Legitimate Political Authority and International Legal Institutions

The purpose of this essay is to develop a concept of legitimate political authority to be applied to international legal institutions (ILIs)\(^1\). The essay consists of two parts. The first examines the concept, the justification and the acquisition of authority. Here our concern is with authority in general though we shall pay particular attention to political authority. The first part is based on Joseph Raz’s views and largely endorses them.

The second part confronts the Razian account with the demands of state sovereignty. The legitimacy of states has usually been linked to sovereignty entailing superior authority. I present arguments for rejecting this traditional notion of sovereignty. Instead, I suggest to reconceive sovereignty as a criterion for the appropriateness of authority in a multi-layered world. Our conception of authority claims universal validity and provides elements for the evaluation of legitimate authority that can be applied to any political authority, be it states, international legal organisations or any other entity.

I. The Razian account of authority

a) The concept of authority

What do a law-maker, a physician and a chess grandmaster have in common? They are all considered to be authorities under certain circumstances. All three are capable of giving advice and opinions related to their fields but that does not yet amount to authority. The distinguishing feature of authority is its binding character (cf. Raz 2006, 1012). The utterances of an authority are not meant to widen the range of options amongst which to choose. They are not to be taken as advice, as helpful devices for the subject to take a decision on its own. Rather, they are meant to “command our will” (ibid.), telling us what to do and, in the case of political authority, expecting us to

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\(^1\) By “international legal institutions” I mean those international institutions that create, interpret or apply international law.
comply. This raises the important question of how authority can be justified. But that shall only be considered in the next section (b). For now, we need to understand more precisely what distinguishes authority from advice or opinion.

Authoritative directives are different in two ways. First, they have an exclusionary character. While a sound advice is regarded as a good reason that alters the balance of reasons in one or another direction, an authoritative directive is not be counted as offering a reason to be added to all other reasons there may be for or against something. Someone who is unsure as to whether choosing fruit or chocolate as a dessert would take the sound advice of a friend as a reason that is to be considered when making the final decision. The advice may even constitutive the decisive reason that tips the balance in either direction. But even so, that reason is usually balanced against opposing reasons. The chess novice, on the other hand, regards the grandmaster’s advice as authoritative if and only if he accepts her advice as a reason for action that replaces all the reasons that count against that specific decision. The reason is thus said to be pre-emptive (Raz 1986, 41-42; 2006, 1022).

Note that the pre-emptive character of authoritative directives does not require the subject to refrain from acting on other reasons as long as they point in the same direction as the directive does. Accepting the directive of an authority therefore does not imply the abandonment of personal judgment altogether. Our decision not to murder is normally not grounded on the authority’s prohibition to murder. We may act solely out of our own, moral reasons for refraining from murdering. Or we may ground our actions both on our own reasons and on the law that prohibits murder. We are only requested to refrain from acting on other reasons when they conflict with the authority’s directive.

The second distinguishing feature of authoritative directives as compared to advice or opinions is their content-independence (Raz 1986, 35). Accepting an advice can be explained by referring to its content. Asking someone why he accepted a friend’s advice to choose fruit instead of chocolate could thus be explained, for instance, by the fact that the advice was related to considerations of healthiness. The person who accepted the advice did so because he found healthiness to be a good reason for the assessment of

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2 I stick to Raz’s definition: “A reason for an action is a consideration that renders its choice intelligible, and counts in its favor” (Raz 2006, 1006).
the situation. The chess novice, on the other hand, is following the directive of the grandmaster not because he found it to be a sound advice helping him to assess the next move in the game, but simply because the grandmaster, who is regarded as an authority, has said so. In Raz words, a content-independent reason qualifies as such “if there is no direct connection between the reason and the action for which it is a reason” (Raz 1986, 35).

The content-independent requirement of authority is fulfilled when a directive “is regarded as a view which ought to be followed despite one’s inability to assess its soundness” (Raz 1990, 63). The expression “inability” is crucial and should be understood in a relational and gradual sense. The inability of assessment derives, as we shall see later (section b), from the authority’s superior knowledge, judgment, impartiality or capacity for coordination in comparison with the subject of authority. In the light of this superiority, the subject should not try to base his actions on second-guessing the merit of each directive (Raz 2006, 1018), for that would be equivalent to treating the directive as an advice, distorting the purpose of authority which is to enhance overall compliance (cf. Raz 1986, 68-69).

It is also crucial to note that, while an authoritative directive is content-independent for the authority’s subjects, it still is dependent on the side of the authority. A directive issued by an authority should be the result of a thorough assessment as the authority’s task consists in discharging its subjects from performing that assessment. The advice of an authority should not be the product of an arbitrary will, but rather dependent on reasons that are relevant in the situation to be decided for the one who is to perform an action (Raz 1986, 42-53). Otherwise the authority runs the risk of losing its justification which, as we shall see, is based on the its ability to improve conformity with reasons that apply to its subjects.

