ARE LEGAL NORMS DISTINCTIVE?

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During the past two decades, research agendas in international relations (IR) and international law have converged around the issues of norm creation and norm compliance. Scholars in both fields have been dissatisfied with approaches that focus entirely on formal state action and have been struck by the amount of cooperation that seems to arise by other means and from other sources. In his article,[1] Steven Ratner is tackling precisely the kinds of questions that interest constructivists in political science. He is investigating the role of a non-state actor, the Organization for Security and Cooperation in Europe High Commissioner on National Minorities (HCNM), in promoting peaceful change, not by coercion or enforcement of state-sponsored rules, but by creating new rules or understandings and persuading actors to comply with them. Ratner's foci—on non-state actors, on political change, on rules and understandings, and on persuasion—are all issues at the top of the constructivist research agenda.[2] IR scholars will

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1. *See* Steven R. Ratner, *Does International Law Matter in Preventing Ethnic Conflict?*, 32 N.Y.U. J. INT'L L. & POL. 591 (2000).

2. I understand the constructivist research agenda to be larger than Ratner does, perhaps, covering all of what Keohane terms "the normative optic." In his presentation of various theoretical approaches, Ratner distinguishes constructivism as an approach concerned with identities and assigns concerns about legitimacy and normativity to approaches in law (e.g., Franck and the New Haven School). *See* Ratner, *supra* note 1, sec. III.B.2. Within political science, however, constructivism has focused on both norms and legitimacy, as much as (and perhaps more than) on identities. Its concerns overlap considerably with those of Franck and the New Haven School, as one would expect, given the roots of constructivist thinking in sociology. *See generally* THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990) [hereinafter POWER OF LEGITIMACY]; THOMAS M. FRANCK, INTERNATIONAL LAW ESSAYS (Myres S. McDougal & W. Michael Reisman eds., 1981). These overlapping concerns are precisely what have produced convergence in the research agendas of law and IR. Note, too, that constructivist empirical research has focused extensively on domestic structures and that the scholars Ratner terms "liberal" have no monopoly on this interest. On the intellectual history of constructivism, its roots in sociology, and the breadth of its focus, see John Ruggie, *What Makes the World Hang Together? Neo-utilita-*

read this piece with great interest, both for the theoretical arguments it makes about these topics and for the empirical material on minorities and ethnic conflict, another subject of shared interest.

Ratner's account of the HCNM's role in brokering solutions to ethnic conflicts reveals many processes that will be familiar to constructivists. The HCNM's "normative intermediary" role is much like the role of "norm entrepreneurs" who have been identified in so many political science analyses of norm creation and norm change. The fact that the HCNM is based in an international organization similarly corresponds to the "organizational platforms," which political science studies consistently have found to be essential for the success of these norm entrepreneurs. Finally, the mediation techniques that Ratner identifies involve many of the same processes constructivists analyze—persuasion, issue "framing," and socialization. Constructivists have turned to research in cognitive and social psychology (the same research on which much of the mediation literature implicitly or explicitly rests) to understand these processes.[3]

Given these similarities, constructivists will have no trouble accepting Ratner's core argument that soft law is influential in the situations he examines. After all, most of their work aims to show the importance of precisely these kinds of norms and rules. However, they are likely to interpret this

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rianism and the Social Constructivist Challenge, 52 INT'L ORG. 855 (1998). Constructivist research on domestic structure is extensive. For an early "sampler," see the essays in THE CULTURE OF NATIONAL SECURITY (Peter J. Katzenstein ed., 1996).

3. For an overview of empirical research on norms in political science that draws out these commonalities and discusses relevant psychological literatures, see Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887 (1998). For empirical studies of framing, persuasion, and socialization, see MARGARET KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS (1998); Thomas Risse, *Let's Argue!: Communicative Action in World Politics*, 54 INT'L ORG. 1 (2000); THE POWER OF HUMAN RIGHTS (Thomas Risse et al. eds., 1999); Jeffrey T. Checkel, *Why Comply? Constructivism, Social Norms and the Study of International Institutions*, ARENA Working Paper No. 99/24 (last modified Sept. 15, 1999) <http://www.sv.uio.no/arena/publications/wp99_24.htm> (making a particularly interesting comparison with Ratner's article, since it deals with a similar empirical domain: citizenship and minority rights in central and eastern Europe).

finding differently than Ratner does, and to raise different research questions about it.

Addressing legal debates about the role of soft law, Ratner shows that the "hardness" or "softness" of law is of little importance to the actions of the HCNM. Not only does the HCNM use soft law frequently in brokering solutions, but parties also readily seem to accept these "softer" authorities as a basis for action. For Ratner, this is a positive finding. The "null hypothesis" in international law debates is that soft law does not matter or does not matter as much as hard law. The fact that policy makers treat them in roughly equivalent ways is a victory for those championing the power of soft law. The research implication Ratner draws from this finding is that we should treat hardness and softness as variables and investigate their influence under different conditions. This may be fruitful, but it is worth noting that Ratner's own preliminary evidence does not suggest that this is a distinction that will account for great variation (since policy makers seem to use hard and soft law indiscriminately).

