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Law, Contestation and Power in the Global Political Economy: An Introduction

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Abstract

The papers included in this collection are part of concerted project to develop a political economy of law in the contemporary global system. Over the past two decades, scholars have noted the expanding role of law, legal institutions, and legal agents that have been part of the process of “globalization,” and have employed a number of frameworks to make sense of this process of legalization. A central theme of our project is that none of these frameworks has provided an adequate political economic analysis of the creation, diffusion, and use of law, and we present an alternative approach to advance the understanding of the turn to law across the many dimensions and sectors of the global system. The papers advance the analysis behind this approach and explore the various ways in which law matters in a variety of areas, including global finance, corporate governance, copyright, diplomacy, and the provision of security. Their goal is to advance our understanding of how law intersects with the mobilization of power in the construction of the contemporary political economy.

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Key words

Law; legal expertise; political economy; globalization

Resumen

Los trabajos incluidos en esta colección son parte de un proyecto conjunto para desarrollar una economía política de la ley en el sistema mundial contemporáneo. En las últimas dos décadas, los expertos han señalado el creciente papel de la ley, las instituciones legales, y los agentes judiciales que han sido parte del proceso de "globalización", y han empleado una serie de marcos para dar sentido a este proceso de legalización. Un tema central de nuestro proyecto es que ninguno de estos marcos ha proporcionado un adecuado análisis económico político de la creación, difusión y uso de la ley, y se presenta un enfoque alternativo para avanzar en la comprensión de la vuelta a la ley a través de las muchas dimensiones y sectores del sistema global. Los trabajos avanzan el análisis de este enfoque y exploran las diversas formas en que la ley importa en una variedad de áreas, incluyendo las finanzas globales, el gobierno corporativo, derechos de autor, la diplomacia y la prestación de la seguridad. Su objetivo es avanzar en nuestra comprensión de cómo la ley se cruza con la movilización de la energía en la construcción de la economía política contemporánea.

Palabras clave

Ley; conocimientos jurídicos; economía política; globalización

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1. Introduction

The papers in this special issue were first presented in the Workshop on “Law, Contestation, and Power in the Global Political Economy,” which was held at the Oñati International Institute for the Sociology of Law on 7-8 June, 2012. This workshop was part of an ongoing project we are pursuing that explores the ways in which Law is mobilized by and in turn structures the conflicts over power, interests, and legitimacy in the contemporary political economy. While many of the papers focus on the role of law in shaping the role of states and markets in capitalism, others extend the focus beyond to show how political economic dynamics shape law and power in more traditionally or purely “political” relationships in the contemporary global system, such as diplomacy and military security. In this essay, we provide an overview of the goals of the project and then a quick review of the main contributions of each paper. Our goal is to elucidate the common themes and concerns – and in particular the commitment to a political economic analysis of legal mobilization – that underlie this stimulating group of contributions.

2. Common themes: a political economy of law

This project is generated by the realization among scholars across disciplines that law is now a ubiquitous part of the global order. Everywhere, it seems, legal institutions, norms, and agents have been insinuated into the infrastructures of regulation and governance through which the global system is produced and reproduced (Likosky 2002). This process has been observed and studied in areas as diverse as the global trade, investment, and financial regimes, the regulation of food and medicines, the protection of the environment, the spread of constitutionalism, the growth of cross-national judicial cooperation and the emergence of supra-national courts, the development of a global practice of administrative law (Kingsbury *et al.* 2005), the proliferation of private transnational governance arrangements, including the strategies of NGOs and other non-state actors, the halting emergence of a transnational criminal law regime, and the legitimization through law of the global private security industry. The ongoing global financial crisis illustrates the centrality of public and private legal regulation to the management and development of solutions to the crisis (Helleiner *et al.* 2010). Clearly, something is going on here that demands the attention of scholars and analysts from diverse disciplinary, theoretical, and geographic backgrounds.

