Law as an Emergent Natural Phenomenon

How Lessons from Indigenous Law Can Help Us Save the International Legal Order

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Over the past few years, there have been signs of increasing instability in the international legal order. One of the most serious signs has been the escalation of conflicts between powerful states such as America and Russia, their withdrawal from nuclear arms treaty, their involvement in proxy wars and their involvement in coup d'états around the world (Sanger & Broad 2019). Trump's opposition to the ICC, his administration's influence in the ICC and the ICC's failure to investigate war crimes committed by America brings into question the legitimacy of the court (Dejong, et al.). The unilateral use of force of powerful states against less powerful sovereign states threatens the stability of the international legal order ("International legal order under threat by unilateralism: Iran" 2018). Finally, the detention and prosecution of Julian Assange bring into question whether the international legal order can function given that the exposure of war crimes is being effectively criminalized by powerful states committing war crimes (Monitor 2019). As the frequency and magnitude of these events increase, it becomes ever more crucial for us to find a way to create a stable international legal order. In the first part of the paper, I will examine the natural decentralized emergence of law in society, the difficulties the international legal order is facing, and the sources of its instability. In the second part, I will tap into insights from decentralized indigenous legal orders and use those insights to address the difficulties the decentralized international legal order is currently facing in order to create a stable decentralized international legal order. Finally, I will briefly discuss implementation. While using certain concepts from economics, game theory, information theory, and other interdisciplinary theories, I will refrain from going into details about how those various interdisciplinary theories work together and focus on how they are relevant within legal philosophy.

The Emergence of Law, Nation States, and the International Legal Order

There are complex dynamics at play in the emergence of nation states and the larger international legal order. The emergence process is fractal and scale-invariant, that is, there are underlying fundamental rules that govern the process across all scales. The emergence of a coherent multicellular biological order gives rise to the organism in question, in this case, human beings. Next, as humans interact with one another we see an emergence of order within the immediate community of humans. Historically, this process had many stages, from small groups of nomadic people who avoided conflict with other groups (Napoleon pg238) to larger sedentary groups. This process was

repeated on a global scale with the emergence of empires that eventually entered into conflict once their territories collided and they lacked the capacity to resolve conflicts in a nonviolent manner. In order to resolve conflicts cooperatively, a certain degree of communication and cooperation is required. As communications and information technologies evolved, so did society, from the emergence of city-states to the emergence of nations states and, eventually, the international legal order.

Within the framework of the international legal order, the basic unit is the nation state. Nation states are the parties, the actors that interact within the legal order, drawing up agreements, resolving conflicts and facilitating their resolution. Since there are no larger entities to adjudicate conflicts between states, the international legal order is decentralized, relying instead on the cooperation of nation states and their adherence to the international legal order. This cooperation between the nation states is crucial to the stability of the international legal order.

In all scales, the law can be best understood as a "language of interaction" which helps us govern our relationships with one another within society, setting clear expectations which allow us to govern ourselves, leading to peace and stability (Napoleon pg235) (Cooter, pg5). Law, thus, naturally emerges over time from our interactions with one another. Over time, Nation States emerged from our interactions and, from the interactions between nation states, the international legal order has emerged. Interactions between nation states can be largely defined by the implicit and explicit agreements they reach with one another, each kind of agreement being associated with different sources of law and forming different decentralized legal institutions. For example, explicit consensual agreements form treaties which often establish tribunals to resolve disputes associated with the treaty. Thus, treaty agreements establish not only primary rules of obligation but also the secondary rules that govern the first one (Hart pg91), thus allowing for the emergence of a decentralized legal order where the law and the structure of the legal order emerge simultaneously.

Problems in the Emergence of the International Legal Order

While the ultimate source of law lies within our interactions with one another, different kinds of sources create a spectrum where certain kinds carry a heavier weight than others. In international law, treaties are often favoured because they involve the self-determination of the parties involved

(Orakhelashvili pg606) and are written and thus predictable (Fuller pg39,41). These features are important but they exist within a larger context of what is considered to be acceptable within the international legal community. There is a normative hierarchy within international law that gives precedence to certain norms over others, constraining the agreements which states can enter into. Thus, these peremptory, or *jus cogens*, norms prevail over treaties (Orakhelashvili pg602,603). These norms are accepted "as necessary to protect the public interest of society of nations or to maintain the levels of public morality recognized by them", they protect the legal system from incompatible laws (Orakhelashvili pg604). *Jus cogens* is then defined by the community interest, the collective rights of the community as a whole, constraining the individual rights of each state. Here we see an extension of the idea of collective rights. In order for a state to claim a right within the international legal order they must justify the burdens they impose on the other members of the community (Jones, pg83). Thus, there is an intimate connection between *jus cogens*, group rights and natural law, which establishes our rights and obligations *erga omnes*.