Raz does not say that the subject should follow an authoritative directive unconditionally. Nothing prevents us from questioning whether an authority is doing its work, namely helping us to conform with reasons that apply to us (Raz 1986, 38-42). A directive asking us to become slaves can and should be rejected since following that directive would constitute a massive breach of moral requirements. We may also have reasons to disobey justified laws in exceptional circumstances. Law may require us to
stop at a red light at any time, but if someone needs to rush to hospital to save a life she may disregard that law even if there were no law providing for such an exception. Finally, deciding for oneself is sometimes considered to be more important than the outcome (Raz 1986, 57, 69). Many people agree that the decision who to marry should not be left to the opinion of an expert, but rather to oneself, even if following the alleged authority would decrease the chances of getting divorced. In these cases, our own reasons for not taking a directive as authoritative are so compelling that they constitute a sort of higher-order veto.

All that needs to be conceded here is that when a directive is taken as authoritative the subject has to regard the reason for action contained in that directive as if there were no conflicting reasons (pre-emptive) and without making his compliance dependent on the alleged merit of that particular directive (content-independent).

One further clarification needs to be made. According to the “no difference” argument, an authority requests its subjects to perform actions they would have done anyway (Raz 1986, 48-53). The authority would then merely play a mediating role, recommending an action that the person would have embraced herself on conditions of sufficient information and commitment. The authority would not create a new reason. But that does not seem to be true. Refraining from murder can, as we have seen, be based on a personal reason that is independent of what any authority says. But a legitimate authority enacting a law that prohibits murder is nonetheless creating a new reason for action that may or may not be taken into consideration when refraining from murdering. What is more, the personal reason and the reason constituted by the law do not need to exclude each other. Someone may refrain from murdering both because the authority has said so and because he shares a personal conviction that murdering is wrong. Since there can be several additional reasons to the one created by an authority (e.g. self-interest), the law prohibiting murder is said to involve a “kind of overdetermination” (Raz 2006, 1021-1022)

In other cases, an authority creates a new reason by solving an underdeterminacy problem. A chess game can be opened in 18 different ways. Some of the moves are widely acknowledged to be bad, but ten of them are routinely tried and they succeed. And, what is more important, there is no way of telling which one of these openings is
the best for winning the game. In such a situation the reason for taking a decision is said to be underdetermined (Raz 1986, 48-49). By recommending one opening among many, the grandmaster is making a seemingly random but nonetheless necessary decision in order to get the game going. The decision is not unjustified since it is based on reasons which support the choice, namely the proved success of that specific opening. On the other hand, it cannot said to be sufficiently determined by reason since a different choice would have been equally reasonable. We can now draw an analogy on the political level. Let us assume that theory succeeds in establishing what the just level of value-added tax in the United Kingdom should be. Assessments are carried out balancing the pros and cons for each scenario, i.e., for each possible tax level. The final result then shows that the most preferable outcomes are produced with tax levels ranging between 16 and 18 percent. It also shows that, within this range, the outcomes are equally preferable. It is therefore not possible to decide, on the basis of the reasons provided by this assessment, if the V.A.T. should be 16, 17 or 18 percent, or somewhere in between these numbers. In this case, the authority needs to make a seemingly random but nonetheless necessary decision which transcends the technical and pragmatic levels leading right into considerations of justice.

By choosing a level of taxation (say, 17 percent) the state is setting a standard of justice. In this narrow sense it may be said that the state is not only promoting, but also establishing justice. The fact that the tax level has been set at 17 percent (and not at 16 or 18) is not dependent on any reason for or against that decision since every other range between 16 and 18 percent could have been adopted as well. In this specific sense, when asking why an authority chose precisely 17 percent it all comes down to the apparently indefensible reason that reads: “Because I say so.” This, however, ceases to be problematic if we adopt Tom Christiano’s distinction between establishing and constituting justice (Christiano 2004, 4.4.). The reason for setting the V.A.T. at 17 percent, is, of course, dependent on considerations of justice as carried out by the assessment in our thought experiment. It is only the first-order choice between several options, all considered to be equally just and thus creating a problem of under-determinacy, which is left at discretion of authority. At this level, the authority is indeed creating a new reason. This can be regarded as the value-adding contribution of authority.
Other quite common examples can be given. Road safety, for instance, depends on a number of conventions whose content needs to be determined by creating a new reason, i.e., a first-order reason chosen by an authority. At the outset it is equally reasonable to let vehicles travel on the right or on the left side of the road. Both scenarios are equally backed by reasons related to road security. But once a choice has been made and a convention established, obedience turns necessary in order to make safe road interaction possible.

b) The justification of authority and political obligation

The utterances of political authority are believed to be more than mere advice or opinions that may or may not be taken as authoritative. The reasons for action provided by law are rather said to be peremptory, thus imposing obligations. An adult person is free to regard the advice provided by a grandmaster or even a physician as non-authoritative. May she also disregard the authority of legal institutions?

We have seen, so far, what it is to be an authority. Now we need to examine how authority can be justified (Raz 1990, 64). An answer has already been given, at least to some extent, by saying that the directives issued by authorities can be expected to be good in several ways. This shall now be examined in detail by looking at Raz’s “Normal Justification Thesis” which reads as follows:

[T]he normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly (Raz 1986, 53).

The Thesis contains a bundle of concepts which need to be carefully disentangled. Note, first of all, that the text refers to “alleged” authorities and subjects. In order to understand this cautiousness we can imagine the process of establishing authority as two-staged. The alleged authority issues, in the first place, a directive over the alleged subject regarding a certain situation which requires action. That, by itself, is not sufficient to establish authority, but requires a second component related to the soundness of the directive and the abilities of the alleged subject. If it can somehow be
shown that the alleged subject has better chances of overall success by following the
bundle of directives imposed by an authority rather than by acting on his own, we can
say that the alleged authority has indeed authority over its alleged subject.

