Revamping Associative Obligations

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Ronald Dworkin was a defender of the idea that we have a general political obligation to obey the law of the state we live in. On his view political obligations are moral obligations that extend over the range of persons who live within a political community and are associated with one another in a special way. Dworkin was probably the first philosopher to describe such obligations of political morality as *associative* but others, most notably Thomas Nagel, soon joined him.

The paper argues for an interpretation of the Dworkinian associative account of political obligations, which does not make political obligation dependent on the coercive institutions of the state. The interpretation relies on a distinction between two candidate explanations of the role social facts play in the determination of political obligations. The first submits that social facts are the sole *grounds* of political obligations, in the sense that those constitute the existence conditions of these. On this account political obligations depend on facts about the coercive institutions of the state. The alternative interpretation considers social facts merely as contributing factors to the existence of political obligations: the way in which they contribute is by triggering background moral reasons, which ultimately ground political obligations. In this, the second, interpretation, political obligations do not depend for their existence on facts about coercive institutions of the state.

If the argument succeeds two intriguing results come to light: first off, at a more abstract level, it allows us to conceive of associative obligations outwith particular forms of social organisation: you and I can partake of an associative relation not just when we satisfy some membership criteria set by convention or practice, but when we become the subjects of a common set of normative reasons which govern our interactions. Second, with respect to Dworkin's own account of law, a surprising albeit welcome conclusion is in the offing: among Dworkin's seminal contributions to legal theory has been the idea that the truth of legal propositions is grounded on moral principles. No sooner, however, had we demonstrated that such principles are not a mere consequence of but the gauge for associative relations, than the possibility of a non-statist understanding of law was rendered conceivable in an attractive manner. A key effect of such a move is the realization of the fact that

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domestic political communities can be bound by international obligations independently of their consent or otherwise involvement in the production of those obligations. What is more, such obligations will turn out to include duties of justice and fraternity in contrast to the view defended by Dworkin and Nagel that such duties obtain only among citizens of the same state.

1. Law and political obligation

A driving theme in Dworkin's thought has been the relatively uncontroversial idea that coercion through the law ought to be justified:

> […] a conception of law must explain how what it takes to be law provides a general justification for the exercise of coercive power by the state.[1]

This explanatory task he set to himself drives Dworkin's seminal contributions to legal philosophy. Perhaps if pressed to name Dworkin's most original contribution one would have to point at *interpretivism* which is an account of the meaning and content of evaluative, and in particular, legal concepts. Famously interpretivism's main claim is that the meaning of legal concepts cannot be fixed by reference to any plain, i.e. non-normative, facts (e.g. facts about social practices, the psychology of their participants and so on) because the instances of applications of such concepts remain throughout sensitive to evaluative argument. Instead interpretivism instructs us to refer to moral reasons in order to determine the content of the law. But reference to *any* moral reasons would not suffice either: what we are looking to refer to are reasons of political morality, i.e. reasons concerning the exercise of government.

No less influential has been Dworkin's claim that there exists a *general political obligation* of those living in a political community to obey its laws, even if they have no reason to do so other than the fact that these are the laws of the community. Also this claim is a consequence of the general constraint to justify state coercion. To understand how we need to remind ourselves that Dworkin understands law as an instance of justified coercion; but if that's what it is, then it generates genuine (moral) duties which in turn support a general obligation to obey the law. But the said obligation is merely a conceptual requirement that follows from the requirement of the justification of coercion. What does not follow from it is that any institutional fact that purports to impose duties will *actually* succeed imposing a genuine obligation. Rather, a certain relation must hold between moral standards of legitimate government and the duty-imposing practices of a community, in order for the obligation to obey the law to take hold. Notice, however, that because legal concepts are

[1] Ronald Dworkin, *Law's Empire* (Fontana Press, 1986), 190.

interpretive, no institutional action that operates outside standards of legitimacy will be capable of contributing to the content of the law; conversely, any such actions that succeed to explain why the law is what it is, will *ipso facto* generate genuine obligation (for otherwise they would not be contributing to the content of the law). As a result, what may count as the law of a political community is conditioned on the normative standards that generate political legitimacy; this is why, in Dworkin's account, when something qualifies as law, then the question about its capacity to obligate becomes redundant.

In a nutshell the connecting narrative between those two key elements of Dworkin's theory runs somewhat like this: to pin down the evaluative facts, which determine the content of legal (qua *interpretive*) concepts, one needs to enquire into conditions of legitimacy that generate the obligation to obey the law. Thus, whatever grounds the content of the law also grounds the obligation to obey it. Or – what is a consequence of the above: in order to determine the content of the law we need to enquire of the conditions under which it generates an obligation to obey it.

The key therefore to understanding the various parts of Dworkin's political philosophy as elements of a unified story[2] is his account of the conditions that legitimize coercive government, which function at the same time as grounds of the content of the law and of the obligation to obey it. Such conditions we are told are moral reasons governing the life of a political community (principles of political morality). Which specific norms count among those principles and how we can locate them are among the central questions that are in need of an answer.

A correct understanding of the relevant principles of political morality requires clarity about the content and nature of legitimacy that is on the cards. Dworkin submits that legitimacy is achieved when the institutions and the structure of the state generate decisions to which political obligation attaches:

> A state is legitimate if its constitutional structure and practices are such that its citizens have a general obligation to obey political decisions that purport to impose duties on them. (LE 191)

In turning to specify the content of political obligation Dworkin rejected early on some standard accounts and proposed a fresh understanding of this concept. Such standard accounts of political

[2] Dworkin's account is non-centralist, in the sense that it does not rely on any master-idea or master-concept for explaining legal phenomena. On a non-centralist account the correct application if the concept law is the one that is favoured by the theory, whichever it may be, that gives the best account of the relationships between specific values that apply to the alternative interpretations of the relevant social facts. For an in-depth analysis of non-centralism, see S L Hurley, *Natural Reasons* (Oxford University Press, 1989), 11.

