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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.

* * *

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.[35] 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

[35] Lutz and Sikkink 2000.

concept, as defined in the framing chapter, and discuss its application to their issue-area. Lutz and Sikkink do not turn legalization into some other analytic concept (like information or credible commitment) to carry out the analysis. In particular, they engage explicitly with the concept of obligation, suggesting briefly that human rights norms are often rooted in customary law. They also stress that any existing "right" to democratization can only be a social norm or a customary norm. Their findings support the understanding of obligation that we traced out earlier, an approach rooted in social processes of interaction. To be effective, obligation needs to be felt, and not simply imposed through a hierarchy of sources of law. Precision and delegation play absolutely no role in the promotion of compliance, at least with these human rights norms. Once Lutz and Sikkink find the legalization hypothesis wanting, they move into familiar conceptual turf (for Sikkink), employing the "norm cascade" concept elaborated elsewhere to explain the pattern of compliance they see.[36]

That Lutz and Sikkink focus so strongly on legalization's contribution to compliance brings us back to an important problem. As noted earlier, the framing article is not clear about analytic objectives. If the volume's purpose is primarily to describe legalization, then Lutz and Sikkink's article is beside the point. After all, the framing article does not claim that legalization will lead to greater compliance with law. Consequently, the fact that a more highly legalized area engenders less compliance than a less legalized area is neither here nor there for the framers of the volume. Yet the idea that this finding is somehow beside the point and gives no pause to the framers, as revealed by Kahler's dismissive treatment of Lutz and Sikkink's article in the conclusion, is surprising, since elsewhere the volume's authors claim to investigate the consequences of legalization that, presumably, would involve compliance.[37] More generally, if the purpose of the legalization concept is to generate hypotheses that guide research, one would expect disconfirming evidence of the type Lutz and Sikkink present to result in a rethinking of the basic concept. ***

CONCLUSION

No analysis can do everything, but analysts must justify their choice of focus in the light of other obvious possibilities. The framers of the legalization concept are not explicit, however, about their limited view of

[36] Finnemore and Sikkink 1998.
[37] Goldstein et al. 2000, 386.

law or about alternative views of law (or IR theory) that might yield different understandings of their cases. Further, they have not adequately theorized their definition of legalization so as to provide clear help to the empirical researchers seeking to apply the concept. We have called attention to some alternative views of law and suggested ways they can help us to address gaps in the authors' own framework that might lead researchers to examine important questions neglected in this volume. Our hope is the same as the authors' – that international law and IR scholars will begin to read each other's work more carefully and use each other's insights in analysis. Our suspicion, however, is that this process will not yield a long trail of scholarship on the concept of legalization as defined in the volume discussed here. Rather, as IR scholars read more broadly in international law, they will find rich connections between the two fields and will be able to create joint research agendas that are diverse and fruitful.

PART IV

INTERNATIONAL LAW AND INTERNATIONAL NORMS

10

Quasi-States, Dual Regimes, and Neoclassical Theory: International Jurisprudence and the Third World

Robert H. Jackson

PRACTICE AND THEORY

Since the end of World War II we have been witnessing what in retrospect looks more and more like a revolutionary period of international history when sovereign statehood – the constitutive principle of international society – is subjected to major change. It is perhaps most evident in the remarkable role of the United Nations in fostering new sovereignties around the world. In this paper I argue that African states are juridical artifacts of a highly accommodating regime of international law and politics which is an expression of a twentieth-century anticolonial ideology of self-determination. This civil regime has important implications for international theory and particularly the renewed interest in sovereignty.[1]

The discourse characteristic of sovereignty is jurisprudential rather than sociological: the language of rules rather than roles, prescribed norms instead of observed regularities. The study of sovereignty therefore

[1] See, for example, Stephen D. Krasner, ed., *International Regimes* (Ithaca and London: Cornell University Press, 1983), particularly the editor's introductory and concluding chapters, and John Gerard Ruggie, "Continuity and Transformation in the World Polity," in Robert O. Keohane, ed., *Neorealism and Its Critics* (New York: Columbia University Press, 1986), pp. 130–57. A major new study which has been very influential in my own thinking is Alan James, *Sovereign Statehood: The Basis of International Society* (London: Allen & Unwin, 1986).

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involves us in legal theory, international law, and international institutions in the broadest meaning of these terms: what elsewhere I call the "civil science" approach to the study of politics.[2] By "neoclassical international theory" I refer to what Hedley Bull describes as "theorizing that derives from philosophy, history, and law" or what Martin Wight calls "a tradition of speculation about relations between states": the companion of "political theory."[3]

The constitutional tradition generally tends to assume, with Grotius, Burke, and Oakeshott as against Machiavelli, Kant, and Marx, that theory by and large is the child and not the parent of practice in political life. In Hegel's famous phrase: "The owl of Minerva spreads its wings only with the falling of the dusk."[4] The same point is made by the English philosopher Gilbert Ryle: "Intelligent practice is not a stepchild of theory. On the contrary, theorizing is one practice amongst others and is itself intelligently or stupidly conducted."[5] He goes on to argue that "knowing that" (history) and "knowing why" (philosophy) are categorically different from "knowing how" (practice) in much the same way as being a connoisseur of baseball does not depend at all on the ability to pitch strikes or hit home runs. The reverse can be true also. Players are often inarticulate when it comes to explaining their play to observers. "Knowing how to operate is not knowing how to tell how to operate."[6] It is the unusual diplomat, such as Machiavelli or Kissinger, who is also an international theorist of note. According to this epistemology, the project of the practitioner is to shape the world, whereas that of the scholar is to understand it and explain it in coherent terms.

