Law and Politics Beyond the Nation-State: Areas of Conversation and of Common Ground

by

Thomas Risse


Author’s Address:
Center for Transatlantic Foreign and Security Policy
Department of Political and Social Science
Free University of Berlin
Ihnestr. 22
14195 Berlin
Germany
Tel.: +49-(0)30-838 55527
Fax: +49-(0)30-838 54160
Email: risse@zedat.fu-berlin.de
Web: http://www.fu-berlin.de/atasp
Introduction: International Relations Theory Discovers the Law

I am a political scientist by training. Worse, I am a trained international relations (IR) scholar. The stylized version of a traditional IR scholar’s view of law, let alone international law, goes something like this: The law, in particular international law, is epiphenomenal in world politics. It constitutes the expression of other forces at work, be it material power, economic interests, or domestic politics of states. If you are interested in understanding international relations, do not study (international) law! It distracts you from more important issues in political science. End of conversation with lawyers. This view, of course, is not even the “external perspective” of the law which Tom Heller ascribes to political scientists and which should leave some common ground for lawyers and political scientists to explore. Heller’s political scientist colleague is at least interested in the politics of legal interpretation (Heller 2001, 1).

The epiphenomenality of law was, of course, due to the legacy of (neo-) realist thought in international relations theory (e.g. Waltz 1979; Gilpin 1981). Then neoliberal (or rationalist) institutionalism entered the scene. It tried to make sense of an international world increasingly populated by cooperative arrangements among states to deal with collective action problems, to provide public goods, and to regulate policies in all issue-areas of international life. The initial theoretical move was to assume egoistic utility-maximizing corporate agents – mostly states – and to explain (against [neo-] realism) why international cooperation “under anarchy” was possible and necessary for problem-solving and goal attainment (see e.g. Krasner 1983a; Oye 1986; Keohane 1989b; Stein 1990; Rittberger 1993; Zürn 1992). Neoliberal institutionalism talked about law without mentioning the term. Take the original consensus definition of international regimes: “sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of international relations” (Krasner 1983b, 2). Of course, implicit principles, norms, rules etc. represent “customary law” in international life, while explicit norms and rules constitute international treaties, conventions etc. and both make up the furniture of international law. Yet, IR scholars appeared to fear using the term “law” like der Teufel das Weihwasser! The 1990 state of the art volume of German-speaking IR theory included essays on regime analysis, but still

---

1 The following represents a thinkpiece rather than a full-fledged article. For comments on an initial draft I thank Tanja Börzel.

2 One should note, though, that there has been a similar discussion among legal theorists until rather recently whether “international law” could in fact be called “law” due to the absence of enforcement mechanisms (QUOTES). Thus, there have been some parallels to realism in legal thinking.
no treatment of international law (Rittberger 1990). We would rather call it norms, defined as “standards of appropriate behavior for actors with a given identity” (Finnemore and Sikkink 1998, 891; Jepperson, Wendt, and Katzenstein 1996). And this included those who started calling themselves “constructivists” – with one notable exception, Friedrich Kratochwil’s 1989 volume on “Rules, Norms, and Decisions” (Kratochwil 1989, see also Onuf 1989). In 1996, Katzenstein’s book established constructivism as a respected theoretical endeavour in U.S. IR. It was all about “norms,” the interpretation of international norms, and legitimacy in international life. The book, once again, talked about law without mentioning the term. Last not least, the index of Wendt’s standard account of constructivism in IR theory – “Social Theory of International Politics” – contains just three entries pertaining to international law (Wendt 1999). My last example concerns the 1998 special issue of the top IR theory journal – *International Organization* (Katzenstein, Keohane, and Krasner 1998). The volume contains numerous articles on international institutions, norms, and the rationalist-constructivist debate, plus contributions by an economist (Barry Eichengreen) and two sociologists (Jim March and Johan Olsen). Still no lawyer, let alone an article on international law.

Three years later, things have changed quite a bit. In the fall of 2001, *International Organization* published another special issue, this time on “Legalization and World Politics” (Goldstein et al. 2000b) with contributions from lawyers and political scientists (for a critical discussion, again co-authored by an international lawyer see Finnemore and Toope 2001). And the recently published *Handbook of International Relations* also contains an article on international law and compliance (Raustiala and Slaughter 2002). The profession of international relations scholars seems to have finally come around to not only studying normative obligations and their impact in world politics, but actually to using the term of “law” for those obligations and commitments. Developments in the real world seem to have sparked this shift in focus: “The discourse and institutions normally associated with domestic legal systems have become common in world politics” (Goldstein et al. 2000a, 2). In a sense, IR scholars have only followed suit developments that were underway for quite some time in studies of the European Union (EU). In fact, the recent move toward the study of legalization processes in the IR discipline has been inspired quite substantially by studies on European law and its role in the integration process (see e.g. Alter 1998; Burley and Mattli 1993; Conant 2001; Sandholtz and Stone Sweet 1998; Slaughter, Stone Sweet , and Weiler 1998).

However, one should not make too much of this late recognition of the concept of legalization among IR scholars. Institutionalist theory has been firmly established in the discipline. As I argue in the following, institutionalist reasoning offers enough common ground to spark interdisciplinary
conversations between lawyers and political scientists. Once we start translating disciplinary jargon into each other’s language, we can observe similar controversies and similar efforts at institutionalist reasoning in the two professions. I try to show this by discussing various attempts by legal scholars to theorize about the origins of international law-making as well as compliance with international norms and law. Some theoretical divides inside the two professions appear to be much deeper than divides between legal scholars and political scientists.

I begin with some thoughts on the distinction between “internal” and “external” perspectives of the law put forward in Tom Heller’s paper.

