

You Can't Tell Me What to Do! Why Should States Comply with International Institutions?

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Abstract

The tension between the authority of states and the authority of international institutions is a persistent feature of international relations. Legitimacy assessments of international institutions play a crucial role in resolving such tensions. If an international institution exercises legitimate authority, it creates binding obligations for states. According to Raz's well-known service conception, legitimate authority depends on the reasons for actions of those who are subject to it. Yet what are the practical reasons that should guide the actions of states? Can states be bound by international institutions on all kinds of issues or are certain issues exempted because of sovereignty considerations? This paper argues that self-regarding reasons cannot ground political authority with the respective demand for compliance. Since reasons for states concern individuals both inside and outside of their jurisdiction and other state peoples, self-regarding reasons for states, which form a domain of personal pursuits or sovereign decisions, are highly restricted.

Keywords: legitimacy, authority, reasons to comply, autonomy, state consent, international organisations

Introduction

Increased international coordination after the Second World War saw both the creation of more multilateral institutions but also the deepening of existing institutions' authority. Since then, many international institutions have faced criticism from both civil society and state representatives (e.g. Zürn, Binder, and Ecker-Ehrhardt 2012) which has intensified in recent years. Yet, addressing global problems such as poverty or climate change requires greater international collaboration than ever. So, how should we evaluate the authority of international institutions that demand compliance? When are such institutions legitimate? The question of the state's legitimacy has been at the core of political philosophy, and the concept and standards of legitimacy in respect of international institutions have recently garnered much attention (e.g. Buchanan and Keohane 2006; Christiano 2012; Besson 2014; Adams, Scherz, and Schmelzle 2020; Sandven and Scherz 2022). However, one aspect has largely been neglected in this debate, namely how and when legitimate authority is able to bind not only individuals but also states.

The concept of legitimacy is traditionally applied to state institutions, though questions of legitimacy also arise for international institutions as soon as they demand compliance. International institutions seek to bind and therefore demand compliance primarily of states through their rules or agreements, while they do so of individuals only secondarily through their states. It remains unclear how normative conceptions of legitimacy apply to states. Therefore, it is important to understand how legitimacy is applicable internationally to bind states.

This paper tackles precisely this question: Under what circumstances *should* states comply with international institutions? It is generally assumed that legitimate authority can demand compliance of subjected individuals also in cases when compliance conflicts (or is seen to conflict) with their self-interest according to normative considerations such as the common good, rights or moral reasons. Yet, for states, such normative considerations are often seen as naïve and thus quickly abandoned for realist international relations theories. Therefore, the legitimate authority of international institutions is often challenged on the basis of state sovereignty. On the other hand, if the normative side is taken seriously, state consent is criticised for as a legitimacy standard. Can states be bound in order to solve global problems or to comply with human rights even without their consent? If individuals have a right to "personal pursuits" (Tan 2004) based on their freedom or autonomy, then states might have a similar right to decide for themselves and only be subjected to the authority of international institutions to which they have explicitly consented. However, the use of such "domestic analogies" has often been criticised (e.g. Bull 1977). Therefore, we need to understand what reasons for actions apply to states and what role they play in binding states or

granting them immunity from international institutions' decisions. This paper seeks to provide a coherent normative account of reasons for states to comply with international institutions.

The first part of the paper addresses the conceptual question of how legitimate authority is thought to bind its subjects. It starts from legitimate authority as content-independent and exclusionary reason-giving and outlines conceptual issues with the instrumental conception of legitimacy. Proposing an autonomy-based conception of legitimacy (see also Scherz 2021; Scherz and Zysset 2020), it argues that self-regarding reasons cannot be the basis for authority but that there is a right to personal pursuits for issues that only affect oneself. The second part turns to how such reasons apply to states. It discusses whether states also have a right to personal pursuits that can ground a domain of sovereignty, in which they are immune to the claimed authority of international institutions. It argues that such a domain of sovereignty exists but is restricted by other-regarding reasons concerning both their respective citizens and others outside the state. The paper addresses an objection to this conception, namely that democratic states owe less compliance to international institutions than non-democratic ones. Finally, it discusses what relevance different purposes of international institutions and state consent have for the legitimacy of international institutions.

The paper aims to determine the implications for international institutions' legitimacy if we accept a Kantian autonomy-based account or a modified, non-instrumental service conception. In particular, the autonomy-based conception of legitimacy leads to the conclusion that all states have reasons to join and comply with multilateral arrangements that ensure the equal autonomy of their own citizens but also the autonomy of other states' peoples.

1 The concept of legitimacy

The increasing authority that is claimed by supranational, transnational, and international institutions raises the question of what makes international institutions legitimate.¹ There is a growing literature on why states comply with such institutions (e.g. Hurd 1999; Checkel 2001; Tallberg and Zürn 2019). Jan Hurd distinguishes between coercion, self-interest, and legitimacy as reasons or motivation for compliance. Here, legitimacy is understood as “the normative belief by an actor that a rule or institution ought to be obeyed” (Hurd 1999, 381). This sociological (or descriptive) approach conceptualises legitimacy as the belief in the justified authority of a certain

¹ Hereafter institutions based on bi- or multilateral treaties as well as supra-, trans-, and international organisations will be referred to as international institutions. Even though there are undoubtedly important differences between these types of institutions, this paper assumes that the underlying reasons through which they can potentially bind states are the same.

international institution². From this debate about sociological legitimacy, the relevance of specific compliance audiences such as states or civil society groups is well-known (e.g. Bodansky 2013). In fact, in the case of international courts, attentive publics may primarily consist of various elite actors such as national governments, courts or legal communities (e.g. Pollack 2018). Yet, how are we to think about different compliance constituencies from the perspective of *normative* legitimacy? Why *should* states comply? Are individuals and states in fact bound by different reasons? This question is highly relevant for the legitimacy of many international institutions, as they are first and foremost addressing states in their decisions.

The question about normative legitimacy has traditionally been phrased in terms of whether an authority has not only *de facto* authority but a “right to rule” often associated with a corresponding obligation to obey on the side of those subjected to said rule (Raz 1986).³ In other words, such a right to rule addresses the question of how political power can be justified, i.e. how to set and apply *binding* rules to which compliance is normatively demanded. Since international institutions seek to bind primarily states, it is important to understand how legitimacy is applicable internationally to do so. Before turning to states, however, it is necessary to understand how different conceptions of legitimate authority are thought to bind their subjects. This is crucial to understanding how reasons are generally thought to generate legitimate authority and because the reasons to comply for states may depend on what these reasons are for individuals. To do so, I characterise the concept of legitimacy as a normative power: revisiting one of the most prominent conceptions of legitimacy, namely the service conception, and outlining the alternative of an autonomy-based conception of legitimacy. This conception is shared by many liberal and republican views.

