

International Law: Normative Contestation in the Transnational Realm

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Abstract: *International Law is a dynamic and flexible subfield which can serve as an example of how laws are contested, negotiated, and adopted without the presence of an overarching authority with coercive powers (a leviathan). A greater understanding of the relationship between international law and the vast array of actors currently operating in the interstices of the transnational system brought about by globalization, can provide valuable insights as to how laws are created and legitimized through norm socialization and dialogue leading to a shared intersubjective understanding. This brief essay aims to connect some important insights from legal anthropology to the work of constructivist scholars studying regime formation and institution building in the growing field of international studies.*

Introduction

Modern law has traditionally been inextricably linked to the nation-state system (August, 1995; von Feigenblatt, 2009; Garcia, 2009; MacFarlane & Khong, 2006; Vaughan-Williams, 2008). The contractualists of the enlightenment had a vision of a polity that would ensure the rule of law in a certain territory (Tannebaum & Schultz, 2004). Thomas Hobbes' *leviathan* was meant to wield coercive power in order to protect citizens from their own base impulses (Lal, 2004; Sponsel, 1994). Even Hobbes' more optimistic contemporary, John Locke reached a similar conclusion while attributing the causes of the base impulses to nurture rather than nature

(Curtis, 1981). The trend in the West was to transfer the previously diffuse legislative and regulatory power to the nation-state (Kolodziej, 2005; Roberts, 1997). In continental Europe the result was that statutory law completely eclipsed customary law while in the United Kingdom customary law survived in a very centralized incarnation (McCormick, 2005).

The result of the development of the legal tradition in the West was that the assumed link between the wishes of the citizens and the making of the laws of the nation-state gradually became disjointed. There was still an imaginary *demos* guiding the legislative process from a distance but the actual influence exerted by the average citizen on the norms and rules guiding his or her life waned until only laws passed by bureaucrats or professional politicians in the distant capital were considered binding and legitimate (Roberts, 1997). Thus, the rationalization of governance in Europe separated the governed from the law making process (Moore, 2005c; Ritzer, 2008; Sica, 1998; Weber, 2004).

The previously described process was not complete but rather became an ideal to strive for. Centralizing states such as the virulently unitary French Republic aimed for homogeneity in laws and spread that view of the legal realm through a highly centralized education system while enforcing it through an increasingly intrusive state (Albaugh, 2009; Foucault, 1980; Roberts, 1997). Thus, the main characteristic of the legal system became its internal coherence and logic rather than its relationship to the prevailing mores and customs of the citizenry. There are many ways to interpret this shift toward centralization of legislative power by the government. A Marxist explanation would emphasize that the superstructure, including the legal system, is simply a result and a reflection of the economic structure (Ritzer, 2008; Stuart Sim, 2005). Thus, laws are passed to protect the economic status quo. This view is supported by the emphasis on

contracts and property laws of most European legal systems. Another way to view the centralization of the legal domain is that it embodied certain values held by the governing elite and those values were then disseminated to the wider society through the laws (Anderson, 2006). Thus, from this point of view, Western legal systems are not completely detached from the customs and culture of the population but rather represent the values of a narrow section of the population. Those laws are then actively spread throughout the realm and exert normative pressure on the values and habits of the general population.

Approaches to the Study of Law

The connection between society and law can be approached from a variety of perspectives and disciplines. Formal legal scholarship concentrates on the interpretation of the law which is accepted as a given and assumed to be internally consistent and beneficial to society (August, 1995). Sociological approaches to legal studies tend to concentrate on the social function of laws and on their effect social indicators such as incarceration rates (Ritzer, 2008). The distorting effects of laws on the functioning of the market is the main emphasis of neo-classical economics while neo-Keynesianism emphasizes the functional role that laws can play in regulating the fluctuations of the economy for the benefit of society (Skidelsky, 2010). Thus sociological and economic approaches to the study of law tend to concentrate at the *macro* and *meso* levels while legal anthropology tends to emphasize a more *micro* to *meso* level of analysis. Values, mores, and culture are all emphasized by legal anthropology and the connection of both formal and informal laws to local customs is also addressed by the subdiscipline (Lempert & Sanders, 2005; Moore, 2005a). Finally political science is also interested in the study of law from a public policy perspective (Anderson, 2006; Sharman, 2008). There are many approaches to the

study of law in the field of political science but there tends to be an emphasis on the role of power and how laws reflect and project that power.

