Selective Adaptation and Institutional Capacity: Approaches to Understanding Reception of International Law under Conditions of Globalization

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I Introduction

Legal behavior is strongly influenced by norms of legal and political culture (Etzioni 2000, Kelsen 1991) and by the institutional context within which these norms are operationalized (North 1990). Cultural norms are reflected in rules, including formal laws and regulations and informal procedures and practices. The distinction between rules and the cultural norms they represent becomes especially important when rules particular to one cultural group are used by another, without a corresponding assimilation of underlying norms. Local implementation of non-local rules is also affected by the institutional context. Under current conditions of globalization normative tensions are present as liberal rules of governance generally associated with the Europe and North America are disseminated to other areas characterized by local norms that are often in conflict with norms of liberalism. Globalization also presents challenges for institutional performance, as organizational and administrative structures perform in ways that are embedded with local practices and conditions. International trade and human rights are matters of special importance, where concerns over compliance with international standards often reflect misplaced expectations about the enforceability of rules without agreement on underlying norms and institutional contexts. In the context of globalization, economic and political power has allowed trade and human rights standards associated with liberal democratic capitalism to be imposed on societies outside the European tradition, but has had less effect in displacing local cultural norms and institutional arrangements. Understanding treaty compliance can be furthered through appreciation of the normative and institutional context for legal
performance. This essay introduces an approach to understanding treaty compliance in light of normative factors of selective adaptation and organizational contexts of institutional capacity.

II Treaty Compliance and the Reception of International Law Standards

Treaty compliance is an important example of the reception of international law. Treaty compliance involves dynamics of interpretation and implementation of international legal standards. In cases where treaties involve rules grounded in non-local norms, interpretation involves a dynamic of selective adaptation by which non-local rules are interpreted according to local norms borne of legal and political culture. Even where normative conflict is absent, implementation of treaty requirements also involves factors of institutional capacity.

Selective Adaptation

Selective adaptation involves a dynamic by which international rule regimes are mediated by local cultural norms (Potter 2003, Potter 2004). Proceeding from typologies linking international rules regimes with associated sets of normative principles, and informed by concepts linking rule compliance with the existence of normative consensus, the paradigm of selective adaptation suggests that international human rights compliance may require accommodation with local cultural norms. This is not an exercise in justifying non-compliance with international obligations by reference to Party or state assertions about national and social interests. Rather, selective adaptation posits a model for understanding the reality that non-local rule regimes are interpreted and applied according to the extent of commonality between the norms underlying these rule regimes and local cultural norms. Thus, universal human rights standards on the right to adequate healthcare, for example, will in practice be interpreted according to local norms concerning such matters as the relationship between individual and collective claims, expectations about health and the delivery of health care.

Compliance with treaty rules involves a myriad range of interpretation and application, which in turn involve the intervention of interpretive communities comprised of political, legal and socio-economic elites (Fish 1980). In the trade
area, for example, the international rule regime is grounded in liberal norms of popular sovereignty and limits on state agency (Biukovic 2006). In the health area, the international rule regime is grounded in norms about the links between health and social well-being, the importance of health in realizing values of human dignity, and shared social interests in prevention, monitoring, and treatment of infectious disease (Biddulph 2003). Selective adaptation analysis would examine the extent to which these norms are shared by interpretive communities in treaty member states.

The paradigm of selective adaptation may also be seen to operate by reference to factors of perception, complementarity, and legitimacy. Perception influences understanding about foreign rules and local norms and practices. In the area of human rights to health care, this may involve perception about what the international rule regime requires in terms of health care priorities, outcomes and processes, and perception about local conditions and expectations. Complementarity describes a circumstance by which apparently contradictory phenomena can be combined in ways that preserve essential characteristics of each component and yet allow for them to operate together in a mutually reinforcing and effective manner. In the health care area, for example, complementarity may help explain how international standards for assessment of health needs and delivery of health care can accommodate local social practices. Legitimacy concerns the extent to which members of local communities support the purposes and consequences of international standards. Thus, in the health care sector, popular reactions to state-controlled reporting on infectious diseases such as HIV, SARS and Avian Flu may signal varying levels of legitimacy for the process of localizing international standards.

