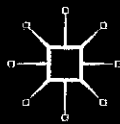


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10

Legitimacy and Multi-Level Governance

Bas van der Vossen

Philosophical work on the topic of legitimacy often proceeds as if we are facing a choice between either endorsing the legitimacy of states or accepting anarchy. Reality, however, is different. If existing states are under pressure, this is because of developments in the direction of what sociologists call multi-level governance. We may loosely define multi-level governance as the exercise of political power by institutions that do not conform to a simple model of territorial sovereignty. Standard examples of such forms of governance are various global networks of national officials, such as those which aim at regulating the global financial economy, fighting international terrorism or addressing various environmental issues. Judicial bodies too increasingly operate in ways that defy the traditional model of strict sovereignty, for example by claiming extraterritorial jurisdiction. There is considerable variety here. Some forms of multi-level governance exist within single states, others span the borders of two or more states. Sometimes such governance is the product of lasting and stable institutions (e.g., the North American Free Trade Agreement or the European Union), sometimes of more amorphous 'global policy networks' and so on.

An extensive and expanding literature now exists documenting and exploring the current and future role of such forms of governance and the threats and opportunities they bring along. Proponents of these developments advocate the further extension and development of forms of multi-level governance. There is also variation in the proposed ways of bringing about such developments. Some argue that different states should be encouraged to seek further integration of their services, but retain ultimate authority themselves. Others argue that states should give up their sovereign powers. Still others go even further and argue in favour of dismantling the state as the centralised locus of

political power, or 'disaggregating sovereignty'. The most radical examples explore possibilities of polycentric law, where multiple governing institutions engage in similar, competing legal and political activities within a territory.¹

The promise of such forms of governance should be clear: the problems authorities are supposed to address refuse to stick to the neat geographical lines drawn on maps indicating separate jurisdictions of sovereign states. Different types of problems can affect different, often partially overlapping, areas (aptly called 'problem-jurisdictions' by sociologists). Consider cases of environmental pollution, for example of rivers, which often affect multiple countries. In such cases, those (negatively) affected by the actions of parties subject to one state's authority include those subject to others, resulting in various familiar problems of coordination and assurance. Institutions with partially overlapping jurisdictions may be better equipped for dealing with this because their jurisdictions can be shaped in ways that reduce the occurrence of such externalities.

Little sustained philosophical reflection is available on the topic of multi-level governance. However, laments about the *lack* of legitimacy of these forms of governance are widespread. At times, such complaints may be reducible simply to the claim that governance networks are *perceived* to be illegitimate by a population, or to calls for greater accountability and transparency. Yet many also clearly adopt an understanding of legitimacy as a normative or moral concept. On such a view, legitimacy indicates that an institution passes some relevant moral test. Thus it is often said that a legitimate political institution has the moral right to rule. It is this understanding of legitimacy that I shall adopt throughout this piece.

The most popular charge holds that forms of multi-level governance are illegitimate because they constitute a move away from, or replace, the existing legitimate form of governance: the 'sovereign' state. That is, critics argue that multi-level governance erodes the sovereignty of states, and that such erosion is morally regrettable because it runs contrary to the rights enjoyed by such states. Consequently, these critics contend, if multi-level governance is to enjoy legitimacy, this must be conferred upon it by the consent of state representatives.

In this chapter I will ask whether such critical responses are warranted. I will accept for the sake of argument the (potentially problematic) starting point of these criticisms that existing states are indeed legitimate, and ask whether this poses a barrier to the legitimacy of multi-level governance. That is, I will ask whether legitimate states

indeed have rights to be either the sole authority in a territory or, failing that, at least the sole authority carrying out the particular governing activities in which they are engaged. The former kind I label a *unique* right to rule, the latter an *exclusive* right. (Strictly speaking, showing that legitimate states have no unique right is sufficient for refuting the critics' case. However, since some proponents of multi-level governance advocate institutions engaging in similar or competing activities, I also ask about exclusivity.)

Below, two possible versions of the critique are identified. Section 10.2 asks whether legitimate states must have a unique or exclusive right to rule. I will argue that their legitimacy does not confer upon states these rights. That is, the grounds of a state's right to rule fail to support for it those additional rights traditionally associated with the doctrine of sovereignty. Section 10.3 inspects a weaker interpretation of the critique. This is the claim that *if* a state is legitimate *and* has the attributes of sovereignty, then it will also have rights to be a unique or exclusive authority within its territory. Both these questions are addressed by testing whether such rights can be derived from two broad justificatory strategies for showing that a given state has the right to rule. I identify these two strategies, as well as the supposed rights of states that are at stake here in Section 10.1. Section 10.4 concludes.

