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Comparative International Law and the Social Science Approach

Emilia Justyna Powell*

Abstract

The social science approach has already contributed and continues to contribute to the study of international law. In particular, research that incorporates the social science approach has provided much insight into reality and day-to-day functioning of international law by going beyond historical and normative description and providing generalizable theories. If based on a sound theoretical framework that is subsequently tested in a rigorous scientific manner, the social science approach allows us to uncover a multiplicity of factors that commingle to shape states’ preferences and actions toward international law. Combining insights provided by analysis of large-N data with qualitative methodology allows for contextualization of the general statistical patterns in the context of specific actors and specific issue areas. In particular, the social science approach elucidates the inherently comparative nature of international law by explaining the nexus between international and domestic legal traditions. In this Essay, I advocate for the use of the social science approach in the study of international law. I use the example of comparative international law—specifically, Islamic law states’ views of the global order—to illustrate the benefits and insights that social science methodology can provide.

* Associate Professor of Political Science, Concurrent Associate Professor of Law, University of Notre Dame.
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I. INTRODUCTION

The social science approach provides much insight into the dynamics, reality, and day-to-day functioning of international law. It goes beyond historical and normative description and moves toward developing generalizable theories. In particular, the social science approach elucidates the inherently comparative nature of international law by explaining the nexus between international and domestic legal traditions. In this Essay, I advocate for the use of the social science approach in the study of international law. I use the example of comparative international law—specifically, Islamic law states’ (ILS) views of the global order—to illustrate the benefits and insights that social science methodology can provide.

II. SOCIAL SCIENCE APPROACH IN COMPARATIVE INTERNATIONAL LAW

To be sure, there are some questions within the study of international law that do not lend themselves to the social science approach. For example, tools offered by social science are not needed—and thus, not well-suited—to describe what international law is. Yet, depending on the question asked, methods of scientific inquiry as offered by social science may indeed be very useful in furthering scholarly efforts to understand the reality of international law. A variety of questions may be gauged empirically. Is international law effective? How does international law work in different contexts? How do considerations of strategy and power politics commingle to curtail the effectiveness of international norms and organizations? Understanding, theorizing, and scientifically exploring how different states, different geographic regions, and perhaps more broadly, the various domestic legal traditions conceive of international norms and institutions constitutes a worthy scholarly effort. Ultimately, the reality of the global order and its underlying normative framework—international law—are interpreted via the

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1 Following my previous work, I define an Islamic law state as
a state with an identifiable substantial segment of its legal system that is charged
with obligatory implementation of Islamic law in personal, civil, commercial, or
criminal law, and where Muslims constitute at least 50 percent of the population.
This definition does not depend solely on the religious preferences of citizens,
but rather fundamentally relies on the characteristics of the official legal system
upheld by the state.

Emilia Justyna Powell, Islamic Law and International Law: Peaceful Resolution of
Disputes (2020). The ILS category includes Afghanistan, Algeria, Bangladesh, Bahrain, Brunei,
Comoros, Egypt, Gambia, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Malaysia,
Maldives, Mauritania, Morocco, Nigeria, Oman, Pakistan, Qatar, Saudi Arabia, Sudan, Syria,
Tunisia, United Arab Emirates, and Yemen. I purposefully avoid the terms “Muslim world,” or
“Islamic world,” recognizing that they are simplistic and misleading in nature. See generally Cemil
lenses of those who use it. The social science approach lends itself naturally to scholarly efforts at understanding this reality.

There are many ways in which the scope of international law is general. By design and by practice, international law constitutes a dynamic and continuously evolving legal system. Its genesis and evolution are firmly rooted in an assumption that a common, all-embracing legal framework should govern behavior of all states and other subjects of international law. Indeed, sources of international law, such as treaties, general principles of law, custom, writings of the publicists, and judicial decisions, lay out general pathways for actors’ behavior. As such, international law generates expectations of relatively unified or somewhat monolithic behavioral output in terms of interstate relations. Yet in reality, states’ behavior is subject to the realities of politics, state-specific strategic considerations, domestic institutions, culture, and so on. Domestic customs, laws, and norms affect how states view international law. The influence of domestic beliefs about morality, justice, and law is clearly seen throughout history, such as in the genesis and evolution of international institutions, specific legal solutions adapted as parts of the global order, and the entire body of international law.² No part of international law has been created in a legal vacuum. Instead, it bears an imprint of “the history of a divided and unjust world.”³ Indeed, the design of international institutions and logic and structure of international rules are directly informed and shaped by principles and norms stemming from domestic legal traditions. Judge Abdulqawi Yusuf of the International Court of Justice (ICJ) stated: “It is not a paradox to say that the universality of international law depends on diversity. Indeed, in the case of international law, universalization and globalization do not reduce diversity; they actually promote it. For international law, universalization means borrowing and adapting concepts and principles from different legal traditions.”⁴

Issues of comparative international law—including the diffusion of international law knowledge through filters/lenses of domestic education, local norms, customs, legal traditions, and so on—frequently call for the methodology

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³ Martti Koskenniemi, Foreword to ANTHEA ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL?, at xvi (2017).

