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# EUI Working Papers

RSCAS 2012/16

**ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES**  
**Global Governance Programme-14**

LEGAL OBLIGATION IN THE GLOBAL CONTEXT  
SOME REMARKS ON THE BOUNDARIES AND  
ALLEGIANCES AMONG PERSONS BEYOND THE STATE

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**GEORGE PAVLAKOS**

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ISSN 1028-3625

© 2012 George Pavlakos  
Printed in Italy, May 2012  
European University Institute  
Badia Fiesolana  
I – 50014 San Domenico di Fiesole (FI)  
Italy  
[www.eui.eu/RSCAS/Publications/](http://www.eui.eu/RSCAS/Publications/)  
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## **Abstract**

The intensity of Globalisation has put under pressure the link between legal obligation and state institutions, which up to recently had been assumed to enjoy the status of an analytic truth. That said, there exists little agreement on how and to what extent the link has been broken, what can repair it, or whether reparation is possible, let alone desirable. Moving beyond the two dominant theories of political obligation, the political and the instrumental, the paper attempts to make a fresh start for reconstructing the content and scope of legal obligation in the global context. In doing so, it introduces a constraint which rests on a qualified notion of coercion, one that is capable of illustrating the grounding of obligations on the moral status of persons (Normative Conception of Coercion). Contrary to the political view it will be argued that state institutions are not necessarily included in the grounding of legal obligation. Contrary to instrumentalism, not all contexts of institutional interaction will be deemed otiose.

## **Keywords**

Global legal order; legal obligation; coercion; Kant



## 1. The Moral Significance of Legal Obligation\*

No other era has exerted so much pressure on the assumption that all legal obligation is grounded on state institutions as has the wave of globalisation that we are currently experiencing. That assumption had been consolidated over the years through the prevalence of a model of understanding of law, which identified the state as the source of all legal obligation. For as long as nation states remained de facto the protagonists on the international stage the said model came to acquire the status of almost an orthodoxy, an orthodoxy that marched together with the intellectual movement of legal positivism, which undertook the task to defend it in detail and guard it with rigor and sophistication against rival views.

Yet a series of recent developments have challenged the standard positivist picture in a number of instructive manners. Increasingly, there arises a need to account in normative terms for the behaviour of non-state actors, whose actions bring about effects that cannot in any way be subsumed under and accounted for within the orthodoxy that is the system of states. On the other hand, and perhaps most importantly, there exists a pressing need to renegotiate the scope of human rights obligations and obligations of justice with an eye to coping with injuries and injustices that elude the corrective and distributive mechanisms of the state system. General as these formulations may come across, they might determine the answers to a number of important more concrete questions: questions about corporate responsibility; or those on who are the subjects of international law? About whether we have obligation from justice vis-à-vis no nationals? Or whether the global economic order is harming the poor and so on.

These developments have, on general consensus, severed the link between legal obligation and state institutions, which up to recently had been assumed to enjoy the status of an analytic truth. That said there exists little agreement on how and to what extent the link has been broken, what can repair it, or whether reparation is possible let alone desirable. In what follows I will attempt to cast a fresh look at these problems and propose a general model for reconstructing the content and scope of legal obligation in the global context. In doing so, in view of the complexity of the issues involved, I shall restrain myself to a general account, laying down principles or guidelines capable of framing a more detailed account, which I hope to undertake sometime in the near future.

The starting point is what I hope most will find to be an uncontroversial premise, which I shall call the *moral requirement* (henceforth, MR).<sup>1</sup> This is the thesis that legal obligation, in purporting to be a species of obligation, must make moral sense.<sup>2</sup> Avoiding a more detailed analysis of morality, MR is about the need to explain anything that purports to generate an obligation in terms of its impact on or

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\* The current version of the paper was written following a doctoral school jointly organized by the EUI Global Governance Programme and the RNP GLOTHRO. The ideas of the paper have been developed over a period of three years, with the generous support of an FWO Odysseus grant on 'The Constitution of Globalisation'. A considerable number of people has helped in further refining the argument. Among them definitely were: AJ Julius; A Sangiovanni; N Stavropoulos; J Pauwelyn; A Herwig, S Loriaux and W Vandenhole. I have benefited from comments on a number of occasions: at the IVR-UK conference in Birmingham in 2010, where the paper was presented as a plenary lecture; at the GLOTHRO stock-taking conference in Antwerp in Spring 2011; at the LEUVEN political theory seminar series (in this context I should single out H De Schutter, S Rummens A Braeckman) and at the GLOTHRO doctoral school at the EUI in Florence in November 2011. Many thanks are owed to the staff of CafeNation in Antwerp for providing a congenial environment and superb coffee during most part of the writing of the paper.

<sup>1</sup> Compare this requirement with the requirement of a Rational Determination Condition proposed by M Greenberg in his 'How Facts Make Law?' in (2004) 10 *Legal Theory* 157. See also the discussion in G Pavlakos, 'Law, Normativity and the Model of Norms' in S Berteau and G Pavlakos (eds), *New Essays on the Normativity of Law* (Oxford and Portland Or, Hart Publishing, 2011) 246-280.

<sup>2</sup> See L Murphy 'International Responsibility' in S Besson and J Tassioulas (eds) *The Philosophy of International Law* (Oxford, Oxford University Press, 2010) 283-298.

link to autonomous agents (persons). Disregarding any finer disagreement on how to cash out such a relationship, I think this general formulation has the capacity to exert enough ‘centripetal’ force to hold together any distinct views that still agree on a connection between obligations and persons.<sup>3</sup>

The MR has found a strong expression within doctrinal debates in international law in the so-called individualist challenge. The challenge has been raised in the context of debates over the responsibility of states in IL, however it carries wider implications for the topic of legal obligation. Here is how Crawford and Watkins formulate the individualist objection:

[the objection] impl[ies] that international law would do well to substitute or supplement state responsibility with a paradigm of responsibility which is more sensitive to considerations of individual deterrence and blameworthiness.<sup>4</sup>

Admittedly the question of responsibility represents but a special aspect of the topic of legal obligation. The reason being that any answers to the former question, but also to any related questions concerning the bearers and claimants of responsibility, depend on an antecedent answer to the question about the grounds of legal obligation: if what obligates is grounded on institutions of some particular form then ascriptions of responsibility cannot escape the boundaries of those institutions. If, however, what obligates is considered as grounded on persons’ autonomy, then any ascription of responsibility will have to begin with persons and only eventually ascent to more complex entities. Of course, this does not prevent one from identifying states or corporate bodies as the final addressee of the obligation. However, there will be no a priori cut-off point of ascription of responsibility because all ascription will have to start at the level the individual and then proceed downstream. This might cater for more laborious legal reasoning, yet it would ensure a much higher degree of subtlety and appropriateness, of the kind usually pertaining to moral reasoning. All in all the issue of responsibility cannot be decided in isolation from individuals, precisely because of the moral relevance of legal obligation. Hence, even if obligations in IL need not be reduced to obligations toward individuals, they are grounded on some moral principles that spring from relations between individuals. Liam Murphy puts it poignantly:

If there is a sense in which a state can be burdened that implies no burdens on people, then burdens, in that sense, are morally irrelevant and not worth talking about.<sup>5</sup>

Until I put forward a more detailed proposal about the content of MR<sup>6</sup> I shall presently use it as a ‘compass’ for selecting what can and what cannot be included into the grounds of legal obligation. Predictably my focus will be to examine the modal status of the state and its institutions for the generation of legal obligation: are state institutions constitutive and/or necessary for the grounding of obligations? In tackling this question I will be looking closer at two views (part 2).<sup>7</sup> First the view that argues that there cannot exist any obligation proper unless it has been adopted by the state system, either by being part of the law that domestic institutions generate or by having been generated by the agreement, and only to the extent to which this agreement allows, of sovereign states. Let ‘political view’ stand as a synecdoche for the family of the views that more or less subscribe to that claim.<sup>8</sup> The political view encourages a dualist understanding of the grounding of obligation. In it what obligates

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<sup>3</sup> Switching to a meta-ethical vocabulary, this condition may be rephrased more accurately as the position that norms imposing obligations be appropriate as reasons for action from the point of view of anyone who is an agent. A more detailed discussion is to be found in G Pavlakos ‘Practice, Reasons, and the Agent’s Point of View’, (2009) 22 *Ratio Juris* 74.

