Law and legalization in transnational relations

edited by Christian Brütsch and Dirk Lehmkuhl.

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This volume addresses the emergence of multiple legal and law-like arrangements that alter the interaction between states, their delegated agencies, international organizations and non-state actors in international and transnational politics.

Political scientists and legal scholars have been addressing the 'legalization' of international regimes and international politics, and engaging in interdisciplinary research on the nature, the causes and the effects of the norm-driven controls over different areas and dimensions of global governance. However, the perspectives on the essence of legalization still diverge.

This book claims that the emergence and spread of legal and law-like arrangements contributes to the transformation of world politics. It argues that 'legalization' does not only mean that states co-operate in more or less precise, binding and independent regimes, but also that different types of non-state actors can engage in the framing, definition, implementation and enforcement of legal and law-like norms and rules, e.g. in terms of private standard setting or certification schemes. To capture these diverse observations, the volume provides an interpretative framework that includes the increase in international law-making, the variation of legal and legalized regimes and the differentiation of legal and law-like arrangements. This book will be of interest to students and researchers of international politics, international relations and law.

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1 Introduction

Christian Brütsch and Dirk Lehmkuhl

For much of the last century, the 'realists' among the political scientists argued that international politics is determined by the struggle for power and peace. They acknowledged that international law could be instrumental to the exercise or the preservation of power. But they claimed it had no significant impact on the politics among nations in what they considered an essentially anarchical world. However, already in the late 1960s, critics observed that international relations were changing. Institutionalists argued that states were likely to pool or surrender parts of their sovereignty if they believed that transferring authority to more or less formalized regimes would reduce the costs for the management of increasingly complex cross-border interdependencies. The English School linked the emergence of normative structures and institutions to the historic development of the international society that conditioned interactions within the international states system. Constructivists showed that norms and rules shaped the behaviour and the identity of political actors.

The economic, social and political globalization of the past few decades has accentuated the role of international norms and rules. Today, legal controls may still be weak with regards to interventions against potential threats to international security. But on the whole, the politics among nations are no longer measured against the principles and provisions of the UN Charter alone. Trade policies are subject to the norms and rules laid out in the GATT/WTO Agreements, labour standards are set by the ILO Declaration on Fundamental Principles and Rights at Work, 'the most serious crimes of international concern' can be prosecuted according to the Rome Statute for an International Criminal Court.

At the same time, the fragmentation of political agency and the diffusion of legal or law-like arrangements at different levels and across different dimensions of global governance have blurred the boundaries between the international states system, the international community and transnational society. Thus, the international community agreed upon a new generation of treaties and conventions framed and wanted by civil society rather than states, such as the Kyoto Protocol against global warming and the Ottawa Convention for a Comprehensive Landmine Ban. Besides, many of the more traditional regimes that were established to solve collective action problems have assumed legal or law-like

characteristics that affect not just the behaviour of states, but also that of sub-state or non-state actors. Moreover, non-state actors are increasingly engaged in the creation, implementation and monitoring of more or less binding norms and rules. Thus, even though the terms of engagement vary, the WTO, the ILO and the ICC rely on the contributions of the entrepreneurs, activists, advocacy groups, professional associations and experts that constitute 'civil society'. Lastly, a growing number of non-state actors have engaged in the creation, implementation, monitoring and enforcement of autonomous law-like arrangements ranging from accounting standards to forest certification schemes or codes of conduct to fight corruption.

Political scientists and legal scholars have addressed these moves to law both in terms of a 'legalization' of international regimes and in terms of a 'juridification' of international politics.[1] They have engaged in interdisciplinary research on the nature, the causes and the effects of the norm-driven controls over different areas and dimensions of global governance. However, the perspectives on the essence of legalization still diverge.

A prominent group of – mainly US American-based – political scientists and lawyers suggest extending the rationalist institutionalist research agenda and to interpret the 'legalization of world politics' in terms of the degrees of precision, obligation and delegation of international regimes (Abbott and Snidal 2001; Abbott and Snidal 2002; Goldstein *et al.* 2001). In Europe, Zangl and Zürn argue that legalization should be considered a 'building block of global governance' that facilitates the shift from interest- and consensus-oriented bargaining to norm-oriented legal procedures that help structuring and resolving disputes about the interpretation and implementation of different elements of governance 'by, with and without governments' in a more rational manner (Zangl and Zürn 2004). Others are less optimistic. Hurrell acknowledges that 'the rhetoric of interests, of regimes, of governance mechanisms' has been 'crucial to increased dialogue between international relations and international law', but denounces its tendency to obscure the 'the equally important links between law and power' (Hurrell 2000: 329).