**Internal and External Perspectives of the Law: Where Can Lawyers and Political Scientists Meet?**

Heller’s distinction between internal and external perspectives of the law offers a useful starting point for thinking about the common ground from which legal scholars and political scientists might be able to engage in a conversation about law and politics. Legal scholars have one privilege over political scientists, though: They can take the internal or inside perspective as practitioners or interpreters of the law. From this internal perspective, they participate in a legal system as a “set of practices derived from a consistent application, under some accepted canon(s) of interpretation, of an authoritative order, principles or text(s), through independent, usually professional, adjudication” (Heller 2001, 1). When political scientists argue that legal scholars “usually take a normative perspective,” they refer to this internal perspective on the law. The inside view pertains to the active participation in the construction and interpretation of legal documents, i.e. in law-making in a broader sense. I do not necessarily mean active participation in courts and judiciary processes. Rather, the inside view concerns to a large degree what legal scholars do for a living, i.e., interpreting and thereby constructing the law. By definition, political scientists cannot and should not participate in this process.

Yet, the internal perspective severely limits an interdisciplinary conversation between law and politics. It still requires political scientists, but on lawyers’ territory. The internal view of the law demands from political science to deliver some factual information about the political world, about the state of affairs which the law tries to regulate. From this internal perspective, lawyers must talk to political scientists in order “to get the facts right” and to learn more about political processes and
institutional designs. The law-politics interaction is necessarily one-sided and asymmetrical with political science performing the task of information providers and legal scholars deciding on what to make of this input for their interpretation of the law.

Of course, there is also an internal political science perspective whereby lawyers provide crucial input for social science work. Those of us studying, say, EU institution-building and the implementation of EU rules and regulations require input from legal scholars specializing in EU law in order to understand what the rules actually mean. We are then usually frustrated, because we normally fail to understand that “the law” is never written in stone, but always subject to interpretation and re-interpretation (for an excellent treatment of legal reasoning as an interpretive and, therefore, constructionist process on the basis of agreed-upon procedural rules see Kratochwil 1989). As a result, you ask three lawyers and you get six different versions of what a particular article actually means plus the various counter-interpretations.3 We are usually on safer grounds when we ask procedural questions to legal scholars, because there is a chance that they actually agree on process. But as this little example shows, this is still an “us-them” perspective whereby political scientists define the territory and the relevant questions and legal scholars are supposed to supply some relevant information.

In sum, I agree with Tom Heller that the internal perspective – whether from a lawyer’s or from a political scientist’s viewpoint – does not get us very far in sparking a serious conversation between law and politics: “Once legal inquiry has moved into external ground, it seems equally amenable to examination by lawyers and political scientists willing to become well versed in the law’s institutional operations” (Heller 2001, 4). This does not mean that legal scholars have to become political scientists and adopt an analytical social science perspective or that political scientists become – usually bad – lawyers. What it does require, though, is to, first, develop a good sense on both sides of the disciplinary divide on how the other discipline operates from its “internal view” and, in particular, what the relevant validity criteria for scientific statements in either profession are. This point is rather trivial and pertains to any form of interdisciplinary engagement.4 Second, legal scholars and political scientists need to adopt a reflexive position vis-à-vis their own internal perspective. I

---

3 Of course, I assume that legal scholars are equally frustrated when they ask political scientists about some “facts in the political world” and get three to four theories how one can actually conceptualize the problem and what the various subtleties of these theories are.

4 Still, the point is worth re-iterating, since most so-called interdisciplinary work is actually multi- rather than interdisciplinary, i.e, does not engage in a serious conversation among equals.
read the first part of Heller’s paper as an attempt to delineate such a reflexive position for a legal scientist. The most important point is probably to reflect on the embeddedness of “the law” in larger social, economic, and political processes which shape legal processes and are in term shaped by them.

For political science, a reflexive position does not require in my view to give up an analytical perspective and become normative, i.e., to give up the conventional social science enterprise. (In parenthesis, just a note on my epistemological position here: I agree with the post-positivist view that there are no value-free statements in social science. Our motivations to do social science research in the first place and our methodological decisions inevitably contain some normative connotations and moral judgements. Yet, this does not mean that there are no differences between the validity claims of an analytical statement about the world including the world of norms, institutions, and laws, on the one hand, and a normative statement about what ought to be the case or to be done in this world, on the other hand. The validity criteria for judging and challenging these two types of statements differ vastly.) What it does require, first, is to abandon the view outlined above in my introductory statement that legal systems are simply epiphenomenal in political life. Second and more important, it demands from us to take the internal view of legal scholars into consideration when studying legal systems and to reflect upon how political systems including the international political world – the object of our study – are deeply embedded in legal procedures and legalized understandings. This is the reflexive move on the part of political scientists. This is why I think that the recent move in IR scholarship toward “legalization” (see above) constitutes a prerequisite for serious conversations with legal scholars on our part.

Here I suggest that Heller’s argument about the external view as the territory for the discovery of common ground between legal scholars and political scientists needs to be amended. It is true that non-legal causal factors need to enter the explanation of legal processes or outcomes which then “inherently threatens to contradict the autonomy claims of those who participate in the internal view of the legal system” (Heller 2001, 3). However, since the internal view forms part and parcel of what constitutes the operation of a legal system in the first place, it has to be reflected upon and become subject of inquiry. The self-interpretations and –representations of a legal system including the interpretations of the legal profession reproducing the system need to become subject of the conversation between lawyers and political scientists. This conversation would still take place from the external perspective. But the latter cannot be confined to the non-legal factors relevant for studying “the law,” but has to take the collective understandings and (self-) interpretations of the
legal system into account. While political scientists constantly remind lawyers that their interpretative work from the inside does not take place in a social and political vacuum, the legal discourse itself as a system of meaning-creation within specific procedural boundaries and accepted canons of interpretation must become subject of the conversation between lawyers and political scientists. Otherwise, we simply miss what “the law” as a reflexive process of norm creation and interpretation actually means. This move, of course, has implications for the substantive conversations on which I will comment below.

