

A Critical Introduction to the 'Legalisation of World Politics'

Written by Peter Brett

This PDF is auto-generated for reference only. As such, it may contain some conversion errors and/or missing information. For all formal use please refer to the official version on the website, as linked below.

A Critical Introduction to the 'Legalisation of World Politics'

<https://www.e-ir.info/2012/03/08/a-critical-introduction-to-the-legalisation-of-world-politics/>

PETER BRETT, MAR 8 2012

The 'legalisation of international politics' literature seeks to explain a striking phenomenon. Contrary to realist expectations, since the late 1970s states have frequently engaged in institutionalised co-operation even under conditions of anarchy (regime theory). Since 1989, however, they have also begun delegating the supervision of this co-operation to independent legal authorities – something realism has an even harder time explaining. Why, after all, would states risk losing control of important parts of domestic *and* foreign policy? Liberal institutionalists have so far dominated the discussion. By 'disaggregating' the state, they have claimed, we can see how powerful domestic constituencies mobilise to protect the benefits of co-operation from the interference of states.

For some this will be interesting enough, but it is likely to leave those less intrigued by these questions rather cold. A number of alternative explanations for 'legalisation' have, however, been developed in other fields. This overview will also introduce these approaches – drawn from constructivist, communicative, and world culture literatures – and indicate important readings in its footnotes. It then discusses well-known problems with measuring the importance of legalisation, and shows how all explanations in fact assume theories about how legal systems work, and from where they derive their force. Finally, in an effort to communicate some of the interest of this topic, it very briefly describes how various well-known social theories – from Marx, Habermas, Foucault and Bourdieu – can be used to critique and improve upon those assumed by the legalisation literature. It concludes with some speculative remarks about how an interpretive approach might usefully be developed complement such critical views.

Approaches to Legalisation

a) Liberal theories

Broadly, liberal approaches to legalisation can be divided into 'neo-functional' and non-functional strands. (Although in fact most writings in this tradition combine both). The neo-functional strand has been inspired, notably, by attempts to explain the extraordinary transfers of sovereignty at the heart of the project of European integration. Andrew Moravcsik has, for example, famously argued that the EU's idealistic rhetoric conceals the fact that powerful states have strategically designed institutions to benefit from increasing economic ties[1]. Integration is functional to interdependence. Legalisation, under conditions of increased co-operation, reduces the transaction costs associated with informal negotiation[2]. But the process is also *politicised* as stronger states, under pressure from domestic constituencies, are in the best position to profit from these changes (hence *neo-functionalism*)[3]. Other liberal scholars have applied similar arguments to the European Court of Justice, suggesting that an increase in trade flows has led to a higher demand for litigation by private actors[4]. Judges have thus found themselves ruling on a greater variety of areas, and 'legalising', or 'judicialising', more kinds of co-operation. Robert Keohane's discussion of another classic liberal topic – the shift from a relatively informal (GATT) to relatively legalised (WTO) world trade regime – summarises this approach[5]. Liberal theories, he claims, identify an 'intimate connection between globalization and legalization', caused by 'thickening webs of interdependence'. States, however, 'comply with law based largely on calculations of costs and benefits. They do not comply automatically on the basis of habit or

A Critical Introduction to the 'Legalisation of World Politics'

Written by Peter Brett

the fact that compliance is appropriate'[6].

These structuralist features of neo-functionalist accounts are frequently complemented by what might be termed 'agency' components. More specifically, it is obvious for many liberal theorists that design *choices* for new legal institutions are crucial for explaining their future prospects. Indeed, if these choices were not significant, it would be difficult to understand why liberal scholars have recently sought out international lawyers for help predicting the effects of various legal regimes[7]. These attempts have clearly been motivated by a desire to produce institutional design best practice. The one design choice they have most singled out as an explanation for effective legalisation is that over whether to grant states *and* individuals, or only states, access to transnational dispute resolution processes[8]. Such a decision, unsurprisingly, has often been welcomed by private parties, since it grants them unprecedented access to the international political sphere. These persons are unlikely, of course, to assess the 'sovereignty costs' of such action in the same way that states do; something now obvious in British controversies over the European Court of Human Rights[9].

The very existence of such controversies is, nevertheless, a somewhat curious fact. It is evidently difficult to interpret the extraordinarily varied and wide-ranging jurisprudence of the Strasbourg Court – from prisoners' voting rights to the legality of 'dwarf-tossing' – as 'functional' to economic interdependence. Nor can it be easily seen as serving the (narrowly defined) interests of powerful states and/or their most influential domestic constituencies. Instead, as two leading liberal theorists have themselves suggested, individual access to international courts must be understood as part of a normative shift towards the idea of a 'global community of law'[10]. Normative concerns clearly combine with material considerations during negotiations over the mandates of such legal bodies. No matter the interests at stake, as some high-profile recent research in the liberal tradition has also suggested, *some* state behaviour can only be explained by a 'belief' in the idea of human rights[11]. Once such propositions are accepted, furthermore, it becomes easier to detect similar dynamics even in areas like trade. As two of the more functionalist-minded scholars of legalisation concede, actors frequently 'bring to bear both normative and material powers' in such disputes. To be clear, as the earlier citation from Keohane suggests, liberal theorists typically do not see these ideational motivations operating 'automatically'. They are mediated or complemented by other material motivations. It would not seem unfair to suggest, however, that specifying the precise relationship between 'ideas' and 'interests' in legalisation remains a weak-point in the liberal tradition[12].

