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# LEGAL INTERMEDIATION: A PROCESSUAL APPROACH TO LAW AND ECONOMIC ACTIVITY

EDITED BY

**AUSTIN SARAT**

*Department of Law, Jurisprudence and Social Thought, and  
Political Science, Amherst College, USA*

SPECIAL ISSUE EDITORS

**SEBASTIAN BILLOWS**

*Max Planck Institute for the Study of Societies, Germany*

**LISA BUCHTER**

*Emlyon Business School, France*

**JÉRÔME PÉLISSE**

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## LIST OF CONTRIBUTORS

<i>Sebastian Billows</i>	Max Planck Institute for the Study of Societies, Germany
<i>Lisa Buchter</i>	Emlyon Business School, France
<i>Camille Herlin-Giret</i>	Centre d'études et de recherches administratives, politiques et sociales (CERAPS), France.
<i>Jérôme Pélisse</i>	Center for the Sociology of Organizations, CNRS, Sciences Po Paris, France
<i>Alexis Spire</i>	Institut de recherche interdisciplinaire sur les enjeux sociaux (IRIS), France
<i>Alina Surubaru</i>	Centre Emile Durkheim (CNRS), Université de Bordeaux, France
<i>Fanny Vincent</i>	Centre de recherche sur l'expérience, l'âge et les populations au travail (CREAPT), France and Centre d'études de l'emploi et du travail - Conservatoire national des arts et métiers (CNAM), France

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# INTRODUCTION: THE MICROFOUNDATIONS OF LEGAL INTERMEDIATION IN ORGANIZATIONAL CONTEXTS

Sebastian Billows, Lisa Buchter and Jérôme Pélisse

**Keywords:** Legal intermediation; regulation; economy; labor; legal tools; neo-institutionalism; France

Law, public policy, and economic activity are intimately tied to each other. State policies and the legal system have often worked in favor of private economic interests. For instance, core features of the US legal system of the nineteenth century were designed to protect the interests of the capitalist class (Horwitz, 1992). Nowadays, narrow definitions of responsibility and privileged access to formal legal institutions still help the “haves” to “come out ahead” (Galanter, 1974, 2013; Sutton, 2001). Conversely, law has also been used (successfully or not) to coerce economic interests. Due to rules governing industrial relations and giving workers more power vis-à-vis their employers, corporations have become “legalized” settings (Selznick, 1969), where labor unions have gained leverage to shape workers’ rights and accommodations (Chappe, 2015; Dixon & Martin, 2012; Guillaume, Pochic, & Silvera, 2015; Pélisse, 2007). Some laws mandated corporations to participate in broader societal change, such as the inclusion of discriminated minorities (Bereni & Revillard, 2007; Burstein, Paul, 1985; Dobbin, 2009; Edelman, 2016; Heyer, Baudot, Borelle, & Revillard, 2013; Lempert & Sanders, 1986; Stryker & Pedriana, 2004) or, in France, the

fight against unemployment through the reduction of working time (Pélisse, 2004, 2011). Finally, the rise of the “regulatory state” (Thatcher, 2014) or “regulatory capitalism” (Levi-Faur, 2005) has led to even more interactions between law and economic activity. Despite popular belief that regulation was abandoned due to the diffusion of neoliberalism throughout the Western world in the 1980s, empirical evidence suggests that privatization, deregulation, and the promotion of market-based solutions under neoliberal governments expanded and extended business regulation in many national contexts (Braithwaite, 2009; Vogel, 1996) and even on a transnational basis (Bartley, 2007, 2010). In other words, the alleged deregulation and move toward free markets led to a slow re-regulation of free markets in the form of soft regulation allegedly perfecting market performance (Levi-Faur, 2005; Majone, 1997).

