

# INTERNATIONAL LAW AND INTERNATIONAL RELATIONS

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in this view is constraint only; it has no creative or generative powers in social life. Yet law working in the world constitutes relationships as much as it delimits acceptable behavior. The very idea of state sovereignty, both a legal and a political construction, creates the context that allows for the formal articulation of treaty rules.<sup>7</sup> Similarly, property rights, over which political actors battle in many of the volume's articles, are themselves dynamic constructions generated by law. Oddly, given this group of authors, even the role of formal law in creating and shaping the life of institutions like the IMF, GATT, and WTO, explicitly addressed in the volume, is neglected. Theirs is an overwhelmingly liberal and positivist view of law. It is also limited to the bureaucratic formalism described by Weber and so is very "Western" in a narrow sense.<sup>8</sup> We are not implying that Western law, positivism, and liberalism are uninteresting theoretical frameworks, but an analysis of the role of law in world politics that is entirely constrained by these three optics, attending primarily to formal institutions, is at best partial.<sup>9</sup>

Despite the efforts of the framers of the volume to define terms and to expressly bracket issues, at the end of the day it is difficult to decide exactly what the authors have set out to demonstrate and what analytic work their concept of legalization is supposed to accomplish. Is legalization a dependent variable or an independent one? \*\*\* If legalization is a phenomenon to be explained, what other factors might explain it, and how important are they? If legalization explains aspects of state behavior, what other independent variables should be considered in assessing legalization's role, and how might these interact with legalization?<sup>10</sup> Equally important for the authors, do the three defining features of legalization all have the same causes, or cause the same effects, and how would we know if they did (or did not)? \*\*\*

<sup>7</sup> Biersteker and Weber 1996.

<sup>8</sup> Glenn 2000.

<sup>9</sup> For a helpful categorization of various legal theories as they relate to the question of compliance, see Kingsbury 1998. Among the competing theories of international law (and particularly of international obligation) that are not included within the volume's concept of legalization are the "world constitutive process" model of the Yale School (Lasswell and McDougal 1971; Reisman 1992), natural law approaches (Verdross and Koeck 1983), the "transnational legal process" model of Harold Koh (Koh 1997), the "interactional" framework of Brunnée and Toope (Brunnée and Toope 2000), and the rigorously rationalistic law and economics approach of Goldsmith and Posner (Goldsmith and Posner 1999).

<sup>10</sup> See Abbott and Snidal 2000; see also Abbott et al. 2000.

### Three Lacunae

Political scientists have understood for decades that formal institutions do not capture many of the most important features of politics. Indeed, the authors of this volume have a fairly broad, and by now standard, political science definition of institutions, one that focuses attention beyond their formal attributes. Institutions are “rules, norms, and decision-making procedures” that shape expectations, interests, and behavior.<sup>11</sup> Marrying such a broad understanding of institutions to a narrow and formal understanding of law seems both unfortunate and unnecessary. A fuller understanding of law would complement our more nuanced understanding of institutions and produce a richer joint research agenda. To illustrate, we discuss three interrelated features of international law neglected in the volume; these features are central to understanding its effects on world politics and, further, are crucial to a theoretically defensible understanding of the very specific legalization phenomenon the volume’s authors employ.

#### *Custom*

The most obvious casualty of the volume’s narrow framing of legalization is customary international law, with which it almost completely fails to engage. Any assessment of law’s persuasive influence that neglects to treat seriously the customary law elements of such topics as state responsibility, legal personality, territory, human rights, and the use of force is bound to produce a skewed perspective. For example, customary law on the use of force stands alongside, complements, and even modifies treaty-based norms.<sup>12</sup> Although the UN Charter and humanitarian law treaties establish an explicit framework of norms circumscribing the use of force in international relations, no one analyzing this issue-area can afford to ignore the customary law of self-defense or the impact of the concept of *jus cogens* (peremptory norms) on the attitudes of states toward the legitimate use of force.<sup>13</sup> It is not surprising that the volume contains but the briefest discussion of security issues, for they simply cannot fit within a narrow judicial and treaty-based perspective on law’s influence in world affairs.<sup>14</sup> Similarly, in the area of human rights, the broadening

<sup>11</sup> Goldstein et al. 2000, 387.

