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Alternatives to "Legalization": Richer Views of Law and Politics

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ABSTRACT:

Legalization, according to the authors of "Legalization and World Politics," is the level of accountability, accuracy, and delegation that international organizations have. We contend that this definition is too restrictive. The practice, beliefs, and traditions of civilizations are profoundly ingrained in the law, which is a vast social phenomenon. It is important to pay attention to the validity of law, how it accords with social custom and practice, the function of legal reason, and how adherent people are to legal procedures, including their involvement in their creation. We look at three examples of "legalization" that are presented in the collection and demonstrate how a deeper analysis of the function of law in politics might result in ideas that are more intellectually sound and beneficial to empirical study.

KEYWORDS:

International, Law, Legal, Legalization, Politics.

I. INTRODUCTION

One school of thought on international law, based on H. L. A. Hart's legal theory, and one school of thought on international politics, neoliberal institutionalism, are expertly linked by the authors of "Legalization and World Politics" (special issue of IO, summer 2000). The linkages between the two fields of study go deeper and further than the volume suggests. International law is more than the formal, treaty-based legislation on which the writers of the book concentrate their work, as has long been recognized by students of international law. Law is a vast social phenomenon that is influenced by the interactions between cultures and is profoundly ingrained in the customs, beliefs, and practices of those communities. This deeper understanding of how law works is evident in customary international law as well as the growing amount of what has been dubbed "interstitial law," or the unwritten norms that exist inside and outside of formal normative frameworks. The interplay of overlapping state and nonstate normative systems is the main subject of legal pluralist analyses of national and international legal systems. We demonstrate that a richer understanding of international law and how it affects behavior makes room for connections between international legal scholarship and research in international relations that are not immediately apparent from the way the "legalization" phenomenon is framed in the IO volume. If they provide conceptual clarity and make it easier to operationalize ideas, narrow and stylized frameworks like this one could be helpful. The empirical applications of legalization in the collection, however, imply the opposite: the articles show that the definition of legalization in the volume is tangential, has to be revised, or leads to incorrect assumptions [1], [2].

A richer view of international law

The volume's creators were meticulous in how they defined its terminology. The term "legalization" refers to a certain set of qualities that institutions may (or may not) have, including responsibility, accuracy, and delegating. Along a continuum, each of these characteristics may exist to varied degrees, and each characteristic may change independently of the others. This focus on definitions is beneficial and helps the book to be coherent, but using the generic word "legalization" to describe just a few aspects of the legislation is misleading. It implies that the body of codified and institutionalized qualities that comprise law is and can only be this small set. Since the structural manifestations of law in public agencies seem to be involved, the process the authors study could be better described as legal bureaucratization. We demonstrate that the authors' three components of legalization lack theoretical consistency and generate more difficulties than they resolve without a larger conception of law that prompts us to focus on legal practices, techniques, institutions, and processes creating legitimacy. Although significant, the perspective on law given in the book is constrained [3], [4].

In it, formal treaty negotiations or court cases serve as the primary means of constructing legislation. Most often in formal institutionalized situations, the procedures of law are seen as methods of resolving disputes. The "international legal acts" included in the volume's preface to represent the phenomena of legalization are mostly illustrations of tribunal judgments. Only the stated responsibilities imposed by treaties serve as the secondary proof of legality. In this perspective, law solely serves as a restraint; it has no generating or creative abilities in social life. Law, however, operates in the real world to both define relationships and set boundaries for permissible conduct. The setting that permits the formal articulation of treaty norms is established by the concept of state sovereignty, which is both a legal and political construction. Similar to this, property rights the subject of conflict between political actors in many of the volume's articles are also dynamic creations brought about by legislation. Oddly, given this combination of writers, even the clearly discussed importance of formal law in the creation and structuring of organizations like the IMF, GATT, and WTO is overlooked. Their perspective on the law is predominantly liberal and positivist. It is also restricted to the bureaucratic formality that Weber outlined, making it overwhelmingly "Western" in a constrained sense. We don't mean to suggest that positivism, liberalism, or Western law are uninteresting theoretical frameworks, but a full study of the function of law in international politics that only considers formal institutions is at most incomplete [5], [6].

Despite the volume's editors' best attempts to clarify terminology and clearly bracket topics, it is ultimately impossible to determine precisely what the writers want to prove and what analytical work their idea of legalization is meant to produce. Is legalization an independent or dependent variable? What additional variables, if any, may explain legalization, and how significant are them if they do? What additional independent factors should be taken into account in evaluating legalization's function and how may they interact with legalization if legalization explains certain elements of state behavior? Do the three key characteristics of legalization have any common origins or consequences, and how would we know if they did (or did not)? Are both crucial questions for the writers?