<sup>4</sup> See J Crawford and J Watkins ‘International Responsibility’ in S Besson and J Tassioulas (eds), n 3 above, 291.

<sup>5</sup> L Murphy, n 3 above, 302-3.

<sup>6</sup> See below, section 3.

<sup>7</sup> I shall take issue only with views such that accept the MR in a stronger sense and will not discuss directly those views that reject MR from the outset – given the individualist challenge in IL. For the latter views see my paper and M Greenberg, n 2 above; and G Pavlakos, n 4 above.

<sup>8</sup> See T Nagel, ‘The Problem of Global Justice’ in (2005) 33 *Philosophy and Public Affairs* 113.

persons can feature in an account that is independent from what obligates institutions. A striking example of dualism at work is the case of obligations of justice. Obligations of justice can only burden states but not individuals. Individuals have merely a duty to set up the institutions that are appropriate for promoting justice (and not, directly, the obligation to promote justice).<sup>9</sup>

The second view, which following a strand in the literature I shall call ‘instrumental view’,<sup>10</sup> disputes the fact that obligations are grounded on states and their institutions. Rather, the grounding locus of obligations on this view are persons.<sup>11</sup> In this scheme authoritative institutions may play an instrumental role in enhancing and discharging obligations which already exist, but are not capable of grounding them in the first place. The instrumental view encourages monism with respect to the origins of legal obligation: in placing persons in the centre of the stage, it lines up the duties of institutions with those of persons. Accordingly the grounds of obligations remain invariable across the multitude of authoritative institutions.

Both views contain some grain of truth. However neither tells a complete story. We need an account that makes normative sense of the reasons for the diverging solutions each theory proposes, with an eye to arriving at a more complete story about the grounding of legal obligations. I shall rely on MR to develop this account, by introducing the constraint that any such story will be required to give an account of how individual persons are affected. In part 3 I will focus on the special role coercion plays in order to pinpoint the elements that deliver the moral significance of legal obligation, in line with the requirements of MR. In particular I will single out a qualified notion of coercion, one that is capable of illustrating the grounding of obligations on the moral status of persons (Normative Conception of Coercion). Contrary to the political view it will be argued that state institutions are not necessarily included in the grounding of legal obligation. Contrary to instrumentalism, not all contexts of institutional interaction will be deemed otiose. Indeed I shall argue for an amount of interaction between agents, which even though need not acquire the status of state institutions, is required in order to activate obligations.

Part 5 will take on board a separate objection why the state might after all be constitutive for legal obligation. While this objection is very serious, I shall aim to show that it takes its strength from the same account of obligation which puts autonomous persons in its centre.

Two clarifications are owed to the reader: I will mostly be speaking about obligations of distributive justice, however I mean to include also obligations against wrongdoing (or obligations of corrective justice). This equation is likely to raise a few eyebrows amongst those who have spent a long time debating those issues. My justification for doing so is this: the person-based nature of obligations of corrective justice are easier to handle. It is mostly a person-based account of distributive obligations that is usually met with scepticism. By making a case for the latter (as I hope I will) I will also have discharged the burden of proving the argument to be true of the former, without committing myself to any strong thesis about the identity of the two kinds of obligation, or in any other sense conceding that they admit of uniform treatment.<sup>12</sup>

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<sup>9</sup> I suspect that this kind of dualism underwrites the dualism in the more technical sense that International lawyers employ it in the ordering between distinct normative legal orders: the fact that there are two normative perspectives, that of the state and that of everything outside it, is the result of resisting to ground all legal obligation on the same normative locus (something along the lines of ‘the person’). However more argument needs to be offered to substantiate this suspicion.

<sup>10</sup> See L Murphy, n 3 above.

<sup>11</sup> This version of instrumentalism is still deontological for it is concerned about the grounding of legal obligation on persons’ moral status. As such it should be sharply distinguished from an instrumentalism of utilitarian inspiration. There institutions are instrumental in serving the maximisation of impersonal or agent-neutral value.

<sup>12</sup> Admittedly, when it comes to the allocation of responsibility, there exists an asymmetry between obligations of justice that are corrective and those that are distributive. That said it could still be argued at a general level, that to that extent that obligations are anchored to persons, any responsibility of the state that does not correspond to responsibility of the citizens, but still burdens them, is to be deemed coercive.

Finally, it might have become obvious by now, that the entire paper presupposes the view, commonly attributed to Kant, that moral obligation is grounded on the rational powers of autonomous agents. Although I shall not try any more to explicitly defend this view against other rival views of moral obligation, I shall hope that my analysis will suggest, at least implicitly, why something like a Kantian account is to be preferred.

## 2. The Political and the Instrumental View

### *a. The Political View*

The political view is the view that grounds legal obligation on the institutional framework of the state. State institutions, on this view, are constitutive of legal obligation because it is they that reveal the grounds of legal obligation, that is those principles which are capable of legitimizing state coercion.<sup>13</sup> It is worth noticing that even when those principles are of a moral or other extra-institutional nature, institutions still retain their grounding role, for it is only through them that we get to defer to the correct justificatory reasons. Hence the prominent role that is assigned to them.

The political view is of course much more ambitious and comprehensive than that. It starts from the assumption that the state personifies in some sense the political community, as a result of which states speak and act in the name of the members of the community. The fact that the words and deeds of state institutions are performed in the name of its subjects activates the legitimacy requirement: unless those acts are properly legitimised, states cannot claim for themselves the right to the monopoly on the use of coercive force.

Concerning our inquiry into the grounds of legal obligation, the political view offers two important insights: first, the need to invoke legitimacy for tokens of agency originating in state institutions arises from the impact those have on persons, as it is only persons, as opposed to other individuals, who are endowed with normative value – throwing a stone into the lake requires, *prima facie* no justification; directing someone to drive on the left side of the road does. Second: state institutions are not merely signposts in the direction of the grounds of obligation but, what is more, they embody those obligations. In the political view, a significant class of obligations, that is distributive obligations, address only state officials rather than the members of the community. Although obligations against wrongdoing do address persons too, the political view seems to suggest also in their case that obligations do not pertain to persons directly but are mediated by state institutions.<sup>14</sup>

Pending further argument<sup>15</sup> the combination of the two claims leads to an unstable edifice. It would seem that if coercion were the link between state action and persons' moral status, a link capable of pointing at the grounds of obligation, then one would expect its significance to derive from the impact such acts have on persons; not from the non-moral characteristics of those acts (including the fact that they were put forward by an official or 'in the name' of the coerced). However, at least *prima facie*, the political view seems to put too much emphasis on the non-moral characteristics of the coercive acts of the state, when making these a litmus test for the grounding of obligations.

A great deal, it would seem, turns on how the political view understands what constitutes coercion. Given that coercion is crucial in revealing the grounds of obligation it is important to examine whether it can lead to conclusions that satisfy MR, which was earlier deemed to be a guideline in our enquiry.

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<sup>13</sup> See also H Kelsen, *Introduction to the Problems of Legal Theory*, Translated by B Litschewski Paulson and S L Paulson (Oxford, Clarendon Press, 1997) Ch 4.

<sup>14</sup> This view carries over to the international field as the claim that human rights obligations exist to the extent and inasmuch as states have committed to them.

<sup>15</sup> See below sections 4 and 5.