These concepts are all tied together by the natural emergence of law from our interactions. We find ourselves in the presence of other human beings and the rules that govern our interactions with one another spring naturally from our fundamental, universal, characteristics (Napoleon pg233, 235). From our shared characteristics, we get our rights and responsibilities towards one another, forming the foundation from which our customs and, eventually, our contracts, treaties, and rules can evolve. While the process of emergence is naturally occurring and based on our fundamental characteristics, not all emergent patterns are inherently moral. Emergent patterns are governed by our interactions and thus are a reflection of our relationships (Napoleon pg234). The internal morality of law can thus be observed in the behaviours of the parties who obey the laws. It is the behaviours of the parties that determine which laws have been internalized. The internalized laws are not necessarily moral. For instance, there were those who followed Nazi law who truly believed in the inherent morality of the laws they were following even though, in retrospect, it is clear that such laws were immoral. What distinguishes a truly moral law from an immoral one is the inherent coherence of morality, an affinity between coherence and goodness (Fuller pg636). Coherence is the result of an internal, underlying, logical order that is more fundamental than the law itself, it is a natural coherence that leads to more sustainable and self-sustaining relationships, where the relationships

between the parties involved improve over time, leading to a decrease in conflict between the parties. It is a coherence that develops naturally from the cooperation between all parties. This is the coherence that is inherent in *jus cogens*, providing the basis for the emergence of a coherent legal order. This internal coherence is particularly crucial within a decentralized legal order since there is no organization with centralized power capable of enforcing the law, so decentralized legal orders must rely on the internalization of law. Furthermore, the efficacy of the law comes from this internalization, this general acceptance of the law as inherently moral and necessary (Fuller pg639), its obedience as something necessary rather than something that one must be coerced into, and the inherently cooperative nature of moral law.

The structure of law thus emerges from this natural internalization of the rules that arise from the interactions between people within the context of their environment and society (Napoleon pg232). This structure is weak within the international legal order due to the significant differences of power between states. Decentralized law emerges from the interactions between people and, thus, decentralized law is not imposed from an authority from top to bottom (Cooter pg4) but, rather, it is discovered (Cooter pg7). This discovery, however, is based on the interactions between people within the context of a distribution of power. Therefore, the laws that emerge will be a reflection of that distribution of power and determined by the incentive structures that produce it (Cooter pg14). These emergent structures can be analyzed with game theory. A game is a mathematical model that represents the strategic interactions between rational decision-makers (Myerson pg1). The norms that govern society and create its laws emerge when a game evokes an internalized sense of obligation (Cooter pg16), thus creating a self-organizing legal order that doesn't require enforcement from a centralized legal body. In a typical game, without getting into details, a player has the option to either cooperate with another player or appropriate. In this context, appropriation is a rejection of the norms. Cooperation results in both players benefiting while appropriation results in one player benefiting more at the expense of another. Players that internalize the norms have a general propensity to cooperate, while those who have not internalized it cooperate only if the payoff is at least as high as appropriation (Cooter pg26). But more cooperation increases the level of trust and the expected value of the game, in contrast with appropriation where the value decreases for the benefit of the players who appropriate (Cooter pg25). Hence, cooperation is favoured over

appropriation. Without a centralized body to enforce the norms, enforcement in a decentralized game is done through reputation, thus players who appropriate are punished with avoidance and sanctions. There is then a social pressure for everyone to cooperate, and obligations are enforced by the community as a whole (Hart pg88). Hence all players will signal cooperation regardless of their strategy (Cooter pg25). Players who have not internalized the norms will act strategically in order to avoid punishment. Thus, the game will evolve as those who have internalized the norms interacts with those who have not internalized them, and the social pressure will tend to promote the internalization of norms. We see this process in international law, where states that fail to cooperate have sanctions imposed upon them. Rather than relying on "hard law", where a breach gives rise to legal consequences, the international legal order relies on "soft law" giving rise to political consequences, where non-legally binding political instruments such as "declarations, resolutions, and programs of action" are used to put political pressure on states that don't cooperate (Shelton pg319). So far, we have only looked at our motivations, but our relationships are defined not only by our motivations but also by our abilities, our social and economic power. Certain legal theorists characterize individuals as simply self-interested "rational maximizers of their satisfactions" (Posner pg129) and characterize rights as claimed purely out of self-interest without taking into consideration the burdens they impose on others (Raz pg134). This individualistic perspective tends to focus on the motivations of individuals without taking into consideration their abilities, the differences between their levels of abilities and the assumed, purportedly neutral and objective, context (Crenshaw pg150) which society and the legal system operates. By doing so, it creates a legal geography that pre-establishes winners and losers according to the existing structure, institutionalizing social and economic power, making social domination legitimate and invisible (Smith pg155). Thus, differences in social and economic power can influence the emergence of law, leading to legal orders that are either inherently moral or immoral depending on the patterns of interaction that arise from different distributions of power. What is missing from the discussion is how the distribution of power affects the game. Power dynamics are always part of social relationships (Napoleon pg244). The decentralized order fails to function if certain players have significantly more power than others. This is due to the fact that cooperation requires power to be distributed. If certain players have more power than others, they have less motivation to cooperate

