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Commentary on “A Perspective of Objectivity in the Human Rights Arguments”

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The main question answered in Jingjing Wu’s paper is the following: “is there objectivity in the international human rights law against which the justifiability of arguments can be determined?” Even though she states that her “approach could be applied to any ... arguments” (p. 14), she, correctly, devotes her paper to the study of “relativistic arguments”. As I take it, a *relativism argument* justifies an idiosyncratic interpretation of human rights based on cultural relativism, sovereignty or post-colonialist criticisms. One of the examples of relativism arguments provided by Wu comes from the Chinese response to the accusation of not having included a definition of torture in its legislation. Rephrasing what Wu said, the Chinese response in a premise-conclusion structure, the Chinese delegation’s response was:

- (1) We have not included any definition of torture in our legislation.
↑
- (2) “[The] [d]efinition of torture varied, so that what in the Chinese view was positive might be considered negative elsewhere” (p. 13).

To be sure, this is a relativistic argument because it is justifying (2) on the different cultural interpretations of the expression *torture*. Given the importance of relativism arguments in Wu’s paper, it is worth rephrasing her main concern as follows: “in what way or to what extent could relativism arguments be justified against universal norms of human rights?” (p. 14).

Wu’s original response to this question is: “relativism arguments are justifiable if they do not contradict the intentional, textual, or teleological reading of the treaty in question and be supported by one of them” (p. 14). This response reminds me of the RSA Triangle by Ralph Johnson and Anthony Blair. To recall, for them, an argument is good if their premises are relevant, sufficient and acceptable. Similarly, Wu proposes three criteria for the justifiability of relativism arguments, namely, “the intentional, textual, and teleological reading of the treaty in question”. Unlike Johnson and Blair’s, Wu’s triangle is less demanding because she does not require the three criteria for justifiability to support the relativism argument. Instead, for Wu, one of them suffices, as long as the other two are not contradicted.

Wu’s triangle for the justifiability of relativism arguments is an interesting proposal for making three apparently conflicting schools of legal interpretation compatible in the articles 31 and 32 of the Vienna Convention of Law of Treaties. Using Wu’s words, “[t]he textual school ‘centres on the actual text of the agreement and emphasizes the analysis of the words used’ ... [, t]he intentional school ‘looks to the intention of the parties adopting the agreement ... [, and the teleological] school ... [centers on] the object and purpose of the treaty” (p. 4). The problem that Wu aims to solve is that “ ‘the rule(s) of Articles 31 and 32 are ... a compromise between various approaches which itself goes back to a compromise concerning the various distinct

activities that treaty interpretation signifies—and it will be obvious that not too much ought to be expected from Article 31 and 32 as such” (p. 4).

Wu’s inspiration came from Gustav Radbruch’s theory of antinomies of the idea of law. For Wu, “there is ... a triangle relationship between the three schools of interpretation that corresponds with Radbruch’s original formula” (p. 7). Such a formula, under Wu’s interpretation, “proposed that the essence for the rule of law was constituted by equality, expediency, and legal certainty ... [E]quality is of distributive justice: to treat like cases alike and different cases differently; expediency addresses the purpose of the law; whereas legal certainty requires the law to be positive” (p. 7). For Wu, there is a one-to-one relationship between the schools of interpretation and the elements of Radbruch’s theory. Practically, “the textual school embodies the equality element,” “the idea of intentional school is resonant with the legal certainty” and “[t]he teleological school ... represents the expediency aspect” (p. 7).

From my perspective, there is not a one-to-one relationship between the schools of interpretation and the elements of Radbruch’s formula. Specifically, I believe that, according to Radbruch’s formula, equality is not compatible with the textual school of interpretation. Before fleshing out my view, I am going to reconstruct Wu’s argument. The relevant quote is:

the textual school embodies the equality element. This is because this school emphasizes that the original treaty text should be taken the way it is ... This approach is basic to guarantee that equals are treated equally. (p. 7)

Let me reconstruct this argument with a premise-conclusion structure.

- (3) The textual school embodies the equality element.
- ↑
- (4) The textual school is basic to guarantee that equals are treated equally.
- ↑
- (5) The textual school emphasises that the original treaty text should be taken the way it is.

Firstly, I am going to rebut the foundation of (5). Wu claims that treaties should be taken the way they are because they are collective speech acts. On one hand, quoting John Searle, she defines a *speech act* as an “act characteristically performed by uttering expressions in accordance with certain constitutive rules” (Searle, 1969, p. 37). Some paradigmatic examples of a speech act are to promise, as in “I promise that p,” to order, as in “I order that p,” or to assert, as in “I assert that p.” On the other hand, quoting Anthonie Meijers, Wu states that a speech act is *collective* when uttered by a collective agent (Meijers, p. 93), such as a state. With this in mind, Wu states that “an international treaty, containing a set of (regulative and constitutive) rules to declare legal obligations among State parties, *is* a (set of) speech act(s), or more precisely, a collective speech act” (p. 10) (*Italics added*). I am afraid, however, that international treaties are not speech acts, and the reason is simple: international treaties are not acts. Therefore, they cannot not be speech acts.

Secondly, I believe (3) and (4) are problematic. As I interpret Radbruch’s formula, equality does not necessarily coincide with the textual school of interpretation. Indeed, for him equality is one of one of the criteria of correction for written and valid law, as it is shown in this passage:

The conflict between justice and legal certainty may well be resolved in this way: The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as ‘flawed law’, must yield to justice. (Radbruch 2006, p. 7)

According to this, written law is, *prima facie* valid law, unless it intolerably conflicts with justice. In which case, written and valid law loses its legal status. If this is right, the textual school and the equality criterion are not necessarily compatible. Consequently, Wu’s triangle would lose one of its constitutive angles.

To conclude, the main virtue of Wu’s paper is the intent to combine three apparently incompatible schools of legal interpretation looking for criteria determining the justificatory status of relativism arguments. From my perspective, Radbruch’s formula does not seem a fortunate tool for achieving this purpose, but it does not mean that the construction of a comprehensible theory for the interpretation of international treaties and a theory for the justifiability of relativism arguments are not intellectual goals worth pursuing.

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