

# **Behavioral International Law: Law-in-books vs. Law-in-action Resembling the Neoclassical Economics vs. Behavioral Economics Debate**

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**ABSTRACT:** International Law historically stems from a collection of international rules and principles to regulate international conduct of nation states towards another. The International Law Commission (ILC) is a gremium of international law experts voted by the United Nations in order to help develop the theory, codification and practice of international law and its wider range into legal diplomacy. The ILC discusses and debates emerging topics of relevance in international law in the pursuit of developing international legal principles and setting out global standards of nation state conduct towards another. A contemporary effort of the International Law Commission is the scientific investigation of the gap between law-in-books and law-in-action. Law-in-books describes all written-down laws, regulations and written legal customs. Contrary to legal writing in law, treaties, statues and cases, law-in-action is a legal theory that examines the role of law how it is actually applied and practiced in society. Law-in-action scholars often draw from observations about the actual behavior exhibited by executives in legal institutions, courts and jurisprudence officials. Law-in-action is also concerned with the effect of laws on actual people in the real world as well as the impact of legal frameworks and societal interpretations of the rule-of-law. The noticed gap between the law as written in books and the law in reality is currently subject to scrutiny by the current ILC in the quest to derive insights about successful environments to help improve efficiency in legal conduct, stability in international law making as well as combat societally-harmful discrepancies, e.g., such as corruption but also human decision making fallibility and preference reversals. In this fairly novel endeavor of the ILC, the wealth of insights derived from the behavioral economics revolution that undermined the neoclassical economic rational choice theory could be tapped into. International Law scholars may derive inferences from the history, methods and applied behavioral insights how to close the gap between stylized aspirational efficiency goals and actual decision making and actions of real-world people. International law may also benefit from the newest critique of the macroeconomic efficiency maximization in the behavioral Post-Keynesian opening for the integration of political, societal, environmental and historical facets as influence factors on the success of macroeconomic measures. In all these endeavors, closing the gaps between scientific aspirational goals and legal models with real-world relevant applied law practice and policy outcomes promises to instigate optimality in scientifically-led ways how to legally rule the world but also to help research understand better what actual real-world actors do when being exposed to different legal choice architectures and policy frameworks.

**KEYWORDS:** Behavioral Economics, Behavioral International Law, Behavioral Macroeconomics, Behavioral Law & Economics, Choice, Impact, International Law Commission, Economics, Law, Law & Economics, Law-in-action, Law-in-books, Legal Realism, Neoclassical Economics, Policy Making, Post-Keynesian Economics, Public Policy, Rational Choice, Society

## **International Law**

International law is a public law with global context that concerns the law of nations and international ethics (Encyclopedia Britannica 2019). International law studies the set of rules, norms, and standards generally recognized as binding between nations (Bentham 1789). International law scholars establish normative guidelines and a common conceptual framework for conduct between states with applications in international politics, diplomacy, trade, war and peace as well as human rights and humanitarian aid. The codification of international law is at the core of common customary law practices with the aim to promote stability, consistency and organized international relations (Sломanson 2011).

International law develops from international customs as accepted by law, treaties, general principles of law recognized by most national legal entities. International law differs from national legal systems and regulatory frameworks as this public law is often based on historically-grown customs that are practiced over time and in different national relations and then get transformed into codified law and/or treaties. The accordance with international law is primarily based on mutual trust of all participating entities as the direct enforceability is limited in the recognition of national sovereignty.

Newest international law trends usually develop in legal practice of customary law over time, which eventually grow out from day-to-day general state practice as accepted by law, treaties, general principles of law recognized by most national legal systems. International laws or constitutions tend to provide a vital basis for the implementation or integration of international legal obligations into domestic law.

### **International Law Commission (ILC)**

One of the main institutions to develop and monitor international law is the International Law Commission (ILC). Comprised of a body of experts from different nations, the ILC tracks the development and codification of international law. The ILC is a body of experts composed of 34 individuals recognized for their expertise and qualification in international law, who are elected by the United Nations General Assembly every five years.