Not surprisingly, the debate about the epistemic relevance of legalization has not been resolved. Rationalist institutionalists argue that legalization can explain the transition to co-operation, and suggest analyzing when either 'soft' or 'hard' forms of legalization can be expected to better resolve collective action problems (Abbott and Snidal 2002). Zangl and Zürn suggest examining whether the legalization of procedural elements – adjudication, enforcement, law-making – and the socialization of norms contribute to the constitutionalization of the complex architecture of global governance (Zangl and Zürn 2004).

In this volume, we do not attempt to pre-empt the debate by opting for one rather than the other proposal. Indeed, we believe that despite the extensive coverage of the different areas and aspects of legalization, the overt assumptions and the relatively narrow analytical focus that characterize many of the most prominent approaches provide an inadequate picture of the impact legalization has on world politics. Research on the legalization of international regimes captures the emergence of an increasingly 'objective' system of norms and

rules, but ignores the emergence of transnational legalities, and struggles to acknowledge the asymmetries of power and the distortions produced by the more or less clouded shadow of hegemony. And while the analysis of the spreading of legal or law-like procedures helps us to interpret the transformations of political agency 'beyond' the state, the assumption that the legalization of international affairs and the socialization of norms and rules (should) lead to a constitutionalization of global governance tends to underestimate both the murkiness of legalization and the relevance of the capability of specific actors to influence outcomes and to determine which norms and rules eventually succeed in shaping different areas and dimensions of global governance.

The main aim of this volume is to re-frame the debate on legalization and to extend research on the different dimensions that characterize the 'complex legalization' of international affairs. Its ambition is to provide an interpretative framework that enables us to capture different moves to law and to map the paths different actors take to advance or detour legalization. Thus, rather than suggesting that research on complex legalization should either confirm the realist claim that power relations determine the reach, scope and role of international norms and rules, extend the rationalist institutionalist focus on the transition to co-operation, or develop constructivist research on the socializing factors of norms, we suggest that, each and any of these claims may provide bits and pieces to explain different dimensions of complex legalization. The puzzle we try to resolve is how and to what extent international affairs are transformed by overlapping, often competing and potentially conflicting legalities that emerge in distinct settings, have different law-like properties, and have different policy implications

The contributions in this volume document that many of the legal or law-like arrangements that have emerged in the past few decades cannot be explained in terms of a changing order of preferences of the usual suspects involved in creating regimes. Legalization has transformed – and/or benefited from the transformation of – the institutions of global governance and the broader frameworks of agency that enable different actors to participate and operate in world politics. To a certain extent, the process may even modify the power relations and structures on which these frameworks are built.

On an analytical level, the case studies in this volume seek to interpret the manifold legalities that shape international affairs in terms of the increase, variation and differentiation of international law making and implementation in the broader context of 'complex' legalization by:

- identifying legal and law-like arrangements that address specific problems in different areas of international/transnational affairs;
- reconstructing the dynamics leading to the emergence of such arrangements, in particular with regards to the actors and policies that contribute to the framing, implementation and monitoring of these arrangements;
- addressing the co-evolution and the interaction among different legal or law-like arrangements.

The contributions to this volume are organized as follows:

In the next chapter, Brütsch and Lehmkuhl introduce the notion of 'complex legalization', arguing that research on legalization should not only explain when more or less precise, binding and independent regimes facilitate international co-operation or look for legal law-like arrangements that may, eventually, contribute to a 'constitutionalization' of global governance. Challenging state-centred interpretations of the role of law in world politics, they propose to extend research on 'complex legalization' to capture a broader range of legal and law-like arrangements affecting both international and transnational relations: research should acknowledge that 'complex legalization' includes different moves to law that lead to an increase of international law-making, a variation of legal regimes and a differentiation of legal and law-like arrangements. On the analytical level, Brütsch and Lehmkuhl suggest abandoning theoretical parsimony for a pluralistic framework of interpretation, and propose to direct research on complex legalization to capture how legal and law-like arrangements contribute to the framing and management of the increasingly complex and thick interdependencies that link states, their delegated agencies and private actors at different levels of governance and across different geographical locations.