Now we can understand in what sense political authority is said to be binding. The
Normal Justification Thesis by itself does not establish an obligation to obey
authoritative directives. Given that a subject is “likely better to comply with reasons
which apply to him” by following an authority, we can say that obeying is reasonable or
prudentially required, but the peremptory character of law is not yet implied (Sadurski
2006, 388-389). It only emerges with the introduction of certain duties which subjects
are said to have and where authority can serve as a value-adding intermediate. There is,
according to Raz, a “partial and qualified obligation” to obey an authority “to the extent
necessary to enable it to secure goals, which individuals have reason to secure, for
which social co-ordination is necessary or helpful, and where this is the most promising
way of achieving them” (Raz 1986, 100). This notion of obligation gains its
justification from moral considerations. Let us take a closer look at this.

In the “Groundwork of the Metaphysics of Morals”, Immanuel Kant makes a useful
distinction concerning the uses of the term “good”. Something is said to be good in a
*technical* sense when it is good for something. It is good in a *pragmatic* sense when it is
good for someone. And, finally, it is good in a *categorical* sense when it is morally
good (Kant 1785, 414-420). Only the latter sense can account for political obligation.

On the level of technical and pragmatic goods, the actions required for the achievement
of those goods have an instrumental value. If I want to read at night, then the action of
activating a light switch is valuable only insofar as it illuminates the space and insofar
as that serves the reason I have for reading at night. Such a reason can apply to
someone, but it does not have to. It would thus be absurd to issue a rule telling people to
turn on the light whenever it gets dark. Sound advice would rather have to read: “If you
want to read and it is dark, then you should turn on a light.” Things are different at the
moral level. Moral reasons are said to contain a categorical “ought” and that means,
among other things, that they apply to a subject regardless of her particular will in a
certain situation. If you hear your room neighbour crying for help while you are
reading, you may well prefer to use some ear-plugs and continue with your book, but
that does not mean that the moral reason for helping your neighbour disappears. The persistence of binding moral reasons helps us to understand why, on this level, there can be rules that adopt a categorical form: “Help your neighbour when he appears to be in need [regardless of what you want]!”

Political authority, Raz writes, is grounded on morality. This is the only way for justifying the binding character of political authority: “If it [authority] is binding on individuals it has to be justified by considerations which bind them. Public authority is ultimately based on the moral duty which individuals owe their fellow humans” (Raz 1986, 72). The underlying idea is that moral reasons create moral duties towards others and perhaps even towards oneself. These duties have a binding force upon individuals. Political obligations, i.e., reasons for action with peremptory character, need to be grounded on the binding force of moral duties in order to be justified. We shall now specify under which conditions a person has an obligation to obey the authority.

Raz’s service-conception calls for a piecemeal approach towards authority (Raz 1986, 80). According to his Normal Justification Thesis, a person lacks political authority if its alleged subject is equally or even more able to comply with a reason that applies to him by acting on his own that by following an authoritative directive. Raz offers the example of an “expert pharmacologist” who possesses sufficient knowledge and judgment regarding the safety of drugs to carry out an assessment on his own rather than by submitting himself to an authority (Raz 1986, 74). A philosopher who, in contrast, has no clue on how to deal appropriately with potentially hazardous chemical materials would be well-advised to submit herself to an authority. But does she have to do so? Is there a political obligation to comply with an authoritative directive? Once again, Raz’s approach is service-oriented. Our philosopher could either gather enough information to carry out her own assessment. She may delve into books explaining the nature and danger of chemical processes and eventually acquire sufficient expertise to bypass the regulations of an alleged authority. Or she could decide that it is better to spend the time doing something else. In that case and due to her poor ability to comply by her own assessment of the situation, she would indeed have an obligation to follow those rules (Raz 1986, 100). We can also imagine a situation in which someone has the capacity to realise a sound assessment but is still unlikely to comply because of temptations or pressure (Raz 1986, 75). An example for this could be a dispute between
persons who both have a clear knowledge of the legal situation but submit themselves
to the authority of a third person who is believed to be impartial. Still another example
is the problem of the free rider whose reasons to cooperate are undermined by the
temptation to evade the duties that make cooperation possible when there is a clash with
self-interest.

An authority can also impose obligations “to the extent necessary to enable it to secure
goals, which individuals have reasons to secure, for which social coordination is
necessary or helpful, and where this is the most promising way of achieving them” (Raz
1986, 100). This takes us back to the examples of taxation and road safety where a
binding rule determines one out of several equally reasonable options. Individuals need
an authority to set these rules, not necessarily because their inferior knowledge or moral
weakness, but because they need to act according to commonly shared standards of
what is to be counted as just taxation or right driving. The establishment of these
standards cannot, as we have seen, be discovered by reasoning alone and thus needs to
rely on a new reason created by an authority.