In the following, I stick to Heller’s example and comment on ongoing conversations between lawyers and political scientists in the joint space defined by the external view. While Heller’s paper deals with transition research and the relationship between democracy, economic performance, social norms, and law, I concentrate on another area of potential common ground, institutions for governance beyond the nation-state. I try to show that there is enough commonality between legal controversies and disputes among political scientists as to the underlying theoretical assumptions to allow for substantive conversations. All one has to do is to translate the different jargons.

### Governance Beyond the Nation-State and the Various Institutionalisms

#### Three Logics to Studying Institutional Arrangements

In the following, I distinguish between three attempts to theorize institutions depending on the underlying theory of social action (see also Risse 2002). The first account follows a “logic of consequentialism” (March and Olsen 1989, 1998) which is the domain of rational choice and rationalist

---

5 I am happy to comment on this either during the conference or in the revised version of the paper. It is up to the conference organizers to decide what they want me to do. Here is my sound bite version of a comment:

1) Empirical work reported by Przeworski, Limongi and others has reached consensus more or less that constitutional democracy and economic growth/performance are orthogonal to each other in the early transition phases: We neither need democracy to get capitalism (Olson is simply empirically wrong) nor is capitalism required to get democracy (Lipset is as wrong). These findings point, of course, to scope conditions and I agree completely with Heller that research on democratization is under-specified in this regard.

2) Things look different when it comes to the consolidation phases of democratization processes. There is increasing evidence that economic growth/performance helps substantially to consolidate constitutional democracy by improving output legitimacy.

3) While the link between economic growth/performance and democracy/constitutionalization seems to be indeterminate and subject to further specification of scope conditions, the same cannot be said between the democracy-rule of law nexus. Democratization in terms of increasing participatory rights, human rights improvements, and establishing the rule of law via constitutionalization appear to go hand in hand empirically and the evidence appears to be overwhelming.
institutionalism. Agents enact given identities and interests and try to realize their preferences through strategic behavior. The goal of action is to maximize or to optimize one’s interests and preferences. Institutions including norms and legal standards are considered fundamentally external to actors. They constrain behavior and affect actors’ strategies (or policy preferences), but are not assumed to influence deeper interests (preferences over outcomes), let alone collective identities.

The second account emphasizes a “logic of appropriateness:” “Human actors are imagined to follow rules that associate particular identities to particular situations, approaching individual opportunities for action by assessing similarities between current identities and choice dilemmas and more general concepts of self and situations” (March and Olsen 1998, 951). Rule-guided behavior differs from strategic and instrumental behavior in that actors try to “do the right thing” rather than maximizing or optimizing their given preferences. The logic of appropriateness entails that actors try to figure out the appropriate rule in a given social situation. Normative rationality implies constitutive effects of social norms and institutions, since these rules not only regulate behavior, i.e., have causal effects, but they also define social identities (“good citizens do X”). Normative rationality also entails socialization effects. Norm-guided behavior requires at least knowledge of the rule and some internalization of the knowledge. Sociological institutionalism usually emphasizes the logic of appropriateness.

Most of the controversy between rationalist (or “neoliberal” in IR jargon) and sociological institutionalism has focussed on the relationship between the “logic of consequentialism” and the “logic of appropriateness.” This debate has overlooked a third mode of social action. In many social situations, actors regularly comply with norms which they have internalized and which they “take for granted.” While strategic behavior is explicitly goal-oriented and intentional, the “taken for grantedness” of norm-regulated behavior implies that enacting the (legal) norm does not need to be a conscious process. In this case, the social structure of norms exerts its effects on actors almost directly, since actors know what is expected of them and what constitutes appropriate behavior. The logic of appropriateness does not imply that actors actively approve of the social norms in terms of believing in the moral validity of the norm, only that they acquire and internalize the social knowledge of what is expected of them in a given social situation. Internalizing social knowledge still requires that agents adjust their preferences and – maybe – even social identities. In this sense, the “logic of appropriateness” still differs from a rational choice point of view of norm compliance.
whereby this is all about reputation and reputational costs. But the “taken for grantedness” concerns acquiring social knowledge as an almost subconscious process (see Giddens 1984, ch. 1, on this point). This version of a logic of appropriateness emphasizes structure over agency.

Yet, rule-guided behavior often involves a conscious process whereby actors have to figure out the situation in which they act, apply the appropriate norm, or choose among conflicting rules. The internalization of (legal) norms does not help in a situation, for example, in which actors are faced with conflicting rules. The rational choice logic implies, of course, that actors will follow the norm which better suits their given interests in such a situation. But what if exogenously defined interests do not give clear guidance? The more the norms are conflicting or contested, the less the logic of the situation can be captured by the statement “good people do X,” but by “what does ‘good’ mean in this situation” or even “what is the right thing to do?” But how do actors adjudicate which (legal) norm applies? They reason, thereby following a “logic of truthseeking or arguing.” Arguing implies that actors try to challenge the validity claims inherent in any causal or normative statement and to seek a communicative consensus about their understanding of a situation as well as justifications for the principles and norms guiding their action. Argumentative rationality means that the participants in a discourse are open to be persuaded by the better argument and that relationships of power and social hierarchies recede in the background (Habermas 1981; Habermas 1992, 1995). Argumentative and deliberative behavior is as goal-oriented as strategic interactions, but the goal is not to attain one's fixed preferences, but to seek a reasoned consensus. As Keohane put it, persuasion “involves changing people’s choices of alternatives independently of their calculations about the strategies of other players” (Keohane 2001). Actors' interests, preferences, and the perceptions of the situation are no longer fixed, but subject to discursive challenges. Where argumentative rationality prevails, actors do not seek to maximize or to satisfy their given interests and preferences, but to challenge and to justify the validity claims inherent in them – and are prepared to change their views of the world or even their interests in light of the better argument. In other words, argumentative and discursive processes challenge the truth claims which are inherent in identities, interests, and (legal) norms.

