
Book Reviews

Eric A. Posner. ***The Perils of Global Legalism***. Chicago: The University of Chicago Press, 2009. Pp. 296. \$29. ISBN: 9780226675749.

At a time when the Obama administration, the rest of the G20, and other governments, are emphasizing multilateral action to address global problems, such as global warming, terrorism, financial regulation, monetary policy, failed states, and public health, much is at stake in theoretical and empirical arguments about the possibility for effective collective action among groups of states. In *The Perils of Global Legalism*, Eric Posner argues that these efforts are largely futile. Can it be true that international law offers little or no assistance in response to global collective action problems? Posner grimly asserts that 'if a world government is not possible, then solving global collective action problems is also not possible'¹ (at 8). If he is right, and given that the kind of world government he has in mind is indeed implausible, then the efforts of policy-makers and diplomats should immediately be diverted from efforts to craft international legal responses to global collective action problems, and reallocated to more productive pursuits. The implication of Posner's book: call home the diplomats and be content with the inefficiency implicit in unilateral action to address global collective action problems.

From one perspective, this book might be viewed as a welcome dissenting voice amid general calls for more international law, and

it rightly rejects what are by now caricatures of the American and European idealists who believe that the world could be perfected if only we wrote and complied with the right laws. Indeed, international law is not a nirvana solution to all our global problems, but merely part of the toolbox of practical political efforts to improve our situation. Posner has applied his considerable analytical talent to the question of when and how international law may be useful. He has no doubt provided a provocative and interesting book.

The problem is that Posner is not content merely to show the flaws in the idealistic general argument for more international law. He goes on to make a general argument against more international law. I do not believe that it is possible to make a general argument either for or against more international law. More refined and context-specific analysis will be necessary to know whether more international law is or is not useful in particular contexts. But there is little doubt that international law has been, and will be, useful to solve some global collective action problems. This utility is just as clear as the utility of contracts to solve some inter-firm collective action problems and the utility of social institutions to solve some village-level collective action problems, as shown by the 2009 Nobel economics laureates, Oliver Williamson and Elinor Ostrom, respectively.

Posner defines 'legalism' as 'the view that law and legal institutions can keep order and solve policy disputes' (at 21), while 'global legalism' is 'an excessive faith in the efficacy of international law' (at xii). Posner describes American-style global legalists as overestimating the social value of international law, and therefore overestimating the reciprocal, retaliatory, or systemic costs of violation, with the effect that they overestimate the effectiveness of international law.

¹ To be fair, Posner's statements on this issue are inconsistent throughout the book, where, for example, he variously says that the use of international law for cooperation will be 'limited' (at 38), 'rudimentary' (at 7), or 'useful' (at 39). But the main thrust, and the brunt of his argument as described below, is pessimistic.

How does Posner know that the legalists have generally overestimated the value of international law? Neither he nor they has the necessary context-specific data. Instead of presenting context-specific data, Posner makes a general theoretical argument that multilateral international law has little value to solve collective action problems (as contrasted with coordination problems, where there is by definition no reason to cheat), because it is generally ineffective to do so. For Posner, European-style global legalists simply make unwarranted natural law-based presumptions requiring unmitigated compliance with international law, even where, all things considered, compliance is not beneficial to the acting state.

Posner ascribes a progressive vision to these global legalists, stating that the central tenet of global legalism is 'faith that if international law advances then eventually true international law-enforcing (and eventually law-making) institutions will follow in its wake, and *then* people will transfer their loyalty' (at 91, emphasis in original). More international law leads to more international institutions, which together lead to a transfer of loyalty and thus global government. Posner rightly rejects this millennial dialectic. But this is a straw man and in my experience very few, if any, European international lawyers or 'liberal' American international lawyers believe in this dialectic. And while we will not soon have global government of the kind Posner envisions, we need to know whether international law offers possible mechanisms to deal with practical, on the ground, global collective action problems.