A more and more prevalent phenomenon, the interplay between law, public policy, and economic activity has become a core part of socioeconomic and socio-legal scholarship (Edelman & Stryker, 2005; Stryker, 2003; Bessy, Delpuech & Pélisse, 2011; Edelman, 2016).<sup>1</sup> A major outcome of this literature is that public policy goals, legal norms, and the ensuing enforcement measures are inherently ambiguous (Dobbin, 2009; Edelman, 1992), especially as we shift from “government” to a “governance” model where multiple stakeholders design and implement regulations (Ansell & Gash, 2008; Braithwaite, 1982; Freeman & Minnow, 2009; Kagan, Gunningham, & Thornton, 2003). Due to normative ambiguity and to the organizational clout of economic interests (Perrow, 1991), legal mandates always go through some degree of reinterpretation by economic and organizational actors, which impacts the reach of regulatory authorities (Edelman, 2016; Edelman, Krieger, Eliason, Albiston, & Mellema, 2011). Our argument is that this ongoing process of legal intermediation is shaped by a diverse set of actors and relies on hybrid tools and instruments, which have differential effects (either positive or negative) on organizational routines, compliance monitors, as well as judicial and legislative forces. The process leading from a new regulation to new organizational and business routines involves specific actors whom we call “legal intermediaries.” While some economic actors and organizations turn to external and highly specialized corporate services, such as tax advisers or business lawyers, others rely on various types of “in-house” legal or non-legal specialists. A significant aspect of their work is to design specific devices, such as contracts, guidelines, or any other type of formalized procedures. Those legal devices, which stand halfway between the regulatory and the managerial sphere, shape the legal consciousness of laypeople who undertake economic activities or who work in large organizations (Ewick & Silbey, 1998; Pélisse, 2005).

Our processual, intra-organizational approach departs from other accounts of legal intermediation (Talesh & Pélisse, 2018). Regulation scholars are now taking “regulatory intermediation” seriously (Abbott, Levi-Faur, & Snidal, 2017). However, because they focus on formal institutions such as international bodies or rating agencies, their approach overlooks subtler and more local forms of intermediation affecting organizations and economic activity (Gray & Pélisse, 2019). Despite using at times a different terminology, the neo-institutional

literature on “legal environments” has already researched legal intermediation at length (Dobbin, 2009; Edelman, 2016; Talesh, 2015). This literature’s main findings can be summarized as follows: by infusing “managerial logics” into law, organizational fields are capable of mitigating the impact of legislation targeted at them. In a second step, which is referred to as “endogenization,” managerialized law “subsequently influences understandings of law and legal actors and legal institutions” (Edelman, 2016, p. 19). Although we build on core insights of the neo-institutional approach, such as the managerialization of law and legal endogeneity, our approach to legal intermediation departs from the latter in four respects: (1) we challenge the current portrayal of legal intermediaries (primarily seen as legal experts or compliance professionals) by studying actors who are neither legal professionals nor corporate managers and who nonetheless deeply influence the interpretation of the law; (2) we emphasize the multiple roles of legal devices in shaping compliance or non-compliance; (3) from a methodological standpoint, we use an intra-organizational and intra-industry perspective rather than a field-based perspective; and (4) we investigate the relationship between law and economic activity within more varied social settings: in countries outside the United States and in other areas of regulation than anti-discrimination law, both of which are overwhelmingly represented in the neo-institutional literature.

Our first difference with the neo-institutional approach is that we provide a more detailed account of legal intermediaries’ work and profile. Proponents of the neo-institutional approach have shown how different types of “compliance professionals” (Edelman, 2016) reinterpreted US laws fighting employment discrimination. Compliance professionals include lawyers, consultants, human resource professionals, and insurance staff. By contrast, our symposium describes a wider range of legal intermediaries, such as legal counsels, civil rights activists, judicial experts salespeople, hospital directors, union members, managers, health and safety specialists, or even street level bureaucrats, who may or may not belong to established professions. In his contribution, Jérôme Pélisse presents a systematic comparison of these actors, which helps understanding and contrasting the different ways through which they contribute to legal intermediation. In particular, he stresses the importance of what he calls non-legal professionals acting as legal intermediaries within organizations.<sup>2</sup> They contribute to the framing of ordinary legality on the workplace and in other areas of economic activity. Their contribution to legal intermediation depends on different types of constraints and resources, such as their relational profile, their hierarchical status or their local reputation.