Of course, we rarely find “ideal speech situations” in the real world and, according to the Habermasian theory itself, the ideal speech situation constitutes a counter-factual presupposition, i.e., an as-

Still, I fail to see how rational choice arguments about norm compliance for reasons of social reputation can be theoretically justified if one does not presuppose a society and social structure into which social agents are embedded. But this is another point.
umption against reality which we have to make in order to be able to communicate meaningfully with each other. As a result, there are many social situations in which argumentative rationality takes over even though the speaker are far from motivated by truth-seeking alone. Take a court room: We can probably and safely assume that defendant’s lawyers and public prosecutors in a courtroom hold rather fixed preferences (even though their job description still requires truth-seeking) and, therefore, engage in rhetorical action (on this concept see Schimmelfennig 2000, 2001). Yet, they have to convince a jury or a judge of their respective viewpoints within certain procedural and substantive rules. In other words, the institutional setting of the legal system requires argumentation and engaging in argumentative rationality in order to persuade others – an audience who decides about the “truth” - of one’s respective viewpoint (for a theoretical argument on why even instrumentally motivated speakers will be “forced” to engage in an arguing mode of reasoning, once institutional rules emphasize argumentative rationality see Müller NEW MS.).

In sum, the three modes of action outlined here are grounded in different theories of social action (Handlungstheorien), even though it is very hard sometimes to separate them in reality (in the courtroom example, all three modes are present: lawyers and prosecutor follow a logic of consequentialism, while the institutional rules of appropriateness require reason-giving and arguing so that judges and juries can adjudicate based on the “better argument”). We can distinguish the various approaches to legalization and constitutionalization beyond the nation-state depending on the underlying logic of social action assumed by the authors.

**Rationalist Institutionalism and the Functional Analysis of Legal Arrangements**

The special issue of *International Organization* devoted to “Legalization and World Politics” mentioned above (Goldstein et al. 2000b) pretty much follows the logic of consequentialism and a constrained choice perspective. The editors define “legalization” as a particular characteristics of institutions along three dimensions: obligation, precision, and delegation (OPD). “Obligation” means that “states or other actors are [legally/TR] bound by a rule or commitment…” “Precision” means that the legal rules “unambiguously define the conduct they require, authorize, or proscribe.” “Delegation” refers to the possibility that “third parties have been granted authority to implement, interpret, and apply the rules” and to resolve disputes (Abbott et al. 2000, 17). The higher values an institutional arrangement achieves on each of these dimensions, the more it is said to be legalized: “Highly legalized institutions are those in which rules are obligatory on parties through links to the
established rules and principles of international law, in which rules are precise (or can be made precise through the exercise of delegated authority), and in which authority to interpret and apply the rules has been delegated to third parties acting under the constraint of rules” (Abbott et al. 2000, 34).

Abbott and Snidal, in their contribution to the volume, then use the three dimensions to distinguish between hard (high on OPD) and soft law (lower on OPD) in international governance (Abbott and Snidal 2000). They develop a functional account of the conditions under which actors (mostly states, but the analysis can be extended to private actors and principal-agent models of domestic politics as in “two level games”, see Putnam 1988; Moravcsik 1997) are likely to choose hard law over soft law and vice versa. Hard law has the advantage of ensuring credible commitments, as in the case of NAFTA and the Mexican government’s effort to increase the credibility of its neoliberal economic policies (Abbott 2000) and of reducing the transaction costs of subsequent interactions through making legal norms as precisely as possible. In addition, delegation to third party dispute resolution such as the European Court of Justice (ECJ) or the WTO Appellate Body serves as a useful means to handle problems of incomplete contracting.

In contrast, “soft law” institutional arrangements are likely to emerge whenever the contracting costs themselves are particularly high (as compared to the post-agreement costs of monitoring and enforcement) and when binding legal arrangements would entail particularly significant “sovereignty costs” in terms of loss of authority and state autonomy. Moreover, soft law offers an attractive solution to deal with highly complex problems under conditions of uncertainty in which very precise legal norms might quickly become inadequate for problem-solving. Finally, Abbott and Snidal point out that soft law might be a useful tool to achieve compromise among actors with very heterogenous and conflicting interests, as is often the case in international life.

These assumptions and propositions are very much in line with neoliberal institutionalism and the functional theory of international regimes (see e.g. Keohane 1989a). Moreover, they are fully compatible with the rationalist logic of consequentialism, even if actors’ preferences are assumed to be ideational or value-oriented (e.g. concerning human rights) rather than materially based. The authors of the legalization volume – whether legal scholars such as Abbott and Slaughter or political scientists such as Goldstein, Keohane, and Moravcsik – take an external perspective on the law and essentially put forward extra-legal hypotheses on the conditions under which states and other actors pick more or less legalized international governance arrangements.
The same theoretical perspective also offers some propositions on compliance with legal arrangements. Yet, rationalist institutionalism has to overcome an initial puzzle concerning compliance. Assuming perfect information, rational actors who behave strategically and anticipate the consequences of their action, should not face compliance problems in the first place. If they decide to cooperate to solve some collective action problems or coordinate behavior, the costs of complying with inconvenient rules should have entered their utility functions to begin with. This is why neorealists argued that powerful states would only agree to those norms and rules with which they can comply rather effortlessly (Downs, Rocke, and Barsoom 1996). This includes setting up international or domestic monitoring and enforcement mechanisms to ensure rule compliance of smaller states and to take care of free riders.

