Ost and Michael van de Kerchove's *De la pyramide au réseau*.[53] Oren Perez and Ofir Stegmann have recently taken the metaphor further to trace a shift towards a "transnational networked constitutionalism," though with a primary focus on the interaction of private regulatory authorities.[54]

Boundary-crossings tend to be easier for anthropologists and sociologists than for lawyers and legal theorists, and so network approaches and inquiries into new hybrid forms find more resonance among them. Exploring human rights practices between the local and the global, for example, Mark Goodale suggests an orientation around "human rights networks" with nodes in different sites and meaning being produced,

[46] Marc Amstutz, *Metissage: On the Form of Law in World Society*, 112 Zeitschrift für vergleichende Rechtswissenschaft 336 (2013), *reprinted in* Luhmann and Law 499 (Christopher Thornhill ed., 2017).

[47] Samia Bano, *Muslim Dispute Resolution in Britain: Towards a New Framework of Family Law Governance?*, *in* Managing Family Justice in Diverse Societies 61, 67–8 (Mavis Maclean & John Eekelaar eds., 2013).

[48] Raz, *supra* note 34, at 146; Shapiro, *supra* note 33, at 223.

[49] *See, e.g.*, Constitutional Pluralism in the European Union and Beyond (Matej Avbelj & Jan Komárek eds., 2012); Alec Stone Sweet, *A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe*, 1 Glob. Const. 53 (2012); Kumm, *supra* note 40.

[50] For the critique, see Krisch, *supra* note 1, ch. 2.

[51] Walker, *supra* note 3. But see also his broader inquiry in Neil Walker, Intimations of Global Law (2014).

[52] Keith Culver & Michael Giudice, *Entanglement of State and Indigenous Legal Orders in Canada*, *in* Entangled Legalities Beyond the State, *supra* note 2, at 376; *see also* Keith Culver & Michael Giudice, Legality's Borders: An Essay in General Jurisprudence (2010).

[53] François Ost & Michel Van de Kerchove, De la pyramide au réseau? Pour une théorie dialectique du droit (2002); Teubner, *supra* note 36 at 161.

[54] Oren Perez & Ofir Stegmann, *Transnational Networked Constitutionalism*, 45 J. L. & Soc'y S135 (2018).

and traveling, between them.[55] We find similar accounts, pointing to fluid orders or actors' attempts at creating transsystemic coherence, in observations from family law to corporate responsibility in global value chains.[56]

The most prominent theoretical proposal to reconceive law along such lines, Boaventura de Sousa Santos's "interlegality,"[57] imagines "different legal spaces superimposed, interpenetrated, and mixed in our minds and in our actions"—a "porous legality" of "multiple networks of legal orders forcing us into constant transitions and trespassings."[58] The proliferation of bodies of norms in the postnational space has brought this vision back to the fore, and interlegality has become more common in the vocabulary of lawyers.[59] But quite how strongly it challenges traditional frames is not always clear among those who draw on the concept. Sanne Taekema, for example, traces competing interpretations but also highlights how a focus on certain legal values drives societal actors towards system-oriented practices.[60]

Whether actors are indeed driven in this direction is primarily an empirical question. In anthropological work on the ways in which actors—judges, officials, activists, tribal chiefs, individuals—navigate a multiplicity of norms, the result is often a far more disorderly picture than that suggested by reception and conflict rules in systemic accounts which often rely on doctrinally and judicially consolidated rules.[61] Sometimes this state of affairs might resemble a "web," but sometimes it might defy attempts at describing it in such macro terms, throwing us back onto the many micro-practices it is made of. These practices might converge or diverge, yet it is through them that the relationships between norms—and thus the shape of the overall order—are defined.

3.3. Towards entanglements

My focus on "entangled legalities" seeks to take up these challenges and draw attention to the central role of interactions across different sites and layers of law, highlighting a feature that has been characteristic of law in many, if not most, times

[55] Mark Goodale, *Locating Rights, Envisioning Law Between the Global and the Local*, *in* The Practice of Human Rights 1 (Mark Goodale & Sally E. Merry eds., 2007).

[56] Anne Griffiths, *Reconfiguring Law: An Ethnographic Perspective from Botswana*, 23 Law & Soc. Inquiry 587, 598 (1998); Julia Eckert, *Entangled Hopes: Towards Relational Coherence*, *in* Entangled Legalities Beyond the State, *supra* note 2, at 399.

[57] Boaventura de Sousa Santos, Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition (1995).

[58] Boaventura de Sousa Santos, *Law: A Map of Misreading. Toward a Postmodern Conception of Law*, J. L. & Soc'y 279, 297–8 (1987).

[59] *See, e.g.*, Robert Wai, *The Interlegality of Transnational Private Law*, 71 Law & Contemp. Probl. 107 (2008); The Challenge of Inter-Legality, supra note 43.

[60] Sanne Taekema, *Between or Beyond Legal Orders: Questioning the Concept of Legal Order in Light of Interlegality*, *in* The Challenge of Inter-Legality, *supra* note 43, at 69. Other contributions in that volume reflect diverging approaches; see, e.g., Jan Klabbers & Gianluigi Palombella, *Introduction: Situating Inter-Legality*, *ibid.*, at 1, and Gianluigi Palombella, *Theory, Realities, and Promises of Inter-Legality: A Manifesto*, *ibid.*, at 363.

[61] *See, e.g.*, Eckert, *supra* note 56; Tobias Berger, *Denial, Deferral and Translation: Dynamics of Entangling and Disentangling State and Non-state Law in Postcolonial Spaces*, *in* Entangled Legalities Beyond the State, *supra* note 2, at 35.

and places, as the survey above reflects. By legal entanglement, I understand a situation in which law is constituted by the ways in which norms from different origins are linked with one another without being integrated into a common order (or being entirely separated into different, parallel orders). Entanglement, in one form or another, is a normal state of law, even if it has been pushed out of view during the heyday of the nation state. The focus on entangled legalities aims to bring this normality back in, and it hopes to provide a frame for studying the phenomenon. It seeks to provide an instrumentarium through which we can observe and detect the many ways in which law is entangled and understand variation in the degree and form of entanglement across sites and periods. This turns the question into an empirical one which should enable us to gain a clearer picture of the structures of law that exist in social practice, without privileging any of them *a priori*.

The notion of entanglement is not an invention of lawyers. 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 particle of the group cannot be described independently of the state of the other(s)."[62] 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 by the insight that the histories of European and extra-European societies cannot be understood without taking into account the continuous connections between them.[63] Unlike comparative approaches which inquire into similarities and differences, entangled histories—similarly to *histoires croisées*—are interested "in processes of mutual influencing, in reciprocal or asymmetric perceptions, in entangled processes of constituting one another,"[64] 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."[65] In cultural studies more broadly, the notion of 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.[66]

In the study of law, proponents of legal pluralism have done most to trace entanglements between different legal orders. They have come to stress the "complex and interactive relationship" between different forms of ordering and their intertwined

[62] https://en.wikipedia.org/wiki/Quantum_entanglement (last visited March 25, 2022).

[63] Shalini Randeria, *Geteilte Geschichte und verwobene Moderne*, *in* Zukunftsentwürfe: Ideen für eine Kultur der Veränderung 87 (Norbert Jegelka, Hanna Leitgeb, & Jörn Rüsen, eds., 1999).

[64] Jürgen Kocka, *Comparison and Beyond*, 42 Hist. & Theory 39, 42 (2003).

[65] Sebastian Conrad & Shalini Randeria, *Einleitung: Geteilte Geschichten: Europa in einer postkolonialen Welt*, *in* Jenseits des Eurozentrismus 32, 40 (Sebastian Conrad, Shalini Randeria, & Regina Römhild eds., 2d ed. 2013). *See also* Michael Werner & Bénédicte Zimmermann, *Beyond Comparison:* Histoire Croisée *and the Challenge of Reflexivity*, 45 Hist. & Theory 30 (2006).

