The Process of Legalisation After 1989 and its Contribution to the International Rule of Law

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Without being a laudator temporis acti, I cannot help myself but to think that we have missed something...
Outside international law, the process of legalisation more often than not will have a negative connotation. Making informal relations and social norms (say: greeting one's colleagues at an international-law conference) subject to legal consequences, in principle, is not a prospect that many people would cherish.

Legalisation originating from an international-law context is generally seen in more favorable terms. The distinct character of international society makes the romantic view that informal relations are normatively superior to legalised relations less likely. Moreover, since the role of consent remains so dominant, the result is that relations will be legally regulated only with consent of those regulated. Indeed, the process of law making is so cumbersome that many would appraise legalisation in international law in positive terms. That positive assessment may in part be induced by the instrumental value of legalisation: it can allow the achievement of particular social objectives, but beyond such instrumentalist goals, legalisation may be seen as an important contribution to the further advance of the rule of law in international law affairs. It may replace, in particular areas, prevalence of power politics by a rule-based system. In the work of the UN on the rule of law at the international level, more international law is indeed seen as central element in the further development of the international rule of law.6

However, the proposition that legalisation furthers the rule of law in international affairs would be too simple. The fundamental weaknesses of the international legal order, that make the ideal of the international rule of law far removed from present-day reality, cannot be simply overcome by ever more international laws. It may be necessary to differentiate between different types of international norms. It is also questionable whether it is proper to speak of a contribution to the rule of law irrespective of the actual use and enforcement of such newly adopted rules.

In this chapter I will examine the possible contribution of legalisation to the rule of law at, respectively, the international and the domestic level. Section V contains brief conclusions.

II. THE CONCEPT OF LEGALISATION

Before assessing the trends towards legalisation a few words on the concept are in order. In international law the term legalisation is not commonly used. In its narrow legal meaning it refers to legalisation of foreign public documents.7 However, the concept has drifted in from international relations literature and now appears to be increasingly used to refer to a process of increase in (the use of) law.

While legalisation in this broader sense has no widely shared meaning, from the perspective of international law we can readily agree on the core aspect of the phenomenon, that is: legalisation entails more law.8 The term then refers to the emergence

and development of legal norms for the ordering of relations between subjects of international law. This may involve new treaties or protocols, development of existing instruments through amendment or otherwise, or it may involve the extension of existing norms to newly ratifying states. It may not be obvious that using legalisation in this way has much conceptual value. The development of legal norms can also be referred to by terms such as law making, regulation, legislation or even codification. However, each of these terms has its own distinct meaning and limitations, and the term legalisation may be conveniently used as an umbrella term capturing diverse trends of an increasing number of international rights and obligations.

The term legalisation can be extended to refer to the subsequent process in which subjects increasingly make use of legal norms to organise their moral relations, including the settlement of any disputes that may arise in these relations.9 Whether or not the term should be used in this second sense is debatable. On the one hand, and contrary to the position taken by some (notably US) scholars,10 a legal norm that in practice fails to guide behaviour is still a legal norm. In that respect, more and more legal norms create legalisation irrespective of their use. On the other hand, it may be said that an increasing use of legal norms, even irrespective of an increase in the quantity of such norms, means that the relations between relevant actors are to a greater extent governed by law in practice. It seems one can speak of increasing legalisation as being determined by the use of law in practice.

It therefore may be proper to distinguish degrees of legalisation, depending on whether it involves only the adoption of more legal rules, and/or also entails the increase use of legal norms in practice.11

In literature, we also find other uses of the term legalisation. In what probably is the most widely cited account of the term, Abbott et al have used it to refer to a combination of three elements: obligation, precision and delegation.12 While we can readily agree that there can be no legalisation without obligation, the other two criteria seem to be located at different levels of analysis. Precision is a useful factor to distinguish legalisation processes. A treaty consisting of only hortatory norms, for instance, can be more effectively regulate the relations between actors bound by such norms than a treaty containing very specific norms. It makes sense to say that in the latter case there is a qualitatively different process of legalisation than in the former case. In assessing trends of legalisation we may have to differentiate according to the character, scope and precision of legal norms.