Under conditions of complete information, compliance problems for powerful actors might arise in cases of “incomplete contracting,” that is, if the international rules are less clear and/or the international monitoring and enforcement mechanisms are less stringent (Abbott et al. 2000; Raustiala and Slaughter 2002). This leads to the hypothesis in the legalization literature that compliance with inconvenient international norms is likely to be higher, the more specific the rules and the more effective the monitoring mechanisms are (Abbott et al. 2000; Legro 1996). This is the advantage of hard law over soft law, according to rationalist institutionalism.

If we relax the assumption of complete information, even powerful states are likely to face compliance problems. Under conditions of bounded rationality, compliance problems might occur because of “involuntary defection.” The “managed compliance” perspective argues, for example, that states are generally willing to abide by international law, but might lack action capacities and resources of the administrative and political system (Chayes and Chayes Handler 1995; Chayes, Chayes, and Mitchell 1998; Chayes and Chayes Handler 1993). International institutions are supposed to prevent involuntary defection through technical and financial support and capacity-building.

Involuntary defection might also occur, because national governments are unable to foresee the domestic consequences of international arrangements (Zürn 1997). Domestic – both private or public -

---

7 Following Raustiala, Slaughter and others, I use the term compliance as incorporating the implementation of legal norms, but implying effectiveness in terms of problem-solving. Compliance means rule-consistent behavior, i.e. a “state of conformity or identity between an actor’s behavior and a specified rule” (Raustiala and Slaughter 2002, 539). The following owes much to Tanja Börzel’s work.
actors may try to override or subvert an international agreement against their own government (cf. the non-ratification of the comprehensive test ban agreement by the U.S. Senate). Two accounts can be distinguished. The first refers to domestic institutional features such as the number of veto players in a given polity (Tsebelis 1995), or the autonomy of the national government vis-à-vis society. A second account focusses on domestic societal interests. International institutions lead to a re-distribution of power capacities among the relevant actors in a political, social, or economic system (Milner 1988; Rogowski 1989). The more domestic actors are empowered by international norms and rule structures and the more this differential empowerment changes domestic “winning coalitions,” the more we would expect increasing compliance and institutional change. In sum, rationalist institutionalism emphasizes enforcement, legalization, capacity-building, and the redistribution of domestic resources as the main remedies for dealing with compliance problems. And once again and irrespective of whether political scientists or legal scholars reflect on international governance arrangements from this perspective, they not only take the external viewpoint, but also identify the sources of (non-) compliance outside the legal system in various social and political circumstances.

This constitutes a major difference to the two following accounts concerning sociological institutionalism emphasizing the logic of appropriateness and arguments about legal reasoning and deliberation. Both entail a constructivist ontology which by definition includes the (self-) interpretation of actors into their causal story (Giddens’ famous “double hermeneutics”, Giddens 1982). In other words, the “internal perspective” becomes part and parcel of the interpretative account from the outside. It can no longer be ignored what those who socially construct the law in their daily practices, think about it.

Sociological institutionalism and the Internalization of (Legal) Norms

Let me start with the critique of the rationalist legalization perspective as put forward by Finnemore – a political scientist – and Toope – a lawyer (Finnemore and Toope 2001). First, they criticize the narrow conceptualization of legalization as solely pertaining to formalized and institutionalized features. Instead, they argue that, under a broader view of law, legalization “encompasses features and effects of legitimacy, including the need for congruence between law and underlying social practice. It attends to the purposive construction of law within inherited traditions, the way participating in law’s construction contributes to legitimacy and obligation, and to the continuum of legality from informal to more formal norms” (Finnemore and Toope 2001, 744). One casualty of this
narrow conceptualization of legalization is customary international law which in fact regulates vast areas of international life such as the use of force and even the area of human rights. Customary law is of particular interest to sociological institutionalists and constructivists in the conversation between law and politics. If I understand this correctly, customary law arises essentially out of social practices themselves, almost as an unintended consequence of these practices. In other words, the intentionality of law-making which the legalization literature assumes, appears to be absent in this case. However, customary law scores rather highly on the legalization indicators, particularly with regard to obligation and, maybe, even delegation. This ought to be fascinating stuff for political scientists interested in the institutionalization of international order beyond the nation-state.

Second, Finnemore and Toope point out that the rationalist approach to legalization fails to conceptualize one particularly significant source of the “power of the law,” i.e. legitimacy. While one could argue that obligation as a defining feature of legalization should refer to the legitimacy of a legal order generating a “compliance pull” (Franck 1990), it is interesting to note that the legalization volume never mentions it. Here, Finnemore and Toope take the inside view of the law in order to criticize the external (rationalist) perspective: “Law is legitimate only to the extent that it produces rules that are generally applicable, exhibit clarity or determinacy, are coherent with other rules, are publicized (so that people know what they are), seek to avoid retroactivity, are relatively constant over time, are possible to perform, and are congruent with official action” (Finnemore and Toope 2001, 749). The point is here that incorporating the internal perspective is necessary for a deeper (external) understanding of the law, since legitimate law “generates obligation, not just in a formal sense but also in a felt sense” with empirically observable behavioral consequences (ibid.). In other words, strong legitimacy of legal arrangements should generate better compliance even in the absence of strong enforcement mechanisms.

The third point to be made here concerns the emphasis on constitutive rather than only regulative effect of legal arrangements. Constructivists – lawyers and political scientists alike – tend to emphasize constitutive features of the law and of norms in general (for political scientist work on this see, above all, Onuf 1989; Kratochwil 1989; Wendt 1999). Many social norms not only regulate behavior, they also constitute the identity of actors including the range of legitimate interests. This is what constitutions normally do – apart from regulating behavior. We know a chess game by its

---

8 It is noteworthy in this context that the table of forms of international legalization in Abbott et al. 2000, 22, does not entail customary international law at all. Rather, the lowest category of OPD is reserved to “spheres of influence” and the “balance of power.”
rules. The norm of sovereignty not only regulates the interactions of states in international affairs, it also defines what a state is in the first place (Biersteker 2002). Human rights norms not only protect citizens from state intervention, they also (and increasingly) define what it means to be a "civilized state" in the modern international community. The EU treaties define the EU as a legal community based on the protection of human rights, democracy, and social welfare – irrespective of whether we call them a “constitution” or not. Thus, they define state identities – with profound consequences even for non-members (see Laffan, O'Donnell, and Smith 2000 on this point).

