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Legitimacy beyond the state: institutional purposes and contextual constraints

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ABSTRACT

The essays collected in this special issue explore what legitimacy means for actors and institutions that do not function like traditional states but nevertheless wield significant power in the global realm. They are connected by the idea that the specific purposes of non-state actors and the contexts in which they operate shape what it means for them to be legitimate and so shape the standards of justification that they have to meet. In this introduction, we develop this guiding methodology further and show how the special issue's individual contributions apply it to their cases. In the first section, we provide a sketch of our purpose-dependent theory of legitimacy beyond the state. We then highlight two features of the institutional context beyond the state that set it apart from the domestic case: problems of feasibility and the structure of international law.

KEYWORDS Purpose; feasibility; international law; institutions

One of the central concerns of modern political philosophy and political theory has been the question of state legitimacy. The canon of modern political thinking evolved simultaneously with, and in large parts as a response to, the ascent of the nation-state as the most influential and foundational site of politics and human society. The question of when and under what conditions a state was legitimate had important implications, *inter alia*, for just war, resistance, and loyalty. What went mostly unquestioned in all this theorizing was the nature of legitimacy itself. According to the 'traditional view' (Copp, 1999, p. 10), legitimate states have the (claim-) right to rule and subjects of legitimate states have political obligation; illegitimate states lack the right to rule and subjects correlatively lack political obligation. Political theorists mostly argued about what *made* a state legitimate – consent, fair procedures, or its instrumental value – but not about what it *meant* for a state to be legitimate.

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Especially over the last two decades, this focus has shifted in two ways. First, inspired by the conceptual tools of analytic jurisprudence (Hohfeld, 1919) and philosophical anarchists' doubts, many scholars moved away from the established debate regarding the justifiability of the state's rights and powers. They turned instead towards previously underexplored conceptual questions of what exactly these rights and powers (should) consist in and how re-conceptualizations of legitimacy would affect the justification of state authority (Appelbaum, 2010; Copp, 1999; Edmundson, 1998; Ladenson, 1980, Morris, 1998; Reglitz, 2015; Schmelzle, 2015, ch. 1). The second shift in the debate over political legitimacy concerned the object of legitimacy assessments. In an increasingly globalized world, characterized by a huge variety of supranational actors and the fragmentation of political authority, many theorists moved their attention to the question of legitimacy beyond the state (Besson, 2010; Bohman, 2007; Buchanan, 2004, 2013; Buchanan & Keohane, 2006; Cohen & Sabel, 2006). Discourses concerning the legitimacy of various international institutions like the United Nations, regional treaty organizations, and international law more generally were increasingly common. Yet understanding their legitimacy in terms of the traditional view as a right to rule correlated to political obligation is challenging (Buchanan, 2010). These institutions do not rule in the ways that states rule and political obligation does not capture the relationship between individuals or states and international institutions. Even more radically, legitimacy discourses get applied to institutions that do not rule at all. For example, NGOs (Rubenstein, 2015) and transnational corporations (Karp, 2014) do not generally attempt to rule or exercise authority over outsiders. Still, due to their influence on global public society, the legitimacy of such institutions seems open to consideration.

So state-centred notions of legitimacy are insufficient when applied to institutions that differ from the state in type, level of governance, scope, and much else besides. As the traditional concept of legitimacy is put under increasing strain, strain on the normative standards follows. It is not obvious whether the democratic standards widely regarded as necessary for state legitimacy apply to institutions beyond the state (Christiano, 2012). This is especially true because international and transnational institutions still operate contemporaneously with states and so many of the fundamental political tasks that require democracy, like giving people equal say in shaping the rules of their societies, are left to states. What is needed, therefore, is an approach to legitimacy beyond the state that develops an understanding of legitimacy and accompanying standards of justification for the functions and purposes of non-state institutions and the contexts and constraints in which they operate. It is the aim of this special issue to make some initial steps towards developing such an approach. The following questions are at

the heart of our project: What does it mean for institutions to be legitimate that have radically different purposes, means, interests, capacities, constituents, and roles from states? And what standards do such institutions have to meet in order to count as legitimate?