To spell out the point more clearly: to do the work required by MR a normative understanding of coercion is needed, one that is capable of delivering the goods, rather than merely postponing answers and misleading us into futile taxonomical debates.

In a first step the political view needs to meet the objection that coercion is irrelevant to legal obligation: if true this objection would disarm the efforts of the political view for a deontological justification of law and state, which I take to be its main contribution to the debate on legal obligation. The objection has been levelled by what I will refer to as the model of authority.<sup>16</sup> The model of authority submits that the law consists of a set of authoritative edicts, which need not be supplemented by the use of force. Availing itself of the thought experiment of an angelical society this view argues that even in such a society, while there is no need for coercion, there remains a need to direct action through authoritative edicts. Absent the need for coercion, the argument continues, there is no necessary link between law's authority and any conditions for the legitimacy of coercion. The upshot of this reasoning is that authority is not conceptually entwined with coercion, hence, moral reasons need not feature amongst the grounds of law.

To support this conclusion the model of authority takes a very narrow view on what constitutes the directing force of the law. It takes the view that law's directive capacity is exhausted by the content of the edicts which are uttered as institutional facts within a legal practice. This view stems from the more general claim, itself almost a stipulation, that for something to be capable of directing action it must be self-contained in its directing powers, which is to say, it must make a practical difference to the reasons of an agent directly, that is without any reference to its impact on any of the other normative circumstances of the agent.

It is not difficult, of course, to see why coercion comes too late in this picture. As we saw earlier, the role of coercion was to invoke the entire palette of reasons against which state coercion can be rendered legitimate. However under the stipulation of the capacity to direct action as edict—which the model of authority submits—any such reference to external or indirect determinants of action would deprive legal edicts from their directing force. In that case by conforming to coercion agents would be following a totally separate reason from the reason the edict is pressing—hence, on the authority model, coercion is at most 'a philosophical distraction'.<sup>17</sup>

Hence, in preventing coercion from having an impact on legal obligation the model of authority also drives out the conditions for legitimate coercion from the determinants of legal obligation. To rebut this understanding of legal obligation, the political view must demonstrate that no stipulation of authority can change the fact that any deed or word purporting to direct action, which fails on the count of legitimacy, is rendered coercive in an illegitimate sense.<sup>18</sup> I will postpone such demonstration until part 3 of the paper. For now suffice it to say that it will not do the job to just point at the capacity of the state to enforce the law, or some other non-normative feature of the enforcement mechanism of the state; or some other aspect of the exercise of state monopoly on the use of force. Such moves will be entangled in the wide and powerful net that was cast by the authority model, leaving the political view in a dangerous normative limbo. Instead a fresh understanding of coercion is to be sought, one that can also disarm accounts of authority which do not attach the use of force to the deeds and words of state institutions.

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<sup>16</sup> Prominent exponent has been Joseph Raz, even though he never uses the label attributed here. See, J Raz, *The Morality of Freedom* (Oxford, Oxford University Press, 1986); 'The Problem of Authority: Revisiting the Service Conception' (2006) 90 *Minnesota Law Review* 1003, reprinted in J Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford, Oxford University Press, 2009) 126–65. Also see N Stavropoulos, 'The Relevance of Coercion: Some Preliminaries' in (2009) 22 *Ration Juris* 339; and G Pavlakos, n 2 above.

<sup>17</sup> N Stavropoulos, *ibid* 347.

<sup>18</sup> In addition this may point to a shortcoming of the model of authority, rather than the irrelevance of coercion: that is, when action-direction is in play, coercion is always on the cards; see N Stavropoulos, n 17 above.

On the way to constructing a normative conception of coercion, one that steers clear from undesirable confusions that threaten to reduce it to uninformative descriptions, a second obstacle must be tackled. This concerns an association of coercion with the psychological features of the agents involved (either the coercer or the coercee). A normative understanding of coercion ought to reconstruct agents not as psychophysical entities but as persons who possess normative value. I shall briefly go over two flawed understandings of agents, which ought to be avoided.

On the one hand, coercion should not be made to simply be about consent (see other authors); whether or not the state engages the will of its subjects does not depend on whether they are disposed to consent to it. Here the political view does well: engaging the will of the subjects is an objective which obtains whenever the state acts through its agents, irrespective of how much citizens consent or not. (Unless within 'consent' one wishes also to include the satisfaction of standards of conduct that ought to underpin state action; arguably such an understanding of consent would be over-inclusive).

Second, to the extent that state coercion is considered to engage the will of its subjects, its existence cannot depend merely on the claim that the state is acting in their name. For, whether the claim is actually existent or not is irrelevant for the existence of coercion, in the normative sense of the term. The point is that the state must be assumed to be acting in the name of its subjects, given the impact that its actions have on citizens.<sup>19</sup> In other words, the question about the impact of state action on its subjects is antecedent to the question about whether the state is acting in the name of its subjects.

Interim conclusion: coercion does not depend either on the non-moral characteristics of its source nor does it depend on psychological facts relating to the claims of the coercer or the acceptance or lack thereof of the coercee. Such non-moral characteristics and psychological facts become relevant *ex post*, that is in the light of the moral status of the person that is subject to coercion. In that respect, as we will see in part 3, any and not just the deeds of a particular institution (state) can have a coercive impact on persons. For what renders an act coercive and determines its impact are the moral characteristics of persons rather than any intrinsic features of the act.

### ***b. The Instrumental View***

The instrumental view (or instrumentalism, following Murphy) lies almost in the antipodes of the political view, with the caveat that both views recognise the importance and necessity for an account that takes on board the moral significance of legal obligation.

Painting with a broad brush the instrumental view comes across like a version of utilitarianism, save for the fact that it focuses on the moral status of persons rather than some impersonal values. So rather than promoting maximisation of value irrespective of the impact on persons, it recommends the fulfilment of agent-relative obligations, that is obligations that are grounded on the moral status of persons. What unites utilitarianism and the instrumental view of legal obligation is the role both reserve for the state and its institutions: these have no intrinsic moral value, but are to be employed as means to the furthering of the ends specified by the correct reasons, depending on each theory's understanding of the latter. The instrumental view has been developed mostly with regard to obligations of distributive justice and it is to these that I am going to limit the discussion.<sup>20</sup>

The main claim of the instrumentalism with respect to justice is that this is essentially a global concern while state boundaries are of instrumental significance only. A main consequence of this view concerns the status of the state system: it is an entirely contingent matter whether state institutions are justified or not. This depends on whether there is room for changes that would result to better

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<sup>19</sup> It is in fact in cases when the state is actually claiming *not* to be acting in the name of its citizens that coercion is on the cards (think of the all-encompassing *Führerprinzip* and his applications throughout the Nazi legal order).

<sup>20</sup> What follows is a reconstruction of L. Murphy, n 2 above, 303-306.

outcomes in terms of welfare and its distribution, on a global scale. On this view, it is perfectly conceivable that the state system is unjust, the mere product of historical injustice and that we had better replace it as soon as possible with something that would bear almost no resemblance to it. Perhaps the most radical aspect of instrumentalism is:

... its implication of stringent negative responsibility, which has very demanding implications for the world's rich. Not only must our states do what they can to promote economic justice world-wide, each of us, as individuals, should at least do our fair share of what can be better done directly, without the mediation of the legal and political institutions of the state system.<sup>21</sup>

In reducing state institutions to means for the attainment of distributive justice, instrumentalism hopes to have resolved the paradox of dualism,<sup>22</sup> that is the paradox resulting from the discrepancy between what burdens the state and what its subjects. On the political (or some broadly non-instrumental view), if international law happened to impose obligations of justice on states, then the burden such obligations would incur for their subjects would remain unjustified, for on those views individuals are never obligated directly by justice. By contrast, on the instrumental view, no inconsistency remains between imposing obligations of justice on states and imposing them on their peoples, for obligations of justice apply in the first place to persons individually. States or any other institution ought to be configured to comply with those, if they are to remain justified.