In an attempt to systemize international law, the ILC watches international customary law practice changes and the newest political developments' influence on legal practice between countries around the globe. In recurrent meetings, foremost at the annual sessions held at the United Nations Office at Geneva, the ILC monitors and discusses the newest trends in international law in order to assist the development of theory and practices of international legal principles.

The ILC is the main body to establish international law frameworks for forming and interpreting international treaties as well as monitoring the interpretation, implementation and application of international law. The ILC works closely with the International Criminal Court as the first permanent tribunal tasked with adjudicating international law offenses, foremost in atrocities such as genocide or crimes against humanity.

During each working period of a standing International Law Commission, major trends and developments in international customary law are discussed with the view to improve international law theory, codification and practice. The current International Law Commission has set out to deepen its understanding on the law-in-books versus the law-in-action divide in order to improve international law conduct and impact around the globe.

### **Law-in-books versus Law-in-action**

The law-in-books versus Law-in-action debate started with Roscoe Pound's (1910) analysis of the gap between legal writing and regulatory statutes versus the actual legal interpretation and implementation but also what impact law has on society.

As a hallmark foundation towards American legal realism, the debate opened up a reality check of the scientific idealism of law versus the real-world reality of actual legal accomplishments. Law as written down in books was compared to the actual enforced legal principles in practice. Studies under scrutiny included the noticeable departure of court decisions from statements of statutory (or constitutional) law as well as the discrepancy between doctrines in books and the empirical validation of legal practice (Halperin 2011).

While some of the European legal traditions – such as Hans Kelsen's normativism and the Pure Theory of Law as well as Anglo-Saxon legal positivism as developed by H.L.A Hart – chose to not backtest legal doctrines for their application in legal practice-in-action with its potential discrepancies (Halperin 2011); the North American Legal Realism was ready to scrutinize normative doctrinal work for its real-world applicability in the day-to-day practice

of law. Realization of potential gaps between law as written down in books and law practiced in action may also have helped in setting the stage for embracing Law & Economics and evolutionary law as flourishing fields and long-term developments in the North American legal world (Grechenig & Gelter 2008).

In most recent Behavioral International Law, empirical investigations proved that complex choice architectures, political uncertainties but also limited human decision making capabilities influence the actual legal conduct (Broude 2014; van Aaken 2014). Stylized legal norms had to give way to matters of social facts. Political realities, technical experiences but also national characteristics appear to have a stark influence on how law in books actually gets practiced. In the international arena, national differences additionally tainted the standardized interpretation, implementation and practice mandates. Around the globe vast differences are noticed, which inspire comparative legal analyses on the actual practice of law with a particular focus on national characteristics aside from pure technical functional analyses.

The international development of codified international law is enacted through the formation of general principles underlying conventional customary law. In the ILC context, the principles that are formed within the international system of the United Nations transpire into international treaties that then should form universal norms and standardized practices of aspirational goals. The applicability and impact of international law remains limited by not only by acknowledging national sovereignty – but also by the national interpretations, political environments as well as human decision making susceptibilities.

Today's global challenges range from climate change, international global pandemic alleviation through access to affordable medicine as well as global space exploration (Pierson 2021; Puaschunder 2020b, 2022a, b; Puaschunder & Beerbaum 2020). All these global common goods problems demand for collective action in line with international law mandates.

In the realization that the practice of law varies drastically throughout the world, the demand for a standardized practice as well as fair and equitable treatment of law around the globe has gained unprecedented momentum. In the quest for universal practice of general international principles, the need to identify key basic universal features and global requirements but also standard success factors for standardized legal practice has risen. Identifying favorable and unfortunate choice architectures for legal practice promises to improve the universality quest of international law.

A major determination derives from whether the practiced gap between law-in-books and law-in-action leads to positive or negative consequences. Discrepancies between what is written down in international law and what is actually practiced by nation states can have positive features when it is experienced as flexibility to adapt quickly to national contexts or timely changes. In this light, international law appears as up-to-date guidepost that solves predicaments efficiently and with respect to national sovereignty in line with the respective cultural and social norms in place. This flexibility in the practice of international law feeds customary law practice over time and breeds respect for international law all over the world. The adaptability of international law is also at the core of international law fortification and the detection of new trends that then inform and shape bodies like the ILC in their revision capacities of existent international law.

