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# *Incomplete Internalization and Compliance with Human Rights Law: A Reply to Ryan Goodman and Derek Jinks*

Roda Mushkat\*

## **1 Overview**

In a series of influential articles, Ryan Goodman and Derek Jinks, professors at Harvard Law School and University of Texas Law School respectively, have proposed a distinctly sociological approach to analysing compliance with human rights law.<sup>1</sup> The conceptual framework which they have constructed for this purpose is grounded in the notion of acculturation, a well-established social process whose dynamics in the international legal context has been examined by the two authors in a multi-step fashion, featuring a progression from general model-building to elaborate responses to specific issues raised by critics. Their latest contribution on the subject falls predominantly into the latter category. It is entitled 'Incomplete Internationalization and Compliance with Human Rights Law' and has been recently published in the *European Journal of International Law*.<sup>2</sup>

Goodman and Jinks differentiate between coercion-based and persuasion-based mechanisms for promoting adherence to social norms, including human rights law. The former entail pressure on recalcitrant actors to follow a desired/virtuous path and the latter connote resort to conviction in an effort to instil a belief in the intrinsic value of the relevant norms and their appropriateness. These parallel processes of social influence are observed in the international arena and are assumed to have

\* Professor and Director of the Centre for International and Public Law, Brunel Law School, Brunel University; Honorary Professor, Faculty of Law, University of Hong Kong. Email: Roda.Mushkat@brunel.ac.uk.

<sup>1</sup> Goodman and Jinks, 'Toward an Institutional Theory of Sovereignty', 55 *Stanford L Rev* (2003) 1749; Goodman and Jinks, 'International Law and State Socialization: Conceptual, Empirical, and Normative Challenges', 54 *Duke LJ* (2005) 983.

<sup>2</sup> Goodman and Jinks, 'Incomplete Internationalization and Compliance with Human Rights Law', 19 *EJIL* (2008) 725.

inspired the two principal strategies relied upon to enhance rule conformity: the goal is achieved either by exercising what amounts to coercion or by employing softer forms of persuasion.

In contrast, acculturation apparently involves a norm-centred response on the part of relevant actors without direct stimuli, whether ‘hard’ or ‘soft’ in nature, originating from any authoritative source, at least in the *ex ante* sense of the term. The process is presumably self-shaped for the most part and characterized by a high degree of spontaneity, although not necessarily the absence of formal deliberation and coherent structure (given that it is self-shaped). There does not seem to be a target as such, but social influence flows from one segment of the international legal system to another and it may thus be possible to identify *ex post* parties playing a role akin to that of a source and those functioning like a target. As Goodman and Jinks have elaborated:

By acculturation, we mean the general process by which actors [target] adopt the beliefs and behavioural patterns of the surrounding culture. This complex social process is driven, at bottom, by identification with a reference group [source] which generates varying degrees of cognitive and social pressures to conform with the behavioural expectations of the wider culture.<sup>3</sup>

Such a perspective evidently diverges from those rooted in the realist/rational choice schools of thought. Goodman and Jinks also argue that, while it qualifies as broadly constructivist, the theoretical viewpoint they put forward possesses attributes that set it apart from fundamentally similar (i.e., sociological) approaches. Both constructivism and the acculturation-centred analytical framework posit that actors in the international arena, notably states, are products of social processes. However, whereas the former displays a bottom-up orientation, the latter focuses on the global level (i.e., the way states reflect the wider institutional setting in which they are embedded). By the same token, Goodman and Jinks de-emphasize the importance of persuasion and habitualization in determining state action and highlight the role played by mimicry and orthodoxy in the process.<sup>4</sup>

Legal researchers typically seek empirical support for their propositions by conducting case studies (unlike experimental social scientists, generally of the single rather than multiple variety). Goodman and Jinks opt for an essentially top-down methodological route. Empirical validation of the acculturation hypothesis is obtained at the macro level where a high degree of structural isomorphism is said to prevail. Specifically, ‘the structure and formal commitments of States, across remarkably many issue areas, are increasingly similar. The pattern of this isomorphism strongly suggests that the structural attributes of States substantially derive from institutionalized models promulgated at the global level.’<sup>5</sup>

Unlike their realist counterparts, legal scholars who embrace the constructivist perspective are almost invariably inclined to see the proverbial state compliance glass as

<sup>3</sup> *Ibid.*, at 736.