⁴ Abdulqawi Yusuf, Diversity of Legal Traditions and International Law, 2 CAMBRIDGE J. INT’L & COMP. L. 681, 683 (2013); POWELL, supra note 1, at 135.
offered by social sciences. In an important way, comparative international law asks questions that deal with an “external” view of international law, as referenced by H.L.A. Hart, and reiterated by Abebe, Chilton, and Ginsburg. If indeed international law is not taught, written about, understood, and thus, practiced in the same manner across the world, then we must be seeking answers to questions such as, “Why do certain states sign certain treaties and avoid others?” or “What effects do international institutions and treaties have in the various geographic regions of the world?” The social science approach provides tools that enable scholars to theorize about as well as operationalize the uniqueness and contextualized dynamics of international law. The use of large-N observational data, field experiments, and qualitative field research—tools inherent to the social science approach—allow for testing specific hypotheses stemming from theoretical frameworks in instances when questions asked call for such an approach.

In this context, it is crucial to recognize that no application of the social science approach will be useful without a sound theory. A researcher must identify a concrete research question, state it clearly, and think carefully about the theoretical framework and hypotheses. In other words, a sound way to incorporate the social science approach in the study of international law should involve testing hypotheses flowing from specific theoretical expectations in a rigorous scientific manner. Such a process can entail, for example, applying statistical techniques to large-N datasets where the models chosen simultaneously control for a host of confounding factors. Indeed, a multiplicity of factors commingle to shape states’ preferences, and, subsequently, their actions toward international law. It is not merely the substantive content of international law that informs state behavior. One should not delegitimize the impact of other influences, such as power, or cost-benefit calculations. As subjects of international law who interact with each other, states pursue their strategic interests. The social science approach allows a scholar to control for all these factors. Yet, combining insights provided by analysis of large-N data with qualitative methodology is very informative since such multi-method research design allows for contextualization


of the general statistical patterns in the context of specific social environments. As King, Keohane, and Verba write, “social science research should be both general and specific: it should tell us something about classes of events as well as about specific events at particular places.”

In this context, therefore, it is paramount to note that one cannot reduce the concept of the social science approach merely to the usage of quantitative large-N datasets with numerous cross-sectional time-series observations. Indeed, the use of qualitative field research, case studies, or even purely theoretical approaches lie at the core of the social science approach. For instance, case studies allow us to determine whether certain states or certain geographic regions as a group are a hard case for international law and international courts. Usually, it is the combination of both methods—qualitative and quantitative—in the context of a particular research question and a specific theoretical framework that brings out the most insights into the dynamics of international law. Undoubtedly, there are limitations to the insights that a purely quantitative data can generate. To be sure, there is a danger of overgeneralization. Additionally, statistical relationships can be misidentified. However, guided by a sound theory, statistical models can reveal many interesting patterns that may be harder to tease out via purely qualitative case studies. As Beth Simmons writes, quantification “is an effort to document the pervasiveness and seriousness of practices under examination.” In an important way, results of such statistical analyses “provide direct evidence to prove or disprove the hypothesis.” The social science approach embraces methodological pluralism.

Research that relies on the social science method does not purport, as a whole, to be a conclusive and uncontested statement with regard to a specific topic or issue under investigation. Largely, social sciences operate on the basis of likelihood and probabilities. This is particularly true about large-N analyses, which go beyond the context of concrete countries, specific policymakers, and so on. Also, the social science method is particularly useful in developing and testing midrange theories, and not meta-theories. Are the effects of international law

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11 Abebe et al., *supra* note 6, at 16.
similar or dissimilar in different contexts? These contexts are, of course, different for every study. Yet the social science approach enables us to understand specific fragments of international law through the lenses of state practice. The simultaneous use of qualitative and quantitative methodology homes in on decision-making processes that produce patterns and regularities, which are later reflected in statistical results, field experiments, survey experiments, or qualitative field research. In many ways, it is the togetherness of human experience and many individual-level decisions—those of state leaders, policymakers, practitioners of international law, etc.—that combine to generate states’ preferences, and consequently choices, vis-à-vis norms of international law. The social science approach recognizes the multiplicity of factors at work that amalgamate in shaping the relationship between international law and its subjects.