[66] Philipp Wolfgang Stockhammer, *Conceptualizing Cultural Hybridization in Archaeology*, *in* Conceptualizing Cultural Hybridization: A Transdisciplinary Approach 43, 47–48 (Philipp Wolfgang Stockhammer ed., 2011).

nature,[67] and this interest has only increased under conditions of globalization.[68] This has also inspired legal historians to inquire more closely into legal entanglements. Using 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."[69]

Much of this historical work, just as well as much legal pluralist writing and studies of interlegality, focuses primarily on de facto influences and the traveling content of legal norms. Legal transplants and the substantive reception of legal forms and institutions are recurring themes,[70] in a somewhat similar way to archeologists studying the material entanglement of objects that are created in imitation of, and borrowing from, foreign examples.[71] The perspective is often that of an outside observer tracing such influences, even if the participants in legal discourse (or the different legal discourses intersecting here) continue to emphasize traditional frames.[72]

Yet norms from different origins become "entangled" not only as a matter of fact, but also in discursive construction. Actors—litigants, judges, dispute settlers, observers, addressees—make claims about the relation of norms from different origins, and they thus define and redefine the relative weights and interconnection between the norms at play. They thereby also determine to what extent norms form part of broader assemblages—in the relatively stable and firm mode of modern state legal orders or in more porous ways.

When we focus on legal entanglement, we mean such discursive entanglement: the universe of statements that link different bodies of norms with one another. In this understanding, legalities are entangled when norms from different origins are in practice brought into a relation that is not merely one of systemic separation or integration, and when the interaction between them plays a constitutive role for the legal context it relates to. In a context of growing multiplicity, we expect this entanglement to become stronger—where various norms are seen to apply to the same situation, actors will often be forced to clarify the relation between them, to generate statements on the relation between them, and in turn to generate a greater "centrality of the margins."[73]

In order to trace the universe of such entanglements, we need to cast a wide net. As we seek to understand the extent to which the model of modern state law continues to reflect reality, we cannot reduce ourselves to prisms and methodological approaches derived from that model. This means, first, that we need to take into view practices of all kinds of actors related to law and legal norms, not merely those of a particular

[67] Merry, *supra* note 11, at 873; John Griffiths, *What Is Legal Pluralism?*, 18 J. Legal Pluralism & Unoff. L. 1, 17–18 (1986).

[68] Klaus Günther & Shalini Randeria, Recht, Kultur und Gesellschaft im Prozess der Globalisierung (2001); Ralf Michaels, *Global Legal Pluralism*, 5 Ann. Rev. L. & Soc. Sci. 243 (2009); Peer Zumbansen, *Transnational Legal Pluralism*, 1 Transnat'l Legal Theory 141 (2010); Berman, *supra* note 41.

[69] Thomas Duve, *Entanglements in Legal History: Introductory Remarks*, *in* Entanglements in Legal History: Conceptual Approaches 3, 8 (Thomas Duve ed., 2014).

[70] Entanglements in Legal History: Conceptual Approaches, *supra* note 69.

[71] Stockhammer, *supra* note 66, at 50.

[72] Günther & Randeria, *supra* note 68.

[73] Walker, *supra* note 3.

class of officials—judges—typically prominent in the state context but not necessarily elsewhere. In many normative orders inside and outside the state, actors other than judges—regulators, informal dispute settlers, addressees—play a large role, and an attempt at reconstructing law that starts from a basis in "descriptive sociology"[74] needs to account for this role and take seriously the ways in which this broader range of actors construe law and legal relations through their social practices.[75]

Secondly, casting a wide net means suspending, at least initially, too rigid a delimitation of the domain of "law." What defines law has been much debated by legal theorists, and equally by legal pluralists for whom the boundaries between law and other normative orders often appear blurred.[76] Whether or not it is possible to draw a general boundary at all, for our exploratory purposes it would be prejudicial to choose one that relies too closely on an analogy with state law. Being "inflationary and not too precise over details"[77] may be advantageous here—also because a broader gaze that includes law-like phenomena with contested standing can help us to sharpen our assessment of how the construction of entanglements varies in different types of normative orders, formal and informal, public and private. Legality is better conceived as a matter of degree rather than a binary attribute in any event,[78] and many of the rules populating the postnational sphere will lie somewhere between the poles. Where certain norms unite a sufficient number of relevant criteria—where, for example, they form part of "institutional normative orders"[79] or operate as "rules of the game"[80] for the contexts they apply to—we include them in our inquiry, regardless of whether they come with a claim to, or recognition of, bindingness in a formal sense. This should allow us to trace entanglements also with and inside the grey zones of legality which characterize many areas of governance beyond the state today.

4. Forms of entanglement

If we want to understand the shape of postnational law, we need to trace how entanglements between its different parts are construed in social and institutional practices. In some contexts, actors will entangle norms more tightly, in others more loosely, with space for maneuver between them. At times they will refuse to entangle

[74] Hart, *supra* note 25, at vi.

[75] *See, e.g.*, Brian Z. Tamanaha, A General Jurisprudence of Law and Society 6 (2001); Margaret Davies, *Plural Pluralities of Law*, *in* In Pursuit of Pluralist Jurisprudence, *supra* note 2, at 239, 250–4.

[76] On recent attempts to define the boundaries of law with a view to the global order, see, e.g., William Twining, General Jurisprudence: Understanding Law from a Global Perspective (2009); Thomas Schultz, Transnational Legality: Stateless Law and International Arbitration (2014); Murphy, *supra* note 32; Brian Z. Tamanaha, *A Reconstruction of Transnational Legal Pluralism and Law's Foundations*, *in* Entangled Legalities Beyond the State, *supra* note 2, at 449.

[77] Raz, *supra* note 34, at 143.

[78] *See* Joseph Raz, Practical Reason and Norms 150 (1999); Shapiro, *supra* note 32, at 224. This holds especially true for scholarly inquiry; perhaps less so for the application of law where binary choices have to be made. *But see also* Schultz, *supra* note 76.

[79] Neil MacCormick, Institutions of Law: An Essay in Legal Theory (2007).

[80] Andrei Marmor, Philosophy of Law 82 (2010).

them; or they will connect them so strongly as to integrate them into a common whole, potentially a legal system along the lines of the state model. Entanglement sits between systemic integration and separation—best thought of as ideal-typical end points of a continuum—and all these states are the contingent result of the social practices actors of all kinds engage in on a daily basis.

Entanglement thus comes in degrees. Yet it is "relative" also in the sense that it depends on the perspective of actors. Entanglement is not necessarily the same for all actors concerned—unless there is consolidation around one interpretation of the relationship of different norms, divergences may persist, often very consequentially. For example, the Court of Justice of the European Union and the German Constitutional Court have been locked in an unresolved fifty-year contest over whether EU law is hierarchically superior to German law or not (or only with caveats).[81] Likewise, certain civil society activists and religious groups as well as courts in Bangladesh differ radically in their views on the relation between state and religious law, and on the position and relevance of international human rights law for struggles over family law and status.[82] While forms and intensity of entanglement may appear well defined from one perspective, they may appear differently from another, and they will often be in flux.

Entanglement does not necessarily come in positions on the wholesale relations between legal systems or layers of law. Instead, it may also consist in relations with or between individual norms or clusters of norms, sometimes driven not by considerations of formal pedigree but instead by substantive appeal or fit.[83] The transnational practice of using human rights norms and interpretations from other sites, national and international, is a good example here—human rights norms are typically not given particular (often persuasive rather than binding) authority because of their status as norms of international law (or the constitutional law of one or the other country). Instead, they are taken into account because of substantive resonance and specificity in developing one's own norms further.[84]

What then are the ways in which relations between norms from different origins are construed? The following section provides an overview of different tools and approaches, situated at different points on the continuum between separation and integration of legal orders, as visualized in Figure 1.[85]

Close to the extremes sit two more common modes of construction: reception norms, typical of the treatment of international law or foreign legal orders in international private law; and overarching norms, characteristic for the conflict norms

[81] *See* Neil MacCormick, Questioning Sovereignty: Law, State, and Nation in the European Commonwealth (1999).