10.1 Two kinds of justification

The view that legitimate states can insist on various rights traditionally associated with the doctrine of sovereignty is widespread. This perceived equivalence between legitimacy and sovereignty is no doubt encouraged by the rights enjoyed by states under international law. International law accords to states various rights of sovereignty, such as rights to territorial integrity, non-interference, powers of treaty, and so on.² It is common to label states that enjoy these rights legitimate.

There is surely also a historical dimension to this. The distinguishing feature of the modern, sovereign state was that it defined itself as legally self-contained, against competing claims from the papacy or the Holy Roman Empire. A sovereign state is competent to legislate for itself, and reigns supreme over other jurisdictions within its boundaries. Theories of legitimacy are typically concerned with offering justifications for this position: how political rule can be rightful on its own terms, independent of religious justification or historical inheritance. Not coincidentally, perhaps, philosophical reflection on legitimacy took prominence with the development of social contract theory, arising around the same time

that consider the right to rule to be grounded in various *incurred political obligations* on the part of a state's subjects and those that do not. According to the former kind of theory, a state's legitimacy depends on some fact or feature in the shared history of the state and its subjects. This may be a particular event such as the subjects' consent to be governed, their receiving certain benefits, or it may refer to characteristics of the community that is living under common political rule. In any case, however, this fact or feature made its subjects incur political obligations, and it is on the basis of these obligations that the state has the right to rule. Consequently, such views regard the nature and content of the right to rule enjoyed by legitimate states to depend on the nature and content of the political obligations of its subjects.

Theories that do not fall within this family of views need not deny that a state's legitimacy means that its subjects have certain obligations, such as obligations to obey the law. But they do not view those obligations as incurred, contingent upon state or subjects acting or being a certain way. Typically, these views approach the issue of legitimacy in a *teleological* fashion, arguing that a state can have the right to rule if it achieves the right sorts of results. Here we may group consequentialist approaches, theories that consider a state's right to rule to be grounded in a natural duty of justice, as well as Raz's conception of legitimate authority.⁵

Let me emphasise here that I do not mean to suggest that this taxonomy exhausts the field of available views. Nor is this way of grouping theories intended to ignore or belittle the many important and subtle differences between approaches here grouped together. Each of these groups contains various substantive theories, with various substantive commitments. The purpose of this distinction is strictly analytical. The theories grouped together all share a structural similarity in terms of the justification they provide for a state having the right to rule, and grouping them together in this way will allow us to address our general question in a more straightforward manner.

10.2 Is the right to rule exclusive or unique?

I now turn to the two ways of justifying a state's legitimacy to see if these support a unique or exclusive right to rule for legitimate states. Here, as in the next section, my argumentative strategy is to assume that these theories are fully successful in their own terms, and then ask whether we can derive the required rights for states.

as the rise of the sovereign state (Levy 2009). The most explicit combination of these views is still to be found in Hobbes. But others too hold that legitimacy must adopt the basic features of sovereignty, depending on nothing externally, leaving no space internally for others.

Another reason this view might seem attractive is that it may be seen to give content to the distinction between the moral justification for a state's governing activities and a state's legitimacy. It is one thing, one might say, to show that a state does no wrong in exercising political power, quite another to establish that it has the right to rule. Only the latter entails showing a state is legitimate, and this entails rights over subjects, as well as rights against other states and other groups and institutions. Among these rights may figure the traditional rights of sovereignty.³

For present purposes we need to focus only on those rights associated with the concept of sovereignty that potentially stand in the way of legitimate multi-level governance. These we may call a state's territorial rights. They are rights that, it is claimed, award states a certain privileged position with regard to the exercise of political power within a particular area: its territory. States not only claim the right to impose (alter, remove) certain obligations on subjects through law and enforce them. They also claim to have the exclusive or unique right to do so within their territory.

It is important to distinguish here between claiming a right to be an exclusive political authority and a right to be the unique political authority within a jurisdiction. A political institution is a territorially *exclusive* authority when it is the sole authority within its territory for any particular function it performs. With such an authority there are no competing authorities engaged in similar activities within its territory. Thus it is possible for there to exist side by side in one territory two different but each exclusive political authorities, as long as they are engaged in separate activities. This is not possible with a territorially *unique* political institution. Such an institution will be the sole political authority within an area. With such an authority, there are no other, independent political institutions within its territory. Unique rule thus presents a strong version of exclusive rule: it expresses a claim of exclusivity concerning all possible governing functions in an area.⁴

Below I will ask whether these rights can be derived from some of the more popular and plausible justifications for the legitimacy of states. But first I will distinguish between two broad justificatory strategies that such theories might adopt. This distinction is between theories

10.2.1 Incurred obligation theories

Theories that consider a state's legitimacy to be grounded in the incurred obligations of its subjects come in two broad versions. The difference between these two versions concerns the conditions they identify for subjects to be said to have incurred the relevant obligations. Some, call these *voluntaristic* theories, hold that subjects can only be said to have incurred political obligations if the act or event involved relevantly engages these subjects' wills. Such views will insist, for example, that a subject's consent must be given freely, or that the benefits of government must not only be received but willingly accepted. *Non-voluntaristic* theories argue that the subjects of a state can incur political obligations even under conditions where such voluntarism on their part is absent.

