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Backlash against international law by the East?

How the concept of ‘transplantation’ helps us to better understand reception processes of international law

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The symbolic metaphor of ‘Eastphalia’ that has been referred to in the opening post of this symposium, which is a wordplay around ‘Westphalia’, is very loaded in its curious terminological choice. Westphalia is a myth that plays a central role in the linear narrative on the development of international law from West to East. The analogy is not very flattering – as it is another ‘orientalist’ labeling that creates an impression that the so-called ‘East’ will now follow the footsteps of the so-called ‘West’.

The ways in which the idea of a linear development of international law manifests itself has already been discussed elsewhere extensively and ought not to be rehashed here. Nor is it necessary to repeat the critiques ‘from an Eastern perspective’. Instead, I would like to discuss how it is possible to go beyond the idea of a linear development of international law. I propose to look into the process of what I call the ‘transplantation’ of international law. With this I mean the process which takes place during the adoption of a foreign legal system. It entails that the transplanted law necessarily comes to be rooted in the society to which it is transplanted to and hence, that this society comes to nourish such transplanted law. The central claim of this post is that the adoption of international law must be understood as such a transplantation of concepts and formats of western legal systems by the East. This will be illustrated with the example of the genesis of the concept of *right* in Japan. It is argued that this approach also helps us to better understand current developments many consider to be a challenge against international law by the East.

Beyond the linearity of dominant historical discourses about international law

There is a general consensus that the origin of international law is found in what is called ‘European’ international law’. This consensus has interestingly not been questioned by the abounding scholarship on the dark legacies of the European *mission civilisatrice*. In these critiques of ‘Eurocentrism’ in international law, the development of international law continues to be portrayed as being linear and having started as territorial expansion of European values through often forced adoptions of the European legal system by non-Western states. The idea of Eurocentrism also informs historiographical discussions. For instance, Martti Koskenniemi acknowledges that the vocabulary and set of techniques of analysis

deployed in international legal scholarship cannot escape Eurocentrism. The idea of a European international law that was expanded to the East is a central component of the idea of a linear development of international law from West to East.

Recent historical work on international law, however, shows that this linear view is too simplistic. Instead, alternative frameworks have been proposed such as that of Arnulf Becker Lorca's "appropriation" or Mohammad Shahabuddin's "contextualization". These alternative frameworks, while rightly contesting the idea of a linear development of international law, still fall short of capturing the complexity of the adoption of new legal systems in a country. It is important to emphasize that the adoption of international law also *recreated* the legal concepts by the use of analogies to the socio-legal system of the society where it was being transplanted (as much as European scholars created international law by analogy to their own domestic legal systems). I would like to share one small example which most of my colleagues from Europe find very intriguing: the concept of *right* in Japan. I submitted that this example usefully illustrates the process at work behind the transplantation processes discussed in this post.

Adoption of foreign legal system: the so-called 'Westernization' of Japan

As was already discussed in a previous post in this symposium, Japan experienced the adoption of foreign legal systems on at least two occasions, that is the adoption of the ancient Chinese legal system and the 19thcentury Westernization that included international law. This post focuses on the 19thcentury adoption of Western and international law.

By the beginning of 18thcentury, 'international law' was transformed from universal natural law to the law of nations which applied only among the 'civilized' European States, and the 'others' were left beyond the pale of law. Naturally, the choices left for the 'others' were either to adopt the European legal system to present themselves as 'civilized', or to be colonized. Japan was one of a few exceptional non-Western States which has never been colonized by Western powers. It is widely believed that Japan could fortunately persuade its fellow European powers that it would transform itself into a civilized sovereign nation by westernizing its socio-legal system. As this mainstream story goes, Japan has been 'modernized', the western system and thoughts 'replaced' the indigenous ones and Japan thus came to 'share' the 'values' of the international society. In the words of Annelise Riles,"in Japan, it was a time of 'Westernization' in which everything Japanese was to be discarded for things foreign". I submit that the process in Japan followed the more subtle process of transplantation. This can be illustrated by the genesis of the concept of right.