<sup>4</sup> *Stanford L. Rev.* *supra* note 1, at 1750–1753.

<sup>5</sup> *EJIL*, *supra* note 2, at 726.

half full rather than half empty. Goodman and Jinks are more flexible in this respect in that their conceptual framework allows for a decoupling of general values from practical action ('[p]ublic conformity with global norms often has little to do with private acceptance of those norms').<sup>6</sup> Nonetheless, they stress that in many instances acculturation features a substantial internalization of global scripts, may entail decoupling without materially impinging on adherence to human rights/international law, facilitates reform and creates conditions conducive to a narrowing of the gap between general values and practical action.<sup>7</sup>

## 2 Assessment

Goodman and Jinks offer original insights regarding rule conformity in the international arena and dissect the subject in a rigorous fashion, skilfully blending legal and sociological ideas in the process. The theoretical edifice they propose merits serious attention and should be productively incorporated into academic work on international legal compliance (including human rights law). The explicit top-down orientation, in particular, is quite unique in this context and adds a new dimension to a sub-field of international law characterized by a proliferation of bottom-up approaches, even if highly heterogeneous in nature. However, as I have experienced in my research on Chinese adherence to the provisions of various international legal instruments,<sup>8</sup> the Goodman and Jinks analytical structure poses some conceptual and practical problems which need to be highlighted and addressed.

Acculturation is largely taken as given. The precise channels through which it exerts influence on state behaviour are not specified. A number of useful examples, involving principally national security practices, are provided.<sup>9</sup> These are illuminating, but their function is to selectively illustrate rather than furnish a fairly detailed blueprint. Elsewhere in constructivist (or, for that matter, realist) territory, micro-type theoreticians have tended to generate more concrete designs. A scholar wishing to explore the impact of acculturation on rule conformity in a well-defined geographical

<sup>6</sup> *Ibid.*, at 727.

<sup>7</sup> *Ibid.*, at 727–728.

<sup>8</sup> See Mushkat and Mushkat, 'The Political Economy of International Legal Compliance: Pre-1997 Predictions and Post-1997 Realities in Hong Kong', 10 *UC Davis Journal of International Law & Policy* (2004) 501; Mushkat and Mushkat, 'International Law and Game Theory: A Marriage of Convenience or Strange Bedfellows?', 2 *NZ Yearbook of International Law* (2005) 101; Mushkat and Mushkat, 'Economic Growth, Democracy, The Rule of Law, and China's Future', 29 *Fordham International Law Journal* (2005) 229; Mushkat and Mushkat, 'The Political Economy of Sovereignty Revisited: A Re-Examination of the Public Choice Model in Light of China's Accession to the World Trade Organization', 7 *Asper Review of International Business and Trade Law* (2007) 115; Mushkat, 'Implementing Environmental Law in Transitional Settings: The Chinese Experience', 18 *University of Southern California Interdisciplinary Law Journal* (2008) 45; Mushkat, 'Contextualizing Environmental Human Rights: A Relativist Perspective', 26 *Pace Environmental Law Review* (2009) 119; Mushkat, 'Dissecting International Legal Compliance: An Unfinished Odyssey', abstract available at SSRN: <http://ssrn.com/abstract=1394359>; Mushkat, 'Compliance with International Environmental Regimes: Chinese Lessons', abstract available at SSRN: <http://ssrn.com/abstract=1394385>.

<sup>9</sup> *Stanford L Rev. supra* note 1, at 1766–1780.

setting (e.g., China) rather than on the global level is thus deprived of effective, let alone standardized, tools to undertake the task.