[82] Berger, *supra* note 61.

[83] *See* Dana Burchardt, *Intertwinement of Legal Spaces in the Transnational Legal Sphere*, 30 Leiden J. Int'l L. 305 (2017); Thomas Riesthuis, The Intertwinement of Legal Orders: A Critical Reconstruction of Theories of Jurisprudence (2019).

[84] See Christopher McCrudden, *Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights*, 20 Oxford J. Legal Stud. 499 (2000).

[85] For other, more limited, accounts, see, e.g., Delmas-Marty, *supra* note 41; Dirk Pulkowski, The Law and Politics of International Regime Conflict (2014); Anne Peters, *The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization*, 15 Int'l J. Const. L. 671 (2017).

Figure 1. Forms of entanglement

within a legal order.[86] These forms recreate traditional system boundaries, but we can observe much dynamism in the ways in which they calibrate relations in ever more intense contacts between norms from different origins. Between reception and overarching norms lies a wider, more inchoate field of "straddling practices." These practices tie together norms from different origins in various ways, some more tightly, others more loosely, straddling system boundaries in one form or another. Unlike in the other categories, in which relations are usually construed according to generalizable rules, here links are often established in an ad hoc or circumscribed fashion, not following patterns that can easily be applied to other situations. Notions such as "interface norms" or "linkage norms,"[87] apt for the first two categories, are less well suited to this third type of relationing—the practices that shape the relations of different legalities are often not guided by norms (or refer to them) but proceed through situational moves by legal actors.[88] These three types of practices—just as separation and integration as end points—are not clearly distinct categories. There are overlaps and practices not easily classified as one or the other. But the typology should help us to systematize the inquiry into the wealth of entangling practices and bring out important differences between them.

4.1. Reception norms: Calibrating ties across boundaries

Reception norms are the typical form through which a legal system deals with external norms; they reproduce the inside/outside distinction and define the ways in which outside norms enter a given body of norms. As we have seen in our exploration in the previous section, they take pride of place in most theorists' approaches to multiplicity, and they provide the model for traditional conflict-of-laws norms as well as norms for the reception of international law.

How they are framed determines the degree of openness of a given system. To use the classical dualism/monism distinction, they can require international legal rules to be incorporated one by one into domestic law through legislation, or make them automatically part of the domestic legal order.[89] Likewise, they can open the door wide to an application of foreign law (or, for example, religious law) in a country's courts, or they can leave the door mostly shut. In a globalizing world, reception norms have moved from the margins to the center, forcing legal practitioners in many sites to deal with the relations with other legal orders as a matter of course.

[86] Michaels & Pauwelyn, *supra* note 37.

[87] Krisch, *supra* note 1; Detlef von Daniels, The Concept of Law from a Transnational Perspective (2016).

[88] *See* Caroline Humfress, *Entangled Legalities beyond the (Byzantine) State: Towards a User Theory of Jurisdiction*, *in* Entangled Legalities Beyond the State, *supra* note 2, at 353.

[89] *See generally* André Nollkaemper, National Courts and the International Rule of Law (2011).

The increased relevance of relations with external norms has also generated greater variety in content. Reception norms often create special linkages with certain bodies of norms—customary international law, human rights treaties, or global financial standards.[90] They can also establish conditions for the entry of external norms—*ordre public* clauses in private international law are the typical example here, but also conditionalities for international or regional law, for instance on the model of the *Solange* jurisprudence of the German Constitutional Court.[91] Conditions can be substantive—often expressed in requirements of compliance with fundamental rights—but also procedural. The World Trade Organization's Technical Barriers to Trade (TBT) Agreement is a case in point here: it grants certain technical standards a particular status if these have been created with respect for principles of transparency, openness, impartiality, and consensus.[92] Oftentimes, conditionality seeks to ensure that an opening towards another order does not significantly compromise the regulatory aims pursued—for example through requirements for equivalent protection in mutual recognition regimes[93] or in accepting a delegation of powers to international organizations.[94] Reception norms in these cases balance the desire for openness with the maintenance of (a certain degree of) control and risk reduction—they produce both proximity and distancing between norms from different origins.[95]

Many of the conditions mentioned here are relatively vague—*ordre public*, openness, equivalence—and thus leave some latitude and flexibility for the solution of individual cases. The stance of Latin American courts vis-à-vis regional human rights jurisprudence is a good example: while accepting in principle the binding character of the jurisprudence of the Inter-American Court of Human Rights, they reserve for themselves the right to assess whether a certain judgment was sufficiently justified.[96] A similar flexibility is achieved through discretionary elements in reception norms, which have become increasingly frequent. External norms are then not brought in as a matter of obligation but instead as weighty elements, sometimes "persuasive authority" or consistent interpretation, in the process of interpretation.[97] This is

[90] *See* Pierre-Hugues Verdier & Mila Versteeg, *International Law in National Legal Systems: An Empirical Investigation*, 109 Am. J. Int'l L. 514 (2015); Chris Brummer, Soft Law and the Global Financial System: Rule Making in the 21st Century (2d ed. 2015).

[91] *See, e.g.*, Antonios Tzanakopoulos, *Judicial Dialogue in Multi-Level Governance: The Impact of the Solange Argument*, *in* The Practice of International and National Courts and the (De-)Fragmentation of International Law 185 (Ole Kristian Fauchald & André Nollkaemper eds., 2012); Jan Oster, *Public Policy and Human Rights*, 11 J. Priv. Int'l L. 542 (2015).

[92] World Trade Org. Comm. on Tech. Barriers to Trade, Second Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade, G/TBT/9, Annex 4 (Nov. 13, 2000). *See* Lucy Lu Reimers, *International Trade Law: Legal Entanglement on the WTO's Own Terms*, *in* Entangled Legalities Beyond the State, *supra* note 2, at 193.

[93] *See* Kalypso Nicolaidis & Gregory Shaffer, *Transnational Mutual Recognition Regimes: Governance Without Global Government*, 68 Law & Contemp. Prob. 263 (2005).

[94] *See* Challenging Acts of International Organizations before National Courts (August Reinisch ed., 2010).

[95] *See also* Nollkaemper, *supra* note 89, at 11.

[96] *See* Alejandro Chehtman, *International Law and Constitutional Law in Latin America*, *in* The Oxford Handbook of Constitutional Law in Latin America 533 (Conrado Hübner Mendes, Roberto Gargarella, & Sebastián Guidi eds., 2021).

