

Describe the Concept of Legalization

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ABSTRACT:

To demonstrate how law and politics are connected across a broad variety of institutional forms and to frame the analytical and empirical papers that will follow in this book, we establish an empirically grounded definition of international legalization. Three characteristics of institutionalization known as duty, precision, and delegation describe international legality. States are considered to be under obligations when they are held to laws or pledges and are as a result bound by the fundamental principles and practices of international law. Precision refers to how clearly the regulations define the behaviour they demand, permit, or forbid. Delegation gives third parties the power to carry out rules, including their interpretation, application, resolution of conflicts, and (potentially) future rule-making. Each of these dimensions is a question of degree and gradation and is conceptually independent. A tremendous range of international legality results from their varied mixes. We show a continuum from "hard" legalization, which is often associated with domestic legal systems, through different types of "soft" legalization, to circumstances in which law is essentially absent. The majority of international legalization occurs in the middle, when players mix and make use of various levels of responsibility, accuracy, and delegation to produce deftly nuanced combinations of politics and law.

KEYWORDS:

International, Law, Legal, Legalization, Rules.

I. INTRODUCTION

The term "legalization" describes a certain collection of traits that institutions may (or may not) have. Obligation, accuracy, and delegation are the three aspects along which these qualities are characterized. An obligation is when a state or other actor is constrained by a single rule, a group of related rules, or both. More specifically, it implies that they are subject to the broad principles, practices, and rhetoric of international law as well as often local law since they are obligated by the rule or obligation in question. Precision refers to how clearly regulations describe the behavior they demand, permit, or forbid. Delegation indicates that the power to implement, interpret, and apply the rules, to settle disputes, and (perhaps) to create new rules has been given to a third party. Each of these dimensions may change on its own and each is an issue of degree and gradation rather than a strict dichotomy. The idea of legalization therefore encompasses a multidimensional continuum that ranges from the "ideal type" of legalization, where all three properties are maximized, to "hard" legalization, where all three (or at least obligation and delegation) are high, through various forms of partial or "soft" legalization involving various combinations of attributes, and finally to the total absence of legalization, which is another ideal type [1], [2]. None of these factors, much less the whole legalization range, can be completely operationalized. We do, however, take into account a variety of ways that players modify the aspects of legalization in the section titled "The Dimensions of Legalization," and we also provide various associated indications of the strength or weakness of legal arrangements.

By straying from the traditional image of law as something that must be enforced by a coercive sovereign, our theory of legalization provides political scientists and lawyers with a shared understanding. This criterion has guided much of the thought on the subject of international relations. This threshold is essentially unmet by any international organization, which has resulted in a general disrespect for the significance of international law. However, the focus of theoretical study in international relations has turned away from the need of centralized enforcement and toward more institutionalized means of fostering cooperation. Additionally, given the absence of centralized pressure, the types of legalization that we saw at the turn of the century are thriving [3], [4].

The many levels of legalization

The diversity of each of its three dimensions, and therefore of the total legality of international norms, agreements, and regimes, is a key aspect of our understanding of legalization. Each component of the definition is

ranging from the weakest form (the absence of legal obligation, precision, or delegation, other than as provided by the background operation of the international legal system) to the strongest or "hardest" form (the presence of legal obligation, precision, or delegation) at the right. Figure 1 further emphasizes the independence of these dimensions from one another: theoretically, at least, the creators of a legal instrument are free to combine any degree of responsibility, accuracy, and delegation to create a legal institution that is perfectly suited to their own requirements. In reality, as we'll demonstrate, certain combinations are used more often than others [5], [6].

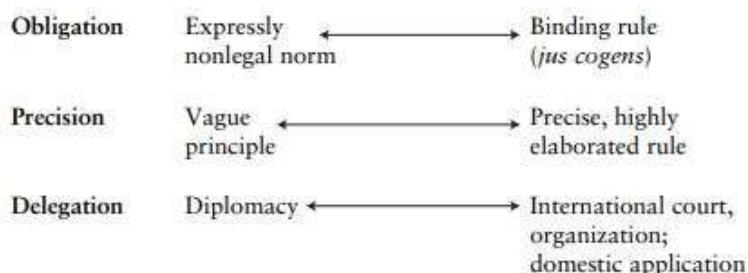


Figure 1: The dimensions of legalization.