obligation seem to require some form of control on behalf of agents over the obligations that become binding on them: whether it be under some variant of the consent theory or any of the available scenarios of fair play, agents are assumed to have 'authorised' the responsibilities they incur through participating in a social practice. This is clearer in the case of consent within the context of social contract theories but applies, *mutatis mutandis*, to accounts of fair play to the extent to which those assume that people have the opportunity to reject the benefits involved in the participation to a practice[3]. A further result of 'voluntaristic' accounts of legitimacy is that they amount to a fair degree of relativism when it comes to specifying the principles that govern patterns of collective action: I am alluding here to the danger inherent to entrusting the force of legitimating reasons to contingent facts (consent) or even the particular views of a collective about what counts as benefit, which deserves fidelity by anyone who is part of the scheme.[4]

In the place of such accounts Dworkin advances the idea of associative obligation to describe the special responsibilities that a social practice attaches to membership in some social group. In calling upon the idea of associative duties Dworkin aims to model political obligations after those other responsibilities that attach to agents in virtue of their membership in social groups (*associative obligations*). It would seem that, although non-political associations differ from political ones both in size and degree of proximity between their members, they may still offer a good place for basing an account of the core features of political obligation. Let me offer a brief conspectus of some of their key features.

First off, non-voluntariness: associative obligations attach to agents independently of their capacity to exercise control over them. Dworkin speaks characteristically of the fact that associative practices/relations, even those that appear to be the result of choice (e.g. friendship), *attract* obligations of which we are rarely aware until some later moment when some instance of application arises.[5] This captures accurately the way in which members of a political association incur obligations between one another. At the same time it preserves the valuable intuition that obligations are not independent of particular relations or interactions between agents, as some ideas of a natural duty to support justice would have it. A key consequence of non-voluntariness is that political obligation takes hold on citizens not as piecemeal approval of individual obligations but,

[3] Granting this opportunity must be incorporated in the account of fair play for otherwise agents would incur obligations simply by receiving what they do not seek.
[4] For an in-depth discussion see Ronald Dworkin, *Law's Empire*,192-5; John Horton, *Political Obligation*, 2nd ed. (Palgrave, 2010), Ch. 6.
[5] Dworkin, *Law's Empire*, 197.

instead, as a general scheme of principle which ought to be presumed as forming a shared conception of legitimacy among the members of a political community.[6]

Second, the moral pedigree of associative obligations: associative relations seem to fit our best understanding of how conventional facts, which are parts of larger social practices, interact with practice-independent moral principles. Dworkin has defended throughout his work, but most prominently in *Justice for Hedgehogs,* the view that social facts cannot, on their own, determine the content of associative obligations.[7] Rather obligations that attach to associative relations are only partly grounded on the social facts of the relevant practice. Conventional practices, including law-making ones, are parasitic on underlying and independent moral facts which are the ultimate determinants of the content of the relevant obligations.[8]

It should be pointed out that the associative account of legitimacy has the further advantage of demonstrating the superiority of the interpretivist explication of the law over most other positivist legal theories. In contrast, most of the other standard accounts of legitimacy (fair play, consent) are compatible with positivist accounts of the law: they can be added as an extra layer on top of a positivist story that identifies the content of the law independently of its merit or demerit, but delegates the question of the obligation to obey the law to a different level. Thus prominent positivists are happy to identify the law independently of any conditions that generate an obligation to obey it.[9]

2. Political Association Curtailed

In a surprising move Dworkin (and more recently Nagel[10]) have sought to limit the scope of associative obligations to domestic political communities and their legal practices. A quick explanation for adopting this stance is the overstated focus on the coercive apparatus of the state. Recall that the early concern of Dworkin, what in fact I called a driving idea of his entire legal philosophy, was a concern to provide justification for state coercion. It would seem that this emphasis of coercion misleads both philosophers to think that questions of justification and

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[6] *Ibid*, 208-215.
[7] Ronald Dworkin, *Justice for Hedgehogs* (Cambridge Mass: Harvard University Press, 2011).
[8] See n 7 and for a very informative recent reconstruction of Dworkin's views Nicos Stavropoulos, "Legal Interpretivism", *The Stanford Encyclopedia of Philosophy* (Summer 2014 Edition), Edward N. Zalta (ed.), URL = http://plato.stanford.edu/archives/sum2014/entries/law-interpretivist/.
[9] Famously, Joseph Raz distinguishes between the question about the content of the law from the one about the obligation to obey the law and points at separate criteria for answering each of them. See instead of other places, J Raz, *Practical Reason and Norms*, 2nd ed. (Oxford University Press, 1999).
[10] Thomas Nagel, 'The Problem of Global Justice', *Philosophy and Public Affairs*, 33 (2005).

legitimacy arise only with respect to the coercive imposition of laws that are created and managed by a centralized government.[11] To this Nagel adds the further condition that coercion be imposed 'in the name' of its addresses.[12] It is through this further claim, Nagel thinks, that our coercive institutions become subject to justification from associative principles of political morality. But if the demand for justification arises only on the occasion of coercion exercised by sovereign institutions, then political morality becomes operative only within domestic political communities. In other words, we can be associated in the salient moral sense, only when we are coerced centrally and 'in our name'. It comes then as little or no surprise that Dworkin and Nagel, when turning to discuss associative relations (and concomitant political obligations) beyond the state, they reject the possibility of such relations among persons who are situated in different communities. Let me discuss briefly why this is a surprising conclusion before I turn to point out two instances of the detrimental results of this conclusion.

First off, Dworkin explicitly commits to the view that the state is no more than a personification and should not be taken to constitute a distinct 'party' in the associative relation:[13] rather, in looking for associative relations we are looking at relations between individuals while the state serves more the purpose of a shortcut for conceptualizing collections of individuals. If that is true, then it seems surprising to require the presence of the state as a distinct agent for the determination of associative obligations. Instead, it would be far more consistent with Dworkin's reductive conception of the state to also conceive the building blocks of the associative relation in a manner that does not involve facts about the state.