[97] *See* H. Patrick Glenn, *Persuasive Authority*, 32 McGill L.J. 261 (1986); Nollkaemper, *supra* note 89, at 7.

sometimes expressed, for example in the UK Human Rights Act, as a requirement to "take into account" norms or decisions from an external source.[98] The UN Human Rights Committee has called upon national courts and legislators to give "due consideration" to its jurisprudence—a linkage below the level of obligation, but one that requires engagement. National courts' practices in response vary heavily: they range from outright dismissal and discretionary, occasional uses to approaches that treat the findings of UN human rights treaty bodies as "authoritative" and require "compelling reasons" for deviating from them.[99]

4.2. Overarching norms: Between integration and distancing

If reception norms are the typical tool to structure relations *across* legal systems, conflict norms are normally used to organize relations *within* one system. As overarching norms, they are understood to be valid for all norms, regardless of their origin—the most common ones seek to resolve horizontal conflicts (such as *lex specialis* or *lex posterior*) or vertical conflicts (especially norms about hierarchies, as between federal and state law in federal orders or between the UN Charter and other international rules). Such norms can also stipulate substantive integrating rules or principles, such as human rights, democracy, or sustainable development, which create normative expectations throughout the entire system.[100]

Usually seen as driving towards integration and coherence, overarching norms can also generate distance. They may be used to carve out autonomous spaces—be it for local self-government or religious groups within a state setting, or for particular treaty regimes in international law. In the case of the latter, tools such as the notion of a self-contained regime or simply the operation of *lex specialis* among the parties can help to place them at arm's length from norms of other origins.[101] This is visible especially in the economic law context: in the World Bank's long-standing insistence that its Articles of Agreement exclude a consideration of human rights in its project management,[102] in the resistance of international investment arbitrators to use norms from sources other than investment treaties,[103] or in the generally weak reception of non-World Trade Organization (WTO) norms by the WTO panels and Appellate Body.[104]

[98] Roger Masterman, *Taking the Strasbourg Jurisprudence into Account: Developing a "Municipal Law of Human Rights" under the Human Rights Act*, 54 Int'l Comp. L. Q. 907 (2005).

[99] Machiko Kanetake, *Giving Due Consideration: A Normative Pathway between UN Human Rights Treaty-Monitoring Bodies and Domestic Courts*, *in* Entangled Legalities Beyond the State, *supra* note 2, at 133, 138-160.

[100] *See, e.g.*, Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and Beyond the State*, *in* Ruling the World? Constitutionalism, International Law and Global Governance 258 (Jeffrey Dunoff & Joel P. Trachtman eds., 2009).

[101] Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-contained Regimes in International Law*, 17 Eur. J. Int'l L. 483 (2006).

[102] Galit Sarfaty, Values in Translation: Human Rights and the Culture of the World Bank (2012).

[103] *See* Francesco Corradini, *The Social Life of Entanglements: International Investment and Human Rights Norms in and beyond ISDS*, *in* Entangled Legalities Beyond the State, *supra* note 2, at 162.

[104] *See* Reimers, *supra* note 92. *But see also* Antonello Tancredi, *Trade and Inter-Legality*, *in* The Challenge of Inter-Legality, *supra* note 43, at 158.

If such distance is not to result in "clinical isolation,"[105] it needs bridging mechanisms. These can be discretionary and ad hoc—in the case of the World Bank, despite consistent claims of activists for the need to respect human rights obligations as a matter of principle, human rights have only found selective reflection in internal policies drawn up by the Bank.[106] Often, however, bridging requires a more generalized approach. In the investment context, the question of whether and how human rights matter in principle has been hotly debated.[107] Arbitral tribunals have largely maintained distance, emphasizing the *lex specialis* principle and jurisdictional boundaries, yet in some cases they have held that investment agreements cannot be interpreted "in a vacuum," that other international law norms have to be taken into account, and, in a rare opening, that investment treaties have "to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights."[108] UN human rights bodies and experts have likewise called for human rights obligations to be "taken into account," and they have pointed to a primacy of human rights deriving from article 103 of the UN Charter.[109] Positions on the relation between investment and human rights law continue to diverge heavily, and they bring to light very different forms of entanglement. Some take a more integrative perspective, stressing systemic integration, harmonious interpretation, and hierarchy rules. Others emphasize boundaries and resemble the tools we have encountered in contexts in which different systems interact: distanced in principle, yet mitigated by requirements to take external norms "into account."

A similar oscillation is visible in other areas of international law.[110] In the trade context, the WTO Appellate Body has explicitly sought to avoid a "clinical isolation" of trade rules[111] but has erected a high threshold for the entry of other norms, keeping them at bay in most cases.[112] The International Court of Justice has shown greater openness, emphasizing the "great weight" and "due account" it accords findings of the UN Human Rights Committee and regional human rights bodies when interpreting human rights agreements—but both notions leave the door ajar for a potential deviation in the future.[113] The European Court of Human Rights has strongly emphasized systemic integration in international law but has then employed it so flexibly as to

[105] Appellate Body Report, *US—Gasoline*, at 17, AB-1996-1, WTO Doc. WT/DS2/AB/R (Apr. 29, 1996) [hereinafter AB Report, *US—Gasoline*].

[106] Sarfaty, *supra* note 102, at 4; Nico Krisch, Francesco Corradini, & Lucy Lu Reimers, *Order at the Margins: The Legal Construction of Interface Conflicts over Time*, 9 Glob. Const. 343 (2020).

[107] Corradini, *supra* note 103.

[108] Urbaser S.A. et al. v. The Argentine Republic, ICSID Case No. ARB/07/26U, Award, ¶ 1200 (Dec. 8, 2016). *See also Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Ad hoc Committee Annulment Decision, ¶¶ 86–92 (Dec. 30, 2015).

[109] UN Comm. on Econ., Soc. & Cultural Rts., General Comment No. 24, ¶ 13, UN Doc. E/C.12/GC/24 (Aug. 10, 2017).

[110] See also the flexible mechanisms traced in Peters, *supra* note 85.

[111] AB Report, *US—Gasoline*, *supra* note 105, at 17.

[112] Reimers, *supra* note 92.

[113] Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Merits [2010] ICJ Rep. 639, ¶¶ 66–7 (Nov. 30, 2010).

severely curtail the application of UN sanctions.[114] This may not be fragmentation *tout court*, but it is also not the "farewell to fragmentation" diagnosed by some today.[115]

Remarkably, despite often contrasting rhetoric, these intra-systemic responses turn out not to differ much in practice from those found between different systems. Instead, we can observe a significant convergence—in both cases, we find neither full integration nor separate spheres but instead a mix of linkage and distancing that allows for a flexible calibration and recalibration of relations.

4.3. Straddling practices: Blurring the boundaries

Other practices create relations between norms in ways that are yet more difficult to categorize along the lines of system boundaries. One of them is *overlapping norms*: the construction and use of norms with roots in different contexts that can act as a "transmission system" straddling the boundaries between different bodies of norms.[116] Open concepts are perhaps the most obvious example here: notions such as "due diligence," employed in a variety of contexts and dynamically interpreted to embody shifting demands on companies in their supply chain management, can serve as a conduit for drawing on developments across system boundaries. They can also allow travel between domestic private law, especially tort law, and transnational standards, such as the Guiding Principles.[117] Principles of good faith or legitimate expectations can facilitate linkages with outside norms, for example technical standards adopted by transnational bodies.[118] A similar circulation of meaning can occur as a result of "multi-sourced equivalent norms"—norms from different contexts with similar content[119]—or of the use, repetition, and cross-referencing of certain concepts in a variety of normative instruments, an "intertextuality" traceable, for example, in the context of global counter-terrorism regulation.[120] The use of a proportionality test, somewhat disconnected from a particular legal order, can have the same effect.[121] The resulting norms may be understood as hybrid, as not entirely belonging to one or the other order but leading an in-between existence.[122]

[114] Al-Dulimi and Montana Management Inc. v. Switzerland, Eur. Ct. H.R., June 21, 2016, 55 ILM 1023 (2016).

[115] A Farewell to Fragmentation: Reassertion and Convergence in International Law (Mads Andenas & Eirik Bjorge eds., 2015).

[116] Yuval Shany & Tomer Broude, *The International Law and Policy of Multi-Sourced Equivalent Norms*, *in* Multi-Sourced Equivalent Norms in International Law 1, 9–13 (Yuval Shany & Tomer Broude eds., 2011).

[117] See Doug Cassel, *Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence*, 1 Bus. Hum. Rts. J. 179 (2016); Dalia Palombo, *The Duty of Care of the Parent Company: A Comparison between French Law, UK Precedents and the Swiss Proposals*, 4 Bus. Hum. Rts. J. 265 (2019).

