Pandemic, Solidarity and the Foundations of International Law

By:

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It is a moment in which virologists and public health scholars are carefully listened to. Their observations say a lot about Covid-19 reveals not only about the dynamics of the pandemic, but also about the very foundations of the public international law. Take the comment by Martin McKee:

> “We have seen how the Covid-19 infection moved rapidly from China to all parts of the world. In this globalised economy that we now live in, every country is only as secure as the weakest country in the world”.

Looking at it from the Kenyan perspective, for example, one will assume that if the virus is not contained here, it is not contained at all. It is like with a research essay: if it is only 99% ready, then it is 100% NOT ready. Being aware of the limitations of the Kenyan public health system (which are prevalent in many other developing countries and not only those), this may be felt as a whiff of relief, as apparently, the health of a Kenyan is not just Kenyan concern, it is a global concern. Pope Francis said that “this isn't a time for self-centeredness

because the challenge we're facing is shared by all". If the challenge is shared by all, is the responsibility also shared by all? A responsibility of the international community for the health of every Kenyan? And what about the economic malaise brought about by the virus, the lockdowns, the anticipated recession, which is likely to hit developing states the hardest? Not to mention the tourists who stay away, and the flowers, which remain unsold, and the budget revenues which will lead to deficits in the provision of essential services for Kenyans? – Should the international community help deal with this, or does the responsibility lie with Kenya alone? Pope Francis says that because the whole world is suffering, the whole world needs to be united. But what do the lawyers say? To what extent – and if at all – do those lofty and idealistic thoughts translate to international law principles? The modest objective of this contribution is to present some thoughts on the foundations of international law offering argumentative tools which might be helpful in assessing the legality of reactions to the Corona-crisis and also challenging the legal *status quo*.

One school of thought, it may be referred to as voluntarist orthodoxy, denounces any attempts by scholars to translate their moral insights into rules of law binding on others. Common interest is not what international law is about, as it is not even clear if it goes beyond restricting recourse to war. The international law is what the States want it to be; it is based on the voluntary acts of States that fix certain policy choices in legal norms. It is State-centered and sovereignty based. Rooted in nationalism, it romanticises the State as a personification of the nation and it is the State which provides the framework for the liberty and well-being of individuals. As eloquently explained by a prominent politician last year, "the future belongs to sovereign and independent nations who protect their citizens, respect their neighbors and honor the differences which make each country special and unique. […] When our nations are greater, the future will be brighter […]". And indeed, even in the European Union which is far more integrated that the global international community, the initial responses to COVID-19 were responses of "sovereign and independent nations", involving closure of borders and hoarding of medical equipment. Even now, the row over the so-called Corona-bonds shows that a coordinated answer in the spirit of common responsibility is difficult to find, not to mention the withdrawal of funding for the WHO. Where is the bright future?

International law constructed along the voluntarist orthodoxy doesn't help in the time of pandemic. It leaves the poorer at the good will of the mighty, for it largely ignores the actual power relations between states. The inter-state deals struck "voluntarily" and the policy choices thus fixed reflect the bargaining power of the States. This being the case, the international law is likely to reinforce and perpetuate inequalities, rather than being a check against the use of political power. As the post-corona crisis is likely to strike the poorest nations hardest, the bright future for some may mean dim prospects for others.

Another conception of international law may be referred to as constitutionalist or communitarian. It understands the international law as a system at the service of an international community, founded upon objective norms – independent from the consent of the states – and advancing common interest. Of course, there are different views about how this international community is constituted, what the "objective" norms are and where they come from. Some scholars point to the UN-Charter, others to the norms of *ius cogens* and *erga omnes*. Modern constitutional approaches are, however, not about reading some predetermined values of natural law into the intranational law. Due to the indeterminacy of such values and potential clashes between them, such a concept would be prone to abuse by the powerful states who may be tempted to impose their reading of such values upon the less powerful. And still, the notion of objective norms, of the sovereignty of the law which tempers the power of sovereign states and inspires international action in common interest, is worth taking up, especially in the times of pandemic. The ideas of two precursors of the constitutional approaches to international law, Immanuel Kant and Georges Scelle, look particularly appealing today.

Kant observes that all individuals share the common place on earth and are necessarily in a relationship to each other. The choices of one individual may limit the choice of action of another individual, the claim to property of one individual, may limit similar claims of other individuals. The state of nature and an absence of legal constraints would thus mean a systemic violation of individual freedoms. To terminate it is a matter of a moral obligation. By establishing a civil constitution, the individuals use reason to form an omnilateral will, that is a will of the community together, aiming at establishment of common standards of behavior. Those standards define the

proper way in which individuals relate to each other and thus authorize an individual's action. Kant advances the standard of a "moral politician" who administers a republic thus created. The moral politician understands his or her role as encompassing the perspective of the whole and advancing the good of the whole.

