



the sydney law review

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Address

Challenging Expert Rule: The Politics of Global Governance[†]

DAVID KENNEDY*

Abstract

In my Julius Stone Memorial Address, I explored the hypothesis that everyday decisions made by the professionals who manage norms and institutions which seem to lie in the background of global politics may be more important to global wealth and poverty than what we customarily think of as the big political and economic decisions made by parliaments and presidents or brought about by war and peace. If you have the energy to protest, criticise and change the distribution of wealth and status in our newly globalised world, it can be hard to locate points at which allocative decisions can be politically contested. The urgent political disputes that become international front-page news can seem peripheral to the decisions responsible for the distribution of things in the world. Although meetings of the International Monetary Fund (IMF) or the G-7 (Group of Seven) provide useful backdrops for street protest and media attention, it is not clear that the decisions being taken inside those meeting rooms are either meaningfully responsible for global distributions of wealth and power or contestable in conventional political terms. Although it is easy to think of international affairs as a rolling sea of politics over which we have managed to throw but a thin net of legal rules, in truth the situation today is more the reverse. There is law at every turn — and only the most marginal opportunities for engaged political contestation. The footprint of national rules and national adjudication extends far beyond their nominal territorial jurisdiction. Private ordering, standards bodies, financial institutions and payment systems, tax systems, trade regimes — all are managed by legal expertise. Indeed, to say the world is covered in law is also to say we are increasingly governed by experts — legal experts. Even the story of the war in Iraq is overwhelmingly one of law, of military force mobilised, coordinated and legitimated by law. The difficulty is to understand more adequately what these experts do, the nature and limits of their vocabulary, and the possibilities for translating their work into politically contestable terms — or promoting the experience of responsible human freedom among the experts who govern our world.

[†] The Julius Stone Institute of Jurisprudence, University of Sydney. The Julius Stone Memorial Address 2004, Thursday, 17 June 2004.

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1. *Introduction*

Good afternoon. It is an honour to deliver a lecture that has had such a distinguished history and audience. Julius Stone was a lion of international jurisprudence, his influence as a theorist and innovator felt by generations of students and scholars. Reading Stone's many contributions to the *sociological* interpretation of international law has been an inspiration for the research agenda I would like to sketch this afternoon.

My plan is to explore the significance of legal expertise in global governance. I begin with a simple 'Julius Stonian' observation: the international world is governed. The domain outside and between nation states is neither an anarchic political space beyond the reach of law, nor a domain of market freedom immune from regulation. Our international world is the product and preoccupation of an intense and ongoing project of regulation and management.

Although it is easy to think of international affairs as a rolling sea of politics over which we have managed to throw but a thin net of legal rules, in truth the situation today is more the reverse. There is law at every turn — and only the most marginal opportunities for engaged political contestation.

Seen sociologically, the official — and unofficial — footprint of national rules and national courts exceeds their nominal territorial jurisdiction. Tax systems, national public and private laws, financial institutions and payment systems, the world of private ordering — through contracts and corporate forms, standards bodies — all affect the behaviour of public and private actors beyond their nominal jurisdictional reach.

And that's just the beginning of international regulation. Of course, there is public international law, the United Nations, the world's trading regimes — it's a long list.

Seen sociologically, the international legal order is far more diverse and extensive than we public international lawyers normally imagine. The United Nations Charter¹ does not provide its constitution — still less is the Security Council its legislator. The functionalist neologisms of the last century — 'transnational law', 'international economic law' — reached to describe it, but each stopped short with a catalogue of favourite regulatory initiatives.

Indeed, to say the world is covered in law is also to say we are increasingly governed by experts. Not by the American empire, not by 'global capital' — but by experts. These experts — quite often lawyers — make decisions that affect the wealth, status and power of other people. They do so by interpreting and enforcing the background norms and institutions which structure activity in the market, in the state, in the family. Their routine work establishes and refurbishes this complex transboundary legal and institutional milieu. Across the globe, experts communicate with one another in common vernaculars, their significance in every national system enhanced at the expense of conventional politicians by the processes we so often refer to as 'globalisation'.

1 United Nations, *Charter of the United Nations*, 26 June 1945 (hereafter *UN Charter*).

Yet how, precisely, do experts rule? The nature, limits and contestability of expertise remain obscure. To explore the significance of experts and expertise for global governance, we need to develop three ideas.

First, the proposition that background norms and institutions *are* more important in global governance than we have thought. Second, the idea that the *vocabularies, expertise and sensibility* of the professionals who manage these background norms and institutions are central elements in global governance. Third, the proposition that expert work might be reinterpreted and contested in political terms, despite the ubiquity of the conviction among international legal experts that their expert work is not political.

2. *Background Norms*

When we think about ‘international politics’, we focus on the institutions we associate with public deliberation. In the United States, our television news rarely fails to let us know what the President was up to on a given day. My first proposition is a simple and familiar one — when we treat the *President’s* world as *the political world*, we miss a great deal.

But what, precisely, do we miss? What do we mean by ‘background norms and institutions’? We are all familiar with the suspicion that something that purported to be the result of foreground deliberation was actually the product of less visible background forces. We are accustomed to looking *behind* what the judge said, or what the legislation says, to understand the human intentions and social forces that shaped it. The sociological tradition is rooted in precisely this idea.

Any so-called ‘realism’ that attends only to the overt acts of national sovereigns is no longer realistic. In our world, power lies in the capillaries of social and economic life. Myriad networks of citizens, commercial interests, civil organisations and government officials are more significant than interstate diplomacy. Statesmen and stateswomen act against a background fabric of expectations — the legitimating or de-legitimizing gaze of world public opinion — and they act in the shadow of all manner of public and private norms.

As American trade law scholar John Jackson put it:

“Interdependence” may be overused, but it accurately describes our world today. Economic forces flow with great rapidity from one country to the next. Despite all the talk about sovereignty and independence, these concepts can mislead when applied to today’s world economy. How “sovereign” is a country with an economy so dependent on trade with other countries that its government cannot readily affect the real domestic interest rate, implement its preferred tax policy, or establish an effective program of incentives for business or talented individuals? Many governments face such constraints today including, increasingly and inevitably, the government of the United States.²

2 John Jackson, William Davey & Alan Sykes (eds), *Legal Problems of International Economic Relations: Cases, Materials and Text* (4th ed, 2002) at 1.