It would be incorrect to equate the left and right end points of these dimensions with "law" and "politics," respectively, since politics persists (although in various forms) even in places where there is law. The designations in Figure 1 imply that both norms (like ethical principles and regulations of practice) and institutions (like diplomacy and the balance of power) may exist beyond these dimensions, therefore it is important not to mistakenly assume that the left-hand end points represent the lack of norms or institutions. Simply said, Figure 1 depicts the elements of legal institutions. One may visualize where a certain arrangement sits on the three dimensions of legality using the framework of Figure 1. For instance, the World Trade Organization's (WTO) Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) is strong in all three areas. Despite being legally binding and highly specific, the 1963 Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space, and Under Water delegated practically little legal power. Furthermore, while it was quite detailed, the 1975 Final Act of the Helsinki Conference on Security and Cooperation in Europe was expressly not legally enforceable and conferred minimal power. The structure of Figure 1 may also be used to show changes in the level of legality over time within a single international regime or document (John King Gamble, Jr. has conducted a comparable internal study of the UN Convention on the Law of the Sea) [7], [8].

For instance, the Universal Declaration of Human Rights was very weakly organized and overtly aspirational; over time, the human rights system has developed into more rigid forms. The International Covenant on Civil and Political Rights establishes (limited) implementing structures, lays out principles that were only vaguely mentioned in the declaration, and imposes obligatory legal responsibilities. Here, we define duty in order to make our presentation clear accuracy, and the degree of delegation. The eight potential combinations of these value rows are sorted approximately in decreasing order of legality, with legal obligation a particularly significant aspect of legalization being assigned the greatest weight and delegation coming in second and accuracy receiving the least. The continuous nature of the legalization dimensions, as demonstrated in Figure 1, is sacrificed by a binary categorization, which also makes it challenging to represent intermediate forms. However, the chart serves as a handy shorthand for often used clusters of parts, illustrates the breadth of institutional options covered by the idea of legalization, and underlines the costs associated with weakening (or strengthening) certain aspects [9], [10].

II. DISCUSSION

This table Row I represents circumstances that are close to the ideal sort of complete legalization, such as well-established domestic legal systems. This is where a lot of European Community (EC) legislation belongs. Additionally, the WTO oversees a remarkably comprehensive set of legally binding international agreements. It also runs a dispute-settlement mechanism that includes an appellate tribunal with significant authority to interpret and apply those agreements in the course of resolving specific disputes, even though that authority has not yet been fully established. Forms of International Legalization is depicted below in Table 1.

Rows II–III reflect circumstances when the law continues to be fairly strict, with a high level of legal responsibility and one of the other two factors being rated as "high." Many of the regimes in row II should be regarded as nearly equal in terms of legalization to those in row I because the institutional response to

uncertainty, even in domestic legal systems, frequently and effectively combines relatively ambiguous rules and strong delegation (the Sherman Antitrust Act in the United States is a prime example). The initial European Economic Community (EEC) regulations of competition law (Articles 85 and 86 of the Treaty of Rome) were, for the most part, rather ambiguous, much like the Sherman Act. But over time, a substantial body of law was created as a result of the European courts using their interpretative power and the Commission and Council passing rules. Contrarily, the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer (row III) established a rather detailed and comprehensive set of legally enforceable guidelines without assigning any considerable degree of authority for its implementation. We see this arrangement as less highly legalized than others previously mentioned since third-party interpretation and execution of laws is so essential to legal institutions.

The challenges of organizing and dichotomizing our three dimensions become increasingly obvious as we down the table. Saying that the arrangements in row IV are inevitably more legalized than those in row V, for instance, is not informative; this conclusion needs a more thorough description of the types of obligation, precision, and delegation utilized in each situation. In certain circumstances, even if the latter was more specific and required more delegation, a strong legal requirement (such as the original Vienna Ozone Convention, row V) may be more legalized than a lesser commitment (such as Agenda 21, row IV). Additionally, at lower levels, the relative importance of delegation in relation to other aspects becomes less obvious since really "high" delegation, such as judicial or quasi-judicial power, practically never coexists with low levels of legal responsibility.

Table 1: Forms of International Legalization

Type	Obligation	Precision	Delegation	Examples
Ideal type:				
Hard law				
I	High	High	High	EC; WTO – TRIPs; European human rights convention; International Criminal Court
II	High	Low	High	EEC Antitrust, Art. 85–6; WTO – national treatment
III	High	High	Low	U.S.–Soviet arms control treaties; Montreal Protocol
IV	Low	High	High (moderate)	UN Committee on Sustainable Development (Agenda 21)
V	High	Low	Low	Vienna Ozone Convention; European Framework Convention on National Minorities
VI	Low	Low	High (moderate)	UN specialized agencies; World Bank; OSCE High Commissioner on National Minorities
VII	Low	High	Low	Helsinki Final Act; Nonbinding Forest Principles; technical standards
VIII	Low	Low	Low	Group of 7; spheres of influence; balance of power

Rows IV and VI often exhibit administrative or operational forms of delegation. A precise but optional agreement (like the Helsinki Final Act, row VII) might therefore be considered to be more highly legalized than an ambiguous but optional agreement that is accompanied by a limited administrative delegation (like the High Commissioner on National Minorities of the Organization for Security and Cooperation in Europe, row VI). "Balances of power" and "spheres of influence" are examples of rule systems including the extremely low levels of legality in row VIII. In any true sense, they are not legal institutions. Rules of practice⁶ and diplomatic agreements, such as the Concert of Europe, served to define the balance of power.