1.1 Legitimacy as a normative power

This paper works with the concept of legitimacy as the right to rule, as a justified normative power (Hohfeld 1917), rather than a claim right or a liberty right (e.g. Applbaum 2010; Christiano 2012; Enoch 2014; Reglitz 2015). This means legitimate authority is a normative power to change normative relationships such as rights and duties. In the following, I understand the concept of legitimacy, that is to say legitimate authority, as consisting of a normative power to impose and apply binding rules that subjects have exclusionary, content-independent reasons to comply with. The content-independence of the reasons to act is an important feature of authority. It is exhibited

² Some also measure legitimacy in the form of compliance or the lack of contestation. Yet, equating the lack of contestation with legitimacy is problematic as it neglects power structures (see Hurd 2019) and transparency issues.

³ Whereas Buchanan’s account discusses reasons to support institutions, I will focus only on political institutions that demand compliance with rules and decisions.

in the fact that the mere say-so of the authority creates a reason for action. In other words, what is decisive to establish the reason for action is not the content of the demanded action, but rather the source of the directive. If legitimate authority is particularly important under “conditions of politics,” characterised by reasonable disagreement about justice (Waldron 1999), content-independence provides an essential stability and efficiency to political institutions. Second, exclusionary reasons do not only establish a reason for an action; they are second-order reasons that exclude certain first-order reasons that would count against the action (Raz 1986, 57 ff.).⁴

1.2 What reasons can bind? Distinguishing other- and self-regarding reasons

Normative legitimacy concerns the question of how political authority or political power can be justified.⁵ Can someone else’s authority over us be compatible with our equal moral status? Such authority seems problematic from the perspective of both freedom and equality. Raz’s service conception answers this question affirmatively if the authority performs a service for those subjected to it. More technically, the service conception states, in the normal justification thesis (NJT), that an institution has authority over its subjects if following its directives enables them to act better on the reasons that apply to them (independent of the authority’s command) than acting on their own would (Raz 1986, 53). Fundamentally, this conception is an instrumental view of legitimacy based on objective reasons about which the person to whom the reasons apply might be mistaken. This means that Raz is a realist regarding reasons: in this view, normative facts exist independent of beliefs.

Overall, the service conception is an attractive view as it explains legitimate authority on the basis of the interests of those subjected to it. Yet, there is a narrow, strictly instrumental reading of Raz’s theory, based on perfectionism, and a broad one, including the intrinsic value of certain procedures based on autonomy or equality. It is important to distinguish these two interpretations, as they have vastly different implications for which institutions are legitimate and how we can recognise them as such. Raz’s service conception has often been read in the narrower way, which is in line with his overall perfectionist theory. There are, however, passages in his work that point to the broader interpretation. For example, Raz states that “Public authority is ultimately based on the moral duty which individuals owe their fellow humans” (1986, 72). The account of autonomy-

⁴ Whether such exclusionary or protected reasons in fact establish duties or rather some privileged reasons for actions is not relevant here. On Raz’s account, protected reasons (consisting of a first-order reason for an action and an exclusionary reason that excludes reasons against that action) are what constitute duties (e.g. Raz 2010).

⁵ See Scherz (2021) for an account that argues for graded legitimacy standards depending on the level of political power.

based legitimacy outlined below can be understood as specifying a broad, non-instrumentalist reading of Raz's theory and in a more critical vein, targeting the perfectionist foundation of the service conception.

The broad reading of the service conception finds further support in Raz's later work as well as contributions by other authors. Raz (2006) makes it clear that a second condition applies to the service conception, namely the *independence condition*. This condition restricts the NJT to matters for which it is "better to conform to reason than to decide for oneself." Tom Christiano suggests that the NJT may include reasons to publicly treat others as equals and therefore requires democratic procedures (2008, 252). Similarly, Daniel Viehoff (2011) argues that the service conception can allow for procedural fairness considerations to be counted as reasons. Others, however, have been sceptical as to whether the NJT can include intrinsic reasons based on autonomy or equality, for which we value fair procedures. For example, Scott Hershovitz (2003) argues that this is not the case, because otherwise the service conception would accommodate all kinds of legitimacy theories. It would therefore lose its substance and appear empty (Buchanan 2018, 70 ff). However, regarding the emptiness objection, Raz admits that the independence condition does not solve the problem but claims that this is not its task; rather it frames the problem (Raz 2006, 1015).

Can the wider service conception, as outlined by Christiano and Viehoff, help to resolve the problem so framed? This depends on *how* the NJT relies on reasons. Fabienne Peter (2020) suggests distinguishing between fact-, belief-, and will-based conceptions of legitimacy. According to a fact-based conception of legitimacy, political decisions are legitimate if they are warranted by normative facts, while "belief-based conceptions take the ground of legitimacy to be beliefs about the decisions warranted by the normative facts, not the facts as such" (Peter 2020, 381). There is a certain ambiguity about whether Raz holds a fact- or belief-based conception of legitimacy (see Kirby 2017). While the fact-based reading fits well with Raz's overall perfectionist approach and realist understanding of reasons, it leads to severe problems.

The legitimacy framing of the fact-based NJT is particularly problematic for the political domain. If we understand legitimacy judgements of political institutions to apply also under conditions of persistent but reasonable disagreement about values and how to pursue them, pointing to objective reasons does little to obtain legitimacy judgements that can be action guiding. Assuming that legitimacy judgements have an important practical function, namely to enable the coordination of action towards particular institutions (see Buchanan 2018) – in particular compliance and non-compliance – not being able to fulfil this function is a major deficit for an account of legitimacy. In other words, the potential lack of normative facts' accessibility causes a

severe issue for the account. The fact-based reading is problematic for legitimacy's essential action-guiding function of settling judgements (Peter 2020).