<sup>12</sup> *Nicaragua v. United States (Merits)* [1986] ICJ Rep. 14.

<sup>13</sup> See Bowett 1958; and Ragazzi 1997.

<sup>14</sup> The exception is a brief foray into ASEAN’s security relationships in Kahler 2000a. The *Nicaragua Case* (1986) is discussed in Keohane, Moravcsik, and Slaughter 2000, though for purposes unrelated to an analysis of the customary law on the use of force.

of customary law obligations has altered the content of interstate diplomatic rhetoric and affected bilateral political relationships. Canada and Norway now engage in a trilateral “human rights dialogue” with China, for example, an engagement that could not take place in the absence of customary norms, for China has yet to ratify key human rights treaties.<sup>15</sup> Again, it is not surprising that the one article on human rights concludes that the legalization framework does not explain behavior particularly well.

### *Defining Characteristics of Law*

A second, related issue concerns the selection of obligation, precision, and delegation as the defining characteristics of legalization. While the volume’s framers offer careful discussion of these terms, their meanings, and characteristics, they say little about why, among the universe of legal features, these three are more important than others. These three features certainly do not define law or distinguish it from other types of normativity, nor are they the source of law’s power (or, if they are, that case is not made in the volume).

Precision and delegation are particularly problematic. In a number of well-established areas of international law with strong records of influence and compliance, norms are relatively imprecise. Examples include the delimitation of maritime boundaries (often accomplished on the basis of “equity”), the bases of state criminal jurisdiction (where overlapping rules are the norm), and state responsibility (including a very broad duty not to knowingly allow one’s territory to be used in a manner harmful to another state). Similarly, there are wide swaths of functioning international law that do not depend in any way on extensive “delegation” of decision-making authority. Outside of the European context, the entire law of human rights operates and affects world politics without any mechanisms of compulsory adjudication. \*\*\* A comparable pattern of influence in the absence of delegation is found in international environmental law. Many international environmental commitments continue to function on the basis of information-sharing and voluntary compliance. Where modern treaties create mechanisms to promote implementation, they are often premised on the need for positive reinforcement of

<sup>15</sup> For example, although China recently ratified the International Covenant on Economic, Social, and Cultural Rights, it has yet to ratify the International Covenant on Civil and Political Rights.

obligations rather than on adjudication and sanctions for noncompliance. There is no extensive delegation of decision-making authority. Why delegation and precision should be defining features of legalization and what they add to the analytic power of this concept is simply not clear.

Further, the relationship among these three characteristics is unexplored, a significant lacuna since these features could contribute to contradictory developments in many circumstances. Increased precision could lead to less obligation, when prospective members of legal regimes are driven away by fears of detailed rules that are inflexible (a point actually supported by the description of the WTO offered by Judith Goldstein and Lisa Martin).<sup>16</sup> Delegation of decision making can also lead to less precision in rules rather than to greater clarity, as presumed by the proponents of legalization. If one considers the decisions of the International Court of Justice in boundary delimitation cases, for example, the results are clearly legal, influential, and effective in promoting compliance, but they are highly imprecise.<sup>17</sup> What we gain by combining, rather than disaggregating, concepts with such complex and tense interrelationships is not well explained.