Understanding how much flexibility variance is needed in the interpretation and practice of international law in order to aid its successful implementation and flexibility to leave room for positive change – such as in trends emerging through practice flourishing into new customary law – may lead the way to transplant success factors in legal compliance around the globe.

On the other hand, one can also image the negative consequences gaps between law-in-books and law-in-action – for instance in corruption, bribery and unlawful practice but also unwanted behavioral fallibilities. Acknowledging the failure to stick to the plan and in the

sphere of international law practice as anticipated will open gates to study harmful influence factors that allow for negative consequences of law-in-books and law-in-action discrepancies. All these endeavors are aimed at ensuring legal security, flexible law interpretations adjusting to emerging trends as well as granting fair access to justice around the globe.

Contemporary global developments in international law nowadays have inspired the International Law Commission to adopt a behavioral direction in a reality check of law-in-books versus law-in-action at the frontier of international law development on the most pressing international customary law predicaments. Theorizing and empirically capturing the Law-in-books versus Law-in-action discrepancies promises to build a legal science based on empirical results that connects to human action. Closing the Law-in-books versus law-in-action gap can also inspire legal framework conditions that help human decision makers act according to plan and in a rational yet socially beneficial way.

In the eye of legal change necessary given worldwide predicaments that are too big to be solved by one nation state, such as rising sea-levels and shifting borders in the wake of climate change, global pandemics' demand for access to healthcare and prevent as well as ethical predicaments around international space invasion; the time for understanding how to create the necessary framework conditions that human practice law as envisioned has come (Pierson 2021; Puaschunder 2020b, 2022a, b; Puaschunder & Beerbaum 2020). In the constant evolution of legal scholarship in the pursuit of an efficient legal order but also given what is at stake in the contemporary climate, bringing law closer to behavioral facts could be inspired by the over half-a-century ongoing behavioral economics revolution.

### **Behavioral economics and behavioral insights**

Since the end of the 1950s, Behavioral Economics revolutionized mainstream neoclassical economics and revolutionized decision-making theory (Puaschunder 2020a, forthcoming). First theoretical discourse criticized that standard neoclassical axioms did not capture how human decision makers actually chose.

From the 1970s on, a wide range of psychological, economic, and sociological laboratory and field experiments proved human beings deviating from rational choices as standard neoclassical profit maximization axioms failed to explain how humans actually behave (Puaschunder 2020a, forthcoming). Human beings rather use heuristics in their day-to-day decision-making (Puaschunder 2020a, forthcoming). These mental shortcuts enable us to cope with a complex world yet also often leave individuals biased and falling astray to decision-making failures (Puaschunder 2020a, forthcoming).

What followed was the extension of behavioral economics insights onto very many different domains. The behavioral revolution changed economic theory and policy practice in fields ranging from marketing, corporate governance to public affairs as well as leadership. Behavioral insights offer promising avenues to help people make better and more socially responsible choices (Puaschunder 2020a, forthcoming).

What followed was the powerful extension of these behavioral insights in the domains of public administration and public policy-making. Behavioral economists proposed to nudge and wink citizens to make better choices for them and the community. Many different applications of rational and efficient coordination followed ranging from improved organ donations, health, wealth, and time management, to name a few (Puaschunder 2020a, forthcoming).

Behavioral economists nowadays nudge and wink people into favorable decision outcomes. Nudges are verbal cues that propose positive reinforcement and indirect suggestions as ways to influence the behavior and decision-making of groups or individuals. Winks are nonverbal cues that try to elicit certain acts and choices of humans.

Drawing from a line of research on bounded rationality, behavioral economics nowadays informs what choice architectures help individuals to stick to their predetermined

plan as well as to make more rational and wiser decisions for themselves and within a social community in a complex world. The application of behavioral economics to leadership and digital governance accounts for the most cutting-edge approach to capture the power of real-world relevant economics.