For Posner, a certain scale of institutional infrastructure, and a transfer of loyalty to a world government, would be necessary before international law can be effective. In this way, Posner's views are aligned with the most romantic, pie-in-the-sky, idealists—the only difference is in Posner's pessimism that this romantic vision can be achieved. He sees the transfer of loyalty as necessary to the establishment of a world state, and he sees a world state as essential to the effectiveness of international law. Posner fixates on the state as the

exclusive repository of authority and loyalty, and thus argues that it is necessary that there be a world state in order for international law to have strength (at 128). Unlike most international lawyers, his evaluation of existing international law and institutions, and his view of the future, do not identify or anticipate possible centres of authority, and the possibility of law or government, outside even if not in place of, the state. For Posner, international law is generally epiphenomenal in connection with multi-state cooperation problems.²

As part of this fixation on the state, Posner argues that the biggest problem with global legalism is that it espouses law without government. For Posner, in order to have law, you need government in the form of the traditional institutions of the state, including fully empowered legislatures, judiciaries and executives, as well as a monopoly on the use of force. He posits that 'if it is true that national governments are needed to solve national collective action problems, then it seems that it would follow that a world government would be needed to solve global collective action problems' (at 8). Consider this syllogism. The premise is debatable, and its extension to the international setting is dependent on a highly questionable, and unsupported, assimilation of the international setting to the domestic setting. That is, even if we accept that a certain type of institution is needed within the state to solve intra-state collective action problems, it cannot simply be assumed that precisely the same institutions are needed or appropriate to solve international collective action problems. A parallel, and equally faulty, syllogism would state that 'if it is true that humans need oxygen tanks to remain under water, then it follows that oxygen tanks would be needed by fish to remain under water'. In order for this syllogism to be true, a fish would have to

² Interestingly, he believes that bilateral international law, and multilateral international law addressing coordination problems, as opposed to cooperation problems, may be effective. I will discuss this further below.

be the same as a human with respect to the relevant characteristic. But Posner offers no evidence that the international setting is the same as the state in the relevant characteristic that concerns him.

Based on this faulty syllogism, Posner does not allow that collective action problems might be solved by a variety of institutional mechanisms short of a kind of global government modelled on a strong national government. He neglects the possibility of a Coasian choice between the firm and the market – between integration and contract – to solve collective action problems, but insists on integration as the only basis for resolution. He seems to entertain no possibility for nuance or for distinct institutions that may be appropriate for distinctly international collective action problems, or for the distinct international context. In fact, he seems to see no difference between the role of law in the international context as compared to the domestic context. But while for Posner the dynamics of the international and domestic contexts are the same, there is for him a critical difference. The difference is that the domestic setting contains institutions that solve cooperation problems, while the international setting simply does not and will never do so.

Posner thus purports to draw 'a crisp analytic distinction between intrastate cooperation, which is capable of solving major nation-level collective action problems, and interstate cooperation, which is itself subject to collective action problems and thus cannot solve them, except in a very rudimentary fashion' (at 7). He argues that 'global collective action problems cannot be solved – or not very well' (at 7–8). Note his evaluation: what exists or what can be is only 'rudimentary' or 'not very good'. How can he know that what exists is not precisely what states wish to exist?

A fundamental point in Posner's argument is that we 'cannot solve global collective action problems by creating institutions that themselves depend on global collective action' (at 34). This glib assertion is patently false: consider as an example the formation of any constitution – constitutions themselves depend on collective action, and they are used to

address collective action problems. In domestic society, and in all other social contexts, the creation of institutions always depends on collective action, and always is intended to solve collective action problems.

Similarly, Posner later emphasizes that 'it is the conceit of global legalism that people – ordinary people, government officials, bureaucrats – will obey law even though they would not obey or consent to the international versions of government institutions that we all agree are necessary to make law workable at the domestic level' (at 128). Here, Posner makes the additional error of extrapolating from the domestic context to the international context without recognizing contextual and teleological differences. The result is the breathtaking assertion that international law, to be effective, requires the same supporting institutions that domestic law has.

Furthermore, when Posner specifies that the type of institutions for enforcement of law found in the state are the only adequate ones, he assumes a very idealized and narrow set of institutions available in the state for enforcement of law. A quick survey of comparative politics and comparative constitutionalism would confirm that state institutions are actually quite varied and malleable, and nuanced, even within the narrow category of advanced liberal states. And the literature of social norms, led by Robert Ellickson, shows how in domestic society rules can arise and be stable and effective without formal organizational support.³ Institutional economists distinguish between institutions, which may be formal or informal, and organizations, which are formal. Posner seems to consider that only *organizations*, of the type found in the state, are sufficient to support international law. An institutional economist surveying the existing field of international law would find a rich variety of institutions, including organizations. The rich literature of international

³ R. C. Ellickson, *Order without Law: How Neighbors Settle Disputes* (1994). Eric Posner has also contributed to this literature. E. A. Posner, *Law and Social Norms* (2002).

regime theory, pioneered by Robert Keohane, recognizes the critical role of informal institutions in international society.