Political scientists have known for decades that many of the most significant aspects of politics are not well represented by formal institutions. Indeed, the definition of institutions used by the authors of this book, which concentrates attention beyond their formal qualities, is rather wide and has become a typical one in political science. Institutions are "rules, conventions, and decision-making processes" that influence expectations, interests, and conduct. It is terrible and inappropriate to combine such a wide knowledge of institutions with a formal, limited grasp of law. Our more complex knowledge of institutions would be enhanced by a deeper grasp of law, which would also result in a more comprehensive collaborative study program. To give an example, we discuss three interconnected aspects of international law that were left out of the volume but are essential to comprehending how it affects global politics and how to understand the very particular legalization phenomenon that the volume's authors use [7], [8].

Custom

The most glaring victim of the volume's restrictive definition of legalization is customary international law; with which it engages hardly at all. Any evaluation of the persuasive power of law that fails to take the customary law components of issues like state responsibility, legal personality, territory, human rights, and the use of force seriously is sure to result in a biased viewpoint. For instance, customary law on the use of force coexists with, enhances, and even alters standards established by treaties.12 No one studying this topic can afford to ignore the customary law of self-defense or the effect of the idea of jus cogens (peremptory norms) on the attitudes of states toward the legitimate use of force, even though the UN Charter and humanitarian law treaties establish an explicit framework of norms limiting the use of force in international relations. It is not unexpected that the book only briefly discusses security-related topics since these topics cannot be included in a limited judicial and treaty-based viewpoint on the impact of law on international affairs [9], [10].

II. DISCUSSION

Defining Characteristics of Law

The decision to make duty, specificity, and delegation the distinguishing qualities of legality is a second, connected problem. The authors of the book carefully explain these terminology, their definitions, and their traits, but they don't really explain why these three legal aspects are more important than others in the wider world of legal features. These three characteristics in no way define law, separate it from other forms of normativity, or explain how law acquires its authority or, if they do, the book doesn't make the case. Particularly challenging concepts are delegating and precision. Norms are rather ambiguous in a few well-established fields of international law with significant histories of influence and adherence. Determining maritime borders, which is frequently done on the basis of "equity," the foundations of state criminal jurisdiction, where overlapping rules

are the norm, and state responsibility, which includes a very broad duty not to knowingly allow one's territory to be used in a way that harms another state, are some examples. The vast majority of international law that is in operation also does not rely in any way on broad "delegation" of decision-making power. Without any means for compelled adjudication outside of the European framework, the whole human rights legislation is active and has an impact on international politics. International environmental law has a pattern of impact that is akin to that of delegation in the absence of delegation. Numerous international environmental agreements still operate on the principles of information exchange and voluntary adherence.

Modern treaties often base their procedures for encouraging implementation on the need for positive reinforcement of duties rather than on adjudication and penalties for noncompliance. There isn't a lot of power to make decisions delegated. It is just not obvious why delegation and accuracy could be seen to be defining characteristics of legalization or how they increase the concept's analytical potency. Furthermore, the link between these three traits has not been fully investigated, which is a critical gap given that these traits might often lead to conflicting outcomes. When potential participants in legal systems are scared off by concerns about intricate, inflexible rules, more accuracy might result in less duty (a claim that is actually confirmed by the description of the WTO provided by Judith Goldstein and Lisa Martin). As opposed to what the proponents of legalization believe, delegation of decision-making may result in less clarity in the regulations. It is evident that the International Court of Justice's rulings in border delimitation cases are lawful, significant, and successful in encouraging compliance, yet they are very vague. It is unclear what we gain by merging notions with such intricate and tension interrelationships as opposed to disaggregating them.

The idea of duty, which is probably the main focus of both lawyers and political scientists concerned in how norms shape state action, is perhaps the most difficult aspect of the book. The framework of legalization in this book is based on obligations, yet the authors provide no theory of obligations and exhibit a startling lack of interest in how obligations may be created. Legal duties are described in a completely circular manner with reference to their outcomes in the volume's lead article: "Legal obligations bring into play the established norms, procedures, and forms of discourse of the international legal system." Although this method does not explain how responsibility produces these outcomes, we may determine obligation by what it does. The conceptualization is exceedingly formal, contractual, and shallow to the degree that the grounds of obligation are even included in the framing article. When parties sign treaties or other formal agreements, obligations are formed. Choice, assumed made by agents who are interested in maximizing their own utility, is the mechanism for producing obligation. However, it is widely known to both legal and international relations (IR) academics that conduct is often not determined only by contractual duties.