This is not the whole story when it comes to justifying authority. On the level of content
we need to ask what class of duties should be picked up by a political authority in order
to impose obligations. Many actions regarded as immoral do not enter the sphere of
political authority. To break up a friendship in a perfidious way may be morally
condemnable but that is not seen as a reason for establishing a legal rule on how to end
friendship. We also need to ask how moral duties can be identified and specified so as
to fit the grammar of rules. For it is one thing to acknowledge that freedom of
expression is a moral right and another to define what legal rights and duties should be
established. These substantial questions, important as they are, as we are concerned
with a primarily conceptual account of authority.

c) The acquisition of authority

Raz’s Normal Justification Thesis (NJT) does not make the legitimacy of authority
dependent on what the subject does, but solely on whether the directives of an authority
have the potential of helping the subject to enhance compliance with reasons that apply
to him and do so independent of that authority.
Whether the alleged subject accepts or rejects the directive is thus not relevant for justifying authority. However, Raz thinks that conformity is necessary for another reason. He argues that, in order to be effective, to achieve goals which require coordination and cooperation, an authority needs to enjoy a certain level of conformity by its subjects (Raz 1986, 56, 26; 1979, 8-9; 2006, 1036). Effectiveness is needed on the level of political authority where considerations of effectiveness are crucial, but not on the level of theoretical authority\(^3\).

Someone with superior scientific knowledge, Raz writes, may be “the greatest authority in one field” an yet “go unrecognized” (Raz 1979, 8). What is more, he may remain silent throughout his whole life, never giving advice. He would, according to Raz, nevertheless have to be regarded as an authority for it is his knowledge, not his relation to others, that grants him authority in a theoretical sense (Raz 2006, 1036). On the other hand, theoretical authorities are authorities but they cannot have authority over others since they provide reasons for belief instead of reasons for action. And beliefs, in contrast to actions, cannot be imposed on someone. There is no duty to believe what a theoretical authority has said, taking Raz’s example, on eighteenth-century farming methods. Practical authorities, for instance parents in relation to their children or political agents, impose duties to act in a certain way. Practical authority, therefore, in addition to being an authority, also has authority over others (Raz 2006, 1034-1035).

II. Legitimate authority, states and international legal institutions

Having considered the basic features of the Razian account of authority, it is now time to apply it to our domain of interest, namely international legal organisations. In doing so, we cannot but consider the authority of states. Despite recent changes, states are still regarded to be the primary and constitutive actors of international law (Warbrick 2003, 206). The creation of international law and the founding of legal institutions is, as a matter of fact and legal practice, widely dependent on the consent of states.

\(^3\) While political authority and practical authority in general provide reasons for action, theoretical authority provides reasons for beliefs (Raz 1979, 8-9). Parents are another example for practical authority.
a) Sovereignty

In order to explain the primacy of states it is helpful to draw on the concept of sovereignty. But we need to move carefully as we are dealing with a concept which is not only applied in different contexts but also being contested regarding its central criteria. Samantha Besson has therefore proposed to handle sovereignty as an “essentially contestable concept” meaning, among other things, “that debates about the criteria of correct application of a concept are inconclusive” (Besson 2004, 6-7). According to Besson, this inconclusiveness does not entail scepticism as there can well be one correct concept of sovereignty. Nor does it mean that fundamental disagreement must be a permanent state of affairs. It rather means that, in the current situation, there are good reasons for challenging the central criteria that have usually been applied to identify the concept of sovereignty while admitting that we do not yet possess a satisfactory alternative account that could settle a conceptual shift. Keeping this caveat in mind, we shall proceed to characterise the traditional conception of sovereignty and offer some arguments for a possible alternative.

Sovereignty is related to political authority. That seems to be clear and uncontested. There is, however, not much more that can be said without provoking reasonable objections. In the usual understanding of the concept, sovereignty has been applied exclusively to the authority of states. In addition, sovereignty has always had a comparative element denoting not just the authority of states, but some form of superior or exclusive though not necessarily unrestricted authority. As I shall argue later on, both the claims for state-centredness and superiority need to be contested as they are unjustified.

Secondly, it should be noted that the traditional concept of sovereignty does have different contexts of application. It can be divided into internal and external sovereignty, where the former refers to the superior authority of a state over its territory and citizens while the latter refers, broadly speaking, to the independence of a state in relation to other states or the community of states. This is not the only available distinction. By sovereignty we can either mean the authority of a government which does not need to be representative or that of a people represented by a state (often called

The etymology of “sovereignty” can be tracked back to the Latin word “superanus” which roughly means “superior” (cf. Ilgen 2003, 9-10).
popular sovereignty). Sovereignty can be used descriptively by pointing out the authority and political recognition a state actually enjoys, it can also be used normatively by setting out either the legal principles that ought to be applied according to valid law or the conditions under which we consider sovereignty to be justified from a moral, not necessarily legal point of view. It is important to keep in mind these different perspectives and the different meanings of sovereignty they entail in order to avoid confusions. It is often argued that the process of globalisation has eroded the concept of sovereignty since states are, now more than ever, in need of cooperating and accepting international legal principles in order to serve its citizens properly. That may be true as a descriptive account, but it does not necessarily entail, from a normative point of view, that the concept of sovereignty should be modified or even given up. Some argue, for instance, that sovereignty, understood as popular sovereignty, needs to be upheld in order to preserve the values of a community which, in turn, render a political authority legitimate (Luban 2004, 125-131).