b) World culture approaches

The clearest contrast with neo-functionalism can be found in the 'world culture' school of institutional sociology. *Contra* Keohane, states, on this account, *do* frequently comply with law on the basis of simple appropriateness. Law, these sociologists claim, is 'inherently neither functional nor repressive'. But is in fact 'important for its linkage to perceived universal principles', derived from the modern Enlightenment successor to the (Ancient Greek and Christian) 'Western cultural account'[13]. From these origins 'world culture', which has steadily been spreading throughout the world since the nineteenth-century, has inherited various deeply-rooted characteristics. Within its orbit, notably, 'of all the possible forms political entities might take', those where 'rational and responsible states rule via 'authoritative, law-based control systems' are 'utterly dominant'[14]. This (Western) *cultural* preference for rationalised and formal governance, and aversion to informal and negotiated forms of social organisation, has long explained legalisation within nation states. In a period of hastening globalisation, however, it may now also explain similar developments at the global political level. This framework, certainly, has been applied with much success to case studies that are difficult to understand in functionalist terms. The International Criminal Court (ICC) and many human rights regimes, as mentioned above, appear to be neither serve processes of economic integration, nor state interests[15].

c) Constructivism

Constructivists occasionally endorse these ideas. They note, for example, that law is in many ways 'constitutive' of international relations[16]. States will thus often relate to each other by accepting some laws – usually derivable from world culture – as simply non-negotiable. 'Customary' international law, for example, is often invoked by lawyers to refer to those ideas accepted by the international community[17]. The ICC, for example – which complements the

A Critical Introduction to the 'Legalisation of World Politics'

Written by Peter Brett

more informal system of *ad hoc* international criminal tribunals created in the 1990s – is a product of changes in international legal 'custom'. After 1989, international lawyers began to declare that some crimes against humanity breached *jus cogens* norms, standards that the international community rejects. Subsequent state behaviour may, perhaps, be seen as reflecting deep internalisation of these ideas[18]. This development may indicate the arrival in the international sphere of a world cultural preference for rationalized legal systems.

Characteristically, however, constructivists are critical of world culture scholars' attempts to explain these legalisation trends[19]. How, for example, can a (more than two-thousand year-old) 'Western cultural account' explain the many rapid changes in customary law that followed the end of the Cold War? The agency of the international lawyers disappears completely. Constructivists try instead to identify where, when, and how the material interests of powerful states are re-configured by norms in a way leading to legalisation. They do not see the process as automatic, but rather as the consequence of the strategic social construction, or 'framing', of diverse social phenomena as breaches 'law'. The essays in one important early collection, for instance, describe how transnational networks promoted the idea of human rights in East Africa and Latin America in a way that encouraged domestic actors to see some authoritarianism as no longer in their interest[20]. They also capitalised on various infamous incidents in the history of South African *apartheid* to encourage Western publics to mobilise – again using the idea of human rights – against their governments' foreign policies[21].

On occasion, these tactics of persuasion, shock and behavioural influence may lead to the creation of new international legal regimes. The international apparatus created to monitor 'violence against women' is a good example of this. As Kathryn Sikkink describes, NGOs in the mid-1970s 'literally created the issue' by bringing diverse practices – rape, domestic violence, dowry death and female genital circumcision – under the same criminal law umbrella[22]. This was followed by the 'social construction of legal rules', as the same activists began campaign towards the General Assembly's 1994 Declaration on the Elimination of Violence against Women, and its regional enforcement mechanisms[23]. The basic contrast in scope with liberal theories is clear. Whereas the former would prefer to reserve the concept of legalisation for the transference of *existing* co-operation from informal to legal institutions, scholars like Sikkink see no reason why *anything* should not be 'legalised'.

d) Communicative approaches

The approaches discussed thus far all paint a rather bleak picture of legalisation. Massive social and economic processes, the narrow interests of powerful groups, and behavioural change agendas are placed at the centre of their explanations. Communicative approaches, by contrast, suggest that states and other actors may, in *certain* kinds of negotiation, support legalisation because the 'better argument' has been offered in its favour[24]. They see politics as sometimes involving appeals to decision-makers' intellectual faculties, and not just to their psycho-social dispositions (constructivism), or material interests (realism and many liberal theories). Decisions may not just be taken, that is, because of their effects ('the logic of consequences'), or because of social approval ('the logic of appropriateness'), but *sometimes* because they are rational from international society's point of view. These communicative theories also hope to counter teleological tendencies in their competitors. Much of the history of international negotiation, for example, bears witness dramatic shifts in position: apparently inexplicable by reference to participants' fundamental identities or perceptions of their interest.