Let us start with voluntaristic theories. Voluntaristic theories hold that a state is legitimate only if all its subjects have voluntarily incurred political obligations. Consequently, those persons who refuse to incur political obligations remain morally free from such obligations. Imagine a state for which it is true that all subjects consented to its rule: such a state would be perfectly legitimate. But while this state will obviously have the right to rule over its subjects, it cannot be said to have a right to exclusive or even unique authority within a territory.

The reason is that this state's right to rule is justified by reference to the relation in which it stands to the individuals over whom it will govern. All theories of incurred political obligation consider legitimacy a bilateral concept, expressing the morally significant relation in which a subject stands to a state. A state's purported exclusive and unique right to rule, by contrast, is territorially defined. These are purported rights of territorial jurisdiction, rights to be the exclusive or unique ruler within a geographical area. Such territorial rights presume that a state's authority prohibits or precludes those in its territory from erecting their own, rival authorities or obeying others. What this means is that all who are in a legitimate state's territory must, thereby, have at least something like a political obligation – for the state has at least so much authority over them so as to rule out their setting up or following another authority. Unique or exclusive rights to rule, therefore, presume that a state has (some) authority over all who are in its territory. And they presume it has that authority over them just because they are in its territory; that presence in a legitimate state's territory is sufficient for being subject to its authority.

This idea is directly contrary to the central thesis of voluntaristic theories. These hold that no one can be rightfully subjected to the authority of a state unless they voluntarily choose to be.⁶ It follows,

then, that if those individuals who consented were to decide to move away from their present location, the state's authority over them may remain perfectly intact. More important for present purposes, however, is the converse implication. New persons who come into the area (whether they be born there or arrive by travel) will not be subject to the state's authority until they voluntarily give their consent. As a result, such individuals remain morally free to go their own way, which must include, for voluntarists, the freedom to set up or pledge allegiance to alternative political institutions. In the words of arch-voluntarist John Locke:

MEN being ... by nature all free, equal, and independent, no one can be ... subjected to the political power of another without his own consent ... This any number of men may do, because it injures not the freedom of the rest; they are left, as they were, in the liberty of the state of Nature.

(Locke 1988 [1690], Second Treatise, sect. 95)

It follows also, then, that they may do this concerning any potential governing activity, whether the already existing state is engaged in them or not.

What might convey the impression of a territorial right to rule is only that in our imagined example the group of persons with political obligations happened to be, now, located in the area designated as its territory. But it is unclear how a voluntaristic theory could see the choices of some people present in a territory to confer upon a state the right to restrict the choices of newcomers of whether to accept the state's authority. After all, the starting point of voluntaristic theories is that no one is subject to authority unless they voluntarily choose to be. We can conclude then that theories that hold a state's legitimacy to be based on the voluntarily incurred political obligations of its subjects fail to support a unique or exclusive right to rule. Hence, they are compatible with the legitimacy of multi-level governance.

The same conclusion holds, for different reasons, for theories that allow for the legitimacy of states when their subjects have incurred political obligations that are not voluntarily accepted. Such obligations can be incurred, it is said, through being a member of a community or by receiving certain benefits provided by the state. Here, it will be clear, the territorial nature of a unique or exclusive right to rule no longer poses an insurmountable problem. For since the conditions of incurring obligations are no longer voluntaristic in nature, it is possible for those

conditions to be tied to a person's presence in a territory. The question we are facing, then, is whether non-voluntaristic justifications for a state's right to rule show this right to be unique or exclusive in nature.

The answer is negative. We saw that incurred obligation theories conceive of legitimacy as a bilateral affair between state and subject(s). The distinctive feature of non-voluntaristic theories of incurred obligation is that they hold that subjects can incur political obligations just because of something a state does to them, or some other fact about them that is independent of their will. And while this allows such theories to escape the more radical implications of voluntaristic theories, this comes at the price of allowing for the possibility of multiple legitimate authorities. For if one authority can affect a group of people in a certain area, or be relevantly connected to them, so that they incur political obligations, so too can another. Non-voluntaristic theories, therefore, fail to support a unique or exclusive right to rule. And hence, they must allow for the legitimacy of multi-level governance.

