Cher Weixia Chen

Compliance and Compromise

The Jurisprudence of Gender Pay Equity

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By

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PREFACE AND ACKNOWLEDGEMENTS

I love international law. The reality that international law has been belittled by so many for so long certainly puzzles me. My quest to understand international law started with the readings of its classics. No scholar is owed a greater debt in this regard than the late Virginia Leary, whose *International Labor and National Law* (1982) was the main inspiration for this book. The level of her legal erudition is simply insurmountable to me, which is worsened by the fact that I am a political scientist and not a lawyer. But I would like to at least try hard to follow her step and I was delighted to find myself sharing something in common with the great Virginia Leary: the passion for international law.

After the successful defense of the research proposal, I went to the International Labor Organization (ILO) at Geneva, Switzerland to collect the data. The ILO is a veritable treasure house that should be of tremendous value to both practitioners and scholars. Later the internship with the United States Department of Labor enhanced my overall understanding of labor law. With such preparation, I began writing my doctoral dissertation and then this book manuscript.

This book is an attempt to broaden the scope of the subject in the field of international legal compliance. As domestic industrial relations and labor conditions have been seriously challenged by globalization, various international labor standards have been proposed to safeguard and promote labor rights. However, an important question remains: are these rules and standards enforceable and well enforced? This manuscript hopefully contributes to the existing literature on compliance of international human rights law with its study of a fundamental human right which has not been addressed before—gender pay equity.

There are various approaches to address the issue of gender pay equity. This book chooses to frame it within the research program of "international legal compliance". So "compliance and compromise" is the theme throughout the book. In other words, this book is more about the compliance of the international law (ILO No. 100 in particular) on gender pay equity rather than the causes of gender pay equity

(certainly the second chapter does review the literature on gender pay equity).

There have been plenty of ups and downs during the long journey of writing this book. When I look back, I can only be grateful for this irreplaceable experience, for all the people who cared for and supported me throughout all these years.

I would like to first express my deep gratitude to my mentors: Professor Alison Dundes Renteln, Professor Stanley Rosen and Professor Eugene Cooper at University of Southern California, for their constant guidance and insightful comments. In particular, I am indebted to Professor Alison Dundes Renteln for her invaluable encouragement throughout the course of writing. I was fortunate to have Professor Renteln as my mentor. Her passion for international law and comparative law drove me into the then newly merged Politics and International Relations program. During the five years of my graduate study at USC, she taught me how to write and teach. She, as a brilliant scholar and human being, made me realize that anything is possible (OK, almost). She read drafts of this book manuscript with rigorous comments and interest, and provided critical insights for revision. If someday I could be remotely close to what she has achieved as a scholar and woman, I would be happy enough. Professor Rosen taught me about Chinese politics and films. His kindness, sense of humor, and sincerity as a scholar are what I could only hope for. Professor Cooper, from whom I learned about the anthropological perspective, offered challenging comments for my book. His continuous support and mentoring made me a better scholar.

Special thanks are due to Dr. Jennifer Cichocki for editing some part of this book. I am always amazed by her optimistic attitude towards life and work. I would also like to thank my colleague and friend Ms. Li Wenyu for her kind help with the use of SPSS.

My family back in China, provided me unconditional support and love, no matter where I was. After my father passed away when I was in my seventh grade, it was my older sisters and brothers who raised me. Without them, I could not imagine what my life will be like now. I owe my life to them, especially to my sister Weixin. She is my hero. I worked hard in the high school and went to the best university in China, just to make her proud. And now, I am still trying to make her proud.

Finally, I wish to dedicate this book to my husband Shawn and my daughter Ivy. With Shawn, I find home. He believes in me more than

I believe in myself. His presence has been a loving part that I cannot live without. I am thankful for having him as my husband, my friend, and my partner. My daughter Ivy has changed my life drastically. I am simply grateful for all of the wonderful changes she has brought into my life. I am a proud mother and hopefully she is a proud daughter.