[118] *See* Harm Schepel, The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets ch. 10 (2005); Carola Glinski, Die rechtliche Bedeutung der privaten Regulierung globaler Produktionsstandards (2010).

[119] Shany & Broude, *supra* note 116.

[120] Grégoire Mallard & Aurel Niederberger, *Targeting Bad Apples or the Whole Barrel? The Legal Entanglements between Targeted and Comprehensive Logics in Counter-Proliferation Sanctions*, *in* Entangled Legalities Beyond the State, *supra* note 2, at 229.

[121] *See infra* text accompanying note 158.

[122] *See also* Burchardt, *supra* note 83, at 311–20.

These examples lay bare not so much (secondary) norms governing the relation between (primary) norms from different origins, as in the majority of cases in the previous sections. Instead, they turn on practices of actors that directly connect primary norms, drawing on openings in the structure of the latter. Focusing on such practices, often incompletely reasoned as a matter of principle, allows us to see a broader range of boundary-blurring elements. It brings into view instances in which courts and other dispute settlers draw freely on norms across legal orders, downplaying (at least implicitly) the structuring force of boundaries between them and thus *weaving a web* of law. One example is a case concerning UN sanctions in the Court of Appeal for England and Wales. The court here used the notion of "conciliation" to bring together UK primary and secondary legislation, the European Convention on Human Rights, as well as obligations deriving from UN Security Council resolutions in a harmonious fashion, rather than stipulating rules of hierarchy or reenacting the boundaries between legal systems.[123] These boundaries are also straddled, to some extent, by courts using formal or informal international rules to inform their rulings without regard for reception rules that might sanction this use.[124] The move, in some Latin American countries, to construe regional and universal human rights law as part of a "constitutional block" can be understood in a similar fashion.[125]

Other tribunals already begin their work without an immediately available "system" that could offer defined boundaries. The Court of Arbitration for Sports (CAS), the final instance in many sports-related disputes, uses a wide variety of norms to complement its basic documents and weave a transnational *lex sportiva*. Swiss law, European human rights law, and European Union law become part of this fabric, with the CAS occupying the role of a quintessential "seamstress."[126] As intimated earlier, some of the NCPs established under the OECD Guidelines perform a similar role.[127] In one example, the Dutch NCP made use of the UN Guiding Principles, the International Covenant on Social, Economic and Cultural Rights, as well as the UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage to determine whether the local population had to be consulted before the removal of a fifteenth-century tomb.[128] Just as the *lex sportiva*, the OECD Guidelines have in practice become a tangled web.[129]

Such webs are spun not only by dispute settlers but also by lawmakers and regulators. The OECD Guidelines were already drafted to contain, in their official commentary, manifold references to treaties and other instruments on the different issues in their

[123] A, K, M, Q & G v. HM Treasury [2008] EWCA 1187 (Civ). The UK Supreme Court eventually decided the case solely on domestic constitutional grounds. *See* Krisch, *supra* note 1 at 161–5.

[124] *See* Nollkaemper, *supra* note 89, at 146–60; Machiko Kanetake & Andre Nollkaemper, *The Application of Informal Instruments before Domestic Courts*, 46 Geo. Wash. Int'l Rev. 765, 778–9, 783 (2013).

[125] *See* Chehtman, *supra* note 96.

[126] Antoine Duval, *Seamstress of Transnational Law: How the Court of Arbitration for Sport Weaves the* Lex Sportiva, *in* Entangled Legalities Beyond the State, *supra* note 2, at 260. *See also* Lorenzo Casini, Il diritto globale dello sport (2010).

[127] *See* Section 2.2.

[128] Neth. Nat'l Contact Point, *FIVAS, the Initiative to Keep Hasankeyf Alive and Hasankeyf Matters v Bresser*, Final Statement, at 4 (Aug. 20, 2018), available at https://complaints.oecdwatch.org/cases/Case_485.

[129] *See* Morochovič & Reimers, *supra* note 21.

ambit—ranging from the human rights covenants to multiple OECD documents on competition and corruption and ISO standards on environmental management. In a yet further-reaching example, the Financial Stability Board (FSB) has sought to connect global financial standards from various transnational and international standard-setters, public and private, formal and informal, through its *Compendium of Standards*, with fifteen "key standards" singled out as requiring particular attention.[130] Through the *Compendium*, the FSB seeks to build a more integrated order out of the existing multiplicity, though one that functions not in the form of a system but through a web with less stable linkages and hierarchies.

Straddling practices with little respect for systems or boundaries come into even better view when we pay attention to actors beyond the official realm. In their efforts at organizing and legitimizing transboundary value chains, multinational companies often draw on a multiplicity of different norms and standards and declare their respect for them without much regard for their origins, binding character, or formal addressees. BP, for example, "respect[s] internationally-recognized human rights as set out in the International Bill of Human Rights and the core labour standards recognized by the International Labour Organization (ILO)" and "recognise[s] our responsibility to respect human rights and avoid complicity in human rights abuses, as stated in the UN Guiding Principles on Business and Human Rights." In its human rights policy, BP also mentions the Voluntary Principles on Security and Human Rights and the UN Declaration on the Rights of Indigenous Peoples, thus invoking an assemblage of binding and non-binding, publicly and privately generated, and state- and company-oriented norms.[131] Other companies appear to follow similar patterns,[132] which *cumulate norms* and thereby select, strengthen, and connect them as part of a broader assemblage of relevant standards.

Norms from different origins are similarly cumulated in practices of activists and litigants. In the *Los Cedros* case, which concerns the environmental and health impact of a planned mining operation by a Canadian company in Ecuador, litigants and *amici curiae* invoked not only Equatorean law, but also a host of international norms, hard and soft, from environmental and human rights law, binding and non-binding pronouncements of the Inter-American Court of Human Rights.[133] Legal anthropologists have noted how people not "trained in the finer distinctions of bodies of law and their jurisdictions" mobilize "different legal orders, such as international human rights law, customary law and 'travelling' models of conflict resolution."[134] This may also apply to (well-trained and well-payed) lawyers navigating—and

[130] Francesco Corradini, *The Struggle for International Financial Standards: An Historical Analysis of Entangling Legalities in Finance*, *in* Entangled Legalities Beyond the State, *supra* note 2, at 289, 307–12.

[131] *BP Business and Human Rights Policy* (May 2020), www.bp.com/en/global/corporate/sustainability/improving-peoples-lives/human-rights/human-rights-policy.html.

[132] Ciarán O'Kelly, *Human Rights and the Grammar of Corporate Social Responsibility*, 28 Soc. & Legal Stud. 625 (2019).

[133] Eckert, *supra* note 56. *See also* Laura Affolter, *The Responsibility to Prevent Future Harm: Anti-Mining Struggles, the State, and Constitutional Lawsuits in Ecuador*, 4 J. Legal Anthropology 78 (2020).

[134] Julia Eckert et al., *Law's Travels and Transformations*, *in* Law against the State: Ethnographic Forays into Law's Transformations 1, 3 (Brian Donahoe et al. eds., 2012).

construing—the complex postnational order. Many actors operating in these contexts seem to regard different bodies of law less as mandatory structures than as resources to be used,[135] and they straddle boundaries between different orders by drawing on norms that are portrayed as hanging together regardless of origin and status. Whether a norm is invoked or not then depends not so much on its pedigree and formal status as on its substantive fit and the prospect of changing the narrative and outlook of judges, officials, and broader audiences, often over a longer period of time.

5. Order out of entanglement

Entanglement comes in many shapes and forms, and it is, as we have seen, widespread. The typology developed above is by no means a representative picture, but it does suggest that entangled legalities are a defining feature of law and politics in many contexts—and that they are not marginal but often constitutive of the law.