Raz's account is, however, better understood as belief-based (Peter 2020), meaning that legitimacy depends on sufficiently justified beliefs about normative facts, not the facts themselves. Raz explicitly acknowledges the epistemic dimension of this issue:

The point of being under an authority is that it opens a way of improving one's conformity with reason. One achieves that by conforming to the authority's directives, and (special circumstances apart) one can reliably conform only if one has reliable beliefs regarding who has legitimate authority, and what its directives are. If one cannot have trustworthy beliefs that a certain body meets the conditions for legitimacy, then one's belief in its authority is haphazard, and cannot (again special circumstances apart) be reliable. Therefore, to fulfill its function, the legitimacy of an authority must be knowable to its subjects (Raz 2006, 1025).

However, the epistemic issues do not stop at the level of normative facts but extend to sufficiently justified beliefs about these facts. As Peter (2020) notes, there is epistemic underdetermination in the political domain, which means that no one holds sufficiently justified beliefs about what should be done. Under the conditions of politics, including profound but reasonable disagreement, there are different valid claims that are not due to mistakes or a reluctance to consider the relevant evidence. Peter attributes this to the complexity of the issues. While she argues that there are certain political decisions that fall within the range of sufficiently justified beliefs – for example, decisions that promote slavery or genocide will be illegitimate on this basis – many, if not most, political issues are not of this kind (2020, 385). Therefore, Peter argues for a disjunctive account that, first of all, relies on the beliefs, and only on wills when belief-based judgements are epistemically impossible. I will argue that this prioritization is not justified. To do so, I will outline the essential idea of will-based conceptions of legitimacy, which I call autonomy-based, and Peter's (2020) critique of them.

Autonomy-based conceptions give priority to persons' capacity to be the authors of their own lives because they are seen as "self-originating sources of valid claims" (Rawls 1980, 543). Autonomy-based conceptions of legitimacy evaluate the legitimacy of an institution according to the risks and benefits that its authority generates with regard to equal autonomy. Therefore, this view shifts the perspective to how authority needs to be justified to those subjected to it, by taking their potentially diverging views seriously. As Charles Larmore puts it: "[H]olding that our view is correct and claiming that it should be imposed on all are two separate matters, especially when the view is one about which reasonable people disagree" (2020, 48). The latter requires that the justification of authority respects persons as equals, thereby basing legitimate authority on

adjudicating between different views based on some process that establishes support, acceptance or acceptability. I take it that most liberal and republican theories are based on such an autonomy-based conception of legitimacy, while differing in what exactly comprise the underlying duties that follow from equal autonomy.⁶ Autonomy-based conceptions also share certain similarities with political realist accounts (e.g. Williams 2005; Rossi 2012) as they take legitimacy questions of political authority to be prior and distinct from morality in general and therefore ground legitimacy in the people's perspectives. However, in contrast to some realist accounts, I take autonomy-based conceptions to be fully normative.⁷

For example, the autonomy-based conception of legitimacy can be specified as justified acceptability under public reason (Habermas 1998, 49 ff.).⁸ This means that the assumption that authority needs to be justified to everyone subjected to it comes with a strong requirement of equality, which in turn restricts the views that are admissible in the evaluation of legitimacy. Importantly, autonomy refers to external freedom in the relationship to others as "independence from being constrained by another's choice" (Kant 1996, 393 (DR 6:237)).⁹ This includes two interrelated aspects of autonomy: *personal* autonomy as having the capacity of freedom of choice and *political* autonomy as having the status as equal norm-giver. Political authority is therefore required to protect and enable not only equal personal autonomy, but also political autonomy (Habermas 1996, Chapter 3; Forst 2012, 125–37). This is realised if individuals are recognised as equal co-authors in the political process of the setting of laws for their society. On an autonomy-based account, the legitimacy of political institutions depends to no small degree on whether they are structured democratically.

According to Peter, autonomy-based views mistakenly understand people as self-originating sources of valid claims in general (2020, 379). The validity of some claims is of this kind, for example what kind of food I like, yet Peter argues that this is not generally the case in the practical domain. She argues that privileging this first-person perspective on valid claims leaves these conceptions open to arbitrary political decision. Peter considers two replies to this objection: 1) Views that rule out such decisions, e.g., the support of slavery or genocide, as illegitimate because

⁶ Peter (2020) lists unanimity, public-reason and participation views as autonomy-based concepts.

⁷ Some realist accounts also acknowledge the normativity of their approach and allow for certain external critique (see Cozzaglio 2020)

⁸ I agree with Habermas that this condition cannot be collapsed into actual acceptance. Rather it is restricted by the procedural aspects of the public use of reason that capture the interpersonal recognition as equals.

⁹ This use differs from the common Kantian terminology where autonomy refers to the moral self-legislation of the will. The external relations regarding freedom of choice that are relevant for legal and political rule, which are at the core of my use of autonomy have also been referred to under the republican term non-domination (e.g. Pettit 2012).

they do not recognise all persons as self-originating sources of valid claims. In other words, reasonable views must accept the restrictions of what is incompatible with treating others as equally autonomous sources of valid claims. 2) As an alternative to the conditions of reasonable first-person claims, political decisions can be restricted by objective third-person principles (e.g., the respect for persons) grounded in normative facts. Against the second, Peter argues that other valid claims than the fundamental principle (e.g., that immigration policies that separate small children from their families are wrong) could also be valid based on normative facts. She objects that the first reply gets it right for the wrong reasons: “What makes such decisions illegitimate is not that reasonable wills will not will it, it is that they go against the correct judgment that those decisions are not what should be done” (2020, 380).

However, this underestimates the severity of the charge of violating the conditions of reasonable will formation. It is not that reasonable wills will not will it empirically, but that they cannot do so per definition. Decisions that violate the very conditions of justifying collective decisions to each other as equals can be excluded as the wrong thing to do. Autonomy-based conceptions cannot just recognise the few cases that Peter lists as epistemically clearly illegitimate, but also provide a justification for why they are wrong, namely because they undermine the very conditions of equal autonomy, both as individual self-determination and collectively justifying claims to each other as equals. Therefore, I argue that justification is essential for the validity of claims in autonomy-based accounts. In fact, political decisions have to be justified to everyone in order to be legitimate. Justification in this sense is not detached from facts, as Rawls’s definition of public reason shows (2001, 89–90), but takes seriously different perspectives under conditions of reasonable pluralism. Yet, even if we accept Peter’s objection, it should be noted that on her disjunctive account most political decisions have to be made according to an autonomy-based conception. Therefore, it relies heavily on autonomy-based conceptions. In my view, the most convincing interpretation of the broad reading of the service conception not only needs to give up the perfectionist starting point of the theory but leads to an autonomy-based conception of legitimacy.¹⁰ In the second part of the paper, I will rely on this view.