The historical foundations of behavioral economics but also the political economy of Post-Keynesian behavioral macroeconomics could provide valuable cues for the contemporary law-in-books versus law-in-action gap closing debate.

### **Neoclassical law-in-books versus Behavioral law-in-action**

Current international law developments may draw from the evolution of behavioral economics and behavioral insights with attention to legal scholarship (Broude 2014; van Aaken 2014). Behavioral economics evolved out of the understanding that real world behavior did not correspond with what economic rational choice theory would predict human would actually do. The growing body of knowledge on how decision makers actually choose was then used to give advice how to craft policies and design decision making architectures in order to help people make more rational and more favorable choices over time and in large cooperative entities and groups.

As the current International Law Commission as voted by of the United Nations has set out to discuss and evaluate the discrepancy between the law-in-books, which is laid out in legal codes, constitutions, treaties, etc., in contrast to the law-in-action, which is the actual application and performance according to the law; a newly opening field of Behavioral International Law could emerge that starts with a reality check of the practice and actual conduct of law-in-books. A behavioral analysis of international law could offer ample applications, for instance, as currently scrutinized in the most pressing international customary law predicaments of rising sea-levels and moving borders or refugee crises due to climate change. International law leaders around the world could draw from the insights gained in behavioral economics and behavioral insights for the current adjustment of laws and legal frameworks to fit human decision making needs with respect for human fallibility and the behavioral tendencies.

### **Behavioral International Law**

Behavioral International Law could in particular focus on the historical foundation of behavioral economics and its emergence over time. Behavioral analyses of international law could draw from the behavioral economics methods that paved the way for creating awareness for the discrepancies between scientific axioms versus actual behavior. Behavioral International Law could also adopt an open-mindedness for the re-evaluation of the contemporary methods and state-of-the-art models to capture, craft and implement law being inspired by the Post-Keynesian behavioral embracement of additional interdisciplinary analyses tools and inclusion of novel influence variables in standard macroeconomic theories and empirical models.

*Historical foundations:* Concrete insights could be derived from the historical foundations of behavioral economics in the opening of the neoclassical tradition for interdisciplinary viewpoints. Knowledge of the historical hick-ups and traditional behavioral revolution could prepare legal scholars for the painful acknowledgement of the limitations of law-in-books, as was experienced by the neoclassical tradition having to admit that the standard economic axioms were rather wishful stylized models detached from the harsh reality of uncertainty and human decision making capacity limitations. Realization of the elevated international law maxims potentially also being disconnected from the bourgeois reality of day-to-day law practice whimsically influenced by social facets, political realities and choice architectural designs may experience a similar reactance as the behavioral first steps historically report.

Opening eyes for the discrepancies between law-in-books versus law-in-practice is though necessary to pave the way to openly discuss and investigate what deviations from the written law to the legal practices are welcome (e.g., in terms of flexible changes and necessary adjustments to changing circumstances over time as the springfeather for legal change) and which discrepancies have hurtful and unwanted consequences (e.g., in the case of missing standardization of the rule-of-law in the wake of corruption or missing tax revenues due to fraudulent conduct). Individual legal decision makers would also be empowered to address deficiencies and improve framework conditions if there is a clear and widespread acceptance of the individual decision makers' collective action problems.

Knowledge of the two concurrent European and North American behavioral economics schools could come in beneficial in the predicament of whether to trying to close the gap between law-in-books and law-in-action or not. The European behavioral economics school has a tradition of regarding heuristics as naturally evolutionary-grown decision making aids to cope with a complex world (Gigerenzer 2007; Gigerenzer & Selten 2001). In North American heuristics are rather seen as decision making failures that need to be averted. This divide between two concurrent traditions could aid in understanding the positive and negative aspects of a leeway in being flexible inbetween what is written in legal books and what is actually needed on the legal ground. This divide appears particularly important in the international law context and public policy making, where often international laws, universal treaties and global governance face critique or backlash for being remotely detached from the reality of implementation afar. For instance, the Washington Consensus and the Club of Rome had implementation issues in remote places but also the 2015-incepted Sustainable Development Goals and the United Nations Conference of the Parties on Climate Change in Paris 2015 offering nation states more leeway and self-determined choices in light of learnings after the more centralized Millennium Development Goals or previous climate talks, such as the Cancún or Copenhagen Accord. When following the rationale of the North American behavioral economics school that sees heuristics rather as problem to avoid, closing the law-in-books versus law-in-practice performance gap should be aspired, especially in light of leeway potential for opening the floor to legal instability and creative flexibility sliding down a slippery-slope of negative implications in instability and susceptibility to bribery and corruption.

