

On The Monist Structure of Legal Obligations

A. The Workings of Constitutional Pluralism (CP)

1. **What is it:** Constitutional pluralism is *the idea that state practices realize a scheme of constitutional principles, which can legitimize the legal obligations generated by those practices. Whilst the scheme remains the same, its realization is not monotonic (monist or dualist): sometimes it is realized better through supranational institutions and other times by domestic ones. Yet the realisation is structured by the same scheme of principle itself* (Kumm, 2012).

CP rejects the idea that monist or dualist interpretations of state practices with respect to international law are equally plausible or, at least the idea, that there is no further level for adjudicating between them. In the standard pluralist understanding there is no way to say whether (or when) monism or dualism should take precedence: the standard understanding endorses a pluralism that is unprincipled or random (e.g. Kadi in the first instance court and the ECJ). The standard picture amounts to a *deep* pluralism, which features at the very grounds of legal obligation (Kumm 2012).

Instead CP proposes that all state practices, at any level, in order to make sense as legitimate sources of legal obligation, must be read in the light of the same set of substantive (moral principles). These principles determine when a monist or dualist reading of supranational law is the appropriate one – appropriate is the reading that ‘realizes’ the relevant principles in the ‘best’ manner (‘best’ in this context may require for its determination an act of balancing). Thus, ‘monism’ and ‘dualism’ succeed each other in a principled manner. As a result the pluralism generated is shallow; it relates to the concrete manifestations of a set of substantive principles.

2. Some problems. Despite its effort to escape statism, CP remains wedded to the idea of the state: only state action is salient in triggering off the appropriate set of constitutional principles. This new twist on statism gives rise to two possible objections:

- a. The objection from the pluralism of principles: how come that different levels/bodies of international law realize the same principles of political morality? This would seem rather unlikely, given that the idea that states bound themselves through consent is ingrained in any statist understanding of legal obligation.
- b. A second objection comes from the range of principles that CP purports to capture: in most versions it leaves out principles of distributive justice (Kumm). This point can be postponed for present purposes, however it should not be forgotten.

Let me flesh out point a):

The objection to CP on behalf of the statist model would run something like this: states do two very different things when they engage in coercive practices domestically and when they engage in practices of consent at the supra-national level. It is only the former that require appeal to substantive moral principles (in order to generate

genuine obligations for the citizens-coerced); in the latter, all states do is to conclude agreements with an eye to furthering their goals (this is even accepted by non-statists like Nagel 2005).

According to the objection, when the BVerfG says ‘Solange...’ it does not mean; ‘I am dissenting because the German legal practice realizes better the common principles of Europe for all of us’ – it simply states: ‘I am dissenting because I am evoking the principles that best justify my practice vis-à-vis the subjects of Germany’.

The objection stands even if we interpret the state practice of consent as being itself *coercive*: again here, because it passes through¹ the state, the practice will be coercive only vis-à-vis the subjects of that state: In this case also, the scope of ‘solange’ of the BVerfG would be restricted to principles that underpin German domestic practices and capture German citizens only, not everyone in Europe.

So the question persists: How come it is the same scheme of principle that governs domestic and supranational state practice? It would remain possible, in other words, that obligations on states rest on different principles at different levels of state practice, given that all that grounds obligation are the sayings and doings of state officials.

B. The Workings of Principled Monism (PM)

I propose to spell out in more detail the reason why state practices, at any level, have a ‘moral’ impact, along the lines of triggering off the kind of substantive principles which CP argues they do (plus those principles it argues they don’t!).

One fruitful way of doing that is to focus on the question about the grounds of legal obligation. Approaching our topic from that angle offers the opportunity to establish a connection between state action and the morality of autonomy, which arguably provides the background against which facts of state practice acquire normative significance *qua* obligation-imposing norms. In this case, the moral impact of state practices is explained as the impact exerted by the coercive practices of states on the autonomous agency of those who stand in the receiving end. Autonomy is that which rationally determines facts about practices (i.e. non-normative facts) as having normative significance (Greenberg 2004).