The second *narrow* reading that is fully instrumental without relying on intrinsic values, such as autonomy or fairness, is problematic because it allows for paternalistic forms of authority. To

¹⁰ One critique that can be raised about the autonomy-based conception is that it does not cover everything that is normatively valuable. However, it should be noted that the dual basis of personal and political autonomy is very broad and therefore covers human rights as well as political inclusion. One concern that may lay outside this scope are concerns for non-human animals and ecological systems. Yet, they may be included either by expanding the account of autonomy based on other factors than rationality and reasonability or by relying on the importance of ecological systems for the autonomy of humans.

see why this is the case, a closer look at which reasons are relevant to create exclusionary reasons is necessary. The NJT can be based on both prudential and moral reasons as well as on self- and other-regarding reasons.¹¹ Here reasons refer to practical reasons for an action. Self-regarding reasons are reasons for actions based on the value and effects of the action for the acting person, while other-regarding are the same for others, from the perspective of the acting person. Importantly the foreseeable effects of an action can be reasons for or against it. Self-regarding reasons can be seen as being based on self-interest in the broad sense which includes values, not just the rational maximisation of benefits. It is possible to have self- and other-regarding reasons for the same action. For example, I can have reasons to buy a cake because I would like to eat one and because I would like to share it with a friend. The structure of relationships importantly influences the structure of reasons.

It is problematic to ground authority on self-regarding reasons (by helping us better comply with these reasons), as this would raise the problem of paternalism (Green 1989; Darwall 2010; Schmelzle 2015). Leslie Green gives an example that shows how the NJT problematically relies on self-regarding reasons:

Suppose Carol is an excellent investment counselor and that conformity to her advice is certain to be optimal. Suppose further that there is no intrinsic value in David managing his own financial affairs. Does that show that Carol has legitimate authority to act for David? No; although it does show if she were given such authority she would be justified in having it, and it also shows that David would be justified in giving it to her. (Green 1989, 811)

The domain of personal investment is generally considered to be permissibly based on self-regarding reasons. The explanation for why Carol does not have legitimate authority, even though she fulfils the NJT, is that self-regarding reasons are the wrong kind of reasons to generate practical authority. In particular, reasons to have the ideal investment do not override autonomy-protecting mechanisms such as consent. It is difficult in practice to sharply distinguish between self- and other-regarding reasons. For example, there may be good other-regarding reasons to invest private funds, such as taking care of family. My point here is not that such considerations are never important but rather that where we take self-regarding reasons to be relevant, authority cannot be grounded without further authorisation mechanisms. To bring out the insufficiency of such reasons to ground authority, we need to eliminate the possibility of other-regarding reasons: Imagine that I am stranded alone on a deserted island with loudspeakers issuing commands. According to the

¹¹ Raz rejects the distinction between prudential and moral reasons because all reasons are grounded in values (1986, 320).

autonomy-based conception they would not have authority over me, no matter how well-informed they are about the island and my goals. This is simply because my own decisions establish what is right for me to do. Because I am alone on the island (without hope of rescue or other contact) the “commands” do not protect the equal autonomy of others and my own autonomy does not need protection for exactly the same reason. Of course, I might decide to follow these orders, but I do not treat them as exclusionary reasons. Importantly, I am not committing a moral wrong if I do not comply with these orders.

In contrast, on the narrow interpretation of the NJT, the loudspeakers should in fact be seen to hold authority if they help me to better comply with reasons that apply to me. This shows how this conception’s reliance on self-regarding reasons leads to counter-intuitive and paternalistic forms of authority. In the expanded version of the NJT, which includes the *independence condition*, it is not clear whether the loudspeakers have authority. The expanded NJT does not provide guidance on whether this is a matter over which it is important to decide for oneself. Or in other words, it does not tell us what the underlying duties or reasons are, on which authority can be based. In this sense, I agree that the service conception is empty.

In this respect, the autonomy-based conception provides a clearer answer: first of all, for self-regarding reasons, deciding oneself always has priority as it establishes the value of certain actions through these choices. Therefore, authority cannot rely exclusively on self-regarding reasons. This account establishes a general presumption that it is valuable that individuals can decide for themselves. Second, this does not mean that individuals qua autonomous cannot be subjected to authority. Rather this account relies on underlying duties of establishing an *equal* autonomous relationship to others based on the respect of their autonomy as equals.¹² In a setting with others, the autonomy-based account of legitimacy makes this capacity of choice and value attribution the prominent feature of legitimacy assessments. The autonomy-based conception of legitimacy specifies the background duties to respect others’ equal autonomy. Therefore, to establish rightful relations with them through state institutions is what gives legitimacy to the state’s authority. This shifts the main source of authority to other-regarding reasons, specifically to respect others’ equal autonomy. This also includes duties to ensure the political autonomy of others as equal co-authors of the law.

Third, because authority cannot be grounded in self-regarding reasons alone, the autonomy-based conception relies on authorisation mechanisms to establish authority. Such authorisation

¹² In the following I will use underlying or background duties as a shorthand, but this is not meant to exclude that these are simply weighty reasons in some sense.

protects autonomy as the value to decide oneself how to lead one's life. Coming back to the example of the financial advisor, Carol does not have authority even if the conditions of the NJT are fulfilled; it merely shows that she would have legitimate authority if she were authorised. However, in the absence of authorisation, epistemic grounds such as expertise are not sufficient for authority. Others have discussed in detail how Raz's reliance on expertise creates a general problem of standing and a "reverse entailment problem" (Darwall 2010; Perry 2013; Fox-Decent 2014). The latter states that even a moral obligation to comply with a particular directive does not entail that the source issuing the directive is a legitimate authority. What is lacking is the connection between a particular authority and those subjected to it. Autonomy-based conceptions rely on authorisation procedures to do so. Yet they not necessarily require a consent account of authority because they ground legitimate authority on other authorisation mechanism and other-regarding reasons. In particular, authorisation mechanisms that respect others as equals in collective decision-making processes are required to uphold their equal norm-giver status. The next section discusses how such prior duties and authorisation can ground legitimate authority.