Incomplete model specification means that it is not entirely certain how acculturation operates across space and over time. The impression given, perhaps not deliberately, is that this, for all intents and purposes, is a uniform process. In the final analysis, all states, be it cautiously-treading China or muscle-flexing Russia, succumb to normative stimuli emanating from global sources, although mild (in terms of consequences) forms of decoupling do materialize. The divergences, if any, appear to be mostly immaterial. By the same token, the dynamics of the process is not a crucial element in the equation. Whether it is smooth or uneven, to single out just two possible patterns, does not seem to be highly relevant. The emphasis is on the underlying cause (acculturation) and the ultimate effect (state action/compliance with international law).

Black box-style modelling, while focused and parsimonious, may lead to a loss of valuable information. A juxtaposition of Chinese socio-cultural impediments to the promotion of human rights with the more propitious institutional and ideological climate prevailing in Taiwan lends support to this assertion. As Metzger has noted, China has embarked on its modernization drive with an uninhibited political centre, but Taiwan took the same step with an inhibited one.<sup>10</sup> The powers that be in Beijing also enjoy the dignity derived from their status as the rulers of unified China at peace ('the mandate of heaven'), whereas their Taipei counterparts had less scope for autonomous action because of the lack of this dignity and due to rising Taiwanese nationalism.<sup>11</sup>

Another marked difference lies in the intellectual underpinnings of the two regimes. The Maoist ideology drew strength (it still selectively does) from Mao's charisma, the powerful saga of the communist revolution and the prestige of Marxism as a philosophy not merely in accord with the revered May Fourth Movement but one viewed seriously in intellectual circles.<sup>12</sup> By contrast, Taiwan's Sunist ideology was at odds with the May Fourth spirit, commanded no worldwide attention and was an eclectic mode of thought much more compatible with the acceptance of human rights logic than the ideological mosaic observed in China.<sup>13</sup>

Further, by incorporating the notion of democracy and endorsing the Confucian tradition with its propensity towards 'protest in the name of righteousness', Sunism was rhetorically vulnerable to a process of spiritual mobilization aimed at securing universal franchise and human rights.<sup>14</sup> Thus, arguments in favour of political gradualism are quite respectable in China today, and are even advanced by prominent scholars and independent professionals, but such arguments in previously authoritarian

<sup>10</sup> Metzger, 'Sources of Resistance', 9 *Journal of Democracy* (1998) 18–26, at 23.

<sup>11</sup> *Ibid.*, at 23.

<sup>12</sup> *Ibid.*, at 23.

<sup>13</sup> *Ibid.*, at 23–24.

<sup>14</sup> *Ibid.*, at 24.

Taiwan could be put forward only by those brave enough to incur the wrath of 'true intellectuals' demanding democracy and the Rule of Law.<sup>15</sup>

From an external perspective, Taiwan was considerably more influenced by American culture than China has been or is likely to be, and its precarious international position rendered it highly vulnerable to liberal pressures from Washington (the administration and Congress) and US media.<sup>16</sup> In Taiwan, some key political groups also gravitated towards the post-Second World War Japanese model and shared political and legal ideals with liberal circles in Japan.<sup>17</sup> Equally significant was the desire of the Taipei ruling elite, at least by the 1980s, to 'upstage' China by successfully importing Western-type economic structures and forms of governance.<sup>18</sup> Its Beijing counterpart displays far greater ambivalence towards symbols of Western civilization.<sup>19</sup>

For the latter, importation of ideas has the problematic implication that China is merely following in Taiwan's footsteps. The blueprint it prefers is that of 'transcending the West' (and, of course, Taiwan) by realizing a version of modernity different from and superior to the Western variety.<sup>20</sup> By the same token, the not entirely positive Chinese image of the West as a developmental model to be avoided has been much more prominent in mainland than in Taiwanese intellectual and policy circles. This somewhat critical image also meshes with a nationalistic outlook fairly common on the mainland but quite rare in Taiwan.<sup>21</sup> Such institutional and ideological divergences inevitably impinge on acculturation and attitudes towards international law.