A bridging argument will be offered, which will show that state coercion is not special for triggering off moral reasons (principles). Focusing on what precisely is coercive about state practice, I will suggest that other practices/contexts of interaction between agents are capable also of triggering off the same moral principles which ground obligations between the agents involved. Importantly, I shall claim, coercive relations are not exhausted by a specific type of fact (facts about state practice) but rather involve a distinct structure of demanding of someone to do something for the wrong kind of reason. I will call this structural account of coercion *the normative conception of coercion or NCC* (part C of the paper).

In effect, the proposed line of argument will aim to ‘reduce’ facts about state practice to normative contents that impose genuine obligations (reasons). Lifting the ‘veil’ of

¹ More accurately: it is still state action that determines to what extent instances of consent count as coercion.

statism will encourage us to stop counting state action as bedrock condition for the existence of legal obligation. This ‘deconstruction’ will go hand in hand with a fresh understanding of legal obligation: On the proposed understanding legal obligation is of the kind that pertains between agents who engage in joint projects/activities. The ‘density’ of such contexts of interaction between agents is on a par with that of domestic legal practices. However, their *scope* extends beyond any single legal order (domestic or international).²

C. Two Conceptions of Coercion

In this part I focus on the understanding of the role of coercion that underwrites CP, which in many ways is responsible for obfuscating the link between coercive relations and principles of political morality.

There is a venerable tradition in legal and political philosophy which argues that legal institutions (institutions of basic structure more generally) generate genuine obligations only to the extent to which they coerce citizens legitimately. In Dworkin’s words law is about the legitimate exercise of institutional coercion. Call this the standard picture of coercion.

The standard picture assumes that coercion triggers off principles of political morality in virtue of its purporting to direct the action of autonomous agents: those can be properly directed iff the coercive direction ‘relies’ on sound/correct principles which govern independently the relation between the agents. Along these lines, there exists a legal obligation only if coercion ‘activates’ correct principles.

Now a surprising conclusion of this line of thought is that absent state coercion somehow the principles which govern the relations between agents remain inapplicable or, to use a figurative expression, ‘silent’. This generates a paradox: for all along, under the standard picture, coercive imposition by the state was not grounding the relevant principles. It was merely ‘triggering off’ or ‘activating’ them. Accordingly, one could plausibly assume that the relevant principles were grounded elsewhere – or in different ways.

But the assumption, if true, generates a fresh worry: in virtue of what are these principles supposed to enter the lives of the relevant agents? How are they supposed to become salient in their relations in the absence of state coercion? In other words even if state coercion is not necessary for grounding the said principles, it might still remain necessary for making them salient. Were that true, the absence of the state would be crucial for the existence of those principles in our lives even though not necessary for their existence *simpliciter* (i.e. in determining existence conditions for those principles).

I will suggest that state coercion is not necessary either for the grounding of the obligations that pertain to our interaction as persons or for the salience of those principals to our particular interactions. The upshot of this line of argument will be

² At this juncture there exists a surprising and potentially refreshing parallel to be drawn between debates in legal philosophy, concerning the grounds of legal obligation, and those debates in political philosophy that seek to specify the site and scope of the basic structure as a condition for distributive justice.

the claim that there exist legal obligations antecedently of whether states coerce us. For, I will claim, coercion is on the cards independently of any facts about the state.

Let me first go in some more detail into the workings of state coercion. I shall assume, together with the standard picture theorist, that the principles that ground legal obligation do not depend, for their own grounding on institutional coercive facts. Accordingly I will focus primarily on the role of facts of coercion in making those principles salient to our lives. I will claim that salience is not grounded in any intrinsic properties of state coercion, but instead in the manner in which state coercion directs the actions of persons (the ‘how’ question). In this respect I will put forward a *structural account of coercion* which will be independent of state institutions. This conception of coercion, for which I will coin the term *Normative Conception of Coercion (NCC)*, will demonstrate that there exist instances of directing action which are coercive independently (or on the side) of instances of state coercion.