Yet, there might be another reason why the scope of the associative bond should be confined to the domestic realm, notwithstanding the reduction of sates to collections of individuals. Frequently (both in *Law's Empire* and in *Justice for Hedgehogs*) Dworkin speaks of associative relations as designating a *special relation* that is manifested through an acceptance or appreciation of the responsibility toward those others to whom we are related.[14]

The obvious way to interpret 'specialty' in a manner that would restrict the scope of the associative bond would be to narrow it down to instances of proximity, which require the presence of specific psychological or other attitude-based responses of affinity, kinship or even tribal allegiance between those associated with one another. Now, such a move would be reversing the order of explanation

[11] See Ronald Dworkin, 'A New Philosophy for International Law', *Philosophy and Public Affairs*, 41 (2013), 17.
[12] Nagel, 'The Problem of Global Justice', 121.
[13] Dworkin, 'New Philosophy for International Law', 9-10.
[14] Dworkin, *Justice for Hedgehogs*, 320-1.

between associative obligations and feelings of responsibility: it is because we 'care' about others in a special way that we incur the relevant obligations. On this explanation, one first needs to develop a special psychological proximity with someone before they recognize any responsibility toward them. Helpfully, Dworkin has warned time and again against such interpretations, mainly with an eye to rebutting the argument against the extension of the associative bond from the context of small substantive relationships (family, friendship) to more impersonal, 'at-arms-length' interactions between agents (political communities).[15] He contends that the criterion for an associative relation should remain normative, not psychological or otherwise empirical, arguing that the *feeling* of a 'special' bond does not explain our being in association with others but rather it itself is the outcome of the normative pull on us exercised by the principles that ground the associative bond.[16]

In addition to surprise the confinement of associative obligations to domestic political communities leads to a couple of disturbing results: On the one hand, it makes it very difficult to escape a statist understanding of international law with an eye to setting it free from the caveats imposed by narrow sovereign interests. This is what Dworkin set out to do in his posthumously published 'A New Philosophy of International Law' with very modest results. A key requirement for undermining the standard statist understanding of international law is to remove state consent from the grounds or the validity of international law obligations. Dworkin's anticipated argumentative move in that paper was to replace state consent with associative obligation, as the ultimate ground of the norms of international law. However, this move was not available to Dworkin because of his earlier commitment to the 'domestic' nature of associative relations. If no associative relation can take hold between agents who are not co-citizens, then there is little hope to detect associative obligations at the international level.

Dworkin's second-best solution has been to invoke a rather cumbersome conceptual construction in order to ground the force and validity of international law on domestic associative relations. He argues that states incur international obligations when these would enhance their own legitimacy vis-à-vis their own citizens. But why should an obligation, say, owed to an immigrant non-national (I), who has not yet enter state X's territory, become binding on X if there was no obligation in the first place to justify X's decisions to immigrant I? Dworkin would reply that because X has an

[15] Dworkin, *Law's Empire*, 201.

[16] Dworkin, *Justice for Hedgehogs*, 314-5. It is true that in *Law's Empire* Dworkin identifies several conditions for the legitimacy of associative obligations, many of which smack of psychologism. All of that is set aside in *Justice for Hedgehogs*. In this book he points out that the background legitimating principles – in whose light a social practice can qualify as associative – are moral facts which are related to fundamental aspects of agential autonomy. He also adds that the associative obligations generated by practices simply clarify those background moral principles. But admittedly his discussion remains abstract without much detail (i.e. there is no list of such moral principles or a method for working them out or making them explicit, if indeed they are implicit in the meaning of autonomy and dignity.

obligation to justify its decisions to its own citizens, therefore X should incur any other 'external' obligation that is likely to enhance its legitimacy vis-à-vis its own citizens. It is easy to detect the problematic character of this hybrid solution: in it the associative bond between the members of a political community makes it the case that a set of non-consent based obligations attach to the community even toward actors who are not members of the domestic association. Puzzlingly, such obligations remain associative only for the members of the domestic community, but not for those outside it. We never learn whether these actors acquire rights corresponding to the said obligations; or whether they themselves become also bearers of duties toward those living in other communities; and so on.

What is probably the most disturbing consequence of the 'domestication' of associative obligations is a refusal to extend political obligations of justice and fraternity beyond the boundaries of domestic political communities. Following Dworkin's understanding of associative obligations Thomas Nagel, in a much discussed – and criticized – paper, states that obligations of distributive justice are associative and as such they materialize only among agents who are subject to a coercive legal system that enforces the law 'in their name'.[17] Thus, Nagel accepts that he himself stands in the right associative relationship with the New Yorker who irons his shirt but not with the Brazilian who grows his coffee.[18] And with that he draws a normative atlas of the world which excludes ex ante any investigation into the justification of claims of re-distribution when these are not accommodated under the common umbrella of coercive government.

2. On the site and the scope of associative obligations

We must do better. It is not productive, as in the case of Dworkin, to propagate a progressive, non-statist understanding of international law and at the same time accept as a default position that political obligations obtain only between fellow citizens. It is also very disappointing, as in the case of both Nagel and Dworkin, to consider restrictions on autonomy and choice caused by fellow citizens as sufficient for imposing duties of justice but decline to recognise such duties when the exact same type of restriction is directed at actors beyond the boundaries of our institutional coercive order.

In this section I wish to review this impasse and suggest that the associative account of political obligations can reach beyond or across boundaries of states. Authors working in the field of global

[17] Nagel, 'The Problem of Global Justice', 129-130.
[18] *Ibid.*, 141.

justice have already criticized the limitations imposed by Nagel on an important class of political obligations (principles of justice). Yet those accounts – beyond rejecting the premise of Nagel about the requirement of coercive imposition – have not sought to clarify the independent value of the associative account. They have not assessed whether the element of coercive imposition is a necessary component of the associative account, or whether that account could be refined with an eye to explaining the obtaining of political obligations beyond the state.

A second limitation of these accounts is that they hardly refer to the details of the associative account of political obligations. This is not surprising, because Nagel himself merely points in the direction of Dworkin, without supplying much detail. Yet this is regrettable, for Dworkin's account, aside of being the original locus of exposition, is also richer and can offer important insights into the nature of political association, if updated appropriately.