So, while it is true that law requires institutions, or more accurately that certain types of law will be more efficiently made and enforced with certain types of institutions, we cannot move from there to the proposition that the government organizational features found in the state – indeed in Posner's idealized state – exhaust the category of institutions that may be effective to support international law.

A social scientist examining international problems of cooperation would not take the top-down approach of asking whether there is a need for a global state that simply replicates the organizational features of the strong national state. Rather, a social scientist would take a bottom-up approach, examining each type of cooperation problem separately, in order to determine which institutional solutions would resolve strategic or transaction cost problems endemic to that problem. Only after examining the range of international problems, and their individual solutions, would a social scientist go on to examine the need for institutional or organizational responses and the potential synergies among the solutions. In this way, we might say that the state, with its wide range of internal subsidiarity, as well as its capacity to enter into international legal arrangements, is only a first approximation of the level at which collective action problems might be addressed.

Posner says that the organizational features that are missing at the international level are legislatures, enforcers and adjudicators. And a cursory examination of the broad international legal system will confirm that there is little that looks like the organizational features of a strong state. At the multilateral level, there is no real parliament and no sheriff, and there are few courts of mandatory jurisdiction. And yet, the social scientific question is not whether there are institutions with these labels, or these formal functions, or that look like an idealized set of domestic institutions. State-type institutions are not the exclusive means to resolve collective action problems, even within the state. The social scientific

question is whether there is a sufficient institutional structure to have the desired level of behavioural effect. And the appropriate reference is not the idealists' desired level of behavioural effect, but the level of behavioural effect sought and agreed upon by the states parties.

While Posner is obviously right that there is no world government modelled on strong national governments, it is not necessarily so that there is no world government at all. Much depends on what we mean by 'government'. If we mean a formal set of institutions (including, but not limited to, organizations) that have some degree of legislative, adjudicative, and enforcement power – sufficient to affect behaviour – we already have that in international society. States follow agreed rules regarding legislation through treaty and custom, they adjudicate international law, and they enforce international law. As to mechanisms for legislation, while at the international level most of these require unanimity, all sorts of devices, including package deals, log-rolling, payoffs, and other mechanisms, are available to induce states to agree to rules that may not otherwise be in their narrower interests. While there is indeed generally no sheriff to engage in enforcement activities, there may be community-authorized sanctions, community sanctions, posses, and other enforcement mechanisms. While there are few courts of mandatory competence, there are some, and in some areas there are other tools of more or less authoritative interpretation.

How does Posner know that this set of mechanisms, combined with existing international law, has no behavioural effect? Further, how does Posner know that this set of mechanisms is not precisely what states desire to respond optimally to global collective action problems, given state preferences? No one can say whether the existing international law institutions are optimal responses to government preferences, but nor can anyone claim that they are suboptimal without articulating the transaction costs or strategic problems that cause them to remain suboptimal, or showing that they in fact fail to achieve the goals of states. If Posner has established a case for a requirement of a particular *level* of

institutional density or power to affect behaviour, it is not apparent in this book. If he has established a way to know that the level of institutionalization that exists is insufficient to achieve the goals that states desire to achieve, it is not apparent in this book.

So, it is simply incorrect to presume that the institutional structure for international law must have the shape and power of a strong national state in order to be effective. Remember that Posner's core question is whether international law can address international cooperation issues. Therefore, the question is not whether this system looks like a domestic system, but whether it has the ability to address international cooperation issues which, by definition, and contrary to Posner's apparent assumption, are distinct from intranational cooperation issues.

How are they distinct? First, as Posner points out, international cooperation issues, compared with domestic cooperation issues, will generally involve wider differences of individual preferences, wider ranges of wealth, different scale, and different technological and social characteristics. This is implicit in the principle of subsidiarity: we hope to do at the state level what is best done at the state level, and we hope to do at the international level what is better done at the international level. The principle of subsidiarity actually demands that cooperation issues at the international level be different from cooperation issues at the domestic level. In addition, international cooperation problems that can be addressed by international law traditionally involve the behaviour of governments, and not the behaviour of individuals, so it would indeed be strange if domestic structures, appropriate for use in regulating the behaviour of individuals, were exactly the same structures needed to regulate the behaviour of states.