Kant justifies the existence of the international law the way he justifies the existence of his republic. The States too relate to each other making contradictory claims and hence, have a duty to subject themselves to universally valid laws. There is however no need to form a "global republic", which according to Kant would be not governable and could degenerate into "soulless despotism", as the state of nature has already been rationalized by the existence of a civil constitution within a State. What the states need to do is to form a special type of league, a non-coercive confederation. In this way, Kant outlines a project for a progressive development of the law focused on the common interest. For Finnish International Lawyer Matti Koskenniemi, Kant's moral politicians try to shake off sectarian interests and advance the good of "all".

But Kant also does not constrain humanity to state territories. In Kant's project, every individual has a "cosmopolitan right", which in Kant's time meant a right to visit, to present oneself to the society of another state. It is non-derogable and rooted in the original idea of the shared possession of the earth by all individuals. The right is meant to create a cosmopolitan public sphere and compel the particular states to integrate the claims of non-citizens into their domestic discourses. Under the present-day conditions, in a globalised world, people interact with the government of other states not just through visits. They can be affected by actions of foreign governments not moving from home. This is why the right to visit is interpreted more widely; it is a right to have one's basic interests considered not just by one's own government, but by every government. In this sense, the Kantian cosmopolitan right responds to the TWAIL critique of the human rights regulation, which is concerned with conditions within a country, diverting the attention from historically unequal relations between states and their different levels of economic and social development. The cosmopolitan right thus means, that the right to health of a Kenyan is indeed not just a local, but a global common concern and, more

generally, that the every government, either acting on its own or collaborating with others, while tackling the pandemic and mitigating the economic consequences thereof, should take the rights of the people in the every part of the globe genuinely into account.

The Kantian idea of a "moral politician" is close to Georges Scelle's theory of role splitting ("*dédoublement fonctionnel*"). Accordingly, the international law is made by government agents who, however, do not act only on behalf of their states, but also as law making organs of the international community. From a Kantian perspective, the government agents should thus be committed not only to the interests of their respective nations, but also to the interest of the international community taken as a whole. But for Georges Scelles, international law is not "made", but "declared", thereby putting his thought in a strong opposition to voluntarist theories. Scelle differentiates between "objective law" and "positive law". The "positive law" is, simply put, the international law as we know it, encapsulated in treaties and customs. The "objective law" derives from the social facts, form the division of labour, or in other words, from the fact, that people need each other to satisfy their needs. The objective law reflects the necessities of the social reality. Scelle calls it solidarity. The role of the government agent is to translate the objective law to positive law. If they fail to do so, if they ignore the requirements of solidarity, the necessities of social reality, the positive law, which they come up with would be, according to Scelle, anti-legal. Finally, Scelle does not distinguish between national and international law; there is just one, universal, all-embracing law, of which only individuals and not states are subjects. States offer a framework, in which solidarity is most fully realised (this is why their independence should be protected), but it is only a partial, sectoral solidarity, which must give way to universal solidarity. It is law itself which is sovereign, not the states.

Kant's and Scelle's concepts offer a useful lens to look at the international law as it is and to challenge it. Are the investment and trade agreements an expression of the objective law? Do they stand for solidarity? Are they negotiated by moral politicians who have not only the interest of their governments, but also the global, common interest in mind? Or are they just imposition of the will of the stronger upon the weaker and thus violence

sanctioned by positive law? A voluntarist approach doesn't offer any such lens.

As Scelle's objective law is a dynamic concept, it is now important to reflect, what does this pandemic teach us about universal solidarity? What do we learn about social realities? What is new that we see now and we haven't seen before? McKee's message quoted at the beginning is the eye-opener. The message corresponds to the solidarity idea underpinning the African Charter of Human and Peoples' Rights, the idea that "the full development of the individual is only possible, where individuals care how their actions would impact on others", that freedom also means zeal and responsibility for community development, because the well-being of an individual is tied to the community's well-being. By staying at home and scaling down on our lives, we have "flattened the curve" and saved other people's lives. The solidarity is at work and it is what our social reality desperately needs. But as McKee observed, we depend on each other not only locally, but also globally. And here it is, the objective law: pulling together for a common interest, for the public health during the pandemic and for the recovery, a healthy environment and a new international economic order in the aftermath. Positive law which fails to acknowledge this is anti-legal. The moral politicians' time of trial has come.

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