

LEGALIZATION OF INTERNATIONAL INSTITUTIONS AND THE EUROPEAN UNION

1- Introduction

High level of the globalization in the recent centuries presents many trans-boundary opportunities and threats not only to the states, but also non-state global players. Increasing number of transnational issues results in a complex international legal system. Expansion of institutionalization does not mean that all international institutions are structured uniformly. One important characteristic of institutionalization which provides a beneficial tool for understanding the complexity and variety of the international order is the *legalization* concept. Legalization represents a form of institutionalization characterized by three dimensions: *obligation*, *precision* and *delegation* (Abbott & Snidal, 2000).

In this paper, I will analyze why different level of legalization is preferred in different international circumstances. Liberalist understanding provides major contribution for the reasons of this variation. However, as stated by Walt (1998), no single approach can capture all the complexity of world politics. So, the normative understanding and the realist perspective provide further valuable explanations. This paper will not therefore absolutely stick with one approach. I will firstly handle the legalization concept, and secondly analyze possible reasons of variation in legalization of the institutions, and finally, I will assess the legalization of the European Union (EU) in detail.

2- Legalization Concept

Legalization provides norms, procedures and mechanisms by which the behaviours, interests and identities of the actors are shaped. An international commitment can be a binding legal agreement according to the international law, but it can also be non-binding and vague, according to the definition of legalization. Thus, legalization and international law are not synonymous (Abbott & Snidal, 2000).

Legalization is characterized with conceptually independent three dimensions: *Obligation* means that actions of the states or other international actors are bound by

legal rules and commitments. Level of unambiguousness of rules represents *precision* and lastly, *delegation* illustrates the extent to which actors delegate authority to the designated third parties for implementation, interpretation, monitoring and even creating further rules (ibid). Variation in legalization results from specific combinations of these dimensions. In short, legalization is a multidimensional continuum ranging from hard legalization in which all dimensions are high, to soft legalization in which all dimensions are ranked low.

One aspect of legalization is that hard legalization does not automatically mean high level of *compliance*. Haas defines compliance as a matter of state choice, which is subject to institutional and constructivist forces (Shelton, 2003). So, there are many other factors that affect the compliance level in addition to legalization. Nature of the collective action problem, possibility of sanction, capacity, institutional setting, and involvement of domestic actors, information asymmetry, and economic costs are factors affecting compliance (Abbott & Snidal, 2000).

Lastly, accountability and legitimacy mechanisms are not necessarily identical with the legalization dimensions. An international institution can be delegated without concerning accountability and transparency. Sources of legitimacy can be a powerful state or influential interest group, although the decisions of those international institutions directly affect whole societies and citizens. For instance, both the IMF and the EU have a relatively high level of legalization, but the IMF struggles with legitimacy and reputation problem (Reus-Smith, 2004). On the other hand, even if the EU is not ideally democratized and legitimized, it has some mechanisms such as directly elected parliament, indirect control of the council of ministers by domestic accountability channels and the scrutiny of the ECJ. Hence, high-level of legalization does not assure more legitimate and democratic institution in every circumstance.

3- Variation in Legalization

Legalization of the particular international institution has a unique characteristic. It is structured by interactions of many factors such as politics, nature of the goods provided by the international institutions, interests of involving actors and their relative power, culture and normative principles. Main explanatory input for

the legalization variation comes from functionalist and liberalist understanding. Realist and constructivist approaches also help to explain different faces of legalization.

Liberalists emphasize interdependence and cooperation among the countries (Walt, 1998, Snyder, 2004). Thus, legalization variation can be explained by the contribution of particular forms of legalization to the desired level of international cooperation. Self-interested actors consider the type of the game they face, uncertainty level, and their potential costs and benefits before deciding legalization level.

Some forms of legalization can be observed more. These particular forms can provide specific benefits and opportunities in certain conditions. Soft legalization is mostly observed in international ground because it removes most of the costs of hard legalization such as sovereignty costs. Besides, soft legalization provides similar benefits like hard legalization, and also provides additional opportunities such as flexibility and decreased transaction costs in the bargaining phase (Abbott & Snidal, 2000). However, it does not assure sustainability of commitments and equally enforced rules and more complete contracts. Some types of policy fields, such as arm control or environment protection, necessitate more precise and binding laws and third party implementation bodies for preventing opportunistic and discretionary behaviour. So, hard legalization sometimes becomes inevitable.

Domestic political competition and preferences of local actors are essential for the choice of legalization (ibid.) Governing groups may accept high level of legalization to an international institution by forgoing their sovereignty for the sake of lessening domestic pressures and sustaining durability of their politics in the long-term. For instance, the IMF and World Bank programs are accepted by the governments of developing countries for the purposes of decreasing oppositions to their economic reforms, which create dissatisfaction in vast amount of their societies.

The realists claim that legal rules emanate from dominant powers and represent their interests. Comparison of NAFTA, WTO and the EU indicates that the EU has hard legalization, and that NAFTA and the WTO are relatively less legalized

(Abbott, 2000). One reason for this difference can be the reluctance of the US to delegate power to third parties, which may act without considering the US interests and threat to sovereignty. It is clear that preferences of dominant powers are one of the key factors shaping the legalization process.