TABLE OF CONTENTS

Preface and Acknowledgements ix
List of Tables xiii
List of Figures xv

Chapter I: Introduction 1
I. Literature Review 2
II. Research Design 9
III. Arrangement of the Book 12

Chapter II: Gender Pay Equity and the International Instruments 15
I. Causes 16
II. Gender Pay Equity 19
III. The Sources of International Standards on Gender Pay Equity 26
IV. Regional and Other Standards on Gender Pay Equity 35

Chapter III: Legislative Compliance – The Process of "Internalization" 39
I. General Observation on Legislative Compliance 39
II. Specific Observation on Legislative Compliance 60
III. Typology of Legislative Compliance 68
IV. A Comprehensive Legislative Approach 72

Chapter IV: Judicial Compliance- The Process of "Interpretation" 81
I. Judicial Compliance- The "Interpretation" of the Convention in National Judiciaries 81
II. Typology of Judicial Compliance 103

Chapter V: The Process of "Interaction" 109
I. Horizontal Interaction 109
II. Vertical Interaction 112

Chapter VI: Canada v. Japan: The Best v. the Worst 131
I. Canada 131
II. Japan 141
III. Conclusion 147

Chapter VII: Conclusion 149

Bibliography 155

Appendix: C100 Equal Remuneration Convention, 1951 189

Index 195

LIST OF TABLES

Table 1: The Legal Status of Equal Pay in the Ratifying States 40

Table 2: Frequency – Specific Legislation (Equal Value=1, Equal Work=0.5, General/non=0) 45

Table 3: Gender Pay Equity and Gender Wage Gap in 29 States 73

Table 4: Frequency – Specific Legislation (Equal Value=1, Equal Work=0.5, General/non=0) in 29 States 75

Table 5: Two Sample T-Test – Paired Samples Statistics 75

Table 6: Two Sample T-Test – Paired Samples Correlations 75

Table 7: Two Sample T-Test – Paired Samples Test 75

Table 8: The Ratifying States' Report Performance 113

LIST OF FIGURES

Figure 1: Frequency – Specific Legislation (Equal Value=1, Equal Work=0.5, General/non=0) 46

Figure 2: Frequency – Report Performance of the Ratifying States 118

CHAPTER I

INTRODUCTION

> International law is an unwanted intruder into domestic law. In much the same way that common law legal systems resisted the 'Romanist' influences of European civil law, so too do many domestic legal institutions actively repel the application of international law norms.
>
> —David J. Bederman[1]

I do not "hate" international law scholarship as Bederman does, but I do wonder whether and how domestic law so "unwants" and "resists" international law.

Does international law matter to international relations or domestic politics? The literature of "international legal compliance" asks the same question. Many scholars believe that the end of the cold war has rendered international law an independent power of constraining and shaping state behavior. Since the 1990s, this body of literature has become rather theoretically and methodologically diverse. It explores the causal process leading to the states' compliance with international law, and investigates the various aspects of this process. However, this research program on compliance leaves certain questions unanswered. Particularly, the area of international labor standards surprisingly remains almost untouched.

The related research program on international institutions and domestic politics examines the ways in which domestic institutions deal with international law and how they interact with international institutions. But its literature has largely overlooked the role of legal systems including judiciaries. To fill in the gap in the existing literature, this book aims to explore the national legal systems' compliance with one of the core international labor standards– gender pay equity, by applying the dynamic "transnational legal process" theory.

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[1] "What's Wrong with International Law Scholarship? I Hate International Law Scholarship (Sort of)" (2000), *Chicago Journal of International Law* 1: 75, p.75.

I. Literature Review

The literature on international legal compliance explores states' willingness to comply with international instruments and the conditions necessary to sustain such compliance. Scholars inquire whether how states' compliance occurs, with a focus on the role of various actors in this process. To date, several explanatory frameworks have been invented by scholars to account for international legal compliance, while certain issues remain unexplored. Among these explanatory frameworks, the theory of "transnational legal process" is the most vibrant and complete one.

