

RECENT BOOKS ON INTERNATIONAL LAW

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BOOK REVIEWS

Evading International Norms: Race and Rights in the Shadow of Legality. By Zoltán I. Búzás. Philadelphia, PA: University of Pennsylvania Press, 2021. Pp. 317. Index. doi:10.1017/ajil.2021.64

Racism and racial discrimination have recently received new prominence from international institutions and international law scholars. The killing of George Floyd in June 2020 prompted an emergency special session of the United Nations Human Rights Council to investigate systemic racism and police brutality in the United States.¹ In 2021, the *UCLA Law Review* published a major symposium on the intersection of critical race theory and Third World Approaches to International Law.² Scholars have also unearthed evidence of racism in international law's past and present, ranging from legal doctrines and court decisions to the choices made by researchers and journal editors.³ Taken together, these developments reveal that international law's racial reckoning is at hand.

¹ E. Tendayi Achiume, *Transnational Racial (In)Justice in Liberal Democratic Empire*, 134 HARV. L. REV. F. 378 (2021).

² *Transnational Legal Discourse on Race and Empire*, 67 UCLA L. REV. 1386 (2021) (featuring fifteen essays by eighteen scholars). Recent international relations scholarship also focuses on racism. See, e.g., Kelebogile Zvobgo & Meredith Loken, *Why Race Matters in International Relations*, FOR. POL'Y (June 19, 2020).

³ See, e.g., James Thuo Gathii, *Studying Race in International Law Scholarship Using a Social Science Approach*, 22 CHI. J. INT'L L. 71 (2021); Henry J. Richardson III, *The Limits of Human Rights Limits*, 115 AJIL 154 (2021) (reviewing HURST HANNUM, *RESCUING HUMAN RIGHTS: A RADICALLY MODERATE APPROACH* (2019)).

Most of the discourse on racism focuses on issues relating to the treatment of Black, Brown, and Indigenous groups. As important as those issues are, it would be remiss to overlook other forms of racism. A compelling and insightful book by Zoltán Búzás, associate professor at the Keough School of Global Affairs at the University of Notre Dame, illuminates one of these forms—the longstanding practice of segregation and exclusion of Roma individuals and communities in Europe.⁴

Evading International Norms: Race and Rights in the Shadow of Legality is the rare academic work that achieves multiple objectives. Búzás offers a nuanced account of how states distinguish international laws from international norms, creating “law-norm gaps” (p. 37) that enable strategies of “norm evasion” (p. 33) to defend discriminatory domestic policies that plausibly violate their treaty obligations. He situates the theory of norm evasion at the intersection of several literatures—international relations (constructivism and legalization, in particular), studies of compliance with human rights treaties, analyses of racial and ethnic discrimination, and critical approaches to international law and politics—that are seldom in conversation with one another. And he illustrates norm evasion's operation with two detailed, mixed-method case studies—restrictions on Roma immigration in France, and segregation of Roma schoolchildren in the Czech Republic—that synthesize a vast array of UN and European human rights

⁴ Búzás argues that the Roma have been “‘racialized’ or constructed as a race” in European popular imagination, although he recognizes that “some of the elements employed in constructing them as a group are . . . more closely associated with ethnicity than race . . .” (p. 28). Given this mix, Búzás concludes that the Roma are “best seen as an ‘ethnorace’” (p. 29).

rules, hundreds of national and regional court cases, semi-structured interviews with dozens of stakeholders, and a discourse analysis of newspapers, political speeches, and other texts. The result is nothing less than a tour de force—a theoretically and empirically sophisticated study of an underappreciated and pervasive policy of racism in a region whose supranational institutions and governments profess a commitment to combat all forms of discrimination and xenophobia.

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Evading International Norms is divided into seven chapters. Three are devoted to background, theory, and implications; four describe the two case studies. Chapter 1 opens with a sobering assessment of the legalization of human rights norms in treaties and international institutions that is a defining feature of post-World War II international human rights protection. Legalization aims to make human rights “more enforceable, legitimate, and politically salient” (p. 4). The reality, however, is that the “violation of human rights norms often persists and sometimes even increases after legalization” (p. 5). Central to this claim is the distinction between international *laws* and international *norms*, which “overlap, interact, and shape each other in many ways [but] . . . are not necessarily identical” (p. 12).⁵ The space between the two creates “law-norm gaps” in which “legality and appropriateness often diverge” (*id.*). Governments are aware of these gaps and seek to exploit them under certain conditions.