During the Cold War, spheres of influence were ill-defined, duties were primarily unwritten but somewhat reflected in treaties, and there was no institutional oversight. We finally reach the ideal form of anarchy that is prevalent in international relations theory at the base of the table. Anarchy is a term of art that is readily

misunderstood since even circumstances that are seen as severe examples of global anarchy are really organized by laws, most notably laws establishing state sovereignty, that have legal or pre-legal qualities. Hedley Bull describes the "anarchical society" as being comprised of institutions like sovereignty, international law, diplomacy, and the balance of power. Furthermore, there is a huge difference conceptually between the weakest kinds of legalization and the total lack of norms and institutions. We do not take the stance that more legalization or any specific kind of legalization is intrinsically preferable given the variety of options. In "Hard and Soft Law in International Governance" (this book), Kenneth Abbott and Duncan Snidal argue that institutional structures at the middle or lower levels may best accommodate the varied interests of interested players.

The dimensions of legalization

1. Obligation

States and other subjects (such as international organizations) are subject to a certain form of legally enforceable obligation as a result of legal norms and commitments. Compared to responsibilities that arise only out of morality, comity, or compulsion, legal obligations are distinct in nature. As was previously said, legal duties put the established norms, practices, and discursive structures of the international legal system into action. *Pacta sunt servanda*, a basic tenet of international law, states that principles and pledges included in recognized international agreements are considered binding, subject to certain exceptions or defenses, and not susceptible to disregard when preferences change. They must be carried out honestly notwithstanding any conflicting domestic law rules. In addition, international law offers a number of technical guidelines on issues including creation, reservations, and revisions as well as principles for interpreting agreements. It is acknowledged that breaking a law results in "legal responsibility," which does not need for particular governmental agencies to demonstrate their intention.

A certain kind of speech is evoked while establishing a commitment as a legal norm. Discussion of topics only in terms of interests or power is no longer acceptable, despite the fact that actors may dispute about how to interpret or apply a set of rules. Along the spectrum of duty, commitments may differ significantly. Article 24 of the Vienna Convention on Diplomatic Relations, which states in its entirety, "The archives and documents of the mission shall be inviolable at any time and wherever they may be," is an example of a rigid legal requirement. This treaty as a whole indicates the parties' intention to establish legally enforceable commitments controlled by international law. It employs the language of obligation, requests the customary legal formalities of signature, ratification, and entry into force, calls for the registration of the agreement and national ratification documents with the UN, is referred to as a "Convention," and describes how it relates to existing principles of customary international law. In formal, even "legalistic" words, Article 24 imposes an unqualified duty.

Instruments that expressly deny any intention to establish legal duties are at the opposite extreme of the range. The 1975 Helsinki Final Act is the most well-known illustration. The parties indicated that this agreement was not a "arrangement... governed by international law" by stating that it could not be registered with the UN. Witness the 1992 "Non-Legally Binding Authoritative Statement of Principles for a Global Consensus" on sustainable management of forests for examples of other instruments that are even more clear. Numerous intergovernmental working agreements are expressly non-binding. In general, "recommendations" and "guidelines," such as the OECD Guidelines on Multinational Enterprises, are not meant to impose obligatory legal duties.

Actors use a variety of strategies to shift legal responsibility between these two poles, often resulting in startling differences between form and content. On the one hand, clauses in legally enforceable agreements are typically written to limit their power. On the other hand, a lot of documents include obviously unqualified responsibilities despite the fact that the organizations or processes that produced them lack any direct legal-making capacity! For instance, despite the assembly's lack of formal legislative authority, several UN General Assembly pronouncements outline legal standards. Even nonbinding pronouncements have the power to influence nations' actions over time, as well as other actors' expectations of proper behavior. This may result in the development of customary law or the adoption of more rigid accords. Soft pledges may potentially violate the legal requirement of good faith compliance, which would make future developments less objectionable. The legal ramifications of soft instruments are widely debated in numerous topical areas. Supporters make the case for immediate and global legal effect under both conventional (such as the notion that an instrument codifies pre-existing customary law or interprets an organizational charter) and novel (such as the notion that an instrument reflects an international "consensus" or "instant custom") theories. Therefore, soft normative tools as acts of international governance have a well crafted ambiguity.