I shall not subject the instrumental view to sustain scrutiny. However, I would like to draw attention to one general objection that in my view undermines decisively its appeal as a viable account of institutions. Arguably instrumentalism treats obligations as aiming at states of affairs that are intrinsically valuable and should be maximised at all costs. While this premise seems to work well with respect to the obligations of justice (for in that case what is being instrumentalised are institutions), it seems to fair less well with respect to other kinds of obligation. Here I have in mind mostly obligations against wrongdoing. It would appear that when a state incurs responsibility from wrongdoing (e.g. in cases of genocide), then the instrumentalist deems it justified if the related burdens attach also to the people of that state, despite the fact that those bear no responsibility whatever. This seems to me to be a clear case of instrumentalisation of persons and had better be avoided.

Such instrumentalisation of persons can be avoided if one subjects the grounding of any obligation (be it a distributive obligation or one against wrongdoing) to the requirement that a context of interaction exist between the holders and recipients of the relevant obligation. I shall argue later<sup>23</sup> that such contexts of interaction can ground any type of obligation in the light of the moral status of agents. It follows in this case that both obligations of wrongdoing and distributive obligations require, in order to arise, some context of interaction between those who are connected by the relevant obligation.<sup>24</sup>

### ***c. The Extended Political View***

There is a third view, which on a first glance, seems to steer a middle way between the political and instrumental views. I shall refer to it as the extended political view. The extended political view argues that institutions, contingent and instrumental as they may be, are still necessary in some form for

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<sup>21</sup> Ibid 305.

<sup>22</sup> See n 25 below.

<sup>23</sup> See below sections 3 and 4.

<sup>24</sup> This implies that distributive obligation cannot be activated *in abstracto*, as is the case for obligation against wrongdoing. On the other hand obligations of both kinds can be activated also through representation (that is, through the state or a corporation). The plausibility of the latter point becomes evident when we contrast the burdens incurred by a legitimate government with those incurred by a rogue regime. In the former case the incurred burdens ought to attach to the people while in the latter they do not. The reason for differentiating lies with the defects of representation in the latter case.

grounding obligations of justice.<sup>25</sup> Here necessity attaches to the type of institutional interaction, but does not require any particular token of institutional structure to be in place. To that extent, as with the instrumental view, institutions retain an instrumental role and are amenable to adjustment with an eye to meeting those obligations that pertain to them. On the other hand, as in the case of the political view, the extended political view argues that obligations of justice can only burden institutions but never persons directly. In extending the moral importance of institutions beyond the state the view under discussion might suggest a more satisfactory explanation of the coercive effect of institutions, in terms of their impact on the moral status of persons.

The view under consideration presses the issue of the impact of institutions on persons' moral status and shows that institutions are relevant not in their (or on some) particular configuration, but because of the moral impact they exert on autonomous agents. In doing so it abstracts from the specific characteristics of state institutions (use of force, capacity for enforcement) or other psychological facts about the exercise of coercion (claim to legitimacy; acceptance on behalf of the coerced) and strives to spell out a more general account about what makes institutions normatively relevant to the grounding of obligations of justice. Accordingly, it would seem that this account could be utilized for driving home a normative understanding of coercion as the link between the moral status of persons and the grounds of legal obligation, a link that was so central in the account of the political view in the first place. However the advantages of the extended political view stop here: to my knowledge there has been no specific attempt to furnish a more autonomy-oriented account of the normative significance of institutions such that would meet the requirements of any of the versions of the political view. But even if one could gesture toward such an account (as I will be doing in a moment), it would still remain too weak to justify the insistence on the constitutive role of institutions to which either versions of the political view attain.

An account of the normative significance of the general form of institution (in the context of the extended political view) can be reconstructed if one reads institutions in the context of the coercive impact they exert on persons' autonomy. What is salient, on this reading, about institutions is not so much the properties pertaining to the institutional structure itself, but more importantly the fact that institutions give rise to contexts of interaction between autonomous persons. It is this juxtaposition between persons that counts from the point of view of autonomy and which makes institutions relevant for obligation. Anticipating some of what will follow, we can already put this idea more succinctly: the moral or normative relevance of institutions is to be discovered in concrete contexts of interaction between autonomous agents under conditions of temporal and material scarcity.

Against the backdrop of what has just been said, one may assume that the extended political view would probably want to argue that institutional interaction stands for the existence of the relations that characterise what Rawls calls the basic structure of a society. But again here, the direction of fit is reverse from the one the political view invites us to assume (or is leaving up for grabs): it is not the case that we need to identify a basic structure antecedently to affirming the normative importance of some institutional context. It is rather the case that any context of interaction will tend to develop, in lower or higher degree, relations of basic structure *given* its impact on the autonomous agents who are involved.<sup>26</sup> Naturally, but rather trivially, what remains antecedent or immune to normative assessment is a requirement of a minimum of interaction between autonomous agents. All in all, the relevance of

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<sup>25</sup> See T Pogge 'On the Site of Distributive Justice: Reflections on Cohen and Murphy' in (2000) 29 *Philosophy and Public Affairs* 137. I think this view can be expanded to cover obligations against wrongdoing.

<sup>26</sup> How much of relations of basic structure are in place and what exactly is the extent of the obligations in each case will remain subject to more detailed judgement. However the way to go about such judgement is not to say: 'Ah there is x amount of basic structure, consequently there exists x amount of obligation of justice'. Rather our reasoning needs to proceed from the existence of normative obligation to the assessment of how much of the basic structure is there. Because, at the end of the day, 'relations of basic structure' is a condition that is trivially met for any context of interaction between autonomous agents under conditions of temporal and material scarcity.

institutions is a question of practical judgement through and through, leaving no factual configuration immune to normative evaluation.

But if this is the explanation of the normative significance of institutions that the extended political view can offer then it faces a dilemma that Liam Murphy has poignantly identified: if what grounds the relevance of obligations of justice is the moral status of persons, why aren't those directly obligatory also for persons but need to be mediated by institutions?<sup>27</sup> How come, in other words, we are not directly responsible for discharging the obligation to promote economic justice across the globe, but this remains an institutional obligation? To be fair to the extended political view, it does propose to link obligations to persons too: it says that all of us are obligated to set up such institutions that can discharge the obligation of economic justice (and that to the extent that we fail to do so, or if we support unjust institutions, we are harming others<sup>28</sup>). However, why retain such a two-layered construction? Retaining the two layers tends to undermine the central role of the moral status of persons and to lead to a dualist understanding of obligations, which *prima facie* weakens the deontological aspirations of the political view. For, in a dualist scheme, obligations of justice are discharged only if certain institutions are in place but never in a direct manner through attaching to persons. In Liam Murphy's words:<sup>29</sup>

Whereas monism holds that people have direct responsibility for justice, dualism holds that as far as justice is concerned, the responsibility of people is mediated by institutions. If just institutions must aim at equality, monism holds that people must aim at equality too; dualism holds, by contrast, that people must aim at the existence of institutions that aim at equality.

For want of a more special justification that would, from within the logic of agential autonomy, demonstrate the intrinsic normative role of institutions<sup>30</sup>, the extended political view, like the political view before it, seems to remain wanting when assessed in the light of MR, that is the condition that all legal obligation must make moral sense from the agent's point of view. True enough, the extended view takes great pains in locating the moral grounds why institutions exert a coercive effect on persons; however, having done that, it fails to demonstrate convincingly a cut off point for confining obligations to institutions.

