B.1 The Condition of Law: Essays

Law is What it Says it is. . . Thoughts on Weaving the Strands of Emerging Systems of Enforceable Expectations in Contemporary Global Order(ings)

Coalition for Peace & Ethics
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Lawyers--and especially legal academics--have been very jealous guardians of the ancient cult of "Law," which has been all nicely dressed up in a quite particular way over the last several centuries. That particularity is also peculiar--for it is meant in the first instance to ensure a community of meaning around the term in a way that aligns law with the state. That is, these priests of the worship of the divine qualities of (old) law never tire of repeating its credo: law must be understood as a manifestation of the state; law and the state are aligned, each sharing the other's authority, legitimacy, and power. Law is the state and the state is the institutionalized aggregation of its law, that is of its own production of its own system of coercive expectation made legitimate and authoritative precisely because it is the product of the genius of the people embedded within the institutions of the state and operated in accordance with the rules they produce for themselves.

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Yet the business of law, and the construction of its divinity (understood here in the sense that it is manifested as a thing that is acknowledged as superior, powerful, authoritative, and that can have consequences if crossed, and as a process that manifests order) has moved far beyond the temples of the acolytes of the High Churches of (Old) Law. It is not so much that communities have lost faith in (old) law, Rather, and acknowledged or not by the high priests of the old legal orders comfortably ensconced in their high level academic or administrative perches, it is that this (old) law has now descended back into the space from where it emerged several centuries ago. It has rejoined the pantheon of methods, habits, customs, and practices, *as (one) part of a large stew pot of expectations that have consequences precisely because a community has invested it with meaning and thus invested creates methods of rewards and punishments for those who meet or fail these expectations*.

The extent of these consequences (the "application" of "law") are highly relational, contextual, and contestable. They are relational in the sense that expectations can have consequences only to the extent they might apply to the relations among actors and, more importantly, only to the extent they are understood as affecting or relating to each other producing clusters of expectations that must be balanced by the parties subject to them. They are contextual in the sense that the relationships of the ingredients in our legal stew pot will manifest itself differently depending on who is "eating" law, where and when. They are contestable in the sense that relations and context constantly shift the lens through which law can be both grasped and applied. In this sense, there is no right way, only a plausible way in context; the rest is power (to influence, to enforce, to impose).[2]

All of this is very abstract, and thus of little interest to people fully engaged in the world. However, the ideas are worth considering precisely because it is those who are in the world, who do not think about these things, who do not act consciously to transform societal instruments of management to one ends or another--these are the people who are actually driving the changes. They drive by doing rather than by speaking or theorizing. They are the people--practicing lawyers, clients, NGOs--who by their actions, and by their incessant need to confront the expectations imposed on them without regard to their theoretical character, and to align them to best advantage in the context of decisions or choices that have to be made, who are driving the keepers of the purity of the old way of protecting and practicing law out of the temples of managing communities.

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[2] Consider the politics of its ideology in Tetyana (Tanya) Krupiy, 'Leaving the Dice for Play: A Critique of the Application of the Law and Economics Lens to International Humanitarian Law,' (2021) 13(1) European Journal of Legal Studies 223-269.

Practitioners are not spending a tremendous amount of time hand wring about the nature of law. They worry about weaving those expectations with "bite" into something that is coherent enough to advance the interests of their clients. This weaving of "law" provides the front lines of truth from facts and is worth unpacking at least a little. These weavings produce complications for those who seek simple and direct comprehensive responses to the challenges of managing behavior and behavior rule systems touching on the human rights and sustainability effects of economic activity.

The semiotician in me can't resist pausing at this point to attempt to situate the meaning of this "weaving" theme within its own universe of meaning.

1. When I think about weaving I think of the *Norns* who twine the threads of fate[3]—but of course, whose weaving were broken as the great systems of the gods gave way to a new order.[4] One doesn't engage with the *Norns*; they can care less except as the incarnation of that which we do ourselves. They are a reminder that theory is sometimes made on the ground. And when it is given birth inside the head of some powerful enough person, assumes a concrete form only when thy, in turn, are also manifested on the ground--by force, by manipulation, or by inspiring belief that is confirmed by practice.