5 M Faultescu and J Jigoz, 'Internationalisation: A Broader View of Law, Power and Politics' (2001) 51 International Organisation, 714, 744 (noting that "under a broader view of law, the legalisation of power frameworks more than the largely technical and formal criteria of obligation precision and delegation, it encompasses features and effects of legitimacy, including the need for congruence between law and underlying social practices.
Also delegation, including the granting of competence of international institutions to interpret, apply, and enforce the law, is a criterion by which we can identify particular types of legalisation. A defining feature of the process of legalisation after 1989 is that more and more institutions have been set up charged with tasks of law making, interpretation and supervision—where a low degree of precision may be accompanied by high degree of delegation.

The approach of Abbott et al is problematic, however, in so far as they would suggest that precision and delegation can somehow compensate for the absence of obligations. This would make it possible to consider processes involving precision and delegation, but not involving obligation, in terms of legalisation. In this vein, it has been said that research on legalisation should not only explain when precise, binding and independent regimes facilitate international co-operation, but should also capture a broader range of law-like arrangements affecting international and transnational relations. Others have written that a definition of legalisation that includes legal obligation as a defining element hinders rather than helps empirical research and that a fuller consideration of elements hinders rather than helps empirical research and that a fuller consideration of

III. THE TREND TOWARDS LEGALISATION

If we limit the concept of legalisation to the combined phenomenon of more legal rules and the increasing use of such rules in the actual relations between subjects of international law, it can readily be determined in the period after 1989 there was significant change. An easy, though perhaps not the scientifically most sound, illustration is the changing size and scope of textbooks: compare the sixth edition of Shaw with its 1531 pages of text and the 516 pages in the first edition. The increase in number of pages may in part be due to new insights or choices of the author. For instance, whereas the first edition only briefly refers to international humanitarian law, the sixth edition has an entire separate chapter on the topic; it is not obvious that there is much new law that would account for that increase. But otherwise, the extension largely reflects a trend of legalisation. A handful of pages on international environmental law turned into a full-blown body of law that took up an entire 30-plus-page chapter, discussing many new treaties.

Other chapters reflect not so much an increase in the number of rules of international law as an increasing practice of using international law for conducting relations between states and other subjects. For instance, the first edition contains six pages on individuals and human rights and criminal responsibility, whereas in the sixth edition we find separate chapters on both international and regional protection of human rights, and a separate chapter on individual criminal responsibility in international law (a topic that took up a bare two pages in the first edition). Also, the section on international law before domestic courts is twice as long in the sixth edition as the first, mostly with new practice.

An accurate measurement of legalisation is highly complex and perhaps impossible. To mention one problem: what is the unit to be used in counting? Treaties, articles, practice based on such treaties? We should also take into account that new rules in part may change or replace old rules, and do not so much lead to new laws as to different law. Nonetheless, a quick look at treaty numbers suggests a clear trend. That trend is particularly clear for states that were directly affected by the fall of the Iron Curtain. Consider the following figures on treaty-making practice of a random sample of such states. The numbers of Council of Europe treaties rose for Albania from 0 in 1989 to 72 in 2009, for Bulgaria from 96 to 79, for Poland from 3 to 83 and for Romania from 0 to 90. For the same states, the number of treaties registered in UNTS rose for Albania from 19 to 274, for Bulgaria from 122 to 220, for Poland from 138 to 208 and for Romania from 99 to 259.

At a global level, the movement is less spectacular, but nonetheless distinctly observable. The number of multilateral treaties registered with the UN between 1989 and 1999 stands at 371, whereas the number of treaties registered between 1989 and 2009 stands at 1286. The rise in bilateral treaties is slower, from just over 21000 between 1969–2009 to well over 20000 between 1989 and 2009.

An assessment of an increase in the uses of international law is still much more complex, but the increase in numbers of international courts and their practice, the rise of international institutions with a role in the interpretation and supervision of international obligations, as well as the increasing practice of national courts all suggest that legalisation is not limited to more laws on papers. We can also refer to the tremendous increase in binding resolutions of the Security Council (from less than 20 before 1989 to 469 after 1989, an increase of more than 2000%) and to the tremendous increase in binding resolutions of the Security Council (from less than 20 before 1989 to 469 after 1989, an increase of more than 2000%). All of such factors provide evidence that we have indeed witnessed an unprecedented process of legalisation.