1. *Does/How does International Law Matter?*

The managerialist and legitimacy theory, liberal as well as constructivist theories assume that international law is law and that states' compliance is a rule rather than an exception. The managerial theory posits that: "The fundamental instrument for maintaining compliance with treaties at an acceptable level... is an iterative process of discourse among the parties, the treaty organization, and the wider public."[2] This essentially legal process-based theory, developed by Abram Chayes and Antonia Handler Chayes, emphasizes on intergovernmental coordination at the nation-state level. It claims that the norm of "*pacta sun t servanda*"(treaties are to be obeyed) has a profound effect on state behavior. This theory maintains that international cooperation and management are instrumental in ensuring compliance. Non-compliance results mainly from lack of state capacity and insufficient knowledge about treaty obligations.[3]

The legitimacy/reputation theory portrays states as agents concerned with their reputation and legitimacy as well as distributive justice.[4] It agrees with the managerialist and transnational process theories that states generally comply. The liberal theorists adopt a different approach. They focus on domestic political and legal structure and

---

[2] Abram Chayes & Antonia Handler Chayes (1998), *The New Sovereignty: Compliance with International Regulatory Agreements*. Cambridge: Harvard University Press, p. 25.

[3] *Ibid.*

[4] Thomas M. Franck (1995). Fairness in International Law and Institutions. Oxford: Clarendon Press. Also see Ian Hurd (1999). "Legitimacy and Authority in International Politics", International Organization 53:379. H. L. A. Hart (1994). "International Law", in *The Concept of Law*. Oxford: Clarendon Press.

argue that if a country has a "liberal" structure, namely a representative government, protection of civil and political rights together with an effective judicial system following the rule of law, it has a tendency to comply with international law.[5]

Constructivism stresses the role of ideas in persuading states to follow the international regimes such as the human rights regime and to press them on others.[6] It highlights the interaction between states and NGOs and the dissemination of ideas.[7] Risse and Sikkink have developed a five-step spiral model of the human rights change which is conducive to the understanding of the compliance with the human rights agreements. They look to both the internal and external factors.[8] Internally, the domestic NGOs act as "compliance constituencies" to pressure the government officials to adhere to their international commitments.[9] Externally, the "transnational advocacy networks", which are comprised of the concerned individuals, groups, and domestic and international government agencies and officials, work to solve the human rights problems. Connecting with these transnational networks, the domestic compliance constituencies are able to create the "boomerang effect"[10] of influence on "vulnerable"[11] states by pressuring the government officials "from above" and "from below".[12]

Risse and Sikkink's support-structure-based framework has offered a seemingly plausible explanation to account for the compliance of the international human rights regimes. However, it is not flawless, as it simply dismisses the important role of the international governing

---

[5] See Andrew Moravcsik (1997). "Taking Preferences Seriously: A Liberal Theory of International Politics", International Organization 51: 513; Anne-Marie Slaughter (1995). "International Law in a World of Liberal States", *European Journal of International Law* 6: 503; Anne-Marie Slaughter (1995). "The Liberal Agenda for Peace: International Relations Theory and the Future of the United Nations", *Transnational Law and Contemporary Problems* 4: 377.

[6] See for example, Alexander Wendt (1995). "Constructing International Politics", *International Security* 20:71. Also see Margaret Keck and Kathryn Sikkink (1998). *Activists beyond Border*. Cornell University Press.

[7] Thomas Risse & Kathryn Sikkink (1999). "The Socialization of International Human Rights Norms into Domestic Practices: Introduction", in Thomas Risse et al eds. *The Power of Human Rights: International Norms and Domestic Changes*, pp. 1–39. Cambridge, the United Kingdom: Cambridge University Press.

[8] *Ibid.* Pp. 17–35.

[9] See Miles Kahler (2000). "Conclusion: The Causes and Consequences of Legalization", *International Organization* 54:661, p. 675.

[10] See Risse & Sikkink, *supra* note 7, at p. 18. See also Keck & Sikkink, *supra* note 6, pp. 12–13.

[11] See Keck & Sikkink, *Ibid.* at p. 29.

[12] See Risse & Sikkink, *supra* note 7, at p. 26.

bodies and national governments, who are the pillar of the entire process of compliance. Moreover, as constructivism is a norm-based theory, it lacks the explanatory power to explicate such a complicated and multi-dimensional process as "compliance".[13]

In contrast to the constructivists, the realists and rational choice theorists are skeptical of the role of international law in constraining state behavior. The realists doubt the independent efficacy of international law.[14] They insist that states use international law to pursue their own national interest.[15] The rational choice theory argues that law is epiphenomenal and states comply with international law only when it converges with their national interest. The interpretation and application of customary international law by the domestic courts is only to implement their national interest.[16]

2. *Do/How do Domestic Legal Systems Support International Law?*

Domestic legal systems, as scholars generally agree, play a significant role in the compliance of international law.[17] The liberal theory in particular suggests the causal relation between a liberal domestic legal structure and the compliance with international law.[18] The recurring failure to ratify the border agreements in the legislature has been argued as one of the main domestic political conditions linked with the willingness of states to subject their disputes to international arbitration.[19]

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[13] See Rosalyn Higgins (1994). *Problems and Process-International Law and How We Use it*. Oxford: Clarendon Press. At p. 267 she puts that "International law is a process, a system of authoritative decision-making. It is not just the neutral application of rules... The role of international law is to assist in the choice between... various alternatives... International law is a process for resolving problems."