The contributions to this special issue seek to advance the debate on these questions at both abstract and more concrete levels. The first two contributions focus on the conceptual level and theorize elements of a general framework for theorizing legitimacy and the challenges of extending such a framework beyond the state. N. P. Adams focuses on the role of institutional purpose, showing how different features of an institution's purpose affect the stringency of the justificatory standards that the institution must meet. Adams also describes the various theoretical roles played by purpose when we are more concerned with describing the purpose of extant institutions in all their messiness than theorizing what purpose could serve a justificatory role, as in much of the discussions on state legitimacy. Eva Erman and Jonathan Kuyper propose an approach according to which there is no single, pre-theoretical feasibility constraint on normative principles relevant for legitimacy, instead arguing that feasibility plays distinct roles depending on the institution and debate in question. Erman and Kuyper especially focus on how feasibility constraints will vary according to two factors: the function of the normative principle in question and the coherence of feasibility with other normative commitments.

The remaining four contributions consider the legitimacy of specific international institutions and actors. Carmen Pavel considers the rule of law as a legitimating factor and argues that the rule of law in the international realm upholds a diverse set of values which includes, most importantly, state sovereignty. But Pavel argues that the value of sovereignty is ultimately entirely derivative of how it advances individual autonomy, which should influence the weight that the international rule of law attaches to both state's rights and human rights. Thomas Christiano considers the legitimacy of the International Criminal Court in light of objections that the court's jurisdiction is arbitrarily and unfairly circumscribed, especially as the world's most powerful states are outside its jurisdiction. The fact that such states have not consented to the treaty is not a panacea, argues Christiano, because there are limits to the role of state (non-)consent and because fairness is a core element to rule of law.

Antoinette Scherz and Alain Zysset consider the legitimacy of the UN Security Council as a balance of three features: purpose, competencies, and procedures. They argue that the Security Council can be understood as justifiably aiming at both the maintenance of world peace and at the promotion of human rights while the expansion of its competencies to law-making is not sufficiently supported by justifying procedures. Finally, Cord Schmelzle combines substantial conceptual reflection about the nature of institutional legitimacy with an analysis

of the nature of occupying military forces. Whether we understand occupiers as having a fiduciary purpose – playing the role of government while domestic institutions are incapable of functioning – or a transformative purpose – restructuring the basic social order – matters greatly for what powers they could rightly claim and for what standards they must meet to gain such powers. Despite their different objects of assessment, these four studies share the methodological commitment to exploring the meaning and conditions of legitimacy as relative to the institutions' purposes and the contexts and constraints in which they operate.

In the remainder of this paper, we further articulate this methodology and show how the special issue's individual contributions advance the debate. We proceed in three sections. In the following section, we introduce the guiding methodological idea that institutional purposes determine the mode by which institutions are justified, the scope of their authority, and the normative advantages that they may claim (I). We then highlight two features of the institutional context beyond the state that arise throughout the special issue, are especially characteristic of that context: feasibility constraints (II) and international law (III).

Towards a purpose-dependent theory of legitimacy beyond the state

Perhaps the most important result of turning our attention beyond the state is the recognition that both what it means for an institution to be legitimate and the standards it must meet to be legitimate are contextual. In many ways, this is obvious, if implicit, in the literature on state legitimacy. Disagreements about the nature of the state and what purposes it can or must pursue shapes the disagreements between, for example, anarchists and statists or libertarians and liberals. The hard question for extending legitimacy to the huge variety of institutions beyond the state is understanding how more radical differences in context matter for the legitimacy of that institution. This also connects to the global justice debate and its recent move towards questions of what justice means within certain institutional regimes (e.g. Sangiovanni, 2008).