Relying on some of the insights gained from the criticism of a number of prominent understandings of legal obligation in the international field, I shall proceed to spell out the details of the normative conception of coercion, with an eye to arriving at a unified or monistic explanation of what grounds legal obligation in the global context. Similarly to the institutional view, whilst retaining a strong deontological element, the monism recommended here is of a substantive kind, one that aims to ground all (legal) obligation on the moral status of autonomous persons.<sup>31</sup>

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<sup>27</sup> L Murphy 'Institutions and the Demands of Justice' in 27 (1998) *Philosophy and Public Affairs* 251; and *idem*, n 3 above.

<sup>28</sup> Here, I mainly summarize Pogge's argument, n 26 above.

<sup>29</sup> L Murphy 'Institutions and the Demands of Justice', n 28 above, 251 (at 271).

<sup>30</sup> For such an argument pertaining to the institution of the state, see below section 5.

<sup>31</sup> For a more detailed discussion of the traits of substantive monism in international law, see G Pavlakos and J Pauwelyn, 'Principled Monism and the Normative Conception of Coercion under International Law', in M Evans and P Koutrakos (eds) *Beyond the Established Legal Orders: Policy Interconnections Between the EU and the Rest of the World* (Oxford and Portland OR, 2011) 317.

### 3. The Normative Conception of Coercion

#### *a. Coercion qua Action-direction*

The preceding analysis has been instructive in bringing out an important point about the centrality of coercion in an account of the grounds of legal obligation. This is the idea that not merely institutions but anything that has the capacity to exert (coercive) impact on persons' autonomy becomes relevant to the grounding of obligation, not because it itself can ground obligation but because it is appropriately configured to 'tease out' what in fact grounds obligation: namely, the moral status of autonomous persons. However, and this is the rub, what actually constitutes coercion also depends on the moral status of persons, for precisely the reason that coercion derives its grounding capacity from its affinity to autonomy. This conception of coercion that is appropriately configured to generate normative results is the Normative Conception of Coercion (henceforth NCC). In what follows I shall offer an outline of NCC while attempting to ground it against a broadly Kantian background.

We saw earlier that the political view of legal obligation fails to identify the normative significance of coercion as a result of which it falls prey to the objection, levelled by the model of authority, that coercion is not a necessary component of legal institutions. Were this true, it would sever the link between the moral status of persons and the content of legal obligation. NCC in advancing a more fine-grained understanding of the workings of coercion aims, amongst other things, precisely to block that kind of objection, instead arguing that institutional interaction is coercive for reasons that are institution-independent.

Coercion is always on the cards when it comes to law, not because of some property exclusive to law, but because institutional facts possess a deeper structure, which is not unique to them: they are action-directing in an inherent or intrinsic manner. Roughly put this means that they interfere with the reasons agents have antecedently to institutions, by rearranging those reasons in one or the other way. This rearrangement, however, is, normatively speaking, not indifferent – at least not to the extent that we take action-directing acts to be directing the action of autonomous agents who respond to reasons and who are likely to be already embedded in a network of reasons at the moment when an institutional act impacts on their lives. Hence action-direction is not morally neutral: in fact it acquires the morality of those reasons (principles) that already apply to agents who are capable of handling reasons for action. But if so, then the morality of action-directing action points the way forward for establishing the content of legal obligation: action-directing acts amount to legal obligations to the extent and in the manner that they fit into the overall scheme of reasons on which they impact.<sup>32</sup> You see now how coercion is always on the cards, each time agents interact irrespective of the institutional form of their interaction: proper action-directing action entails legitimate coercion while flawed one gives rise to illegitimate coercion and, by the same token, to an instance of injustice that ought to be blocked.<sup>33</sup>

A few more remarks on the logic (and morality) of action-direction are due. Action-directing reasons are reasons that purport to get other agents to act in ways that converge with one's purposes, usually against the background of joint projects or activities. To that extent action-direction is a special mode of normativity that usually pertains to contexts of joint endeavours. Given that such contexts require co-ordination, action-directing reasons, if successful, can underpin the task of coordination. Thus, if A is engaged in a joint project with B and R is a valid action-directing reason, then A is entitled to appeal to it for guiding B's behaviour. More specifically, if the joint project is one that

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<sup>32</sup> See N Stavropoulos, n 17 above, 343-4, where he builds upon ideas of T Scanlon on the grounding of promissory obligations; For Scanlon's argument see T Scanlon 'Reasons: a Puzzling Duality' in R Jay Wallace et al (eds) *Reasons and Value. Themes from the Philosophy of Joseph Raz* (Oxford, Clarendon Press, 2004) 231.

<sup>33</sup> A J Julius 'Getting People to do Things', MS version 20 April 2009 (in file with author) 7-9.

encapsulates elements that are typical of a basic structure of a political community, then action-directing reasons can be legally enforced with an eye to co-ordination.

An action-directing reason becomes a valid source of obligation when it meets the negative constraint of not amounting to illegitimate coercion. Although this negative constraint does not point directly at any grounds that positively shape the content of action-directing reasons, it does so indirectly. Before elaborating further on this point, let me spell out the negative constraint for action-directing action, which I borrow from the work (some of it unpublished) by A.J. Julius.

(1): 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.)<sup>34</sup>

(1) Says that leading B to x on grounds that B does not share as leading to x independently of A's action-directing act would constitute an instance of (illegitimate) coercion.<sup>35</sup> Clearly this stipulation does not directly spell out which among such independent grounds are involved; it does so indirectly, however. In recognising the authority of any agent as a negative constraint for coercion, it implicitly takes the same authority to be capable of specifying positively the content of such grounds that would constitute appropriate action-directing reasons. Thus (1) tells us that action-directing reasons may be only such items that can be authorised by the reason-giving or deliberative capacities of agents AND do not violate (1). But notice this: (1) is not an extra filter or sieve that comes later to contain or purify items that have been designated as reasons for action antecedently of (1). Rather, (1) is the starting point for grounding action-directing precepts in a manner that is agent-relative, if not relativistic (in fact I would argue that (1) assumes something like a unified normative point of view, one that can ground reasons for action *simpliciter*).<sup>36</sup>

In explaining coercion as action-directing action NCC underpins a full-blooded account of coercion that fully satisfies the constraint of MT, that is the requirement that nothing constitutes a genuine obligation unless it is a reason for the agent.<sup>37</sup> The full-blooded account of NCC moves well beyond traditional accounts of coercion, such as those of the political view in any of its versions, accounts that mainly focus on brute force, the harm caused to agents, or some other fact about the agent's psychology. In such *outcome-oriented* accounts coercion comes too late to point to the morally or normatively significant elements that contribute to the genesis of legal obligation.<sup>38</sup> In them coercion assumes the role of an additional incentive for compliance to a norm, but fails to explain what is that in virtue of which a fact that takes place in the external environment acquires normative significance (that is, becomes obligatory) for the agent. Instead, NCC understands coercion as constituting a constraint on agent autonomy that is antecedent<sup>39</sup> to any loss of welfare (i.e. harm), the application of

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<sup>34</sup> I copy with minor alterations from A J Julius, n 34 above, 1. I am aware that at the time of writing Julius was elaborating further his thoughts on the matter. To that extent I am not claiming that the quoted formulation captures exhaustively or uniquely the content that Julius confers to action-directing action. That said, it suffices for my purpose here.

<sup>35</sup> Further intricacies of action-direction amounting from (1) include: a) The thesis that an independent reason that applies to my doing x, should also apply to all antecedent actions that lead me to x. b) In the absence of any reason to the contrary, the same structure should be expanded to interpersonal relations: I ought not to lead you to do x without considering the reasons you have for x-ing as applying also to my own acts that purport to lead you to x. c) Finally, a and b yield the thesis that coercion, when it serves to co-ordinate joint action, is justified under the condition that it is legitimate from the first-person point of view before it is addressed to others. For, if coercion facilitates someone's response to a joint requirement, then this person can rely on the fact that the threat of coercion will facilitate everyone else to pursue the same joint requirement, without wronging them in any way; see A J Julius, n 34.