[14] Jack Goldsmith (2000), "Sovereignty, International Relations Theory, and International Law", *Stanford Law Review* 52: 959.

[15] Francis Boyle (1985). *World Politics and International Law*. Duke University Press.

[16] Jack L. Goldsmith & Eric A. Posner (1999). "A Theory of Customary International Law", *University of Chicago Law Review* 66:1113. Also see Tom Ginsburg & Richard H. Adams (2004). "Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution", *William and Mary Law Review* 45:1229. Jack L. Goldsmith & Eric A. Posner (2003). "International Agreements: A Rational Choice Approach", *Vanderbilt Journal of International Law* 44:113. Jack L. Goldsmith & Eric A. Posner (2005). *The Limits of International Law*. Oxford University Press. Eric Posner (2003). "A Theory of the Laws of War", *University of Chicago Law Review* 70: 297.

[17] Friedrich Kratochwil (1991). Rules, Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs. Cambridge University Press.

[18] Anne-Marie Slaughter, *supra* note 5.

[19] Beth A. Simmons (1998). "Compliance with International Agreements", *Annual Review of Political Science* 1: 75.

It is also suggested that the domestic courts have transformed international law because they consider international law as a persuasive authority.[20] Some national judiciaries may tend to support the application of international law because international law provides an additional resource in pursuit of their agenda.[21] As argued, if those doctrinal obstacles such as standing and sovereign immunity could be reduced, the domestic courts would be the most effective agents to ensure compliance with international environmental law.[22] However, not everyone agrees. For example, it has been suggested that the American judiciary is reluctant to invoke international law because of the "territorial-democratic" principle which means judges are more skilled in applying the law of their own territorial jurisdiction and more comfortable in applying law that has gone through the national democratic process.[23] Likewise, the principal-agent model is also proposed to explain why the American courts are unwilling to apply international law. Judges are more concerned with their own careers and therefore the policy preferences of their political principals (their constituents).[24] Some also argue that the existence of the precedents can explain the reluctance of national judges in applying international law.[25]

Iwasawa in his work on the impact of international law on the Japanese courts suggests that the Japanese courts have not yet fully become the standard-bearers for international human rights law, contrary to some common law countries.[26] He provides a critical

[20] Karen Knop (2000). "Here and There: International Law in Domestic Courts", *NYU Journal of International Law and Policy* 32: 501.

[21] Karen Alter (1996). "The European Court's Political Power", West European Politics 19: 458. Also see Benedetto Conforti (1993). *International Law and the Role of Domestic Legal Systems*. Martinus Nijhotf Publishers.

[22] Mary Ellen O'Connell (1995). "Enforcement and the Success of International Environmental Law", *Indiana Journal of Global Legal Studies* 3: 47.

[23] Saadia M. Pekkanen (2005). "International Trade Law in US courts", paper presented at a seminar of Center for International Studies, University of Southern California.

[24] See J. Mark Ramseyer (1994). "The Puzzling (In)Dependence of Courts: A Comparative Approach", *The Journal of Legal Studies* 23(2): 721, pp. 724–726. Also see J. Mark Ramseyer, and Eric B. Rasmusen (2003). "Judicial Independence in a Civil Law Regime: The Evidence From Japan", *The Journal of Law, Economics, and Organization* 13(2): 259, pp. 260–261.

[25] Yuji Iwasawa (1993), "Implementation of International Trade Agreements in Japan", in *National Constitutions and International Economic Law*, edited by Mehinhard Hilf and Ernst Ulrich Petersmann. Boston, MA: Kluwer Law and Taxation Publishers, p. 328.