Therefore, the structure of international cooperation issues, and the structure of international society, suggests that we would see different institutions for cooperation at the international level. There is no need for a world state to exist in order to have international law with real social effect. There is no reason to expect that international formal

institutions for legislation, enforcement, and adjudication would look like domestic institutions: that international government would look like a world state.

To summarize, Posner has no reason to know that the types of institutions in existence in the international legal system are insufficient to address the collective action problems that states wish to address. He has no reason to know that if states changed their goals, and decided to address further collective action problems, they would be unable to do so. He has no reason to know that if states determined that it would be best to establish additional institutions in order to have more effective law, they would be unable to do so.

At the core of this book is Posner's argument that international law is generally ineffective to address international collective action problems. He states (at 39) that 'theory suggests that cooperation to solve global collective action problems will be limited'. Neither this book, nor his previous work, does much to develop this theory, and indeed, analysis shows that theory suggests no such thing.

For Posner, while world government is needed, it becomes less likely as the number of states in the world increases, and the number of states in the world seems to be increasing. Posner posits that there will be greater demand for cooperation as the number of states increases, because these states would necessarily be smaller and therefore unable to supply public goods at the optimal level when the optimal level is greater than their size. There may also be technological, social and economic reasons why more international law may become necessary. Yet for Posner the conundrum is that as the number of states increases, cooperation is less likely.

Why does an increased number of states mean that effective international law is less likely? Although this assumption is central to Posner's book, it is not supported, and in fact, while it is likely to be true in some particular circumstances, it cannot be generally true. Posner concedes (at 90) that there is no basis for his assumption, stating that he 'awaits proof' that compliance declines with the number of states, yet this assumption is central to his

thesis.⁴ Indeed, as Norman and Trachtman have shown in theory,⁵ in response to earlier work by Posner and Goldsmith,⁶ compliance with international law could either increase or decrease with the number of states involved, depending on other parameters. For example, in the case of public goods where the benefit from the public good increases with the number of states that contribute, cooperation will become more likely as the number of states increases. So, there will never be proof, along the lines Posner awaits, that compliance with international law generally declines with the number of states.

In fact, there may be reason to expect the opposite effect. Posner posits that greater demand for cooperation will arise from a larger number of states. This greater value of cooperation would systematically make cooperation *more* likely, not less likely. Furthermore, even if we provisionally accept Posner's incorrect assertion that cooperation generally becomes more difficult with more states, he has no way of knowing which effect is greater: the increasing value of cooperation or the increasing difficulty of cooperation. So, even if we were to accept Posner's notion that cooperation generally becomes more difficult as the number of states increases, this countervailing effect makes it impossible to draw the conclusion drawn by Posner: that cooperation becomes less likely.

Even if Posner were right that, in theory, cooperation declines with the number of states, we have no way of knowing the slope of the curve, or where we presently are on the curve. It might be that the effect he speaks of is very modest at 200 states, and only becomes significant at 5,000 states. With this type of speculative theorizing, there simply is no way of knowing. In fact, if we follow Posner's approach, why is it that the possibilities for

human cooperation did not end at the village of 50 individuals? Elinor Ostrom won the Nobel Prize for 2009 for showing that they did not.⁷ How did we come to develop the state with millions of individuals? How is it that the United States established and maintains formal federal cooperation among its states?

To put it graphically, Posner argues that there is a shift to the left in the supply curve for cooperation due to the increasing difficulty of cooperation as the number of states increases (at 99). But he also accepts that there is a shift to the right of the demand curve due to the increasing demand for cooperation caused by the same increasing number of states. He has no way of knowing the slopes or intercepts of these curves. So, even accepting Posner's arguments, it is as plausible that the level of cooperation would remain the same, or increase, as it is that it would decline. There is no theoretical or empirical basis for Posner's pessimism regarding the social effects of international law. Don't recall those diplomats just yet.

