Shifts in the Multiple Justifications of Minority Protection

I. Why Speak Again of the Justifications of Minority Protection?

Justificatory Chains and the ‘Deep Structure of Law’

In social sciences in general and in the science of law in particular, it is almost impossible to describe the causal paths that resulted in the adoption of a particular piece of legislation, and even more difficult to discern shifts in perceptions of a legal system or of a society. The usual methodological approach of social scientists is therefore to look at the multiplicity of factors and variables affecting a social phenomenon and to try to create an explanatory model for such phenomena. Indeed, in law in particular it is crucial to be able to account for the justifications underpinning a piece of legislation or a legal reasoning in a court decision. The formal legality of a legal product is linked to its substantive legitimacy as well as to its sociopolitical embeddedness. Formal legality relies upon the processes of adoption of a court decision or a piece of legislation, whereas substantive legitimacy is concerned with the accordance and coherence between the different rules of a legal system and their respect for the core principles and values of that system. Finally, the sociopolitical embeddedness of a legal act is concerned with the understanding and acceptance of that rule or legal product by core groups affected by it (as objects or as implementers) and by the broader society as a whole. So each time a legal rule or set of rules is questioned, or even attacked rhetorically or empirically (through non-observance), the need to reformulate, reexplain and reassess the justification behind the rule(s) is triggered. We are confronted with “the obstinacy of the legitimacy issue”.\(^1\) Such obstinacy seems particularly acute with regard to minority protection in international law because there are a number of states, even within the limited geographic boundaries of Europe, that completely refuse to accept minority-related obligations, while the argument is frequently made that minority-protection regimes are concerned with and are adapted only

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to the continent of Europe. Meanwhile, social scientists from different disciplines and theoretical strands continue to analyze minority rights and their institutional regimes from their various preferred angles, whether that may be security, multiculturalism, individual human dignity or democratic participation.

If we continue to use Kaarlo Tuori’s writings and his understanding of a ‘deep structure of law’ and of the discursiveness of legal practices, then understanding and being able to account for this ‘deep structure of law’ is necessary to establish the normative as well as the empirical legitimacy of law. In a similar vein, Thomas Franck has argued that the legitimacy of international law relies upon the coherence, validation and determinacy of international decisions and rules. For Tuori, legitimacy is twofold: it is formal and it is substantive (or normative). For the latter, Tuori requires justification in “the light of the morally- and ethically-laden principles of the law’s subsurface layers”.

Joseph Raz argues that “lawyers commonly conceive of the law as made of sets of nested rules linked by justificatory chains”. On the basis of this it has been argued that international law, as a structure of authority, forms such a justificatory hierarchy and that new rules are developed through old rules existing in treaties, customs, general principles, etc. This is not simply a question of the hierarchical relation of rules and of formal legislative procedures but, equally, of the goals aspired to by the adoption of the rules. The importance in Raz’s formulation lies, however, in his use of the plural form when writing of “nested rules linked by justificatory chains”. Thus, one rule, or one set of rules, does not necessarily rely simply on a single clear-cut justificatory chain. At times, the justificatory chains may converge and reinforce each other, but at other times they might diverge, creating the internal dynamics of the legal process.

In this article, many elements of the argument will be well known and have been analyzed previously by various authors. The effort here is to draw together these different lines of argument and thinking about minority protection and to demonstrate ways in which they coexist and interact. Instead of simply trying to respond to questions like, “Why is minority protection neglected?” with pragmatic answers such as, “Because states do not want to limit their sovereignty” or “Because minority situations vary greatly and do not render themselves suitable to international regulation”, it might be more useful to reflect upon the basis and the basics of minority protection. Why is minority protection part of international law, and why is it still controversial? It is so because even though many states have ratified many of the international instruments protecting minorities and indigenous peoples, there is no doubt that minority questions are still perceived in many

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2 Ibid., 244-281.
4 Tuori, op.cit. note 1, 276.