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THE POWER OF LEGALITY

From an airstrip in Saudi Arabia, the CIA launches drones to 'legally' kill Al-Qaida leaders in Yemen. On the North Pole, Russia plants a flag on the seabed to extend legal claim over resources. In Brussels, the European Commission unveils its Emissions Trading System, extending environmental jurisdiction globally over foreign airlines. And, at Frankfurt Airport, a father returning from holiday is detained because his name appears on a security list. Today, legality commands substantial currency in world affairs, yet growing reference to international legality has not marked the end of strategic struggles in global affairs. Rather, it has shifted the field and manner of play for a plurality of actors who now use, influence and contest the way law's rule is applied to address global problems. Drawing on a range of case studies, this volume explores the various meanings and implications of legality across scholarly, institutional and policy settings.

Nikolas M. Rajkovic is Professor and Chair of International Law at Tilburg University, the Netherlands. He is also an Adjunct Professor in International Law and International Relations at Kyung Hee University, South Korea, and a faculty member of the Harvard Law School's Institute for Global Law and Policy (IGLP).

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THE POWER OF LEGALITY

Practices of International Law and their Politics

Edited by
NIKOLAS M. RAJKOVIC
TANJA E. AALBERTS
THOMAS GAMMELTOFT-HANSEN

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FOREWORD

The debate about the virtues of interdisciplinary work is surely as old as the Western academy itself. From the struggle of the faculties that Kant surveyed at the close of the Enlightenment, the debate has proceeded with varying intensity and under different vocabularies to international law and political science as these projects got under way at the close of the nineteenth century. It may be useful to remember that when Samuel Pufendorf received the first chair on the new discipline of "*jus naturae et gentium*" at the University of Heidelberg in 1661 that chair was, to Pufendorf's great disappointment, situated in the philosophy and not the law faculty. That decision doubtless reflected the situation of the Holy Roman Empire of the German nation after the close of the Thirty Years' War. As a "higher faculty," law would need to assist in German state-building after the devastation. In this process, the notion of "legality" – the idiom of this volume – was taken to reflect the (positive) law of the Empire that needed support and study. By contrast, natural law and the law of nations would become part of the abstract – indeed "philosophical" – reflection on the universal principles of law and the human community, distant from the practical work of ruling the Germans.

But it did not take long for Pufendorf to turn his discipline in the direction of assisting the prince in the government of confessionally divided polities. Natural law could build its principles on close observation of the character and behaviour of human beings, following the example of the natural sciences. From precisely such perspective, Thomas Hobbes in England had drawn a scandalous conclusion: legality was what the sovereign desired. As he wrote in a critique of the practitioners of pure legality, law did not emerge from reason, but will, and a statute was nothing "but dead Letter, which of itself is not able to compel a Man to do otherwise than he himself pleaseth."[1] Force and determination to use

[1] Thomas Hobbes, *A Dialogue between a Philosopher and a Student of the Common Laws of England*, ed. J. Cropsey (University of Chicago Press, 1971 [1681]), 58–59.

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it were needed for legality to be "real." But Pufendorf thought that Hobbes had exaggerated the dependence of social life on the sovereign's intuitions. Instead, he thought, it was possible to extract from social life a set of practical directives about how territorial polities could be ruled with the view of reaching the common good, the *salus populi*. The precepts of "legality," he insisted, were to be "derived primarily and directly from sociality."[2] In the space of only a few decades, chairs of *jus naturae et gentium* were set up in most German universities, now increasingly also in the faculties of law. With fame also came bifurcation: was "society" to be understood abstractly or concretely, a matter of "reason" or behaviour? At Halle, Christian Wolff and his followers followed the former path, imagining legality as an effort to reach the "perfection" of human communities, from the family to the state and from the state to the *Civitas maxima*, the great commonwealth of humankind. Law and philosophy coincided in the "interdisciplinary" pursuit of techniques of governance towards the harmonious flourishing of human communities. At the same time, in Göttingen, pragmatically oriented jurists were aligning legality with the reason of state, comparative studies and diplomatic techniques such as the balance of power through which the prince could attain the "welfare" of the population. This was public law as policy-science and *Staatskunst,* a wholly empirical discipline designed to produce policy directives from calculations of relative state power.

As is well known, Immanuel Kant's critical project targeted both Wolffian rationalism as well as the assumption that normative conclusions could be drawn from empirical studies. His legality was a world of pure normativity in which human freedom would be realized outside the compulsions of natural science or the random and antinomical conclusions of abstract reason. For his followers, reflecting on legality turned into jurisprudence and was relegated to the margins of the law faculty. This did not mean the end of studies on legality operating outside the (European) state-form, however. An especially interesting "interdisciplinary" approach was taken by Georg Jellinek, Max Weber's friend and colleague at Heidelberg, suggesting that law and statehood had two sides: a normative and factual side so that it could be subjected to *both* legal and sociological study and that it was only by having account

[2] Samuel Pufendorf, *On the Duty of Man and Citizen*, ed. J. Yully (Cambridge University Press, 1991 [1673]), 37.

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of both that a realistic and normative study of legality – including international legality – would be based.