While selective adaptation offers potential to understand dynamics of localization of international human rights standards, it also works to limit efforts to insulate or excuse government behavior from human rights criticism. For the key determinant in selective adaptation is the relationship between the norms underlying international human rights standards and local cultural norms—not necessarily as articulated by the state or by local elites, but rather as discerned empirically in society. In the health area, we have found that the international rule regime is
grounded in norms about the links between health and social well-being, the importance of health in realizing values of human dignity, and shared social interests in prevention, monitoring, and treatment of infectious disease (Jacobs and Potter 2007). While much of the academic and policy work on the international health rights regime focuses on rule compliance, understanding such compliance requires more than simply comparing local performance against international requirements. Rather, compliance can be understood more clearly by examining the extent to which norms underlying the international regime are consonant with local norms. This can help explain compliance outcomes, by differentiating between those situations where non-compliance is the result of normative conflict and those cases where local norms are consistent with the norms of the international regime but local practices fail to satisfy international standards. Such a norms-based approach invites expansive empirical research on the structure and content of local cultural norms, and the link with acceptance of international rule regimes. The focus then shifts from state-centered discourses of compliance to socially grounded analysis of normative consensus.

As a result, remedies for non-compliance with international human rights standards may vary depending on the normative relationship between international rule regimes and local society. Demonstrated lack of normative consensus on the goals, processes, and outcomes on human rights may invite efforts to explore the potential for accommodation of normative difference and may support movement toward accepting normative diversity in the recognition and enforcement of human rights. On the other hand, non-compliance in the absence of normative conflict may invite performance remedies and possibly institutional incentives to induce stronger compliance. In sum, the focus on normative dynamics of compliance allows the paradigm of selective adaptation to limit the scope of claims to cultural relativism as an explanation for non-compliance with international human rights standards. Where demonstrable conflicts exist between international rule regimes and local popular norms, accommodation to cultural differences might be useful. But non-compliance unrelated to factors of normative consensus cannot be excused by reference to cultural relativism.
2 The Challenge of Institutional Capacity

Alongside the normative interpretation offered by selective adaptation as a dynamic of interpretation hinging on issues of legal and political culture, institutional capacity addresses operational factors of system performance, which is contingent on domestic political and socio-economic conditions (Healey 1998, Martin & Simmons 1998).

In China, for example, local conditions of rapid socio-economic and political transformation pose particular challenges for institutional capacity. With official acceptance of the decline of class struggle, the regime turned its attention away from managing social behavior and more toward supporting economic growth. The gradual loosening of social and economic restraints presented the regime with new challenges of maintaining political control while still presenting a broad image of tolerance aimed at building legitimacy. Under such circumstances, institutions of social control must operate in an environment of changing contexts and priorities. No longer is the government focused on directing social behavior to the meet the imperatives of revolutionary transformation, but instead aims to facilitate broader socio-economic autonomy that is still subject to political oversight. Yet the policy consensus over this transformation remains weak, with the result that social autonomy is not subject to reliable institutional protection. Newly emerging institutions, in the human rights area and others, continue to struggle for support and operational effectiveness. Hence discussion of institutional capacity in China should focus initially on basic questions of purpose, location, orientation and cohesion (Potter 2004).

Institutional Purpose concerns the way in which the goals of institutions reflect material and ideological contexts, the availability and nature of financial, human and other resources, and the various limitations that attend institutional performance. Institutional purpose plays a significant role in determining the capacity of institutions to respond to socio-economic change. Just as China's political reform has been driven by policy goals of social stability and the need to preserve the Community Party's monopoly on power, so too has legal reform been driven largely by policy imperatives centered on economic growth aimed at building Party legitimacy. The "relative autonomy" ascribed to legal institutions in the
European and North American traditions may be even more limited in the case of legal reform in China. Thus, the capacity of China’s legal institutions to implement international human rights standards depends on the extent of clarity and consensus regarding policy objectives.