Let us first think through how the state coerces in the standard picture of coercion. Uncontroversially, state directives take the form:

D: A, otherwise S

Two cases may be distinguished:

a) Good case scenario (legitimate action-direction): A is backed by a sound principle (or, is the instantiation of a valid principle). In that case if an agent does not comply with D then S follows non-problematically. Notice here, that all is really happening is to connect a sound reason for action (or incentive) A to an appropriate consequence C. This can be the case also in many other contexts outside instances of state coercion.

b) Bad case scenario (illegitimate action-direction): there is no sound reason that backs D. Now we get a case of aligning a ‘bad’ reason (incentive) with what may or may not be an appropriate consequence C. The standard account of coercion would want to say that this is an instance of illegitimate coercion, on the grounds that the salient principles governing the relevant domain of action do not generate good reasons for the imposition of the consequence S (assume here for a moment that state sanctions are the right way for directing actions, other things being equal).³

In both scenarios, the standard theorist would want to claim that it is state imposition that makes the right principles (i.e. those principles that govern the relevant domain of action) salient. But why should state imposition be privileged in playing that role? I think that *any other* instance in which an incongruence between reasons (incentives) and direction (or consequences) occurs, is capable of making salient the principles that apply to the domain. I would like to call these instances coercive also, and attribute to them a common structure (cf with Burra 2013). Take for example an instance of blackmail (arguably paradigmatic of coercion):

B: If you don’t sleep with me (A), I will fire you (S)

³ I will return to this point later.

Here too we have a case in which the wrong kind of reason/incentive is aligned with a consequence which in itself might not be wrongful (firing someone is appropriate if they consistently fail to turn up for work). Plausibly, the structure of coercion is exactly about that: namely, about aligning the wrong kind of reason/incentive with a demand (which may otherwise be appropriate). When we do that, we are not generating sound reasons for the subject whose compliance we demand. In the blackmail example, this is easily illustrated if we re-write **B** as the reason the coercer proposes to be governing the domain of her interaction with the coercee: **R'**: "There is a reason to fire someone if they refuse to sleep with you". But this is like carving the normative domain in the wrong joints: there is no reason such as **R'** because **R'** is gerrymandered. In conclusion, it is precisely this structure and not any fact about state enforcement that is coercive.

Now we can see clearer how the structure of coercion can account for salience. What renders certain principles salient with respect to any instance of action-direction (demand) is a constraint that we avoid replicating the structure of coercion. In other words that we avoid aligning incentives with demands in a manner that fails to 'refer' to a sound reason governing the relevant domain of action (in our blackmail example that domain would be labor relations).

Here is a more formal expression of the said constraint:

C: A should not (do y, believe that her y'ing will lead B to x and that this fact is a reason to y and fail to believe with justification that A's y'ing will facilitate B's coming to x on the basis of her recognition of reasons to x that she has independently of A's y'ing).⁴

Several implications of this view are worth examining:

1. Coercion is not wrongful in itself. The structural account merely says that when coercion is on the cards, wrongfulness is determined by the principles which govern the relevant domain of action (in more technical language, the structural account is buck-passing).
2. The structural account shows that coercion is *relational*. This relates to two further features: i) coercion requires that the parties involved are engaged in some reciprocal or joint activity (if I am not employed by you, you are not coercing me by threatening to fire me); b) relatedly, the salient principles of the domain that determine the wrongfulness of the situation are joint obligations to which both parties are subjected.

What does all this tell us about law?

First off, that state enforcement is not necessary for coercion. On the structural account (N.C.C.) any instance of directing the actions of others by aligning the wrong kind of incentive with a consequence/demand may count as coercive (see Kadi).