We shall be primarily concerned with sovereignty from a moral perspective. Under which conditions, if any, can sovereignty be justified? Our evaluation is guided by Raz’s service-conception of authority. We shall conclude that the concept of sovereignty as superior and state-centred authority stands on weak ground and contravenes the service-conception, therefore being unjustified. As an alternative, we will take a look at what has been described as “shared”, “pooled” or “dispersed” sovereignty, meaning that authority is to be divided not only horizontally within the different branches of central state government, but also vertically on a multilayered scheme involving local, regional and global authorities. The criteria for the allocation of authority will thus not rest on the traditional notion of statehood as established by the Montevideo Convention, but on the nature of the issues to be dealt with and the capability the respective levels of political authority have in solving them.

But could that alternative still be called sovereignty, or does it imply such a departure from the original concept that we are better served in dropping it entirely? I shall suggest maintaining the concept of sovereignty, though in a strongly modified form

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5 “The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states” (retrieved from http://www.yale.edu/lawweb/avalon/intdip/interam/intam03.htm).
where superior or exclusive authority is replaced by a notion of appropriate authority. A sovereign authority would then be an authority that is best placed for serving its subjects in a given domain and regarding certain attributes. Sovereignty would thus constitute a criterion for the allocation of the right to rule in a multilayered world. But, first of all, we will need to confront the classical justification that has usually been given for retaining sovereignty understood as ultimate authority.

The classical account of internal sovereignty justifies ultimate authority as a necessary means for avoiding an infinite regress and a potential deadlock between authorities. I argue, along with Christopher W. Morris, that the notion of ultimate authority is conceptually unclear since authority relations can be both multiattributive and multidimensional. This, in addition to the argument that attributes and domains of authority should be distributed to different authorities according to their particular capacities in serving their subjects, constitutes good reasons for rejecting an ultimate authority.

b) Sovereignty as superior vs. sovereignty as appropriate authority

What is meant by saying that an authority is “ultimate”? To understand this, we will have to look at the most demanding model of state sovereignty which Christopher S. Morris has labelled “classical sovereignty” (Morris 1998, 174). He attributes it to Thomas Hobbes and Jean-Jacques Rousseau. It rests on the assumption that state authority should be ultimate, which implies several conditions: A sovereign state has the highest authority within a hierarchy of authorities. It rules directly, permeating every level on this hierarchy and there is no intermediate authority able to interfere. This feature becomes especially clear when contrasted to the medieval system where political authority was fragmented and decentralised (Morris 1998, 33-36). Its rule is final, which means that its decisions are not open to further appeal. The authority of a sovereign state is also said to be supreme, meaning that it can regulate other state and even non-state authorities as well as human behaviour (cf. Raz 1990, 150-152). And, finally, the classical account of sovereignty holds authority to be absolute, i.e., unconstrained, inalienable and indivisible, which means that it cannot be delegated or divided (Morris 1998, 177). Given this massive claim of authority, the need for
sanctions including the use of force has usually been invoked as necessary means to ensure compliance and to suppress competing authorities.

When we look at current legal practice, we find a notorious disparity between internal and external sovereignty. While it is hard to find a legal system which, following Morris’s terminology, concedes ultimate authority to a single ruler or body, it is still part of legal theory to grant states the right to be, to some degree, in exclusive charge regarding the conduct of their internal affairs. States are also said to be free, again to some extent, to choose their level of involvement regarding international obligations. The Charta of the United Nations holds among its principles that the United Nations shall not “intervene in matters which are essentially within the domestic jurisdiction of any state” (art. 2) unless there is a threat or breach of peace as outlined in chapter VII of that same charter. States are said to be free in the conduct of international relations and the relations towards its own citizens so long as they do not trespass those areas of international law to which all states are said to be bound independently of their having consented to it or not. This includes the prohibition of aggression and, more generally, customary law and ius cogens which is defined by the Statute of the International Court of Justice as “general principles of law recognized by civilized nations” (art. 38). In addition, when states sign treaties and join international organisations they are subsequently bound by their regulations and decisions.

We are, remember, primarily interested in knowing whether the concept of sovereignty, either in its classical “strong” or its contemporary “weaker” version, is normatively required from a moral point of view. Are there any reasons why such a concept of sovereignty should be upheld for our purposes, that is, for the formulation of legitimate political authority?

The classical demand for an ultimate authority has often been defended as necessary in order to avoid an infinite regress. The argument goes like this. A law cannot be put into practice without agents. It needs to be interpreted, applied and eventually enforced by an authority. If that authority is itself constrained by laws, then those constraining laws must be interpreted, applied and enforced by another authority which, because of its constraining power over the former authority, is to be considered ultimate unless it is itself constrained, in which case there would need to be a third authority. And so it goes
on (cf. Pogge 1992, 59; 2002, 178-179). In order to avoid an infinite regress, according to this argument, we need an ultimate authority which is not subject to any law. If that were true, if any limitation of authority necessarily presupposed a greater authority, then the international legal system would either have to play a subordinate role as compared to the state system or erect itself as a sovereign world state. There would be no solution in between, no possibility of genuinely shared governance between states and international institutions (cf. Horn 1996).