Indeed, the international regime today is a dis-aggregated network of institutions, some public, some private, which are only loosely coordinated by national governments. This general argument blends two quite different observations. First, the idea that *other people* than those who seem to be in charge are making the real decisions, and second, the idea that *no one* is making the decisions — they are driven by facts on the ground, by natural forces, by unconscious motives or by invisible hands.

Although these two ideas often travel hand in hand, they are strikingly different. To distinguish them from one another, I *term* the operation of impersonal forces ‘context’. I use the word ‘background’ to refer to the work of *other people* than those who seem responsible for visible foreground decisions.³

I: BACKGROUND NORMS & INSTITUTIONS

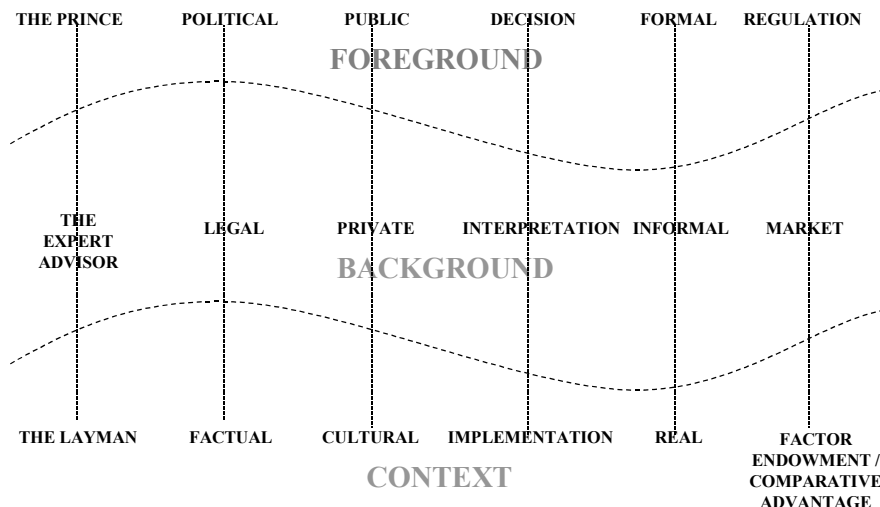


Figure 1.

We often feel foreground politics are merely an expression of deeper, impersonal forces — what I call ‘context’ — the means of production, say, or the interests of the ruling class. And context often seems to limit what we can do — the law in the books is never quite realised in action. Context can also provide the prod of inevitability — the hand of history or the market. We have context in mind whenever we extract an ought from an is.

³ See Figure 1.

My own project focuses on background rather than context — and it is here that I begin to depart from the sociological tradition. Focus on context — on the impersonal forces — blunts the responsibility of actors in the foreground, while affirming their centrality. It creates a misconception that to the extent someone *can* do anything about anything, it will be the normal players in the political system. It's them, or it's necessity. Although sociological jurisprudence promises to 'contextualise' the decisions of sovereigns or legislators or judges, it also legitimates their authority — they are all we have and they did what was necessary, or all they could do, under the circumstances.

I propose that we focus rather on the background, on the decisions of other people than sovereigns and legislators. Indeed, it is striking how often we downplay the work of experts, attributing everything to foreground and context. And yet it is often experts who decide what is foreground and what is context — by distinguishing public regulation from private ordering, or the dynamic world of the market from the context of factor endowments and preferences actors bring to the table.

It is the expert who stands between the foreground *prince* and the lay *context*, advising and informing the prince, implementing and interpreting his decisions for lay people. It is the scientist, the pollster, who interprets *facts* for the *politician*, and it is the lawyer, the administrator, who translates political decisions back into facts on the ground. Both the assertion that something *is* the context, and the interpretation of its *consequences* are the acts of experts. Is the new global context one of fragmentation or integration? Does the new situation require multilateralism or unilateralism?

To bring the work of experts into focus, we will need to suspend the tendency to see everything that is not foreground as necessity. Doing so will be difficult: try to list, in your mind, the norms and institutions which affect, say, wage rates in the developing world. There are foreground political decisions — but not that many. Much seems like context — demand, supply, transport costs, competition. As an exercise, however, try to state these elements of context as the work — the decisions — of actual people.

It turns out that the distribution of resources, authority and contentment between a hypothetical worker and employer in a third world industrial setting is the product of an enormous web of human decisions. Suppose Mahrk, an Australian, pays Phred, an Indonesian, five dollars a day for his work in Jakarta.

What does that mean for Phred — what can he buy with it, how does he value it? What are his other costs and obligations? How did he compare this job to others?

Who influenced his thinking on these matters — his family, his church, the movies, his girlfriend, his nation, his government, his union? What decisions went into the prices of products he might want? What does five dollars mean to Mahrk — what else could he do with it? What *does* he want? Who influenced his thinking about *this*?

Let us suppose Phred and Mahrk came to the figure ‘five dollars’ by bargaining — in the shadow of what laws, institutions, social expectations did they do so? What strengthened or weakened their respective bargaining power?⁴

Perhaps Phred’s ‘skills’ seemed decisive — but who decided that he would end up having precisely these skills? How is their little bargain affected by the relative strength of larger social or political actors in other bargains? If the left just won the election, will that make Phred bolder? If his ethnic group, his religion, comes to power, what effect on wages — and who decided *what* to bring *that* about? It soon becomes clear that Phred’s wage may be affected by public and private administrative or regulatory decisions across the globe — or by the wings of an expert Chinese butterfly.

Indeed, it turns out there is very little ‘context’ which might not also be viewed as background — as the result of a decision taken by an expert — if we thought about it in that way. The power exercised in thousands of private decisions, business decisions, cultural choices and personal decisions about family, work and play also governs who will produce what, consume what, be mobile or stay put, have what status and what identity in the international world.