<sup>36</sup> See G Pavlakos 'Agents. Practice...', n 4 above; and idem 'Law, Normativity ...' n 2 above.

<sup>37</sup> See above, section 1.

<sup>38</sup> We considered earlier the objection levelled by the model of authority at the political view, that coercion is a philosophical distraction, see n 15 above.

<sup>39</sup> It is antecedent in the sense that it determines the normative significance of any loss of welfare or causing of harm as wrongdoing, rather than vice-versa.

brute force to the agent, any claims to legitimacy raised by the coercer or, finally, the acceptance or consent of the coerced.<sup>40</sup>

### ***b. A Kantian Grounding***

I wish next to suggest a firmer grounding of the notion of action-directing action. I shall propose to read it in the light of the notion of interference with a person's autonomy, which forms a key element of Kant's legal and political philosophy and has been more recently discussed extensively by Arthur Ripstein in his work *Force and Freedom*.

NCC, in moving beyond brute enforcement and its effects, treats the behaviour of legal institutions only as a special case of the deeper and more far-reaching question 'how can anyone's act place others under an obligation where there were none before?'<sup>41</sup> Ripstein traces this question back to Kant's discussion of the original acquisition of property, which he suggests is the proto-case for all relational obligations, including those arising from public right.<sup>42</sup> He asks: 'Why isn't it the case that at the moment of first acquisition of property, the one who acquires is not coercing but instead he or she places others under an obligation?' The NCC, in pointing to requirements of autonomy aims to ascertain the determinants of the obligations that originate in the deeds of others. Conversely, failing to project those deeds in the light of NCC would eschew their normative significance.

Ripstein's answer to that question presents us with one of the most challenging parts of his reconstruction of Kant's legal philosophy.<sup>43</sup> His account explains the structure of relational obligations against the backdrop of Kant's account of autonomous agency, which constitutes the cornerstone of the philosopher's theory of action. The account of autonomy focuses on the concept of interference, which it renders crucial for identifying the conditions under which an act originating in another may amount to a valid obligation from the point of view of the agent. Here interference is the property that divides all acts that originate outside the agent into those that ground obligation and those that constitute wrongdoing.

The structure – if not the content – of interference can be fully determined from within the resources of the agent's rational capacities: anything that has not been authorised by the agent's own reflective endorsement would count as interference in the sense that is crucial to NCC.<sup>44</sup> To ground this conclusion one needs, as Ripstein does, merely to refer to Kant's conception of autonomy as is advanced through the discussion of the Moral Law in Kant's two major works of practical philosophy (the *Groundwork of the Metaphysics of Morals* and the *Critique of Practical Reason*). There autonomy is fleshed out as the ability to choose one's own reasons for action unhindered by anything that would constitute heteronomous interference with the ability of the agents to choose under conditions of freedom. Along these lines Kant's account of the Moral Law as the condition of autonomy spells out

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<sup>40</sup> See A Ripstein, *Force and Freedom* (Cambridge Mass. Harvard University Press, 2009) 42-47; 81-85. Other 'full-blooded' accounts of coercion are to be found in A J Julius, n 34 above, and Stavropoulos, n 17 above. The term *Normative Conception of Coercion* is coined in Pavlakos and Pauwelyn 'Principled Monism...', n 32 above.

<sup>41</sup> Ripstein seems to me to be viewing public authority as a special case of that more general question rather than treating it as an answer to it (see Ripstein, n 41 above, 153 ff.). The reason is that he is considering innate right as the flip-side of persons' capacity for purposiveness, that is their capacity to set their own ends free of intervention. To that extent, there emerges a source of legal obligation that is non-relational and independent of public institutions. Consequently the question about how our deeds and sayings obligate others acquires a generality which escapes the realm of public institutions. I owe this interpretation of Ripstein's view to K Flikschuh, 'Innate Right and Acquired Right in Arthur Ripstein's *Force and Freedom*' (2010) 1 *Jurisprudence* 295-304.

<sup>42</sup> Ripstein, n 41, 148-159 (at 154-5).

<sup>43</sup> Ibid.

<sup>44</sup> Ripstein's account seems to be in line with the account of rational agency familiar from C Korsgaard, *The Sources of Normativity* (Cambridge, Cambridge University Press, 1996) 90-130.

as it were conditions of ‘purity’<sup>45</sup> for what may count as valid practical reason: nothing that is imposed from sources external to the agent’s own reflective endorsement can constitute valid practical reason for that agent.<sup>46</sup> The upshot of this argument is that practical reasons, in line with the commands of the Moral Law, ought to assume the form of general propositions whose validity does not depend on particular circumstances or the substantive aims of the agent, but remain valid *simpliciter*. Such propositions are laws (norms), not unlike laws of physics, which can provide a complete answer to the question of whether any ‘p’ is a genuine reason for action. Thus, on this account, it is not possible that ‘p’ be a reason to  $\Phi$  for agent A and that there still be room left for A to wonder: ‘is ‘p’ a valid reason to  $\Phi$ ?’

To sum up: the full-blooded account of coercion advanced by NCC regards institutional intervention in persons’ lives as a species of the more general question ‘how can anyone’s act change the normative situation of others?’ and answers it by pointing to the deep structure of action-direction, as one that is capable of generating intervention with the moral status of agents. It is in this notion of action-direction qua intervention that the question of the grounds of legal obligation may find an adequate answer.

In this context there remain two important questions that call for clarification:

The first concerns the issue of institutional interaction as a general condition of legal obligation. Even though NCC rejects the view that any particular institutional arrangement enjoys a special grounding status, it seems to suggest that some level of interaction between agents is required in order to activate or enable obligations. To put it differently, obligations, even though they are grounded on the moral status of persons, require a specific context of interaction in order to definitively relate two or more agents to one another. To the extent this is true the account of legal obligation emerging from NCC will carry a certain affinity to the extended political view.

The second question relates to the role of the state in the grounding of legal obligation. Even though NCC has disqualified the reasons offered by the political view for a special grounding role of the state, there might exist reasons, based on the moral status of agents, which bestow a special role on states. In fact, as we shall see, such reasons do exist, even though the conclusion they support does not restore the arguments of the political view. In this case the importance of the state is grounded on certain substantive functions which the state can fulfil. To the extent that such functions can be met by an alternative institutional arrangement, the state-form remains contingent from a normative point of view.

#### 4. Two Conceptions of Social Interaction

I wish to suggest a distinction between a context of interaction between agents under conditions of (material and temporal) scarcity and an institution. Both items have normative significance in the sense that those involved in them occupy normative roles and undertake normative commitments. However, whilst institutions are necessarily also ‘contexts of interaction’ the reverse is not the case: a context of interaction need not have yet assumed a particular form of organisation which would

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<sup>45</sup> ‘Purity’ in this context purports to point out that when we are looking to identify reasons for action we are interested in the *right kind of reason* and not just any item that might impact upon the behaviour of the agent, but might fail to constitute a genuine reason for the action performed. See P Hieronymi, ‘The Wrong Kind of Reason’ (2005) 112 *The Journal of Philosophy* 437.

<sup>46</sup> Such external sources include also internal psychological states (impulses). What appears as a paradox, namely to explain something that is internal to the agents’ psychology as being at the same time external to them, is explained away when we consider externality in a normative rather than explanatory light. That is, not as referring to the source but to its relation to agent’s capacity for autonomy. For a thorough discussion, see Korsgaard, n 45 above, ch 3.

subsume it under any of the existing institutions of international law.<sup>47</sup> If the distinction holds, it would mean that there exists an intermediate level between a non-normative level of concurring behaviour between agents and the level of institutional interaction. This intermediary level embodies the same normative obligations that institutional interaction also does (even though the latter usually channels obligations into much more detailed arrangements etc).