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2. Ibid. (2003).
IV. CONTRIBUTION TO THE RULE OF LAW AT THE INTERNATIONAL LEVEL

Legalisation is often seen as relevant for advancing the rule-of-law agenda. Developing more treaties and securing wider participation are dominant themes in the work of the UN on the rule of law at the international level. The Secretary-General noted in his report In larger freedom that

Support for the rule of law must be strengthened by universal participation in multilateral conventions. As present, many States remain outside the multilateral conventional framework, in some cases preventing important conventions from entering into force. … I urge leaders especially to ratify and implement all treaties relating to the protection of civilians. 24

The causal relationship between more treaty ratification and a stronger rule of law at the international levels is far from clear, however. For one thing, we need to distinguish between law as instrumentalist idea versus law as a constraint on power. 25 More international laws that seek to secure particular social objectives (say, combating climate change, securing social security for migrant workers or banning cluster munitions) in itself do not strengthen the rule of law. The increase in the number of laws only tells us that states have agreed to deal with these issues by law, rather than by other instruments—that is, they have chosen for rule by law. Indeed, if anything, the enduring trend of legalisation makes clear that states, and international institutions, increasingly have chosen to rule by law. But rule by law is in itself not rule of law. 26

In some respects, adoption of more treaties, even when these are adopted with an instrumentalist aim, nonetheless may strengthen the rule of law. For they strengthen the commitment of states, 27 pre-existing discretion in the exercise of power and replace it by control of law. Moreover, interested (and injured) parties (whether states or private parties) could on the basis of a legal obligation hold the state accountable for its policies relating to, say, climate change or social security of migrant workers, rather than voicing disagreement. In that respect, new obligations, by definition, add an element of control. 28 They may ensure that public policy is not only guided by power and will of states, but guided by agreed norms that protect in part the weak from the strong. This is part of the concept of supremacy (or primacy) of international law over politics. 29 It might be objected that the adoption of new rules is neutral for the control of power, since it only replaces one norm with another. In the concept as defined above, legalisation refers to the development of new law, or the new use of law. It thus suggests a dynamic development of expansion and intensification. It may be argued that new conventions pre-existing background norm that permitted that particular activity. 30 In this respect, legalisation does not so much provide new law, as it provides different law. However, from the perspective of the rule of law, there are qualitative and quantitative differences between a simple liberty that allows them to use cluster munitions, or to trade chemicals, on the one hand, and treaties that limit such use and that require them to adjust domestic legalisation, on the other. The second category has a qualitatively different impact on the rule of law.

The effect of legalisation (even if it results from an instrumentalist agenda) on the rule of law can be illustrated by elements of the rule of law at the international level identified by Sir Arthur Watts, in what probably remains the best analysis of the rule of law at the international level. One of these elements is the completeness of the law. 31 The idea of the rule of law is premised on the existence of a body of law. But obviously there are qualitative differences between a situation in which a very limited number of rules exist, on the one hand, and a situation with a very extensive body of rules, covering many or most areas in which public power is exercised, on the other. In the latter case, courts to which jurisdiction has been allocated will have more laws on the basis of which they can decide cases. Completeness is in large part a function of general principles, 32 but will also be a function of more extensive treaties in different areas of international affairs; in this respect ongoing legalisation supports the development of a rule of law.

Another element of the rule of law which is supported by the trend of legalisation is certainty. 33 The rule of law requires that the body of law has reached a state of development in which the law can be certain and predictable. General principles and customary international law are not necessarily incompatible with the rule of law, but a qualitative distinction can be drawn from the perspective of certainty and predictability between, for instance, a customary rule prohibiting transboundary harm and a treaty prohibiting emissions of certain chemicals that have transboundary effects.

While in this respect and some other respects the mere phenomenon of legalisation may have certain supportive effects on the international rule of law, a number of qualifications are in order. First, a positive relation between legalisation in the sense of more treaties and more decisions of international institutions and the rule of law presupposes that treaties actually constrain (powerful) states. 34 But this presumption is not necessarily valid—treaties may in fact confer and justify rather than control power, 35 and the actual effect of treaties (or decisions of international organisations) depends on a case-by-case analysis.

Second, in addition to such elements as completeness and certainty, the ideal of an international rule of law also presumes universality, that is: rules must apply also to all members of the community. 36 Here the pattern post-1989 is mixed. On the one hand, it is true that part of the process of legalisation involves more multilateral treaties of,
potentially, world-wide application. On the other hand, it should be observed that there are significant differences between regions. The numbers of new treaties in Europe are, unsurprisingly, significantly higher than in Asia, the Americas and Africa. Consider the following figures: for Europe the number of regional treaties classified as such by the UNTS database stands at 424, 214 of which were concluded after 1989. For other regions these figures differ significantly: for Asia 43 out of 88 date from after 1989 and for Africa 104 out of 243.