I found the social science approach to be particularly useful in explaining how ILS perceive international law. The Islamic legal tradition present in ILS has its own somewhat distinctive way of conceptualizing and understanding international law. In a way, this characterization refers also to these states’ perception of the global order. Of particular importance to international law is the Islamic logic and culture of justice anchored in nonconfrontational approach to dispute resolution. In many ILS, Islamic law replaces, augments, or informs secular rules in state governance and influences these countries’ perceptions of the global order. Though outlining the broad similarities and differences between international law and the Islamic legal tradition is certainly useful, one cannot ignore the reality that the ILS category is not a monolith. Therefore, not all ILS are “Islamic” in the same manner. It is certainly the case that the Islamic legal tradition and international law may diverge on some issues. Yet, it is also the case that these two legal traditions have in common more features than it is often

12 See generally Shaffer & Ginsburg, supra note 7.
recognized. Interestingly, in the context of international dispute resolution, some ILS readily accept the jurisdiction of international courts, while others avoid them. These patterns suggest that at the core of the relationship between Islamic law and international law is not a fundamental, irreconcilable collision of values. Consequently, while conceptualizing this relationship, it is unfitting to formulate blanket, all-encompassing statements about ILS’ practices. Instead, each relationship is fundamentally context-specific. The structure of domestic laws, customs, and practices is unique within each Islamic law state. This reality holds true not only across space, but also across time. Secular and religious laws merge in a different fashion in different domestic jurisdictions. The combination of qualitative and quantitative methods of scientific inquiry shows that ILS whose domestic legal systems are permeated with a version of Islam adhere most firmly to those elements of the global order that are similar to principles embraced by the Islamic legal tradition and culture. By way of illustration, international nonbinding third-party methods of peaceful resolution—in particular, mediation and conciliation—are procedurally similar to sharia-based dispute resolution. Thus, there is a natural synergy there. International legalized methods of dispute settlement—arbitration and adjudication—are more attractive to ILS whose domestic legal systems incorporate strong secular laws. In sum, different ILS are naturally attracted to different international settlement mechanisms.

The social science method is at the core of this research. In answering my research questions, I embrace methodological pluralism. To elucidate, inform, and visualize statistical results stemming from large-N cross-sectional time series data, my theoretical argument, as well as empirical implications, are immersed in multiple qualitative interviews with Islamic law scholars and practitioners of international law, including judges of the ICJ, states’ legal counsels, and several policymakers and religious leaders. These conversations allowed for in-depth examinations of causal factors and mechanisms shaping ILS’ attitudes toward international law and international institutions.

Importantly, my research does not deal with how states—in my case ILS—should behave toward international law, the ICJ, or other methods of dispute resolution. In contrast, I focus on reality, the day-to-day practice of international law, ILS’ attitudes toward the particular aspects of the global order, and their

15 See, e.g., POWELL, supra note 1; Emilia Justyna Powell, Islamic Law States and Peaceful Resolution of Territorial Disputes, 69 INT’L Org. 777 (2015); Emilia Justyna Powell, Not So Treacherous Waters of International Maritime Law: Islamic Law States and the UN Convention on the Law of the Sea, in COMPARATIVE INTERNATIONAL LAW, supra note 5, at 571 (Anthea Roberts et al. eds., 2018) [hereinafter Not So Treacherous Waters].
16 See POWELL, supra note 1; Not So Treacherous Waters, supra note 15.
17 POWELL, supra note 1.
18 Id.
19 Id.
perception of the ICJ’s jurisprudence. The social science method enables me to ask, “How do ILS assess the various aspects of international law?” “Do they see it as neutral and legitimate?” “What do policymakers and Islamic law scholars think of the nexus between Islamic law and international law?” One cannot understand the realities of the relationship between international law and Islamic law without moving beyond the question of how this relationship should be. Thus, there is a need for an empirical assessment. Why would ILS commit to resolving their contentions at the ICJ via signing the Optional Clause or becoming part of treaties with compromissory clauses? We cannot assume the effect of international law on ILS. The social science approach allows me to demonstrate that this effect is context-specific, hinging on the nexus between secular law and religious law within ILS’ domestic jurisdictions. There is no one way in which the Islamic legal tradition is practiced, and this reality fundamentally impacts the relationship between the Islamic legal tradition as a whole and international law. Thus, all else equal, the efficacy of international law depends on features of domestic legal systems operating within these states.

Though my theory and empirical results capture central aspects of ILS’ behavior, a multiplicity of dynamics remain unexplored or underexplored. Any data collection effort involves judgment and some measurement error. Like other methodologies, the social science approach is not perfect, but has inherent shortcomings and limitations. The relationship between international law, religion, domestic notions of justice, and politics with regard to any group of states requires much in-depth theoretical development. Nevertheless, I believe studying the nexus between the Islamic legal tradition and international law via the social science method constitutes an important step in the scholarly efforts to understand the practice of international law by a unique group of states.

III. CONCLUSION

The social science approach has already shed much light on our perception of the way that international law is practiced and viewed across the globe. It is good to be skeptical about any methodological approach one adapts to study a research question. Human behavior—which in turn translates to outcomes on state-level behavior vis-à-vis international law—is inherently difficult to gauge. Yet, along with other methods, the social science approach can bring much to our understanding of international law and its efficacy. If grounded in solid theoretical framework and non-judgmental observational evidence, the social science approach adds important insights.