The concept of kenri *as a lens –* kenri *and rights in Japan*

The concept of right is a fundamental concept, not only in modern legal systems of Western origin but also in international law. It is in this context that John Wigmore's 1882 report on Japan expressed his surprise (or rather disappointment) towards the non-existence of the concept of 'right' tied to individuals in the history of Japan. Wigmore's natural expectation for Japan – which had then been introduced to the

Western world with its sophistication of arts and cultures – was that the country had already reached a degree of development that entailed its own concept of rights of individuals and justice among people. Putting aside the relevance of Hegelian linear concept of historical development (which created a 'paradoxical' situation in the eyes of young Wigmore), the fact that the existing socio-legal system in Japan was not built upon the concept of individual rights was thus found idiosyncratic and created some difficulties during the codification process of the civil code in the 19th century based on the French civil code – particularly when the need came to translating the term *droit civil*.

In this regard, it is relevant that Nobushige Hozumi observed that "there was indeed the notion of duty or obligation, but neither the notion of right nor the word for it existed either in Japanese or Chinese". He added: "The nearest approach to it in Japanese was 'bun (#)' which means 'share' or 'portion'. This word was frequently used to express the share or part which a person has in society and which he expected that society would recognize as his due. But this word was not quite definite in its meaning, and was more often used in a contrary sense, expressing a person' duty or something that part of limit which he ought not to exceed". Hozumi further sketched up the genesis of the term *right* in Japan by Dr. Tsuda who translated the notion of right as *kenri* (##) – ken (#) as power/authority and ri (#) as interest. This terminology has the rather similar structure to *bun* (#), which means authorized portion of interest that an individual is recognized by the society. With the deepened penetration of democracy in Japanese society over the century, *kenri* has come to be the accepted terminology in Japan to correspond to what is called 'right' in western societies. Further empirical examination on the development of the concept remains necessary. Yet, for the sake of the argument made here, it is sufficient to point out that the underlying socio-legal thought tied to the terminology of *kenri* constitutes the lens that Japan has been (and will be) using when the concept of right is invoked in relation to the making, interpretation, and application of international law. This example thus usefully illustrates the process at work behind the transplantation discussed in this post, and furthermore suggests how Japanese practice is shaped through the recreated international legal concepts.

Backlash against international legal law by the East?

This example of Japan provides a new perspective on the idea of challenge/backlash to international law by the East. What may look as a 'challenge' from the perspective of a linear development of international law from West to East is not a 'challenge' in the eyes of Eastern Asian lawyers but merely a natural practice of transplantation of a foreign legal system as understood here. According to the perspective that law not only shapes the society but is also shaped by the society, international law is inevitably practiced and thought through the various lenses existing in the society where it is transplanted. These lenses may create tensions with the perceptions of Western States. However, these tensions do not constitute a 'challenge' to international law as international law is not anymore 'Western'. The *kenri* example illustrates that although Japan underwent an extensive westernization of its legal system, the underlying values tied to historical and socio-economic conditions of Japan were not simply overwritten. Transplantation is not replacement, but

recreation – Japan continues to practice international law through the recreated legal concepts, which in turn feeds back to international law and in the end enhances the latter's diversity and legitimacy.

The framework of transplantation defended here is a challenge to this idea of a linear development of international law and the common contention that the origin of international law is to be found in European international law. This common construction overlooks that societies where international law is transplanted also chose and shaped the international legal system. Notwithstanding the merits of being aware of the European origins of international law and the Eurocentrism of international legal discourses, lawyers and historians must also be aware that international law could never have been simply 'adopted' in its original meaning and form.

What is necessary for insightful scholarly debates on the development of international law is an exchange truly based on the understanding that there are functioning modern legal systems other than those of Western origins and that one should not just remain at the surface of the Westernized vocabularies deployed around the world. This exchange also requires publications from the non-western world. While most of the scholarly attention focuses on secondary material and translations, research based on primary sources remains highly necessary. And the same is of course valid for other states than Japan.

The idea of 'transplantation' defended here is the author's own, but mention must be made of a larger theoretical and empirical project meant to explore acceptance, internalization, and transformation of international law in Japan by prominent Japanese scholars. The outcomes of this project will be published as part of an edited collection in English as well as in a series of articles. In the end, it is hoped that shedding light on the process of 'transplantation' and moving away from the idea of a linear development of international law from West to East enhances the diversity and the legitimacy of international law on a global basis.

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