The proposed distinction illustrates why institutions are not constitutive for obligation: if the same obligations pertain to a level that is more basic, then institutions cannot claim a grounding function. However, how to escape the obvious objection that contexts of interaction do the grounding, in as much the same way as institutions did before them?<sup>48</sup> I think that the objection fails for the following reason: contexts of interaction are normatively relevant not because of any structural characteristic they themselves possess, but instead because they express a limit or a boundary where the autonomy of agents meets.

Contexts of interaction are instances where the autonomy of agents meets under conditions of temporal and material scarcity. What remains non-normative here is of course the minimal fact that the environment consists of finite resources plus the fact that we act under temporal constraints. These are minimal factual requirements which do not possess any significant institutional features. However these two parameters are disposed to lead to a normative outcome each time agents, who are considered equally autonomous, engage in mutual interaction: if under conditions of scarcity I put my holdings to a purpose that involves your holdings or person, then a cluster of normative limitations kicks in. Thus a context of interaction signifies a boundary beyond which things between agents are no longer 'normatively innocent'.<sup>49</sup> Beyond this boundary agents find themselves entangled in concrete obligations between one another.

'Contexts of interaction under conditions of scarcity' is the only non-normative description that remains available once NCC has been taken on board. Given the propensity of any action-directing act to interfere with the autonomy of others, the only items that might escape an evaluative characterisation in an account of obligation are the fact of material and temporal scarcity and the fact that most of the time in order to achieve our ends we must act together with others. But even these are barely non-normative, given that whatever lies downstream is normatively coloured, whilst there is nothing to be found upstream.

It would appear then that, because in contexts of interaction between agents there exist but some minimal factual conditions, it is easier to understand that what does the normative grounding of the relevant obligations is the moral status of persons. True enough, these obligations might have the form of proto-obligations, pointing only toward the direction of a course of conduct, rather than enforcing some concrete course of action. The latter might indeed require the existence of more robust institutions. And yet it would be difficult to deny that obligation existed already at the proto-level of interaction. It is a different matter of course whether such proto-obligations also include obligations to set up appropriate institutional arrangements for pursuing their realisation. In such case there would exist an agreement with the instrumental view, presented earlier, which argues that institutions are simply means for realising institution-independent obligations.<sup>50</sup>

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<sup>47</sup> In making this distinction I wish to flesh out an earlier point about the existence of a minimal context of interaction between agents as a minimum requirement for the activation of normative obligations, without committing to any particular institution.

<sup>48</sup> There is also an additional objection from the danger of a regress: Why is it not the case that there will always exist a more basic level of grounding and this *ad infinitum*? This objection can be met too by the same argument I offer in response to the main objection above.

<sup>49</sup> It might even be the case that actually there is no space for any pre-normative condition that can be instantiated outside a context of interaction.

<sup>50</sup> However, in contrast to the institutional view, NCC remains deontological.

The question about the site and the scope of obligations of distributive justice lends itself to a further demonstration of the advantages of the proposed distinction between institutions and contexts of interaction under conditions of scarcity.<sup>51</sup> We saw earlier that the extended political view maintains the normative importance of political institutions at the global level, without insisting on any particular form of institution being normatively more salient than any other. A coherent interpretation of the extended political view may argue that the reason it assigns normative importance to institutions is because institutions usually exemplify the traits of a *basic structure*, in the sense Rawls uses the term in his *A Theory of Justice*. Interpreting the normative significance of institutions in the light of the content of the basic structure is a decisive step toward locating the criterion of the normative significance of institutions in the moral status of agents.

However this step is bound to remain hanging in the air, unless the relation between the basic structure and institutions is radicalized: The question whether there are relations of basic structure should be made antecedent to whether there is some appropriate institution in place. Rather than assuming that relations of basic structure exist if certain institutional properties obtain, we should be asking whether some particular token of action or practice, in virtue of its being action-directing, is disposed to interfere with the autonomy of the addressee(s) in a manner that affects their receiving of benefits and burdens of the social life, their opportunities, social recognition, their income and wealth, and so on. Regrettably there is enough evidence that the current debate on the scope and site of distributive justice is conducted in the more sterile manner identified previously: those involved in it set out to look for institutional facts which then are treated as criteria for authorising the inference to the existence of a basic structure.<sup>52</sup> In contrast, thinking in terms of contexts of interaction would guard more efficiently against a cover up of the normative issues involved in the various forms of human agency across the globe while it would have the welcome effect of limiting taxonomical arguments, often quite confusing, to a minimum.

The great gain from introducing the notion of a context of interaction is that we can think of the same obligation as being subject to multiple forms of institutionalisation. As a result what would count as ‘legal obligation’ in this context needs to be qualified: those who insist reserving the concept ‘law’ for those obligations that are institutionalised within the state system, ought to expand their vocabulary with an eye to also capturing instances of the same type of obligation, which arise in contexts of interaction that have not been formalised within the state system. Conversely, those who are happy to take ‘legal obligation’ to depict also phenomena of action-direction arising within contexts of interaction that lie beyond the state system, need not need to invent any new term, but merely to ‘reform’ or ‘reconstruct’ their understanding of the meaning of ‘law’.<sup>53</sup> The latter is perfectly consistent with the requirement, posed by the relevant obligation, that some more specific institution<sup>54</sup> be set up with a view to guaranteeing its realisation.

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<sup>51</sup> For the extensive recent debate on the site and scope of distributive justice – run mostly through the pages of *Philosophy and Public Affairs* – see, T Pogge, n 26 above; L Murphy ‘Institutions and the Demands of Justice’ in (1998) 27 *Philosophy and Public Affairs* 251; J Cohen and C Sabel ‘Extra Republicam Nulla Justitia?’ (2006) 34 *Philosophy and Public Affairs* 147; and A Abizadeh ‘Cooperation, Pervasive Impact and Coercion: On the Scope (not Site) of Distributive Justice’ (2007) 35 *Philosophy and Public Affairs* 318.

<sup>52</sup> A Abizadeh, n52 above.

<sup>53</sup> Such a reconstruction can be thought of as belonging to the justificatory task of the interpreter, which is supposed to advance our understanding of our (normative) concepts. This has been one of the main insights of Dworkinian Interpretivism; see his *Law’s Empire* (various editions); For a very illuminating discussion of the process of ‘conceptual discovery’ also see S Haslanger ‘What Good Are Our Intuitions?’ (2006) 80 *Aristotelian Society Supplementary Volume* 89.

<sup>54</sup> Although such institutions might bear resemblances to state institutions, they will not require the existence of a fully-fledged state, but only arrangements that can effectively pursue the functions that usually state institutions do.

## 5. An Independent Justification of the State

Finally I shall deal with a separate justification of the role of the state in the grounding of legal obligation. Far from resting on a challenge of NCC, the justification under discussion takes its cue from the two interrelated ideas of the context of interaction and action-directing action. We saw earlier that contexts of interaction between agents give rise to obligations precisely because when we act together, under conditions of spacio-temporal scarcity, our acts display the structure of action-directing action, that is they remain subject to the normative limitations posed by the autonomy of those with whom those acts interfere.

Now, the normative interpretation of contexts of interaction, powerful as it may be, it also leads to a serious impasse: if everything we do in contexts of interaction needs to be justified from the point of view of everyone involved, then perhaps nothing can be justified, for the simple reason that there might be no overlap between the various points of view.<sup>55</sup> The result in this case would have little to recommend it: here we are, each buttressed in our castles of autonomy, unable to pursue any project on pain of illegitimate interference with the autonomy of others. For, any action we would be undertaking (from opening a road through the land of others to facilitate travelling, to imposing the legitimate terms of a contract) it would be carrying the stamp of unilateral interference with the autonomy of others, hence it would be rendered coercive through and through.