Stepping outside these legal debates, Ratner's finding raises a more fundamental question: if policy makers do not know and do not care about the legal status of these rules, what reason do we have to think that "legalness" matters at all in compliance with norms? Thus, my counterproposal for research would be that we first think seriously about a more fundamental, and logically prior, question: do legal norms, as a type, operate differently from any other kinds of norms in world politics? There are, after all, many kinds of norms in the world—social, cultural, professional, moral, religious, and familial. What makes compliance with legal norms different from compliance with non-legal ones? Does being "legal" add any kind of weight to a norm? If so, why and how?[4]

Political scientists are only beginning to deal with these questions explicitly.[5] In most of their research on norms, legal

4. Ratner raises this issue himself in his article, but he presents it only as a problem for legitimacy arguments such as Franck's. If legal norms do not have distinctive and important effects, however, this is a fundamental issue for international law scholars generally, not just for Franck. *See* Ratner, *supra* note 1, sec. IV.C; POWER OF LEGITIMACY, *supra* note 1, at 41-49.

5. There is substantial work in manuscript that deals at least tangentially with the "legalness" of norms, and the journal *International Organization* is planning a special issue on the "legalization" of international relations enti-

norms are not distinguished from other types.[6] We know from this research that norms need not be legal to have powerful influences on states. Professional norms are powerful, as the epistemic communities' literature shows.[7] Moral norms with no legal status can have powerful effects on state behavior, as work on the suffrage, anti-slavery, anti-apartheid, and early human rights movements shows. A goal of these grassroots social movements was to incorporate moral norms into law, but the research suggests that the power or authority of the norms fueling these movements was moral or "principled," not legal.[8] Elsewhere in social science, institutionalists in sociology (not to be confused with the "liberal institutionalists" in political science whom Ratner discusses) have produced extensive research on the role of world culture in pushing states to adopt similar bureaucratic forms.[9] They identify no particular role for law in this process. In fact, law is one of the things being homogenized by world culture in their view. All of these professional, moral, and cultural norms display the same features that legal scholars identify as the sources of soft law's influence. These norms are powerful because they have legitimacy. They are viewed as "binding," as having qualities of "ought-

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tled *Legalization and World Politics.* 54 INT'L ORG. (forthcoming Summer 2000).

6. Constructivists have distinguished among norms based primarily on function rather than substance. The widely accepted distinctions are between *regulative* norms, which order and constrain behavior, and *constitutive* norms, which create new actors, interests, or categories of action. Some add *evaluative* norms, which prescribe behavior. There are a few arguments in political science about the impact of differing substantive content (some borrowed from law), but they are not well developed. For an overview of all this work, see generally the review essay by Finnemore & Sikkink, *supra* note 3.

7. *See* Peter M. Haas ed., *Knowledge, Power, and International Policy Coordination,* 46 INT'L ORG. 1 (1992).

8. *See generally* Keck & Sikkink, *supra* note 3; AUDIE KLOTZ, NORMS IN INTERNATIONAL RELATIONS: THE STRUGGLE AGAINST APARTHEID (1995); ROBERT MCELROY, MORALITY AND AMERICAN FOREIGN POLICY (1992).

9. Seminal works in institutionalism include: INSTITUTIONAL STRUCTURE: CONSTITUTING STATE, SOCIETY, AND THE INDIVIDUAL (George M. Thomas et al. eds., 1987); STUDIES OF THE MODERN WORLD-SYSTEM (Albert Bergesen ed., 1980); JOHN BOLI & GEORGE M. THOMAS, CONSTRUCTING WORLD CULTURE: INTERNATIONAL NONGOVERNMENTAL ORGANIZATIONS SINCE 1875 (1999). For an overview of this work, see Martha Finnemore, *Norms, Culture, and World Politics: Insights from Sociology's Institutionalism,* 50 INT'L ORG. 325 (1996).

ness," and as having all the elements of Franck's "compliance pull"—pedigree, determinacy, coherence, and adherence.[10] There is nothing specific to legal norms in any of these characteristics. Thus, non-legal norms seem to exert power for the same reasons and in the same ways as soft law. What distinguishes legal norms from other norms is simply not clear. One could quarrel with these research findings, and it may be that one reason political scientists and sociologists have not found a clear role for law in the influence of norms is that they have not explicitly looked for one. My point is only that international law debates about "Hard Law, Soft Law: Does It Matter?"[11] run the risk of irrelevance if we do not first establish that legal norms, as a whole, have distinctive effects.

