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Constitutional Migration' reviewed in light of 'Obedience Theory'

Introduction

The idea that law is 'travelling' beyond national borders is not new, it is most known as the phenomenon of legal globalization. However, this flow, like the wind, has no univocal circulation movements, be it in terms of content or form. This flow can be observed at the state-to-state level or international-to-state level, it may induce improvements at the domestic level in terms of democracy and human rights or regressions in those areas, for the benefit of 'higher interests'. In her article about 'constitutional migration', Kim Lane Sheppele argues that this term should be preferred to the term 'constitutional borrowing', in that it gives us tools "[...] to think with what 'borrowing' cannot."¹The concept of 'constitutional borrowing' is claimed to mislead the understanding of how constitutional ideas travel or move in transnational legal space. It reduces the scope and transformational effect of the flow of legal ideas but it is also limited to state-to-state borrowing.² Sheppele claims that legal globalization is conducive of progress in the human rights areas (what she calls the first wave), as well as regressions in the same areas for the benefit of other phenomenon of legal globalization, such as international security law. She analysis the phenomenon of integration of international norms into domestic legal orders by using as a causal explanation the pressure exercised by 'higher levels' (international levels) on states. However, I argue that this explanation might overlook certain elements such as the diversity of actors, state identity and interests and that these elements can be found partly in the Obedience theory.

¹ Sheppele, K. L. (2007). The migration of anti-constitutional ideas: the post-9/11 globalization of public law and the international state of emergency. In S. Choudhry (Ed.), *The Migration of Constitutional Ideas* (p. 458). Cambridge: Cambridge University Press, p. 347.

² Sheppele, K. L. (2007), *idem*, p. 349.

1. Constitutional migration

The concept of 'constitutional borrowing', is criticized in its consequences at two levels: 1) the characteristics of the flow, i.e. if I borrow a book it implies that I have to return it; that I make a temporary use of it; that I am not the owner of the book; and that I 'use' the book without altering it. 2) the characteristics of the parties, i.e. when borrowing a book, I will consider that I am equal to the lender and that I want the book and voluntarily accept it.

On the other hand, the concept of 'constitutional migration' provides a wider explanatory scheme: 1) at the level of the flow, if I migrate to another country, it could be because I expect to benefit from higher levels of legal protection (if for example I am a political refugee); and I might as well project ideas as to what the new place where I migrate will offer to me (e.g. the idea of the 'American dream'). 2) at the level of the parties, I might migrate because I want it, it is my will or I might be forced to migrate because of the internal situation in my country.³ In a word, the concept of migration enables to think the transformations implied by the flow, and thus broadens its scope not only beyond domestic constitutional ideas, but also to international legal ideas (coming from the international community or international institutions) that can 'move' to domestic legal orders. In this sense, states may be influenced by legal globalization independently of each other, i.e. legal globalization does not only originate horizontally, at the states level, but also vertically, from the international to the state level.⁴

Furthermore, legal globalization has been observed in two waves: firstly, in the field of human rights, and most recently in international security law, created by the UN Security Council and regional bodies in order to tackle terrorism.⁵ Sheppele claims that this second wave of legal globalization undermines domestic constitutional structures and protections. She examines the UN Security Council actions and their

³ Sheppele, K. L. (2007), *op.cit.*, p. 348.

⁴ Sheppele, K. L. (2007), *idem*, p. 349.

⁵ Sheppele, K. L. (2007). *ibidem*.

legal implications for domestic law, as well as the power game between the Security Council and the states. To put it short, by issuing the Resolution 1373 under the authority of Chapter VII of the UN Charter (which makes the Council's Resolutions legally binding), the Security Council required states to take several internal measures in order to fight terrorism. While it appeared that some states attempted to resist the Security Council's pressure, the majority endeavored compliance with the requirements issued by the Security Council. Sheppele analyses this phenomenon through the legal implications for domestic legal systems, i.e. as impeding on domestic constitutional principles⁶ and explains the propensity of some states to voluntarily encroach upon their constitutional principles because of their own political agenda and/or the power games within the domestic order.⁷ She further concludes, "The press toward using emergency and emergency-like powers to fight terrorism has created the migration of anti-constitutional ideas, just as the first wave of public law globalization produced a migration of constitutional ideas."⁸ This phenomenon is explained by a top-down dynamic where the Security Council played the legislative role and where compliance with the enacted norms is monitored by an institutionalized entity (the Counter-Terrorism Committee).