In terms of prevailing conceptions and assumptions underlying model-building, acculturation bears some similarities to globalization. Occasional setbacks notwithstanding, both processes are expected to evolve in an orderly fashion and culminate in an appealing/liberal structural configuration. Outliers and time-dependent complexities are thus conveniently relegated to the periphery. Powerful impulses originating in the international arena readily dominate any countervailing forces and minimize deviations from the secular trend. To oversimplify matters, the outcome is a foregone conclusion, although this inherently attractive position may encounter stronger resistance among economic historians than culturally-oriented students of human rights/international law.

The analogy is fruitful because it allows a number of pivotal lessons to be drawn. Perhaps the most significant is that deeply-entrenched trends can be reversed. Globalization flourished during an era known as the *belle époque* (1870–1914), during which the internationalization of economic (as well as social) life was nearly complete, according to Keynes.<sup>22</sup> The prospect of a devastating war in the early 20th century was deemed to be utterly unthinkable. Yet, the guns of August

<sup>15</sup> *Ibid.*, at 24.

<sup>16</sup> *Ibid.*, at 24.

<sup>17</sup> *Ibid.*, at 24.

<sup>18</sup> *Ibid.*, at 24.

<sup>19</sup> *Ibid.*, at 24.

<sup>20</sup> *Ibid.*, at 24.

<sup>21</sup> *Ibid.*, at 24.

<sup>22</sup> J.M. Grieco and G.J. Ikenberry, *State Power and Word Markets* (2002), at 6.

1914 brutally suppressed the seemingly irrepressible liberal idealism prevailing before that cataclysmic event.<sup>23</sup>

The dissection of globalization processes also suggests that patterns of structural isomorphism may give rise to a host of theoretical interpretations. Constructivism in its various forms is merely one of competing/complementary analytical perspectives embraced by scholars engaged in exploring it systematically. Structural and conjunctural theories examine the same phenomenon but from different viewpoints (in terms of focus, causal mechanisms and causal dynamics).<sup>24</sup>

Nor can all theoretical work on globalization be portrayed as macro/top-down in its orientation. Micro/bottom-up and hybrid-like research strategies are commonly pursued.<sup>25</sup> The phenomenon is too complex to be addressed in a conceptually and methodologically uniform fashion, necessitating shifts from one level of analysis to another and an eclectic synthesis of insights generated in the process.<sup>26</sup> Given the apparently close parallels between acculturation and globalization, manifesting themselves both in the theoretical and practical domains, a similarly wide-ranging and flexible approach might arguably be appropriate in seeking to come to grips with the former.

Indeed, the distinction between the macro/top-down and micro/bottom-up perspectives becomes at times blurred in the course of model-building and application. Realist and rational choice discourse is seldom couched in macro/top-down terms. Constructivists (as well as liberally-minded legal scholars), on the other hand, generally tend not to follow rigidly the established demarcation lines between fundamental levels of analysis. Key studies focusing on Chinese adherence to human rights/international law reflect this methodological pattern.<sup>27</sup>

### 3 Conclusion

Goodman and Jinks' studies constitute a seminal contribution to the burgeoning literature on international legal compliance. They offer an entirely new conceptual perspective, incorporating imaginatively sophisticated ideas from the social sciences and resting on solid empirical foundations. Nonetheless, there may be gaps in the theoretical façade constructed and areas where further exploration may be needed. Because of the intellectually provocative nature of this work, it has not lacked critical attention from legal researchers and Goodman and Jinks themselves have endeavoured to anticipate possible reservations about various dimensions of their approach. It is hoped that the views expressed here will be seen as part of that dialectical process, facilitating the evolution of an essentially compelling analytical framework.

<sup>23</sup> McGrew, 'The Logics of Globalization', in J. Ravenhill (ed.), *Global Political Economy* (2005), at 207–234, 208–224.

<sup>24</sup> *Ibid.*, at 224–299.

<sup>25</sup> *Ibid.*, at 224–299.

<sup>26</sup> *Ibid.*, at 224–299.

<sup>27</sup> A. E. Kent, *China: The United Nations and Human Rights* (1999); G. Chan, *China's Compliance in Global Affairs: Trade, Arms Control, Environmental Protection, Human Rights* (2006); A. E. Kent, *Beyond Compliance: China, International Organizations and Global Security* (2007).