In what follows I shall argue that coercive imposition as a factual condition is a necessary element of one only among many possible sites of political obligation (i.e. the site of the nation state). However the scope of political obligations should not be confused with any of their particular sites. Rather, in order to determine the scope[19] of political obligations we need to look into what grounds them, i.e. what determines their existence and content. Ultimately I will suggest that the idea of associative relations, if refined, has the resources to offer a plausible account of the grounds of political obligations which escapes the limitations imposed by a narrow focus on facts of coercive imposition.

a. Grounds and triggers

In attacking Nagel's account of global justice, many theorists located its weakness in the central assumption of its author that the site of the nation state is identical to the scope of obligations of global justice. Cutting through the thickets of subscripts, here is a succinct reconstruction of the criticism: the site-scope identity is a substantive thesis, not an analytical truth and therefore its demonstration requires substantive argument. In other words there is no conceptual argument that can establish that it is part of the meaning of the concept of political obligation that its normative ambit encompasses only those who are subject to the coercive institutions of the same state. If such argument were available, there would exist little disagreement about the scope of standard instances of political obligations, such as obligations of justice. But the disagreement is deep and pervasive,

[19] 'Scope' refers to the range of subjects on whom the obligation becomes binding. See for a detailed discussion, Arash Abizadeh, 'Cooperation, Pervasive Impact and Coercion', *Philosophy and Public Affairs*, 35 (2007), 320.

which suggests the need to employ substantive arguments about the existence conditions and the content of political obligations (one hastens to add, in the manner suggested by Dworkin's interpretivism).

What would be then the associative version of the existence conditions or grounds of political obligations? There are two possible candidate versions for such an account: a less appealing version might contend that facts about coercive government *ground* political obligations. I argue below, by pointing to Dworkin's own writings that this is not what the associative account recommends. A second more promising version says that on the associative account what grounds political obligations are not the social facts of coercion but the principles of political morality, which *justify* coercive imposition.[20] This interpretation can be extrapolated from Nagel's claim that obligations of justice apply only to coercive institutions which act *in the name of their citizens*:

> Justice, on the political conception, requires a collectively imposed social frame- work, enacted in the name of all those governed by it, and aspiring to command their acceptance of its authority even when they disagree with the substance of its decisions.[21]

The second interpretation makes space for a distinction between *a ground* and *a trigger*, each representing a distinct mode of explanation. A trigger merely activates or calls upon an item (fact, property and so on) which might then perform a more robust explanation (e.g. to operate as ground) with respect to the phenomenon under investigation. In contrast a ground – using the parlor of metaphysics – is an item (fact, property and so on) which generates a full explanation of the existence of the phenomenon under investigation. Here is a first suggestion how this distinction may operate in the context of the explanation of political obligations: if coercive facts are triggers then they do not directly explain the existence of political obligations. They merely 'tease out' other facts (in the present context, background moral principles) which actually do the grounding work with respect to the obligations at hand. In particular, coercive facts can 'tease out' moral principles

[20] It is more accurate to say that social facts cannot be the sole grounds of political obligations, even though they need to feature among the facts that ground those obligations. Their real shortcoming is that they cannot determine their own contribution to the explanation of an obligation given that such facts are bereft of normative relevance. Instead, we would need to refer to some other kind of fact which can render intelligible the role of social facts in the determination of the content of obligations. In as much as it will turn out that normative facts (e.g. moral reasons) are responsible for determining the contribution of the various grounds to the content of political obligations, I shall consider them to be the ultimate determinants of the grounding relation and, as a consequence, the *grounds proper* of political obligation. To that extent I will omit some of the complexity pertaining to different types of grounds and shall refer as 'grounds' only to whatever turns out to be an ultimate determinant in the above sense. For refinements of the grounding relation between social facts and obligations (albeit applied to legal obligations more narrowly) see the seminal text by M Greenberg, 'How Facts Make Law' (2004) 10 *Legal Theory*, reprinted in Scott Hershovitz (ed), *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (Oxford, Oxford University Press, 2006).

[21] Nagel, The Problem of Global Justice', 140.

in virtue of their capacity to impact on the autonomy of the actors involved, and through that invite an onus of justification.

The short conclusion from the second variant of the associative account might run like this: what marks the capacity of coercive institutional facts to function as triggers is the onus of justification that is attached to them as a result of the impact those facts have on the autonomy of agents. It turns out, thus, that the relevance of coercion is not one of a ground but of a trigger: coercive facts trigger those moral principles which can justify the impact those facts have on the autonomy of actors. But if that is true, then other instances of social fact, which have an impact on the autonomy of agents, will trigger the same principles of political morality which can justify the said impact.

In what follows I shall try to demonstrate that Dworkin's analysis of associative relations lends support to the interpretation that takes institutional coercive facts as mere triggers of political obligations. Resting on this conclusion, I will suggest that any other social fact or event that has an impact on autonomy in the appropriate way may function as a trigger of the same moral principles. Following up on this premise I will further suggest that such autonomy-restrictive facts are not confined within the site of states but can arise beyond and across states. This will lend support to two conclusions: first that we do not need the consent of states to account for the validity of international law obligations; second, that obligations of justice do materialize beyond the boundaries of the nation state.

b. Scope before site

I begin by investigating whether Dworkin's associative story licenses the conclusion that coercive social facts have the capacity to determine obligations in Dworkin's account.

We saw that a striking advantage of representing political obligations as associative is that, while they remain connected to actual instances of human interaction (social practices), at the same time their existence cannot be suspended, as would be the case with any conventional arrangement which remains subject to revocation. The later aspect is present because of the background moral principles which are attached to the practice independently of the mental attitudes of the participants. Using the parlor of site and scope that I introduced earlier we can now take a closer look at Dworkin's argument. In doing so I will consider the early and the later phase of Dworkin's work alike.