The merit of this explanation is that it opens the field of transnational legal flows not only in terms of 'progresses' for the advancement of human rights. It also enables to think the convergence of national legal systems from a vertical perspective (international to national legal orders) and not only from a horizontal perspective alone (national to national legal orders). However, Sheppele's causal explanation is to be found in pressure, and to some extent in state's political agenda and domestic institutions power games. This is probably overlooking several elements: 1) states are not monolithic blocs; they are composed of an array of actors, including civil society actors. In this sense, the fact that the war on terror has been elevated into an ideological war and thus penetrated not only the governmental level but also the

⁶ Sheppele, K. L. (2007), *op.cit.*, p. 361.

⁷ Sheppele, K. L. (2007), *idem*, p. 368.

⁸ Sheppele, K. L. (2007), *ibidem*.

civil society of each state has to be taken into account; 2) the 'identity' factor also plays an important role, in the sense that, the 9/11 drama was felt as an attack not only on the US but on what the US represented. And thus like-minded states, including the governmental and non-governmental groups within states that identify with the US model, values and ideals were feeling threatened by such an attack; 3) the attack itself represented a use of violence that is totally condemned and against the spirit of the community of states constituted by the United Nations. Hence, the stake might not have been perceived as a simple matter but as a matter of survival, the survival of the present international order. This international order can be seen as the guardian of domestic legal orders (a society were terrorist acts would become 'usual' would most certainly not be able to keep its internal stability), and thus domestic norms should 'submit' to international norms when matters of survival are at stake.

These elements of analysis can be found in the 'Obedience theory' developed by Harold Koh, and although this theory has been developed regarding what Sheppelle calls the first wave of legal globalization (in the human rights area), it might be a useful (though no comprehensive) tool for further analyses of the second wave, i.e. international security law, not only in terms of pressure but also in terms of persuasion. The next section will thus describe the Obedience theory in order to highlight several elements that might intervene in states compliance with international norms.

2. Obedience theory

Harold Koh sees strong explanatory power in the arguments of constructivist theories and of the English 'international society'⁹, according to which states obey international law not only on the basis of 'sophisticated calculations' on how compliance or non-compliance affect their interests, but "[...] because a repeated

⁹The British "international society" scholars, represented by Hedley Bull and Martin Wight considers norms, values, and social structure of international society as shaping the identity of national actors who operate within the international society.

habit of obedience remakes their interests so that they come to value rule compliance.”¹⁰ Moreover, compliance is also seen as deriving from the relationship between individual rules and the broader context of international relations, i.e. compliance with specific rules is induced by a long-term interest in the maintenance of an international community based on law. These assumptions are completed by the notion of transnational legal process. Transnational legal process is “the theory and practice of how public and private actors including nation-states, international organizations, multinational enterprises, nongovernmental organizations, and private individuals, interact in a variety of public and private, domestic and international fora to make, interpret, internalize, and enforce rules of transnational law.”¹¹ It differs from international legal process theories (basing their explanations at the international level exclusively)¹² in that it focuses on transnational, normative and constitutive character of international legal processes and introduces a central element, i.e. an interaction process resulting in the interpretation of international norms at the institutional level and internalization of those norms at the domestic level.

Koh developed a ‘theory of Obedience’ with international law according to which “True compliance is not so much the result of externally imposed sanctions so much as internally felt norms. In other words, as we move from external to internal factors, we also move from coercive to constitutive behavior.”¹³ Thence, the most effective form of *law-enforcement* is not the imposition of external sanction, but the inculcation of internal obedience. Different degrees of norm internalization are distinguished from coincidence to obedience. These degrees express the

¹⁰ Koh, H. H. (1997). Why Do Nations Obey International Law? *The Yale Law Journal* , 106 (8), p. 2634.

¹¹ Koh, H. H. (1997)., *idem*, p. 2656.

¹² Abram Chayes, Thomas Ehrlich, Andreas Lowenfeld were part of the International Legal Process School that addressed the question of the ‘nature’ of the legal process by which interests are adjusted and decisions are reached on the international scene. The causal mechanism is here process based: transnational actors interact in public and private fora, and this interactive process enables transnational actors to comply with transnational law. International law provides thus a matrix for enabling political decision at three levels: it constrains actions, it shapes organizational structures and procedures, and it provides the basis for justifying or legitimizing actions.

¹³ Koh, H. H. (1999). How is International Human Rights Law Enforced. *Indiana Law Journal* , 74, p. 1408.

transformation of rules from being an external sanction to becoming an internal imperative, thereby inducing an increase in normativity, or obligation felt *internally* by state actors.