Entanglements are not the same across the board—they are stronger in some settings than others, and they take different forms. Here is not the place for a systematic empirical analysis of such variation. Some areas are difficult to conceive today without an account of the linkages between norms from a variety of origins. In others, the relation between bodies of norms has come to shape important elements of both of them, but has left other elements untouched. And there are places and issue areas in which transnational integration and pressures for entanglement are weaker. Yet some degree of entanglement is visible in many contexts—even in one as local as primary school education, in which many countries have interlinked their regulatory structures with OECD recommendations following the organization's Programme for International Student Assessment (PISA) assessment.[136] In many developing countries, international standards—often required by development aid organizations and donors—have long been interwoven with domestic law and governance in areas ranging from infrastructure planning to education and health.[137] The splendid isolation of legal systems, albeit prominent in legal theory, has perhaps never been a reflection of reality; today, it is certainly the exception.

5.1. Polycentric politics, entangled law

This uneven landscape of entanglements, varying in strength and form, is brought about by myriad acts of governments, regulators, judges, litigants, and societal actors, all with their own objectives and their particular ideas about the law to be applied.[138] The agglomeration of these acts leads to different legal forms, more or less consolidated, over time. Yet on a macro level, entanglement is also a reflection of

[135] Davies, *supra* note 75, at 251.

[136] Dennis Niemann, Kerstin Martens, & Janna Teltemann, *PISA and Its Consequences: Shaping Education Policies through International Comparisons*, 52 Eur. J. Educ. 175 (2017).

[137] *See, e.g.*, 37 Antony Anghie, Imperialism, Sovereignty and the Making of International Law 5 (2007).

[138] For a discussion of actors and factors driving entanglement, see also Nico Krisch, *Framing Entangled Legalities beyond the State*, *in* Entangled Legalities Beyond the State, *supra* note 2, at 1.

broader forces shaping the contemporary political order. Historically, entanglement has been closely linked with prevailing authority structures—prominent in times of dispersed authority, it appeared weaker in contexts in which a single authority could integrate different legalities into one, especially during the heyday of the modern, Western nation-state. Even if legal multiplicity was not empirically absent then, it was sufficiently marginal to allow for a representation of state law as the center of the legal universe, integrating other norms within, and controlling its relations with the outside.

This central position of the state has been under challenge for some time, both practically and discursively, resulting in a widely noted diffusion of authority and a governance structure in which a great number of institutions, formal and informal, public and private, coexist, collaborate, or compete.[139] If this leads to a dazzling plurality of norms at different levels, the complexity is further enhanced by the fact that projects of norm creation are often pursued by very different actors, sometimes for functional reasons, sometimes in order to advance a certain substantive agenda that would otherwise face greater resistance. This is true for transnational norms—for example, for civil society actors and industry groups seeking to codify diverging views on corporate social responsibility—but also for treaties drawn up to counter the particular normative program of an existing agreement.[140]

The result is not only "regime complexity" in the sense of multiple intergovernmental regimes,[141] or a fragmentation of international law,[142] but a polycentric order of many overlapping bodies of norms.[143] In this order, political conflict over substance is often processed through contestation over which norms ought to count. The relations between norms—between the domestic, transnational, and international level, but also between different bodies of norms in international law—are thus not merely technical questions, to be resolved with lawyerly skills, but instead deeply political issues. Whether a state's obligation to protect foreign investments is construed in line with its obligation to provide clean water under human rights instruments is not just a doctrinal statement on applicable law clauses and conflict rules,[144] but also a substantive intervention into the general political contest between economic liberalization and social policies.

[139] *See, e.g.*, Susan Strange, The Retreat of the State: The Diffusion of Power in the World Economy (1996); Who Governs the Globe? (Deborah D. Avant, Martha Finnemore, & Susan K. Sell eds., 2010).

[140] *See, e.g.*, Surabhi Ranganathan, Strategically Created Treaty Conflicts and the Politics of International Law (2014); Julia C. Morse & Robert O. Keohane, *Contested Multilateralism*, 9 Rev. Int'l Org.. 1 (2014).

[141] *See, e.g.*, Kal Raustiala & David G. Victor, *The Regime Complex for plant Genetic Resources*, 58 Int'l Org. 277 (2004); Karen J. Alter & Sophie Meunier, *The Politics of International Regime Complexity*, 7 Perspectives on Pol. 13 (2009).

[142] See the discussion in Martti Koskenniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 Mod. L. Rev. 1, 4–9 (2007).

[143] *See, e.g.*, Larry Cata Backer, *The Structural Characteristics of Global Law for the 21st Century: Fracture, Fluidity, Permeability, and Polycentricity*, 17 Tilburg L. Rev. 177 (2012).

[144] See, e.g., the discussion in Tatiana Sainati & David Attanasio, *Urbaser v. Argentine Republic*, 111 Am. J. Int'l L. 744 (2017).

The "centrality of the margins"—of the relations between different bodies of norms[145]—is further strengthened by the fact that these relations are inscribed in conflicts not only over substantive goals but also over the level of authority itself.[146] This has been put into particular relief in recent years with the rise of populist, anti-internationalist politicians targeting decision-making in and through international fora as such. As political cleavages in many countries now reflect no longer just a left/right divide, but also one between communitarians and cosmopolitans,[147] struggles over the relationship between domestic law and transnational and inter- and transnational legalities have taken on new significance. Where a requirement for domestic courts to take account of the findings of international human rights bodies may once have seemed a tool for a productive dialogue, it will now appear to many as an embodiment of the contrast between national and "foreign" control.[148]

Efforts at stronger entanglement may then be seen as overcoming parochial preferences, but they can also appear as attempts at domination. Linking investment treaties with environmental and human rights norms, or national asylum law with international refugee protection norms, will often appear as the former. In contrast, efforts at entangling colonial and local law by imperial powers, or creating linkages with global financial standards, brought about in many countries as a result of conditionalities in International Monetary Fund (IMF) or World Bank lending, will be seen as examples of the latter. Resistance to further entanglement, or efforts at weakening or eliminating entanglement, are the flipside of this picture. Whether they appear as safeguarding self-government in the face of foreign pressure, or as defending unjust privileges, depends on the context as well as the normative framework through which we observe them, leaving the politics of entanglement highly ambivalent.

The tensions produced by this political context do not necessarily engender friction—we can also observe a wide range of cooperative stances among actors and institutions in the face of competing rules and norms.[149] Yet true agreement on the right relationship between such norms—and generalizable rules to govern it—will often prove elusive. Entangling norms, with the concomitant openness we have diagnosed above, will then often provide a way out—a way of finding a middle ground without having to decide the broader conflict as a matter of principle. Many of the more subtle instruments in the entangler's toolbox allow for nods in both directions, and they make it possible to postpone a more general resolution to a later date. This is as true of conditional reception rules which allow for development and concretization over time as it is for overarching rules that leave flexibility when it comes to hierarchies between different parts of one legal order. It applies even more to straddling practices,

[145] Walker, *supra* note 3, at 376.

[146] On the lines of contestation in global governance, see Michael Zürn, A Theory of Global Governance: Authority, Legitimacy, and Contestation 105–94 (2018).

[147] *See* The Struggle Over Borders: Cosmopolitanism and Communitarianism (Pieter de Wilde et al. eds., 2019).

[148] *See* Mikael Rask Madsen, Pola Cebulak, & Micha Wiebusch, *Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts*, 14 Int'l J. L. in Context 197 (2018).

[149] Christian Kreuder-Sonnen & Michael Zürn, *After Fragmentation: Norm Collisions, Interface Conflicts, and Conflict Management*, 9 Glob. Const. 241 (2020).

which tend to proceed not through generalized statements but rather ad hoc linkages. Reading one norm in light of another in one case then does not necessarily commit an actor to reading it in the same way in the next. This falls short of integrating, or constitutionalizing, a space often depicted as disorderly and unruly. Yet it also counters the image of disconnection and anarchy often associated with regime complexity or legal fragmentation. Entanglements come in various strengths and forms, but they create significant linkages across norms in the postnational space—complex linkages, but linkages nevertheless.