2. The etymology of weaving also suggests the richness of the concept: It is not merely the interlacing of yarn but also—figuratively—the devising, contriving, and arranging of those threads into patterns, designs, that are to some extent based on the materials used but also on the artistry of the weaver. In this sense "weave" is both a verb (the act of interlacing) and also a noun (the object produced). Yet weaving includes yet another meaning—to move from place to place or from side to side—to weave in and out around obstacles, for example. We encounter weaving in all these aspects in these marvelous presentations. Weaving, in these senses--as the motion of around about, and as the action of interlacing strains of necessary threads, and as a noun--the cloth produced and then (successfully?) utilized provide a nice visualization of what for theorists point to the challenge to the supremacy of traditional state based law, the emergence of the multiplicity of expectations that appear to have the effect of traditional law, and their entanglements.

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[3] See generally, Karen Bek-Pedersen, *The Norns in Old Norse Mythology* (Dunedin Academic Press, 2011

[4] Especially well known to contemporary audiences through the interpretation of portions of the *Nibelungenlied* in Richard Wagner's Ring Cycle., where over the course of four operas the age of the gods give way to that of the hero and the authority of the Norns is broken as humans become responsible for their own fate. See, e.g., J.P.E. Harper-Scott, 'Medieval Romance and Wagner's Musical Narrative in the Ring,' (2009) 32(3) 19th Century Music 211-234.

3. So, if one is inclined to think about legal multiplicity, and of its entanglements and collisions, in this context, one seeks its Norns, one examines its threads, and the way in which they are interwoven. But one also looks in the room in which this is all undertaken and considers the sources of the thread, and the sources for the ideas about the threading that produces the cloth which we are expected to wear—and happily. And of course, to the buyers.

4. This weaving of norms assumes an interesting interaction with cultural drivers--with the expectations of society as it moves to refine the meaning of core principles. This is especially apparent, for example, in the ways in which the transformation of sports gendering.[5] But it is not just weaving, but layering and conversion (in this case perhaps best understood as repurposing) of the institutions which are the looms on which all of this activity is examined. A few ideas are worth savoring:

> A. One might start with the making of the threads of expectation (in this case through a gendered lens). The examination of the dependence of institutional authority on its responsiveness both to emerging realities and to the tastes of the community from which the institution derives and expresses its authority was particularly interesting--as over the course of a generation, this self-regulating institution both constrained and responded to changes in expectations of the society around it, a society from which it derived its authority. . In this case the gendered quality of World Athletics' core principles: globality, autonomy, and equality—initially necessarily gendered and eventually necessarily multi-gendered nicely evidenced not just the politics of the principles for which authority is deployed, but the nature of its interactive quality—between the community consenting to be governed and the governing institutions. What started as the unremarkable premise that sport was reserved to men to the equally unremarkable premise that sport was reserved to men and women nicely sums this up.
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> B. Yet at the same time one notes not just institutional dynamism but also the way in which institutional complexity could serve to buffer, distill, and control the timing of change to test for its power and authenticity. Sport is more than happy to open its doors equally to men and women. But sport between them remains problematic--and who is a man or a woman is quite controversial in society and through the institutions of the regulation of sport. The issues of gender, and sex, in particular, mirrored both cultural conversations (at least in the West) and its authentication through institutional adoption. And it is that connection—between cultural change and its imprimatur and subsidy, its embrace—by institutional actors, that

[5] See, e.g., Bethany Alice Jones, Jon Arcelus, Walter Pierre Bouman, and Emma Haycraft 'Sport and Transgender People: A Systematic Review of the Literature Relating to Sport Participation and Competitive Sport Policies,' (2017) 457 Sports Med 701-716.

merit some further consideration. Indeed, the discussion got me thinking about the distinction between legalities and the non-legal sector and from that back to cultural legalities. Cultural legalities, for example, are the rules that may bind consenting communities but which are ignored or opposed by the formal structures of social organization (the rules of the mafia, the rules of boozing during Prohibition, etc.).

C. The resistance of the internal governance of sport to direct application of outside legalities suggests the way that legal multiplicity produces an entanglement that effectively allows one to indirect interconnection. That was a critical insight that is worth further consideration. Here is where one moves from an internal weaving—that entanglement between cultural expectations of the sport community and its institutions—to an external interweaving. That external interweaving requires some arranging of the threads of institutional governance to fit within the weave of a larger cloth. That is necessary precisely because Sports autonomy is always conditional on its attachment to the cloth of the societies in which and for which it is woven. One speaks here, then, of law and legalities, of its forms and dynamism, as expressions of cultural weaving. Legalities, then, might appear to be understood here as the expression of the administration of culture and its entanglements the conflicts over the role of its weavers, the choice of the thread and the quality of the cloth.