Chapter 2 is devoted to identifying those conditions and developing the theory of norm evasion that is the book’s linchpin. According to

Búzás, norm evasion has two components. In the first phase, a state chooses to engage in norm evasion in response to relatively equal pressures from domestic interest groups who favor and oppose compliance with international human rights standards. The government seeks to reduce these competing pressures by adopting a policy or practice that is technically legal but contravenes the spirit of the law. Norm evasion is an attractive strategy because it “allows the state to satisfy the violation coalition while shielding it from the legal pressures of the compliance coalition” (p. 46). In the second phase, the two groups contest the legality and the normative appropriateness of the government’s policy or practice, including by challenging it before domestic and international courts. “When courts uphold the legality of the state’s actions but these acts are widely characterized as inappropriate in [public] discourse, they are constructed as norm evasion” (p. 67).

Chapters 3 and 4 comprise the case study on French restrictions on Roma immigration, which ballooned after Romania and Bulgaria joined the EU in 2007. The resulting influx of 15,000 to 20,000 Roma elicited widespread public hostility in France and demands to expel the new arrivals, while the Council of Europe, European Union, and pro-human rights groups vociferously opposed the expulsions.

Chapter 3 convincingly identifies three law-norm gaps that the government exploited to facilitate removal of the Roma: a “legal exception” gap (the product of broadly interpreting exceptions to the right to free movement and residence, and exceptions that permit discrimination between citizens and foreigners); a “subtle compulsion” gap (which resulted from deeming departures that were only nominally voluntary as outside the ban on compelled expulsion on the basis of race); and a “superficial examination” gap (which arose from treating numerous contemporaneous expulsions as individualized determinations rather than as a policy to expel the Roma as a group) (pp. 79–81). The government used these law-norm gaps to construct four norm evasion strategies: “humanitarian returns that exploited the subtle compulsion gap;

⁵ Búzás identifies the international *law* of racial equality as grounded in the International Convention on the Elimination of All Forms of Racial Discrimination and the prohibitions on such discrimination in regional treaties and legislation adopted by the Council of Europe and the European Union (pp. 62–65). He identifies the international *norm* of racial equality, which is broader than the requirements of these instruments, as comprised of three elements—equal treatment, equal opportunity, and equal outcomes (p. 66).

standardized expulsions that relied on the superficial examination gap; threat to public order expulsions made possible by the legal exception gap; and abuse of rights and unreasonable burden expulsions that were also enabled by the legal exception gap” (p. 72).

Chapter 4 explores the campaign by a coalition of domestic and transnational NGOs to challenge these laws and policies. The coalition’s strategy of litigating in French courts was mostly unsuccessful. Búzás offers a detailed analysis of these decisions, revealing that the majority of judges upheld the Roma expulsions (p. 105). Beginning in 2014, however, the government shifted toward “dual compliance” with both the laws and the norms of racial equality as applied to Roma expulsions. The shift resulted from several factors—a decline in humanitarian returns for all EU nationals, modest efforts to integrate Roma into French society, enhanced pressure from the EU and the Council of Europe, public shaming strategies by civil society groups, and changes in European migration rules (pp. 122–23).

The case study on Roma education in the Czech Republic is the subject of Chapters 5 and 6. Several countries in Central and Eastern Europe have long placed Roma children in special schools for students with learning or mental disabilities. The policy of segregation, which is especially prevalent in the Czech Republic,⁶ has generated extensive litigation before national courts and the European Court of Human Rights (ECtHR), including, in 2007, the groundbreaking Grand Chamber judgment in *DH and Others v. Czech Republic*.⁷ According to Búzás, *DH* marked a decisive change in the

Czech government’s policy of discrimination against Roma children. The decision strengthened the hand of groups seeking to compel the state to abolish segregated schools, causing the government to shift from openly violating both the laws and the norms of non-discrimination to policies that sought shelter in technical legality while evading the broader norms of racial equality.