In their discussion of the development, endorsement and enforcement of international accounting and disclosure standards for publicly traded companies, Wüstemann and Kierzek document a first controversial dimension of transnational legalization. They show that the International Accounting Standards Board's efforts to define a common core of globally valid accounting and disclosure standards are clearly conditioned by the competition between the world's two major trading blocs: the European Union and the United States of America. They also show that 'private' forms of legalization are not necessarily independent from public authority, but may well be a tool in policymaking. But they also highlight a dilemma: to be credible in the business community, private standard setters have to balance the demands of their two most important interlocutors – although the bundled weight of the US capital markets puts US regulators in a favourable position. Wüstemann and Kierzek conclude that the transatlantic divide does not only prevent the emergence of global accounting standards. It exacerbates differences in national regulatory philosophies and implementation patterns and thereby contributes to legal uncertainty within the EU.

In his account of the harmonization of secured transactions, Cohen explores the dynamics of legalization with regards to the transformation of private international commercial law. He illustrates the complex patterns of interaction that enable legal experts to cross the boundaries between domestic and international markets and thereby blur the distinction between public and private legal authority. In fact, according to Cohen, legalization is the result of the exchange between legal experts and national and international institutions aimed at settling divergences about the meaning and effectiveness of individual principles and norms. Cohen also notes that in these exchanges, power relations and power differentials play a significant role – a point in case being the different gravity of

US, European or Asian financial markets or the willingness and capability of national regulators to export their own regulatory frameworks.

According to Pieth, the 'Wolfsberg Anti-Money Laundering Principles' and the 'Partnering against Corruption Initiative' reveal both the potential and the drawbacks of private alternatives to international law. The Wolfsberg Principles emerged after a series of scandals struck the European banking sector and the prospect of a hardening of the traditionally rather soft mixture of legal instruments regulating money laundering became more probable at both the national and the international level. In this context, the major banks agreed that a self-imposed arrangement would minimize the risk of excessive regulatory costs. However, stained by competition, they struggled to agree on a common strategy to fight against transnational economic crime. This changed when two non-profit organizations became involved as intermediaries and helped to establish an atmosphere of trust amongst competitors. At an early stage, an exclusive strategy helped to establish a set of coherent principles that increasingly extended its reach and by now is incorporated into many national provisions.

Although the development of anti-corruption principles also adopted a multi-stakeholder approach with intermediaries displaying similar entrepreneurial capacities, the cross-sectoral nature of the problem made a more inclusive strategy necessary right from the beginning. Given the absences of the direct threat of hard public regulation, however, initial obstacles to co-operation among competitors were much harder to overcome. Both initiatives may serve as examples of how in sectors with existing significant public intervention, private parties provide genuine contributions that reach beyond public rules.

Coleman and Reed's discussion of the certification of organic agriculture offers a complimentary perspective on the linkages between public and private initiatives for legalization. Initiated by farmers to provide alternative agricultural products on local and domestic markets, organic agriculture has experienced a significant growth both in consumer demand and producer supply since the 1990s. With rising stakes, the internationalization of the markets for organic agriculture has undermined the legal framework controlling that organic agriculture be organic. According to Coleman and Reed, the initial pattern of private norm production, in which producer co-operatives established national networks that eventually defined international norms, has been complemented by government interventions at different levels. The parallelism of the extraterritorial extension of domestic arrangements and 'global' initiatives for legalization has created a range of overlapping and conflicting norms and rules. Different standards of organic agriculture, requirements for the accreditation of certification organizations and approaches to the certification of organic agriculture support and compete with each other. A series of contradicting provisions documents that global legalization does not necessarily imply a rationalization. Indeed, despite far reaching and often complimentary efforts, the core principles of governance for organic agriculture remain contested.

The co-ordination of and competition between different rules systems is also at the centre of Meidinger's account of the efforts of different transnational