Most problematic, however, is the volume's conceptualization of obligation, arguably the central preoccupation both of lawyers and of political scientists interested in how norms affect state behavior. Obligation is central to the volume's framework of legalization, yet the authors articulate no theory of obligation and seem remarkably uncurious about how a sense of obligation might be generated. In the volume's lead article, legal obligation is defined in an entirely circular fashion, with reference to its products: "Legal obligations bring into play the established norms, procedures, and forms of discourse of the international legal system."<sup>18</sup> We know obligation by what it achieves, but this approach does not explain how obligation creates these products. To the extent that the bases of obligation are treated at all in the framing article, the conceptualization is very thin, formal, and contractual. Obligation is created when parties enter into treaties or other express agreements. The mechanism for generating obligation is thus choice – presumably choice by

<sup>16</sup> Goldstein and Martin 2000.

<sup>17</sup> In the *North Sea Continental Shelf Cases* [1969] ICJ Rep. 3, the court articulated a "rule" of law that the continental shelf should be divided on the basis of "equitable delimitation taking into consideration all of the circumstances." This rule has shaped all subsequent continental shelf negotiations as well as judicial and arbitral decisions.

<sup>18</sup> Abbott et al. 2000, 409.

utility-maximizing actors.<sup>19</sup> Yet both legal scholars and international relations (IR) scholars understand very well that contractual obligations alone are often insufficient to determine behavior.

More careful theorizing of these defining characteristics might have led the framers to explore some alternative features of law and develop more robust concepts. For example, one concept that is notably absent from the various analyses of obligation is legitimacy, yet legal scholars have long focused on legitimacy as an essential source of obligation and “compliance pull” in law.<sup>20</sup> Legitimacy in law has been argued to have a number of interrelated sources. Legitimacy is generated in part through attention to internal legal values that we seem to take for granted in the liberal democratic West but that students of repression will recognize as essential. Law is legitimate only to the extent that it produces rules that are generally applicable, exhibit clarity or determinacy, are coherent with other rules, are publicized (so that people know what they are), seek to avoid retroactivity, are relatively constant over time, are possible to perform, and are congruent with official action.<sup>21</sup> Law that adheres to these values is more likely to generate a sense of obligation, and corresponding behavior change, than law that ignores these values. Legal legitimacy also depends on agents in the system understanding why rules are necessary.<sup>22</sup> Participating in constructing law enhances agents’ understanding of its necessity. Finally, adherence to specific legal rationality that all participants understand and accept helps to

<sup>19</sup> In Abbott and Snidal’s discussion of “soft law,” that quintessentially fluid concept is treated as a preexisting form of institution to be chosen by states for strategic reasons. Abbott and Snidal 2000. This approach misses much of what we know from many legal analyses about how soft law works; see Chinkin 1989; Hillgenberg 1999; and Finnemore 2000. First, soft law is not simply “out there” waiting to be chosen. Part of what is “soft” about this form of law is precisely that it is in flux, in the process of becoming. How states treat it is not exogenous to soft law; it determines and shapes soft law; it is constitutive of it. Equally important, the notion that states “choose” soft law formulations is misleading. Soft law, like customary law, is not always “chosen” in a meaningful strategic sense. For example, the evolution of the “precautionary principle” or “intergenerational equity” in international environmental law is a study in normative entrepreneurship and subtle instantiation as much as in strategic choice. See Brunnée 1993; and Brunnée and Toope 1997.

<sup>20</sup> See Lauterpacht 1947; Lasswell and McDougal 1971 (where legitimacy is not discussed directly but is implicit in the posited relationship between “authority” and “control”); Franck 1990; and Byers 1999.

<sup>21</sup> See Fuller 1969; Franck 1990; and Postema 1994. These legitimating characteristics are much broader than the volume authors’ concept of “precision,” as indicated by Fuller’s term for these values – “internal morality of law.” Fuller 1969.

<sup>22</sup> See Fuller 1969; and Postema 1994.

legitimate the collective construction of the law. Legal claims are legitimate and persuasive only if they are rooted in reasoned argument that creates analogies to past practice, demonstrate congruence with the overall systemic logic of existing law, and attend to contemporary social aspirations and the larger moral fabric of society.<sup>23</sup> Law that exhibits this kind of rationality – that is viewed as necessary, involves in its construction those it binds, and adheres to internal legal values – is more likely to be viewed as legitimate than law that does not have these features.