The previously mentioned approaches to the study of the connection between law and society tend to differ in terms of the rigidity of the models used to analyze laws as well as in terms of the number of assumptions made regarding the role and function of the legal system. Economics and traditional political science carry a heavy burden in terms of initial assumptions about the proper function and relationship the laws to society and therefore are hampered in providing new insights as to the relationship between laws, society, and universal human needs. The sociological perspective also has a heavy functionalist bias in that correlations between social indicators and certain legal definitions of deviance continue to occupy most of the legal research in the discipline (Jiang, Perry, & Hesser, 2010).

Legal Anthropology and its Contribution to the Debate

Legal Anthropology mobilizes the research methods traditionally espoused by anthropologists such as in depth description of social practices based on fieldwork, a greater holism in terms of viewing society as an interrelated entity, an emphasis on culture and shared values and a growing interest in informal social norms (Moore, 2005a; Sponsel, 1994). It should be noted that most of the advantages of anthropological research complement the disadvantages of research in the other social science such as an overreliance on quantitative data, simplistic models, overgeneralization of findings, and an emphasis on official government structures.

Returning to the initial debate concerning the nature of law in terms of its creation, legal anthropology departs from the traditional emphasis of the other social sciences on generalization

and rather than applying allegedly universal principles and blanket assumptions regarding “human nature”, concentrates on studying the situation on the ground from the perspective of those who are actively interacting and reconstructing the social norms which ultimately become the laws governing their daily lives. While universal commonalities are not denied they are expected to be found on the ground rather than accepted uncritically from the start (Moore, 2005b).

One good example of a study exemplifying most of the strengths of legal anthropology is Bowen’s study of judicial decisions in a mountainous village of Aceh, Indonesia (Bowen, 2005). The study involves an eclectic mix of field work over a prolonged period of time as well as documentary research and thus provides a more complete picture of the way in which legal decisions and laws themselves are affected by both local and national factors. In addition to that Bowen shows how the interpretation of the law has changed over the years as a reflection of a shift in the relative importance ascribed to local custom vis-à-vis Islamic and national laws. While the detailed conclusions of the paper are beyond the scope of this exploratory essay, Bowen shows that the relationship between the application, the creation, and the interpretation of law is complex and permanently in flux. More pertinent to the main topic of this exploratory essay, Eriksen’s study of the intersection of human rights, multiculturalism, and individualism in Mauritius shows how legal anthropology’s holistic approach is best suited to tackle such a broad and complex question (Eriksen, 2005).

International Law and Constructivism

It is interesting to note that one of the few other approaches to legal studies concentrating on the importance of values and norms is the constructivist branch of institutionalism in the

growing field of international studies (Brunnee & Toope, 2006; Jackson & Nexon, 2009; Kolodziej, 2005). The emphasis has been on how international norms are created, legitimized, and eventually institutionalized. While this subfield of international studies deals with issues of governance and not only the creation of laws, the formation of voluntary international regimes and the expansion of the array of international actors under study allows scholars to speak of a budding transnational society (Kornprobst, 2009; Walker, 2008). The important characteristic of this research agenda is that there is a lack of an overarching authority with coercive power to impose its laws on the rest of the transnational community. Moreover norms and values are negotiated and renegotiated until a voluntary agreement can be achieved. Norms are institutionalized and incorporated into international law through a vast array of methods. Furthermore, international law is not limited to international covenants and conventions but also includes voluntary regimes and custom (August, 1995).