Constitutive effects are not causal effects in the narrow sense of the word in that they determine behavior. They rather define agents as part of a social environment in terms of their social identities and the range of legitimate and acceptable interests which these agents can pursue. In a sense, the constitutive properties of legal structures and other rules define the specific logic of appropriateness in which the pursuit of rational interests is possible in the first place. This does not mean that constitutive rules cannot be violated or never change. The rules of sovereignty have been violated so often that Krasner calls them “organized hypocrisy” (Krasner 1999). Yet, sovereignty still constitutes states as actors in the international system – as distinguished from, say, Multinational Corporations or INGOs. We cannot even describe the properties of social agents without reference to the social structure in which they are embedded.

A final difference between rationalist and sociological institutionalism concerns the conceptualization of the compliance problem. However, non-compliance with international norms and rules should be as puzzling for constructivists as it is for rationalists, once the logic of appropriateness kicks in. It predicts a “compliance pull” (Franck 1990) of international legal standards, the more these norms have acquired consensual status as standards of appropriate and legitimate behavior in international society. In other words, once a critical mass of states subscribes to the new rules (Finnemore and Sikkink 1998 refer to this as a “norm cascade”), compliance should improve. Judging from the empirical record, however, there does not seem to be a straight line from collective identification with international institutions to rule-consistent behavior. When states ratify international treaties, they do not automatically implement the rules, let alone comply with them, as a very strict understanding of the logic of appropriateness would suggest (Liese 2001). There is a gap between norm acceptance and rule compliance (for a further discussion see Börzel and Risse 2002).

Sociological institutionalists offer the following accounts for the compliance puzzle. First, they point to “decoupling” whereby behavior does not conform to institutional norms and rules in which
actors are embedded. According to Meyer and Rowan, “decoupling enables organizations to main- 
tain standardized, legitimating, formal structures while their activities vary in response to practical 
considerations” (Meyer and Rowen 1991, 58). In other words, we need to distinguish between the 
prescriptive status of an international norm, on the one hand, and rule-consistent behavior, on the 
other. However, “decoupling” does not seem to be a universal condition, it varies tremendously. 
Unfortunately, sociological institutionalism of the Stanford school variety is of limited help in ac-
counting for this variation. This school is so much concerned with demonstrating the structural ho-
mogeneity of corporate actors including states in the contemporary world system that it has little to 
offer about degrees of decoupling, the variation in compliance with international rules, and the rea-
sons for this variation.

Constructivists have used a “cultural misfit” proposition to specifically account for variation in 
norm implementation and rule compliance and the differential diffusion of norms into domestic 
practices. According to the “resonance” hypothesis, new international rules including legal norms 
are the more likely to be implemented domestically and ultimately complied with, the more they are 
compatible with pre-existing domestic norms or collective understandings and identities embedded 
in a social and political culture (Ulbert 1997; Checkel 1997; Cortell and Davis 2000). The greater 
the misfit between international rules and regulations, on the one hand, and domestic rules and pro-
cedures, on the other, the more difficult rule compliance becomes. The “resonance hypothesis” has 
generated quite substantial empirical research across various issue-areas of international life in-
cluding citizenship norms, environmental rules, and international trade (overview in Cortell and 
Davis 2000).

But “cultural misfit” can only be a starting point for dealing with compliance questions from a con-
structivist perspective. Compliance by definition only becomes a problem when the rules are incon-
venient, i.e., if they entail some material or ideational costs for those who have to enact them. Thus, 
a certain degree of “misfit” must be assumed in order to have a compliance problem in the first 
place. At this point, we need to leave overly structuralist accounts and bring agency back in. Rule 
compliance and implementation constitute a socialization process during which actors – govern-
mental, transnational, and societal – gradually became acquainted with international legal norms as 
a result of which they assume their “taken for grantedness” and become habitualized practices.

Harold Koh’s work in law comes closest to this socialization perspective (Koh 1997). His focus on 
transnational legal processes of institutional interaction through which norms are internalized by
domestic actors resembles work by political scientists on international-domestic linkages in socialization processes (e.g. Checkel 1999; Finnemore and Sikkink 1998; Risse, Ropp, and Sikkink 1999). Koh sees transnational actors as transmission belts between international and domestic law: “As governmental and nongovernmental transnational actors repeatedly interact within the transnational legal process, they generate and interpret international norms and then seek to internalize those norms domestically” (Koh 1997, 2651). In other words, agency matters. These processes then result in identity changes and compliance becomes the self-interest of the state. Koh distinguishes between social, political, and legal internalization as three interconnected processes. Social internalization refers to increasing public legitimacy of international norms, while political internalization concerns the same on the level of political elites and state actors. Finally, legal internalization refers to the process by which international norms are incorporated into the domestic legal system through executive action, judicial interpretation, and legislative action. Koh’s “external look” at the internal world of legal interpretation and the process by which transnational “norm” agents socialize domestic societies and polities into international norms comes remarkably close to our own work in the human rights area and to our “spiral model” of human rights change (Risse, Jetschke, and Schmitz 2002; Risse, Ropp, and Sikkink 1999).

Koh’s work not only refers to the logic of appropriateness as theorized by sociological institutionalists. It also concerns the role of interpretation and deliberation in the process of law-making and – implementing. This is another area of common ground for legal scholars and political scientists to which I now turn.