The inspiration of these approaches in general, and for their view of law in particular, is the work of Jürgen Habermas. His writings on this topic can be read, in very general terms, as a defence of the popular belief that modern legal systems represent, at base, *reasoned* social consensus over the organisation of society[25]. The debates in Paris and Philadelphia that produced the constitutions of revolutionary France and America are here paradigmatic examples. Crucially, however, the participants in these debates shared the same 'life world'. For decades, that is, face-to-face in coffee shops and *salons*, they had been able to engage in far-reaching conversations over not only the details of particular proposals, but also the assumptions that lay behind them[26]. These 'ideal speech situations' allowed them to re-assess both their cultural prejudices and narrow interests, and ultimately to produce the normative foundations of enlightened political systems. However, the fragmentation of modern society in a number of self-regulating 'systems', each regulated by their own distinct and highly complex legal codes, makes these processes difficult to replicate. The media and business interests that dominate these systems

A Critical Introduction to the 'Legalisation of World Politics'

Written by Peter Brett

are now clearly opposed to any public deliberation over one set of principles that would govern all of them[27]. In Habermas' early days at least, these difficulties were compounded by his class analysis of the 18th century revolutions: the revolutionaries' life world was thoroughly bourgeois[28]. It would not be easy to institutionalise their discussions in mass, pluralist societies. In more recent years, though, he has contented himself with calling for EU constitution-making processes to be subjected to democratic debate and referenda[29].

Empirical research on legalisation from a communicative perspective attempts to identify negotiating scenarios that approximate to a shared life-world. It generally suggests that such situations produce the legalisation of some international problems based on principled legal language, such as that drawn from public and/or constitutional law. Where shared life-worlds are absent, by contrast – like during cultural conflict or when back-room deals promote undeclared interests – more informal, compromise-based arrangements tend to result. A communicative analysis of the creation of the ICC, for example, locates key 'islands of persuasion' in the debating process[30]. At key junctures, states' negotiating teams were invited by NGOs to participate in round-table discussions with other delegations from their region. The informal exercise of power and cultural misunderstandings were thus, it is claimed, excluded from discussion. This dialogue in a shared life-world may have led to states to have changed their position on the ICC: shifting from a cautious position concerned with its effects ('the logic of consequences'), to a more positive one that highlighted international 'public interest' in the new institution ('communicative rationality').

This view of law is both descriptive and normative. Its ability to critique current practice is as important as its empirical view of legalisation. Nevertheless, key features of the communicative account of legalisation are clearly still in need of a more robust defence. Is it really the case, for example, that 'ideal speech situations' and shared 'life worlds' actually favour problem-solving by principled institutions? Could counter-examples not be found? As the leading communicative theorist himself points out, furthermore, the scope of Habermas' 'life-world' is unclear and difficult to specify for empirical research[31]. The question of just how much common cultural background is required is a tricky one. Whilst the ICC study above, for example, finds it approximated in regional fora (SADC, Mercosur etc.), others have suggested that *all* diplomats in act share common cultural assumptions that enable international discussion (p.7)[32].

The Measurement Problem

The previous section has outlined various ways in which legalisation might be explained. But how in fact do we know when it has taken place? For world culture and communicative approaches this question is not important. The former takes such a long view of its subject that arguments over whether specific cases count are more or less irrelevant. The latter largely disclaims any interest in potential instances of legalisation that do not match its normative concerns. Between constructivists and liberal institutionalists, however, the question has been hotly debated. The former, in keeping with their general focus on the social context of formal institutions, generally insist that it only makes sense to talk about legalisation when new rules elicit *compliance*[33]. The latter, by contrast, often claim to only seek to explain the creation of new legal bureaucracies; 'legalisation', as a key formula has it, 'is a particular form of institutionalisation'[34]. Institutions can be said to be legalised according to three criteria: 'the degree to which rules are obligatory, the precision of those rules, and the delegation of some functions of interpretation, monitoring, and implementation to a third party'[35].

From this, however, it is unclear why legalisation represents a subject of any interest. As any student of sub-Saharan African regional organisations can confirm, the world is full of bureaucratic institutions that have these formal characteristics but no apparent effect on the outside world. We surely require some grip on the political *effects* of legal forms. Unfortunately, though, measuring these effects is extremely difficult. It is far from clear, for instance, that the liberals' inclusion of 'precision' as an attribute of legalisation corresponds to an increased capacity to effectively influence behaviour. Liberals themselves recognise aspects of this problem – highlighting, for example, that parties to informal regimes may actually choose to leave if the rules appear too legalised or restrictive[36]. But they are perhaps still to fully appreciate the extent to which we can only measure 'compliance' with legal systems after adopting some *theoretical* view of what they are[37].