By contrast, a way out of the impasse requires the opening up of a space that would enable agents to interact with one another without hindering mutually their autonomy. Such a space ought to comprise rules not of a unilateral but of an omni-lateral<sup>56</sup> nature, in the sense of having been authorised by everyone. Such rules would function as vehicles for interaction without infringing on the autonomy of the agents involved. In having met with the authorisation of everyone, instead of hindering agents, these rules would actually be reconciling the autonomy of agents in a (normatively speaking) conflict-less manner. An account along these lines is to be found, of all places, in Kant's legal and political philosophy. What on a first glance might look like a paradox, gains in plausibility on a closer look.

Taking a broadly Kantian viewpoint, it turns out that interference with the moral status of agents requires the inclusion of a space of rules that have been authorised by public institutions. Arthur Ripstein argues that a complete account of interference in Kant's legal philosophy requires the inclusion of a further dimension, a collective dimension as it were, which extends beyond the confines of an agent's reflective endorsement. It is the aspect of omni-lateral authorisation, which is exclusively rooted in the public institutions of state law (the rightful condition).<sup>57</sup> True enough, the structure of interference can be determined through the elements of autonomous agency that render it in the first place ill-suited for obligation. However a fully-fledged account of interference and the requirements for legitimate obligation that originates in others' actions calls for some institutional arrangements that ensure omni-lateral authorisation, for otherwise any interference that remains unilateral would constitute illegitimate coercion.

Along these lines Ripstein wishes to argue that the notion of interference, which is key to the NCC and its function as determinant of the determinants of legal obligation, becomes richer when we move

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<sup>55</sup> Another aspect of the conundrum comes to light when we interpret it as a problem of combining subjective conceptions of the good with impartial ones. For reasons of space and coherence, I shall not pursue this aspect of the problem here. On this topic see the very incisive remarks of T Nagel in Ch 5 of his *Equality and Partiality* (Oxford and New York, Oxford University Press, 1991) 41ff.

<sup>56</sup> For the term see A Ripstein *Force and Freedom*, n 41 above.

<sup>57</sup> Ripstein, n 41 above, ch 7 (at 190ff). As one might assume, such institutions cannot take any possible form but need to be in conformity with the outer limits set by individual autonomy: no omni-lateral authorisation could validate obligations which would have been rejected by the reflective authority of the agent (ibid, *Force and Freedom* 202). The implications of this caveat will re-emerge in the closing paragraphs of the paper.

from the agent's point of view to conditions of interaction between plural agents, who of course are symmetrically endowed with a reflective capacity for autonomy.<sup>58</sup> The enriched notion of interference circumscribes an array of new possibilities for the content of obligation, on which we would be missing out if we were to restrict our query only to Kant's account of individual autonomy (even though the latter suffices for pointing to the structure of interference)<sup>59</sup>. Such a loss would be fatal to a complete understanding of the workings of obligation in conditions of acting in concert with others.

Thus the answer to the question 'In virtue of what is interference with anyone's capacity for autonomy legitimate?' has two prongs: for one part, what determines whether something constitutes interference with someone's ability to set one's own ends derives from Kant's account of personal autonomy.<sup>60</sup> However, on the other hand, what renders such interference legitimate seems to hinge on the institutional structure of the state law: we need, Ripstein argues, public institutions of law such that are omni-laterally authorised in order to render interferences on autonomy legitimate.<sup>61</sup>

It would appear that the significance of coercion, which lies in its capacity to connect deeds and sayings, which occur in the environment, with the normative status of agents as persons, requires – and that despite the claims of NCC – the intervention of public legal institutions in order to ground genuine obligations.<sup>62</sup> But is that so? Whether this is true or not depends on how much of the grounding power of public institutions lies with their form and what portion lies with their substantive content. Interestingly, there is no simple answer to be given.

On the one hand, the Kantian account relies upon a substantive understanding of individual autonomy with an eye to spelling out requirements for the design of public institutions as well as delimiting the outer limits of what those institutions may legitimately impose.<sup>63</sup> It is argued that this account of autonomy can by itself ground an obligation on everyone not to interfere with my body. This obligation corresponds to what Kant labels innate right and which is grounded irrespective of institutional arrangements or the existence of other agents.<sup>64</sup> However, on the other hand, everything else I do (from appropriating objects for my purposes, to putting others at my service through contract, or exercising relations of status) can only obligate others 'to play along' if there is a legal system in place.<sup>65</sup>

It seems to me that to the extent that the normative significance of public institutions itself is grounded on an account of the moral status of persons, it is plausible to say that what grounds legal obligation is antecedent to any institutional arrangements and may be reported from within the resources of individual autonomy. To be more precise, I believe that even if public institutions do play an important role in shaping or enabling legal obligations, it is the Kantian account of individual

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<sup>58</sup> A Ripstein, n 41 above, Chapters 3 and 4.

<sup>59</sup> Cf. '[the] *structure* [of private rights] can be articulated without reference to legal institutions, but they do not apply to particulars outside a rightful condition', A Ripstein *Force and Freedom*, n 41 above, 224. Also see the appendix of the book, 373-387.

<sup>60</sup> In particular his account of the Moral Law in I Kant *Groundwork of the Metaphysics of Morals* (various editions).

<sup>61</sup> Ripstein, n 41 above, Ch. 7.

<sup>62</sup> Not only for securing or enabling the exercise of private right but also for introducing genuine obligations addressed to the public at large (e.g. taxation, redistribution and so on). See Ripstein, *ibid*, Ch. 9. As Ripstein submits '... public law obligations are grounded on their capacity to facilitate the realisation of the innate right of humanity: 'These novel obligations are grounded in the public character of a rightful condition, rather than in either human needs or the private duties of human beings among themselves.' (*ibid* 299).

<sup>63</sup> Ripstein, *ibid*, 202-3.

<sup>64</sup> *Ibid*, Ch. 2.

<sup>65</sup> *Ibid*, Chapters 3-5. Interestingly Kant views the grounding, albeit not the enforcement, of property rights as independent of institutions: '...the form of interaction in which property rights constrain the conduct of others does not depend on positive law', Ripstein, *ibid* 87.

autonomy, which ultimately determines the extent to which institutions contribute, when they do, to the content and shape of legal obligation. Which, after all, has been the contention of NCC all along.

Turning to the problem of accounting for legal obligation in the global context, the Kantian account points to some fresh conclusions: it invites us to distinguish between the question of grounding and the question of legitimate implementation of obligations, while submitting that the two aspects of grounding and implementation are interrelated. Along these lines we may say that the various contexts of interaction, which are initiated by globalisation, give rise to obligations irrespective of the existence of any public institutions. However, when it comes to implementing those obligations, any implementation ought to take place through appropriate public institutions for otherwise it would be rendered unilateral interference and would amount to illegitimate coercion of those who are in the receiving end.

Two further remarks are in order: first, given that obligations can exist independently of the institutions that implement them in a legitimate manner, it is reasonable to assume that these obligations include a (secondary) duty to set up the appropriate public institutions for their implementation. Second, again because existence and implementation of an obligation are distinct, what guarantees omni-lateral authorisation in the implementation of an obligation need not be identified with the institution of the state.<sup>66</sup> Instead, it is conceivable that public institutions of a non-state (sub-state or supra-state) nature can meet the task of implementation. In the latter case, different parts of the existing international legal order can be combined with a view to addressing breaches of obligation, or that new institutional arrangements be put in place for the same reason.<sup>67</sup>

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<sup>66</sup> Omni-lateral authorisation, on a broadly Kantian account, does not presuppose democracy. As long as there exist authoritative directives that display the legal form and those do not interfere with innate right, then the conditions for omni-lateral authorisation are met.

<sup>67</sup> See the argumentative strategy of the court in Case T-315/01 *Kadi v Council and Commission* [2005] ECR II-3649. See also the discussion in G Pavlakos and J Pauwelyn 'Principled Monism...' n 32 above.

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