Second, the principles that determine the wrongfulness of the coercive situation are joint obligations of the kind that applies to all parties that partake of the coercive

⁴ A.J. Julius 'Getting People to do Things', MS version 20 April 2009 (in file with author) 7-9.

structure. [Further: these principles have enforceability as part of their content; this means: they prohibit/prescribe some conduct *enforceably* – which concretely means that the coerced has an enforceable claim that the coercer be made to do or refrain from an action. Notice here that enforceability does not imply enforcement.] I call these principles enforceable joint obligations of basic structure (E-JOBS), but would also be happy to call them legal obligations. My conjecture is that enforceability is what legality is about (I expand on this point in section d.1, below).

Finally, a word on enforcement, or the actual possibility to impose obligations on those who fail to comply. In this context we need to rely on institutions (e.g. courts), which ensure that obligations be not enforced unilaterally by agents. For, unilateral instances of enforcement would anew be replicating the structure of coercion as described earlier. Such institutions are under a requirement that they enforce obligations with equal respect (I expand on this point in section d.2, below).

D. Legal Obligation beyond the State

In this section I adumbrate the

d.1 Reasons that satisfy <C>:

- Obligations of basic structure (rather than legal obligations).
- They are joint obligations: when I realize R – I realize it for everyone.
- Such obligations are enforceable obligations ('everyone ought to Fi enforceably'). [Enforceability here does not presuppose an actual possibility of enforcement. It is part of the content of the obligation. As such it differentiates this kind of obligation from other kinds of obligations: like strictly moral, etc].
- Contrast between lying *simpliciter* and lying within an exchange.
- In sum these obligations are Enforceable Joint Obligations of Basic Structure (EJOBS).
- *Reciprocracy (or proto-democracy): the existence of EJOBS indicates that there is a logical space of reciprocal reasons, which is conceptually distinct/prior from democratic institutions – plausibly, democratically enacted obligations will be a 'good case' of instantiation of EJOBS*
- *for it succeeds in treating everyone with equal respect by realizing joint principles for all.*
- Any practice (e.g. at global level) that operationalizes EJOBS creates an obligation for every participant to 'comply with the practice or rationally persuade others to change the practice' (AJ Julius, 'Public Transit').
- (Cf with institutionalized civil disobedience and conscientious objection (Kumm 2012)).
- Any such practice is likely to generate more stable EJOBS when it treats the parties to the scheme of EJOBS with equal respect.

d. 2 Enforcement

- What is (actually) enforced is the obligation to comply with the/some practice that realizes EJOBS.
- (Actual) enforcement – being itself an instance of a-d-a – is subject to constraint <C>: it must itself be a practice that treats the participants in a manner that is appropriate to their status as subjects of a practice of EJOBS. This requires here, that the practice of enforcement: 1) relies on a practice of

EJOBS and 2) treats participants with equal respect (by enforcing a consistent scheme of obligations to every participant).

- Usually in the national context the practice of EJOBS and the practice of enforcement overlap – but at global level they often come apart. Here the search for the ‘appropriate’ practice takes the form of contestation between different practices that operationalize the same principle.
- When multiple practices of EJOBS are in play (global level), the act of adjudication/enforcement opens up the possibility of rationally demonstrating which amongst them realizes ‘best’ the relevant EJOBS.
- Democratic practices have a presumption of ‘correctness’ (realizing EJOBS that meet constraint <C>).

SCHEMA: A-D-A -> (C) -> EJOBS -> Enforcement
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E. The Big Picture of the Account

- Focus on the grounds of legal obligation
- What grounds obligation does not depend on any particular type of institutional fact (state based) – the Normative Conception of Coercion.
- A unified scheme of grounds – a unified scheme of obligations - the iceberg metaphor.
- A distinction between grounding and enforcement.
- ‘Monism’ at the level of grounding; ‘pluralism’ at the level of enforcement.
- No ‘global state’ just ‘global’ obligations.
- Existing institutional arrangements handle enforcement; obligation to develop appropriate institutions of enforcement.

Literature

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