A Critical Introduction to the 'Legalisation of World Politics'

Written by Peter Brett

This point has been made by a number of authors. Constructivists have alleged, for example, that the liberals' definition of legalisation implicitly reflects the legal positivism of H.L.A. Hart[38]. This theory, the constructivists take it, serves to isolate particular rules from the systems of which they are part. This does indeed appear to be how the liberal approach has often proceeded, and the problems with it are certainly striking. As Ronald Dworkin famously argued, for instance, in 'hard cases' difficult questions are less over whether rules have been followed, but rather over *which* rules are to be applied. The answer to this second question, Dworkin argues, inevitably depends on judges' view of the normative values underpinning the system[39]. The nineteenth-century positivist view of legal rules as self-standing commands is, in this sense, clearly inadequate.

Hart's updated version of this theory for the twentieth-century, however, advanced a much more sophisticated view of compliance. He suggested that rules not only have 'external' aspects (their legal validity), but also 'internal' aspects (as socially accepted standards for behaviour). At least those officials responsible for maintaining the legal system must have some 'internal' commitment to upholding the standards rules represent. They do not do so, that is, merely because they have to, but rather because – at some level – they believe it to be the right thing to do. If they did not, it is difficult to see how the legal system could maintain itself[40]. Hart's insistence on the importance of social context for compliance is therefore more closely resembles the constructivist position.

Thomas Franck, finally, once influentially argued that compliance with rules is obtained when those rules are believed to be procedurally legitimate[41]. This is in contrast to the constructivist emphasis on socialisation. On Franck's account, legal norms are respected, in part, after conscious assessments by individuals of the merits of the processes that created them. Laws in democratic countries thus typically elicit more compliance than those made in authoritarian settings. This view has affinities with 'process' theories of law production, which see legal systems as socio-political decision making-processes, and not as mere generators of commands. It also bears important resemblances to the Habermas' view of law described earlier. Like Habermas, Franck's view combines normative and descriptive elements, colouring its opposition to 'habitual' accounts of compliance. The law, for Habermas as for Franck, ultimately derives its legitimacy – and hence its force – from *who* has been able to participate in its production, and under what conditions.

Evaluating Legalisation: Critical approaches to the force of law

One's view of whether legalisation has important effects therefore depends on one's theory of the nature of legal systems. Unless we accept the normative components of the communicative approach, however, these legal theories will tell us little about how to evaluate this development. Critical assessments certainly abound in the literature. But these in turn frequently depend on accounts of the force of law that undercut those offered by 'mainstream' legal theory. This final section will outline three of the best known, and then provide a speculative assessment of their merits.

a) Foucault

From a Foucauldian perspective, the attempt to measure compliance with rules misses the point[42]. Legalisation's effects, if they exist, will not be those it proclaims. According to Foucault's famous 'expulsion of the law' thesis, whilst absolutist states in pre-modern Europe *did* exercise power by means of authoritative commands, the modern era saw coercion largely replaced by discipline[43]. What the law said, in other words, now affected behaviour in much less important ways than the disciplinary apparatus of the new society: the asylum, prison, and other implementers of sociological 'insights'. Ironically, this shift to a new disciplinary society coincided precisely with legal theorists' attempt to describe law in terms of sovereign command (see especially John Austin and Jeremy Bentham, the inventor of the Panopticon). Legal ideology thus serves to distract us from a clear view of how power operates. The proliferation of rules does not serve to directly shape behaviour, or protect from sovereign power, but instead helps to *produce* a certain ideal of the actor, which is then compelled to internalise this model and govern itself accordingly.

Applied to the legalisation of IR, this theory of the force of the law is dismissive of the idea that new regimes have

A Critical Introduction to the 'Legalisation of World Politics'

Written by Peter Brett

served to formalise co-operation. It argues instead that a new emphasis on the 'international rule of law' has in fact helped produce a (Anglo-American) model of legitimate 'legal' international behaviour[44]. It increases the power of this undeclared ideal; an international 'rule *through* law'. Interestingly, however, some of the strongest support for this view has in fact come from liberal scholars themselves – often the target of Foucauldian critiques. Far from naively advocating for a neat contrast between the coercive power of sovereignty and the protective power of law, they have often recognised that power is most efficiently exercised when actors govern themselves. As Anne-Marie Slaughter has stated, to the extent that legal rules actually do threaten to constrain behaviour, they risk undermining the *productive* power of 'soft law' governing informal co-operation,

'Legalization can blunt the power of soft power. These networks do not operate through coercion, they are horizontal networks, net works of equals from different nations. The power they exercise is in information exchange, persuasion, deliberation, and socialization. It is important power, power that neither we nor many political scientists fully recognize. It is, I think, an increasingly important power in the information age. If you legalize, you will immediately return to models of coercive power, and to the international lawyer's perennial problem: the lack of real coercive power in the international system'[45].