Sometimes these are small scale decisions — perhaps decisions within families distributing resources among members in terms developed by priests, therapists, the advice givers of the media or the sages within each family network, decisions which in turn affect the global division of labour, patterns of trade or relative wage rates. Sometimes these are the large-scale decisions of business people and investors allocating and conditioning the use of vast resources, made in the vocabularies of economists, accountants and policy analysts seeking to maximise return or corner markets. Far more than we normally think, these decisions are made, defended and criticised in the vocabularies and practices of expertise.

To understand the role of background decisions, we will need the tools of institutional economics, with its focus on local cultures, transaction costs, and path dependencies. To translate these forces into the decisions of real people, we will need the tools of constructivist political science, sociology and anthropology. To understand the people we encounter making decisions, we will need the varied tools of psychology, literature, or management science. The goal would be to develop a compelling account of the actual global governance regime.

A. Well, How Might this be Significant?

First, of course, ignoring the background work of experts may distort our sense for what is actually going on in the world. We might miss the significance of the informal and customary world. Or the opportunity to contest decisions taken in the middle space between foreground and context.

A focus on experts may alter our overall image of the international legal regime. Take an issue like wage rates or safety standards. It might make sense to

4 Robert Mnookin & Lewis Kornhauser, ‘Bargaining in the Shadow of the Law: The Case of Divorce’ (1979) 88 *Yale LR* 950.

speak of industry specific regimes — of ‘automotive law’ or ‘airline law’ or ‘pharmaceutical law’ — rather than ‘international’ or ‘national’ law.

Automotive worker safety may result from product and process standards — think of ISO 9000⁵ — forced through the supply chain by the big manufacturers and consolidated by expert standards bodies. Airline safety might be more the function of the transnational effect of one nation’s administrative agency — the US Federal Aviation Administration — picked up by an intergovernmental agency or by government regulators elsewhere. In another industry, the decisions of local — or American — judges or juries adjudicating product safety suits might be more significant.

Moreover, industrial regimes might influence one another — the pharmaceutical regime might affect the entertainment regime by developing ideas about intellectual property that spread from drugs to DVDs. Taking the focus off the foreground might make the actual decision making procedure more visible. Some agencies may be captured, others not. Viewed clearly, the transnational regime may not be ad hoc at all, but reflect the decisions of quite well organised and stable constituencies.

Focusing on the background may also expand our sense of what is politically possible. We need not treat the impact of private law norms and economic institutions as natural consequences of market forces — or as politically contestable only through the foreground institutions of public regulation. They are also the contestable decisions of experts.

The best example I know of progressive efforts blown off course by disregard for background norms comes from the field of international labour standards. When we think about contesting Phred’s wage politically, we focus on the foreground of national, or sometimes international, public regulation. Where national regulatory capacity seems threatened by the opening of markets to foreign products, services, capital or labour, humanitarians have sought either to restrain these global flows, or to develop international regulatory replacements for national social welfare arrangements.

For years, those wishing to influence global labour conditions have focused attention on the World Trade Organization (WTO) and the International Labor Organization. If only labour standards — a social charter — could be adopted for the entire globe. At the same time, we know the weaknesses of global legislation — vague compromise standards, unenforced agreements, standards which legitimate more than they restrain. National actors have not been willing to adopt rules which would threaten their national economic strategies. But what else can we do?

It turns out the wage rate in Mexico or Bangladesh is meanwhile being set by the decisions of thousands of entrepreneurs, workers and investors, each made in the shadow of rules — formal and informal, public and private, national and

5 ISO 9000 is an international reference for quality management requirements in business to business dealings, devised by the International Organization for Standardization.

international — about the uses of property, the conditions for labour organisation, the transport and trade of industrial inputs and outputs, patterns of credit and payment, immigration and so forth.

Social reformers have virtually ignored the world of background norms — private law, corporate standards, transnational administrative arrangements, rules of corporate governance and liability.

Take the WTO, for example. We have long known that in some sense, as the saying goes, ‘fair trade is free trade’s destiny’. As tariffs came down, industrial nations began to challenge all sorts of diverse pieces of one another’s regulatory environment as ‘non-tariff barriers to trade’. In doing so, they were contesting elements of one another’s background regime. I remember the Reagan administration’s ‘Structural Impediments Initiative’ accusing Japan of blocking access to its markets through everything from informal distribution practices to inadequate English language instruction in their schools. Once begun, there seems no natural limit to this practice — as the European Union’s legal order has amply demonstrated.

It is an old legal realist insight that the reciprocal nature of a comparison between two legal rules — or legal regimes — makes it impossible to say which *causes* the harm or which is ‘discriminatory’. Is it the railroad’s right of way that damages the farmer’s wheat or the farmer’s property right which imposes cost on rail transport?

In the trade context, we might ask whether Mexico’s low minimum wage, or failure to implement its own minimum wage scheme, is an unfair ‘subsidy’. Or whether Mexican or Chinese manufacturers who benefit from non-enforcement of local law are ‘dumping’ when they export to American — or Australian — markets.

But we might equally well ask whether it is a ‘non-tariff barrier’, an unfair or unreasonable extraterritorial reach of US law, for the United States to demand higher labour standards for production of goods to be imported to its market.

To decide, conventional legal analysis relies on an assumption about which legal scheme is ‘normal’, and which not. If farmers *normally* grow wheat, a new railroad may appear to impose the cost — if the difference between American and Mexican wages is ‘normal’, American efforts to raise Mexican standards will seem an abnormal non-tariff barrier. Deciding what is ‘normal’ and what is not is rulership, an unavoidable political decision about allocation of costs.

The WTO provides a mechanism for settling disputes between nations each asserting that *their* background rule is normal and that their trading partner is imposing unfair costs or offering unfair advantages. As it processes routine trade disputes, the WTO system generates a string of decisions about globally tolerated levels of differentiation among labour and other regulatory standards — about the range of ‘normal’ background regulation.