1.3 Prior duties and the particularity requirement

David Enoch (2014) argues that one way in which authority can be normatively legitimised is if it relies on a prior duty to obey.¹³ He does not specify when such a duty exists. He is sceptical about the viability of consent theories to ground the legitimate authority of states but leaves it open whether the legitimacy of democratic states can be grounded in a prior duty of procedural fairness (Enoch 2014, 329–30). Enoch regards the solving of coordination problems as a, if not *the*, paradigmatic case for authority without a prior duty to obey. To illustrate this, he describes a case of a volunteer passenger who solves crucial coordination problems by giving instructions in an emergency situation. Enoch argues that the passenger does not initially have authority. Even though her instruction ("All to the left!") gives the others reasons to comply, as it forms a salient point for coordination and because all the passengers are under a duty to coordinate to save lives, it does not *robustly* give reasons and is therefore not an authority (Enoch 2014, 315–16).¹⁴ However, over time, the volunteer may gain authority if a practice of coordination is established. Such a reliance

¹³ In fact, Enoch argues that having a prior duty is only one way of establishing legitimate authority, but that the service conception is another. As should be clear from the previous section, I disagree with the second point.

¹⁴ According to Enoch, robust reason giving requires the intention to create a duty, its communication and recognition, the duty relying on this recognition and normative success conditions. It creates duties in the same way as promises and requests, not by merely triggering reasons (2014, 311). Another explanation for why this should not be regarded as an instance of authority is that it lacks error tolerance (Brinkmann 2018).

on a background duty (to coordinate) and an established practice may also justify the authority of the state.

Let us consider an example similar to the financial advisor that has been used against the authority of the state. *The insurance company example:*

The mere fact that a business is on balance morally acceptable and a good thing to have around seems to give me no moral reason to do anything for it, unless my failure to act will in some way affect the performance of my duties to others. (Must I support, let alone buy a policy from, some insurance company that is efficient and charitable and offers good bargains on its policies, say?) [...] As long as I mind my moral business, good insurance companies and just states can be created at will by those who want them; but the virtues of these arrangements give them no moral claim on my allegiance (Simmons 2001, 138).

John Simmons argues that just as an insurance company has no authority to demand payments or any other form of compliance if one has not signed a policy with them, so states have no authority over us even if they are on balance just. While I agree that the insurance company, like the financial advisor, does not have authority (even if it fulfils the conditions of the narrow NJT), the state differs from such voluntary associations in that it is based on important prior duties towards *others*, namely the other-regarding reasons to respect their equal autonomy. The state is necessary to establish the conditions for equal freedom, i.e. autonomy among individuals, as it is not possible to mind one's own business in this respect. As physical beings pursuing ends in the world, we are constantly at risk of interference from others. The state's authority is underpinned by the need to regulate our external freedom, of how we interact. Autonomy is not realised as the independence of isolated individuals but rather in equal interpersonal relationships that are only possible under law. Specifically, the state is necessary to establish and enforce rights that cannot be created by private unilateral acts.¹⁵

However, one might still object that it does not follow that we are bound by one particular state. This is what Simmons (2013) calls the particularity requirement, which is a form of the reverse entailment problem. However, just as the volunteer passenger gains authority over time if a practice of coordination is established, so too do states. It is true that the state does not have authority over a neatly defined group of people when it is first created. Yet, as time passes, the state is established as a practice of coordination; it becomes the best way of discharging the background duties of those within the practice, simply since it is the most salient one. That is, however, not enough to reject the reverse entailment problem. Even if the creation of states were comparable to an emergency

¹⁵ For a detailed Kantian account that argues for the authority of the state, see Anna Stilz (2009, Chapter 2).

situation in which the salience of coordination is enough to trigger the underlying reasons, as argued above, this is a problematic case for genuine authority and even more problematic over time. What seems to do the normative work in the emergency case that develops into a practice over time is some form of consent. This means that, again, to solve the reverse entailment problem, some form of autonomy-protecting authorisation mechanism is required to establish a connection between the subjects and the authority. Yet, such authorisation procedures require substantial preconditions and procedures to be in place in order to have normative value. Since this cannot be guaranteed in a state of nature, the reason for the authority of the state should rather be seen in establishing the preconditions to authorise political authority.

In other words, the state is necessary to create the *conditions* of the authorisation based on equal autonomy. These conditions can be thought of in a similar way as Rawls's background justice, which enables agreements to be fair and free (Rawls 1993, 265 ff.). Essential to the conditions is the positive codification of law, social security and the legislation through democratic procedure that secures citizens' personal and political autonomy. The state is only legitimate if it creates these conditions and is then authorised through the created mechanisms of political authorisation (Buchanan 2002). If the authorisation through equal political participation is not (yet) possible, the creation of a rightful condition may be sufficient for legitimacy. Yet, such legitimacy is conditional on realising authorisation and therefore provisional. Since reasonable disagreement also concerns underlying duties, legitimate authority ultimately needs to be conferred by an autonomy-preserving authorisation mechanism. Yet, to do so, a state and in particular a legal structure is required to ensure equal participation in these authorisation processes.

2 Reasons for states to comply

How do these conditions of legitimacy apply to international institutions? Are there underlying duties for states and can states claim a similar right to personal pursuits in order to protect their sovereignty? In order to understand how exclusionary content-independent reasons to comply can be generated by international institutions, to gain authority over states, it is important to understand what reasons apply to states in general. This is not a simple question and requires a more extensive discussion than the format of a paper can accommodate. This section focuses on four aspects: 1) It outlines how the distinction between self- and other-regarding applies to states; 2) It argues that other-regarding reasons can establish a general requirement to enter into multilateral arrangements; 3) It addresses the objection that the respect for political autonomy of democracies causes the autonomy-based conception to acknowledge mainly authority over non-democratic states; 4) It

discusses how different purposes and state consent influence the legitimacy of international institutions.