b) *Marxian approaches*

Dissatisfaction with Foucauldian interpretations frequently stems from their apparent lack of interest in inequalities of power. Emphasis on the diffuse and far-reaching power of discourse replaces a focus on significant actors. Marxian writings on law and politics have, of course, long had this in view. One of its strands, prominent in *Das Kapital*, has often described law as a direct expression of the distribution of power in society[46]. Its force is ideological and flows directly from the nature of capitalism. Its (modern) insistence on equality should thus be understood as masking real inequalities. This is similar to the 'fetishism' that accompanies the 'free' exchange of commodities in the market, concealing to the un-freedoms that it requires. China Miéville has applied these ideas, as formulated by the Soviet jurist Evgeny Pashunkanis, with notable sophistication to international law[47]. For Miéville the notion of sovereign equality is a particularly important example of how law can serve to occult power relations. Legalisation, we can take it, would likewise be interpreted as imparting a false air of equality and consent to diplomatic processes whose reality is profoundly coercive. As Miéville concludes, 'the chaotic and bloody world around us *is* the rule of law' (emphasis in original)[48].

Another important strand of Marxian work, however, has adopted a less trenchant attitude to politics in legal form. Engels himself, reflecting on organised struggles such as that for a legal limit on the working day, argued that law could not retain any *specific* force if it merely served the interests of power. It had, at least occasionally, to do justice for the illusion to be maintained[49]. In the late 1960s and 1970s, as the attraction of Soviet Communism began to wane in the West, this notion of the 'relative autonomy' of law from politics became increasingly popular amongst historians and legal theorists of the Left[50].

c) *Bourdieu*

It was in reaction to these debates that Pierre Bourdieu began to formulate his own distinctive approach to the question of law's force[51]. At its heart lies the shift 'from law to legal field'[52]. Like Foucault, Bourdieu believed that the power of modern law had relatively little to do with its content. He too was deeply sceptical of Habermasian attempts to link legal principles and timeless truths. Indeed, whilst law had classically been conceived as instrument for moving the basis of society from (local) status to (universal) contract, Bourdieu placed struggles for status at its very centre. Unlike Foucault, moreover, he also believed we should turn our attention towards 'legal fields': social domains with specific requirements of membership, comprising not just legal knowledge but sets of unconscious dispositions and behaviours ('habitus') acquired from elite education. A wider focus on social class, or the disciplinary society, risks failing to do justice to law's autonomy from other social fields. This is particularly necessary given how the technical nature and idiosyncrasy of legal language ensures an 'effect of closure', isolating its effects from outside gaze[53]. Whilst, finally, the Marxian 'relative autonomy' thesis perhaps elevates its insight into a universal, timeless construct, Bourdieuan approaches attempt to specify where, when, and how the legal fields acquires this autonomy from other social powers.

A Critical Introduction to the 'Legalisation of World Politics'

Written by Peter Brett

The scholars who have done most to pursue this research agenda to problems of international legalisation are Yves Dezalay and Bryant Garth. They show how international law has acquired much of its force, and international legal fields much of their autonomy, thanks to 'investment' in it by prestigious individuals within *national* legal fields during times of change. (This is part of a wider effort to give a more nuanced picture of 'globalisation'.) Their discussion of the new international commercial arbitration regimes in the later twentieth century, for example, highlighted on the importance of decolonisation and the oil crises of the 1970s for the global economy[54]. The ideological split between First World and Third World in this period placed great stress on neutrality in the resolution of disputes. 'The grand old men' of European legal fields were able to trade their 'symbolic capital' acquired in national arenas for status as neutral arbiters in the new international order. However, as new entrants began to emerge from the South, 'technocrats' from American law firms profited from the symbolic fragmentation of the field that these changes provoked. The prestige of the 'grand old men' was not universal. The American firms emphasised 'transparency', and promoted a legal orthodoxy more centred around facts than law: an approach supposedly open to those outside the charmed circles of the European Old Guard. International commercial arbitration thus acquired much of the prestige associated with the elite law firms of the East Coast.

After 1989, powerful forces associated with American business and the multilateralist, free-trade wing of the foreign policy establishment pushed for a competing system to regulate trade. With the premium on neutrality reduced in the new liberal order, 'a decline in the importance of win/lose decision-making [...] provided an opportunity for U.S. power to flow into 'softer' forms of hegemony associated with legal approaches and institutions'[55]. The legalisation of trade, notably, was not a product the need to reduce transaction costs under globalization (as sometimes suggested by liberal theories), but in fact reflected the dominance of the preferences of 'New York legal elite' in foreign-policy making. The symbolic capital this group enjoyed in the domestic legal field was traded for that in the global political one: a 'strong U.S. position in favor of open markets abroad is now enshrined in global law'[56].

Bryant and Garth have also made a similar argument for human rights. The importance accorded to this notion in the U.S. political field in the 1970s and 1980s, they claim, has led to its legalisation by foreign policy interests, and to lawyers' worldwide with connections to prestigious U.S. law schools 'importing' the idea into their domestic political fields[57]. Hence its importance, for example, in the Latin American politics of the same period[58]. The 'rule of law', similarly, has been imported into political fields worldwide by elite lawyers benefiting from international networks to 'broker' processes of globalisation[59]. The force of law in these fields is determined by the prestige and status associated with these connections.