Meanwhile, humanitarians struggle for adoption of a ‘social charter’ within the WTO, for new international soft law social norms, for implementation of

international economic and social rights. If only the international legal order were powerful enough, we bemoan, to take on the question of labour rights. But the international legal order *is doing that every day* as it provides an interface between national regulatory schemes. The difficulty is finding opportunities for politically contesting the results it generates, results which permit a wide range of low wage industrial strategies.

The political Right has had no trouble focusing on the world of background norms: developing a complex network of financial and payment systems to facilitate the free movement of capital, extraterritorial uses of national regulation to combat terrorism or money laundering, and more. Unfortunately, the humanitarian vocabulary has impeded similar work on the left by focusing our attention on the foreground of public regulation.

Something similar goes on in thinking about war and peace. We focus on summit meetings and late night telephone calls between heads of state, or speeches in the Security Council. Doing so, we underestimate the discretion — and the significance — of people in the background of these public deliberations.

We underestimate the power of *expert consensus* — consensus that Iraq had weapons of mass destruction, that American credibility was on the line, that something must be done, that dominoes would surely fall. We now know that although 9/11 opened a window of plausibility for the invasion of Iraq, the campaign had already long been underway — and not simply because the leadership, the Bush family, say, was ‘obsessed’ with Iraq, but also, and more importantly, because an entire administrative machine had been set in motion, with its own timetables and credibility requirements.

The invasion incubated there, in the background, built momentum through hundreds of small decisions, budgetary, administrative, political, rhetorical, public and private. In some sense, of course, Bush could have called the whole thing off, and without his enthusiasm all that momentum may never have built.

The interesting point, however, is that by the time we focused on ‘the President deciding’, it is not at all clear how much room to manoeuvre he still had. ‘The United States’ had made a commitment to overthrow Saddam Hussein, a commitment whose political and bureaucratic momentum could not easily have been stopped without incurring all manner of further costs, long before the decision came to the President — let alone the Security Council — for explicit decision.

Moreover, even when broad ideological battles have not been crisply won in public fora, they can nevertheless affect the status of forces in all manner of interstitial bargains by affecting the perceived strength, legitimacy or plausibility of actors, programs or positions.

It has become routine to say that international law had little effect on the Iraq war. Arguments by a few international lawyers that the war was illegal failed to stop the Bush administration and its allies, who were determined to go ahead regardless, and who had, after all, their own international lawyers to rely upon.

But this lets international law off the hook too easily. The laws of force are not the only rules that affect the legitimacy, violence and incidence of war. The military conducts its campaigns in the shadow of endless background rules and institutions of public and private law — national and international. If we expand the aperture from the decision to invade — war looks ever more to be a product of law. The laws *in* war which legitimated targeting. The laws *of* war which provided the vocabulary for assessing its legitimacy. The laws of sovereignty which defined and limited Saddam's prerogatives, and which have structured the occupation. Not to mention commercial rules, financial rules, private law regimes, through which Iraq gamed the sanctions system — and through which the coalition built its response. The United Nations law of force makes these background rules seem matters of fact rather than points of choice.

Making war has become an extremely technical practice, involving the details of economic and social life, patterns of traffic and sewerage and investment. When we think about restraining war, it is easy to overlook the background rules and institutions for buying and selling weaponry, recruiting soldiers, managing armed forces, encouraging technological innovation, making the spoils of war profitable, channelling funds to and from belligerents or organising public support.

Global efforts to promote peace — through the laws of war, deterrence, arms control, collective security, or peacekeeping — have themselves become institutional and bureaucratic practices. As this happens, they sink into the background. We no longer notice that they have become vocabularies through which war is promoted, fought and legitimated, rather than restrained.

Occasionally, of course, we do get a glimpse of these background vocabularies, rules and conditions — as in trade struggles over 'normal' levels of background regulation. It is difficult to think about the ebb and flow of military violence in a place like the Congo without thinking about the norms and institutional practices responsible for trade in diamonds and other minerals. Just as it is difficult to think about a global health crisis like HIV/AIDS by focusing only on the United Nations, the World Bank or World Health Organization, while ignoring intellectual property law and big pharmaceutical companies.

Yet, when we want to *do* something, it is tempting to return to the centres of political action in the foreground of our consciousness, demanding resolutions, regulations and funds. We should expand our ability to act through the capillaries of private quality standards or investment guidelines, through consumer boycotts, property regulations and all the other norms and institutions which affect the use of force or the incidence of disease. We should expand our capacity to do so. Nevertheless, it remains all too easy, even comforting, to overlook opportunities to contest and reshape the background because we do not readily comprehend its power to distribute resources in society, nor do we have a clear view of how its terms might be contested.

B. *Still, How Different is Decision Making in this Background World?*

Common sense tells us the difference is large. We associate the foreground world with clashing ideologies and social interests. Left-Centre-Right. Labour vs capital, south vs north, industry vs agriculture. We attribute *discretion* to foreground political actors who speak in these terms.

Our image of the background is different. Experts do not speak in the language of interests or ideologies — they speak professional vocabularies of best practices, empirical necessity, good sense, or consensus values. They do not have discretion — they are compelled by their expertise. For them to exercise discretion — ‘deciding in the exception’, to coin a phrase — is to overstep the proper bounds of background work.

The experts I have known are generally loathe to think of their work in political terms. They advise, they interpret, but they do not rule. Theirs are vocabularies of advice, implementation, technique, know-how — useful for limiting and channelling the power of *others*. More research is needed about the nature of expert decision-making and expert vocabularies. But we can already see some important limits of this commonsense attitude. For one thing, the difference between foreground and background is, as I have mentioned, itself a product of expert analysis and is extremely fluid.

People in the governing professions routinely use the foreground/background distinction to locate responsibility for decisions with which they agree or disagree. Experts sustain their self-image as ‘background’ by locating the ‘political’ elsewhere. They deny responsibility — their own or others’ — by claiming that what was *really* going on was happening at another level. The *real* decision was made ... yesterday, in the Council, by the President, by the Member States, or in implementation, by experts in the background. *Actually*, they might say, the agency was captured by its context. He did his best, but the bean counters just wouldn’t go for it.