In *Law's Empire* Dworkin argued that the bare facts of a practice determine something like the locus or the *site* of the associative relation:

> The question of the communal obligation does not arise except for groups defined by practice as carrying such obligations: associative communities must be bare communities first.[22]

But this might be going too fast: indeed the bare facts of a social relation may delineate a 'space' (i.e. *site*) which is opened up for normative contestation, but it does not follow from that that they can settle the *scope* of the associative relation or of the obligations that this generates. They cannot settle *who may count as a 'member' of the associative relation and/or which persons fall under the scope of the obligations, which govern the relation.*

Dworkin actually seems to allow room for a distinction between site and scope:

> But not every group established by social practice counts as associative: a bare community must meet (…) conditions (…) before the responsibilities it declares become *genuine*.[23]

The interpretivist approach offers plenty of resources to substantiate the view that bare social fact, though necessary for activating normative concerns, is not sufficient for determining any of the aspects of the obligations at play. In particular it appears that the judgment about when bare social facts are 'upgraded' into a genuine associative relation relies on a 'moral' reading of facts and conventions in the light of background moral principles that pre-date any particular configuration of bare fact. In *Justice for Hedgehogs* we read:

> [associative] obligations are genuine because convention does not create but only focuses and shapes the more general principles and responsibilities it assumes.[24]

And a little later:

> So convention strengthens as well as shapes role (i.e. associative – clarification added by GP) obligations. The expectations they nourish cannot be dismissed as mere predictions with no moral force, because they are supported not just by the practices themselves but by the more basic responsibilities the practices refine and protect […] Reciprocal interaction between background responsibility and social convention explains a further and crucial feature of these obligations. Role conventions do not impose genuine associative obligations automatically: the conventions must satisfy independent ethical and moral tests.[25]

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[22] Dworkin, *Law's Empire*, 203.
[23] *Ibid.,* 204 – my emphasis.
[24] Dworkin, *Justice for Hedgehogs*, 314.
[25] *Ibid.,* 315.

What provides more conclusive evidence is Dworkin's contention that social practices cannot generate *ex nihilo* new obligations but have the capacity to merely *clarify* genuine obligations that pre-exist them:

> Once we recognize that role practices clarify genuine but indeterminate responsibilities that flow from the internal character of the relationships on which they build, we have a basis for interpreting them in the way we interpret anything else.[26]

Further these obligations derive from the internal nature of the associative relation and form background principles against whose backdrop conventional practices are to be justified:

> It is the internal character of these relationships, not the fact that some assignment of special responsibility is evidently needed, that drives the responsibilities that the community's conventions recognize and shape. So we must find a justification of the role those conventions play […] The best justification, I believe, describes a repeated feedback loop between a special responsibility we have to people in certain relationships with us, just in the nature of the case, and a set of social practices that progressively reduces the uncertainties inherent in that kind of responsibility.[27]

And:

> Reciprocal interaction between background responsibility and social convention explains a further and crucial feature of these obligations. Role conventions do not impose genuine associative obligations automatically: the conventions must satisfy independent ethical and moral tests.[28]

It is safe to read into these contentions the view that the bare facts or the *site* of a social relation cannot determine the *scope* of the associative relation at hand. For it is the pre-existing background moral principles which actually determine the existence and the scope of the associative bond. Notice also that the conclusion about normative inertness applies to any type of bare social fact, including facts of coercive imposition by an institutionalized organization.

If the site of bare fact fails to determine the scope of the associative relation it is because of the nature of the explanatory relation that pertains between social facts and political obligations. On a charitable reconstruction of Dworkin's account, social facts *cannot ground* political obligations. For, the grounding explanation requires that some other normative fact figure amongst the grounds of said political obligations. The salient normative facts are those background principles of political morality which, on Dworkin's story, are needed in order to classify a set of social facts and events as

[26] Dworkin, *Justice for Hedgehogs*, 316.
[27] *Ibid.*, 311-2.
[28] *Ibid.*, 315.

generative of an associative relation. Not to put too fine a point on it, the inability of bare social facts to ground political obligations is manifested through their failure to demarcate the scope of associative relations. In either case it is background principles of political morality that perform the respective tasks: e.g. to demarcate the range of persons who stand in an associative relationship and ground the political obligations that pertain among those persons.[29]

Yet, a further crucial question arises: can Dworkin's account provide enough support to the claim that facts of social interaction (for short social facts) can *trigger* the principles that determine the scope of the associative bond, by actually grounding political obligations?

Substantiating the triggering function is decisive for otherwise the Dworkinian account would fail to relate social facts to the background principles which generate political obligations. That said, Dworkin's account is incomplete in this respect. One must zoom into his construction in order to retrieve the details of the triggering function of social facts. A good starting point is his account of how associations create obligations: Dworkin thinks that political association produces political obligation in the same way in which any other association produces obligations. Political association merely mirrors the same structure of the production of obligations that is common to all associative relations. Here is a succinct reconstruction: political, as all other associative relations, are entangled in a paradox: they threaten to curtail the autonomy of their members – by imposing joint patterns of action on them (usually designated through collective actions/decisions). But at the same time, they facilitate freedom and autonomy by creating such joint patterns of action.[30]

For the part that they facilitate freedom (by creating join patterns of action which can coexist with everyone's freedom) associative relations become sources of obligation: obligations of friendship, familial obligations, or political obligations such as obligations of justice and the obligation to obey the law. Up to this point there is not much to go by with respect to an explanation of the triggering function of social facts, for the grounding of additional 'joint pathways' of freedom is the task of background principles of political morality, as submitted earlier.