Legitimate law generates obligation, not just in a formal sense but also in a felt sense. Legitimacy thus connects obligation to behavior in important ways.<sup>24</sup> This is a major strain of argument in international law scholarship, one that IR scholars do read, yet the authors of the *IO* volume do not address legitimacy as part of the legalization phenomenon. They never investigate legitimacy's relationship to obligation, precision, and delegation, nor do they explore alternative hypotheses concerning legitimacy.<sup>25</sup> We suspect that legitimacy is a prior variable, generating a felt sense of obligation and empowering those who delegate to do so. Variations in legitimacy almost certainly relate to variations in legalization. The spread of formal legal institutions investigated in the volume is likely to depend on the legitimacy of these formal legal processes generally and on the legitimacy of the particular configurations of these processes (the kind of delegation, the nature and content of the obligation) that these institutions embody.

### *Law as Process*

A third fundamental issue to consider is the nature of legalization itself. The authors of this volume treat law as an artifact – something created by state choice – and equate legalization with three features of the *form* of this artifact (obligation, delegation, precision). Politics thus becomes “legalized,” in their view, as it displays these three features. When one thinks about what legitimates law, however, another possibility emerges. Law, and by implication legalization, may be much more about process

<sup>23</sup> See Fuller 1969; Franck 1990; and Brunnée and Toope 2000.

<sup>24</sup> Franck 1990.

<sup>25</sup> Abbott and Snidal recognize that legitimacy exists, but they do not theorize or investigate its independent causal effects on strategic choice. Abbott and Snidal 2000, 428–29. Lutz and Sikkink do explore legitimacy issues and find, as we suggest, that these are causally prior to legalization. Lutz and Sikkink 2000, 654–59.

than about form or product. Much of what legitimates law and distinguishes it from other forms of normativity are the processes by which it is created and applied – adherence to legal process values, the ability of actors to participate and feel their influence, and the use of legal forms of reasoning. A view of legalization that focused on legal relationships and processes rather than forms would be more dynamic and better suited to explaining change – which many of us, the volume’s authors included, are interested in. Unlike Thomas M. Franck, we would not argue that process is the only thing that legitimates law.<sup>26</sup> Values suffuse legal argument and they underlie legal processes generally, so it is not sufficient to seek the power of law solely in the details of its processes of elaboration and application.<sup>27</sup> But it is equally suspect to craft a framework for the empirical study of legalization that ignores process in favor of an essentially structural, and product-focused, analysis.

As framed in the volume, the world’s “move to law” is a move to a very particular kind of law, and not one that resonates with international lawyers who are unaccustomed to the narrow view of obligation espoused by the authors and who would doubt that precision or delegation are the hallmarks of growing normativity in international relations. A broader understanding of law would open up research connections among scholars who would not find the authors’ formulation of legalization particularly engaging. Most obviously, a more culturally and sociologically attuned formulation of the role of law speaks to constructivist concerns and builds bridges between that group of IR scholars and like-minded thinkers in law. Situating law in its broader social context allows room for cultural explanations of behavior and identity formation in ways that these scholars will find helpful. It also promises to reveal connections between IR theory and approaches to comparative law that address issues of identity and normative change within legal traditions.<sup>28</sup> Focusing on law as a set of relationships, processes, and institutions embedded in social context has the further advantage of reformulating the lively legal debate over how “soft” law “hardens” and connecting it with the rich and growing body of work on transnational norm dynamics that has occupied constructivists in recent years. \* \* \*

<sup>26</sup> Franck 1990.

<sup>27</sup> See Hurrell 2000; and Toope 2000.

<sup>28</sup> See Postema 1991; Kennedy 1997; and Glenn 2000.