5.2. Navigation

Entanglement also changes the way in which law is interpreted. Confronted with the need to bring different legalities into relation, and with the openness of the joints between them, judges, dispute settlers, and other actors often assume a more creative, and less guided, role—one in which they navigate a complex, and often politically fraught, legal landscape.

Not all courts are comfortable with taking on such a role, and some pursue avoidance strategies, often by reference to jurisdictional or applicable law clauses. Investment tribunals are a case in point.[150] Even in *Urbaser v. Argentina*, famous for its emphasis on "systemic integration," the tribunal eventually took into account neither human rights obligations (because they were addressed to the state alone) nor other obligations of the company (because they were part of domestic law and therefore outside of the tribunal's remit).[151] In *EC-Biotech*, the WTO panel refused to give the Biosafety Protocol any weight because its parties were not identical with those of the WTO Agreements the panel was tasked to apply.[152] And the World Bank Inspection Panel has consistently found that it is not authorized to consider international human rights, except insofar as they have been incorporated into the internal policies governing Bank projects.[153] Such jurisdictional limits invite actors to choose (as far as they can) the fora that apply the law most beneficial to them. Forum-shopping has long been seen as typical of pluralist settings in which different institutions apply particular, relatively distinct legalities alongside each other.[154]

Many courts tackle entanglements more directly, and we have traced the tools available to them in the previous section. The space left by many of these tools often invites actors to connect different legalities without clear guidance on the terms on which this connection ought to be achieved. This pushes interpreters away from a binary approach to rule application to a multivalent logic in which there are no clear dividing

[150] *See* Corradini, *supra* note 103.

[151] *See, e.g.*, Urbaser S.A. et al. v. The Argentine Republic, ICSID Case No. ARB/07/26U, Award, ¶¶ 1208–10 (Dec. 8, 2016).

[152] Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, ¶ 7.75, WTO Doc. WT/DS291/R (Sept. 29, 2006).

[153] *See* Krisch, Corradini, & Reimers, *supra* note 106.

[154] *See* Merry, *supra* note 11, at 882–3; Lauren Benton, Law and Colonial Cultures: Legal Regimes in World History, 1400–1900 at 137 (2002).

lines but instead attempts at bridging, at finding a middle ground.[155] The resulting law might be described as "fuzzy," rather than well-structured according to defined distinctions.[156] As H.P. Glenn has observed, this favors "a shift in types of reasoning from one that accords priority to rules, categories, and subsumption, to one making more use of principles, overlapping and accommodation."[157]

The most vivid illustrations of such a shift can be found in settings of a transnational character, in which traditional legal forms have less structuring force. One example is the Court of Arbitration for Sports. The CAS, facing human rights challenges to the regulations of global sporting bodies, has often refrained from a detailed analysis of the compatibility of such regulations with particular rules, such as those contained in the European Convention on Human Rights. Instead, it presents "proportionality" as a "general principle of law" and then proceeds to inquire into questions of necessity and proportionality in an abstract fashion, mostly based on its own assessment and with only occasional references to specific authorities. This allows the court to gloss over the detailed requirements and limitations of particular expressions of proportionality (or other human rights limits) in different contexts, and to avoid findings on the general relationship between the different legalities at play. Instead, it portrays the result as achieving compatibility with a host of different legal orders—the European Convention, EU law, Swiss law, Monegasque law, and the regulations of the Fédération Internationale de Football Association (FIFA), the International Olympic Committee (IOC), etc.[158]

A similarly imaginative approach is visible in the NCPs under the OECD Guidelines. As mentioned above, NCPs have been active "weavers" of the web of corporate social responsibility law, and they have drawn on a variety of bodies of norms, formal and informal, for this purpose. Differences in status between the norms become blurred in a practice that often simply lumps them together—an NCP may "note" different sets of rules or provide lists of "applicable standards," formulating its conclusions "in light of" the various norms but without a specific engagement with their precise meaning and boundaries (for example, when it comes to applying to companies rules originally formulated for states).[159] Legal reasoning here tries to make sense of the complex landscape of multiple norms not through binary choices but instead through accommodations that draw them together, making them compatible with one another for the particular case.[160] The coherence sought here may be more minimalist and localized, shying away from general, definite statements about relations, but evoking an order with different parts that hang together.[161]

[155] H. Patrick Glenn, The Cosmopolitan State 14 (2013); Maksymilian Del Mar, *Legal Reasoning in Pluralist Jurisprudence*, *in* In Pursuit of Pluralist Jurisprudence, *supra* note 2, at 40.

[156] Oren Perez, *Fuzzy Law: A Theory of Quasi-Legal Systems*, 28 Can. J. L. & Juris. 343 (2015).

[157] Glenn, *supra* note 155, at 282.

[158] *See only* H. v. ATP, CAS 2004/A/690, ¶¶ 50–6 (Mar. 24, 2005) (Ct. Arbitration for Sport); Dutee Chand v. AFI and IAAF, CAS 2014/A/3759, ¶¶ 500–48 (July 24, 2015) (Ct. Arbitration for Sport); *Caster Semenya v. IAAF*, CAS 2018/O/5794, ¶¶ 540–626 (Apr. 30 2019) (Ct. Arbitration for Sport).

[159] Morochovič & Reimers, *supra* note 21.

[160] See also the "communicative compatibility" sought in Pulkowski, *supra* note 85, at 6.

[161] Taekema, *supra* note 60; Eckert, *supra* note 56.

The greater openness of the methods of legal reasoning also has an institutional dimension, in particular in the room it makes for inter-institutional interactions. Not every court easily understands itself—like the Canadian Supreme Court—as part of a "choir" of law-shaping courts.[162] Yet many courts, international and domestic, have begun to interact, explicitly or implicitly, with their counterparts from other contexts.[163] Often framed as "dialogues," these interactions may lead to reconciliation and revolve around common legal understandings,[164] but they will also often have a strategic element.[165] This can result in ping-pong-style exchanges, as in the emblematic *Fontevecchia* case in which the Inter-American Court of Human Rights faced resistance from the Argentinian Supreme Court after finding a judgment by the latter to be in violation of freedom of expression. Arguing that as a matter of constitutional principle, it could not be forced to revoke a decision, the Supreme Court proceeded to limit the impact of the Inter-American Court's finding in the domestic legal order. The Inter-American Court responded by softening its stance—not on substance but with a view to potential remedies, thus opening the door to forms of compliance other than revocation. In the final step of the six-year saga, the Supreme Court decided to "agree to what has been suggested" which it now saw no longer as violating basic constitutional principles.[166] "Dialogue" may not be the right term to describe what appears more as a negotiation process, but the outcome certainly cannot be understood without placing the interaction between the two courts at the center.

Navigating the landscape of entangled legalities thus changes the ways of legal actors considerably. The many points of openness drive towards different modes of legal reasoning, and they generate space actors need to fill. Tying together the many parts of the legal order—or driving them apart—legal actors assume a more active, and creative, role in shaping the fabric of postnational law. This creates space—with the joints between different legalities structurally open, the task of (re)defining them falls to the process of interpretation and application, and the various participants in the process are thrust into a central role.[167]

[162] Nevsun Resources Ltd. v. Araya, (2020) S.C.C. 5 (Can.).

[163] *See* Ming-Sung Kuo, *Whither Judicial Dialogue after Convergence? Finding Transnational Public Law in Nomos-Building*, 19 Int. J. Const. Law 1536 (2021).

[164] *See, e.g.*, Peters, *supra* note 85, at 695–8.

[165] *See also* Nico Krisch, *The Open Architecture of European Human Rights Law*, 71 Mod. L. Rev. 183 (2008).