Posner's main thesis is that international law has difficulty dealing with collective action problems because it lacks what he views as the needed institutions. He provides no systematic evidence that the global community has failed to solve the collective action problems it has desired to solve. But, in addition, he must grapple with a remarkable counter-example to his thesis: the development of the European Union from 1957 to today. The European Union is an example of independent sovereign states agreeing to strong international institutions, and solving a wide variety of collective action problems. Indeed, the European Union has regularly overcome collective action problems to build institutions in order to overcome collective action problems. As the Schuman Declaration of 9 May 1950 predicted, Europe was not built all at once, or according to a single plan, but was able to respond over time to on-the-ground needs for law and institutions. Europe demonstrates the validity of the functionalist vision.

⁴ On the other hand, at page 88, he claims that it is 'conventional wisdom' that 'cooperation becomes more difficult to sustain as the number of participants increase [sic].'

⁵ Norman and Trachtman, 'The Customary International Law Game', 99 *AJIL* (2005) 541.

⁶ Incorporated in J. L. Goldsmith and E. A. Posner, *The Limits of International Law* (2006).

⁷ E. Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (1990).

Posner responds with a stark non-sequitur: yes, Europe has integrated in a strong legal manner, but for him Europe's integration demeans the effectiveness of international law in the broader international system (at 115–116). It is not apparent why this latter point (that European integration has reduced the capacity for international cooperation) would be so,⁸ given Posner's view that by reducing the number of actors (which the EU does where it acts instead of its Member States), cooperation in the broader international system becomes more possible, not less possible. Either way, however, Europe's behaviour in the broader international system tells us exactly nothing about the utility of the European experience as a counter-example to Posner's thesis.

The critical point, to which Posner does not respond, is that Europe has done precisely what he says cannot be done in the broader international system. Yes, of course, Europe has involved smaller numbers of states, and greater homogeneity of culture, economic development and preferences than exists in the broader world. However, this is all a matter of degree, and Posner offers no explanation of why these factors would wholly distinguish the European experience. To truly assess the effects of these factors would be a useful contribution to our knowledge of the potential development of international law and institutions. But Posner simply draws an arbitrary line between the European experience and the multilateral setting.

Furthermore, it may well be that regional or plurilateral international law will be the more frequent venue for cooperation than global or multilateral international law; it really depends on a number of parameters relating to each particular issue. It is only natural that a smaller group of more homogeneous states, such as the European Union, would see greater benefits in cooperation, and so would cooperate more. But why is it that a larger group of less homogeneous states would not see *some* benefits in cooperation, and why is it that this possibility is foreclosed to them? Again, Posner

offers no theoretical or empirical evidence that it is foreclosed, as he asserts.

The general international law system, with its rules of treaty law, of state responsibility, etc., is the default institutional setting for international law. But where cooperation can be achieved with lower costs, or with greater benefits, by self-consciously adding organizational or other institutional features, states seem able to do so. This is the functionalist story of the European Union, of the WTO, and indeed of all international organization. It came to pass, for example, that majority voting was seen as potentially helpful in the European Union to facilitate legislation to address intra-European collective action problems, and in 1987, with the Single European Act, it was established. It came to be felt that stronger dispute settlement would be useful in the global trade regime to make commitments more reliable, or to ensure against excessive retaliation, and in 1995 with the advent of the WTO, it was established. These broad institutional features respond to needs on the ground.

Social science implies functionalism as its approach to the establishment of institutions. The basic problem with Posner's thesis is that it rejects functionalism: on the basis of a theoretically unsound and empirically unproven limiting factor, it holds that legal and institutional solutions to our multilateral cooperation problems are unavailable. Yet the history of human society, with its vertical expansion of our options for cooperation over the broad sweep of time, is functionalist. When technological or economic, or institutional, change has caused us to determine to cooperate at higher levels of organization, we have often found ways to do so.

To conclude, it is true, as Posner argues, that international cooperation is not *necessarily* good, or easy to achieve, and perhaps it is useful to have his response to any remaining starry-eyed idealists who see international law as a facile panacea for the world's problems. However, the core argument in this volume seeks to suggest that international cooperation is impossible, or at least unlikely (at 7–8), because we simply do not have, and can never have, the appropriate institutions. Yet, as world leaders increasingly see, there may well

⁸ In fact, Posner seems unsure as well, arguing the opposite at 93.

be circumstances in which states would benefit from international cooperation. The danger of *The Perils of Global Legalism* is that its inaccurate pessimism about the possibility for cooperation, if it were influential, could delay our achievement of increased welfare. Ideas matter, and we cannot afford to foreclose the pragmatic functionalist middle ground between airy idealism and groundless pessimism.⁹

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