Chapter 5 follows a similar structure to Chapter 3. Búzás identifies three law-norm gaps that the Czech government exploited to perpetuate a policy of separate remedial education of Roma youth: a “legal exceptions” gap (the deference that courts such as the ECtHR give to states to show that a policy which nominally discriminates on the basis of race has an objective and reasonable justification); a “burden of proof” gap (the evidentiary standard for complainants to establish a presumption of racial discrimination, which then shifts the burden of proof to the government); and a “formalist” gap (relying on narrow textual understandings of equality and eschewing broader, purposive interpretations of racial discrimination) (pp. 135–41). The government exploited these gaps to construct three norm evasion strategies. As part of a “social disadvantage” strategy, officials invoked the legal exceptions gap to argue that placing Roma children in remedial schools would help them catch up to other students and was thus objectively reasonable. The “increased burden of proof” strategy involved convincing Czech courts to set a high evidentiary threshold to establish a presumption of discrimination, thus capitalizing on the “burden of proof” gap (pp. 159–62). Lastly, the “form without substance” strategy involved adopting “measures designed to comply on paper with applicable laws but to do little for desegregation on the ground”—such as “the renaming of special schools as regular mainstream schools without changing their curricula and mode of operation” (p. 19).

Chapter 6 considers how clashes between two groups—those opposed to segregating Roma children and those favoring the status quo—reinforced the government’s norm evasion strategies. The starting point for these contestations were

⁶ As Búzás explains, segregation “can occur in mainstream schools, where Roma are kept in separate buildings, on separate floors, or in separate classrooms” (p. 134). Education authorities also segregate Roma children in separate remedial schools for children with mental disabilities. “By the mid-1980s, almost half of Roma children attended special schools” (*id.*)

⁷ In this case, the ECtHR Grand Chamber concluded that special education screening tests caused a disproportionate number of Roma children to receive subpar education, resulting in indirect discrimination on the basis of race and ethnic origin. *D.H. and Others v. Czech Republic*, No. 57325/00 (Eur. Ct. Hum. Rts. Nov. 13, 2007).

competing interpretations of the *DH* case. Whereas human rights NGOs argued that the ECtHR judgment stood for a broad principle of racial equality in education, government officials contended that the decision “referred to an old practice that had been discontinued” and that “post-*DH* practices were legal” (p. 167). This narrow view was bolstered by the fact that a decade of litigation challenging other forms of special school segregation did not result in any adverse rulings against the government, either by Czech courts or by the ECtHR. For Búzás—and for this reviewer—this is surprising. The ECtHR has extended the *DH* precedent in decisions condemning segregation of Roma children in other countries in Eastern Europe (p. 169). Yet the Strasbourg Court “has neither examined nor ruled on cases related to *DH*” in the Czech Republic. The absence of follow-on court decisions “validated through omission the legality of special school segregation” (p. 171). Outside of the judicial system, advocates for the Roma have had more success in characterizing segregated schools as normatively inappropriate (pp. 179–84). Yet with the government continuing to defend the discrimination as technical lawful, and with pressures from compliance and violation coalitions relatively balanced and stable, Búzás predicts that norm evasion is likely to continue at least in the short term.

The final chapter of *Evading International Norms* opens with an assessment of the theory of norm evasion in light of the French and Czech cases studies. Búzás reviews the many ways that the case studies support the theory, but he also helpfully identifies some of the theory’s limitations (pp. 194–200). The chapter next considers whether norm evasion has traction beyond racial discrimination, the Roma, and Europe. Búzás identifies three specific areas in environmental protection, the laws of war, and international financial standards where gaps between laws and norms seem especially pronounced and where the theory may help to explain the content of applicable rules and norms, the behavior of states and international organizations, and the evolution of international regimes more generally (pp. 200–06).