It's possible that the framers might have explored some other legal aspects and created more solid notions if they had given these defining traits more serious thought. The idea of legitimacy, for instance, is conspicuously missing from the different theories of duty, despite the fact that legal academics have long emphasized legitimacy as a crucial source of responsibility and the "compliance pull" in law. It has been suggested that there are many interconnected sources of legitimacy in law. Attention to internal legal standards, which we in the liberal democratic West appear to take for granted but which scholars of repression will recognize as crucial, is one way legitimacy is produced. Only rules that are generally applicable, exhibit clarity or determinacy, are coherent with other rules, are made public (so that people are aware of them), attempt to avoid retroactivity, are relatively constant over time, are practicable to implement, and are consistent with official action are laws that are legitimate. one that upholds these ideals is more likely to inspire a feeling of responsibility and a corresponding shift in conduct than one that does not.

The ability of system agents to comprehend the justification for rules is another need for legal validity. Agents' comprehension of the need for law is increased when they participate in its creation. Last but not least, adherence to a certain legal reasoning that all parties comprehend and accept contributes to the legitimacy of the collaborative creation of law. Legal claims are only valid and convincing if they are supported by logical reasoning that draws comparisons to prior practice, demonstrates consistency with the general systemic logic of existing law, and takes into account the greater moral fabric of society as well as current social ambitions. In comparison to legislation that lacks these characteristics, law that demonstrates this form of rationality that is, law that is seen as essential, includes those it binds in its creation, and adheres to internal legal values is more likely to be seen as legitimate.

Legitimate law creates duty, not just formally but also viscerally. Thus, legitimacy establishes crucial connections between duty and conduct. The writers of the IO volume do not treat legitimacy as a component of the legalization phenomena, despite the fact that this is a significant topic in international law studies and one that IR academics do read. They never look into how duty, accuracy, or delegation relate to legitimacy, and they never

look into other legitimacy theories. We believe that legitimacy is a preceding factor that creates a feeling of commitment and gives those who delegate the authority to do so. Almost definitely, differences in legalization are related to differences in legitimacy. It is likely that the legitimacy of these formal legal processes generally as well as the legitimacy of the specific configurations of these processes (the type of delegation, the nature, and the content of the obligation) that these processes embody will determine the spread of the formal legal institutions investigated in the volume.

The Legal Process

It's also important to think about the nature of legalization as a whole. Legalization is equated with three characteristics of the form of this artifact (obligation, delegation, and precision) by the writers of this book, who see law as an artifact formed by state decision. Thus, in their eyes, politics becomes "legalized" since it exhibits these three characteristics. Thoughts regarding what justifies law, however, lead to the discovery of another alternative. Legalization, and hence law, may be far more about the process than the form or content. The methods by which law is made and implemented, including adherence to legal process norms, actors' capacity to participate and feel their impact, and the application of legal forms of reasoning, account for much of what makes law legitimate and distinguishes it from other kinds of normativity. In order to explain change, which many of us, including the authors of the collection, are interested in, a vision of legalization that placed more emphasis on legal relationships and processes than on forms would be more dynamic and effective. Contrary to Thomas M. Franck, we do not contend that the existence of procedure alone constitutes the legitimacy of law. It is insufficient to seek the force of law merely in the specifics of its development and application procedures since values permeate legal debate and underpin legal processes generally. However, it is as dubious to design an empirical research of legalization framework that overlooks process in favor of a primarily structural and product-focused examination.

The "move to law" as it is described in the volume is a move to a very specific kind of law, and this kind of law does not resonate with international lawyers who are unfamiliar with the authors' limited definition of obligation and who would disagree that precision or delegation are the signs of rising normativity in international relations. Scholars who might not find the authors' concept of legalization especially compelling would be able to collaborate on research thanks to a better grasp of the law. The most apparent benefit is that a conception of the function of law that is more culturally and sociologically sensitive responds to constructivist concerns and forges links between that community of IR researchers and like-minded legal thinkers. These researchers will find it useful to place law in its larger social context since it makes space for cultural explanations of behavior and identity formation. Additionally, it promises to highlight links between IR theory and comparative legal theories that address questions of identity and normative development within legal traditions. The additional benefit of emphasizing law as a collection of connections, procedures, and institutions rooted in social context is that it can be reformulated in a way that connects it to the rich and expanding body of work on transnational norm dynamics that constructivists have been engaged in recently.

