

International Legality – A Response to Hathaway & Shapiro

by Samantha Besson

In their article *Outcasting: Enforcement in Domestic and International Law*, Oona Hathaway and Scott Shapiro make a seminal contribution to the study of the legality of international law. Their piece is not only a direct contribution to the burgeoning field of philosophy of international law, but it also participates in and deepens an important conversation within the field of general jurisprudence and the philosophy of law tout court. The authors succeed, on the one hand, in shedding new light on the relationship between legality and legal enforcement that is an old chestnut in legal theory, and in making some interesting methodological claims about the best way to conduct a jurisprudential argument about the concept of law. With respect to the philosophy of international law, on the other, the authors broach the neglected question of the legality of international law, and rightly deem it an important issue and not one that is trumped by others such as the legitimacy of international law in particular.

In this response, I question the authors' argument with respect, first of all, to their underlying reasoning in general jurisprudence, and more specifically the way they link legality to enforcement (that argument, if defeated, no longer conditions the second part of their argument pertaining to the legality of international law), and, secondly, to their take on the philosophy of international law and in particular their argument regarding external outcasting as a form of enforcement inherent to international legality.

Legality and Enforcement (section II)

In the first and shorter part of my response, I would like to question the authors' philosophical argument as to the relationship between legality and enforcement (section II). This passage in their argument is pivotal but is surprisingly brief in view of its importance for the rest of the argument (6 pages in total).

My critique pertains in priority to the authors' extremely brief reply to Joseph Raz's challenge to what they describe as the Modern State Conception. As a matter of fact, their reply turns out to be strategic rather than substantive as they concede to agreeing with Raz. But what are we to make of their claim that since some people are not convinced by 'thought experiments' or that because some have moral 'intuitions' that do not match the outcome of Raz's argument, we should eschew that argument altogether?

It seems to me that in relation to an object of legal theory as complex as international law, this is a very weak claim. It may have rhetorical or persuasive force at the most. Generally, the argument that a negative feature of legality needs to 'exist' for a normative argument against it to succeed may require a stronger justification.

International Legality and Outcasting (sections IV-VI)

The second part of my response pertains to the two authors' argument about the enforcement of international law. There are four main objections I would like to make.

International Legality and International Law

My first objection concerns the state of international law. The authors stress at various points

in the argument that they refer to 'actual legal systems' (277). They also claim later on that their account fits the current state of international law (section VI).

This is a difficult claim to make in view of the extreme diversity of international legal norms in terms of sources, degree of normativity and scope. Think, for instance, of the difference between general and objective international legal norms such as international human rights law, and specific and subjective international legal norms such as NAFTA. While some features of international law may be captured by the outcasting model (see the various examples given by the two authors), others may not. It would be reductive therefore to explain the legality of international human rights by reference to the way in which states are made to comply with NAFTA rules.

Another difficulty pertains to the diversity of international but also domestic perspectives about international law. The inherently domestic dimension of much of international law (individuals are necessarily situated in domestic legal orders, and the enforcement of international law is as a result largely domestic) increases that difficulty. This is even more important as the standpoint used by the two authors is by and large a US standpoint (see e.g. their bibliographical references or examples), even if, as we will see, they regrettably do not refer to US law or domestic law more generally in their account of the enforcement of international law. That standpoint needs to be justified if it is used to develop a conception of law that is 'paradigmatic of all instances of law in the modern world' (345). More generally, there are well-known methodological dangers in devising a concept of law in the light of current legal circumstances. The concept's necessary normative and critical function becomes difficult to justify. These are classical jurisprudential problems but they become even more sensitive when the object is international law.

International Law and Legal Orders

My second objection pertains to the notion of legal order and/or legal system used in the piece. A lot in the argument depends on the boundaries and the identity of the international legal order (e.g. the internal v. external divide in outcasting), but not much is said substantively by the authors about the characteristics that turn a set of legal norms, once they are regarded as legal, into a legal order and/or system.

