

Legitimacy, Authority, Reasons, and International Norms

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International Law presents national legal system with new challenges, towards both its authority and legitimacy. Yet these questions are not as straight-forward as might first appear, especially in light of the specific particularities which the international legal order exhibits. First of all, in Hartian terms, the international community seems to have "law, but not a legal system"¹; it portrays/contains legitimate binding obligations, yet we cannot exactly understand/study it in the same way we understand/study national systems. Within states we are used to this "luxury" - this unity and systemization - which the rule of recognition allows for us². We are used to taking everything which is officially designated as "law" in an "all or nothing" basis; we are used to recognizing valid law through someone's "say so", through its "source" and its "pedigree" within the unbroken chain of rules - to the basic rule (of recognition).

In lack of an international rule of recognition (and an international authority to accompany it) international law, inescapably, lacks this systemization, this descriptive unity which we use to understand domestic legal norms³; this presents obstacles to its understanding and, yet, new opportunities. This "all or nothing" basis disappears, and international law becomes abstract international norms/obligations or at least "sets" of them. This allows for more flexibility and *choice*, which is not possible within states. In Razian terms (using his legitimate authority conception) authoritative norms preempt even when not reflected/deliberated upon a correct balance of legitimate reasons⁴. This brings us to the second peculiarity of international law.

The Razian legitimate authority conception exhibits clearly the vertical relationship between authority and subject; the directives are created and applied vertically to (independently of) the subject - even if they are decided according to reasons which apply to subjects independently of the authority which decides upon them. Within the international community this vertical relationship collapses into a horizontal one; since, according to the traditional Westphalian conception of international law, states are both the (main) legislators and subjects. Although, through this "state consent" model the legality of international norms (at least domestically) inevitably depends upon the discretion of state officials; yet its "legitimacy" might not.

International norms, if legitimate, will stand for years to come and will be inherited by both the subjects of state authority, future authorities and generations to come. It is exactly this fact which raises anew the question of legitimacy of legal norms, this time from the international context - which in turn legitimizes the national one. As such, we cannot base the legitimacy of international

¹ M.Payandeh, "The Concept of International Law in the Jurisprudence of H.L.A Hart", (2011)

² Hart, H. L. A. *The Concept of Law*. Oxford: Clarendon, 1961. Print; Chapter X

³ This was also recognized in Eric Posner, "Do States Have a Moral Obligation to Obey International Law?," 55 *Stanford Law Review* 1901 (2003)

⁴ Raz, Joseph. *The Morality of Freedom*. Oxford: Clarendon, 1986

norms using reasons which apply to passing/temporary authorities/governments. The reasons which legitimize international norms must run deeper than that. From this perspective, it seems fruitful to examine anew the relationship of authority between officials and subjects⁵.

The state is an unavoidable actor within the international scheme, yet any (legitimate) authority it holds internationally it must still derive from the subjects which it represents, or the reasons which apply to them independently; perhaps we can work out the legitimacy of international norms through the existing relationship of authority which exists within the state. Raz's service conception provides a very useful instrument to understand this relationship through; the reasons which legitimize domestic norms could be the same reasons which legitimize international norms; and when state officials are correctly recognizing or refusing to recognize international norms, they could be argued as responding to moral obligations they owe their own subjects, primarily, and subjects of the international community in general.

Raz's service conception cannot be recreated internationally by forgetting the existing domestic relationship⁶. As such the existing national model needs to be extended to account for international norms⁷. Under this extension it seems possible to suggest that there is a moral obligation to follow (an) international norm(s) under three headings. When: 1) they contain directives which are reflected upon a correct balance of (dependent) reasons ; 2) reliance upon certain international norms, mechanisms and schemes equip state authorities better to respond to reasons which exist within the state; and 3) it falls within the obligation to support "just institutions" (which subject hold individually and, as such, is inherited by state authorities).

From this perspective, although international norms do indeed require some sort of state recognition in order to obtain legality, this recognition can only be a product of deliberation. Yet this deliberation, since it is done through a representative capacity, and upon dependent reasons requires the representative state authorities to act within a morally (and in extension politically) correct manner. This correct manner, might certainly be difficult to define, but it includes at minimum dependent reasons. This dictates that any state consent or denial must be a reasoned one, justified upon reasons which apply independently to subjects, real people. This approach does not prescribe results, but a certain type of deliberation within state-actors; a meaningful conversation and debate using dependent reasons; transparency. The further question is in what manner such actions can and ought to be organized in.

⁵ Kumm attempts something similar from a constitutionalist perspective, see Kumm, "The Legitimacy of International Law: A Constitutionalist Framework of Analysis", *European Journal of International Law*, 2004

⁶ Tasioulas in ch. 2 of their book does exactly this. See Besson and Tasioulas, "The Philosophy of International Law" (2010) Oxford

⁷ Besson in her article extended Raz's conception in a more fruitful manner in Besson, S., "The Authority of International Law – Lifting the State Veil", *Sydney Law Review* [Vol. 31:343 2009]