D. Practitioners do not worry about the niceties of the distinctions between law, culture, norm or the jurisdictional origins and practices of institutions--whatever their public or private character--that have power to affect the welfare, desire, or objectives of clients. They just see threads, the utility of the weaving of which is made as a function of their client needs. For them, multiple legalities provides a much richer field in which to work and a more complex set of rule systems to align, fragment, challenge or disrupt as the context demands.

5. Expectations are interlaced with a different set of threads, and on a different loom when one considers the emerging realities of responsible business conduct (more traditionally called corporate social responsibility (CSR)) expectations in the stew point of law, norms, guidance, accountability, markets, and regulators. These considerations produce a different set of challenges when faced with multiple legalities.

A. First is the ancient *problemmatique* of CSR—or perhaps better put now, responsible business conduct. This cannot be ignored but reminds us that terms may be historically as well as contextually embedded. CSR may among the community of meaning makers reference charity, or reference ethics, or reference politics--but it may not reference broader expectations. —cannot be ignored.

Responsible business conduct may include a broader set of expectations, and expectations that take different forms. The problem of definition then poses the initial problem—the quality and nature of the thread that is to be woven, that is the definition of CSR itself. It is common to adopt a specific set of meanings for CSR that emphasizes the dual premise notion of CSR as (1) a set of moral-ethical responsibilities (2) for which business is responsible. But there are other meanings possible--the expectation that the real costs of economic production, including costs to the environment and local communities must be built into financial accounting; the view that responsible business conduct must remain true to and under the guidance/leadership of the political policies and objectives of the states in which they are chartered (or in which they operate). The last definition has great appeal in Marxist Leninist systems, the others much more influence in liberal democratic ones.

B. It is from the embrace of that dual definition that the project of entanglement can be developed elegantly. Again, equally elegant development is also possible. The generally accepted dual purpose definition lends itself to the development of autonomous legalities. It permits the disaggregation of sources of expectations--those who develop sets of moral ethical responsibilities need not be those who manage the responsibilities of business. States, private stardust setters, and public organizations all are important manufacturers of expectations. The OECD is a major actor,[6] and the UN Guiding Principles for Business and Human Rights[7] an important expression. At the same time markets may be the principal organ for enforcement of expectations, but then so are states and other actors. The challenges are compounded from those who must both weave and navigate the weaving here because multiple legalities pose the great challenge for the regulation of global production—and evidences the governance gaps that gave rise to the UNGP in the first place. But at the same time it provides the possibility of legality—and so it lends itself to the great subterranean issues of entanglement: first who gets to develop authoritative moral-ethical responsibilities. That is who gets to develop a legality of CSR. And second, who has the authority to ensure that business is indeed responsible. And what is the role of consent,

C. Of course the two part of this legality—norm making and norm enforcement do not have to be connected. And that makes CSR a very rich space for the study of entanglement. States may create law (the French Supply Chain Due Diligence Law, for example) which is in turn based on international soft law norms. The Norwegian Pension

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[6] See, e.g., Catie Shavin, 'Unlocking the Potential of the New OECD Due Diligence Guidance on Responsible Business Conduct,'(2019) 45(19 Business and Human Rights Journal 139-145.

[7] United Nations, Office of the High Commissioner for Human Rights, *Guiding Principles for Business and Human Rights* (New York and Geneva, 2011).

Fund Global may apply international law by direction of the national legislature that created it to shape the extent to which it will engage in the internal governance of firms in which it has invested or exclude them from their investment universe. And so on.

D. And the focus of the paper was then quite natural and logical—a soft law meta-system developed by the world's richest states. The OECD Guidelines provides the ultimate in system ripe for engagement. A legal system that is not law combined with a dispute resolution system that does not resolve disputes. It encourages states to nudge behaviors through policy decisions and relies on societal systems, mostly the reactions of market actors, to effectively enforce. It creates a jurisprudence that has not legal effect and it has created an atmosphere through which responsible businesses internalize the Guidelines and formalize them through the private law of their internal private law governance.

E. Yet it is in these aspects of conversation and movements that the expectations around the responsible business conduct of enterprises mirror those of the regulation of sport. And like sport, the availability of multiple thread of expectation enriches the space within which it may be possible to maximize its value to the client. Indeed, in the context of business certainly, the multi legalities creates a space for engagement as makers of meaning and for the construction of governance in ways that would have been impossible under more orthodox models. What is sovereign authority, what is the majesty of domestic legal orders and their administrative-judicial apparatus, in a world in which they may be avoided with the purchase of a plane ticket or avoided by agreement of a community of like-minded stakeholders. This is weaving that de-centers the "legislator" and re-centers the act of behavior control in a much larger set of communities, including the objects of "expectations" themselves, in this case enterprises.