But the prominence of law presents a key challenge to social scientists – to explain why so many actors have turned to law to mobilize and discipline power, to evaluate the significance of these “moves to law” (Brutsch and Lehmkuhl 2007) and to understand how legal practices then work to constitute existing and emerging power relationships, forming arenas for political contestation. To this point, the analysis of law in the social sciences has generated four important frameworks or approaches, none of which is entirely satisfactory. The first, which dominates the current discussion of law in International Relations (IR), centers on the problematic of “legalization” (see Goldstein *et al.* 2001). This discourse presents a generally functionalist and liberal-institutionalist approach to explain the spread of legal institutions for the governance of global economic and political relationships, in which the mobilization of law is used to address collective action problems between states and to secure the legitimacy of these responses (see also Keohane 1984). The legalization framework has generated important conceptual and empirical advances in explaining the roles that law can play in the international context, particularly in showing how initial decisions to mobilize law can have often unanticipated consequences in constraining the choices of key actors. But it leaves much to be desired. Its functionalist underpinnings gloss over the many contradictory and conflicting directions and processes of legal action, while the almost exclusive emphasis on states and international institutions misses the central role of non-state and private, corporate actors and processes in shaping the role and mobilization of law (see Cutler *et al.* 1999, Hall and Biersteker 2002, Sell,

2003). Most importantly, from our perspective, the emphasis on legal action as a solution to collective action and coordination problems works to minimize the role of political and economic power in mobilizing, shaping, and implementing law.

The second approach, which emerges from the work of scholars of international and comparative law, has addressed similar developments in terms of the politicization of law. Here, legal action and the creation of legal institutions in transnational contexts are understood as emerging from a combination of motives and directions, including from the goal of institutionalizing certain common principles of regulation, the imitation of perceived legal 'best practices', the desire for more effective and legitimate means of dispute resolution, and the search for better solutions to collective action problems (see Dunhoff and Trachtman 2009, Slaughter 2004, Byers 2000). As such, law has become a key vehicle and venue for the pursuit of political projects. There is significant overlap between these concerns and those of the legalization problematic in IR, which has led to some significant cooperation between IR and Legal scholars working on the international dimensions of legal mobilization (see Armstrong *et al.* 2007). The growth of this literature has added much to our understanding of the dynamics of legal action, as it is much more sensitive to the diversity of political motives and agents involved in legal action – and to the internal dynamics of legal fields – than is typical of the "legalization" literature. It also helps tie together developments in fields as disparate as human rights, business regulation, dispute settlement, and environmental policy. But this discourse is also limited by the standard "tropes" of legal scholarship, which lead practitioners to attempt to delineate the emerging normative structures of legal regimes, evaluate their coherence and relationships to other legal regimes, and suggest substantive moves to enhance the effectiveness and legitimacy of these regimes. As a result, the focus of analytical energy is too often shifted away from critical empirical analysis, and thus away from the nexus between law and power.

A third discourse, which is more scattered across the fields of legal theory, public law, and comparative politics, centers on the phenomenon of the "judicialization" of politics (Hirschl 2004, Shapiro and Stone Sweet 2002). By "judicialization," scholars are referring to the growing role of courts and judiciaries in the political process and resolution of political disputes, as well as the "legalization" (in a different sense) of political discourse. This literature has its roots in the spread of constitutional courts and forms of politics since the 1990s, but has spread to take into account a wider range of developments across the globe. As this discourse has developed, it has moved beyond initially simplistic notions of judicial "power grabs" to much more sophisticated understandings of the conditions under which political actors turn to law to work out conflicts, and the impact this can have on law itself. As such, scholars in this area explore dimensions of both the "legalization of politics" and the "politicization of law," and this work can play a crucial role in advancing our project for explaining the various "turns to law." For the most part, though, this literature has remained isolated from the IR and Legal scholarship on transnational action, as well as from the analysis of the wider range of power dynamics shaping legal construction in the contemporary global system.