[166] Corte Suprema de Justícia de la Nación [CSJN] [National Supreme Court of Justice], Sentencia, 14/2/2017, "Fontevecchia y d'Amico"; Corte Suprema de Justícia de la Nación [CSJN] [National Supreme Court of Justice], Resolución No. 4015/17, 5/12/2017, www.csjn.gov.ar/documentos/descargar/?ID=107787; Fontevecchia and d'Amico v. Argentina, Inter-Am. Ct. H.R., Judgment (Merits, Reparations, and Costs) (Nov. 29, 2011), www.corteidh.or.cr/docs/casos/articulos/seriec_238_ing.pdf; Fontevecchia and d'Amico v. Argentina, Inter-Am. Ct. H.R., Order (Oct. 18, 2017), www.corteidh.or.cr/docs/supervisiones/fontevecchia_18_10_17.pdf.

[167] On the increased relevance of the implementation stage in contexts of institutional complexity and multiplicity, see also Alter and Meunier, *supra* note 141, at 15–17.

5.3. Transformation

Such openness and fluidity will inevitably raise questions of stability and order; the ideal of an order defined by law—a proper rule of law—seems to give way to an order in which the law itself is in flux and remade by the politics it was meant to structure.[168] Yet the real risks for stability and the rule of law often stem not so much from open, pluralist legal structures as from underlying social and political dynamics, and recent studies find that the assumption of instability and conflict under conditions of fragmentation and regime complexity has no clear empirical foundation.[169] Entangled relations do not have to be unstable at all—stability can be brought about by other (political) factors, and also under conditions of entanglement there can be a high degree of consolidation around the norms that govern interactions.[170]

Such an attitude cannot be presumed, but even if underlying tensions persist, the relative openness of such entanglements, and the frequent accommodation of both linkage and distancing just mentioned, may help to channel and cope with, rather than produce, societal conflict. In many instances, entanglement arises from the fact that neither separation nor full integration is possible: separation would run counter to the factual overlaps of social and political spheres, while integration would clash with socially rooted autonomy claims. Entanglement then charts a middle ground that can provide flexibility and safety valves to adjust to unresolved underlying conditions.[171] This can be observed in the relation between indigenous and state law in Canada just as much as in the interplay between international human rights and domestic law or international trade law and environmental norms.[172] In all these contexts, entanglement—of different kinds and with varying intensities—helps to respond to underlying conflicts by allowing for linkage while providing elasticity at the margins.

The relative fluidity of entanglement can also facilitate adaptation to changing societal values and political contexts. Especially in rigid legal orders, as in international law with its high hurdles for change, flexible linkages can be conduits for transformation that would otherwise not be available.[173] Change in international law frequently occurs through the creation of new norms, initially often by smaller groups of states or in softer forms. Rather than directly amending existing norms, they formulate challenges, as in the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, created as a counterweight to the liberalization of trade with cultural goods in the WTO.[174] The relation between the different instruments may remain formally open and undefined—sometimes explicitly so in

[168] *See, e.g.*, MacCormick, *supra* note 79 at 78.

[169] *See* Krisch, *supra* note 1, chs. 7, 8; Kreuder-Sonnen and Zürn, *supra* note 149.

[170] *See* Peters, *supra* note 85; Tamar Megiddo, *Beyond Fragmentation: On International Law's Integrationist Forces*, 44 Yale J. Int'l L. 115 (2019); *see also* A Farewell to Fragmentation, *supra* note 115.

[171] *See* Krisch, *supra* note 1, chs. 7, 8.

[172] *See* Culver & Giudice, *supra* note 52; Kanetake, *supra* note 99; Reimers, *supra* note 92.

[173] *See* Krisch, Corradini, & Reimers, *supra* note 106; Ranganathan, *supra* note 140.

[174] On the latter, see Pulkowski, *supra* note 85, at 106–31. *See also* Sassan Gholiagha, Anna Holzscheiter, & Andrea Liese, *Activating Norm Collisions: Interface Conflicts in International Drug Control*, 9 Glob. Const. 290 (2020).

ambiguous conflict clauses—but the new norms often destabilize existing ones and serve to influence their interpretation in a process of gradual change. It is primarily through such processes of irritation and transformation that the rise of human rights and environmental concerns has come to affect other areas of international law.

What begins as irritation and destabilization will often develop into more settled relations, leading from fluid to firmer entanglements over time.[175] Entangled legalities do not always produce stability—they may also just express the frictions that characterize their context. But their openness allows for a responsiveness to social and political change that can help to align the law with its broader environment.

6. Conclusion

In most people's everyday experience, law is one: it is the law a court applies when settling a dispute between neighbors, or the law used to sentence a wrongdoer. Yet just as when we overlook the movement of molecules in a solid object, the reality behind that everyday experience with the law is more complex. It is a reality characterized, in many contexts, by multiple layers and bodies of norms—bodies of norms that do not merely coexist, but interact and influence one another in myriad ways. Such multiplicity and interaction shape the work of many a corporate lawyer, environmental activist, or financial regulator, and they are present in the practice of investment arbitrators just as much as of indigenous counsel confronted with state law. Multiplicity is not everywhere, but it is a pervasive feature of contemporary law.

With this article, I have sought to better understand how law works under conditions of multiplicity. The picture that emerges is not one of independent legal systems with occasional contacts, as in a conflict-of-laws image, but it is also not an integrated, overarching "global" law. Instead, in many areas, interactions between norms from different origins are frequent, and they often shape central elements of the overall order—legalities are entangled rather than separate or fully integrated, and in some contexts these entanglements straddle and transcend the boundaries of legal systems we traditionally place at the center of legal theorizing. Historically, this is not so novel: in most times and places, law has been much more entangled than we typically acknowledge. Today, multiplicity and entanglement are particularly visible in the postnational space—in the interactions with and between norms of a transnational and international character the number of which has grown rapidly over the past decades. It is these interactions that increasingly define "the law" in areas in which state law has lost its presumed monopoly.

Entanglement then is a central feature of contemporary law, and we need to gain a clearer picture not only of its existence but also of its operation. This article tries to make a step in this direction. It traces how dominant theoretical frames, especially those focused on legal "systems," make it difficult for us to account for the more unruly practices through which different legalities become entangled. It suggests that, rather

[175] Krisch, Corradini, & Reimers, *supra* note 106.

than starting from a preconceived image of legal order, we should focus on the actual ways in which actors construe norms and their relations. "Systems" may then be one, contingent structure resulting from such construction—and standing alongside other, looser assemblages of norms and normative practices. The article reconstructs the forms through which norms are related to one another, tracing how these forms produce both distance and proximity and frequently blur systemic lines. Many of these relations are characterized by a high degree of openness and flexibility, forcing actors to take a more creative role in navigating the different legalities at play. Some actors respond by engaging in dialogue, others in avoidance, yet others in weaving a legal web. Altogether, they define the mode and degree of entanglement across the many norms, formal and informal, public and private, that exist in the postnational space—and thereby the structure of postnational law itself.

Entanglement is a concept more common in history or cultural studies, and it will make many lawyers uneasy as they search for order, boundaries, clarity, and coherence. Yet many legal practitioners will find that it reflects important elements of their work, and lawyers and legal scholars will need to confront it if they want to paint an accurate picture of how law operates—and if they seek to navigate the resulting landscape. This requires us to take a step back from the categories of law developed around the image of the domestic law of the modern (Western) state of the twentieth century, and to explore the more varied, complex, and uneven practices characteristic of today's multiple legalities. This article is only a beginning of this exploration, and much further work will need to be done to develop and clarify the categories and conjectures laid out here, and to understand how entanglement varies over time and across contexts. Still, much evidence already suggests that entangled legalities have been a structural feature of law throughout much of its history, and that they are central to the postnational legal order today—an order which, oscillating between forces of integration and distancing, increasingly seeks in-between spaces and forms to reflect and shape its polycentric structure.