Expanding his analytical lens still further, Búzás next considers the theory’s implications for the relationship between international laws and international norms as well as how states and non-state actors can counter the undesirable effects of norm evasion. On the first issue, Búzás reflects on whether norm evasion is more likely to damage norms or laws, concluding that the latter are more at risk of being narrowed or weakened (p. 207). This has important and underappreciated implications for efforts to close gaps between laws and norms. As Búzás explains:

Although norm-law gaps can be quite durable, there may be strong pressures to close these gaps. In a world where laws are seen as superior to norms, there would be pressure to change norms. When laws are broader than norms, this could expand norms. But when norms are broader than the relevant laws, as is the case in this study, the result would be a narrowing of norms and normative obligations. This narrowing could abolish norm-law gaps, allowing former norm evaders to become dual compliers, and enjoy the accruing legal and legitimacy benefits, without actually improving their human rights practices. (Pp. 208–09)

Turning to policy prescriptions for countering norm evasion, the chapter suggests ways to strengthen compliance coalitions. Búzás urges advocates to creatively combine legal and non-legal instruments while remaining attentive to the difference between technical legality and real-world improvement of human rights standards. Mixing hard and soft law also facilitates the adoption of flexible compliance strategies that deploy litigation selectively as part of an integrated campaign of political pressure, naming and shaming, and forging alliances among social movements (pp. 209–14).

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Evading International Norms sheds new light on the urgent and understudied problem of racial discrimination against the Roma in Europe. The book also contains broader theoretical, empirical,

and practical insights for interdisciplinary research on the relationship between international laws and international norms. Two issues in particular merit further reflection: how to identify the law-norm gaps that are necessary for governments to deploy norm evasion strategies, and whether national and international litigation perpetuates or counters norm evasion.

Many international lawyers will be skeptical of a theory that requires delineating between international laws and international norms. After all, binding treaties and custom as well as soft law influence the behavior of states, albeit to different degrees in different contexts. In the end, however, although I was not fully persuaded by the book's exposition of the theory in the abstract, I was decisively convinced by its application to the two Roma case studies.

The scope conditions that Búzás applies—focusing on law-norm gaps that exist during the same time period, pertain to the same category of human rights, and reflect how laws and norms operate in practice (pp. 37–41)—helpfully narrow the general theoretical framework. Yet I remain unconvinced that the three racial equality norms that the book identifies—equal treatment, equal opportunity, and equal outcomes (p. 66)—can be meaningfully distinguished from conduct that is prohibited by the International Convention on the Elimination of Racial Discrimination. This is especially so given the expansive interpretations adopted by the Committee on the Elimination of Racial Discrimination, the UN treaty body charged with monitoring the Convention. In contrast, the divergence between law and norms is much easier to identify for legal instruments adopted by the EU and the Council of Europe. In that more limited domain, Búzás's analysis of the norm evasion strategies that the French and Czech governments deployed to discriminate against the Roma in normatively problematic but technically legal ways is entirely persuasive.

Turning to the role of litigation, Búzás views national and international courts as essentially the only actors that can decide whether a particular instance of norm evasion is lawful. This is an

unduly narrow definition of legality. Other government officials—such as lawyers in justice departments and foreign ministries—regularly opine on whether a policy is technically within the bounds of the law (a point Búzás acknowledges in passing on page 47), and their views often determine whether the government adopts a policy in the first instance.

Equally unconvincing is the related claim that legality can be inferred when norm evasion is not challenged in court or when court challenges are unsuccessful (pp. 46, 51). Human rights groups often choose advocacy strategies other than litigation, yet that choice needs to be explained. For example, the European Roma Rights Centre—one of the region's most visible and effective Roma rights organizations—did not challenge the French expulsions before the ECtHR, as it did for the Czech policy of segregating Roma children in special schools. This is a puzzling omission from the book, especially given the surfeit of unsuccessful domestic court cases in France. Understanding why the Centre or another NGO did not file a complaint in Strasbourg would likely have yielded important insights, both for the definition of legality and for the different strategies that compliance coalitions use to challenge norm evasion. In the concluding chapter, Búzás acknowledges that defining legality by reference to the absence of litigation is one of the book's limitations. He defends this choice as appropriate for “an initial theory-building effort,” and suggests that future studies “provide more nuanced analyses of norm evasion by disaggregating the broad category of technical legality” (p. 199).

In sum, *Evading International Norms* is deeply researched and compelling. The book deserves to be read by legal scholars and practicing lawyers interested in racial discrimination, human rights, and the limits of international laws and institutions to effectuate social change.

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