Against this background, one methodological question jumps to the forefront: whether each institution and each context requires an independent and bespoke theory of legitimacy or whether there is a general theory of institutional legitimacy that could be applied to all these different institutions, including the nation-state. We think there is such a general theory that revolves around institutional purpose (for previous work in this direction, see Adams, 2018; Buchanan, 2013; Erman, 2018; Rossi, 2012; Scherz, 2019; Schmelzle, 2015; in this issue see Adams, Scherz and Zysset, and Schmelzle). Focusing on purpose is especially apt if institutions are considered as

purposive artefacts: humans organize the system of norms and roles that constitute institutions in order to pursue some end (Searle, 2010). Since such organization constitutes the concentration of power and risk and is used to pursue aims that would otherwise be unattainable by uncoordinated individual action, the question of how institutions can be justified arises immediately. This is the question of institutional legitimacy at its most general level. Purpose structures the institution's form – including the normative advantages or competencies it claims, the ways it relates to other institutions and agents, and the effects it aims to have – so purpose also structures what advantages a legitimate institution of that type would have and what standards it must meet to have them.

The question of institutional legitimacy can be productively theorized at this general level to some extent but an informed descriptive account of a particular institution is necessary for any complete theory of its legitimacy. Any plausible general theory of legitimacy could only give a template or starting point for theorizing the huge variety of institutions beyond (and within) the state. At base, this is because legitimacy is an importantly non-ideal evaluation. The point of a legitimacy discourse is to coordinate our responses to an institution under conditions of disagreement and disappointment; legitimacy's normative role is about how we can move forward with the flawed institutions we have, not about which institutions would be ideal (Buchanan, 2013; Rawls, 2005). Thus, an adequate theory of legitimacy for a particular institution is always involved in the messy empirical details of what the institution actually does and how it fails, how it relates to other institutions in its particular historical, sociocultural context, and what we can reasonably expect from it. We already saw in the previous section how the details matter with respect to debates over institutional purpose, whether with respect to the UN Security Council (human rights or peace), occupying forces (fiduciary or transformative), or international rule of law (individual autonomy or state sovereignty).

One recurring theme when considering an institution's purpose is its deontic status. The case for the legitimacy of governance institutions in large part rests on the claim that they are uniquely necessary to achieve a morally mandatory aim. If an institution concentrates huge amounts of power, issues rules that it expects others to submit to, and uses coercion in order to secure conformity, it cannot be pursuing any merely permissible aim. The risks and harms intrinsic to such activities require justification by appeal to the necessity of those activities for a purpose that is not only important but required. Sometimes theorists make this explicit, but it is worth marking out as an issue of special concern. Many of the questions that theorists take to be fundamental to the issue of legitimacy per se are in fact a matter of specific kinds of institutions attempting to pursue a particular kind of purpose in a very particular way. Not all institutions use coercion, for example, but when

they do it raises particular concerns for their legitimacy; institutions that exercise power by setting and applying rules might be particularly normatively demanding because they restrict the autonomy of those subject to the rules (Scherz, 2019). When we move to other kinds of institutions with other kinds of purposes that rely on other kinds of means to pursue their purpose, different questions of legitimacy arise.

Legitimacy beyond the state and the problem of feasibility

Taking seriously the idea of legitimacy as a normative discourse for coordinating our responses to institutions in non-ideal contexts leads us to the second main theme of the special issue: feasibility. A more ideal normative discourse, such as justice is often framed to be, may articulate ideals without concern for whether and how such ideals can be achieved from the starting point of our actual world. On our understanding, theories of legitimacy cannot be idealized in that sense. Instead, they aim to explain how we should respond to institutions in the actual flawed contexts that we find them. If an institution is pursuing some purpose but often fails to achieve that purpose, it may seem illegitimate. But if there is no feasible way to pursue that purpose other than through the fundamentally flawed institution we already possess, that institution may be legitimate because of the lack of feasible alternatives. On the other hand, the lack of feasible alternatives may not matter for legitimacy when considering an institution that undertakes a desirable but not required purpose.