To illustrate this, let us focus first on whether a state, if legitimate, must be the only (unique) such entity in its territory. Consider a theory that holds states to be legitimate if they provide subjects with certain benefits (Klosko 1992). Such a view considers subjects to be under political obligations just because certain goods have been made available to them. Now imagine that some alternative provider, say a neighbouring state, started making different benefits available there as well. Say, it organises general medical services in addition to the first state's provision of national defence and police protection. It would seem, then, that by the non-voluntaristic argument the people in this area become subject to both authorities. But if neighbouring states can also impose obligation-generating benefits on the subjects of a legitimate state, the present argument must fail to establish that a state can have a right to territorially unique rule.

Alternatively, consider the view that political obligations are due to membership of a community. Such 'associative obligations' require subjects to cooperate to achieve the effective governing of the polity. But this leaves entirely open what kind of institutional arrangement will be in place. Thus, instead of offering particular states privileging rights for governing over a territory, theories of associative obligation too will allow that other ways of governing the polity (other than by territorial states, that is) may be legitimate.⁷

No right to unique rule will thus be forthcoming on a theory that grounds legitimacy in non-voluntaristic incurred political obligations of subjects. How about a right to exclusive authority? Can legitimate

states at least insist on a right to be the sole institution carrying out whatever governing activities in which they are engaged? Given the institutionally open-ended nature of associativist theories, the best way to approach this issue is to look at benefit-based views. Will subjects' obligations to obey and support a political institution providing them with a benefit be an obligation of exclusive allegiance? Again, there is no reason to think so. If it were to happen that two or more authorities undertake similar activities in an area – say they build and maintain roads or provide police protection services – the logic of a benefit-based theory again suggests that these authorities would be legitimate.⁸

One potential objection to this argument is worth discussing at some length. This is the objection that political obligations are in fact necessarily owed uniquely or exclusively to a single political institution. If true, this would mean that whenever a person has a political obligation to obey a certain political institution (A), she cannot also have a political obligation to obey another (B). Showing that all subjects in A's territory have political obligations to A would therefore entail A's unique or exclusive authority. Often such claims are motivated by the observation that if someone is subject to multiple authorities, there is a possibility of conflicting demands. And such conflicts are thought to be intolerable.

Note that this cannot be a conceptual point about obligations in general. For many obligations it is true that if someone owes an obligation to A, she can have a similar one to B. If I promise A to mow her lawn, I am entirely at liberty to promise B to mow her lawn as well. Nor do instances of conflicting demands defeat the authority of institutions. Let us imagine that authority A demands something of Suzie, while B demands some practically incompatible course of action of her. Such situations are clearly possible and compatible with the enduring authority of both A and B over Suzie. So what would be the upshot of such a situation? Perhaps it means that Suzie will find herself subject to two conflicting obligations. In such situations, there may be no straightforward answer about what to do, but then again that may just be part of the fabric of morality: perhaps moral dilemmas do exist. More likely, though, is a scenario where A and B will have set up rules and procedures for dealing with or adjudicating cases of conflicting demands on subjects. (A and B's respective authority will also probably be clearly and carefully delineated, thereby avoiding most such situations.) Such solutions are consistently found in practice, such as in conflict of law cases. In any case, however, the conclusion that (political) obligations must be exclusively or uniquely owed to a single state does not follow. If I have two jobs and both my bosses want me to come in on Monday

morning, we will need to work something out. We do not conclude that I do not have two bosses.

Another way of defending unique or exclusive political obligations argues that these characteristics follow from their *content*. It may be part and parcel, that is, of becoming subject to a legitimate state that one must confine allegiance to this single authority. This might seem attractive: despite the existence of dual citizenship, some states indeed conceive of allegiance this way. But aside from states' desire to see things like this, what grounds do we have for accepting the idea? Allegiance, we have seen, is not unique or exclusive in nature. Nor, as I will argue in more detail below, does this follow from the nature of government activities. If the conclusion is to stand, then, the exclusive content of political obligations must follow from the nature of their justification.

But we have already seen that this argument fails. Voluntaristic views will not support this, since their very starting point is that people can become subject to the legitimate authority of a state only if they choose to be so. And this is directly contrary to any territorially based rights states might wish to claim. Nor do non-voluntaristic theories provide much support. Associative theories are neutral with regard to the institutional implications of political obligations. And assuming, for now, that the argument below is correct that political authority is not exclusive or unique in nature, the provision of benefits to subjects too will fail to support the uniqueness or exclusivity of their obligations.

10.2.2 Teleological theories

The second approach to consider consists of theories that hold that a state can achieve legitimacy by bringing about certain outcomes. Here we can group consequentialist theories, theories that ground legitimacy in a natural duty of justice, as well as Razian views.⁹ We can classify these together because they all value states, and their legitimacy, in strictly instrumental terms – as tools, say, for achieving some further goal or good (their *telos*). Thus, for example, a justice-based view regards the purpose of states as the protection of moral rights, and will qualify as legitimate only those states that make a sufficient contribution to the achievement of that goal (Buchanan 2004). In this section I will focus primarily on this version of the teleological approach.