As a result, we need to relativise our idea of ‘international governance’ more radically. Governance is what we contest as political but there is very little we are not *also* able to see as a ‘mere’ problem of technical management, and vice versa.

But whether making war or pursuing economic development, politicians now speak the language of background experts. The terms of professional expertise increasingly provide the frame for political debates and decisions. The media has become adept at educating its audience into the nuances of what had been technical disputes.

Indeed, there is very little in the foreground of political life which is not *also*, or even better, understood as the work of experts and the product of expertise.

Perhaps the most significant recent example was the ability of the strategic studies profession to transform their computer models of prisoners in reiterated dilemmas into massive defence funding — in Moscow no less than Washington.

The internal debates of technical experts have been transformed into positions which can be more readily assimilated to the familiar left-Centre-Right structures of public political discussion. Technical disputes are often framed in terms that

parallel positions in broader political debate, so that success or failure in one domain can have an impact on what it is possible to articulate convincingly in the other.

Indeed, public programs and regulatory initiatives do not spring whole from the political commitments of politicians any more than they are the product of disembodied entities we refer to as the 'legislature' or the 'executive'. They are imagined, designed, debated, defended and adopted by people, in the vocabularies of one or another policy profession.

In international affairs, state power is everywhere spoken and exercised in the vocabulary of international relations, political science, international law and military science. Wars and the machinery of war are ordered, purchased, launched, pursued in professional vocabularies, whether the computer modelled rationality of nuclear deterrence, the justificatory language of humanitarian intervention, self-defence and rights enforcement, or the gaming vernacular of dispute resolution and grand strategy. International economic life is organised in the vocabulary of professions committed to growth and development. Markets are structured to reflect professional notions of 'best practice', and defended in the professional language of efficiency. Likewise, when state power takes the form of public or private law, it is conceived and exercised in the vocabulary of law and lawyers.

In fact, although we have conventionally overlooked the work of the background, the reverse may be more accurate — the work of the background has colonised the foreground *and* the context. The foreground increasingly seems a mere *spectacle* — a performance to which we attribute agency, interest and ideology. At the same time, it is difficult to locate elements of *context* which are not constructed by people managing background norms and institutions. Indeed, the foreground and the context may well turn out to be effects of background practices.

The foreground sites and axes of international political contestation are also institutions driven, debates conducted, options framed and programs designed in the technical vocabularies of one or another group of experts. As a result, it is often difficult to distinguish the terms of 'political' contestation from the vocabularies we associate with the background tasks of advising, interpreting, implementing the decisions of those in the foreground.

Well, enough said about my first proposition — that background norms are more significant than we may think. The fluidity of the line between background and foreground suggests further lines of inquiry. First, it is crucial to articulate more clearly what it is that *technical experts and professionals* actually do. What is the nature of their expertise, their experience of discretion? How do they maintain their relations with the foreground and the context?

3. *What, Precisely, is Expertise?*

Although much has been written about the sociology of the professions, we know far less about the nature of expertise itself — about the forms of knowledge and practices of argument and persuasion used by experts managing background

norms and institutions. Still, understanding the terms of professional expertise turns out to be less complicated than it sounds, for the expert vocabularies of the governing professionals follow well trodden routines. Patterns of debate recur; characteristic professional styles — the uptight rule follower, the agonised exception-monger, the interdisciplinary enthusiast — are readily recognisable across the professions.

The key issue to be understood is the role of expertise in limiting expert *discretion*. Once we focus on experts, it is easy to *overestimate* their political freedom. As we come to think of the global HIV/AIDS crisis as a matter of drug prices and delivery systems, of intellectual property and health care finance, it is tempting to imagine that one enlightened industrialist could simply make the drugs available, one enlightened judge could carve out an exception to the rules of intellectual property, one enlightened bishop could remove the impediments to education about the causes and consequences of HIV infection.

Yet we also know these people in some very real sense cannot make these choices. They cannot respond to political programs any more than they can respond directly to pressure from patrons, funders, voters, or their own conscience. These people *are experts* who come upon their roles as investors, managers, patent holders or bishops precisely by routinising themselves into a professional vocabulary and practice which makes it difficult for them to experience human freedom and the direct responsibility which goes with it. The difficulty is to understand just how expertise limits expert freedom, and dulls the experience of responsibility.

For some years, I have been conducting research into the structure of legal professional vocabularies in various international fields — among public international lawyers, international trade specialists, refugee lawyers and humanitarians. Beyond understanding these fields of expert knowledge, my goal has been to contribute to a more general understanding of expert knowledge itself.

Expert knowledge is not only important when it channels the advice experts give the prince. Experts also influence the world when they *imagine* the prince as a prince, imagine the economy as an economy, or imagine the law as law, and when they convince us to imagine things the same way. Expertise can shape how problems are defined and narrow the range of solutions considered — along the lines of the old adage, to a man with a hammer, everything looks like a nail.

To trace these effects we need better *maps* of expertise. One might map expert knowledge in a variety of ways. Mapping the knowledge of experts is complex and technical work raising all sorts of methodological issues — who are the experts, what is their vocabulary, what is the relationship between *disputes* among experts, and agreement on the *terms for disagreeing*, or between different *schools of thought* within a profession and broadly shared assumptions? My own work on these questions is just beginning — let me present a series of hunches about how to proceed, and hypotheses about the nature of expertise which emerged from my preliminary studies.

I have typically begun with a specific professional discipline, say, public international lawyers in the United States after the Second World War. The

discipline was composed of particular, identifiable people, pursuing projects of various kinds by making arguments in a common vocabulary. At a very general level, I try to identify their shared 'disciplinary sensibility' — what do they see, what do they worry about, how do they see the world?

For example, public international lawyers have generally seen a world of nation states and are worried about war. Trade lawyers, by contrast, tend to see a world of commerce and remember the trauma of the Depression. For public international lawyers, trauma about the Holocaust, fear of totalitarianism and aversion to ideology, were more common than worry about tariffs or exchange controls.

Both groups share the assumption that the political world of international relations is real — their context — and that international legal arrangements are fragile human constructions seeking to tame a sea of political conflict. All these ideas affect what they feel able, or willing, to do.