[26] See M. Hunt (1997). *Using Human Rights Law in English Courts*. Oxford: Hart Publishing.

assessment of the reluctance of the Japanese judges to follow international legal standards when their domestic practice or law is inconsistent with these standards.[27] Overall, Iwasawa's work is an outstanding case study. However, as Philip Alston points out, this book is somewhat ahistorical and can benefit from providing a broader social and historical context from which the view of the Japanese society towards human rights has evolved.[28]

3. *The Theory of Transnational Legal Process*

The transnational legal process theory postulates that the frequent interaction within transnational communities which consist of the policy-makers promotes the emergence of those norms favoring cooperation and ultimately leads to the internalization of these norms into the domestic law and legal institutions.[29] Koh, the author of the theory, defines it as "the process whereby an international law rule is interpreted through the interaction of transnational actors in a variety of law-declaring fora, then internalized into a nation's domestic legal system".[30] This process is comprised of three elements: the internalization of the international norm into domestic normative systems, the interpretation of an applicable global norm, and the interaction provoked by one or more transnational actors.[31]

Compared to the managerial theory that emphasizes the horizontal legal process, the transnational legal process theory is more comprehensive as it covers both the horizontal and vertical process. It is "the complex process of institutional interaction whereby global norms are not just debated and interpreted, but ultimately internalized by domestic legal systems."[32] This theory is "dynamic" in the sense that it "transforms, mutates, and percolates up and down, from the public to the private,

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[27] Yuji Iwasawa (1998). *International Law, Human Rights Law and Japanese Law: The Impact of International Law on Japanese Law*. Oxford, Clarendon Press. For other case studies of international human rights law on national courts, see Benedetto Conforti and Francesco Francioni (eds.) (1997). *Enforcing International Human Rights in Domestic Courts*. Martinus Nijhoff Publishers.

[28] Philip Alston (1999). "Transplanting Foreign Norms: Human Rights and Other International Legal Norms in Japan". *European Journal of International Law* 10(3): 625.

[29] Harold Hongju Koh (1997). "Why Do Nations Obey International Law?" *Yale Law Journal* 106: 2599. Also see Mary Ellen O'Connell (1999). "New International Legal Process", *American Journal of International Law* 93:334.

[30] Harold Hongju Koh (1998). "Bringing International Law Home", *Houston Law Review* 35: 623, p. 626.

[31] Koh, *supra* note 29, p. 2646.

[32] Koh, *supra* note 29, p. 2603.

from the domestic to the international level and back down again".[33] It is also "non-statist" as it not only includes state actors, but also non-state actors. This theory is both "descriptive" and "normative" since new rules of law emerge, but through interaction, interpretation and internalization, the process starts again.[34] During the process, law influences states and other actors' behavior and their behavior in turn reshapes law.

Such relatively new theory of "transnational legal process" has a potential to fully capture the compliance of international law. The complicated nature of the compliance of international law could be disentangled only by a sophisticated theory like "transnational legal process".

4. *Critique*

In general, the research program on international legal compliance has undergone a significant development particularly since 1990s when the literature on international legal compliance proliferated. It has grown into a more diverse realm, in terms of both its topics and methods. This program has been subject to the influence of other disciplines and a broader intellectual environment. Political scientists, law scholars and intellectuals from various disciplines such as economics have shown tremendous interest in and commitment to this program. Both quantitative and qualitative studies have been applied. Global and comparative perspectives have been attempted, although to a rather limited extent. It is fair to say this program has largely benefited from such diversity. Nonetheless, it has not yet been perfect. The following text offers an evaluation of the program in terms of its definition of the key concept "compliance", its validity and completeness, and methodology and scope.

a. *The Definition of "Compliance"*

Virginia Leary has noted the inadequacy of the definition of "compliance". She suggests that the concept of "influence" is more appropriate for the discussion of "soft law".[35] However, as she admits, it is enormously difficult to measure the "influence" of "soft law" in the field of

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[33] See Harold Hongju Koh (1996). "Transnational Legal Process", *Nebraska Law Review* 75: 181, p. 184.

[34] *Ibid.*

[35] Virginia A. Leary (1997). "Nonbinding Accords in the Field of Labor", in Edith Brown Weiss ed. *International Compliance with Nonbinding Accords: A Challenge to International Law*. Washington, DC: American Society of International Law.