Although the debate over non-ideal theory has increasingly taken up questions of feasibility, theorists are only now bringing such concerns to bear on questions of legitimacy. This is because discussions of feasibility are mostly about comparing alternatives, which in the case of the state has almost exclusively been about comparisons between the state and the state of nature. Since the justifying purposes of the state cannot feasibly be pursued without the sort of organization and institutionalization that constitutes exit from the state of nature, contra political anarchists, the question of feasibility is relevant but essentially settled. Moving beyond the state demonstrates the importance and complexity of feasibility comparisons for legitimacy. Given the background of states pursuing fundamental political purposes, there seem to be a wide variety of options for pursuing our other aims at the international level. This is clear in international law, which right now operates through a hodgepodge of treaties, organizational mandates, regional organizations, ratified state law, and much else. But there are many alternatives, running the gamut from a return to mostly disorganized international anarchy through the current muddled middle to the fully organized global state pushed by some cosmopolitans. In part, the question of whether the status quo is legitimate depends on our judgment of the feasibility of

alternatives. This includes the normative assessment of how feasible an alternative must be before it would make sense to abandon the status quo (which has the great virtue of actually being in practice).

Although it is intuitive that feasibility matters for legitimacy, it also seems contextual: feasibility in different senses matters in different ways for legitimacy evaluations of different kinds of institutions. Feasibility concerns arise throughout the special issue, demonstrating the variety of roles that feasibility plays in connection to legitimacy. Most obviously and explicitly, Erman and Kuyper address fundamental questions such as what feasibility means, when feasibility is relevant to legitimacy, and what feasibility constraints should apply. Feasibility also comes up with respect to whether an institution is sufficiently fulfilling its purpose (Adams) and whether an institution should pursue certain reforms, including whether failure to pursue those reforms threatens its legitimacy (Scherz and Zysset, Christiano).

In our opinion, the main through line in these discussions is the great complexity of feasibility judgments in a multilevel system with different actors that restrict each other's options (e.g. governments, state constituencies, private actors, and international institutions). In the case of the ICC, for example, changing the court's jurisdiction seems feasible for particular powerful states, but not for the court itself or for the international community as a whole. To make a judgment about feasible options and their relation to the legitimacy of an institution, we have to ask not only about which options are feasible but whom they are feasible for and why those agents are the relevant agents for legitimacy. These problematics arise at the domestic level but are exacerbated at the international level by the lack of an overarching sovereign and so the presence of overlapping jurisdictions, the multiplication of actors and levels of action, and the even larger power asymmetries in the international system. Whilst it is important to criticise institutions that only enshrine and reinforce these inequalities, we hold the view that feasibility restrictions remain important for legitimacy judgements if they are supposed to establish how we should act toward certain institutions and which actors to criticise for their behaviour.

The relevance of international law for legitimacy

Legitimacy discourses beyond the state generally look 'up' from the state to institutions at the supranational level. But questions of legitimacy are also coherent when applied to institutions 'beneath' the state, at the domestic level. There are legitimate businesses, legitimate religions, and so on. However, there is an important theoretical reason why theorists rarely address the legitimacy of domestic institutions. We have a settled practice for coming to shared legitimacy judgments about such institutions: domestic law. One of the functions of domestic law is to regulate institutions

within its jurisdiction and so when domestic law is legitimate, we mostly subsume judgments of the moral legitimacy of domestic institutions to their legality. The domestic law does what we want legitimacy discourses to do in general: coordinate our basic practical responses to institutions. The law determines which kinds of institutions get the social support and recognition of legality, and then as individuals we use various other judgments to choose which legal institutions we further support and participate in.