The instrumental view of states and their legitimacy that lies at the heart of teleological theories may seem straightforwardly at odds with the idea that legitimate states must have unique or exclusive authority in a territory. Teleological views are explicitly open to the possibility of other institutional arrangements serving the theory's purposes. When

they do, those arrangements too will be deemed legitimate. But while this point is in essence correct, we should be careful not to move too quickly. One reason is that defenders of such a view often assert that the theory supports the rights of sovereignty for legitimate states. Another reason is that an argument for a state's authority over an entire territory is easily imagined: if a state's being able to govern over all who are in its geographical jurisdiction is instrumental for it bringing about the correct outcomes, a teleological theory will endorse such rights for legitimate states.

Can such reasoning be extended to demonstrate that legitimate states will also be exclusive or unique authorities? That is, can the argument be convincingly made that unique or exclusive authority within a single territory is instrumental to the achievement of the right outcomes? It might be thought here that this question simply reduces to whether in a particular place, at a particular time, justice is best served by a unique, an exclusive, or some other kind of authority. And since chances are that this will at least sometimes, somewhere be the case, teleological theories may thus justify rights to unique and exclusive authority. However, this would be to misunderstand what is at stake. We are considering not just the thought that a state might at times be an exclusively or uniquely justified authority in an area. What we are asking about here is a much stronger view: that legitimate states will, as such, have a unique or exclusive right to rule. Our question therefore is whether there are grounds for insisting on the unique or exclusive right to rule for a legitimate state regardless of whether organising the exercise of political power in such ways yields the desired results here and now.

If such is to be the case, it must be true that justice is most reliably served by uniquely or exclusively governing states as compared to possible alternative forms of governance. Perhaps more than one political institution in a territory is bound to have negative consequences on the quality of its governance? That is, the presence of other authorities, perhaps especially competing other authorities, may be said to necessarily lead to disturbances of justice. Let us start with the idea that unique authorities will clearly perform better than non-unique ones. One reason may be that multiple institutions within one territory will likely come into conflict with one another, leading to detrimental results. But this Hobbesian worry lacks solid grounds, at least in those cases where institutions are engaged in functionally separate activities – say, one provides public order, the other education. There, it is far from clear that institutions will come into conflict (or, at least, that they will

come into conflict more than the separate branches of government within a single state). In fact, the experience of existing forms of multi-level governance suggests that this is not the case. Nor is there reason to think that multi-level governance will typically be less effective than sovereign states. The very reason we are inquiring about its potential legitimacy is its potentially superior problem-solving capacity compared to sovereign states. Teleological views are therefore compatible with the legitimacy of non-unique authority.

Next, consider an exclusive right to rule for legitimate states. Such a right would enable such states to be the sole institution in a territory engaged in those types of activities in which they are engaged. Such a right may seem more plausible, for multiple governing agencies engaged in similar tasks are more likely to get into conflict. Those who defend the position typically refer here to the case of law and its enforcement. Surely having multiple police forces in an area is a recipe for chaos. If so, a teleological theory may grant legitimate states an exclusive right to rule.

However, there are some problems with this argument. Perhaps the point of legal rules for social conduct is that they provide a single, uniform set of rules for regulating practically inevitable interaction in public space. And perhaps this means that having multiple bodies of rules in one area is highly suboptimal. But this argument slides illicitly from an observation about different bodies of rules, to a conclusion about different institutions. Yet it is perfectly possible for authorities with overlapping jurisdictions to issue and enforce sets of legal rules that are harmonious or contain provisions for conflicts of law. That is, even if such a situation would be one of different but overlapping legal codes, it is by no means certain that these will be incompatible in any serious sense.¹⁰

Second, even if it is true that non-exclusive legal authority will be harmful, there is no reason to extend that point to all state activities. What likely damage will be forthcoming from having competing educational systems? Such competing systems already exist in many places. The most obvious case comprises those instances where private parties compete with states, but there also already exist instances of different governments providing educational services within the same area.¹¹ And it is far from accurate to say that their performance is significantly worse than those where the state has a monopoly. Indeed, with regards to virtually all other goods and services, it is uncontroversial that competition leads to efficiency gains, improving the quality of goods and services while lowering their cost. Why would government activities be inherently different?¹²

It is difficult to see, then, how providing legitimate states guarantees of various monopolies, or one big monopoly, will be conducive to the achievement of the correct outcomes. Thus, in the end, the observation with which we started was close enough to the truth: the instrumental role teleological theories see states playing stands in the way of their supporting the view that the right to rule of all legitimate states must be unique or exclusive.