2.1 *Are there self-regarding reasons for states?*

I have argued so far that legitimate authority cannot rely on self-regarding reasons alone, but requires additional authorisation, while other-regarding reasons may at least provisionally ground legitimate authority. How does this distinction apply to states? The answer depends on the concept of the state to which it is applied. One can distinguish between an institutional understanding of the state and an understanding of the state as its citizens. First, if we think about the state instrumentally as an *institution*, its normative purpose is to serve its citizens. From the institutional perspective, different actors such as the parliament or the government are involved, and we might think about their motivation, for example, in a principal-agent model. Nevertheless, normatively the institution's reasons are defined by the reasons of those under its jurisdiction because it is an instrument and therefore dependent on them. In other words, the state as an institution has reasons to act according to the reasons that apply to its citizens in the first place (and help them to comply better with these reasons), which is exactly what makes the state legitimate. Yet, while in this institutional view the state's reasons depend on those of its subjects, the state is still distinct from them. This allows for the critical distance between the state and its citizens that is needed to evaluate whether the state acts in their interest. Therefore, in this institutional view, the state's relationship to its citizens is based on other-regarding reasons. This means that on the instrumental account of the state, it can actually be bound by other-regarding reasons on both how it treats others outside the state and its own citizens, which specifically involves human rights considerations.

According to the second concept, the state is essentially its citizens. In this view, the citizens can be understood either as the *aggregate* of several individuals or as the *embodiment* of a collective people. On the *aggregate* view, the state has many other-regarding reasons that apply between the citizens. However, additionally, this interpretation of the state opens up the possibility that the state has other-regarding reasons for actions that are directed at individuals outside its borders. On an autonomy-based conception, duties to respect others as equals are owed to everyone. The existence of states, through which these duties are discharged with regard to fellow citizens, can, however, influence how these duties towards others outside of the state should be realised. Even if the way in which we discharge our duties to respect others does not require us to form another state with them (or even an analogous international civil condition),¹⁶ this does not

¹⁶ See Flikschuh (2010) for an analysis of whether Kant's theory demands such an international civil condition and if it is possible.

mean that those duties simply disappear. On the *embodiment* view of the state, understood as a collective people, the self-interests of the people as a whole, for example, their economic interests, constitute self-regarding reasons. These are not reasons that can ground authority over the state in question. In this view, individual citizens of the state disappear as other. Yet, again, peoples do have other-regarding reasons towards other peoples of other states, and potentially other actors, which can be reasons for them to comply with international institutions. From the viewpoint of other-regarding reasons, the instrumental and the aggregate views lead to the same conclusion, but the embodiment view creates fewer other-regarding reasons on the grounds of which states can be bound. While on the autonomy-based conception, the political autonomy of peoples is relevant, it does not exist independent of individuals and their autonomy. The embodiment view can therefore also not disregard other-regarding reasons concerning its citizens.

Let us return to the initial question of whether there are self-regarding reasons for states that can constitute a right to personal pursuits for states. For the embodiment view of peoples acting through their state, there can be self-regarding reasons that come with a domain of decision making that we often attribute to political autonomy of peoples or collective self-determination. States (or better, peoples) can claim that the protection of their autonomy is more important than the promotion of their success in following the “right” reasons in these issues. So, there is the domain of sovereign decisions in which states are allowed to make choices themselves either because it is more important that they can choose or because there are, strictly speaking, no accessible right reasons. As argued above, such self-regarding reasons apply to issues that do not concern others’ autonomy and therefore cannot serve as the basis for international institutions’ authority without explicit consent. For example, it is the choice of the state’s people whether the people wants to subject itself to a bilateral trade treaty (BIT) even if it might be considered advantageous to the state’s economy. Yet, the embodiment view is too simplistic, as it neglects heterogeneity and conflict within peoples as well as the question of whether the relevant peoples are in fact at the state level, in particular with regard to indigenous peoples (Scherz 2013; Lu 2018, 245) . Therefore, the state’s sovereignty should be understood as limited by other-regarding reasons towards its citizens (and others outside the state). On this more complex embodiment view of the states as a people and individuals, as well as on the institutional view, there are other-regarding reasons with regard to both internal and external others that restrict personal pursuits and therefore a sovereign domain. To conclude, in comparison to individuals, the domain of self-regarding reasons for states is much more restricted. These restrictions are mirrored in the requirements for internal and external sovereignty.

2.2 *Background duties for states*

The background duties for states consist in enabling individuals to discharge their respective duties. Depending on what duties and reasons we think apply to individuals (and peoples), there might be different duties and different restrictions on acceptable choices for states. These in turn define the reasons states have to comply with international institutions as they help states to comply with their background duties. Since there are diverging accounts of background duties and corresponding state purposes, such as providing security, the realisation of natural rights or establishing equal autonomy, the reasons for states will look different on these accounts. On an autonomy-based account, in relation to individuals inside the state, the state is under a duty to establish and respect the equal personal and political autonomy of its citizens. This requires the institutionalisation of basic rights and democratic participation. In relation to others outside the state, its duties must include a requirement to respect the conditions of their equal personal and political autonomy established through other state institutions. This does not only mean that states must not violate human rights abroad but also that the respect of political autonomy of other peoples requires the institutionalisation of the conditions for background justice (Ronzoni 2009). International institutions can then gain authority over states if they help to live up to these duties. In particular, this concerns issues which states are badly placed to deal with themselves.

Such issues that states cannot address well on their own include international collective action problems such as securing peace or addressing climate change, as well as questions around constraining their own power, for example, being judges in their own cases, protecting individuals from their power, and protecting the equality of states. Internally, the reliable fulfilment of the state's duties towards its citizens is especially likely to give rise to reasons to comply with international human rights instruments. Externally, the collective action problems and the constraining of state power create a requirement for multilateral institutions. Evan Criddle and Evan Fox-Decent argue that international law requires multilateralism in five different settings: “(1) disputes involving rivalrous claims to territorial jurisdiction; (2) disputes involving conflicting legal entitlements; (3) the administration of common resources; (4) threats to international peace and security; and (5) grave breaches of international human rights and international criminal law” (2019, 278). While they argue on the legal grounds of the principle of sovereign equality, in normative terms unilateral decisions violate equal autonomy, as stronger states could dominate less powerful ones. Therefore, an autonomy-based understanding of legitimacy requires multilateralism based on background duties to respect the equal autonomy of other peoples, which is required for the political autonomy of their citizens.

With regard to duties towards individuals, Miriam Ronzoni argues that international institutions are required to protect not only negative sovereignty (as non-interference), but also positive sovereignty as “the substantive problem-solving capacity of states” and “their ability to make meaningful and genuinely discretionary choices on a range of issues” (2012, 574). I agree that such positive sovereignty is essential for states to fulfil the background duties towards their own citizens and that international institutions can be important in realising this.