The difficulties that arise when conceiving of a general and all-encompassing legal order/system such as the international legal order(s) should not be obliterated, however, at the risk otherwise of making proposals that only make sense in a domestic legal order/system that is distinct from others. I fear that this may be the case with the opposition between internal v. external outcasting because that distinction requires insiders and outsiders and, as a result, implies different legal orders in order to make sense. Of course, this may be intentional. But it is actually unclear in the paper whether internal outcasting is used by the authors to refer only to a global international legal order or whether it could also be used to encompass regional or specific international legal orders. Furthermore, an outcasting scheme may be external to a group of states but internal to the organization that is constituted by those states, but that is a distinct subject and legal order. As a matter of fact, the WTO example in the article may also be read as a case of internal outcasting if the WTO is understood as an international subject and not only as a collection of states. State institutions are increasingly also institutions of the international organizations their states belong to. For instance, the domestic judge in the European Union is also a European judge when she applies or interprets EU law. And the same may be said about state institutions acting for the WTO as agents of internal enforcement of the organization.

Moreover, the international legal order(s) is(are) different from domestic legal orders to the extent that it(they) relate(s) closely to domestic legal orders where individuals are primarily situated. International law cannot and should not be understood and justified without reference to individuals and therefore by reference to domestic law and institutions. That close connection between international and domestic legal orders necessarily plays a role in the enforcement context and that kind of enforcement may be regarded as internal to the international legal order, but it is one that goes amiss in the Hathaway & Shapiro model.

International Law and States

My third objection pertains precisely to the notion of state used in the article and more generally of the political entities corresponding to the international legal order(s) at stake. The authors are right to emphasize that much in international law hinges upon the concept of state and hence of state sovereignty (348). One's account of the legality of international law cannot but square as a result with the inherent limitations of those two concepts.

While this is correct, I would like to argue that there is more to draw from these conceptual constraints. To start with, both the concepts of state and state sovereignty are themselves normative concepts. Thus, just as it is the case with the concept of law, their application requires a normative evaluation. This is why the authors' understanding of sovereignty ought to be argued for and cannot simply be posited (348).

More importantly, it is a mistake to assume that our understandings of law and the authority of law between individuals may simply be transposed to international law and the authority of international law between states. States are not like individual legal or moral subjects. They have a constituency of individuals whose interest they ought to serve. As such, the personalization of states qua individuals and analogies with medieval Icelandic individual outcasting or classical canonical individual outcasting do not help grasp the complexity of states as normative agents of their constituencies and the enforcement of international law on them, but also by them qua officials of international law, as this was wonderfully captured by Jeremy Waldron.

This is even more the case when the states in question are democratic states and the organizations of states or 'communities' they constitute are democratic. There, outcasting and other kinds of pre-modern enforcement mechanisms fly in the face of inclusion and participation, and the efforts that are made to bring more democratic legitimacy to international law-making. An example of the democratic limits of outcasting would be the European Union or even the Council of Europe.

International Law, Legitimacy and Enforcement

My final set of comments pertains to the relationship between legality and legitimacy, or legitimate authority. Before we understand how international law may claim to bind legitimately and may effectively bind in practice, we need to clarify the kind of normativity and the type of obligations that stem from international law. It is difficult to understand how certain legal norms are enforced without first grasping the kind of obligations they give rise to.

The complex nature of states and their relationship to their individual constituents should prevent us from developing explanations of the enforcement of international law by analogy to the way one explains the enforcement of domestic law by individuals (esp. by reference to pre-modern examples such as Medieval Iceland or Classical Canon Law). An explanation of

the nature of states' duties under international law qua collective institutional duties, and their relationship to individual duties, or at least the differences from individual duties, appears to be a necessary step towards understanding the way(s) in which those duties are enforced. And this matters whether enforcement is inherent in legality, the way the authors claim it is, or a mere normative consequence of legality.