10.3 Institutional change and the rights of legitimate states

The argument above shows that some of the most popular and plausible justifications for the right to rule of legitimate states are compatible with the legitimacy of forms of multi-level governance. However, the critic of such forms of governance might insist that her objection was not that forms of multi-level governance cannot be legitimate in principle, but that they can only be so if they *come about* in a certain way. In particular, critics object to multi-level governance arising without the consent of existing states.

No doubt many have this in mind. It is a common observation that legitimate states have rights of non-interference. And such rights may mean that legitimate states may resist any non-consensual changes to their positions of authority. Such a right is nearly universally listed by theorists of legitimacy. And it is invoked, for example, by those who object to attempts to extend the jurisdiction of the International Criminal Court to states that refuse to ratify its founding treaty.¹³ Here I will focus on only a subset of the actions that may be ruled out by such rights: the undertaking of governing activities within the territory of a legitimate state. Let us turn to whether such rights can be derived from the justifications of legitimacy.

10.3.1 Incurred obligation theories

Consider again theories that hold legitimacy to be grounded in the incurred obligations of subjects. As we have seen, these views regard the rights of states as a product of their subjects' (voluntarily or not) incurred political obligations. Thus, if legitimate states have rights to non-interference when they are ruling uniquely or exclusively, these rights must also be grounded in the duties of subjects. This means that incurred obligation theories must conceive of rights of non-interference in an unexpected manner: these are not rights on which the state can insist *vis-à-vis* other states; they are rights on which a legitimate state

can insist *vis-à-vis* its subjects. Whatever right to non-interference it has is a right based in its subjects' obligations to show it exclusive or unique allegiance.

It follows, then, that these theories fail to support rights to non-interference for legitimate states.¹⁴ For one, the conclusions reached in the previous section about voluntaristic theories apply here as well. Since such theories fail to grant states rights over land, instead of rights over people, legitimate states cannot have rights that no other institutions undertake governing activities within that area. Non-voluntaristic justifications, however, do allow for territorially based jurisdiction. Will subjects of a state who have non-voluntarily incurred the relevant obligations be required to not obey or support other institutions? That is, is such a requirement part of the content of subjects' political obligation?

Again, while it might seem attractive to say that exclusivity or uniqueness is part of becoming obligated to a political institution, we lack good reason for endorsing this view. Above, I identified two non-voluntaristic contenders: associative and benefit-based theories. Associative theories, we saw, have no attachment to any particular political institutions. If they support rights to non-interference, it will be because such rights make for institutions that are best suited for governing the polity. As such, their position on this matter will be similar to that of teleological theories. I will discuss this below.

Benefit-based arguments, by contrast, hold that persons can incur obligations based on conditions that have to do with the particular nature of the good provided, instead of their acceptance. For example, because certain goods have a public good structure, their provision can generate obligations for those receiving them. Again, this means these theories, as such, fail to justify rights for legitimate states against other institutions deploying governing activities in their territories. If institutions provide the relevant goods, those who receive them will become obligated. Indeed, allowing such benefits to generate exclusive or unique obligations might end up causing serious difficulties for benefit-based theories. Consider someone living in some remote place. The area may be nominally part of a legitimate state's territory, but its climate or geography so far has made it impossible for the state to extend its benefits here. Fortunately, however, the area is not extremely unsafe or violent: neighbourhood associations and local charities have kept things going relatively well. What if the state becomes successful in extending its authority to these parts? If benefit-based obligations have an exclusive or unique character, these people would no longer be able

to become legitimate subjects of this state. But such an implication, it seems, is radically against the spirit of non-voluntaristic theories. For it defeats part of the practical purpose of preferring a non-voluntaristic to a (theoretically more elegant) voluntaristic approach.

We can conclude, then, that these theories of incurred obligations fail to support rights for legitimate states that other institutions not deploy governing activities in their territories. Only associative theories have the potential for such a conclusion. Whether they endorse such rights depends on the same considerations relevant to teleological arguments.

10.3.2 Teleological arguments

Will teleological accounts justify such rights? I will here focus again on justice-based theories of legitimacy. In contrast to many of the issues in this chapter, there has been some discussion of the rights of legitimate states against interference by theorists defending justice-based views on legitimacy. Unfortunately, no clear consensus exists on the justifiability of such rights. Some critique the traditional rights of sovereignty, arguing that international law and international institutions can have legitimate authority in the absence of the consent of states. Others hold that fewer states should be considered legitimate than is often thought, but that those states can call upon rights of sovereignty. Still others hold that the vagaries of international relations imply that only awarding the full rights of sovereignty to all existing states is compatible with justice.¹⁵

The fact that the latter position is defended may show that teleological views will at least support some kind of protected rights to rule. And the thought seems plausible: non-consensual attempts by one political institution at extending its authority into the territory of another seem a recipe for violent conflict and strife, things hardly conducive to the achievement of justice. Note, however, that the upshot of this conclusion is not to be exaggerated. For it is not clear that this point indicts such forms of multi-level governance to a lasting illegitimacy. For that to follow, two things must be the case. First, it must be a necessary condition of an institution's legitimacy that it not come about in a way that involves the violation of the rights of an existing legitimate institution. And second, it must be the case that legitimate institutions have rights against the development of forms of multi-level governance.