Our second departure from the neo-institutional literature is our consideration of legal devices. Legal intermediaries design specific devices that shape economic activity and, in some cases, have feedback effects on regulation. Legal devices are a core feature of the neo-institutional approach to legal intermediation: in response to Equal Employment Opportunity law, organizations set up legal devices such as grievance procedures or guidelines which “symbolically demonstrate attention to law while maintaining sufficient flexibility to preserve managerial prerogatives that are seen as advancing business goals”

(Edelman, 2016, p. 31). However, we argue that the symbolic legitimacy of legal devices (Bourdieu, 1987, p. 4) is only one of three different ways in which they shape economic activity and regulatory outcomes. This symposium puts forth two other channels by which legal devices exercise their influence. The first is instrumental: the mere presence of rules means that economic actors can play with them (Lascoumes & Le Bourhis, 1996). The scholarship at the crossroads of social movement and organizations has showed how activists use symbolic devices put forth by companies to hold firms accountable for their pro-social claims and monitor their practices (McDonnell, King, & Soule, 2015). The second effect of legal devices is constitutive. As Robin Stryker wrote, “law provides tools that help actors attribute meaning, existence, desirability or undesirability to their economic environment” (Stryker, 2003, p. 349). Weber provided empirical evidence of this a long time ago: from a historical standpoint, legal devices changed the way economic actors calculate economic returns and made strategic business decisions (Weber, 1978). By shaping legal consciousness, legal devices may create new opportunities for certain disadvantaged groups to claim more rights (McCann, 1994). To capture the diverse effects of legal devices on economic activity and organizations, we define the act of crafting objects such as contracts, guidelines, grievance procedures, collective agreements, or any other type of formalized procedures, as a social process. As Suchman has shown, such objects “possess both symbolic and technical properties,” which arise from the interactions between experts and laypeople (Suchman, 2003, p. 91). Similar to Macaulay’s work on contracts (1963), we adopt a “law in action” approach to find how and whether those objects are used in economic and organizational contexts. However, in contrast to Suchman and Macaulay’s work, which tends to ignore institutional factors, we never lose sight of regulation and the institutionalized practices that might prevail at the level of an industry.

A third difference lies in the methods we use to study legal intermediaries and legal intermediation. Neo-institutional sociologists have collected evidence of legal intermediation by reading the professional literature (such as magazines), observing professional gatherings (such as conferences or “webinars”), and conducting statistical surveys about organizational practices across a large number of organizations. While these empirical strategies are useful to map out the diffusion of managerialized rules and procedures across the entire organizational field, it fails to account for how legal intermediaries craft and deliver advice within specific organizations and sectors. Yet, as most of the contributions in this special issue show, legal intermediation is particularly salient in the case of industry-specific regulation. To provide a much needed finer-grained view of legal intermediation, our contributions outline the “division of labor [...] in the cubicle” (Abbott, 2005). Similar to the research conducted by Nelson and Nielsen (2000), for example, we investigate the daily interactions between laypeople and the legal intermediaries who assist them in complying with regulation. While the literature has insisted on how professional groups “frame” the law, we take into account both institutional factors and the informal micropolitics that give rise to local compromises between laypeople and legal intermediaries (Huising, 2015). The use of qualitative research methods enables us to

capture not only the specific challenges faced by different actors, but also the impact of their status – formal and informal power, authority, position within the company, ability to speak out (Hirschman, 1970) – on their ability to leverage social change. Additionally, this microsociological perspective helps us to explore cases where legal intermediation is a contentious issue. The neo-institutional literature tends to equate contentiousness with litigation (Revillard, 2017). Our contributions show that even when litigation is absent, the internalization of law by organizations may turn into a contentious social process where different groups of actors defend conflicting interpretations of the law.