The revolutionaries and nationalists, statesmen and diplomatists who gave effect to the twentieth-century revolt against the West succeeded completely in transferring sovereign statehood to Africa and other parts

[2] See Robert H. Jackson, "Civil Science: A Rule-Based Paradigm for Comparative Government" (Delivered at the Annual Conference of the American Political Science Association, Chicago, 3–6 September 1987).

[3] Hedley Bull, "International Theory: The Case for a Classical Approach," in K. Knorr and J. N. Rosenau, eds., *Contending Approaches to International Politics* (Princeton: Princeton University Press, 1969), p. 20 and Martin Wight, "Why Is There No International Theory?" in H. Butterfield and M. Wight, eds., *Diplomatic Investigations* (London: Allen & Unwin, 1966), p. 17.

[4] T. M. Knox, ed., *Hegel's Philosophy of Right* (London: Oxford University Press, 1979), p. 13.

[5] G. Ryle, *The Concept of Mind* (Harmondsworth: Penguin Books, 1968), chap. 2.

[6] G. Ryle, "Ordinary Language," in V. C. Chappell, ed., *Ordinary Language* (Englewood Cliffs, N. J.: Prentice-Hall, 1964), p. 32.

of the non-Western world after a century, more or less, of European colonialism. In the course of doing it they fashioned if not a new, then at least a substantially revised, set of international arrangements which differ dramatically from those imperial ones that previously obstructed the globalization of equal sovereignty. ***

CIVIL REGIMES

International regimes may be defined as "implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations."[7] Although much of the emphasis in regime analysis has been in areas of political economy, this definition is highly consistent with civil domains in international relations directly related to sovereign statehood, such as recognition, jurisdiction, intervention, human rights, and so forth. It is similar to Hedley Bull's constitutional conception of rules in a society of states: "general imperative principles which require or authorise" behavior and which "may have the status of law, of morality, of custom or etiquette, or simply of operating procedures or 'rules of the game.'"[8] ***

* * *

Sovereignty, the basic constituent principle of the international civil regime, is not only a normative but essentially a legal relationship. Alan James defines sovereign statehood as "constitutional independence" of other states. "All that constitutional independence means is that a state's constitution is not part of a larger constitutional arrangement."[9] Sovereignty, like any other human convention, is something that can be acquired and lost, claimed or denied, respected or violated, celebrated or condemned, changed or abandoned, and so forth. It is a historical phenomenon.

Because sovereignty is essentially a legal order and basically entails rules, it can very appropriately be understood in terms of a game: an activity constituted and regulated by rules. It is useful to distinguish two logically different but frequently confused kinds of rules: constitutive (civil) and instrumental (organizational). Constitutive rules define

[7] Krasner, *International Regimes,* p. 2. Among contemporary British international theorists the term "international society" is used to denote the same phenomenon. See, for example, Hedley Bull, *The Anarchical Society* (London: Macmillan, 1967), chaps. 1 and 3. The term "international regimes" is preferable because it denotes principles and rules and not merely regularities or norms: in other words, it is a better jurisprudential term.

[8] Bull, "International Theory," p. 54.

[9] James, *Sovereign Statehood,* p. 25.

the game, whereas instrumental rules are maxims derived from experience which contribute to winning play. The constitutive rules of the sovereignty game include legal equality of states, mutual recognition, nonintervention, making and honoring treaties, diplomacy conducted in accordance with accepted practices, and other civil international relations. On the other hand, foreign policy (whether public or secret) and similar stratagems, as well as the state organizations which correspond to them, are among the major instruments employed by statesmen in pursuing their interests. Classical reason of state and therefore realism as an international theory belong logically to the instrumental part of the sovereignty game.[10] Classical rationalism belongs to the constitutive part, with which this article is mainly concerned.

Sovereignty began in Europe as an independence de facto between states but became an independence de jure – which is "sovereignty" properly socalled – as natural barriers were overcome by technology, international relations increased, and statesmen subjected their external actions to customary practices which in the course of time acquired the status of law.[11] As the system expanded globally into new continents and oceans, states encountered along the way eventually had to be classified.[12] Ashanti, a traditional West African kingdom, was independent de facto prior to its conquest by Britain in the late 19th century. The Gold Coast, a British colony in which the kingdom was subordinated, was not sovereign because it was not legally independent of Great Britain. To the contrary, it was constitutionally part of the British Empire.[13] Ghana, the sovereign successor to the Gold Coast since 1957 in which Ashanti continues to be subordinated, is legally independent not only of Britain but all other sovereign states. Such changes of status are typical of the movement of international civil regimes over time.