Neither of these points is unproblematic. The first principle surely is too strong. One reason is that it threatens the starting assumption that (virtually) all existing states are legitimate. The beginnings of many

states involved violence against other states, the legitimacy of some of which seems at least as likely as theirs. Another reason is that this principle is at odds with the rationale or spirit of teleological theories. These are views that regard legitimacy as based on forward-looking considerations (e.g., the prospect of this institution achieving justice), instead of backward-looking ones (e.g., consent given). They insist that a state's legitimacy is not a matter of entitlement, the source of which may lie in the past, but depends on the results a state brings about for its citizens. Condemning to enduring illegitimacy any institution the creation of which involved the extension of its governing activities into a legitimate state's territory (even if peacefully) thus seems contrary to what teleological views are all about.¹⁶

The second idea may be problematic too. That is, legitimate institutions do not have rights against just anything that may diminish their ability to govern. For example, while large-scale emigration of a population might harm the institution's ability to function by eroding its tax base, this does not show that it has a right that its subjects not emigrate. Spelling out, in other words, what does, and what does not, count as wrongful interference with a legitimate institution is a complex issue. And at least under certain conditions, say of peaceful and cooperative conduct by the rival institution, it is not clear that the setting up of forms of multi-level governance would count as such.¹⁷

Most likely, then, whether teleological views will allow for such developments of forms of multi-level governance will depend on various empirical matters, such as the likelihood of these developments harming the overall quality of governance, the dangers of violence, the conduct of officials and subjects of both old and new institutions, and so on.

10.4 Conclusion

I have focused on the issue whether forms of multi-level governance are in principle capable of achieving legitimacy. I have tried to evaluate a common critique of such forms of governance by investigating whether legitimate states have a unique or exclusive right to rule. This conclusion draws out some implications and indicates some possible avenues for further research. To begin, we can draw the following two conclusions: (a) since none of the arguments discussed above support the supposed unique or exclusive right to rule of legitimate states, the legitimacy of multi-level governance seems perfectly possible; and (b) only a teleological justification of legitimacy can, given certain

factual assumptions, support rights for legitimate states against the creation of such forms of governance without their consent.

I will not here commit to whether it would be a good thing for forms of multi-level governance to proliferate, or for states' supposed rights of sovereignty to be rejected. Such an argument would require a sustained defence of its own. Similarly, it may be thought that the failure of incurred obligation theories to support rights for legitimate states against interference counts as a significant drawback on their part. Again, that issue deserves full treatment elsewhere. What my arguments show is that much of the standard way both philosophers and other commentators understand the concept of legitimacy fails to stand up to scrutiny. Hence, insofar as such rights are deemed important, philosophers need to do better in providing a defence. Then again, it is safe to say that philosophers have not thought hard enough about whether such rights really are as important as we commonly think.

Such reflection will have important consequences. For one, it may turn out that most theories of legitimacy presuppose an understanding of legitimacy that is partially misconceived. This is consistent with another context in which the concept of legitimacy is discussed. When authors write about the legitimacy of *international* institutions, talk of establishing exclusivity or unique authority is readily dropped. In light of the above, that seems appropriate.¹⁸

More generally, a conclusion that justifications of the right to rule fail to support rights of sovereignty can undercut at least some of the grounds on which states are often thought to occupy a morally favoured status. Unfortunately, too much writing in legal and political philosophy regards states and sovereignty as somehow special or morally desirable. This is perhaps most clearly true of some so-called liberal nationalist theories – in which demonstrating that national groups have rights to sovereignty can seem like a holy grail.¹⁹

Similarly, the possibility of legitimate multi-level governance may point to some deficiencies in the conceptual understandings of law adopted by certain legal theorists. That is, some might object that, conceptually, the rules of such institutions cannot qualify as law because they can lack some of the traditional characteristics of legality, such as reliable enforceability, a habitually obeyed sovereign, or a claim to supremacy within its jurisdiction. The existence and functioning of multi-level authorities puts significant pressure on such understandings of law and authority. Our thinking about these concepts may well have to become more flexible so as to allow for cases of non-sovereign

authority and law. Nicole Roughan's chapter in this volume pursues these issues further.