**Institutional Location** concerns the ways in which geographic placement affects perception and behavior. This involves particularly the question of balancing central authority with decentralization of social and economic development initiatives. China has a long tradition of tension between local and central authorities. The practical divisions of power and authority between local and central government departments permit an interplay of power and politics between the central and sub-national governments that echoes practices of federalism (Dougherty and McGuckin 2002, Dougherty, McGuckin, & Radzin 2002). Yet the PRC Constitution provides that China is a unitary rather than a federal state which, while nominally encouraging local initiative still subjects local authorities to unified leadership of the central government. And while scholarly discourses have come increasingly to accept the application of federalist principles to China’s circumstances often this discussion has been marginalized beyond the boundaries of established policy discourse. In the process of bargaining that accompanies the allocation of resources and the distribution of costs and benefits of policy initiative (Shirk 1993), formalistic requirements of submission to the unified state limit the flexibility of local officials. Rigid adherence to contested ideals of unitary authority also limits the ability of legal institutions at both local and national levels to exercise even limited autonomy in support of predictability and stability in socio-economic and political relations.

**Institutional Orientation** refers to the priorities and habitual practices that inform institutional performance. For governance institutions in China, orientation involves particularly the tension between formal and informal modes of operation. This is particularly sensitive in the periphery, where local social norms may privilege non-formal mechanisms for decision-making, dispute resolution, and resource allocation. Much has been written on the role of informal networks as vehicles for socio-economic regulation (Gold, Guthrie & Wank 2002). *Guanxi* in China is often seen as operating in juxtaposition to the role of law and legal
institutions, reflecting perceptions about the weakness of institutions for managing social, economic and political relations and allocating resources. Thus, guanxi may serve as a substitute for the norms and processes associated with formal institutions, allowing more flexible responses to increasingly complex social, economic and political relations. However, the potential role of informal institutions is challenged by the regime's continued insistence on maintaining formal organizational systems to defend ideological orthodoxy and enforce political loyalty. The tension between statist ethics of formal institutionalism and the pervasive local informal arrangements that it strives to control tends to divert resources from institutional performance and undermines institutional capacity.

Finally, institutional capacity depends on issues of Institutional Coherence, involving the willingness of individuals within institutions to comply with edicts from organizational and extra-organizational leaders, and enforce institutional goals. Compliance concerns the recognition and enforcement of norms (Etzioni 2000). Conflicts arise when the norms of particular organizations differ from those of the individuals within these organizations—such as where norms of public policy that drive organizational priorities require subordination of parochial interests of individual officials within the organization. China's anti-corruption campaigns may be seen as attempts to promote bureaucratic reform by disciplining and subordinating individual norms of officials to organizational norms of institutions. Ongoing efforts at bureaucratic reform have faced continuing difficulties in subordinating individual interests of officials to organizational norms of institutions.

III Summary

Factors of globalization have intensified participation of local communities in international legal regimes, including in many cases WTO accession and increased participation in international organizations and discourses for human rights. Yet, there are uncertainties about the extent to which increased participation in international legal institutions has resulted in local assimilation and enforcement of international law standards. Whether in trade or human rights participation in the international legal system often reflects patterns of resistance to international
norms of trade liberalization, while participation in human rights treaty systems sometimes suggests continued resistance to the imposition of international standards. Paradigms of 'selective adaptation' and 'institutional capacity' can be helpful to explain dynamics of local compliance with international law standards. Thus, local interpretation of international standards on trade and human rights may be seen to be moderated by conditions of local legal and political culture – resulting in a dynamic of selective adaptation whereby factors of perception, complementarity and legitimacy affect the interpretation and application of international law rules. Local implementation of international standards may be understood in terms of institutional capacity whereby factors of institutional purpose, location, orientation and cohesion affect the compliance with international law standards. While the dynamics of globalization may drive increased participation in the international legal system, possible conflict may also arise as expectations about treaty compliance face the prospect of disappointment. Understanding the substantive dynamics of local participation in the international legal system through the paradigms of selective adaptation and institutional capacity may help reduce the potential for disappointment, as the contours of normative assimilation and institutional performance are better understood.

(REFERENCES)


Fish, Stanley (1980), Is There a Text in This Class: The Authority of Interpretive Communities, Cambridge MA: Harvard University Press.

Gold, Thomas, Doug Guthrie, and David Wank, eds. (2002), Social Connections in China,
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