The argument for an ultimate authority is closely connected to the need of having a clearly defined mechanism for the resolution of conflicts. The idea is, as Morris points out, that only an ultimate authority will be capable of resolving a conflict, where “ultimate” is defined as before. Two political entities that have authority over the same domain may both claim competence for dealing with a case. In the absence of an ultimate authority able to decide such a conflict, it would seem that a deadlock is indeed possible. Thus, the argument goes, there always needs to be an ultimate authority which does not have to respond to any other authority. In the following, I shall argue that the conclusions are misguided for two reasons. Firstly, it does not seem that there is a criterion for determining if an authority is ultimate. And, secondly, there is as strong case for saying that an authority can be self-constrained by laws even if there is no other authority in charge of supervising compliance with that laws. Let us examine the former argument first.

Imagine a country, say Italy, which is a member of the International Criminal Court (ICC). It has subscribed and ratified the Rome Statute and therefore submitted itself to the institution’s court which is entitled to investigate, prosecute and make binding decisions unless the alleged crime, committed in Italy, is genuinely being investigated or prosecuted by the domestic courts of Italy. How can we, sticking to Morris’s catalogue of conditions, determine who has ultimate authority in this case? That seems to depend on the criterion we use. The ICC can be said to have final authority in that its decisions can only be revised by the ICC’s itself. A sentence issued by Italy’s courts can be reversed by the ICC while Italy cannot reverse a sentence issued by the court of the ICC. But then the ICC cannot be said to have supreme authority over A since, under certain circumstances, Italy has exclusive jurisdiction. Italy is entitled to investigate, prosecute and decide a case on its own, i.e., independently of the ICC. It is thus entitled
to legislate and conduct a process entirely in accordance with its own rules and procedures. At no point during this phase can the ICC interfere. So the process can be carried out on the domestic level with complete autonomy. Once the verdict has been given, a complain may be presented to the ICC. It is only at this point that the ICC can, under certain circumstances, take action. Then, eventually, the ICC passes a sentence which overrules Italy’s verdict.

So the authority of the ICC does not seem to be supreme since the extent to which it can circumscribe the authority of Italy is limited. For the same reason, it does not qualify as indivisible. The ICC has, under certain circumstances, exclusive jurisdiction over certain crimes committed in Italy, but so does Italy.

A general objection to our conclusions could go along the following lines. While admitting that the ICC has authority over Italy in some respects but not in others, our opponent could still say that not all conditions enumerated by Morris need to be fulfilled in order to determine if an authority is ultimate or not. Our opponent could, instead, ask us to perform an overall assessment where the different criteria for sovereignty are weighted against each other and then decide who has ultimate authority all things considered. Morris responds to this objection by saying, quite convincingly, that we would need comparability, a condition which does not seem to be attainable given the multiattributivity and multidimensionality of authority (Morris 1998, 183-184). An authority that operates in the field of telecommunications does not seem to be comparable, regarding the amount of authority, to an authority that operates in the field of human rights because of their different domains. And although both Italy and the ICC are committed to take action against serious crimes, their authority is framed by different conditions as to when they have jurisdiction. We have already seen that, while the ICC has the final say, it cannot said to be supreme. Italy, just to complicate the equation a little further, disposes of military and police forces designed to back its authoritative claims. The ICC has neither. It is thus hard to see how the different attributes of Italy and the ICC should be compared and weighted against each other in order to determine who has the greatest authority. And even if comparability should be possible for some attributes, we would still need to ensure full transitivity in order to make the overall assessment our opponent is asking for. So the ICC’s authority
regarding the attribute x may be greater than Italy’s authority regarding the attribute y, but then attribute z may not be comparable to x (ibid.).

Our second argument against the alleged need for ultimate authority is grounded on the encompassing nature of laws. This means that an authority can be bound by laws even if there is no other authority capable of imposing sanctions on it. Hart calls that the “self-binding force” of legislation (Hart 1994, 42-44). Unlike threats, which are solely addressed to the threatened, the scope of laws can include the author. Even though the verdicts of the ICC are not reversible by any other authority, it is still bound by the general principles of criminal law whose observance is a condition for their legitimacy. We can, of course, imagine the ICC as dominated by incapable, tyrannical or corrupt judges whose verdicts stand in evident and systematic contradiction to those principles. Even if no other authority would be able to reverse such verdicts, the ICC would surely lose its justification if it behaved in such ways.

Considering the previous arguments, we can say that the recourse to an ultimate authority for avoiding a deadlock between different non-ultimate authorities is ill conceived. Thomas Pogge has pointed out that the successful history of the division of powers on the level of states has proven that “what cannot work in theory works quite well in practice” (Pogge 1992, 59). Having considered Morris’s arguments, we can now add that even in theory sovereignty understood as some form of superior authority does not seem to work well. In fact, it is this multiattributivity and multidimensionality of authority which seems to explain why it is possible to have several authorities, none of which is ultimate or superior, working in different or even the same domain. This does not mean that the assignment of competences will always be clear. We can, of course, imagine a conflict between authorities disputing the jurisdiction over a case. We can, returning to our example, imagine the ICC claiming that the domestic courts of Italy are not genuinely investigating a case and Italy denying this charge, unwilling to cede its jurisdiction for this case. But there is no reason for supposing that this needs to be the normal case as Hobbes and others thought.