## WHAT DIFFERENCE DOES LAW MAKE?

A fuller understanding of law is not simply a pleasing accessory to the framework proposed in this volume, however. It is a necessity. The purpose of the legalization concept is presumably to facilitate empirical research. If a narrowly drawn and simplified concept generates new insights for researchers and helps them explain empirical puzzles, it may still be valuable. To assess whether legalization does this, we examine the three articles in the volume that apply the concept of legalization to different issue-areas. Our examination suggests that the concept provides little help to these researchers, not only because it contains such a narrow notion of law but also because it is inadequately theorized.

Beth Simmons, applying the concept of legalization to monetary affairs, asks why states voluntarily declare themselves bound by Article VIII rules concerning current account restrictions and unified exchange rates. She frames this as a credible commitments problem. The policy dilemma for states is to make their commitments to Article VIII rules credible to markets, thus producing desired investment flows. Law's role is to provide a "hook" or signal that makes commitments credible.<sup>29</sup>

The legalization concept does little work here. Simmons certainly does not need it to carry out her analysis. The only aspect of the concept Simmons treats is obligation, recasting it as "credible commitment"; precision and delegation are apparently not relevant. Conceptual equipment for credible commitment and signaling analyses have been around for a long time. Simmons could have completed essentially the same analysis without "legalization." \*\*\*

Adopting a richer view of law, as we suggest, might open this analysis to some important questions and make law more than peripheral in our understanding of these events. A focus on law's role, for example, might prompt us to ask whether or why legal commitments are credible signals to markets for all states. After all, some of the developing countries most successful at attracting investment, such as China and Indonesia, have extremely weak conceptions and applications of the rule of law. If accepting legal obligations is such an important signal to investors, as assumed here, why do investors pour so much money into countries where law is so weak?<sup>30</sup> If Simmons believes that domestic and international rule of law are unconnected, so that investors assume that even countries without

<sup>29</sup> Simmons 2000, 601.

<sup>30</sup> Wang's analysis of exactly this question in the case of China points squarely to the need for a broader view of how law works. Wang 2000.

effective rule of law domestically will be bound unproblematically in the international realm, this would certainly require some elaboration, since it cuts against prominent past work by other authors in the volume.<sup>31</sup>

More generally, equating law with obligation and obligation with credible commitments ignores much of what law does in monetary affairs that might be relevant to Simmons' analysis. The notion that law is merely promise-keeping ignores both the authoritative and the transformative character of law. States are not making the Article VIII decisions in a legal vacuum. The Articles of Agreement (of which Article VIII is a part) created an entire structure of law on monetary affairs, including a Weberian rational-legal bureaucracy (the International Monetary Fund) to make policy on monetary matters. Law thus created a new source of authority in monetary matters, the IMF, which generated new rules for states but also new knowledge about technical matters in economic policy that changed expectations for behavior. Throughout the period examined by Simmons, states are making their decisions about Article VIII commitments in a dynamic environment of law, rules, and economic knowledge about monetary policy, and much of this changing environment is actively promoted by the IMF. \*\*\*

Goldstein and Martin's analysis of trade politics addresses the volume's legalization concept much more directly. They examine the effects of increasing obligation, precision, and delegation in formal trade agreements on international cooperation and compliance. They find that "more is not necessarily better" because more precision and "bindingness" in rules can mobilize protectionist groups who can now better calculate the costs of freer trade.

What work does the legalization concept do here? As in Simmons' article, Goldstein and Martin create a link between legalization and another well-known concept in political analysis, in this case, information. "Increased transparency" (better information) is added to the definition of legalization without comment in this article.<sup>32</sup> Information then becomes the centerpiece of the analysis. "Legalization entails a process of increasing rule precision, [ergo] a more legalized trade regime will provide more and better information about the distributional implications of commercial agreements."<sup>33</sup> Once we understand what legalization

<sup>31</sup> For example, Slaughter 1995.

<sup>32</sup> Goldstein and Martin 2000, 604.

<sup>33</sup> *Ibid.*, 604.

does to information, information does most of the heavy analytic lifting in this article, not law.