There are, in fact, some possible reasons why legal norms could have distinctive effects. Some will be obvious to legal scholars; others, perhaps, will be less so. Each reason suggests research questions that should interest both IR and legal scholars. The most obvious reason why legal norms might exert unique influence is the connection between law and the coercive powers of the state. In at least some widely held understandings, the state's coercive powers exist precisely for the purpose of enforcing law (as opposed to non-law). The trouble here, of course, is that states are notoriously unreliable about using their enforcement powers to secure compliance with international law. Further, they very often use military, economic, and diplomatic coercion to secure other, extra-legal goals and uphold other, extra-legal norms. There would be a couple of research questions here: 1) are states more likely to use their coercive powers when norms have some kind of legal status?; and 2) if so, under what conditions?

Another possible reason why legal norms may be particularly powerful in world politics arises from professional norms and the fact that so many foreign policy makers now have legal training. This was not true a century ago. Prior to World War I and, perhaps, even World War II, aristocrats and men of general liberal education staffed the foreign ministries of major powers, particularly in Europe. Now, however, people with professional training—many (most?) have legal training—overwhelmingly staff foreign ministries. Organizational sociol-

10. *See* POWER OF LEGITIMACY, *supra* note 1, at 184.

11. This is the title of section IV of Ratner's article, *supra* note 1.

ogy has long understood that professional norms can shape organizational behavior.[12] An organization staffed mostly by lawyers is likely to find legal norms more persuasive than other kinds of norms and to give them special weight. As lawyers increasingly staff state bureaucracies dealing with foreign affairs, we would expect legal norms to have a distinctive role in shaping political behavior. This argument is completely consistent with the epistemic communities' work that is well known in international law. Note, however, that in this argument there is nothing inherent in, or internal to, the legal norms themselves that makes them uniquely powerful. If economists (or members of some other profession) dominated policy making, we would expect norms of that profession, and not legal norms, to be particularly powerful. This argument leads to the research question: are legal norms more effective in situations where the key policy actors are lawyers than in situations where they are not?[13]

A more generalized argument for law's distinctive effectiveness would be cultural. Scholars going back to Max Weber have noted the peculiar power "rational-legal" authority holds in modern life. Whether this is a product of Protestantism, capitalism, the expansion of the West, globalization, all of these, or none of these probably does not matter much for current purposes. Whatever the source, the contemporary world is permeated by a culture that invests authority in impersonal rules, procedures, and legalities (rather than in the blood ties or charisma that constituted earlier forms of authority). This insight has fueled the now extensive research on bureaucratization and world culture in sociology.[14] Its impli-

12. For a particularly influential statement of this argument, see Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147 (1983).

13. Ratner might be able to offer some insight here since he does note differences in the ways policy actors viewed and were affected by the legal status of norms. *See* Ratner, *supra* note 1, sec. IV.B.2. If those most affected had legal training and those least affected did not, then that would add plausibility to this hypothesis.

14. *See supra* notes 9 and 11 and accompanying text. Note that these sociologists view the bureaucratization of civil society into nongovernmental organizations as both an artifact of this process and as a crucial engine in the construction and spread of a global rational-legal culture. *See generally* BOLI & THOMAS, *supra* note 9.

cation for international law is that legal norms will have distinctive power over other norms precisely because the culture supports and values them.

This leads to an obvious research question: Do legal norms, in fact, receive more deference and command more compliance than other kinds of norms *independent of state enforcement* (our first hypothesis)? To the extent that this is so, we should expect that a prominent goal of norm entrepreneurs (or intermediaries) would be consolidating unambiguous legal status for their norms. After all, if the broader culture shows particular deference to legal norms over others, this presumably would create a host of extra-state compliance pulls, independent of state action. The indifference to legal valences that Ratner documents militates against this argument. On the other hand, the efforts of so many social activists to codify and legalize moral norms weigh in its favor. Future actions by the HCNM may shed light on this. If the cultural argument were right, we would expect the HCNM and his allies to work to harden the norms they create and elevate the norms' legal status. If they continue to be indifferent to legal valences, this would undermine the cultural argument.

These arguments are not mutually exclusive nor are they exhaustive. All (or none) of them could be true, though perhaps to different degrees under different conditions. We may find additional reasons for distinctive effects, or we may find no distinctive effects at all. In asking whether there is anything distinctive about legal norms, I by no means intend a return to the bad old days when IR scholars dismissed international law. Constructivists in IR will continue to be interested in the effects of legal norms even if nothing distinguishes them from other kinds of norms. These norms, like many others, are powerful and must be studied if we are to understand the political world in which we live. I would think, though, that legal scholars might care deeply about identifying the distinctive features of legal norms. As more research like Ratner's demonstrates the power of these "softer" elements of law, the problem of distinguishing legal norms from others, both theoretically and empirically, will only become more pressing.