Moreover, experts in a given discipline often share an *intellectual history*. Ideas come in and out of fashion. Economics can seem more important than political science for a time, and then the reverse. Some economic ideas can seem more significant than others. Among international lawyers, for example, interest in macroeconomics has largely been displaced by microeconomics. When international lawyers think about the economy, they no longer imagine an input-output cycle responsive to government stimulation, but a market of private actors responsive to price signals.

On the basis of these very general shared assumptions, professionals typically share a set of issues about which they *disagree*. Typically, these are the questions to which their expertise is addressed. What is sovereignty? How do norms bind sovereigns? How should a decentralised sovereign order legislate? How should international institutions be designed for a world of sovereigns? What role for an international judiciary? Should international law strive for uniformity or pluralism? For rules or principles and informal practices? And so on. These are the issues about which experts within a field typically *disagree*. International lawyers make *arguments* about these things, seeking to persuade that one or another approach will be better.

Arguing about these things, they develop what might be thought of as a *vocabulary of arguments*, which can also be mapped, in search of the grammar through which they are held together in persuasive professional arrangements. Patterns of professional argument can be traced over time, as schools of thought emerge within a field, or modes of persuasion themselves come in and out of fashion. Finally, it is possible to trace the projects pursued by individuals and groups within the discipline. A good map may change your view of the discipline. We might no longer see 'international law', say, as 'the rules which bind sovereign states in their relations with one another' — but as a group of people pursuing projects in a common language. One of their projects is to promote the idea that there is 'international law' outside their efforts, and that *it* 'governs' sovereign states — and that it is, by and large, a good thing — there should be more of it.

Having mapped various international legal professions, I find the material crying out for a more general map, for a common vocabulary of expertise. I'd like to share one proposal for such a map with you here.⁶

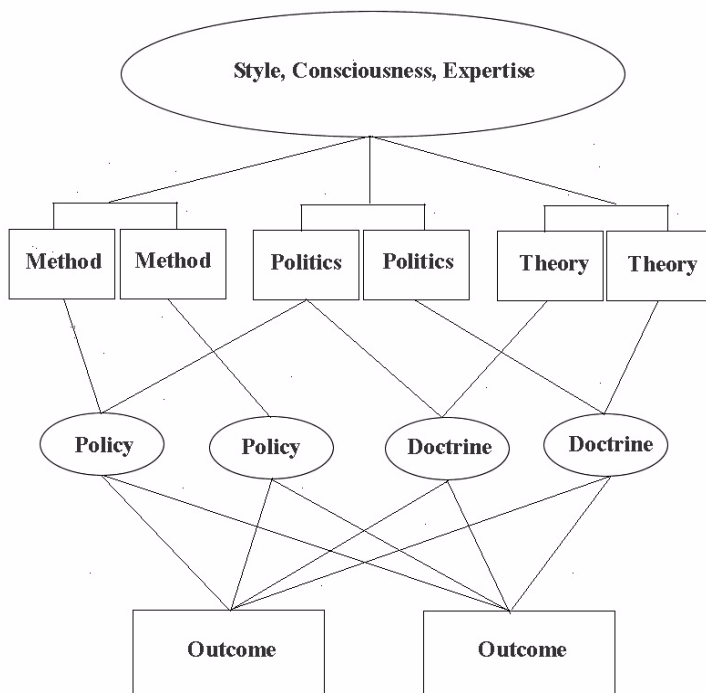


Figure 2.

The central idea is that professionals make arguments about choices which produce *outcomes*. The outcomes might be material and distributional (favour plaintiff vs defendant, agriculture vs industry, slow the economy vs speed up the economy) or normative (strengthen respect for equality or justice, community solidarity or individualism, and so forth).

Experts dispute alternate *policies* and *doctrines* which they think will lead to different outcomes. They select rules and interpret their exceptions. They select among policies — cooperation or coexistence, import substitution or export led growth — and interpret what these policies require in the way of rules and outcomes.

Experts argue for their preferred policy or doctrinal choice by reference to broader *theories*, *methods* and *political commitments* which they associate with the doctrine or policy they prefer. For lawyers, these can be theories of law — positivism, naturalism, sociology, whatever — or theories about society —

⁶ See Figure 2.

realism, idealism and so forth. They can be broad approaches or policy orientations — like ‘humanitarianism’ or ‘cosmopolitanism’.

Although they differ in the choices they promote, they also share a *style or consciousness*. These common assumptions tend to be less fully conscious. They seem compatible with the full range of alternative theories, methods or political commitments about which those in the field disagree.

The work of expertise, in a nutshell, is to build vertical associations and make horizontal distinctions on this general map. We might think, most conventionally, about judges selecting and applying doctrines to generate outcomes, selecting and interpreting doctrines on the basis of underlying methodological or interpretive commitments.

The semiotic analysis of legal expertise is a new field and much remains to be done. Let me indicate some general hypotheses which emerge from preliminary work of this type. First, experts characteristically overstate the solidity of vertical associations on this map. *This theory requires this doctrine*. Experts defend links *between* levels, between doctrines and outcomes, between methods and doctrines, with full knowledge that *other* experts will argue for alternative associations in terms equally consistent with their common expertise.

As a result, it is a very common experience, sociologically speaking, to find that an association between a general theory and a specific policy — a commitment, say, that import substitution requires nationalisation — which seemed stable, on further reflection, and under the pressure of criticism, seems far less compelling.

Second, horizontal distinctions — between two doctrines or theories or methods — can loom far larger in the minds of experts than one would suppose, given the quite common experience of instability along the vertical axis. Indeed, we might say that it is the work of experts to define *choices* along the horizontal axis which seem significant — seem to require decision — because they are associated with different outcomes.

With the common experience of vertical instability comes the equally common experience that experts are making mountains out of molehills — that the horizontal choices they are debating lie closer together than their arguments suggest. The phrase ‘narcissism of small differences’ and the image of professional sectarianism come to mind here.

Putting these two observations together, it also appears that the choices experts debate, defined in the terms of their expertise, may well be both narrower and less significant than experts would have us believe. To the extent these expert choices become the options considered by the prince, the expert vocabulary will have narrowed the terrain of political decision.