“Deliberative” Institutionalism and Legal Reasoning

While sociological institutionalism has been often accused of overly structural accounts, the logic of arguing mentioned above brings agency back into the picture from a non-rationalist perspective. Deliberation refers to a mode of social change within institutional environments that emphasizes reason-giving and the mutual challenging of truth claims. This is another area where useful conversations between lawyers and political scientists are starting to take place (see e.g. the controversy between Schmalz-Bruns and Joerges on deliberative supranationalism in the EU, Schmalz-Bruns 1999; Joerges 2000; also Cohen and Sabel 1997; Gerstenberg 1997).
This conversation is taking place on two levels: First, there is the normative debate on the possibility of legitimate and democratic governance beyond the nation-state. The argument starts from the assumption that output legitimacy in terms of effective problem-solving as the sole source of legitimacy beyond the nation-state is not enough to insure the democratic character of international legalization processes (for the most sophisticated statement in favor of output legitimacy see Scharpf 1999). On the input side of democratic governance, it is also assumed that the mechanisms of representative democracy – particularly the majority rule – presupposes a high degree of collective identity and solidarity in order to assure that the minority accepts decisions “as collective self-determination” (Scharpf 1998, 154/155) which is unlikely to be achievable beyond the nation-state. Deliberative democracy should provide a way out based on what Schmalz-Bruns calls epistemic proceduralism (Schmalz-Bruns 1999, 205): “On the deliberative interpretation, then, democracy is a framework of social and institutional conditions that both facilitates free discussion among equal citizens by providing favourable conditions for expression, association, discussion, and ties the authorization to exercise public power – and the exercise itself – to such discussion, by establishing a framework ensuring the responsivenes and accountability of political power to it” (Cohen and Sabel 1997, 320; see also Wolf 2000; Eriksen and Fossum 2000). The discussion which takes place at the borderline between normative political theory and constitutional legal theory, then centers around the question what kind of institutional arenas allow for sufficient deliberative quality (on the EU’s comitology as a site of deliberative supranationalism see Joerges and Neyer 1997a, b) and what background conditions have to be present (e.g. publicity of the law-making process). Interestingly enough, the meeting point between the two disciplines seems to be based on both taking their respective “internal” perspectives with lawyers concerned about the legitimacy of law-making and political scientists worried about its democratic quality.

Second, there is also an emerging conversation between law and politics from the analytical or “external” perspective on argumentative rationality. Joerges’ and Neyer’s work on comitology is not only concerned with normative questions, but also attempts to provide an analytical account of European law-making as a deliberative process (Joerges and Neyer 1997a, b; see also Neyer 1999; Neyer 2001). However, this external perspective uses the internal one as potential evidence for argumentative rationality. If “the law” including legalization beyond the nation-state is not written in stone, but emerges out of interpretive processes of reflexive reason-giving within the confines of procedural rules (which are themselves subject to interpretation), what about the discursive quality of these processes of meaning construction? The conventional view of international negotiations as law-making processes is one of bargaining on the basis of fixed preferences, i.e. assuming instru-
mental rationality and the logic of consequentialism. Yet, it can be demonstrated empirically and is not really controversial that arguing and reason-giving is ubiquitous in these negotiations. In our own work on multilateral negotiations, we did not find a single incident in which bargaining took place without reason-giving (Müller and Risse 2001; for similar evidence concerning domestic mediation processes see Holzinger 2001a, b). Is this just noise and constitutes ritualistic behavior so that we can safely ignore it, as 80% of the bargaining literature does? Are collective meaning construction and controversies about the interpretation of legal documents ("Berufungsgrundlagen") irrelevant for the outcome of international negotiations as law-making processes?

Holzinger has claimed that arguing is part and parcel of bargaining processes and, thus, has tried to subsume reason-giving under a logic of consequentialism (Holzinger 2001a, b). But things appear to be a bit more complex. The institutional logic (of appropriateness) of such negotiations requires that even instrumentally motivated agents must give reasons and arguments for their demands and must justify their preferences in front of an audience. Reason-giving, however, invites counter-arguments and challenges. Moreover, arguing implies a triadic structure of the interaction in the sense that speakers appeal to universal or generalizable standards of behavior, common values, or common knowledge about facts in the world (Saretzki 1996). This triadic nature of arguing also means that egoistic motives and self-interested preferences have to be justified on the basis of commonly accepted standards including legal norms. As a consequence, even instrumentally motivated speakers become quickly engaged in an interpretive discussion about the applicability of common legal standards, on the validity of procedural rules, and of norms themselves. Finally, arguing and reason-giving is only successful if speakers assume that somebody in the audience is prepared to listen and to be persuaded, even if persuasion requires a change or re-interpretation of interests and preferences. At this points, the logic of argumentative rationality trumps the logic of consequentialism insofar as instrumentental utility-maximizing agents are entrapped in arguing processes (Risse 1999, 2000). Once the logic of reasoning takes over, however, even instrumentally motivated speakers have to convincingly demonstrate that they are prepared to listen and to change their views in light of the "better argument." This might even include a change of preferences and interests.

Now, it would be ridiculous to claim that the ubiquity of arguing and reason-giving in terms of individual speech acts implies the ubiquity of communicative or argumentative rationality as described above in negotiation systems including law-making beyond the nation-state. Rather, one would expect variation, as almost always in political life. The question is under what conditions arguing and reason-giving actually matters in terms of changing outcomes, altering actors’ prefer-
ences, and so forth. It is likely that there are specific institutional conditions that enable discourse and deliberation as a result of which (international) institutions would not only have to be conceived as rule-making and –implementing bodies, but also as discourse arenas. Our own project has moved in this direction of trying to specify various institutionalist contexts in which arguing and deliberation is likely to have an impact (see Müller and Risse 2001).