The final discourse relevant to our concerns is the literature on the "new constitutionalism," which emerged out of various critical political economic traditions in the late 1980s. Inspired by the work of Robert W. Cox (1996), Stephen Gill (2008) and others (Cutler 2003, Schneiderman 2010), scholars began exploring the growing role of constitution-like legal regimes in the global political economy. These regimes, such as the World Trade Organization dispute resolution process, the arbitration regime in investor-state treaties, including the North America Free Trade Agreement, were understood to be a central part of the attempt to formalize "neo-liberal" principles of law and policy standards of legitimate governance and as constraints on the choices of states domestically and transnationally. Together, in this view, these regimes amount to the creation of a *de facto* "constitution" for global political economic relationships intended to bind the exercise of power and

the creation of norms to neo-liberal forms of market discipline and governance. There are clear and promising connections here to the developing work on legalization and the judicialization of politics, but the full potential of this literature within and beyond the realm of economic governance requires a deeper dialogue with the previous literatures.

The papers in this special issue, and the project of which they are a part, share a commitment to the necessity and importance of a focus on the political economic dynamics implicated in the contemporary mobilization of power through law. Why a focus on political economy? We believe that this approach can help bridge an important gap in the rapidly expanding literatures on the mobilization of law – a neglect of the connections between legal practices and the exercise of power. While existing scholarship has brought important insights into what agents are doing with law, it has spent less time exploring how relationships of power shape what law is and what it does. A political economic analysis of the mobilization of law, we suggest is an essential tool for integrating the key insights of each of the above literatures, while providing a framework to advance research on these themes across the social sciences. The contributions to this special issue reflect an emerging critical stream of scholarship of transnational legal mobilization, which is held together by the understanding that the mobilization of law in the global system is part of the mobilization of power by states, international institutions, corporations, legal professionals, and activists attempting to advance projects to shape the way the global political economy works and the impact it has “on the ground” in different parts of the world. Our goal is to develop the key elements of an understanding of the linkages between power and law, and to put them into framework that can help advance research into the changing global system.

In addition to this central concern, the contributors to this volume share a number of other substantive and methodological commitments:

- A focus on the complex interactions between power, interests, and norms in shaping the legal regimes of the global political economy. These interactions are understood to be implicated in a complex and always re-created dialectic of agents and structures.
- An understanding that law is both constitutive of fields of action, but at the same time regulates the actors and behavior in any given field. Actors may turn to law to create a field that advances their projects, or to regulate a field in which actions may threaten their goals and interests.
- An understanding that legal forms and practices arise out of social and productive relations and contestations, but then also give rise to new conditions. Analysis of this dialectic of causation is central to explaining the role of law in the global system.
- Analysis of the relationships between states, international institutions, and various non-state agents – corporations, markets, legal professionals and institutions, non-governmental organizations – in the mobilization of law. The constitutive role of law in the global system is understood to raise in new ways the question of the relationships between “public” and “private” in contemporary capitalism.
- Sensitivity to the conflicts, ambiguities, and sites of contestation interior to and between the emerging regimes of law and legal practice, within and across the various sites of legal construction. This is particularly important in the transnational context, where structures of legal practice are typically unsettled, plural, and dynamic.
- An interest in the critical engagement with Weberian theories of legal rationalization as essential to the stabilization of capitalism. The emerging language(s) and practice(s) of “legal pluralism” and “legal uncertainty” are

understood to raise important and pressing questions concerning the ways law is implicated in the contemporary global system.

These commitments can also be formulated as a set of common questions regarding the proliferation of law and legal action in the contemporary global system:

- Why have so many actors turned to legal action and institutions to advance their projects in the global political economy?
- What is "new" about contemporary political mobilization through law?
- What are the key norms, rules, and principles that inform the mobilization of law in different areas? Are there systematic commonalities and/or differences? What happens in areas/contexts where different legal regimes or jurisdictions claim overlapping authority? Is the concept of "legal pluralism" a useful way of theorizing these situations?
- What is the relationship between legal expertise and political-economic power in the shaping of contemporary legal practices? To what degree do legal norm entrepreneurs drive the construction of transnational legal regimes?
- How does the existence of legal structures and regimes shape the content and pursuit of political-economic projects? In what sense do concerns for legitimacy constrain the substance of these projects?
- What are the implications of contemporary legal mobilizations for the democratic control of political and economic power?
- These questions are now the focus of a burgeoning critical literature among scholars from a variety of disciplines and theoretical traditions. While the scholars included here share the commitments described above, they are likely to diverge in their answers to some or all of these questions. Nonetheless, their work is creating the foundations for the development of a more sophisticated political economy of law in contemporary global system. We believe that the collection of essays in this special issue will provide an important step in pushing forward this development.