A Speculative Conclusion

For all the power and interest of the above explanations, we might still wonder, however, if any of them are truly suited to explaining their object. The anarchical society of international relations is now governed by more than 125 international courts with judicial or quasi-judicial functions; a development matched by the rapid penetration of international legal language and practice into domestic orders[60]. The explosion of the quantity and scope of such new institutions after 1989 has been quite extraordinary. Its effects on international political discourse have been similarly far-reaching. For instance, debates between Right and Left that were once widely understood as political conflicts over distributional choice, are now routinely discussed as clashes between 'first' and 'second' generations of human rights. In response to this we cannot claim, as some may be tempted, that merely reflects the arrival of more high-minded political language. Courts worldwide are in fact obliged to integrate these notions, however aspirational, into a jurisprudence that regulates existing social orders. And these rulings often have important effects[61]. Nor does it seem reasonable to suggest that the choice of 'rights-talk' for political struggles can forever remain a strategic one, with little consequence for how we think and imagine the world[62]. If perhaps true for particular moments, the long-term effects of this discourse – whatever we think of the 'linguistic turn' – are surely significant ones. Legalisation is both a cause and product of a new way of thinking about world politics.

Nevertheless, as we have seen, it is extremely to measure these effects in empirical terms. Attempts to explain legalisation in terms of massive social processes – globalization, capitalism, the spread of world culture, the

A Critical Introduction to the 'Legalisation of World Politics'

Written by Peter Brett

disciplining of society, or (brokered) transformations in the global economy – appear inadequate to account for both the speed of the process in recent years, and for the spread of the political imagination that has accompanied it. More agent-centered accounts, by contrast, such as the constructivism of Kathryn Sikkink or the communicative approach, successfully explain particular cases of 'where' and 'when', but struggle with recent legalisation's sheer breadth and scope. The time is therefore ripe, in this author's view, for an interpretive account that places recent discursive shifts at the heart of our explanation of the legalisation of world politics.

—

Peter Brett is a PhD student in Politics at the London School of Oriental and African Studies. He is writing a thesis on the 'judicialisation' of African politics from the standpoint of interpretive political science and legal theory. His thesis examines how major political contests have moved into courtrooms, and focuses on three well-known cases from Namibia, Botswana and Zimbabwe.

[1]Moravcsik, Andrew. 1998. *The Choice for Europe. Social Purpose and State Power from Messina to Maastricht*. Cornell University Press.

[2]Abbot, Kenneth W. and Duncan Snidal. 2000. "Hard and Soft Law in International Governance." *International Organization* 54(03): 421-456.

[3]Schmitter, Philippe C. 1969. "Three Neofunctional Hypotheses About International Integration." *International Organization* 23:161-166. Politicisation has been given a realist colour in Garret, Geoffrey et al. 1998. "the European Court of Justice, national governments and legal integration in the European Union." *International Organization*, 52: 149-176. The controversy about, and challenges to this interpretation are summarised in Alter, Karen J. 2008. "The European Court and Legal Integration: An Exceptional Story or Harbinger of the Future?." in *The Oxford Handbook of Law and Politics*, eds. Keith E. Whittington et al., Oxford: Oxford University Press, pp. 209-228. Domestic constituencies ('substate interlocutors') are discussed in Alter, Karen J. and Laurence Helfer. 2010. "Nature or Nurture? Judicial Lawmaking in the European Court of Justice and the Andean Tribunal of Justice." *International Organization* 64 :563-592.

[4]Stone Sweet, Alec, and Thomas Brunell. 1998. "Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community." *American Political Science Review*, 92: 63. The direction of causation is however queried in Stone Sweet, Alec. 2004. *The Judicial Construction of Europe*. Oxford: Oxford University Press. 57-63.

[5]See generally Sandholtz, Wayne, and Alec Stone Sweet. 2004. "Law, Politics, and International Governance.." In *The politics of international law*, ed. Christian Reus-Smit. Cambridge University Press, pp. 238-271.

[6]Keohane, Robert O. and Louis Henkin. 2002. "How Actors in World Politics Behave: Legalization and World Politics." *Proceedings of the Annual Meeting (American Society of International Law)*, 96: 214, 216.

[7]Two useful introductions are Abbot, Kenneth W. 2005. "Toward a Richer Institutionalism for

A Critical Introduction to the 'Legalisation of World Politics'

Written by Peter Brett

International Law and Policy.” *Journal of International Law and International Relations* 1 :1 and Krasner, Stephen D. “*International Law and International Relations: Together, Apart, Together?*.” *Chicago Journal of International Law* 93: 93.

[8]Cf. Keohane, Robert O. Andrew Moravcsik and Anne-Marie Slaughter, 2000. “*Legalized dispute resolution: interstate and transnational.*” *International Organization* 54(03): 457-488.

[9]See ‘*Jack Straw and David Davis secure prison vote debate*’, *BBC News*, 18th January 2011: <http://www.bbc.co.uk/news/uk-politics-12214988>.