6. And yet there remains a space for good, old fashioned governance through traditional law at the domestic and international level. One sees this in efforts to regulate matters under a mechanism like UN Convention of the Law of the Sea—constructed as a ship in a bottle but with an opening through which norms and disciplinary modes seep in and out.

A. The construction of a formally autonomous system of supra-national legalities represented the apex product of the logic of a state system in which the state was recognized as the most authoritative center of political power international organizations could represent the constitution of aggregate state powers into which the authority of states could be vested. States remained the only actors that could give this system life--could constitute these actors--and that constitution was to be memorialized through the enhanced authority of international law, which now assumed the character of

a constitutional (that is government constituting) law. It is a form of construction of a lawmakers that is orthodox and at the same time old fashioned from this side of the marker between the 20th and 21st centuries. It provides a nice contrast to the construction of similar systems through private efforts in sport,[8] or through the collective efforts of the OECD in the context of 'corporate social responsibility' or responsible business conduct.'[9] Three different approaches to autonomy and three distinct consequences for the forms and depth of entanglement.; and three distinct forms of opportunities for weaving presented to those who must navigate these terrains for the benefit of clients.

B. It is worth contrasting the dispute settlement universe under the Convention and that developed through the National Contact Point in the context of the OECD Guidelines for Multinational Enterprises (2015) system,[10] or in the private context of sport.[11] But differences do not hide the similarities—especially the importance of the need to capture meaning making in ways that produce compliance in order to enhance autonomy.

C. And yet that process is nicely illustrated to be quite porous. There is, for example, a parallel here of sorts between the inter-cultural conversations about gender in sport and the express incorporation under the Convention. Even conventionally constituted governance systems, wrapped within the structures of autonomous administrative organs, must look out of the borders of its own legalities in many instances. In the case of the Convention that is sometimes formalized. But it is also inherent in the way that even conventional law quite consciously has always remained deeply tied to the customs and expectations of the populations over which it imposes its expectations. Thus the curious insight, that even the most closed and self-referencing system is porous to some extent. But that does not account for the pretensions of such systems--pretensions that are grounded in the development of hierarchies of authorities for legalities when they "go hunting" beyond the borders of their own legalities.

D. The notion of balancing and interpretation mirror some of the discourse of constitutionalism, certainly in post-colonial states, for example the 1990s South African Constitution (though of course that

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[8] See, e.g., Mathew Dowling, Becca Leopkey, and Lee Smith, 'Governance in Sport: A Scoping Review,' (2018) 32 Journal of Sport Medicine 438-451.

[9] See, Patricia Crifo, Antoine Rebérioux, 'Corporate Governance and Corporate Social Responsibility: A Typology of OECD Countries,' (2016) 5(2) Journal of Governance and Regulation 14-27.

[10] OECD, *OECD Guidelines for Multinational Enterprises* (Paris, 2011).

[11] See, e.g., Tim F. Thormann, and Pamela Wicker, 'The Perceived Corporate Social Responsibility of Major Sport Organizations by the German Public: An Empirical Analysis During the COVID-19 Pandemic,' (2021) 3 Frontiers in Sports and Active Living Article 679772.

> sort of discussion is no longer fashionable ass transnational constitutionalism has fallen out of favor). The connection between balancing and interpretation, and its nature as entanglement was also quite interesting. But I note that these appear to be one way conversation. The issue of the way in which internal actors control the balancing, and the entanglement remind me of the issues of structural coupling and the ways in which systems preserve autonomy through permeable barriers that define difference even as it incorporates what Gunther Teubner might call "irritants" within their systems.

7. So there it is. Three quite fascinating investigations of the forms and materials of the weaving that is entanglement within multiple legalities. What counts as worth weaving, who weaves, and who is made to wear the cloth provides the basis for a great set of studies of the micro-dynamics of entanglement. A last set of thoughts:

> A. What tends to hold the interest of systems in the West are the legalities of disputes and institutions of dispute resolution. One is concerned of course with norm making, but that is a political process in a sense. Lawyers and institutionalists, however, appear to value more those institutions within which norms are applied and enforced. And for many that centers on the judicial. It is this entanglement between the political and the non-institutional juridical that may require substantially more consideration.
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> B. It may be important in some future time to consider these cloths within their ecologies. In a world which appears to be a shop full of clothing, it may be worth thinking a little more about the consumers in the shop of multiple legalities as a subject in her own right.

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