3. An outline of the contributions

The contributions to this volume address these concerns at a number of different levels and engage in much dialogue with each other's work. Sol Picciotto's (2013) paper takes a broad approach to analyzing the dynamics of the contemporary system of global capitalism. Picciotto terms this system one of "corporate capitalism," which emphasizes both the centrality of the corporation as the key locus of property rights, capital, and economic activity in the current system, and the close interdependence and connections between corporations and states (and other forms of public power) in the global political economy. In the process, he identifies the centrality of legal expertise in the construction and governance of this system, and explores the various existing and possible linkages between expertise and power, public and private. Picciotto's key contribution for this project is the careful analysis of the ways in which legal doctrine, institutions, and practices – and through them legal professionals – are central to the ways in which power is constituted and exercised in the global system. His analysis is particularly effective in emphasizing the complex, multifaceted, and often uncertain ways in which legal practices work as material forms in and through which power operates.

Sigrid Quack's (2013) paper also focuses on the question of legal practice and expertise, but engages this problem from a different direction. Her work addresses the influential contention that the importance of mobilizing legal (and other) expertise in transnational governance privileges the interests and projects of well-resourced powerful agents in making the rules for the global political economy. Quack argues that, although this is sometimes true, the intersection between

power, expertise, and legitimacy varies depending on the structure and development of specific fields of governance. While some fields are characterized by the dominance of a relatively arcane and cohesive body of expertise, in others access to expertise is more open and there is more contention over the forms of knowledge most appropriate to the problems and issues at stake. Her key contribution is to suggest that, in the latter cases, otherwise “weak” civil society agents can mobilize legal expertise in ways that effectively challenge the claims and priorities of powerful corporate and state agents, opening the door for political action that questions the main directions of the global political economy. Quack’s argument engages in a dialogue with Picciotto’s framework and with some of the later contributions on legal pluralism.

The next three papers engage the debates surrounding legal pluralism and its links to the mobilization of power in transnational fields and spaces. Edward S. Cohen’s (2013) paper explores the connections between transnational legal pluralism and the power of private agents, with a focus on the area of financial law and the financial crisis that began in 2007. He argues that the complexity of legal pluralism privileges the ability of well-resourced private agents, particularly corporations, to mobilize the necessary power and expertise to shape the substance and practice of commercial law. In the context of finance, the context of plural and overlapping law-making sites ensured that there was little challenge to the ability of private financial institutions to dominate the making and interpretation of financial law to secure their dominance over the generation and allocation of credit. Cohen contends that the same system of pluralism has enabled private financial agents to retain much of their power in the wake of the financial crisis, but he includes an important *caveat*. The crisis has also shown the ability of states – acting individually and cooperatively – to challenge and limit the autonomy of private agents; states, it turns out, can match the power and expertise of financial institutions under certain conditions. In the end, though, Cohen contends that a persistent legal pluralism will likely work to maintain a substantial degree of power in the hands of private agents in global finance. Cohen’s argument is in some tension with Quack’s contribution, and the dialogue they generate should prove productive in advancing our understanding of how law and power intersect in the global system.