The last difference between our approach and previous neo-institutional research lies in the empirical scope of our investigations. While virtually all existing neo-institutional research is centered on US anti-discrimination law,<sup>3</sup> we expand the scope and the types of organizational environments where legal intermediation is analyzed, as Talesh and Pélisse (2018) did recently to find out how legal intermediaries impact social change. We believe that legal intermediation is virtually ubiquitous and holds true not only across countries, but also across types of organizations, whether it is private businesses, schools (Hallett, 2010), hospitals (Kellogg, 2009), or scientific laboratories (Huising & Silbey, 2013; Pélisse, 2017). Our contributions use this conceptual framework to address responses to different types of law. While Lisa Buchter's contribution addresses anti-discrimination law in the French context, the rest of our contributions describe areas of regulation that the literature has overlooked so far, such as tax law, competition law, labor law, or health and safety procedures. Moreover, our contributions focus on European cases. This goes against some neo-institutional claims arguing that legal intermediation is unlikely outside the US. More specifically, we reject the claim that compared to the “weak” US federal state and its “vague” law, the “French legal system doesn't permit expansive reinterpretation” (Dobbin, 2009, pp. 6–7). First, the alleged weakness of the US federal state and its legal system has been contested by political scientists, historians, and sociologists alike (Carpenter, 2001, 2010; Lieberman, 2015; Stryker & Pedriana, 2004). Second, besides the contributions showcased in our symposium, there is already a wealth of empirical evidence showing how private actors reinterpret, managerialize, and endogenize the French legal environment (Bereni, 2011; Billows, 2016; Pélisse, 2004, 2011).

Thanks to our approach that focuses on the contingent and processual aspects of legal intermediation, we find patterns of compliance that differ from those predicted by the existing literature. In the neo-institutional approach, legal intermediation is a one-way street by which the profit-oriented logic of private business systematically taints the “legal logic,” a sphere where “principles such as due process, equal access to law, and equal protection of law” dominate (Edelman, 2016, p. 23). Lauren Edelman claims that the “managerialization of the law” (or the infusion of the law with managerial ideals) is so prevalent that it led the US to become a “symbolic civil rights society” (Edelman, 2016), while Frank Dobbin claims that diversity practices are adopted regardless of their efficacy, primarily to protect firms in courts (Dobbin, 2009, p. 209). We argue that

this perspective on legal intermediation is too monolithic, and multiple case studies in this symposium corroborate this idea.

We find instances where legal intermediation actually succeeds in fulfilling the initial goals of regulation. Lisa Buchter's contribution, for instance, shows how activists co-opted French large corporations, and imposed an interpretation of anti-discrimination law that at times made a difference in the lives of the minorities whom legislation sought to protect. Camille Herlin and Alexis Spire show that professional intermediation of law does not always succeed in institutionalizing new interpretations of regulation and that the laypeople who buy their legal services sometimes contest their legitimacy. In her contribution on French hospitals, Fanny Vincent analyzes a contentious process of managerialization of labor law, where nurses and hospital managers clash over a legal rule allowing 12-hour work shifts. Jérôme Pélisse's contribution addresses the diversity of legal intermediation in a systematic way by identifying the factors that allow legal intermediaries to influence legality and impact the legal consciousness of their audience. Their ability to do so depends on the legal frame and legal instruments that they can harness, the profile of the legal professionals and/or the laypeople with whom they interact, and their relative power in their organizations. Finally, our findings also reevaluate the role of the legal devices that organizations set up to comply with regulation and illustrate their diverse impact on legality and legal consciousness in organizations and in economic life. Sebastian Billows shows that, depending on the audience, a single legal device can bear many different meanings and shape different legalities within the same organizational context, a feature which gives large corporations more autonomy in interpreting how they should comply with regulation. Alina Surubarau goes even further and outlines the intra-organizational conflicts that arise from complex legal instruments such as contracts, which weakens their ability to constrain future business behavior.

## NOTES

1. While part of this literature describes the relation between law and economic activity as a top-down process, we focus our attention on the scholarship that views legal intermediation as a bottom-up process. The work on "regulatory capture" (Carpenter & Moss, 2014) constitutes an example of the top-down approach. This perspective situates legal intermediation as a chain link between laws and regulation – which have to be applied to the economic world – and the economic and social relations embedded in organizations, as if law and economy or organizations were two separate spheres, of which we have to study the interrelations. A bottom-up approach does not only start from the social relations but is anchored in a constitutive perspective, where law and organizations are conceived together, shaping mutually one another through, notably, the activities of such legal intermediaries.

2. This does not preclude us from analyzing borderline cases such as the French judicial expert, who stands in between laypeople and the legal profession, or the safety engineer working in a scientific institution, who must translate safety regulations into concrete rules readily usable by the scientists who conduct experiments.

3. Talesh is among the few exceptions (Talesh, 2009, 2015).

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