But a deeper grasp of law is not only a nice addition to the framework suggested in this book. It is essential. The legalizing idea is probably intended to make empirical research easier. A reduced and condensed notion could still be useful if it offers researchers fresh perspectives and aids in their efforts to make sense of empirical conundrums. We look at the three papers in the collection that apply the idea of legality to various subject matters in order to determine if it does this. Our analysis reveals that the notion doesn't provide much assistance to these scholars, both because it is insufficiently hypothesized and because it comprises such a limited understanding of law. Applying the idea of legality to financial matters, Beth Simmons wonders why states willingly acknowledge that Article VIII regulations governing current account limitations and harmonized exchange rates bind them. She presents this as a legitimate commitments issue. Making the markets believe that governments are committed to upholding Article VIII regulations would result in the necessary investment flows is the policy conundrum for states. The function of law is to act as a "hook" or signal to establish the veracity of obligations. Here, the legalizing idea is mostly ineffective. It is clearly not necessary for Simmons to do her analysis. Simmons just addresses one part of the idea, calling it "credible commitment," leaving out delegation and accuracy, which don't seem to matter. There has been conceptual equipment for reliable commitment and signaling assessments for a very long time. Without "legalization," Simmons could have conducted basically the same analysis.

A more comprehensive understanding of law, as we propose, might expand the scope of this study and make it more central to how we interpret these occurrences. For instance, if we concentrate on the function of law, we could wonder whether or not legal obligations provide reliable signals to markets for all governments. After all, China and Indonesia, two of the emerging nations that are most successful at luring investment, have very lax definitions and practices of the rule of law. Why do investors pour so much money into nations with lax laws if

acknowledging legal duties is such a significant signal to investors, as is suggested here? If Simmons is of the opinion that domestic and international rule of law are unrelated and that investors should therefore assume that even nations with ineffective domestic rule of law will be bound without difficulty in the international sphere, this would undoubtedly need some clarification because it contradicts some of the volume's other prominent authors' earlier work.

In general, associating law with responsibility and obligation with credible pledges overlooks a lot of what the law accomplishes in financial concerns that can be pertinent to Simmons' perspective. The idea that law just fulfills promises misses the authoritative and transformative nature of law. States are not making the choices outlined in Article VIII in a legal void. A complete system of monetary law, including a Weberian rational-legal bureaucracy (the International Monetary Fund) to set monetary policy, was established by the Articles of Agreement (of which Article VIII is a component). As a result, the IMF became a new source of authority in financial concerns, giving rise to new regulations for nations as well as new information regarding technical aspects of economic policy that altered expectations for conduct. States are making choices concerning Article VIII commitments during the time period covered by Simmons in a dynamic context of laws, regulations, and economic information about monetary policy, most of which is actively supported by the IMF.

The legalizing notion of the volume is much more specifically addressed in Goldstein and Martin's theory of trade politics. They look at how formal trade agreements' increased obligations, specificity, and delegation affect global compliance and collaboration. They discover that "more is not necessarily better" since "binding" and precise laws may energize protectionist organizations that can now more accurately estimate the costs of increased commerce. Since higher clarity tends to encourage greater use of escape clauses and organize interest groups for disobedience, Goldstein and Martin present a compelling argument that there is an inverse relationship between accuracy and any feeling of felt duty.

Sadly, Miles Kahler's conclusion and the volume's editors don't appear to have changed their minds much on the substance of legalization in response to Goldstein and Martin's results. Even in the Goldstein and Martin paper, such a comprehensive analysis may have shown more problematic connections among their three legalization-related components. For instance, it is not apparent if, as Goldstein and Martin believe, more legal accuracy necessarily results in greater confidence regarding distributional consequences. Delegation by its very nature causes uncertainty in principal-agent interactions, therefore if improved accuracy requires it, uncertainty may stay high or even rise. As a result, although WTO members may have more specific procedures for resolving disputes than they had under the GATT, the WTO's dispute resolution body may operate in a way that is so opaque or unexpected that the distributional effects of its decisions remain unclear in many areas. There is no reason to believe that increasing delegation will always result in more exact rules for the same principal-agent reasons, however. The overall impact of Goldstein and Martin's intriguing discovery on the impacts of knowledge is to imply a broad range of potential linkages among the main components of legalization. This in turn implies that the idea of legality is less analytically valuable than its constituent pieces, which, as we already established, are not always or exclusively legal.