because they have more resources to work with, they have more control over resources and are thus less affected by punishment. They can afford short-term losses in favour of long-term gains and, as they have more control over resources, other states are more dependent on them, thus insulating them from the rest of the players. Meanwhile, powerless players have more motivation to cooperate because they have fewer resources to work with and they are more dependent on other players. They have a greater motivation to cooperate but less ability to do so due to their lack of power and control over resources. We see these dynamics play over in the international legal order, and it is most striking in the relationship between colonial states and their colonies. This process of colonialization is ongoing and it continues in the guise of international trade and the "humanitarian" efforts of powerful states. This creates a fractured international legal order, where it is, in fact, two legal orders- one for powerful states and one for powerless ones. From a Fullerian perspective, the international legal order is not a true legal order. It creates a relationship between powerful states that benefit from their "law" and powerless ones that are subjected to it. Powerful states employ a rational neutral discourse that hides the systemic discrimination and oppression inherent in the international legal order (Crenshaw pg150). Power concentration, then, leads to a fake, immoral, legal order that leads to a decrease in coherence over time. So long as the power distribution between states is highly unequal, the international legal order cannot be stable as powerful states lack the motivation required to internalize inherently moral norms.

Finally, there is one more issue we must address before we move on to our solution. So far, we have discussed how interactions between states influence the international legal order. We must now look at interactions within states. Similar power dynamics exist within states where certain groups of people have significantly more power than others. States are not unified wholes, they are fragmented collections of groups competing for their interests, with states themselves being constructed as groups of people occupying a certain piece of land and trying to make decisions together. Thus, underneath centralized nation states the same power dynamics of the emergent decentralized legal order exists. The difference between the nation state and the international legal order is that nation states have centralized legal orders which can thus enforce their rule of law. This creates an illusion of order, where the norms that are not internalized are enforced via the state's legal system. Decisions made by states themselves do not come from people but, rather, from representatives of the people

who are largely chosen by powerful special interest groups. Here we can then introduce the conception of "fully formed actors". An individual is a fully formed actor because their decisions are congruent with their being, that is, their actions match their will. The same is not true in states. States are not fully formed because the decisions of states are not fully congruent with the will of their citizens. This is a difficult problem to solve, it requires states to have strong democratic institutions and a wide distribution of power. The legitimacy of the state and of their legal system is rooted in "well-functioning democratic processes" (Sunstein pg53). Without democratic, fully formed, nation states, the international legal order lacks a strong foundation.

Lessons from Decentralized Indigenous Legal Order

As we have seen before, a decentralized legal order requires a strong foundation rooted in the internalization of the law and distributed power among its actors. Since the law emerges from individuals, the properties of the local legal order will inevitably influence the properties of the larger legal order. If the local legal order emerges in a distributed fashion, without unequal concentrations of power, then so will the larger legal order that emerges from it. We see this process unfold in indigenous legal orders.

At the core of the indigenous legal order are the connections between people and between people and their environment. The legal order emerges from the interactions between people, as they make decisions and resolve their conflicts together (Napoleon pg229). Indigenous law is about "building citizenship, responsibility and governance" (Napoleon pg230), it is more than just a set of rules they are expected to follow, it is part of who they are and how they live their lives. The indigenous legal order is not a bureaucracy controlled by formal centralized state processes. Instead, it is "embedded in non-state social, political, economic, and spiritual institutions" (Napoleon pg231). Hence, indigenous law is a bit more like the soft law in the international legal order than the hard law of centralized nation states. Since law comes from the interactions between people, it is not a passive set of rules that people obey but rather an active process that people engage in, allowing them to collectively manage themselves (Napoleon pg232). Thus, there is a very close connection between the legal order and the political order. They blend together as the experiences that people go through cause them to consider how previous conflicts were dealt with and, as their society changes so do