Yet there is a further dimension: for the part that they pose a risk to freedom associative relations – and the standards they produce – become answerable to a set of normative standards that are presumed to flow out of the principles which instantiate the freedom of autonomous agents in its

[29] It is apposite to remark that the judgement about whether a collection of bare facts constitutes the site of an associative relation *depends* on the antecedent judgement about its scope, which in turn is determined by the normative principles that are activated by the said bare facts.
[30] Dworkin, *Justice for Hedgehogs*, 312; 320-1.

various aspects. It is precisely at this point that the triggering function of the factual interactions among agents comes at play. In virtue of their capacity to direct the agency of persons, facts of social interaction *trigger* normative standards that control the quality of the direction imposed by the social facts on persons' agency. The triggering function of social facts is of key significance in two respects:

First, it recommends that any socially imposed pattern of action is subject to a formal normative standard: it ought to co-exist with the freedom of every agent whom it purports to direct. Notice two crucial by-products of this recommendation: on the one hand, it appeals to a set of foundational normative principles which instantiate the freedom of persons *not merely as isolated individuals* but also during their mutual interactions, by seeking to create patterns of action in which the freedoms of those involved can coexist with one another.[31] On the other hand the account rejects some unrestricted version of universalism: it does not focus on some notion of the person in general in order to extract principles of freedom. It is interested in establishing conditions of *co-existence* for the freedom of agents who engage in *concrete* instances of interaction. Notwithstanding the fact that the account departs from a general notion of freedom, which admittedly is universal, it is indexed to the problem of enabling patterns of action that can co-exist with the freedom of everyone involved.

Second, it abstracts from any particular instantiations of a trigger. Even granting the contention that state coercion is the paradigmatic case of a triggering social fact, it need not be the sole one. Any instance of social fact or event, which threatens to limit freedom and, thus, poses the problem of a pattern of action that can co-exist with the freedom of everyone involved, has the capacity to trigger the relevant background principles.

I shall turn next to discuss in more detail the conditions under which interactions among agents may pose the problem of a pattern of action that can co-exist with the freedom of everyone involved.

4. Political association revisited

[31] Once the requirement has been formulated like this, two alternatives present themselves for consideration: coexistence of plural freedoms can be understood either as *co-incidence* of self-enclosed, pre-existing individual freedoms; or it may be taken to point at irreducible patterns of joint freedom which possess *independent value*, in that they help to realise the freedom of each agent. In the last part of the chapter I will suggest a way for exploring the latter alternative.

I have tried to suggest the plausibility of an interpretation of Dworkin's associative account of political obligations, which does not make political obligation dependent on coercive institutions of the state. This interpretation relied on the possibility of distinguishing between two candidate explanations of the role social facts play in the determination of political obligations. In the former, social facts are the *grounds* of political obligations, in the sense that those constitute the existence conditions of these. On this account political obligations depend on facts about the coercive institutions of the state. The alternative interpretation considers social facts merely as contributing factors to the existence of political obligations: the way in which they contribute is by triggering the *actual* grounds of political obligations, e.g. background principles of political morality which ultimately ground political obligations. In this, the second, interpretation political obligations do not depend for their existence on facts about coercive institutions of the state. I argued further that apart from its strong normative appeal, the second interpretation is also more faithful to Dworkin's argumentation. Let me take some stock.

The argument in favor of the second interpretation relied on Dworkin's account of the role social facts play in determining associative obligations more generally. There I demonstrated that the *triggering* capacity of social facts is the result of their structure: irrespective of the particular form they assume, ultimately they are inclined to direct the agency of those who interact in virtue of the trajectories those social facts create. Specifically, they generate an onus of justification by directing the agency of those involved, an onus that can be discharged only through meeting the standards of background moral principles which describe general features of agential freedom. This is precisely what the *triggering* function consists in: in activating background moral principles, and effecting their involvement in the determination of the relevant associative obligations.

This line of reasoning also put the account of associative relation in a fresh light: I argued that the range of persons who become members of an associative relationship (i.e. the *scope* of the association) cannot be inferred from any specific configuration of social facts (i.e. *site* of the association) but needs to be directly determined by the obligations that obtain on the occasion of (any) set of social facts, which has the capacity to trigger moral principles of freedom. Any such set of social facts can become an appropriate site for the associative relation. To put it succinctly scope determines site, not the other way round.

This is enough said as far as goes the metaphysics (i.e. the inquiry into what 'counts as') of an associative obligation in general. But now we must revert to associative obligations of the political kind in order to flesh out some details about our preferred interpretation. For, recall that

compatible as it may be with Dworkin's own account, the interpretation favored herein leads to (partly radically) different outcomes. In particular two are the main differences:

First off, in conferring priority of the site over the scope of political associative relation, it is no longer defensible to confine such relations to those who live under the same coercive institutional structure (i.e. state). As a result, second, the full range of political obligations (including those of *justice*) can transcend the boundaries of states and materialize among persons, even in the absence of a single institutional coercive structure that mediates their interactions. I turn to each of the two consequences in order:

a) Political association beyond the established borders

No sooner has the triggering function been attributed to the class of all social facts that produce a limiting effect on freedom, than coercive institutions are divested of any special role in the grounding of political obligations. Thus triggering facts will end up including any pattern of joint action which engages the agency of plural persons: e.g. my transactions with those who manufacture my clothes in some remote country; the pattern set up by the New York headquarters of a multi-national corporation which has created an outpost in a remote country; or, even, a decision of the UN security council to freeze the accounts of those suspect of terrorist activity. Such patterns of joint action trigger those precise principles that can render the course of action specified in the pattern compatible with the agency of everyone who is engaged in the pattern.

Perhaps we are going too fast: surely, one would object, you do not want to include in political relations those associative relations pertaining to friendship, family and so on. But if you divest institutional coercive facts from their specific ability to trigger the principles that ground political obligations, then there would be no easy way to avoid confusion. There is something to be said in response: the triggering function consists in teasing out normative principles (or reasons) which aim to secure consistency of action. A key assumption of this line of reasoning is that the agency-directing patters are answering to a standard of freedom as independence from domination by others. Without putting too much detail in this claim, suffice it to say that it concerns the plausible and widely accepted idea that an agent can remain free only if she can act for reasons that she has independently of the incentives and acts of others.[32] It follows that socially constructed patterns of

[32] This, broadly speaking Kantian, view has informed a number of recent influential accounts with most prominent among them being: Arthur Ripstein, *Force and Freedom*, (Harvard University Press, 2009); A J Julius, 'Independent People' S Kisilevsky and M Stone (eds), *Freedom and Force: Essays on Kant's Legal Philosophy* (Hart Publishing,

action, which purport to direct the agency of those engaged by them, are in danger of collapsing into coercion, exploitation and so on. For that reason each and every agency-directing arrangement comes under an onus of justification. Justification, in turn, is performed by the normative reasons[33] which outline the general features of a 'well-functioning' pattern, in the sense of a pattern that succeeds to direct the actions of everyone involved in the 'proper' manner, i.e. through laying down a course of action that can co-exist with everyone's freedom as independence.[34]