2. Precision

A precise rule outlines exactly and explicitly what is expected of a state or other actor in a certain set of circumstances, including the desired goal and the methods for attaining it. In other words, accuracy reduces the range of acceptable interpretation. Such rules are "determinate," to use Thomas Franck's terminology. Precision for a group of rules indicates that the rules are connected to one another in a manner that is not contradictory and that each rule in the set is unambiguous. This creates a framework that allows for case-by-case interpretation to be carried out coherently. Although not always, precise sets of rules are often quite detailed or thick, laying down the circumstances of application, defining necessary or prohibited conduct in various scenarios, and so on.

Do not drive faster than 50 mph is an example of a normative directive that is often expressed as a very specific "rule" in highly developed legal systems. However, many significant directives are also expressed as relatively generic "standards," such as "do not drive recklessly." A society chooses *ex ante* which types of conduct are undesirable the more "rule-like" a normative prescription is; such judgments are often made by legislative bodies. The more "standard-like" a prescription, the more a community decides this *ex post*, in respect to particular sets of circumstances; such choices are often left to the courts. Despite sacrificing some *ex ante* clarity, standards provide courts to take into consideration equitable elements related to specific actors or circumstances. Because domestic legal systems have established courts and agencies that can interpret and apply them (high delegation), they are able to use standards like "due care" and the Sherman Act's ban on "conspiracies in restraint of trade." As a result, they have built up increasingly precise bodies of precedent.

Judicial, quasi-judicial, and administrative powers are less established and less commonly utilized in the majority of international relations fields. Imprecise rules are, in reality, most often understood and implemented by the same players whose behaviour they are designed to regulate in this thin institutional setting. Additionally, there is no centralized legislative to invalidate improper, self-serving interpretations since the majority of international rules are established via the direct assent or practice of nations. Therefore, clarity and elaboration are two particularly important characteristics of legalization on a global scale. The WTO trade agreements, environmental agreements like the Montreal (ozone) and Kyoto (climate change) Protocols, and the arms control treaties developed during the Strategic Arms Limitation Talks (SALT) and subsequent negotiations are just a few examples of how precise and elaborate international law is becoming. In fact, a lot of contemporary treaties are specifically made to codify and advance the evolution of customary law in order to strengthen determinacy and reduce ambiguity. The Vienna Conventions on the Law of Treaties are prime instances of

Treaties, agreements, and significant provisions of the UN Convention on the Law of the Sea. For instance, the parties must "provide for strong labor standards" under the labor-related side agreement to the North American Free Trade Agreement. According to commercial treaties, nations must provide "favorable conditions" for investment and refrain from "unreasonable" laws. Numerous accords request that states "negotiate" or "consult," but do not identify any specific processes. All of these clauses provide the involved parties a lot of leeway, and many of them are so wide that it is impossible to properly gauge compliance, which calls into question their legal validity. Such imprecision, as Abbott and Snidal underline in their essay, often results from a conscious decision given the realities of local and international politics rather than a failure of legal draftsmanship. However, when it happens in a delegation of power and gives an international organization more ability to interpret it, imprecision is not the same as state discretion. A current illustration amplifies the point. The United States aimed to prevent any significant jurisdiction being delegated at the 1998 Rome conference that established the charter for an international criminal court. Accordingly, it underlined in its recommendation the need for "clear, precise, and specific definitions of each offense" falling within the purview of the court.

3. Delegation

The third aspect of legalization is how much governments and other players give certain third parties, such courts, arbitrators, and administrative bodies, the power to carry out agreements. In accordance with accepted theories of international law, the distinctive types of legal delegation are third-party conflict resolution procedures empowered to interpret rules and apply them to specific situations (and therefore, in effect, to formulate new rules, at least initially). Mechanisms for resolving disputes are best legalized when the parties consent to binding decisions by third parties based on unambiguous, generally applicable rules; they are least legalized when the process involves political bargaining between parties who are free to accept or reject proposals without having to provide a reason. As shown, dispute-settlement mechanisms in practice cover a very wide range: from no delegation (as in traditional political decision-making) to institutionalized forms of bargaining, including mechanisms to foster agreement, like mediation (available within the WTO) and conciliation (an option under the Law of the Sea Convention); nonbinding arbitration (basically the mechanism of the old GATT); and binding arbitration. The acts of decision-makers are progressively controlled and justified by rules as one progresses up the delegation continuum. (Willingness to delegate often relies on how much one

believes these restrictions might restrict the power being transferred.) Adoption of adjudication guidelines will almost certainly accompany delegation to third-party adjudicators. As it resolves disputes between rules or examines the legitimacy of rules that are in question, the adjudicative body may then determine that it is essential to identify or construct rules of recognition and modification.