their processes for resolving those conflicts change. Thus, their law is collaborative in nature, it is not about parties trying to compete towards a resolution that benefits them at the expense of others but rather, it is about parties working together to resolve their conflicts amicably and finding a resolution that reconciles their relationship. They consider their interactions and conflicts over time in order to recognize the overall patterns and roles (Napoleon pg236). When normative disagreements arise, they accept the disagreement and try to resolve it because they are invested in their legal processes, they are in control of it and know that it can be trusted. The legitimacy of their law is derived from their intimate connection with it and their commitment to their legal processes (Napoleon pg237).

In a society that is centrally organized, we see the interactions between people and centralized processes for enacting and enforcing the law. In a decentralized society such as the Gitksan, we see a different structure emerging instead. The Gitksan legal structure is made up of kinship groups known as "Houses" (Napoleon pg233). Houses are the basic political unit of their society, and Houses interact with one another through kinship, marriage and other relationships (Napoleon pg234). Here we then see a larger order emerging from the individual one, where closely connected groups interact, collaborate and share information. Their whole society emerges from the relationships between their Houses, thus there is no "big boss" of all the Houses (Napoleon pg234). For this reason, their norms are more internalized than norms within a centralized society, since there is a deeper connection between the people and the law which emerges directly from their interactions, rather than imposed from a centralized authority. The source of their law comes directly from them rather than indirectly from representatives that are far removed from them, often representing thousands of people as so many do in a typical centralized system. This makes their law more connected to their society and to the people. Their law, the *ayook*, is derived from the long-term social, economic and political interactions of the members, Houses, and kinship networks (Napoleon pg234, 241).

Their law emerges from the individuals to the Houses, often recorded in oral histories and traditions. In the case of the Gitksan is the *adaawk*, which "preserves the identity and history of a House". Their law evolves as a result of people observing the consequences of their behaviour, forming legal precedents (Napoleon pg241). It is thus recorded in their relationships with one another.

Relationships between Houses form a kinship network, where definite roles and reciprocal obligations are established. Hence, in their society people have a fiduciary duty to the society as a whole and especially to those who are closest to them within their kinship network. The laws of the entire society thus emerge from the entire kinship network in a distributed fashion, resulting in a wide distribution of power. Due to the high degree of internalization and the wide distribution of power, the decentralized indigenous legal order provides a very useful blueprint for a strong decentralized international legal order.

While a decentralized society structured like the Gitksan has significant advantages over our typical centralized structures, there are also disadvantages. As sedentary groups grew and their territories started touching, they couldn't avoid conflict anymore and didn't have enough communication technology to resolve conflicts. That was a limitation of their order, as it required a lot of communication between people over increasingly large distances. Part of the reason why the centralized structures evolved was due to the limitations of the decentralized structure. As we go farther from the local structure, into larger scales, it becomes increasingly harder to facilitate organization, and harder to facilitate conflict resolution between increasingly larger groups of people. Decentralized indigenous societies have typically been small due to these limitations. Historically, their territories have been limited to the area they could defend physically and legally (Napoleon pg242). Any larger legal order would become disconnected, as the relationships that serve as the basis of their foundation cannot be connected on larger scales. The larger the legal order, the more information is needed to be exchanged and the farther it needs to travel. This can result in slower exchanges of information and systems that become increasingly slower as more information needs to be exchanged. Our centralized legal systems suffer from the same issue to a certain extent, though the nested doll hierarchical structure of our courts and political systems help alleviate the problem.

Creating a Cybernetic International Legal Order Based on Indigenous Legal Orders

The decentralized legal order emerges from each individual towards the other individuals they interact with and towards their immediate environment. The interactions create a normative order, which ultimately translates into customs and contracts. The process is natural and requires little facilitation at the immediate scale. But as larger groups of people coalesce forming different scales

of legal actors, then the need for facilitation of interactions arises. The need arises due to the biological limitations of storing and transmitting information. Groups require larger volumes of information to be stored and transmitted, which cannot be done by humans. Therefore, we need to use information technology to develop systems to facilitate the emergence of the decentralized legal order. Using the indigenous blueprint, information systems can be developed to connect people both in the democratic process of entering into agreements and in the resolution process of resolving conflicts. Resolving this communication problem can unlock the indigenous order on a global scale. This can be accomplished by combining the principles and network structure of the indigenous order with our current communication technologies, creating a strong and stable foundation for the international legal order to develop and evolve.

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