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The Dynamics of International Legal Regime Formation: The Sino-British Joint Declaration on the Question of Hong Kong Revisited: A Reply to Roda Mushkat

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1 Introduction

Professor Roda Mushkat's article, arguing for the application of international regime theory to understanding the Sino-British Joint Declaration, is a curate's egg. As I read it, I often found myself nodding in agreement with her, especially her analysis and critiques of various international relations theories and methodologies. But she fails to make the case for regime theory analysis in general and for its application to the Sino-British Declaration in particular.

International regime theory has been with us since John Ruggie introduced this concept to international relations through his seminal article 'International Responses to Technology: Concepts and Trends'¹ in 1975. Underlying this theory is the notion that imperatives of behaviour coordination compel the formation of international regimes. Thus, 'regimes' include international organizations such as the International Monetary Fund (IMF) or international agreements, such as the Kyoto

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¹ Ruggie, 'International Responses to Technology: Concepts and Trends', 29 *International Organization* (1975) 557; see also Haggard and Simmons, 'Theories of International Regimes', 41 *International Organization* (1987) 492.

Protocol. They evolve – become structured ‘regimes’ – because they serve as a forum to standardize and facilitate discussion, communications and agreements across various countries. Scholars like Stephan Krasner (whom Mushkat cites) argue that the presence of a hegemon – such as a superpower like the United States – gives momentum to the creation of the regime. This has been called the ‘hegemonic stability theory’² because hegemons use their power to create regimes. Correspondingly, when the power of these hegemons wane, the effectiveness of the same regimes come under threat. Regimes can be subjects of international law in that they shape the behaviour of states, sometimes to the extent that state practice may constitute a source of customary international law.

Mushkat starts out by arguing that students of international behaviour have something to say about the formation of international legal regimes and proceeds to spend several pages defending international regime theory as a legitimate tool for analysis. And in relation to the Sino-British Declaration, she asserts that regime theory offers a ‘more meaningful construct’ than the legal reductionism of treating the Declaration as a mere bilateral accord. Her object is thus to ‘draw some lessons regarding the formation of such entities in light of specific manoeuvres leading to the signing of that unique document’. So far so good.

2 Which or What Regime?

The first problem with Mushkat’s article surfaces here. Exactly which entity or regime is she considering? The Sino-British Declaration was an agreement arrived at between the British and Chinese governments in 1984, setting out the terms under which Hong Kong would be returned to China in 1997. More significantly, the document sets out China’s basic policies regarding Hong Kong and stated that these policies – including the ‘one country, two systems’ principle – would be stipulated in the Hong Kong Basic Law. The Sino-British Declaration was made in 1984 and the Basic Law came into effect in 1997. Is Mushkat suggesting that international regime theory be used to understand the regime that emerged in 1984, or that which came into existence between 1984 and 1997, or is she suggesting that the dynamics of regime formation from 1984 continue to apply to this day?

Her own cursory analysis deals exclusively with the events leading up to 1984 and not 1997. If that were so, then what is the point of this exercise? Unique though the Sino-British Declaration was, the ‘regime’ it created lasted from 1984 until Britain’s handover of Hong Kong in 1997. China’s resumption of sovereignty over Hong Kong must surely be seen as the creation of a completely different order or regime, without Britain as part of the equation. Any regime analysis should surely end with 1997 and not 1984. At the very least, we can see how the dynamics that led to 1984 might possibly have helped us understand what transpired thereafter.

² See Keohane, ‘The Theory of Hegemonic Stability and Changes in International Economic Regimes, 1967–1977’ in O. R. Holsti, A. L. George and R. M. Siverson (eds), *Change in the International System* (1980) 131; and R. Gilpin, *The Political Economy of International Relations* (1987) 72.

3 Theory Over History?

Mushkat argues that the making of the Sino-British Declaration was a unique process that attracted a lot of factual accounts but hardly any 'conceptually-oriented academic enquiries'. And of the few theoretical studies attempted, none of them are ultimately helpful, either lacking in 'predictive power' or limited by the artificial theoretical matrix of game theory. So in comes regime theory, but how does she propose to apply it? Exactly what is considered a 'regime'? Mushkat adopts Stephen Krasner's definition of 'regime' as

... sets of implicit or explicit principles, norms, rules and decision making procedures around which actors' expectations converge in a given area of international relations. Principles are beliefs of fact, causation and rectitude. Norms are standards of behaviour. Rules are specific prescription or proscriptions for action. Decision-making procedures are prevailing practices for making and implementing collective choice.³

Accepting this definition, how does one go about finding out what actors' expectations are and whether they converge, or what their beliefs of fact, causation and rectitude might be? Short of interviewing the key actors – and assuming that you are able to extract an accurate and honest recollection – the only way to do this is through in-depth historical and archival research. Alas, Mushkat's own attempt at chronicling the dynamics of the negotiations leading up to the 1984 Declaration is sparse and superficial and relies primarily on two secondary sources.⁴ There is no attempt to go back to official reports, minutes and primary documentation or to interview the key players.

Instead, she spills much ink criticizing the various theoretical approaches that have been taken by others, concluding that most of them do not work. If her own brief excursion into the history of how various events shaped the development of the 'regime' of 1984 is her idea of regime analysis, what is so special about it? What makes regime analysis so different from any other form of intelligent analysis that eschews theoretical straitjackets and considers the dynamics of human interaction from all angles? Surely, a good historical study in the nature of say, Claudia Orange's erudite *The Treaty of Waitangi*⁵ or Margaret Macmillan's monumental *Paris 1919*,⁶ would shed just as much, if not more, light on what was going on during the creation of the regime at hand.

To close the so-called analytical gaps, Mushkat enjoins us to broaden our conceptual and analytical frameworks and reference points to consider factors like '[e]goistic self-interest, political power (symmetrical or otherwise), norms and principles, usage

³ Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables' in S. D. Krasner (ed.), *International Regimes* (1983) 2.

⁴ Mushkat relies almost exclusively on R. Cottrell, *The End of Hong Kong: The Secret Diplomacy of Imperial China* (1993); and M. Roberti, *The Fall of Hong Kong: China's Triumph and Britain's Betrayal*, rev. ed. (1996).

⁵ C. Orange, *The Treaty of Waitangi* (1997).

⁶ M. O. Macmillan, *Paris 1919: Six Months that Changed the World* (2002).

and customs and knowledge’, among others in understanding international legal regime formation. Is there anything so unique about such an approach? Surely, any well-trained lawyer, looking at a case – in this case, any regime – will consider it from all angles and facets, taking on board all these considerations.

4 Conclusion

Perhaps it is the title of Mushkat’s article that has given me false expectations. It led me to think that it would comprise a short justification for international legal regime theory as an analytical tool, why it provides greater insights than analyses currently available and then a serious application of this form of analysis to the events leading up to the 1984 Sino-British Declaration and beyond. Instead, most of the article is concerned with what is wrong with other theories, but not enough about why international regime theory works better. Even more frustrating is the failure by as strong an advocate as Mushkat to demonstrate, using the real-world instance of the 1984 Declaration, how this type of analysis can best be undertaken and to convince us that the gaps in analysis are best plugged through the application of this theoretical framework. ‘Not all of the egg is bad’, as the curate would say. Her theoretical critiques are scholarly and well-researched, but ultimately, the egg is inedible. The case for international legal regime theory has, I’m afraid, not been made.