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Opinion
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The Structuring Forces of What We Think to be Law: Initial Musings

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In this Opinion Article, I merely want to ask a question, and briefly explain, through an example, why I think the question matters. The question is this: we all think law to be a certain thing, but mostly we do not have to, analytically, think that way. What is it, then, that structures the way we think about law?

A simple answer that comes immediately to mind is that law is something good, a sign of cultural progress, a distinct set of norms which has certain inherent characteristics. Among these characteristics, one may think, is law's ability to help us achieve some of society's grander ideals. Here's an example of how this might work – or rather an example of our beliefs about what law is might precisely defeat the purpose we give to law as a distinct set of social norms.

A few years ago, John Ruggie, the Harvard human rights advocate, drafted a set of human rights principles that corporations should respect [1]. These so-called "Ruggie Principles" set in motion an international movement to put pressure on corporations to comply with these principles. Major companies around the world, including Coca-Cola and General Electric, started to reconsider some of their business practices, no doubt projecting significant costs. A real movement was catching on.

But then South Africa and Ecuador, supported by Bolivia, Cuba and Venezuela, along with almost 600 NGOs [2], banded together in the hope to turn Ruggie's principles into a proper international treaty creating proper binding obligations for corporations [3] - against Ruggie's own earlier [4] and subsequent warnings [5]. Negotiations ensued. Ruggie's diplomatic efforts were replaced by state-centered, classic diplomacy. A plethora of quite expectable disagreements erupted, almost immediately. They seem unlikely to abate any time soon [6].

Today, many believe that the effort is losing itself in the shifting sands of these diplomatic negotiations [7]. As Ruggie puts it, "a general business and human rights treaty would have to be pitched at so high a level of abstraction that it would be of little if any use to real people in real places".

Businesses, of course, rejoice: the dissensus alleviated a good deal of the pressure on them: their legal human rights obligations are on hold, so to speak, pending the outcome of these negotiations, which may never come to fruition.

Is it not ironic? The businesses were "saved" from inconvenient human rights constraints by an idea about what law is. Ruggie's principles most likely lost authority because of an attempt to turn them into "proper" law. The attempt to use law as a means to engineer social progress is, in this case, on a bad track, possibly failing altogether, because of the idea that social engineering through law means social engineering through *state-made* law. For most lawyers, transnational non-state law, like the Ruggie Principles, just will not do.

But just why? Whence this idea, this resistance to transnational non-state law as "proper" law, as law that will do as law? Why, when we want to achieve something through law, through legal regulation, do we tend to think that a state, or several states, has to get involved and stamp the effort with its formal seal of approval? Why do we associate law with the state?

These questions take us to a deeper, or more general, set of musings: Why do we think of law the way we do? What is it that incentivises and constrains, orients and shapes the practice of how we think about law? How do the interests we pursue, for ourselves and for others, influence our epistemology of law? What are the likely determinants of our conduct when we carve out or simply use a certain idea of what law is?

Let us recall that law, as Paul Bohannan puts it, is a noetic concept: It is not represented by anything except our ideas about it [8]. Nothing is intrinsically of a legal nature or not of that nature. What we are willing to recognize as law effectively creates law. Law is whatever we make it be. Our discourse about law is what makes law *law*. If we change our discourse about law, we change what law itself is. An intriguing question follows: whence our discourse?

We have choices in thinking about law, and these choices are choices about what law effectively is. So why do we exercise these choices the way we do?

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