It should be noted that the argument I have provided here shows only that, in most cases, states’ claims to immunity from international institutions’ authority cannot be grounded in sovereignty as a domain of self-regarding reasons. However, a further argumentative step is needed to positively establish that an international institution does have authority over states on specific issues, either through other-regarding reasons or authorisation. I return to this issue with regard to authorisation mechanisms and particular state consent in section 2.4.

2.3 Reasons for democratic and non-democratic states

An objection to the account presented here, an autonomy-based, wide reading of the service conception, is that it results in different reasons for democratic and non-democratic states, in particular in more reasons that can bind non-democratic states. At first sight, this might seem implausible. As I have argued above, the reasons of states are at least partly dependent on the reasons of their citizens. One might argue that only democratic states can claim to act on the reasons of political autonomy, i.e., as a people. However, if these reasons exist, they do so even if the people cannot act on them. In fact, this is what puts pressure on the state to help improve the conformity with those reasons. Does this also mean that international institutions have more authority over non-democratic states if they increase their conformity with such reasons? First, if democratic states help their citizens to comply with the reasons that apply to them better than non-democratic states, this gives democratic states more legitimate authority over their citizens. Second, and more interestingly, it seems that if international institutions can improve certain deficiencies characteristic of non-democratic states (e.g. poor protection of human rights), these states have more reasons to comply with international institutions than democratic ones. Crucially, this conclusion follows only if such an improvement is possible by adhering to international institutions. It is difficult to ascertain whether this is the case since international institutions might help states to better comply with reasons on a single issue or a combination of issues. In this case, difficult questions arise in terms of how the overall performance should be understood. Nevertheless, it is plausible that at least some international institutions, for example international human rights courts, help non-democratic states to improve their legitimacy (see also Buchanan

2011). It would be problematic if international institutions had more authority over non-democratic states for at least two reasons: First, if international institutions should function in a rule-based way, exempting some states from the rules while holding others to them would undermine the reliability and stability of the institution. Second, this selective authority would also be problematic for the perspective of equality, in particular if we consider the history of colonialism and that many international institutions have been created by states from the global North that are considered to be democratic. In several of these institutions states from the states for the global North remain influential. Under these circumstances such institutions would be dominating if they would only bind non-democratic institutions. This is the case even if the states themselves are internally dominating.

Yet, the conclusion that international institutions have more authority over non-democratic states still does not follow. This is the case due to the structure of the background duties according to the autonomy-based conception. If we understand the reasons to respect the equal autonomy of others as general and requiring institutional realisation, they apply to all individuals and states equally. In this regard, the autonomy-based conception of legitimacy differs from Raz's piece-meal account that assigns differential authority over individuals (Raz 1986, 74 ff.) because some might do better than others acting by themselves on the reasons that apply to them in specific domains. For example, on this account, an expert pharmacologist may not be bound by the state with regard to the domain of drug safety. Now, should we also attribute varying degrees of authority over different states to international institutions. Interestingly, John Tasioulas's (2010) application of this account to the international level rejects American exceptionalism as the idea that the US is exempt from public international law. He argues that "the reasons states have, include reasons to respect and promote the collective self-determination of people belonging to *other* states. It is difficult to see how the latter can be fulfilled without a network of international legal norms that is universally binding" (Tasioulas 2010, 113).¹⁷ This is exactly the reason why an autonomy-based conception does not allow for subject fragmentation. On this view, it also becomes clear that this is not a contingent feature but based on the very structure of the most basic reasons that justify political authority.

For an account of political authority, subject fragmentation is very unattractive, since binding only some individuals and states but not others means that the authority is unreliable for everyone. Therefore, the fact that the autonomy-based conception avoids variation in the extent of authority

¹⁷ However, Tasioulas does not reject the general idea that the NJT leads to both subject and domain fragmentation.

for different states is a positive aspect of the account. According to the autonomy-based conception, there can be domain fragmentation, for example an international institution can have authority over states with regard to human rights but not with regard to trade. However, since *equal* autonomy constitutes the main underpinning reasons, in this conception there can be no subject fragmentation for political institutions. This means if an international institution has authority, all states that are subject to this institution are always equally bound by its authority. Of course, there are differences in which states are subject to the institution's jurisdiction in the first place, and there can also be exception clauses within international treaties.¹⁸ However, my point here is that there can be no subject differentiation for states under the jurisdiction of an international institution – it either has authority over all member states or none.

The autonomy-based conception of legitimacy highlights the underlying reasons to respect others as free and equal as the most important basis for authority. The institutional requirement to realise this equality generates procedural reason for rule of law. One might object that even if we assume that this is true for individuals based on their personal autonomy and for certain states as they realise political autonomy, it is not true for all states. In particular, there might be a worry that treating repressive authoritarian states as equals in the international system threatens both the autonomy of the individuals within these states and potentially those outside (Pettit 2015). For example, attributing the right to trade a state's natural resources to whoever controls its territory by force under international law undermines the right of the state's people to its resources and reinforces problematic power relationships (Wenar 2008). However, Dorothea Gaedeke (2016) rightly points to the danger of dominating the people of non-democratic states by not treating them as equals and disregarding their voice and agency.

There are difficult non-ideal theory questions regarding how to best respect and enable the political autonomy of peoples that are not fully represented through their states. However, as with non-ideal cases regarding individuals, such as non-compliance with the law, equal autonomy remains the underpinning reason for the institutional framework. First, this means that international institutions should also follow a presumption of equal autonomy that should lead to equal treatment, which can only be restricted under specific circumstances. Second, just as law-abiding citizens are still bound by the law even if others violate it, so are democratic states. They are not exempt from the authority of international institutions based on their presumed compliance with international law. While despotic regimes' recognition in international institutions and law is normatively problematic, it is not useful to reject the idea that states represent their people in

¹⁸ Some of these restrictions may also be problematic from a normative perspective (e.g. Christiano 2020).

general. Rather, international institutions and law should address issues of violations or abuse of these structures.

In conclusion, while different situations can lead to differences in the reasons that apply to states, the authority of legitimate international institutions is the same for democratic and non-democratic states, according to the account proposed here. The general background reasons to generate institutions that ensure equal autonomy of others mean that both democratic and non-democratic states have reasons to comply with international institutions and to ensure their functioning.