Third, as indicated above, a positive relation between more treaties and the rule of law presumes that treaties are reflected and applied in practice. Just as new treaties that are unmatched by practical effect may be unworthy to be qualified in terms of legalisation, they do not offer much for the international rule of law. Completeness and certainty are not in themselves sufficient to establish the rule of law—the law also has to be effectively applied. Despite progress in such areas as dispute settlement and international supervisory procedures, a major difference continues to exist between national and international law—where effective consequences of non-application are often lacking. The principle of voluntary jurisdiction of international courts remains a fundamental weakness of the international rule of law that may undo, or at least limit, much of the potential impact of the process of legalisation on the international rule of law. It is therefore on good grounds that the UN, and states commenting on the UN process, have attributed much weight to strengthening the role of the International Court of Justice and, more generally, processes of dispute settlement.

Fourth, and most importantly, to assess the impact of legalisation on the rule of law we have to recognize the structural dimensions of the rule of law. More law, even when complied with and even when accompanied by procedures to secure compliance, does not necessarily further the rule of law if the structural elements of the international level do not support such a rule of law. The weakness of the rule of law at the international level does not so much consist of a shortage of international laws, but results from the structure of the international legal order, based on sovereign equality, and a lack of effective means to protect the weak from the powerful. It is this structural dimension that seemed to inspire the reference to the rule of law in the Friendly Relations Declaration. The dominant solution of the international legal order is the prohibition of the use of force—if there was no prohibition on the use of force, compliance in many other areas may not have been sufficient to call the system a rule-of-law system. This overriding importance of the prohibition on the use of force, and the prohibition of intervention,

"As indicated above, the number of multilateral treaties registered with the UN between 1949 and 1989 stands at 214, whereas the number of treaties registered between 1989 and 2009 stands at 1246.


"Our interests are satisfied with...". The International Law Commission’s Articles of Rule of Law, 31.

"Ibid., 10 (noting that "it should..."")."'s contribution to the International Rule of Law: Introduction, Text, and Commentary (Cambridge University Press, 2002).


O Watts, The International Rule of Law, 15."
One of the defining aspects of legalisation after 1989 is that many of the new international laws are of a regulatory nature and are addressing issues that also are subject of national law. Indeed, legalisation is in part the product of the same processes that drive legalisation at domestic level. For instance, environmental treaties in part reflect the same agenda as domestic environmental legislation. In many areas there is thus a strong connection between international and national legalisation. We can explain legalisation through the perspective consequences of international law for domestic political outcomes.

The link between international legalisation and national law is confirmed by empirical data. The issue areas that show significant increase are precisely those where a large proportion of the treaties are of a regulatory nature. For instance, the UNTS database shows for the subject area 'war' an increase of 22 out of 193 after 1989—not more than 11 per cent. In contrast, the percentages are much higher for issues where treaties have a more regulatory character: Investment: 1067 out of 1473 after 1989 (72%); environment: 643 out of 919 after 1989 (70%); terrorism: 54 out of 62 after 1989 (87%); criminal law: 61 out of 952 after 1989 (66%). For human rights the increase is less substantial, 62 out of 214 after 1989 (38%)—probably because we have reached the point where adding yet another treaty serves few purposes.62

Comparable to the situation at the international level, the phenomenon of legalisation as such, its principle, is neutral in terms of its effects on the rule of law. New treaties often require adjustment of national law, but a change of national law in itself does not cause a change in the rule-of-law qualities of national law. Also in this context an essential distinction needs to be drawn between the instrumental aims of international law and their effects on the rule of law. It might even be said that more and more international laws upset the rule of law domestically as they may require changes in the laws domestically—but that argument would incorrectly assume that the rule of law would prefer stability over change. Change in law, whether emerging from international or national political processes, can be perfectly compatible with the rule of law, as long as it follows the ordinary procedures for such change. But the point remains that such change, also if it comes from international law, in itself does not strengthen or otherwise change the rule-of-law quality of national law.