This is one of the reasons state legitimacy is such a hard question: we do not have the higher-order practice of domestic law to settle legitimacy questions in practice as we do for the institutions we encounter in our daily lives. But this is also why legitimacy for institutions above the state raises hard questions: we do not have settled law to determine legitimacy for us. Or do we? Here the question of international law enters and complicates matters, in large part because the legitimacy of international law itself is much in question. We can only reasonably rely on legality as a proxy for legitimacy under a legal regime that is itself legitimate. Under a clearly illegitimate state, the fact that the state allows or disallows a certain kind of institution is no good indicator of whether these institutions should have the right to operate. Further, whether for domestic institutions or states, working within a well-functioning system of law is not only a proxy for legitimacy, it directly enhances legitimacy (Buchanan, 2013). Working within a legal system shapes and constrains the exercise of institutional power, most clearly making it less arbitrary, generating different kinds of reasons and lessening justificatory burdens.

States and international institutions in our actual world operate in a context where there is a substantial amount of international law, so no legitimacy discourse of such institutions can avoid considering whether and how international law as it now operates affects their legitimacy. A fundamental question is whether international law is itself legitimate. This leads us back to the question of the institution's purpose, this time for international law itself. Possible purposes range from mere stability, to regulating expectations and promoting cooperation, to universally securing human rights and equality (Pavel). Our understanding of the purpose of international law is relevant for what it means for such law to be legitimate, the standards it must reach, how it needs to be institutionalised to be legitimate, how it would affect the legitimacy of the institutions it regulates, and the scope of its powers. A variety of standards of representation in the law-making process are plausible at the international level, including through both states and non-state actors or a combination (Besson & Martí, 2018). Democratic standards have also been demanded of international courts in light of their centrality to the application (and arguably also making of) law (von Bogdandy & Venzke, 2012).

Even if international law is legitimate, however, it is unclear whether such law plays the same role as domestic law and so whether we could rely on it to serve as a proxy for legitimacy discourse for international institutions of various sorts or for states. Perhaps ideal international law would serve this function but there may not be feasible alternatives that could perform this function any better, in which case our actual international law may be legitimate without performing the legitimacy-conferring function that domestic law does (because it achieves some other legitimating functions sufficiently well).

To sum up: international law must matter for the legitimacy of institutions beyond the state but complicates our discussions in three ways. First, international law requires its own theory of legitimacy, including what it means for international law to be legitimate and what standards it must meet. Second, whether international law would play the same legitimacy-enhancing and proxy role as domestic law is unclear. Third, we need to determine how international law as it currently exists matters for the legitimacy of institutions here and now, whether or not it is fully legitimate.

Conclusion

We close with some reflections about paths for future research that this special issue has clarified and opened. First, the international case makes the distinction between instrumentalist and proceduralist accounts of legitimacy even more stark. Do we need democratic procedures for legitimate institutions beyond the state, and to what extent does this depend on the purpose that a particular institution is pursuing? Second, the legitimacy of institutions beyond the state in our world today is still legitimacy of institutions in a world of states, and so in relation to states. Does the membership of non-democratic states endanger the legitimacy of an international institution or can it be legitimacy enhancing? Is state consent a requirement or only under certain conditions? Third, individual institutions are in part defined by their relationships to other institutions, including what purposes they pursue and what feasible options there are. To what extent does the legitimacy of one institution depend on the legitimacy of other institutions to which it relates? And how should the objects of legitimacy assessments best be delineated given these interdependencies? Is the fragmentation of the international system an advantage, perhaps allowing greater accountability, or a problem that must be solved with increased integration and perhaps constitutionalization? Finally, theorizing legitimacy beyond the state may have some lessons for state legitimacy. In particular, to what extent does state legitimacy depend on effective constraining institutions both above and below the level of the state or on the state's compliance with certain institutions beyond the state? And might theorizing the legitimacy of interdependent

international institutions help us understand how, for example, the legitimacy of the judiciary depends on the legislature and vice versa at the domestic level? Theorizing legitimacy beyond the state is very much still in the early stages of development, yet we hope that its promise, and challenges, can be clearly seen.

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