*Methods for forming behavioral legal insights:* By looking into behavioral economics, legal scholars could draw from the methods used in behavioral economics, foremost empirically validated laboratory studies or field experiments but also observations and international accounts of practice-differences. The current International Law Commission opening up the field of Behavioral Law in the reality check of law-in-books versus law-in-practice could take advantage of the emergence and insights derived from behavioral methodologies. An evolution from theoretical accounts of the lack of applicability of standard neoclassical axioms (e.g., Amartya Sen 1977) to empirical laboratory experiments (Kahneman & Thaler 1991; Kahneman & Tversky 1974, 1979, 1984) to internet studies (Horton, Rand & Zeckhauser 2011) as well as field experiments (Puaschunder 2017) but also the replication crisis, which brought along quality control of experimental work, would provide ample historical accounts of the advantages but also the downfalls of certain techniques to compare scientific writings' applicability to real-world relevant contexts. In an opening up of 'Neoclassical' Law-in-books thinking, empirical evidence could outline 'Behavioral' Law-in-action findings in order to study how legal behavioral insights can close the gap and improve societal conditions in imbuing efficiency, certainty and global stability in international law. While behavioral strategists could help lead the legal profession in understanding how nudges and winks can be used to choose wisely for society; global governance behavioral specialists could inform how information may distort rational choice and human fallibility may lead to unwanted deviations from commonly-agreed upon plans. A clearer understanding of the impact of heuristics and biases as well as social influences on

collective social outcomes would aid in training legal leadership and global regulatory governance to act strategically in a social compound. Empirically-validated data would also leverage the legal scholarship and law profession a more scientific touch – as it appears striking that economists often regard themselves as 'scientists' in their professional advice whereas legal scholars speak more often of social science informed law making and the European law schools tend to regard law as a *Geisteswissenschaft* in their hermeneutic approach.

*Post-Keynesian multi-disciplinary openness:* Stakeholder-specific facets of behavioral sciences and the different scientific disciplines' approaches toward heterodox economics could inspire in the multi-faceted search for governance recommendations how to align legal scholarship with law practice. Behavioral insights could thereby help international law scholars understand how to create favorable environments to implement laws as a real-world relevant means to minimize societal downfalls and imbue trust in the globalized world economy.

As an additional behavioral concept but with macroeconomic impetus, the behavioral Post-Keynesian school may also help draw inferences in how to make laws more effective on the international level. The Post-Keynesian revolution opened up methodological individualism in economics that underlines mainstream economic theories. A realization of the gap between law-in-books and law-in-action will prepare for the widespread empirically opening up the field of legal scholarship for additional input variables in the search for finding influence factors that lead to the successful standardization of the laws-in-action. Inspired by the wealth of insights derived from decades of Post-Keynesian creative adding of multi-faceted variables that could influence macroeconomic outcomes – e.g., such as political streams, historical facets, political economy dynamics etc., – the Post-Keynesian school's application in behavioral macroeconomics could aid in finding clear guidelines how to determine favorable success factors for legal transplants. Post-Keynesian economics appears as behavioral economics extension in macroeconomic fields with its argument for attention to the fundamental risk and uncertainty but also social conflicts and culture influencing the overall societal outcomes. Post-Keynesian economists urge for integrating human behavior in macroeconomic analyses based on social conventions and groupthink heuristics. Post-Keynesian macroeconomic analyses also give ample credit to institutional contexts shaping individual choices and peoples' behavior that is seen far from rational. Social interactions are credited to amalgamate into systemic macroeconomic impetus, such as animal spirits and emotions driving expectations and market sentiments in finance (Akerlof & Shiller 2009). A Post-Keynesian backbone could also strengthen the legal argument for International Behavioral Law given the Post-Keynesian quest to relive the Keynesian moment of governmental support being the ultimate savior in widespread societal crises.