[10]Helfer, Laurence and Anne-Marie Slaughter, 1997. “*Toward a Theory of Effective Supranational Adjudication.*” *Yale Law Journal* 107:273-392.

[11]Simmons, Beth A. 2009. *Mobilizing for Human Rights: International Law in Domestic Politics.* Cambridge University Press.

[12]These tensions are evident in the conclusion to the best-known article in the field, et al. 2001. Abbot, Kenneth W. et al. 2000. “*The Concept of Legalization.*” *International Organization* 54(03): 401-419.

[13]Boyle, Elizabeth Heger, and John W. Meyer. 2002. “*Modern law as a secularized and global model: implications for the sociology of law.*” In *Global prescriptions: the production, exportation, and importation of a new legal orthodoxy*, eds. Yves Dezalay and Bryant G. Garth. University of Michigan Press, pp. p.66), *For the Western cultural account*, Meyer, John W., John Boli, and George M. Thomas. 1987. “*Ontology and Rationalization in the Western Cultural Account.*” In *Institutional Structure: Constituting State, Society and the Individual*, eds. George M. Thomas et al. Sage Publications, pp. 12-37.

[14] Meyer, John W et al. 1997. “*World Society and the Nation-State.*” *American Journal of Sociology* 103(1): 153.

[15]Lechner, Frank J., and John Boli. 2005. *World Culture: Origins and Consequences.* Wiley-Blackwell, ch.10, Elliott, Michael A. 2008. *A cult of the individual for a global society: The development and worldwide expansion of human rights ideology.* Emory University.

[16]Finnemore, Martha and Stephen Toope. 2001. “*Alternatives to “Legalization”:* Richer Views of Law and Politics.” *International Organization* 55(03): 743-758.

[17]Ibid., 746-748.

[18]E.g. Finnemore, Martha. 1996. “*Constructing Norms of Humanitarian Intervention.*” In *The Culture of National Security: Norms and Identity in World Politics*, ed. Peter Katzenstein. Columbia University Press, pp. 153-185. See also with a focus on the Security Council, Wheeler, Nicholas J. 2000. *Saving Strangers: Humanitarian Intervention in International*

A Critical Introduction to the 'Legalisation of World Politics'

Written by Peter Brett

Society, Oxford University Press, New York.

[19]Finnemore, Martha. 1996. "Review: Norms, Culture, and World Politics: Insights from Sociology's Institutionalism." *International Organization* 50(2): 325-347.

[20]Schmitz, Hans Peter. 1999. "Transnational activism and political change in Kenya and Uganda." In Risse, Thomas and Stephen C. Ropp, and Kathryn Sikkink, eds., *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press), pp.39-77, Ropp, Stephen C. and Kathryn Sikkink, "International norms and domestic politics in Chile and Guatemala.", in *Ibid.*, pp. 172-203.

[21]Black, David. "The long and winding road: international norms and domestic political change in South Africa." in *Ibid.*, pp. 78-108.

[22]Sikkink, Kathryn. 2002. "Transnational Advocacy Networks and the Social Construction of Legal Rules." In *Global prescriptions: the production, exportation, and importation of a new legal orthodoxy*, eds. Yves Dezalay and Bryant G. Garth. University of Michigan Press, p. 44.

[23]*Ibid.*, p.45.

[24]The now classic statement is Risse, Thomas. 2000. "'Let's Argue!' – Communicative Action in World Politics." *International Organization* 51: (2000), pp. 1-41.

[25]A good introduction is Deflem, Mathieu ed. 1996. *Habermas, Modernity and Law*, Sage Publications.

[26]Habermas, Jürgen. 1991. *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, Thomas Burger trans., MIT Press.

[27]See also Habermas, Jürgen. 1987. *Lifeworld and System: A Critique of Functionalist Reason*. Beacon Press.

[28]*Idem.*, *The Structural Transformation*.

[29]*Idem.*, September-October 2001. "Why Europe Needs a Constitution." *New Left Review* 11, pp.5-26.

[30]Nicole Deitelhoff. 2009. "The Discursive Process of Legalization: Charting Islands of Persuasion in the ICC Case." *International Organization*, 63(1): 33-65.

[31]Risse, "'Let's Argue!': 14.

[32]Hawkins, Darren. 2004. "Explaining Costly International Institutions: Persuasion and Enforceable Human Rights Norms." *International Studies Quarterly* 48: 779-804.

A Critical Introduction to the 'Legalisation of World Politics'

Written by Peter Brett

[33]E.g. Finnemore and Toope. "Alternatives to "Legalization"".

[34]Abbot et al. "The Concept of Legalization.": 2.

[35]Ibid., 3.

[36]E.g. Helfer, Laurence. 2002. "Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes." 102(7): 1832-1911.

[37]Cf. Kingsbury, Benedict. 1998. "The Concept of Compliance as a Function of Competing Conceptions of International Law." *Michigan Journal of International Law* 19: 345-72.