It is in fact only a small part of international law that aims at rule-of-law qualities. Treaties in such areas as human rights, but also development and security, expressly refer to and support the rule of law. The fact that these different types of treaties refer to the rule of law reflects the fact that the rule of law at the domestic level can fulfill multiple purposes, including protecting individual rights, creating conditions for economic stability and growth, and security.63

Beyond the aim of particular treaties to contribute to the rule of law domestically, some of the requirements of the rule of law may themselves constitute particular rules of law.64 That holds in particular for human rights, including such requirements as legality and independence of courts. There is little doubt that in respect human rights constitute the cornerstone of the rule of law, at the national level, that international law supports.65 In the Golden case, the European Court of Human Rights underlined the central role of the rule of law in the Convention.66 It stated that the profound belief in the rule of law was one reason why states decided to ‘take the first steps for the collective enforcement of certain of the Rights stated at the universal Declaration’. Also the Southern African Development Community (SADC) Tribunal recognized the rule of law implications of human rights.67

Strengthening these rule-of-law impacts of human rights has little to do with the trend towards legalisation as a phenomenon entailing more international law (discussed above). Rather, it is a matter of better recognition and application of existing human rights provisions. It is remarkable that apart from human rights law, the general concern of the international community with the significance of the domestic rule of law, for instance as a means to make failed states more effective, has only to a very limited extent been made part of positive international law. In this respect, there is room and indeed need for further legal appraisal of the impact of rule of law promotion on general international law and for legal development.68

As for the strengthening of the rule of law at the international level, the strengthening of the rule of law at the national level depends mostly on the actual use and application of international law at the domestic level than on the increases in rights and obligations. In this context, it is relevant to observe that the more towards treaty making in former (non-)controllable states is matched with an opening of constitutions that make many international treaties directly applicable in national law, mostly giving a prioritised treatment to human rights.69

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64 Article 6 of the Treaty on European Union: ‘The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States’ (see also Article 9 (principle of the) of the Partnership Agreement between the Member states of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States of the Other Part (Community Agreement)’ (Official Journal L1/33 of 15 December 2000, as revised in 2005 (Official Journal L209/27 of 15 August 2005).
68 Ibid., paras 115 and 116.
70 Article 13 of the American Declaration of Human Rights (1948).
While the large category of regulatory treaties in itself is in principle neutral in terms of its rule-of-law quality, in one respect it has effects that may undermine rather than support the rule of law. Legalisation to some extent reduces the role of politics, negotiation and even democracy. This has been a common theme in the discussions of legalisation of the trade regime.30 The problem became in particularly significant given the impact on national level—the impact of legalisation on national law is directly connected with the rule of law at the international level. The limited legitimacy of international institutions as well as the impact of legalisation on the domestic separation of powers and democratic processes may offset some of the gains that legalisation may bring in terms of rule of law at the international level. Precisely in areas where international law prescribes domestic laws and performs tasks of adjudication, assessment, or review of domestic decision making, compliance with the rule of law at the international level becomes critical. In this respect, much may be gained from development of principles of legality in international institutions31 as well as a system of control of decisions of political organs.32 The deepening of the process of legalisation in terms of its reach into domestic legal orders, indeed will depend on that legalisation itself being embedded in a proper international rule of law.

VI. CONCLUSION

The trend towards legalisation after 1989 seems undeniable. Its impact for the quest for the rule of law at the international level appears to be rather modest, however. In large part, legalisation seems the result of an instrumentalist project by which international law is used to achieve particular social objectives. In a way, the growth of this body of law presumes a functioning rule of law system, but in itself does not really produce it. It does, however, make a further contribution to the completeness, predictability and universality of international law—which are essential features of the international rule of law. It can also be added that in many areas, perhaps most notably human rights, criminal law and investment law, we have seen a major increase in the use of international law, in particular in international courts and tribunals.

The changes at the more structural level of the international rule of law, revolving around sovereignty, non-intervention, use of force, and also secondary principles of responsibility and dispute settlement, are much slower, and seem to be governed by altogether different dynamics than the process of legalisation that characterises the period after 1989.

In addition to the impact on the rule of law at the international level, legalisation may contribute to the rule of law at domestic level. The domestic level remains critical since the performance of international obligations in many respects presumes a strong rule-of-law quality at the national level, and in that respect the relation between international law and national law in itself is a structural element of the international rule of law.

30 H. Cohen, ‘The WTO and Domestic Political Disputes: How Legalisation of the Global Trade Regime Gave Too Little’ (2001) 18 J of Global Legal Stud 331 (discussing the critique that “while a strong rule of law exists that nations abide by their commitments in the WTO, legalisation has too often resulted in unproductive developments, with judges and lawyers filling gaps left (sometimes intentionally) by negotiators’).
31 Inter alia, The Rule of Law 216.