Thus far there is no difference between political and other associative contexts. The difference comes next, when we turn at the kind of justification, or the type of pattern that is required to become available in different contexts. I shall confine my discussion of the differences to the angle of the political association. There is a standard assumption that political association sets a threshold that is higher than that of other associative relations. Thus Nagel postulates for political associations a higher degree of density and Dworkin the presence of a special bond. In a sense their contention is surprising because it aligns the political association with a class of other associations from which it needs to distinguish itself: family, friendship and other such 'thick' relations surely require a higher degree of density in respect of the bond between their members, but are not on the face of it political. The confusion arises because Dworkin and Nagel wish to keep political associations separate from yet another class of relations that tend to resemble them closely but which, in their view, are not political: i.e. those pertaining between people living in different communities, who are subject to disparate coercive institutional orders. But in relying on the density or specialty of the relation to deliver this task, they focus on a feature that disjoins rather than unites associative relations: density/specialty, if it were rendered the key element of associative relations, would always select the least inclusive relation as approximating the ideal of an associative relation. Thus, expressed in terms of density, family and friendship would turn out consistently to be 'more associative' than citizenship and so on.[35]

The account I have suggested proposes a fresh start by reversing the earlier picture: It identifies in political relations a characteristic that is key *to all associative relations*, i.e. the formal requirement for consistency of action. The requirement is to uphold moral principles that determine the structure of

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forthcoming); *idem*, *Reconstruction*, (Princeton University Press, forthcoming), MS available at http://www.ajjulius.net/reconstruction.pdf.

[33] What is more, as indicated earlier, in the light of those principles the social pattern becomes the site of an associative relation.

[34] See the next section of the paper.

[35] I am not claiming that either Dworkin or Nagel would endorse this outcome, I am only saying that they are reluctantly drawn into that conclusion even as they must fight against it: Dworkin makes an explicit effort to re-interpret the elements of 'density' in a passage of *Law's Empire* that argues against extending then criteria of physical proximity or acquaintance between agents to apply to the case of the political association. See Dworkin, *Law's Empire*, 197-8.

patterns which enable each to act in a way that can coexist with the freedom of everyone else, when freedom is construed as independence from one another's choice. Notice that on this picture the political relation turns out to be the most fundamental[36] associative relation, which is instantiated when collective agency-direction is on the cards, be it informal – i.e. absent any antecedent institution – or as in the standard case of agency-direction through state institutions. The implicit thought is that even those relations which display denser connections among their participants (e.g. family, friendship) are political in a deeper, fundamental sense. What differentiates these associative relations (what adds layers of 'density' as it were)[37] lies downstream of the fundamental political relation, in a manner that does not negate but presuppose it. For, these other associations do not aim to replace consistency of action as the relevant standard but rather to uphold it through reference to reasons that are indexed to particular contexts, roles or properties of agents.[38]

b) Proto-legal obligations

Elsewhere[39] I have called those fundamental political relations *proto-legal*. Proto-legal relations, in instantiating patterns of agency-direction, trigger normative reasons which set out conditions under which those patters can be rendered compatible with the freedom of everyone involved in them. In that sense proto-legal relations are like legal relations because they track the conditions of what has come to be known as *external freedom* but without being dependent on the existence of coercive institutions, which are typically considered to be the hallmark of the law.

In 'mediating' between law and the idea of political association the concept of proto-legal relation can generate appealing explanations of the emergence and role of political and legal obligations. Here is how. Proto-legal *relations* occupy the space of Dworkinian associative relations, but without

[36] In terms of degrees of universality, the scope of political obligations is second only to some unrestricted cosmopolitan obligations (the latter can be portrayed as being indexed to the thinnest possible associative relation: e.g. humanity). Obligations pertaining to family relations and friendship are far more restricted in scope and emerge downstream of political obligations.

[37] A rough and ready proposal for a criterion of degrees of density is to explain them in relation to a concept of 'authorisation' of agency-directing patterns through reference to reasons with variable scope. In doing so we still regard the denser patterns as aiming to realise freedom as independence for everyone involved, yet the freedom-upholding reasons that support them may remain dependent on some test of pedigree or membership (as in the case of family).

[38] It is very interesting how both Dworkin and Nagel, in taking political associations to generate a special bond which sets them apart from cosmopolitan accounts, have to struggle to distinguish them from non-political associations. This forces them to revert to a formalistic criterion – namely the fact that coercion is exercised in the name of the community. But 'in the name of' is arguably a substantive requirement: it can be instantiated even in the absence of any explicit claim that coercion is exercised in the name of the collective. As in cases in which we join our efforts to pursue an aim, or we are involved in interactions that aim to become exchanges between more of us. When we do these things we are acting in the name of everyone (involved), whether it be the case that we proclaim it or not.

[39] George Pavlakos, 'The Proto-Legal Relation: a Normative Compass in a Globalised World' in E-M Mbonda & T Ngosso (eds.) *Théories de la justice Justice globale, agents de la justice et justice de genre* (Louvain, Presses Universitaires de Louvain, 2016); *idem*, 'From a Pluralism of Grounds to Proto-legal Relations: Accounting for the Grounds of Obligations of Justice', *Ratio Juris* 29 (forthcoming 2016).

the fixation on a specific site of social organization: they are instances of social interaction which trigger normative reasons capable of specifying normative conditions of coexistence of the freedom of everyone who is involved in the relation. In the manner outlined earlier, such normative reasons ground obligations, for short proto-legal obligations, whose subjects range over those who are involved in the relation.

Proto-legal *obligations* occupy the space of Dworkinian political obligations and can be employed to explain the production of additional obligations when law-making institutions are involved, as it were, further downstream. Crucially in this picture, proto-legal obligations make their appearance much earlier than any action taken by law-making institutions: in other words, their creation does not require some institution to act. But their nature is not crucially different from that of obligations for which we usually reserve the label 'legal': they demand, on a par with legal obligations, to be enforced in the name of everyone who is involved in the relation, not just the few who on some occasion happen to avail themselves of it.