Obedience is defined as a “[...] rule-induced behavior caused when a party has ‘internalized (a) norm and incorporated it into its own value system’.”¹⁴ It is initiated by a transnational legal process conducive of incorporation of rules and norms into domestic legal systems. This process is composed of three sequences: interactions at the institutional level that provide discussion *forum*, interpretations and internalization by domestic legal systems.¹⁵ It is normative, dynamic and constitutive. The variations in this process then lead states to comply or obey rules and norms.

Interaction is ‘provoked’ by one or more transnational actors and results in an *interpretation* of the international norm at stake. The party that initiates this phase does not simply aim at coercing the other, but aims at *internalizing* the new interpretation of the norm into the other party’s domestic legal system. Consequently the party internalizing the norm integrates the new interpretation as part of its own internal values. The iterative character of this process enables parties to further internalize the norm and re-shape the interests and identities of the participants in the process.¹⁶

Transnational actors form what is called ‘epistemic communities’ and are composed of governmental officials, private ‘norm entrepreneur’¹⁷, NGOs, etc that address a

¹⁴ Raustiala, K., & Slaughter, A.-M. (2002). International Law, International Relations and Compliance. In W. Carlsnaes, T. Risse, & B. A. Simmons (Eds.), *Handbook of International Relations* (pp. 538-558). Sage Publications, p. 544.

¹⁵ Koh, H. H. (1999)., *op.cit.*, p. 1399.

¹⁶ Koh, H. H. (1997)., *op.cit.*, p. 2646.

¹⁷ Ethan Nadelmann defines ‘Transnational moral entrepreneur’ as nongovernmental transnational organizations who “[...] (1 mobilize political opinion and popular support both within their host country and abroad;” 2) “stimulate and assist in the creation of like-minded organizations in other countries”; 3) “play a significant role in elevating their objective beyond its identification with the national interests of their government”. See Nadelmann, E. A. (1990). Global Prohibition Regime: The Evolution of Norms in International Society. *International Organization* , 44 (4), p. 482. See also Payne, R. A. (2001). Persuasion, Frames and Norm Construction. *European Journal for International Relations (EJIR)* , 7 (1), 37-61;

specific legal issue and mobilize society's actors (in the public or private sphere, at the domestic or international level). They constitute the 'engine' behind transnational legal processes through which interaction is made possible, leading to norm interpretation and reinforcement by internalization of the norms in domestic legal systems.

Interaction processes occur in the frame of institutions, regimes or transnational networks, they "[...] generate both norms of external conducts (such as treaties), and specific interpretation of those norms in particular circumstances".¹⁸ This process creates patterns of behavior that are internalized through executive actions, legislation, and judicial decisions into the domestic legal and political structures. Internalization occurs by the perception of domestic decision-maker that their actions might otherwise be seen as unlawful, the 'feeling of obligation' is here internalized in the sense that actors *feel* that they are acting unlawfully if they do not comply with the norm at stake. Thence, domestic institutions adopt "[...] symbolic structures, standard operating procedures, and other internal mechanisms to maintain habitual compliance with the internalized norms."¹⁹ Internalization in turn produces 'default patterns of compliance'.²⁰ However, internalization can occur at different levels, i.e. social (social legitimacy and popular support), political (recognition by the elite group and in policies) and legal (legal transposition and judicial interpretation) levels, and at various time.

It should be noted that this theory does not explain in detail how transnational actors are positioned toward each other, are they embedded in power relations or in equal relations? And how does this influence the process of internalization? The position of actors toward each other is addressed by Goodman and Jinks through the identification of "patterns of acculturation", that is the societal pressures upon a state to assimilate with a higher normative standard as opposed to simple coercion

Finnemore, M., & Sikkink, K. (1998). International norm dynamics and political change. *International Organization*, 52 (4), 887-917.

¹⁸ Koh, H. H. (1997)., *op.cit.*, p. 2654.

¹⁹ Koh, H. H. (1997). *ibidem*.