\*\*\* Goldstein and Martin make a strong case that an inverse relationship exists between precision and any sense of felt obligation, since more precision tends to promote greater use of escape clauses and mobilizes interest groups for noncompliance. \*\*\*

Unfortunately, however, Goldstein and Martin's findings seem not to have prompted much rethinking of the content of legalization by the volume's framers or by Miles Kahler in the conclusion.<sup>34</sup> Such an overall examination might have revealed additional problematic relationships among their three elements of legalization, even in the Goldstein and Martin article. For example, it is not clear that increased precision in law always increases certainty about distributional effects, as Goldstein and Martin assume. If increased precision involves delegation, uncertainty may remain high or even increase because delegation, by its nature, creates uncertainty in principal-agent relationships. Thus, members of the WTO may have more precise rules about resolving disputes than they did under the GATT, but the workings of the dispute settlement body may be sufficiently opaque or unpredictable that distributional consequences remain uncertain in many areas. Conversely, increased delegation does not guarantee more precise rules for the same principal-agent reasons, so there is no reason to think those co-vary. The overall effect of Goldstein and Martin's interesting finding about the effects of information is thus to suggest a wide array of possible relationships among legalization's core features. This, in turn, suggests that the legalization concept is itself less analytically useful than its component parts, which, as we noted earlier, are not necessarily or uniquely legal.

More attention to law might lead these authors to ask some substantive questions that would bear on their findings. These authors are commendably enthusiastic about including domestic politics in their analysis yet remarkably inattentive to variations in those politics created by widely varying structures of domestic law. Law governing ratification of trade agreements, central to this analysis, differs hugely across even the democratic, industrialized countries on which these authors focus. These differences profoundly change the "logic of [domestic interest group] mobilization" in different countries, around which the analysis revolves. For example, the authors assert that it is the need for treaty ratification, with attendant public processes of debate, that gives rise to the

<sup>34</sup> Kahler 2000b.

possibility of effective protectionist backlash. Yet in Canada, the United States' largest trading partner, the treaty-making power is held by the functional equivalent of the executive branch (in practice the prime minister and cabinet), and there is no constitutional requirement for ratification by Parliament. The entire NAFTA treaty could have been concluded by the executive branch, benefiting from the legitimacy granted by an overwhelming parliamentary majority, without any opportunity for formal political debate. \*\*\*

These differences in legal structure are more than simply differences in the constraints or political opportunity structure surrounding strategic actors. Domestic structures of law are, themselves, mobilizing factors for a wide variety of groups involved in trade politics. Domestic law is what constitutes, empowers, and mobilizes a host of interest groups, from trade unions, to professional organizations, to business groups, to environmentalists and human rights activists. Unions have different forms and powers in different national legal contexts, as do business groups and nongovernmental organizations. Law's role in mobilizing different groups is much more profound than mere provision of information.

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Goldstein and Martin are certainly correct that domestic politics are important in trade politics, but significant variation in domestic legal systems should provoke some caution in claiming generalized effects of domestic ratification on interest group politics. If generalizing their analysis to Canada is problematic, we suspect that generalizing to Europe and Asia, and certainly the developing world, would be even more so. \*\*\*

Ellen Lutz and Kathryn Sikkink apply the legalization concept to human rights to test their hypothesis that increased legalization increases compliance with human rights law.<sup>35</sup> They examine three areas of human rights law – torture, disappearance, and democratic governance – and find the least compliance in the most “legalized” area, torture, and the most compliance in the least “legalized” area, democratic governance. They find stronger explanatory power for compliance in broader social variables and in the “norm cascade” that swept through Latin America in the 1970s and 1980s.

Oddly, the legalization concept seems to be most useful to these researchers who find its effects so limited. Unlike Simmons, or Goldstein and Martin, Lutz and Sikkink take us through an examination of the

<sup>35</sup> Lutz and Sikkink 2000.