Lastly, constructivists claim that normative structure is as important as material formation (Reus-Smith, 2004). For example, the functionalist approach fails to explain high level of delegation to the European Parliament (Pollack, 1997). However, from a normative perspective the European identity is an important input in the legalization formation of the EU. I claim that the European Parliament balances the EU's rationalist and realist structure and works as a source of legitimacy and democracy, and represents normative values of member states.

4- Legalization of the EU

The EU is one of the most legalized international institutions. Its legalization does not linearly increase from the Rome Treaty to now. Uncertainty and external risks such as new wars and communism have threatened European countries in 1950s. One solution is to establish permanent cooperation and interdependence in Europe by creating common benefits for every EU countries. The EU aims to accomplish cooperation in specific sectors that would create spill over effects and enable moving to deeper cooperation in more sensitive and disputable issues.

The EU can be graded as hard in all three dimensions of legalization. Nevertheless, it is not uniformly legalized in all policy fields. High legalization is observed in economic and trade issues. Because of high sovereignty costs, it is low in defence and internal affairs. *Acquis communautaire*, law of the EU, legally binds all the member states and it is relatively detailed and precise. In addition EU law in particular policy fields possesses supremacy over national laws. Moreover, when required the ECJ gives precise meaning to the EU regulations. The EU Commission, as the guardian of the *acquis communautaire*, overviews proper implementation of the EU law and even impose fines in some common policy areas such as competition (Alter, 2000).

The functionalist theory and the principal-agent model help explaining legalization, and more specifically delegation to the supranational EU institutions. The Commission and the ECJ primarily concern monitoring actions of the member states, elaborating incomplete contracts, sustaining credible regulations and sharing agenda setting power. However, functionalists fail to explain delegation to the EU Parliament and underestimate the consequences of high delegation (Pollack, 1997). As stated above, delegation to the Parliament can be explained by the constructivist approach. Because of incomplete information and uncertainty, a high-level of delegation to the Commission and the ECJ is not compensated with sufficient monitoring and control mechanisms by member states. In line with bureaucracy theories of public choice, supranational institutions have exploited differing preferences among the member states for their self-interest and increase the legalization of the EU (Dunleavy, 1997). Especially the ECJ, owing to the nature of the judiciary function, has acted more autonomously and increased its power and EU legalization. For example, the ECJ has introduced to *supremacy of the EU law* and *direct effect* principle and it has involved private litigants in the legalization process (Alter, 2000) In this way the ECJ and private litigants have dramatically increased legalization in specific policy areas beyond the expectations of national governments (ibid.). However, the ECJ's role in legalization is not unlimited. EU institutions rationally forecast the winset of their principals to avoid moving beyond it. Tsebelis (2002) explains how the decision-making process works and to what extent EU institutions can achieve movement from the status quo to their desired level.

As result, a reverse movement in EU legalization has been observed in recent decades. Firstly, hard-level legalization of the EU has caused rigidity and resulted in unintended consequences for EU member states. In other words “...forces for disintegration are created by the process of European integration itself” (Alter, 2000, p.515). Therefore, member states have taken some actions to limit the role of the ECJ in new policy fields of the Union. The ECJ is not included in the second and third pillars of the EU. The *subsidiarity principle* is accepted in the Maastricht Treaty and balances the policy involvement of supranational institutions.

Lastly, legalization of the EU is designed as hard aimed to create a club of sincerely committed states that will work as an ex-ante sorting mechanism. According

to the *club goods theory* (Corners & Sandler, 1996), a club produces goods for only its members and non-members can be excluded as being free-rider. However, a club has an optimum size, and with the enlargement, marginal benefit for members decreases because of increasing transaction costs and coordination difficulties. Subsequent enlargements make the EU more heterogeneous and saturated. In other words, member size of the EU club become closer to optimum level and existing legalization levels create dissatisfaction at least for some member

5- Conclusion

Legalization represents a particular form of institutionalization. It is characterized by three dimensions. Different forms of legalization demonstrate that optimum, or at least desired levels of legalization can be hard or soft, depending on certain conditions. Legalization can be explained by their functional values, the interests of involved actors and their powers, and embodiment of particular international norms. Liberalists perceive legalization decision as a trade-off between benefits and costs of hard versus soft legalization. From realist perspective, it can be seen as a game of power in which powerful actors are more effective. Lastly, constructivists include the importance of norms and identities in legalization decision. In short, legalization of international institutions is a multi-faceted issue which can be explained in multi-dimensional approach.

The ultimate aim of the EU is beyond economic and trade integration. It has also different historical and cultural rationales. So, legalization level of the EU is different than any other economic integration. In short, EU legalization cannot be a representative model for other international institutions because of its sui-generic structure.

In recent decades, positive and negative interactions of the EU legalization work simultaneously. Future direction of EU legalization depends on the interests, powers and normative attitudes of member states, supranational institutions, private litigants, and other domestic actor such as national courts.

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