Let me leave this evolving model here and ask how we might understand and contest the work of experts in political terms. We already have a set of intriguing hypotheses about the ways individual experts come to have a narrower appreciation for their *own* discretion or manoeuvre room, while vigorously asserting that *other* experts have more discretion than they think.

4. *Identifying the Political — Three Traditions*

Many critics of ‘globalisation’ have sought a more robust politics for contesting the decisions of our global governance regime. Why do we have so much law, and so little opportunity to contest its terms?

By ‘politics’, critics usually mean more participation and transparency in intergovernmental institutions like the WTO or the World Bank. They decry the ‘democracy deficits’ of our transnational regulatory agencies. In Europe this has brought calls for an expansion of parliamentary control in the European Union.

Or they urge national and local institutions to stem the effects of globalisation. This often drives calls for the return of sovereignty, of unilateralism — of individual and local rights against the transnational regime.

These are all important ideas, but they are not my central focus. These suggestions remain focused on the relative power of foreground institutions, and on the opportunity to participate in them.

There is also a long tradition of identifying the politics of expertise itself. Given the apolitical self-presentation of much expert work, these traditions work by translation — from the vocabulary of expertise, to that of politics.

We might begin by focusing on the decisions experts make, translating the outputs of expertise, if you like, into left-centre-right terms, or linking them with social groups or interests we think of as contenders on the political stage — labour and capital, men and women, the developed North and the underdeveloped South. We might search for biases or blind spots in their expert knowledge that favour these social groups or ideological positions. Or we might look for signs of political possibility in an expert’s own experience of being a free agent — exercising discretion and taking responsibility.

In the remainder of my time with you, I’d like to develop three broad approaches to contesting the work of experts and their expertise in political terms.

A. *First, Translation to the Politics of Ideology and Interest*

This first tradition requires an assessment, however crude or incomplete, of consequences — who wins and who loses? Who decides and who submits to the decisions of others? Only by identifying the *stakes* of expert action can we understand its politics.

An expert decision is political, for this tradition; to the extent its consequences can be associated with left-centre-right ideological positions or with social groups — ‘labour’ and ‘capital’ — which we think of as contestants in our political world.

We routinely interpret expert action in this way, and I need not say too much about it. We associate expert decisions with the *interests* of politically significant groups — claiming they favour agriculture or industry, church or secular society. We might think these interests lay behind the decision, motivating it, or we might think the decision will unwittingly favour them. Or we might simply be struck that the vocabulary used to defend the decision is familiar from other contexts as a defence of one or another social interest.

Much of the expertise of the governing professions consists precisely in criticising the decisions of *other* experts by associating them with ideological positions or social interests. We often assert that a decision-maker has been *captured* by political interests or ideologies. Doing so is a routine professional practice — but it can also be an important political strategy.

Still, capture claims can be difficult to sustain — what *is* in the interests of capital or labour, of the first world or the third? To formulate an answer is to enter the realm of international policymaking itself, attuned to perverse effects, unexpected costs and benefits. To make policy is precisely to distribute among groups — and claims of ‘capture’ are often simply ways of disagreeing with the policies which have been made.

Moreover, the consequences of expert choices are extremely difficult to pin down. Alternatives that seem stark turn out to be more nuanced — to have room for more than one political interpretation. It is easy, in this tradition, to conclude that the only real antidote to rule by experts is more expertise.

Challenging expertise in this way can make you sound shrill, lacking in nuance. When protesters in Davos, or Seattle, or Geneva denounce the WTO as a tool of global capital, it is hard not to think they should probably break things down a bit more, get more precise, maybe go to law school. But somehow we also know that if they did, they would likely lose their edge, dampen their sense for the politics of global governance, precisely as they refined their skills to participate in it. Searching for the politics of expertise has taken us right back to expertise.

B. The Politics of Consciousness

A second tradition is designed to compensate for these difficulties by focusing less on the specific choices experts make than on their underlying shared assumptions — the blind spots and biases which skew their choices, or place some alternatives altogether out of discussion.

Assumptions common to both sides of expert debates — professional preoccupations, *deformations* if you like — can often be associated with a social interest or an ideological position. Expertises differ, and those differences can have a politics. The key in this second tradition is to link this sort of blind spot or preoccupation to political interests or positions.

Take labour policy. For a public international lawyer, the problem will be a lack of governance capacity, a need for norms and institutions to ensure compliance with them. International labour policy will mean a network of international legal rules and standards and enforcement machinery.

For an international *economic* lawyer, the problem will be to interface between different national labour practices without unduly restricting trade. The policies — and the outcomes — which result from thinking about labour in these different ways may well differ dramatically.

In this tradition, we might identify blind spots and biases in the professional thinking of, say, ‘foreign policy professionals’ in the industrialised democracies of the West. These experts have come to share a common vocabulary — ideology, if

you like — which we might call ‘humanitarianism’. Wars are fought, defended, and denounced, in humanitarian terms. Immigration schemes, economic development programs, trade rules, are designed, justified, and denounced, in the vocabulary of human rights and humanitarianism.

Even in the absence of a global government, this kind of common vision among experts can operate as a kind of *as if* world government — wherever two are gathered in the name of humanitarianism, there is global governance. Many have claimed that shared ideas about colonialism or free trade may have operated similarly in the 19th century, widely shared elite assumptions about the separation of economics and politics or the West’s civilising mission substituting for strong global institutional networks. From the other side, we might think of Osama bin Laden’s call for the restoration of a global ‘caliphate’ as the call for a similar *as if* government of the like minded.

This shared vision produces a series of professional deformations. International policy makers operate with a *map* of the world in their heads. On this map, perspective is the foreshortened view from high in the United Nations headquarters building, or flying among conferences and summits, commissions and expert working groups. The sites of prior international engagement loom large — Passchendaele, Somme, Munich, Bretton Woods, or, closer to our day, Vietnam, Cambodia, Bosnia, Rwanda or Iraq. Each stands for a ‘lesson’, which shapes reactions to new problems. Navigating on such a map can substitute for navigating in the world, for assessing the actual consequences of actual policies in contexts to come.