One thing, I believe, can be safely said. Legal and political theorists ought to maintain an open mind about the institutional forms that actually serve human purposes best. This is a familiar (though often overlooked) truth in the old debate about small versus big government. But it also applies to the issue of more versus less centralised government. An important task of legal and political theory is to investigate what really works. Centralised systems of governance may have advantages in terms of coordination and uniformity of rules. But a system of fragmented authority will have its strengths too. It allows power to be checked by other power: subjects having the option to play off one authority against another may render us safer. It may make exit from dysfunctional authorities easier. It offers new possibilities for innovation and learning by having different institutions wrestling with related problems in similar contexts. It will encourage more locally informed and fine-tuned solutions, instead of blunt top-down attempts. And so on. What forms of governance will be more useful may change with changes in social facts about economics, demographics and so on. And what will be the right way to go must therefore partially depend on fundamentally empirical questions. Yet such may be the genuine core of the debate about the legitimacy of existing political institutions.

Notes

1. See for but a few examples, respectively: Chisholm (1992), Bache and Flinders (2004), Rosenau and Czempiel (1992), Sassen (2006), Slaugther (2004), Pogge (1992) Barnett (2000).
2. Exceptions are diplomats, *ius cogens*, and other principles of jurisdiction like nationality, objective territory, or universal jurisdiction. However, these do not affect the main argument of this piece.
3. Some examples of philosophers who take legitimate states to have such rights are Buchanan (1999) (but see Note 18 below), Green (1988), Klosko (1992), Stiz (2009), Wellman and Simmons (2005) (especially pp. 167–8). Christopher Morris (1998) rightly complains that contemporary thinking takes the claims of states too serious, but never follows up on this remark.
4. Those uncomfortable with the use of rights-speak here may re-describe these claims in terms of claims about the scope of authority, or the scope of the right to rule, which a legitimate enjoys.
5. I defend this grouping-together of theories in Note 9 below.
6. See, e.g., Simmons (1993), Beran (1987). It is worth noting that Simmons (2001) has attempted to give an argument for how a voluntaristic (consent) argument may give rise to territorial rights. He argues that the consent of subjects may include the transfer of part of subjects' rights over their

property. If so, a state may gain rights to rule over that property, potentially piecing together an entire territory. Non-subjects would then always find themselves on property that has attached to it the state's right to rule, and their entering such property would entail their accepting this authority. However, this argument fails because it likely is not within people's powers to grant such lasting authority to a sovereign over property. Courts, at least, have in the past refused to uphold attempts by owners to include provisos in the terms of sale of land that it would never come into the hands of, say, Jews or black people. Such rights, the courts argued, are not part of our property rights. The reasoning may apply to the enduring submission of property to one sovereign. Indeed, it seems likely that whatever motivates the adoption of a voluntaristic theory of legitimacy will also motivate the rejection of the possibility of durably submitting land to authority.

7. Leading theorist of associative obligations John Horton is explicit on this (2007, p. 2).
8. One might consider this, plausibly in my view, a seriously problematic implication of such theories.
9. A theory being teleological only means it makes legitimacy conditional upon a certain outcome being achieved. This leaves room for certain ways of achieving the relevant outcome being precluded. Thus, a state's legitimacy may depend on its achieving a degree of human rights protection in its territory, without thereby violating people's rights.
10. See the chapter by Nicole Roughan in this volume.
11. One example is Wix Primary School, the first bilingual school in London opened in 2005 by the French embassy.
12. Philosophers likely exaggerate the problems of competing legal orders. Hume (1987 [1752]) reminds us that the Roman Empire was governed for about 150 years by two supreme legislative bodies with overlapping authority. This period, Hume argues, was among the most stable and prosperous in the history of Rome. For important historical studies see Bernan (1983), Spruyt (1994). For a contemporary argument see Barnett (2000).
13. For an overview, see Wilmshurst (1999).
14. Note that insofar as interference with a state's governing is wrong, it is a wrong perpetrated by the state's subjects (who owe it unique or exclusive allegiance), not the interfering party.
15. See, respectively, Pogge (1992), Teson (1998), Buchanan (2004), Kukathas (2006).
16. Better, perhaps, to say that any institution can gain legitimacy after a period of displaying peaceful and just conduct. Or (additionally) to insist on international institutions approving the new entity after the fact. Leading teleological theorist Allen Buchanan (2004) admittedly accepts a non-usurpation condition for state legitimacy. But note that this is in direct conflict with his denial that state-consent is a necessary condition for the legitimacy of international law and international institutions.
17. Indeed, the proponent of multi-level governance might argue that setting up rival governing institutions need not lead to violent conflict. States will only regard such activities as 'interference', she may argue, if they take for granted that they have a right to be the unique or exclusive authority. But this right is precisely being questioned here. Absent such a right, interferences might

be perceived as less threatening (e.g., when approved by international institutions).

18. See, e.g., Buchanan and Keohane (2006). See also Buchanan (2010).
19. Perhaps the most explicit example is Meisels (2005). Other examples are Miller (1995), Moore (2001). See also Note 3 above. For an interesting exception, see Gans (2003).

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