Jellinek's studies on statehood, the theory of the federation and the position of treaties have had great, though often covert influence in the academic study of public and constitutional legality. But they did not have much of an effect on the pragmatically oriented field of "international law" that emerged at European universities, foreign ministries and diplomacy in the last third of the nineteenth century. This may have been because they lacked commitment to increasing integration within an "international community" that has inspired modern international lawyers. However, for most of the twentieth century, the field has enjoyed a schizophrenic existence. On the one hand, it has tried to help in the management of the legal aspects of foreign affairs. On the other, it has struggled with other legal fields and adjoining specializations (political theory, sociology and international relations) for power and prestige at the university. In both contexts it has needed to defend itself against accusations of being just a hopelessly abstract set of desiderata about peace and harmony; jurists have hence learned to point to its basis in sovereign statehood, the structure of power that is conventionally assumed to rule the world. In defending its "realism" jurists have become accustomed to taking the path of their Göttingen colleagues – reading the law in the light of the policies, interests and strategic choices made by or suggested to powerful institutions. In order not to go too far in that direction, however, they have also learned from the Wolffians to argue in terms of the humanitarian principles, objectives of international institutions, the relative virtue of the choices open to rulers and diplomats. Concrete and abstract, verifiable and normative – once lawyers have departed from their comfort zone in doctrinal analysis and argument, they have made skilful use of tropes and vocabularies scavenged from others. They have linked "legality" sometimes to the needs and values of human groups – self-determination, natural rights or peremptory norms of an international system. At other times they made legality dependent on what could be called the sociology of the international, arguing about the trends of social development, the patterns of power or decision and foreseeable consequences of alternative forms of action. The result has been a language that, even as it has borrowed idioms from disparate sources, still has coherence and system. Even as "legality" remains wholly indeterminate, it has a logic and autonomy of its own. For better or for worse.

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International legality is the product of a rhetorical practice. It is about persuading audiences of the correctness or plausibility of types of action. The context of its operation is frequently that of defending a client, a project or a preference within some institutional context, perhaps court or a tribunal but more often that of a group of colleagues deliberating on some course of action. Even academic studies of international legality are about persuasion – trying to make other academics but also institutional actors, judges, policy makers and men and women in powerful positions see and agree to something. To be persuasive one has to speak the language of the audience one is arguing to, to address its expectations (including by challenging them). Legality becomes "legalities" because audiences appreciate different styles, including ones that depart from classroom legal analysis of rules and principles, the systematization of cases or interpretation of constitutional instruments. Legality is sometimes the outcome of a vocabulary of the right and the good, or it may emerge from a response to the question "what might work, and work for whom?" Legality moves sometimes in the direction of morality at other times towards political causality. Often it takes the space of the "best alternative to negotiated agreement." Legality may be about the meaning of a rule but also about the costs and benefits of alternative rules or indeed about what those rules might be. As I write this, I see the space of European legality split between the legalities of refugee law, constitutionalism, human rights, security, financial management and national identity.

In order to argue well, lawyers must have read and studied many types of professional idioms. But they must also integrate those idioms – that knowledge – in legal speech without appearing merely as mouthpieces to other peoples' agendas. They must make them "theirs" – and only once they are so do they become part of legality. This contribution can then be assessed from various perspectives. Has it been helpful? Has it opened a new perspective or demonstrated some weakness in a traditional approach? Has the audience come to understand something they did not know previously? It does not matter whether the context is "professional," "academic" or that of some lay audience. Each constructs their world of legality by different criteria based on varied experiences and expectations. And yet lawyers enjoy special authority. As native inhabitants in the land of legality, lawyers police its boundaries and set the standards for professionally competent legality speech. It is useful to remember that those are also standards of power and privilege, created

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in the course of a legal training that is, as Duncan Kennedy reminded us many years ago, "training for hierarchy."

In a world of many legalities, should international lawyers become interdisciplinary scholars? Yes and no. Yes in the sense that awareness of adjoining professional languages and a capacity to use those is often necessary for persuasiveness. Yes also in the sense that the more of such languages one learns, the more alternative descriptions of the world one comes to know, the more the legality one produces is open to the experiences of others and the better one can navigate in the contexts offered by professional and academic lives. Setting aside the most recent commentary on the World Trade Organization (WTO) dispute settlement and instead reading a sociology of professionalism or a report on the effect of trade on development is vital for understanding one's own practice and its effects on other people. It is to such efforts that this book wishes to make a contribution. But I am wary of thinking in terms of "disciplines," the way interdisciplinary projects tend to strengthen disciplinary orientations, fix the boundaries of expertise and consolidate existing hierarchies. It ignores the way professional vocabularies are indeterminate, divided against themselves and constantly instrumentalised for the struggle of resources. These problems, too, are highlighted in the chapters that follow.

For there is no magic about any division of disciplines. Like idioms of language, they have emerged from and continue to develop in history, marking the rise and fall of systems of professionalism and their accompanying social hierarchies. It may seem a purely strategic choice to learn as many professional idioms as one can. But I think there is more. In a world of many legalities ("fragmentation" if you wish) many different agendas and priorities demand a hearing. Learning the rules of production of these legalities offers a critical standpoint to those agendas, allowing making the choices that they as mere "legalities" leave obscure: who is privileged by a (system of) legality and at what cost to others? Legalities are like languages of which Paul de Man once famously remarked that they were mechanisms of both insight and blindness, enabling us to see something, but making us blind to other things. It is hard to think how anyone could, in a world of many legalities, act in a reasonable way without seeking to understand their rules of production. This might also open a critical perspective to the naturalness of one's native legality, and its hierarchies of power and privilege.

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There is a large constellation of people and institutions that have contributed to the making of this book in large and small ways, and we express warm and wide thanks to the many paper presenters, commentators and organizers who extended their valuable time to make this volume possible. We would like to thank each of our contributing authors for the time and dedication they invested not just on their individual chapters, but also in the general discussions framing this volume. We would also like to express our gratitude to Professor Martti Koskenniemi for providing his thoughtful foreword to this volume.

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