How should we now proceed with the concept of sovereignty? Should we drop it altogether or rather reconceive it? So far, we have tried to show why a state-centred and comparative account of sovereignty which insists on there being a superior state
authority is unhelpful. Now we need to look at the alternatives. Our tasks becomes clearer if we keep in mind Raz’s service-conception of authority. An authority is said to be justified if it can help its subjects to comply with reasons. Given the presence of various authorities on different levels – local, national, regional and global – we could say that authority is to be allocated to that entity or network of entities which can best serve the relevant reasons. The Normal Justification Thesis would need to be slightly expanded for this purpose:

The normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him […] if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly [or by following any other authority] (Raz 1986, 53).

The conception of sovereignty that is proposed here does not rely on merely comparative criteria, namely which authority is supposed to be the superior or ultimate one, but on the qualitative question of which authority is the most appropriate. That appropriateness is to be found by looking at the requirements for best serving reasons for action. While the traditional concept of sovereignty was directed only at states, this new perspective would grant sovereignty – now understood as appropriate authority – not on grounds of statehood, but on grounds of comparative “bestness”.

Let us now look at some implications that arise from this conceptual shift. State-centred sovereignty has been defended by arguing that distinct political communities generate and embrace distinct values. There are some parallels to this in legal normativity and it may be helpful to take a brief look at them, but once again, we should be careful not to conflate the legal and the moral notions. With the colonial independence movements after the Second World War, self-determination was coined as a legal principle and anchored both in the Covenant on Civil and Political Rights and on the Covenant on Economic, Social and Cultural Rights (both from 1966). Although self-determination is often mentioned in the same breath as popular sovereignty, the right to self-determination does not need to include demands for democracy or representative governments (cf. Warbrick 2003, 226-228, against: Higgins 1994, 44). In the philosophy of international law, sovereignty has been defended as a way to protect the claims of a community (cf. Beitz 1991, 250-254). In one variant, this position holds that legitimate states are in a unique position to promote and defend the values of a
community which ought to be protected from outside intervention (Luban 2004, 125-131). I do not think it is necessary to deny or endorse this view for our purposes since it is not incompatible with the affirmation of universal moral values which are best promoted with the incorporation of institutions on the global level.

The other implication I would like to draw is concerned with the sharing of authority. We have said that authority can and sometimes should be shared even regarding the same domain of action. The WTO, to give a current example, is committed to the liberalisation of international trade, but it does not prevent bilateral or regional agreements from working in that direction independently of the WTO. From our perspective we can say that under certain conditions, namely when it is likely to produce the best outcome, this sharing of authority is justified. However, there are also cases where only one authority should be allowed for ruling in a certain respect. This is a plausible suggestion if we again consider Christiano’s claim that authority establishes justice by setting commonly shared standards of what is right to do (Christiano 2004, 4.4.). Our example presented earlier was the setting of value-added tax. In our scenario we assumed that we have a reason to pay taxes and that the most preferable outcome according to considerations of justice would lie between 16 and 18 percent of V.A.T. Though every tax level within this range is equally preferable, once the authority sets a determinate level (e.g., 17 percent) the subjects have a reason for paying 17 and only 17 percent of V.A.T. since any contribution above or below that level would constitute unjust taxation. In a scheme of common participation such as tax payment, justice or injustice is not only determined by an authority-independent reason (namely the duty to pay taxes when living in society), but also by the cooperative relations between individuals (in this case the citizens of a given state and their levels of contribution). In this sense, Christiano says that authority can establish justice. That constitutes a strong argument for accepting one and only one authority when it comes to setting tax levels and other standards within a state. A parallel can be drawn on the international level.

Let us assume that all human beings have, as Buchanan argues, a Natural Duty of Justice which gives us a moral obligation to contribute to the protection of human rights of all other human beings. Employing the criterion of sovereignty, i.e., of authority best fitted to serve this purpose, would probably yield different results at different levels ranging from the global to the local. But we would need, to start with, an international
organisation capable of setting levels of contribution which applies the same standard for each participating country. That could be done, for instance, through an agreement with each state to levy a tax on its citizens for this purpose. The overall contribution each state would be required to make could then be made dependent on its size, wealth, etc. What is important is that equal criteria for contribution need to be set in order to establish what is to count, for everyone and every state, as a just contribution with regards to the Natural Duty of Justice. This idea is, of course, incompatible with that of states subscribing to different organisations, each deciding to follow different models of contribution. Therefore, there would have to be an international organisation exclusively in charge of setting those standards. On the other hand, the organisation would certainly need to share its authority with regional and locally operating organisations who will probably be in a better position, within their area of action, for designing policies dedicated to meet the particular needs in a given area where a service is to be provided.

c) The relevance of the use of force

Having examined the concept of sovereignty and its relation to the authority of international legal organisations, we shall finish by taking a look at the role of the use of force. Our views on legitimate political authority are still widely dominated by the model of states. This could lead to the idea that international legal organisations, who usually lack the attribute of using force, require a different, somehow tailor-made account of legitimate political authority or that they are not legitimate at all. We therefore need to consider whether the use of force is a constitutive element for political authority (cf. Morris 1998, 105-111).