## **Discussion**

Overall, behavioral economics could aid the contemporary ILC's quest to investigate the discrepancies between law-in-books and law-in-action. Outlining the international variances and systematic human decision making fallibilities in the gap between aspirational legal guideposts versus the reality of diverse law practices will open the gates for studying how to improve global standardization and actual harmonized legal action. In international bodies – like the United Nations, but also the World Bank, International Monetary Fund and any contemporary global governance institution – the realization of legal and regulatory goals that were agreed upon in a global consortium may experience vast interpretation differences and hence differing legal practices throughout the world may herald a behavioral revolution in international law that sets the stage for a newly emerging field of Behavioral International Law.

Acknowledging that Behavioral Economics revolutionized mainstream neoclassical economics will prepare the uncovering of the limitations and implicit problems arising from

law-in-books versus law-in-action gaps in academic but also applied contexts. In order to back insights on gaps between what is written in legal codes and what is practiced in various nations, international law scholars may learn from the methods used in behavioral economics. Behavioral studies could introduce the wide range of psychological, economic, and sociological laboratory and field experiments that proved human beings deviating from rational choices in order to apply them to legal contexts in the awareness building for the law-in-books versus law-in-action discrepancies.

Extending on standard neoclassical profit maximization axioms having been found to fail to explain how humans actually behave, legal scholars could now target finding interpretation gaps of international codes. Human beings rather using heuristics in day-to-day decision-making may inform how legal practitioners may fail to interpret complex international legal guidelines and apply legal codes harmoniously. Mental short cuts that were found in behavioral economics to enable human to cope with a complex world could be shown to also leave legal practitioners and policy advocates biased and falling ashtray to decision-making failures that are influenced by the situation and the national context but also the political reality legal catalysts often face.

The insights gained in Behavioral International Law will aid in investigating how international law can be applied for the greater good in the global political arena. Scientifically-backed knowledge can further strategies to unravel favorable context for legal harmonized practices. Empirical evidence could elucidate how to improve law to favorably shape customary norms for the societal good. Behavioral insights and the positive historical reception of behavioral economic could aid in the opening up of empirically-informed legal practice including a heterodox Post-Keynesian stance on the macro-legal interdisciplinary improvement recommendations.

From the powerful extension of behavioral insights for public administration and public policy-making, international law scholars may nowadays derive insights how international law scholars can create favorable environments to naturally nudge and wink national legal practitioners and governance executives to make more harmonious choices for the community. The results of behavioral insights could help to derive hands-on legal leadership recommendations for contemporary international law taking a critical approach to the doctrinal analysis of contemporary legally-informed public choices. In a truly nested interdisciplinary approach, the interaction of legal leadership with the real-world legal followership on the international level could be investigated targeted at results to have direct implications for policy-makers to create favorable framework conditions. These insights could also teach upcoming legal scholars on how to conduct heterodox science projects alongside breeding civic engagement and leadership on an international level. Delineating the potential of behaviorally-informed legal action to implement social welfare will help portray legal behavioralism as a real-world relevant means to minimize societal downfalls due to legal discrepancies and innovative way to create favorable choice architectures around the world.

Overall, this article was meant to open the floor for exchange on how behavioral insights can aid in the contemporary law-in-books versus law-in-action debate. The historical foundations of behavioral economics that prepared behavioral insights improving choices around the globe but also the most novel extensions of the behavioral Post-Keynesian revolution to open the field for a truly interdisciplinary methodological approach including multi-faceted influence variables on collective outcomes, could grant the necessary legal leadership Behavioral International Law deserves based on strategic nudges and winks. Informing about the most novel behavioral insights in the legal domain and controlling the standardized interpretation of legal books with respect for flexibility to adjust in response to global contemporary challenges in the world is meant to in its quest to bring positive change in the legal world and imbue trust in controlled legal change around the globe.



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