Arguing and deliberation also matters when it comes to compliance with international legal norms and norm internalization processes. Here, agency-centered constructivism and interpretivist legal scholars would emphasize compliance with international norms and rules as a fundamentally intersubjective and interpretative process. No matter how robust and how precise international regulations are, there is always room for interpretation. Legal scholars, for example, often emphasize processes of norm interpretation by which actors deliberate about the meaning of certain rules. Even the most specific rules need to be interpreted and applied to concrete circumstances. Actors often disagree about the meaning of a rule and how to apply it. The logic of arguing kicks in again, even if actors – governments accused of norm violation and their accusers alike – behave instrumentally and strategically. Such argumentative processes resemble court proceedings (see above), whether they are carried out in front of a public international audience, specific (international) courts, or (international) commissions monitoring compliance. The point is that accusers and defendants have to accept a common legal basis and to give reasons for their opinions if they want to persuade an audience. We can extrapolate from this that compliance with international rules should increase, the more discourse arenas exist allowing for such processes of legal internalization. This can be domestic or international courts, but also international organizations and commissions monitoring compliance with international treaties. Thus, constructivists agree with rationalists that international monitoring mechanisms are important for improving rule compliance, but for different reasons. The emphasis is on discourse arenas enabling argumentative processes rather than simply the provision of information about rule compliance.

As a result, persuasion rather than enforcement or capacity-building becomes the dominant mechanism to ensure rule compliance. But what makes a norm persuasive? At this point, both constructivist institutionalists and legal scholars emphasize, once again, the legitimacy of a rule (Franck 1995; Koh 1997; Hurd 1999). The perceived legitimacy of a norm increases compliance. Legitimacy is not a given or simply the result of a particular procedure of rule generation, but is linked to democratic participation and deliberation in the negotiating process leading to the norm in the first place. This brings us back to the above discussion about deliberative democracy. Perceived legiti-
macy of a rule as a prerequisite of norm compliance then entails two ingredients: the participation of the rule targets in the law-making process and a (meta-) agreement among the concerned participants about rules of fairness and justice (Dworkin 1986; Franck 1995; for empirical evaluations see Steffek 2002; Zürn and Joerges forthcoming).

Instead of Conclusions: Areas of Further Conversation between Law and Politics Beyond the Nation-State

I have used institutionalist reasoning about legalization processes beyond the nation-state to suggest that the external perspective emphasized in Tom Heller’s papers allows for fruitful conversations across the disciplinary boundaries of law and politics. Once this external perspective is adopted and once disciplinary jargon is abandoned, legal scholars and political scientists alike pretty much deal with similar theoretical problems. Moreover, (meta-) theoretical commitments to rational choice or constructivism appear to matter more than disciplinary boundaries. I have used the three logics of consequentialism, or appropriateness, and of deliberation/arguing to explore further the common ground between law and politics.

In conclusion, I want to suggest four areas in which further debates between law and politics appears to be necessary:

1. (Meta-) theoretical commitments only get you so far. The “games real actors play” (Scharpf 1997) actually engage and mix the three logics of social action in various ways. As a result, the times of trench warfare between, say, constructivism and rational choice are pretty much over. Future theory-guided empirical research should concentrate on the relations and interconnections between the three logics and the transition points between them (for some ideas in this context see Risse 2002; Börzel and Risse 2002). Take the work on limits of rationality, e.g., Simon’s concept of “bounded rationality” (Simon 1959; Simon 1982): Once we accept that the “boundedness” of rationality has something to do not only with limits of cognitive information processing capacities (this can be easily reconciled with sophisticated rational choice), but with the embeddedness of actors in social settings and intersubjective processes of meaning construction, one starts entering the “constructivist world” from a rationalist starting point. Or take constructivist work on framing and strategic constructions (Gamson 1992, 1995): This work is about the construction of meanings, but for strategic purposes. I.e., constructivists end up on rationalist territory.
2. As to substantive areas of future conversation between law and politics, the literature on legalization in international politics has so far neglected the huge area of customary international law and of what has been called “interstitial law”, i.e., “the implicit rules operating in and around explicit normative frameworks” (Finnemore and Toope 2001, 743). I am not enough of a legal expert to know precisely what I am talking about. But if it is true that customary law has something to do with the emergence of spontaneous social orders that then become law in the strict sense of the word with high legitimacy and a strong sense of obligation, this should be of enormous interest for political scientists interested in issues of governance (beyond the nation-state).

3. Another area of fruitful conversation between law and politics concerns the increased interest in “soft law” (which Abbott and Snidal define as low on OPD, see Abbott and Snidal 2000). Informal rules as well as non-legislative norms and procedures make up an increasing part of the furniture of transnational governance. If this is the case (is it? For a sceptical view with regard to the EU see Héritier 2002), how does this work? Do we observe similar processes of rule-making and rule compliance as in the case of formalized legal norms? What about non-hierarchical forms of steering, such as persuasion, learning etc.? Under what conditions does it work? And do they deliver the goods in terms of better governance?

4. Very closely related to this is the inclusion of non-state actors – both firms and not-for-profit NGOs – in law-making and implementation processes. “Public private partnerships” (PPPs) seem to have become a new catchwork in global governance – by practitioners and analysts alike (Rosenau 2000; Reinicke 1998). Yet, we know very little about these new creatures. Most studies suffer from selection bias in that they generalize from a small set of successful cases (Reinicke 1998; Reinicke and Deng 2000). What are the implications for international law-making and legislative processes if private actors are increasingly involved? Do PPPs increase the legitimacy and democratic accountability of transnational governance by integrating the rule targets in the processes of rule-making? Alternatively, do PPPs constitute new forms of exclusionary and intransparent networks, thus exacerbating the problems for legitimate governance? Finally, what about the consequences for problem-solving beyond the nation-state, if public authority is delegated to non-state actors and these actors become intrinsic part of governance structures?

---

9 A google search on the internet yielded more than 1,5 million entries on PPPs. Most of them in domestic politics, particularly local affairs.
References