This should not come as a surprise. Enforceability should not be confused with enforcement: while the latter concept requires for its instantiation the actual existence of coercive institutions, the former is tied up to a normative requirement, which lies in the core of political association: the requirement that freedom can be realized only if we are acting together for its sake - *we can only be rendered free together*. When collective or joint freedom becomes our starting point, not an end- point, then the normative reasons that instantiate it ground obligations in the *name* of a collective 'we-subject' and not in the *names* of aggregated individuals. However, and that shouldn't be too hard to picture, if the obligation is imposed in the name of some collective we-subject, a kind of 'polis', then the claim to uphold it is not merely second-personal, limited to the binary relation between claimant and addressee, but omnilateral. It becomes a claim that involves a we-subject which assumes the responsibility for upholding it. This can be represented in a triangular structure involving a claimant, an addressee and the 'public' or 'omnilateral' we-subject. If that is not the textbook depiction of the structure of legal obligation, then what is!

Illustrating enforceability as a triangular normative relation precisely captures the political significance of the law (its publicity, omnilaterality) without holding the political relation hostage to a preoccupation with any particular set of social institutions and their configuration under some rule of recognition. To that extent, recasting political obligations (and the relations that trigger them) as proto-legal has the clear advantage of demonstrating the *continuity* between the normative tasks undertaken by political obligations and narrowly confined legal obligations. Further it demonstrates

that the task law is invited to accomplish has actually began much earlier: it has began in all those occasions of interaction, in which coexistence of freedom is at stake.

In this picture *law narrowly confined* is only a 'by-product' of proto-legal relations and the obligations generated by them. Saving a lot of detail for another occasion, here is a succinct description: when a proto-legal relation takes hold it generates obligations which very roughly can be categorized into two types: on the one hand, enforceable obligations which describe general characteristics of patterns of action which guarantee that everyone involved is acting in a way that can coexist with the freedom of everyone else. These obligations are self-standing and all institutions can do is 'repeat' them by coupling them with the possibility of coercive force. On the other hand, the set of proto-legal obligations will typically include an obligation to set up institutions which produce more norms that specify additional 'pathways' of action which can co-exist with the freedom of everyone involved. Here we can imagine, downstream of the proto-legal relation, an array of institutional actors which can generate further freedom-combining course of action. Crucial is to point out that not only the particular products of institutional action, but also the abstract (proto-legal) obligation for the establishment of law-creating institutions aim to realise the system of collective freedom. To speak with Kant the abstract proto-legal obligation stands for an obligation to enter a *rightful condition* which, far from addressing humanity as a whole, is canvased against a more modest background of proto-legal relations.

b) International law and justice

I reverted to proto-legal relations in order to capture the transformation of political associative relations from relations that are tied down to a particular site of social organization – that of the nation state and its coercive institutions – to such relations as arise in any interaction between agents which comes under the constraint of achieving consistency of action.

The key advantage of thematising associative relations as proto-legal is the prospect of offering appealing explanations of international law and justice. Recall Dworkin's recent efforts to undermine a statist conception of international law in favor of a moralized one.[40] In particular he was interested to show that the binding force of international law is not conditioned by the consent of states but rests on independent normative principles that are not left at the disposal of individual states. Yet, in order to argue for this idea in international law, he would have to point at some form of international associative relation which would ground the requisite principles. For, as we know

[40] See Dworkin, 'A New Philosophy for International Law'.

from the domestic case, Dworkin explains legal obligations against the backdrop of principles that pertain to the associative relation between citizens. However, this option is not available once he steps outside of the domestic realm: here, as we saw, there is no room in Dworkin's account for any supra-, inter- or trans-national associative relations. Accordingly the prospect of developing, in terms of associative obligations, a moralized conception of international law is curtailed.

Contrariwise, political associative obligations understood as proto-legal are capable of grounding directly enforceable (proto-legal) obligations between agents across and beyond the established, institutionalised forms of political association. This dispenses with cumbersome constructions, such as Dworkin's, which ultimately must ground international law on the domestic political community.

The account of political association in terms of proto-legal relations has a further, far from negligible, advantage. It exports the full range of political obligations into the international realm. Of particular importance is this consequence for obligations of distributive justice. Both Dworkin and Nagel decline to allow obligations of distributive justice to take hold beyond the nation state.[41] Their thought is that obligations of justice are strictly political and to that extent require the existence of robust associative relations, of the kind we encounter only at the domestic level. Once we leave the boundaries of the state justice dissolves, for those whom we encounter are no longer fellow citizens but, at most, human beings who might need our help or charity.[42] Naturally were the current community of states to develop into a world state, equipped with a coercive apparatus for imposing decisions in the name of everyone, then obligations of justice would anew acquire 'global' status.[43] However, in Nagel's words, not only is the current world far removed from such a state of affairs, but also we do not incur any obligation to take things forward with an eye to a world state.

If, however, what is distinctively political about associative relations is their capacity to track normative conditions of external freedom, under which a pattern of interaction can be rendered compatible with the freedom of all those partaking in it, then there is little to recommend a confinement of political obligations (including those of justice) to fellow citizens only. Rather, we should say that where agents – as a condition for engaging in non-harmful exchanges – are confronted with a demand to realize together one another's freedom, their actions should become

[41] Conversely, they are happy to concede the existence of international standards governing the justification and conduct of war as well as those corresponding to the most basic human rights. For an explicit statement see Nagel, 'The Problem of Global Justice'.

[42] In that respect Dworkin and Nagel side with John Rawls's account of international justice in *The Law of Peoples* (Harvard University Press, 1999).

[43] Nagel, 'The Problem of Global Justice'. The reason they would become global is because there would follow up on the existence of a global state.

answerable to the full range of principles which determine the features of appropriately freedom-enhancing patters of action: such principles ground obligations which claim force in the name of everyone, much in the way political obligations do at home.