Legal power may be transferred in areas other than conflict resolution. A variety of organizations, from simple consultative agreements to fully-fledged international bureaucracies, contribute to the elaboration of hazy legal standards, the implementation of agreed-upon rules, and the facilitation of enforcement. Legalized delegation adds new players and new political structures into international interactions, particularly in its more extreme manifestations. Delegated legal authority holders have their own interests, which may be more or less effectively restrained by the restrictions attached to the delegation of power and the ensuing member state supervision. Through influence or active engagement at the supranational level, transnational coalitions of nonstate entities also pursue their interests, sometimes with greater divergence from the objectives of member states. The resolution of conflicts, the adoption or creation of new rules, the implementation of accepted standards, and the response to rule infractions all produce their own kinds of politics, which aid in the restructuring of conventional interstate politics.

Highly legalized institutions are those in which rules are precise (or can be made precise through the use of delegated authority) and in which third parties acting under the constraint of rules have been given the authority to interpret and apply the rules. These institutions also have links to the established rules and principles of international law. However, there is no distinct boundary separating institutions that are lawful from those that are not. Instead, there is a discernible continuum that extends from conditions of little legality to several types of soft law, each with its own unique combination of traits. This continuum assumes that authorized institutions are to some extent distinct from other kinds of international organizations, and that this divergence may include characteristics related to technique, procedure, culture, and information.²³ Legal processes involve a discourse framed in terms of reason, interpretation, technical knowledge, and argument, which is frequently followed by deliberation and judgment by impartial parties. This is in contrast to mediation, for example, where mediators may be free to broker a deal based on the "naked preferences" of the parties. Different actors may participate in the process, but they are restricted from using the same arguments they would use in a non-legal setting. Legal judgments must also be founded on considerations that apply to all persons involved in a case who are in a comparable situation, not just the parties to the current dispute.

A recurring issue in our notion of legalization is the denial of a strict contrast between "legalization" and "world politics." At all stages of legalization, politics and the law are linked. There is a lot of difficulty in determining the causal impacts of legalization as a result of this interaction, which is represented in many of the essays in this collection. In addition to their legality, there are several more reasons why regulations are followed. Other moral and practical factors also come into play, such as concerns about reciprocity, reputation, and harm to important governmental institutions. However, it is logical to suppose that political and legal factors often interact to affect conduct. Even "pure" political negotiation, at one extreme, is affected by underlying legal standards like sovereignty laws. On the other hand, even international adjudication occurs in the "shadow of politics": parties with an interest in the matter influence the proceedings and set the agenda; judges are typically aware of the political ramifications of potential decisions and attempt to predict the responses of political authorities. Between these two extremes, which is where the majority of international legalization occurs, players combine and invoke different levels of responsibility, accuracy, and delegation to produce deft combinations of politics and law. According to Clausewitz, "law is a continuation of political intercourse, with the addition of other means" in each of these contexts.

III. CONCLUSION

The notion of legalization is intricate and multidimensional, with important social ramifications. In this chapter, we have examined many types of legalization, such as the legalization of gambling, the legalization of drugs, and the legalization of same-sex unions. In order to explore all sides of the debate, social, economic, and ethical factors have been taken into account. The effect of legalization varies depending on the particular setting and the activity or behavior under consideration, according to one important result. For instance, legalizing drugs may lower crime rates, increase tax income, and reallocate funds to public health programs. However, it also prompts worries about the prevalence of addiction and the potential for unfavorable societal effects. Similar to this, it has been shown that legalizing same-sex unions encourages equality and individual liberties while challenging conventional ideas of marriage. It may, however, encounter opposition from conservative organizations and provide difficulties for both mainstream acceptability and religious freedom. The economic advantages of legalizing gambling are often emphasized, including increased income and job development. However, there are

worries over the possibility of addiction, rising crime rates, and detrimental societal effects. In general, the idea of legalizing necessitates rigorous analysis of its possible effects and trade-offs. Policymakers must balance the risks and rewards while considering social norms, moral standards, and the long-term effects on many stakeholders. To resolve any unexpected repercussions and guarantee the efficacy of the permitted operations, continuing review and regulation are also important.

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