One example of a model explaining how international law is created is the Spiral Model of Norm Socialization developed by Risse and Sikink and the expanded version of the model renamed the Parallel Cycles Model of Norm Socialization developed by von Feigenblatt (von Feigenblatt, 2009; Kollman, 2008). The expanded version of this model is made up of two parallel cycles, the “decision-maker” cycle and the “constituency/population” cycle. Each cycle is made up of seven steps: namely norm creation, norm violation, denial of norm legitimacy, tactical concessions, prescriptive status of norm, norm internalization with norm consistent behavior, norm internalization with norm inconsistent behavior, and modification/evolution of the norm (von Feigenblatt, 2009, p. 7). This model provides a relatively parsimonious explanation of how international norms become institutionalized and how they are modified and revised. Other scholars such as Kollman have applied similar models to how private actors such

as corporations have developed international norms with enough legitimacy to be considered part of international law (Kollman, 2008).

The study of voluntary regime formation in the transnational realm can provide important insights as to the relationship and possible universality of international law. A vast array of international regimes ranging from the ISO family of standards to the role of civil society organizations in the banning of landmines attest to the possibility of non-state actors cooperating in order to institutionalize shared norms (Dingwerth, 2008). Moreover, Habermas has written considerably about the process of European unification and rise of democratic cosmopolitanism (Habermas, 2006; Jordaan, 2009).² His approach to the topic of cosmopolitanism is based on communication and theorizes that in order to move towards a state of cosmopolitanism there needs to be understanding between the members of a social group. This understanding implies that there is a shared intersubjective reality which is achieved by an improvement in communication through dialogue (Habermas, 2006). On the topic of the Kantian project of a global community Habermas' take is that a world government is unlikely and ultimately unnecessary since there is movement "toward a sanctioned regime of peace and human rights at the supranational level" (Habermas, 2006, p. 160). The role of that "regime" is to "provide the framework for a global domestic politics without a world government at the transnational level as global society becomes increasingly peaceful and liberal" (Habermas, 2006, p. 160). Thus Habermas' democratic cosmopolitanism is compatible with institutional constructivism in international studies in that both approaches to the meaning and role of international law point to

² Democratic Cosmopolitanism is part of dialogic cosmopolitanism and differs from communitarian cosmopolitanism. The emphasis of the former is on dialogue to reach common understandings while respecting differences while that of the latter is building a relatively homogeneous community at the transnational level akin to those found at the local level through a process of assimilation into a dominant worldview.

the pivotal role of dialogue and cooperation in reaching a voluntary understanding as to which norms are important and should therefore be subsequently institutionalized.

Preliminary Conclusions

Needless to say the way in which laws are enacted varies from country to country and also depends on the level of analysis, village level, the community, or transnational regimes, however there are some overarching processes that can be identified through a holistic approach that takes into consideration the mores and values of those who enact and are affected by the laws. Anthropological studies provide the necessary detail and holism in order to get a glimpse at the complex process of norm creation and the subsequent crystallization of those norms into laws. While it is difficult to concentrate on the role of the demos in the negotiation and renegotiation of laws at the national level due to the presence of a coercive power (*leviathan*), it is much easier to concentrate on the interaction of a vast array of actors at the transnational level. This paper covered a few examples of norm creation at the transnational level and how they can be analyzed from an institutional constructivist perspective while also discussing Habermans' approach to the Kantian project and the role of supranational organizations in the negotiation of laws.

This brief exploratory essay shows that there can be transnational norm creation in a similar fashion as there is cooperation and dialogue between different social and cultural groups at the national level. Therefore institutions such as the International Criminal Court and other IGOs with adjudicatory powers can legitimately impart justice as long as the norms they embody have been internalized by the vast array of actors in the transnational sphere and those norms have been arrived at through constant dialogue leading to a shared intersubjective understanding.

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