Volkmar Gessner’s (2013) paper engages the discussion of legal pluralism in the context of debates in legal theory. His particular focus is on the work of Max Weber (1968), whose analysis of the role of law in capitalism has been uncritically adopted in a number of the discourses discussed above. Weber’s emphasis on law’s role in providing the predictability needed for capitalist action has been extended, especially but not exclusively in German legal theory, into an argument that capitalism “requires” a legal structure in which there is a clear hierarchy of norms and authorities through which law can be given the precision and predictability necessary for capitalist investment and exchange. More specifically, commercial law in this tradition is often interpreted as a “gapless” system in which there is no uncertainty regarding norms and principles. Gessner’s essay shows persuasively why this understanding of law is inadequate to grasp the fluidity, plurality, and uncertainty of law in the context of a plural transnational order. Focusing on contractual enforcement, he demonstrates that contemporary commercial law is characterized by competing norms and conflicting doctrines, and this plurality will remain a defining feature of law in the global political economy.

A. Claire Cutler’s (2013) contribution offers a different perspective on the discussions of legal pluralism. Drawing on the “new constitutionalism” perspective, she asks where pluralism fits in the overall construction of a legal order that secures the power relationships of contemporary global capitalism. Cutler’s analysis focuses on the ongoing dynamics between legal harmonization and legal pluralism that have defined much of the processes of legal construction over the past four decades (the question of pluralism versus harmonization is one that is also addressed by Picciotto, Quack, and Cohen, and Cutler’s contribution helps to focus

this line of analysis as well). Contrary to most analysts, who see these as alternative modes of law in the global system, she argues that the dynamic of harmonization versus pluralism is in fact a defining feature of the legal project of global capitalism. The tension inherent in this dynamic empowers powerful states and private corporate actors to mobilize law in different ways to construct a framework that “constitutionalizes” global capitalist relationships and makes them resistant to challenge. At the same time, however, Cutler recognizes that this dynamic creates points of uncertainty and ambiguity that opens up spaces for contestation over the shape of legal regulation of global capitalism.

The next two papers shift the focus from the global economy to the areas of security and diplomacy, but demonstrate the ways in which a political economic analysis is crucial to highlighting key emerging trends in these more “traditional” areas of international politics. In both cases, though, the theoretical and conceptual issues engaged by the authors connect their work closely to the concerns of the previous papers. Deborah Avant’s (2013) paper compares key trends in the global regulation of two dimensions of security – the flow of small arms and the growing use of private military/security contractors by states. Avant shows that developments in both areas are connected to the changing roles of states and the increasing complexity and plurality of legal and regulatory fields, both of which are of course central to the other papers in the collection. Moreover, in both areas we see the emergence of transnational forms of political and economic action that are missed in standard treatments of security policy. Avant notes, however, that the path of legal and regulatory development is quite different in these policy areas. Her paper explores the intersection of a variety of political and economic dynamics to explain these differences in law and regulation, and in the process demonstrates how contemporary political economic developments have encroached into the classical political center of state power.

Noe Cornago’s (2013) paper comes to a similar set of conclusions in the context of contemporary diplomatic practice. Diplomatic law has a long history of development and doctrine and has long thought to be a safe haven of state authority and autonomy, well insulated from the developments in the global political economy. As Cornago demonstrates, however, some of the key political economic trends of the past four decades – the growing role of non-state actors in legal and regulatory affairs, the recognition of the legitimate role of such actors in limited areas, and the weakening of the sharp public-private boundary in international law and practice – have had a substantial impact on diplomatic practice and (to a lesser but growing degree) diplomatic law. Developments such as the new practices of investor-state arbitration, the growing role of corporations as actors and agents of diplomacy, the use of private companies to provide consular services, and the granting of diplomatic protection to private actors and companies acting in the name of the state are working to question some of the basic assumptions of traditional diplomatic law. Cornago shows how these practices are breaking down the traditional division between diplomacy and political economy, and demonstrates the necessity for a political-economic analysis of diplomacy. In this sense, his paper brings us back to the question of how the role of states is changing under the pressures of a changing global political economy, one of the fundamental concerns driving our intellectual project.

Together, we think these contributions do much to advance our understanding of the many ways in which law – as a set of rules, practices, institutions, and actors – is implicated in the changing global political economy. They provide important insights, explore and advance ongoing debates, and suggest new avenues for analysis. The workshop at which they presented provided a stimulating, creative focus for the pursuit of these questions, and we believe that this selection of papers will provide the reader with the same interest and excitement.

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