High up there, it is easy to expect the Potemkin village of intergovernmental institutions to operate like the domestic institutions — courts, administrations, parliaments — on which they were loosely modelled. The expert’s mental map discourages engagement with things *below the line of sovereignty*. We focus on what happens *outside and between* national jurisdictions. In Antarctica. In outer space. On the seabed.

International policy makers imagine themselves in a space *above* sovereignty, a space in which sovereigns mingle, communicate, have ‘disputes’. For something to get into this space — to be ‘taken up on the international plane’ — it must be a *grave* matter, a *serious* breach, cause *material* damage, result in *irrevocable* harm, *shock* the conscience or meet any of numerous other substantive tests for reversing the presumption that things below the line of sovereignty are immune from international policy making. Sovereigns can do as they like at home: for their actions to be respected *on the international plane* they must meet certain standards.

This gives international policy an odd shape. The international policy maker sees things like smoke or fish when they cross boundaries more clearly than when they stay close to home. The law of the sea classifies the world’s fish species according to their migratory habits, measured by their propensity to swim across international boundaries. International environmental policy covers the oceans, but with decreasing intensity as one moves closer to shore or on board a ship; it covers outer space; and it covers those pollution flows which cross boundaries so

long as it causes substantial harm. Of course, with clever and expansive interpretation, international policy makers *could* stretch until very little escaped their purview. Experts know *how* to blur the boundaries which restrict their ambit, but their default conception is unnecessarily self-limiting.

The global expert's mental map makes economic 'forces' seem naturally global, while the regulation of economic 'actors' seems naturally to be the function of national government. International governance seems separate from both the global market and from local culture. It seems a matter of public, rather than of private law.

In this vision, international policy making seems to be an exceptional matter of intervention from 'above,' oscillating among respecting, bundling and unbundling sovereign rights. Preoccupied with sovereignty, it is easy to underestimate the worlds of private and economic law or overestimate the military's power to intervene successfully while remaining neutral or disengaged from local political and culture struggles. When foreign policy experts overestimate the technocratic nature of economic concerns — or the autonomy of economics from culture and institutional context — they underestimate their ability to contest the distributional consequences of transnational economic forces.

Thinking of their work as 'intervention', down from a great height, experts are prone to think there was no international policy *before* intervention — and they easily become preoccupied with debate about *whether or not* to intervene. This obscures our ongoing engagement with local conditions, and the extent to which all regimes are today the product of transnational meddling and influence.

Indeed, it is quite common to imagine the international community as a place beyond culture and politics, a neutral world of expertise. Policy makers are prone to think one might intervene in Kosovo or East Timor simply to 'keep the peace' or 'rebuild the society' *without* affecting the background distribution of power and wealth, that we might have an international governance which does not govern.

Moreover, the idea that one should not intervene without good reason and good authority erects a conceptual hurdle in front of every humanitarian initiative. What standing do we have? Innumerable worthy international policy initiatives have crashed on the rocks of hesitation to engage in what we are all too prone to call 'cultural imperialism'.

International humanitarians all too often focus on who makes policy rather than the policy they will make, and on the appropriate form for policy rather than the resulting outcomes of policy making. They worry more about the defensibility of international action than about the potential for good results.

A striking illustration of this was the limitations of using human rights and humanitarianism to oppose the war in Iraq. There is no question the humanitarian vocabulary of proportionality, necessity and self-defence, was very useful for legitimating the war. But opponents of the Iraq war were themselves blown off track by their humanitarian expertise. The war would not have made any more sense, after all, had it been approved by the United Nations apparatus. More importantly, the Charter scheme had the unfortunate effect of changing the subject.

Let us say, for a moment, that after 9/11 we did need a completely new political and military strategy for dealing with the Middle East. Let us say it was necessary to 'change regimes' from eastern Turkey to western Pakistan.

Notice how difficult it is to discuss these ideas. Notions of sovereignty, the limits of the UN Charter, core humanitarian commitments all render the desire to change regimes undiscussable. This frame makes it difficult to talk about the ongoing and legitimate ways in which supposedly sovereign regimes are always already entangled with one another. Our humanitarian expertise makes it difficult to acknowledge that we — our economy, our government, our international financial institutions, our media, our humanitarian agencies — influence regimes across the globe every day. We force their governments to accept structural adjustment policies, open their markets, exploit their resources, change their cultures.

In political terms, humanitarian expertise gave progressives an easy and irresponsible way out. We never needed to ask: *how should* the regimes of the Middle East — our regimes — be changed? Is Iraq the place to start? Is military intervention the way to do it?

Why not consider changing regimes the European way — through the promise of accession to the EU? This strategy would have been equally expensive and risky — but would it have been more or less likely to work? We will never know because it was never seriously mooted as an option.

It now seems clear that Iraq was not the right place to start, and war was not the right instrument. But it was surely right that we could no longer afford to rely on the stability of shaky dictatorships across the Arab and Islamic worlds, unable to provide for the basic welfare of their citizens.

The options most salient to the humanitarian imagination — restraining the hegemon, and offering humanitarian assistance — are no longer sufficient basis for a responsible foreign policy. Yet our humanism and the expert vocabularies we have developed to give it expression gets in the way of developing workable alternatives.

Experts share maps of time as well as space. International policy makers situate themselves in a grand story of the slow and unsteady progress of law against power, policy against politics, reason against ideology, international against national, order against chaos in international affairs over 350 years. In this story, international governance is itself a mark of civilisation's progress. Progress narratives of this sort can become policy programs, both by solidifying a professional consensus about what has worked and by defining what counts as progress for the international governance system as a whole. This can redirect policy makers from solving problems to completing the work of a mythological history, orienting or shaping their efforts to build the international system.

The historical conviction that international policy making is already and automatically part of the solution rather than the problem can blind internationalists to the dark sides of their activities. We speak of international environmental law as synonymous with the effort to generate environmentally protective norms. And yet, a catalogue of international norms affecting the