Does the fact that most international legal institutions, as opposed to states, lack the use of force, call for a different account of legitimacy? Since the acquisition of political authority depends on a certain level of compliance, it could be argued that the use of force is needed to meet such a threshold. In that case, international legal institutions would either disqualify as legitimate authorities or we would indeed need a different

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6 I prefer “use of force” to “coercion” as the latter implies threats backed by all kinds of sanctions (e.g. a condemning resolution) provided that the subject complies “in order to avoid the threatened penalty for non-compliance” (Arneson 2005, 147). “Use of force”, in contrast, is circumscribed to the application of violence.
account of authority. But making everything dependent on the use of force overlooks three important points:

(1) The use of force by political authorities is not the only and not even the most prominent way to achieve compliance. It is much more common to use threats regarding not only the use of force, but also the withdrawal of rights or the imposition of additional duties. The crucial point for ensuring a sufficient level of compliance therefore does not seem to be the use of force, but the attachment of different types of burdens. International organisations, and to some extent states, sanction non-compliance with the withdrawal of rights (e.g. membership, free trade, voting or driving) or the imposition of duties (such as a fine). And, in doing so, they usually achieve a decent level of compliance without bringing into play the use of force (cf. Beitz 1999, 47).

(2) Some legal philosophers, most prominently John Austin, have argued that the normative force of authoritative commands cannot be understood without drawing on the motivational power of the use of force. Raz’s concept of authority, however, does not imply the use of force or even sanctions as a matter of necessity. What is more, we can conform with the directives of legitimate political authority in the absence of any reasons other than that constituted by the directive itself. Someone can be motivated to obey the law solely because it is the law. Authoritative commands would then constitute “complete reasons” for action (Raz 1990, 78-79; cf. Hart 1994, 88-91), that is, reasons which are decisive on their own. It is perfectly conceivable that when laws are followed the avoidance of sanction does have to enter the balance of reasons. Following the law does not even have to be backed by moral reasons on that particular issue. While someone thinks that murdering is wrong in addition to there being a law prohibiting murder, she may have no moral convictions about the rightness or wrongness of wearing a seat belt when riding on a bus. She may only wear it because English law requires her to do so and because she trusts that, all things considered, the requirements of English law help her comply with reasons that apply to her independently of that authority (in this case, road safety).

(3) In the field of International Relations, it is widely assumed that conformity with laws is either motivated by the desire to avoid sanctions or its coincidence with self-
interest (Hurd 1999, 379-380). But this is to neglect the possibility of compliance out of
the commitment just mentioned (2). This process of internalisation allows for subjects
to conceive of the duties imposed by an authority as one’s own duties. It can thus be
said that compliance out of commitment is an effective and cheap alternative to a
sanctions-based model since no authority can detect and prosecute every breach of the
law committed by its subjects.

It is not our goal to unmask the use of force as an unjustified pretension for any
authority, but to exclude it as a constitutive element in the exercise of legitimate
political authority. The use of force is an optional feature whose incorporation would
need to be evaluated, once again, according to its contribution to serving reasons. It is,
for example, plausible to assume that the use of force constitutes a significant
enhancement in the domain of criminal law (national and international) while it may be
of no help when it comes to the liberalisation of trade. Similar arguments can be made
regarding the importance of there being only one authority in charge of establishing
uniform standards of justice. While this is a reason for exclusive authority regarding
that standard-setting attribute, it does not entail the argument of traditional sovereignty
that there should be one superior or even ultimate authority. Quite the contrary, it is
plausible to assume, as we have seen, that authority will have to be shared on different
levels regarding one and the same domain of action.

Our examination regarding the implications of the Razian account for the exercise of
authority cannot therefore claim to be an exhaustive receipt for the establishment and
evaluation of specific political authorities. We were not looking for a definite account
for the practice of legitimate political authority, but for a minimal account, entailing
only those attributes without which the exercise of legitimate political authority is not
conceivable and which are, at the same time, sufficient to enable its conformity with the
requirements of the Normal Justification Thesis.

Having this minimal account is helpful in that it provides criteria to evaluate the
legitimacy of all kinds of political authority. It is not useful to ascertain which
combination of attributes renders a certain institution most effective. That question,
important as it is, probably cannot be solved once and for all, but rather requires
extensive empirical research considering the distinct challenges that political authorities
face on very different terrains. We will have accomplished at least something if we can argue convincingly that, notwithstanding that pluralism, international legal institutions can still be accommodated within a unitary account of political authority. That would provide us with an argumentative basis for endorsing them and rejecting the crude dichotomy that presents the unconditional supremacy of the state system, on the one hand, and the sovereign world state on the other as the only available alternatives.

**Conclusion**

It is time to draw some final conclusions. The aim of this essay was to take a look at the Razian account of authority and its implications for international legal institutions. We confronted the traditional conception of sovereignty which assigns superior authority to states and presented some arguments for reconceiving sovereignty as appropriate authority in accordance with Raz’s service-conception. We also considered the view which includes the use of force as a constitutive and therefore necessary element in an account of political authority. This is implausible as even states often rely on the attachment of burdens to non-compliance, such as the withdrawal of rights or the imposition of fines, which fall short of using force. It is also implausible because authoritative directives can be taken by the subjects as complete reasons for action which do not need to be backed by any other reasons (such as the fear of being sanctioned or coincidence with self-interest). Our minimal account of authority only includes the right to issue binding rules, to impose sanctions for non-compliance other than the use of force and, on the side of the subjects, a partial and qualified obligation to conform with these rules.

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Bibliography


Raz, Joseph:


