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"Anchoring Normative Spaces in Global Legal Order — A Brief Comment on Gilles Lhuilier's Working Paper"

Author : HASEGAWA Ko, Professor, School of Law, Hokkaido University

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Anchoring Normative Spaces in Global Legal Order
— A Brief Comment on Gilles Lhuilier's Working Paper —

Ko Hasegawa[†]

Appreciating his interesting paper "Academic Knowledge—Three Views on Global Law and Global Legal Theory", I think that Gilles Lhuilier's main point lies in grasping "law shopping" as a typical phenomenon for yielding decentered normative spaces in the making of global law. Lhuilier also seems to take Annelise Riles' emphasis on the spontaneous shaping of collateral knowledge in the global legal practice of finance as another example of his theme. There is a slight difference, though, from my viewpoint that, while Lhuilier tries to capture the strategies for making various new spheres in law, Riles does to capture various movements of legal actors in yielding those spheres as a result.

I have no substantial objections to these analyses, both because I am a layperson to this transforming field of international private law and because I sense these analyses will give much stimulation to the theorizing of the today's change in law. Still, it seems to me that these two distinguished scholars tend to praise the diversity of law especially against the existing positive and state-bound legal practice and its understanding, and that they do not have much concern about the problem of possible connections for the integration and its conditions in such a transformation of law. Of course, one might say that a point of their perspectives is in such a postmodern one which appreciates the devolution or even deconstruction of the modern project of state-bound law-making; which is basically understandable for the recognition of the emergence of polycentric legal practice in today's globalizing circumstances.

[†] Professor of Philosophy of Law, The Advanced Institute for Law & Politics, School of Law, University of Hokkaido, Sapporo, Japan. To contact: <khase@ec.hokudai.ac.jp>. I am very grateful to Isabelle Giraudou at Maison Franco-Japonaise who kindly gave me this significant opportunity for writing a comment to Gilles Lhuilier's paper.

In this respect, the point in my article Lhuilier mentioned, “Incorporating Foreign Legal Ideas through Translation”, may look rather modern one in emphasizing the connection of apparently heterogeneous laws especially typified in the process of legal modernization in the late 19th century East Asia, even if seen through the interpretative/translational perspective (which itself can be postmodern). Indeed, my theoretical concern so far is the problem how the significant connection of culturally heterogeneous legal ideas (such as “rights” and “権利 [kenri]”) is possible and what the salient features of the connecting point for them is. If so, the question may be raised from Lhuilier’s or Riles’ standpoint to what extent this kind of integrative perspective is related to the decentering movements and their products in globalizing law today. And I also sense this is why Lhuilier seems to be a little bit uneasy to place the points of my article in the problem concern in his paper, in contrast with Riles’ work.

Then, I would say from my own standpoint that (1) there will be several global legal contexts each of which indicates a different posture of decentering and shows another possibility of new connection: while it may be seen that in the filed of international private law to which both Lhuilier and Riles invite to pay attention certain legal strategies for dissociating from the existing state control occurs to secure the freer spaces of global economic activities, the expansion of constitutionalization through state to market as well as to civil society especially in the filed of international public law is to be observed; furthermore the hyper-jump, as it were, between international and state law is also to be seen in the problem of, say, the legal mobilization of indigenous people in a society by utilizing a variety of legal documents or discussions (which shapes itself a transnational legal problem), and thus that (2) in this regard, what I tried to explicate for the interpretative/translational connection in the late 19th East Asian and Japanese context can be relevantly claimed as actually still occurring in various fields of law today, even in the strongly decentering normative spaces yielded by the law shopping Lhuilier concerns.

In the expansive process of modern constitutionalism, particularly for the necessity of the judicial review of human rights issues, we are experiencing the connection problem among various societies including such international or regional institutions as UN and EU. Here is no denying in that the possibility of transcultural understanding of

the significance and meaning of particular human rights, say, freedom of expression, freedom from torture, religious freedom, or protections of women's rights, is heatedly debated; which necessarily includes the problem of the proper interpretation/translation of Western understanding of those rights in non-Western societies. Just for one simple example, we should consider about the translatability and commensurability of the meaning of "human dignity" against the backgrounds of divergent cultural settings. It will be clear that how to understand the core meaning of the idea of "human dignity" is a contested interpretative/translational question among divergent societies outside the West such as China, India and other East Asian societies including Japan.

Also, in the case of the indigenous rights claims against the colonial stance of modern states, it is very popular that those indigenous peoples try to justify and even share their claims by resorting to international and other related legal sources in any available ways, say, by resorting to the UN Declaration of the Rights of Indigenous Peoples established in 2007. This is itself a possible strategic move for their legitimate legal claims for land and language interests; which may be regarded as a sort of hyper-jump mentioned above between multiple legal sources. In so doing, indigenous peoples can utilize non-national legal documents for their own domestic problem situation beyond the border of nation-state and try to transform the existing (often narrow) understanding of the domestic laws in question. For example, some interpretative/translational question will arise in such a context as constructing the meaning of "the right to self-determination" in the international declaration above. Understanding the meaning of this right in a particular domestic context (say, as in the Japanese concept of "自決権 [jiketsuken]") may evidently include the interpretative/translational problem noting here.

In the field of international private law rapidly globalizing and decentering as Lhuilier and Riles heed to above, the situation might be seen different at the first look. In various normative spaces in this context, interpretation/translation might not seem to be such a serious problem; mutual understanding with interchangeability of legal and other related words and phrases looks almost always simply mechanical. Indeed, the focus on the dynamic pursuit of subtle techniques among private legal actors for extending the free economic activities can find that sort of connection problem as ignorable, especially when the party in question tries to stipulate their own legal terms

and easily equates technical words and phrases in their own legal knowledge as a simple analogue making. Nevertheless, I wish to point out that, even if in the field of such technicality, there do exist certain interpretative/translational problems: one is the problem of semantic shift, as I call it, aroused culturally and strategically, say, as to the understanding of background conditions of contracts such as the scope of the principle of "good faith and fair dealing"; the other is the problem of the multifarious hyper-jump among various national, international, or private norms in a particular field of law to pursue more successful endeavors in it (with its spill over to other normative spheres; needless to say, this is an aspect of law shopping); and another is the problem of the background understanding of the economic in global capitalism such as the pursuit of efficiency or rationality. This point that the technical link in various legal fields may be possible without any interpretative/translational connection problems is only made significant with those problems being possibly solved in some suitable way in the shared understanding of relevant culture.

In this respect, interpretative/translational problems are both ubiquitous and valuational in any possible connections among various legal spheres· on this globe (including further internal logical configurations within one legal sphere); even in the decentering of law, interpretation/translation is inescapable for valuationally anchoring divergent normative spaces. Here, the difference of emphasis between the mechanical links in the economy-oriented legal spheres, the substantial connections in the publicized secure legal spheres, and other kinds of inventive connections among different spheres involves a moral debate on the importance or the priority of one sphere among various spheres. And various legal activities would yield various interpretative/translational interconnections among various norms in different level of legal interactions. Here we may probably distinguish the anarchist, the totalist, and the integrationist of legal spheres, and also, within the integrationist camp, the libertarian, the liberal, and the communitarian positions for global law. They will contest with each other for the moral struggle in shaping global law, as the similar contestation about the concept of law in domestic setting which jurisprudence has been exploring. Then the

· The word "legal sphere", as I use it hereafter, means the space of various laws, including national legal systems, international law, normative spaces as Lhuilier call them, and other relevant legal standards.

ultimate point of this kind of debate will be concerned with the moral attitude toward shaping global law to attain *trust* for global human order.

This point seems to finally lead us to the problem of the point of our academic discussion itself, as Lhuilier perceptively remarked in his paper. What I have noted above never means that the academic explorations of global law are ultimately a matter of bare political ideology. What I mean to say is only that we cannot but face with the moral point of law in some part of our theorizing. As well known, this is the theme a legal philosopher Ronald Dworkin has been famously arguing for. Here lies the famous (or notorious?) debate between modern legal positivism and the Dworkinian legal interpretivism in the jurisprudence on the grounds of law. Although this debate has been concerned with the understanding of domestic law, I believe this issue is also much relevant to the understanding of global law. In particular, the important issue here is whether one does positive description of law without any value-load or interpretive articulation of law with moral valuation.

The other related point I wish to raise is that there are two kinds of exploration in the interpretive approach to global law: constructive and therapeutic. Whereas constructive approach tries to capture the positive side of global law in an active engagement of explorer, therapeutic approach tries to analyze the hidden side of global law in a critical watch of explorer. In contrast with constructive one, therapeutic approach is negative in the sense that this aims at the critical dislocation of our pre-understanding rather than aiming at the prospective configuration of it. One might say these are the opposites, and yet I believe that these are complementary, though with the priority of constructive one. Therapeutic approach makes sense after constructive one be done, simply because the therapeutic needs the constructive as its target. This also means that therapeutic approach may provide the *ex post facto* revisions or corrections for constructive approach. Thus I believe that constructive approach to global law is inevitable for the hope in our legal practice today that we need a truthful view of global law for developing it with reason. And I wish to add that our theoretical enterprise (including my own in this comment) is itself already an aspect of this development.