These writers may pose several important issues that might have an impact on their conclusions if they paid more attention to the law. These writers are admirably passionate about include domestic politics in their research, but they are strikingly blind to the disparities in those politics brought about by drastically different domestic legal regimes. Even the democratic, industrialized nations on which these writers concentrate have vastly different laws that regulate the ratification of trade agreements, which is a key component of their research. The "logic of [domestic interest group] mobilization" in various nations, which is the focus of the investigation, is significantly altered by these variances. For instance, the authors claim that the potential for an effective protectionist backlash is caused by the need of treaty ratification and the associated public deliberation procedures. However, in Canada, the United States' top trade partner, the prime minister and cabinet the functional equivalent of the executive branch hold the right to make treaties, and approval by Parliament is not required under the constitution. Without the need for a formal political discussion, the whole NAFTA agreement could have been reached by the executive branch with the backing of a resounding legislative majority.

These legal system variations go beyond simple variations in the restrictions or political opportunity structure around strategic players. Domestic legal systems serve as organizing agents for a broad range of parties engaged in trade politics. A variety of interest groups, including trade unions, professional associations, business associations, environmentalists, and human rights activists are formed, empowered, and mobilized by domestic legislation. Unions, business associations, and nonprofit organizations all have varied structures and legal authority depending on the country. Law plays a far deeper role in empowering diverse communities than just disseminating knowledge. Domestic politics play a key role in trade politics, as Goldstein and Martin rightly

point out. However, given the wide range of domestic legal systems, it would be prudent to exercise care when generalizing domestic ratification's influence on interest group politics. We believe that if generalizing their analysis to Canada is difficult, generalizing it to Europe, Asia, and undoubtedly the developing globe would be considerably more difficult. To test their claim that higher legalization promotes adherence to human rights legislation, Ellen Lutz and Kathryn Sikkink apply the legalization idea to the field of human rights. The least compliance is found in the most "legalized" area, torture, while the highest compliance is found in the least "legalized" area, democratic government. They investigate three areas of human rights legislation.

The "norm cascade" that swept over Latin America in the 1970s and 1980s and more general societal factors are shown to have more explanatory power for compliance. Interestingly, despite its modest impacts, the legalizing idea appears to be most helpful to these researchers. Unlike Simmons or Goldstein and Martin, Lutz and Sikkink walk us through an analysis of the idea as it is described in the framing chapter and talk about how it relates to their particular problem. In order to do the study, Lutz and Sikkink do not transform legality into another analytical term (such as information or a credible promise). They specifically interact with the idea of obligation, briefly implying that customary law often serves as the foundation for human rights rules. Additionally, they emphasize that any "right" to democratization that may exist can only be a social norm or a customary norm. Their results are consistent with the social interaction-based interpretation of duty that we outlined previously. Obligation must be felt in order to be effective; it cannot just be imposed via a legal hierarchy. At least with regard to certain human rights criteria, precision and delegation have no place in the promotion of compliance. After finding the legalization hypothesis to be unconvincing, Lutz and Sikkink shift their attention to more familiar conceptual ground (for Sikkink), using the "norm cascade" notion developed elsewhere to explain the pattern of compliance they see.

The fact that Lutz and Sikkink place such a high priority on legalization's role in compliance leads us back to a crucial issue. The framing article's explanation of the analytical goals is unclear, as was already mentioned. Lutz and Sikkink's essay is irrelevant if the volume's main goal is to outline legalization. After all, the framing article makes no assertion that legalizing would result in more legal compliance. Therefore, the fact that a region with more extensive legalization encourages lower compliance than a region with less extensive legalization is neither here nor there for the volume's authors. Kahler's dismissive treatment of Lutz and Sikkink's article in the conclusion, which implies that this finding is somehow irrelevant and does not cause the framers to pause, is surprising, given that the authors of the volume have previously claimed to investigate the effects of legalization, which presumably would involve compliance. More broadly, if the goal of the legalizing concept is to provide hypotheses that direct research, one would anticipate that disconfirming data of the kind shown by Lutz and Sikkink would lead to a reevaluation of the fundamental idea.

III. CONCLUSION

Although no analysis is capable of doing everything, analysts must defend their choice of emphasis in the context of other evident alternatives. However, the creators of the legalization notion are not upfront about their constrained interpretation of the law or about other interpretations of the law (or IR theory) that may lead to alternate interpretations of their examples. Additionally, they have not conceptualized their notion of legalization enough to provide clear guidance to empirical researchers attempting to implement the idea. In order to fill in any holes in the authors' own framework and encourage academics to look into crucial issues that were skipped over in this book, we have drawn attention to several alternative legal perspectives and offered some ways in which they may be useful. We share the authors' hope that academics of international law and IR would start reading each other's writing more closely and using each other's ideas in analysis. However, we have a sneaking hunch that this process won't produce a significant body of scholarly work on the definition of legalization found in the book under discussion. Instead, as IR academics read more extensively in international law, they will discover rich links between the two subjects and be able to develop collaborative research agendas that are interesting and productive.

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