²⁰ Koh, H. H. (1997). *ibidem*.

or persuasion. The concept of acculturation aims at grasping the social environment in which states evolve in order to better understand the mechanisms by which law influences state behavior.²¹ This is without doubt a non-negligible dimension of the process of internalization of international norms. However, another notion could also be highlighted here, i.e. the notion of trust. As Richard Bilder pointed out in his lecture about the role of trust in international agreements “[...] trust is a psychological device through which people seek to manage the risks inherent in their cooperative and other interactions.”²² As Peter Haas mentioned, compliance might diverge according to the way agreements have been reached, i.e. truly voluntary will or exercise of pressure/power. Here we need to precise the term ‘truly voluntary will’: depending on the type of cooperation, parties might engage in cooperation and bind themselves with norms whose consequences are already known or familiar to them. In this sense, ‘truly voluntary will’ involves agreeing on already known schemes of actions and compliance patterns. Parties trust each other because they know what they want from each other, they agree on the substance of the norms and their consequences are known. It involves a kind of trust based on certainty, ‘I trust because I know the consequences and I am certain I want them’. It is a kind of trust based on interests. In the sense that the trust is not so much directed at the other party than at our own understandings and assessments. On the other hand, states might engage in cooperation whose compliance consequences are less certain, not known or difficult to assess. Here ‘truly voluntary will’ takes another meaning and is more linked to trust based on a mix of interests and values. Parties agree to be bound because the ‘ideal’ or expected consequences of the norms are wanted. Even though the consequences are not certain and cannot be exhaustively assessed in terms of costs, burden, effort, etc. This involves a trust based on the values that are recognized in the norm but also a trust in the other

²¹ Jinks, D., & Goodman, R. (2005). International Law and State Socialization: Conceptual, Empirical, and Normative Challenges. *Duke Law Journal*, 54, p. 990. See also Koh, H. H. (2005). Internalization through socialization. *Duke Law Journal*, 54 (4), 975-982 and Alvarez, J. E. (2005). Do States Socialize? *Duke Law Journal*, 54 (4), 960-974.

²² Bilder, R. B. (1981). *The Role of Trust in International Agreement*. University of Wisconsin, Law School. <http://papers.ssrn.com/>, p.3.

party that it will, via its demands, 'empower' the other to reach compliance.

Conclusion

What could be the added value of applying the assumptions of the Obedience theory to Sheppele's analysis?

Firstly, the overall assumption of the Obedience theory that compliance is also a matter of long-term interests in maintaining the international legal order might be integrated in the explanation of states compliance to international security law inasmuch as the 9/11 drama was perceived as a threat to the international order stability as mentioned in the Security Council Resolution 1368 that called the attacks "a threat to international peace and security".²³ Moreover, this threat is perceived not only at the international level but also at the domestic level. Terrorism might well destabilize the international order but it occurs at the national level and that implies increasing security and prevention within each domestic legal order.

Second, regarding the analysis of states as monolithic blocs: the fact that the Obedience theory rests on transnational legal processes that include the actions of epistemic communities could also be a valuable factor of explanation. What are, for example, the epistemic communities concerned and active at the level of the UN Security Council, and at the domestic level as well? What role do they play and what instruments do they use? Are epistemic communities involved at the social, political or legal level? Here we might think, for example, about the role of foreign offices in advising their government, but also about the role of media (the fact that the 9/11 images were transmitted around the clock on TV channels all over the world), or the role of judges applying the laws enacted at the domestic level.

²³ Sheppele, K. L. (2007)., *op.cit.*, p. 352.

Third, regarding the identity factor: the identification of certain epistemic communities with the values and interests that were threatened by the 9/11 attacks might here be helpful in explaining the mobilization of some states. But not only that, the discussions that happened at the Security Council, i.e. the interaction process initiated at the international level resulted in an interpretation in the form of the Resolution 1373 and its subsequent resolutions and institutional undertakings. This was in turn internalized by state actors at the domestic level through legislations, and the same effect might happen as in the case of human rights law, i.e. the party integrating the norm integrates the new interpretation as part of its own internal values in a process that re-shapes interests and identity. This 'new' interpretation might well be the fact that the security of the international legal order depends on the stability of the domestic legal order, which in turn rests on peace at the international level.

Lastly, I would argue that trust might also be an element of explanation for states compliance in the area of international security law. Indeed, the adoption of anti-terrorist laws and regulations entails a great deal of unknown consequences at the domestic level, not the least is the reaction of the civil society against these measures. Hence, in some cases it might appear that the conservation of higher interests, i.e. international peace, led to trust the actions taken by the UN Security Council as 'the right thing to do'.

As we have seen several explanation factors can be drawn from the Obedience theory and applied to the phenomenon of international security law. If these assumptions would reveal themselves to be correct, it would imply that not only pressure is a causal factor for states compliance in this second wave of legal globalization, but also persuasion and trust.

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