2.4 Legitimacy of international institutions: different purposes and state consent

How do different purposes of international institutions and state consent influence the legitimacy of international institutions? In accordance with the background duties that underpin the exclusionary reasons of authority, we can distinguish different purposes of international institutions: First, morally mandatory purposes based on background duties to other states' peoples (such purposes include securing international peace and addressing climate change); second, mandatory purposes with regard to the equal autonomy of individuals under the state's jurisdiction (this includes human rights protection); and third, permissible purposes with regard to others and the state's own citizens (examples here being trade and investment). In particular, states have reasons to comply with this third kind if they have consented. One might think that state consent is, as in the individual case, only necessary for institutions that are not based on other-regarding background duties. As in the example above, BITs can only exercise authority over states if they are based on the consent of these states (assuming that BITs are permissible). Yet, how important is state consent for the legitimate authority of international institutions with mandatory purposes?

State consent has been criticised as neither necessary nor sufficient for legitimate authority. Against state consent as a *sufficient* condition of legitimate authority, it has been argued that as a procedure to create international institutions it can only contribute to legitimate authority if it actually protects the equal autonomy of peoples and individuals. First, to guarantee this, certain conditions to generate genuine consent have to be in place (e.g. stark bargaining inequalities between states can be problematic and non-democratic governments may not promote the autonomy of their people). Second, there are certain issues that states are not at liberty to consent to (immoral purposes such as slavery or torture). While the second limitation of consent is well founded, the first is further complicated from a non-ideal theory perspective. Disregarding the decisions of non-democratic states or less powerful ones would deny them international representation and add insult to injury. Generally, there should be a presumption that states express the political autonomy of their people and that state consent therefore protects political autonomy.

While under certain circumstances this presumption should be discarded, generally accepting state consent seems to be the best way to respect the people of the respective states. This is necessary to respect their agency even if their state might not comply with democratic ideals. Of course, international institutions should avoid reinforcing problematic power structures within and between states. However, if a state has consented to become a party to an international treaty, there should be a *general presumption* that this consent is sufficient to generate legitimate authority over it.

In addition, there remains a serious question as to how far state consent can go. There can be good reasons to withdraw consent once given, such as procedural and effectiveness issues. There might be cases in which the institution expands its mandate beyond the consent that was initially given. It is worth noting, though, that this shifts the focus from the reasons to comply that a state has, once it has consented, to the conditions under which a state should revoke its consent. If we consider consent to contribute to legitimate authority as content-independent exclusionary reasons, to provide this function consent cannot be reconsidered at every turn. Rather, consent should only be revoked if an institution fails to fulfil its purpose or violates equal autonomy. In addition, questions of feasible alternative institutions, transition and signalling effects to other states must be taken into account.

State consent is often seen as a *necessary* requirement, since in the interstate case reasonable disagreement about what morally mandatory background duties are and how they are best realised requires an authorisation mechanism. Against this position, it can be objected that the interstate case is similar to the interpersonal case, in which consent was not regarded as necessary to establish state authority. Allowing states to pursue independent strategies to achieve morally mandatory aims without coordination will create unilateral action (or inaction) that violates everyone's autonomy.

The classic argument against this objection is that states are not individuals, as they have already established a civil condition (Kant 1996, 327 (PP 8:355-6)) and therefore at least enforce some form of rule of law. Forcing individuals under the authority of states is permissible as it creates the preconditions for a legitimacy conferring authorisation mechanism to begin with. This subjection cannot violate individuals' autonomy as autonomy does not exist without the state. The exceptional circumstances of the interpersonal state of nature that allow neglecting authorisation for legitimate authority in order to setup its preconditions are not given in the interstate case precisely because states are the guarantors of the conditions of equal autonomy. Therefore, forcing states to enter into international institutions potentially endangers the conditions of both personal autonomy – secured through rule of law conditions – and political autonomy – expressed through the state's decisions.

In other words, state consent is important because states are still the locus of securing autonomy, including the accountability of political power for persons.

Yet, while the protection of autonomy within states is crucial, I have argued that the protection of autonomy across state boundaries is also a normative requirement for states. Since state consent as a strictly necessary condition for the legitimacy of international institution neglects the latter, a more balanced account is needed. Such an account is proposed by Thomas Christiano (2012), who focuses on international institutions' promotion of morally mandatory aims, but argues that state consent is important because there can be reasonable disagreement about how to reach these aims. This issue is similar to the particularity problem discussed above. Nevertheless, if states do not consent to an institution with a morally mandatory aim, the burden of showing how they contribute to achieving this aim in other ways falls on them. I agree with Christiano's argument and consider state consent to be normatively relevant for the authorisation of international institutions, but within limits, not as a strictly necessary condition. As argued above, states have other-regarding reasons to enter multilateral institutions to ensure the equal autonomy of others. This puts the burdens of justification on states that are not participating in international institutions with aims to achieve other-regarding background duties. States must either join existing international institutions with morally mandatory aims or establish new ones, which credibly aim to achieve these purposes. As shown in the first part, arguments against this requirement based on a sovereignty domain and personal pursuits are restricted to self-regarding reasons and cannot hold where the autonomy of others is endangered. Yet, while states are under a duty to assent to such institutions, the lack of their consent creates a potential legitimacy issue for international institutions. This means that the normative necessity for state consent to bind states is more restricted than generally assumed but that there are good reasons not to disregard consent completely.

Conclusion

An account of the legitimacy of international institutions needs to clarify what reasons apply to states in order to ground the requirement for their compliance. I have proposed an autonomy-based conception of legitimacy that is applicable on both the individual and the state level. Reasons that apply to states are based on those of individuals, but both an institutional and people-centred understanding of the states leads to more other-regarding reasons for states. Therefore, the domain of self-regarding reasons which cannot serve as grounds for authority is more restricted for states than for individuals. As to whether these reasons are different for democratic and non-democratic states, I have argued that reasons for states are generally the same as they are grounded in background duties to respect the equal autonomy of others that apply to all states. The autonomy-

based conception rejects the idea of subject fragmentation regarding political authority also on the international level. Rather it explains why states have reasons to enter multilateral institutions that ensure rule of law and impartiality as requirements of the autonomy-based account. Finally, since neither individuals nor states are alone on an island, the autonomy-based account's focus on disagreement provides an understanding of why authorisation mechanisms such as consent and democracy are important for legitimate authority.

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