Sovereignty is an extremely important political value in itself, as the 20th-century revolt against the West by Third World anticolonialists

[10] Classical realism goes one step farther by suggesting that international relations are totally instrumental and not at all an institutionalized game. Hans Morgenthau discloses this conception in his defining statement: "International politics, like all politics, is a struggle for power." *Politics among Nations* (New York: Knopf, 1966), p. 25.

[11] See C. H. McIlwain, *The Growth of Political Thought in the West* (New York: Macmillan, 1932), p. 268.

[12] See the remarkable collection of essays analyzing this process in Hedley Bull and Adam Watson, ed., *The Expansion of International Society* (Oxford: Clarendon Press, 1984), especially Parts I and II.

[13] See Martin Wight, *British Colonial Constitutions 1947* (Oxford: Clarendon Press, 1952), pp. 80–81.

strikingly indicates. It is significant for this reason alone. In addition, however, it is consequential for other political goods, domestic and international, such as order, justice, economic welfare, and so forth.[14] Sovereignty, like all constitutive rules, has important consequences, intended and unintended. The rules are intrinsically interesting for international lawyers who, as practitioners, treat the law of sovereignty as a text to master. For international theorists, however, sovereignty is a language to understand.[15] Where the rules lead are usually more important than the rules themselves. The unintended consequences are often most interesting theoretically because they are also unexpected and therefore disclose something similar to the refutation of a hypothesis in science.[16] An example relevant to this discussion is the surprising civil and socioeconomic adversities which befell many African jurisdictions following their acquisition of sovereignty.

As with other constitutive rules, there are important conditions which make sovereignty attainable or unattainable in any particular case. In 1885, for example, the constitutional independence of African states was not only unattainable but also inconceivable. *** A hundred years later the rules and the conditions had changed fundamentally. Among the most important conditions affecting changes in the sovereignty game are the differential power and wealth of states, of course, but also prevailing international moralities and ideologies. In some cases the latter may be the most significant, as I suggest below in discussing the spread of sovereignty to tropical Africa.

It should by now be evident that colonialism, in addition to being a socioeconomic phenomenon, is in important and indeed fundamental respects an international civil regime grounded in the law of sovereignty. Colonization and decolonization therefore denote changes in the principles and rules by which people are governed: their movement from one regime to another. More significant than this, however, is a fundamental change of regime which has happened in connection with colonialism: international regime change. *** Decolonization is the sort of basic historical change which we have perhaps come to take for granted but

[14] See J. Roland Pennock, "Political Development, Political Systems, and Political Goods," *World Politics* 18 (1966), pp. 415–34.

[15] The distinction between politics as a literature and as a language is explored by Michael Oakeshott in "The Study of 'Politics' in a University," *Rationalism in Politics and Other Essays* (London: Methuen, 1962), p. 313.

[16] According to Popper this is how science advances. See his *Conjectures and Refutations* (New York: Harper & Row Torchbooks, 1968).

which signals a fundamental alteration in the constitutive principles of sovereignty, particularly as regards the Third World periphery.

DECOLONIZATION

President John F. Kennedy once characterized decolonization as "a worldwide declaration of independence."[17] This is certainly true of sub-Saharan Africa, where in 1955 there were only three independent countries: Ethiopia, Liberia, and South Africa. By the end of 1965, there were thirty-one, and decolonization was looming even in the so-called white redoubt of southern Africa. By 1980, the entire continent was sovereign apart from Namibia.

African decolonization, like the partition of the continent three-quarters of a century earlier, is the instance of a straight line in international history: a political artifact largely and in some cases almost entirely divorced from substantive conditions; a supreme example of "rationalism" in Michael Oakeshott's meaning of politics "as the crow flies."[18] It is not only possible but has become conventional to regard a single year – 1960, the year of Prime Minister Harold Macmillan's famous "wind of change" speech and of the decolonization of the entire French African empire – as a historical dividing line separating the era of European colonialism from that of African independence. That year is matched only by 1884–85, when the continent was subjected to international partition according to rules established by a conference of mainly European states meeting in Berlin.

The political map of Africa is devoid by and large of indigenous determinations in its origins. All but a very few traditional political systems were subordinated or submerged by the colonialists. Decolonization rarely resulted in their elevation. "Most of the boundary lines in Africa are diplomatic in origin and, in very many instances, they are that abomination of the scientific geographers, the straight line."[19] In colonial Africa, according to an important study, "the ultimate decisions in the allocation of territories and the delimitation of borders were always made by Europeans."[20] Despite the fact that it was European in origin, the

[17] Quoted by E. Plischke, *Microstates in World Affairs* (Washington, DC.: American Enterprise Institute, 1977), p. i.
[18] Oakeshott, *Rationalism in Politics*, p. 69.
[19] G. L. Beer, *African Questions at the Paris Peace Conference* (New York: Scribners, 1923), p. 65.
[20] S. Touval, *The Boundary Politics of Independent Africa* (Cambridge, Mass.: Harvard University Press, 1972), p. 4.