[38]Finnemore and Toope. "Alternatives to "Legalization"": 743.

[39]Dworkin, Ronald. 1975. "Hard Cases." *Harvard Law Review* 88(6): 1057-1110.

[40]Hart, H.L.A. 1994 [1961]. *The Concept of Law*. 2nd edition. Oxford: Clarendon Press, pp. 88-117. This argument was famously extended in Neil MacCormick, 1978. *Legal Reasoning and Legal Theory*, Oxford: Clarendon Press.

[41]Franck, Thomas. 1990. *The Power of Legitimacy Among Nations*, New York: OUP.

[42]This section follows the classic interpretation in Hunt, Alan, and Gary Wickham. 1994. *Foucault and the Law: Towards a Sociology of Law As Governance*. LPC Group, rather than the more recent Golder, Ben, and Peter Fitzpatrick. 2009. *Foucault's law*. Taylor & Francis.

[43]See especially Foucault, Michel. 1995 [1975]. *Discipline & Punish: The Birth of the Prison*. Vintage.

[44]Rajkovic, Nikolas. 2010. "'Global law' and governmentality: Reconceptualizing the 'rule of law' as rule 'through' law." *European Journal of International Relations* XX(X): 1-24.

[45]Scott, Shirley and Anne-Marie Slaughter and Friedrich Kratochwil. 2002. "Legalization: Interpreting the Empirical Evidence." *Proceedings of the Annual Meeting (American Society of International Law)* 96: 296. The non-coercive power of 'networks' is developed in Slaughter, Anne-Marie. 2004. *A new world order*. Princeton University Press.

[46]E.g. Cain, Maureen and Hunt, Alan. 1979. *Marx and Engels on Law*, London: Academic Press, p. 254.

[47] Miéville, China. 2005. *Between Equal Rights: A Marxist Theory of International Law*, Brill.

[48]Ibid., p.319.

A Critical Introduction to the 'Legalisation of World Politics'

Written by Peter Brett

[49]Cain and Hunt. *Marx and Engels on Law*, p.55.

[50]An important landmark is Thompson, Edward P. 1975. *Whigs and Hunters: The Origin of the Black Act*, New York: Pantheon. An excellent overview is Cotterrell, Roger. 1995. *Law's Community: Legal Theory in Sociological Perspective*. Clarendon Press, ch. 6.

[51]The most significant item is Bourdieu, Pierre. 1986. "The Force of Law: Toward a Sociology of the Juridical Field." *Hastings Law Journal* 38: 805-853. See pp. 814-6 for the 'relative autonomy' debate.

[52]See Helle Krunke ed. 2006. *Pierre Bourdieu: From Law to Legal Field (Retfaerd)*, Djoef Publishing.

[53]Bourdieu, "The Force of Law": 834.

[54]Garth, Bryant and Yves Dezalay. 1996. *Dealing in Virtue: International Commercial Arbitration and the Emergence of a New International Legal Order*, University of Chicago Press.

[55]Garth, Bryant. 2008. "The Globalization of Law." in *The Oxford Handbook of Law and Politics*, eds. Keith E. Whittington et al., Oxford: Oxford University Press, p. 247.

[56]Ibid., p. 257.

[57]Garth, Bryant and Yves Dezalay. 2006. "From the Cold War to Kosovo : The Rise and Renewal of the Field of International Human Rights." *Annual Review of Law & Society* 2: 231-255.

[58]Idem. 2002. *The internationalization of palace wars : lawyers, economists, and the contest to transform Latin American states*. University of Chicago Press.

[59]Idem eds. 2011. *Lawyers and the rule of law in an era of globalization*, Routledge.

[60]Koskenniemi, Martti. 2007. *The Ideology of International Adjudication*, working paper of the Erik Castren Institute of International Law and Human Rights, at <http://www.helsinki.fi/eci/Publications/MKHague%201907-puheversio07a.pdf07>, (accessed 10th December 2010), p.1.

[61]See, for example, the discussion of the South African Treatment Action Campaign in Fourie, Pieter. 2006. *The Political Management of HIV and AIDS in South Africa: One Burden Too Many?*, Palgrave MacMillan.

[62]An example of this is the application of Gayatri Spivak's 'strategic essentialism' principle to indigenous rights, as in Lee, Richard. B. 2006. "Twenty-first century indigenism." *Anthropological Theory* 6(4): 455-479 or Barnard, Alan. 2006. "Kalahari Revisionism, Vienna

A Critical Introduction to the 'Legalisation of World Politics'

Written by Peter Brett

and the Debate." Social Anthropology 14(01): 1-16. For the original idea, Spivak, Gayatri. 1998. "Can the Subaltern Speak?" in Cary Nelson and Larry Grossberg, eds. Marxism and the interpretation of Culture. Chicago: University of Illinois Press, pp. 271-313.

About the author:

Peter Brett is a Teaching Fellow in Politics at the London School of Oriental and African Studies. He writes on the 'judicialisation' of African politics with a focus on Southern Africa.