

Bernd M Krehoff  
Somerville College

# The Legitimacy of International Legal Institutions

DPhil Thesis  
Faculty of Philosophy, University of Oxford  
Hilary 2011

Supervisors: Dr John Tasioulas, Dr Daniel McDermott

Examiners: Prof Cécile Fabre, Dr Rowan Cruft

62.927 words (including citations and footnotes)

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*To the memory of my father, Bernd Gustav Krehoff*

## ***Introduction and Acknowledgments***

This thesis is about the legitimacy of political authority in general and international legal institutions (ILIs) in particular. It is divided into two parts with three chapters corresponding to each part. The first part presents an account of legitimate political authority that is based on Joseph Raz's service conception of authority but also makes some important modifications to it. The central claim of the first part is that the legitimacy of political authorities in general, as measured by the standard of Raz's Normal Justification Thesis, depends in a crucial way on the ability of the subjects to get involved –more so than Raz is prepared to admit– in the activities that are relevant in the political domain.

The thesis offers a general account of legitimate political authority, i.e. one that is valid for any type of political authority. The second part, however, examines the implications of this account for the legitimacy of ILIs. These are non-state authorities, such as the World Trade Organisation or the International Criminal Court, that deal with problems of global political relevance. Because of this global approach, the subjects of ILIs (i.e. those whose reasons are to be served by the ILI) are not confined to the boundaries of regions or states, but distributed across the world. ILIs operate by creating, interpreting, and applying public international law.

Despite some striking differences between ILIs and other types of political authority (particularly states), I argue that they all ought to be measured by the same standard of legitimacy, namely the Normal Justification Thesis. But I also argue that the requirements for meeting this standard of legitimacy may vary according to the type of political authority (especially with regard to the requirement of democracy).

The first chapter presents an outline of Raz's service conception of political authority. In that chapter, I explain why the legitimacy of any practical authority (not just political authority) depends on its ability to serve certain reasons for action in a certain way, and what distinguishes practical from theoretical authorities. I also argue that the distinctive feature of political authorities, as compared to other practical authorities such as doctors, is to be found in their right to rule, i.e. in their right to claim a moral obligation to be obeyed. Chapter I also examines the crucial role of legitimacy for this thesis.

Chapter II explores the conditions that are needed for subjects to have a moral obligation to obey the authority. This condition, I argue, is to be found in the ability of subjects to form reliable beliefs about the purposes and capacities of their political authority. The focus of this chapter is on practical reasoning. I examine the relation between subjects and their moral duties, and how political authorities can either come to mediate or obstruct that relation. An authority which fails to enable its subjects to develop reliable beliefs on its purposes and capacities bars its subjects from responding to their moral duties. This is critical for the authority's legitimacy because the ability of subjects to respond to their moral duties is necessary for them to be able to discharge those duties. To the extent that the authority is unable to help its subjects in discharging their duties, its capacity to serve reasons is significantly impaired.

The third chapter presents democracy as a further condition of involvement related to legitimacy considerations. There, I argue that subjects ought to have a democratic right to decide by themselves at the level of overall goals. The domain of overall goals comprises the kind of activities concerned with choosing and specifying the broad objectives that ought to be pursued in the political domain. The level of overall goals is to be contrasted with the technical level. The latter does not deal with choosing and specifying broad objectives, but with their realisation. It deals, in other words, with the

means required for achieving overall goals. While it is easy to see how political authority can be legitimate at the technical level, the legitimacy of political authority at the level of overall goals is much more problematic. It is much more problematic because it presupposes the existence and identifiability of moral experts. I shall argue that the latter kind of legitimacy can only obtain in exceptional circumstances where the ability of citizens to engage in sound moral reasoning and to participate in democratic processes is severely impaired. In all other circumstances, subjects cannot expect their authority to serve their reasons for action. Because of this, they have, at the level of overall goals, the liberty-right to decide by themselves (i.e. they are under no obligation to follow the authority).

The second part deals with the implications of the arguments developed in chapters II and III for the legitimacy of ILIs. Each of those two chapters presented an independent justification for the involvement of subjects. Chapter IV draws on the arguments developed in chapter II in order to introduce transparency as a legitimacy condition for ILIs. And chapter V, which draws on the arguments of chapters II and III, deals with global democracy as a legitimacy condition that is additional to transparency.

Both chapters seek to clarify the meaning of these concepts by confronting them with competing philosophical accounts of transparency and democracy for the international domain. In chapter IV, our notion of transparency is compared with the one elaborated by Allen Buchanan and Robert O. Keohane. I argue that their justification of transparency is instrumental and depends on empirical assumptions that are not entirely convincing. For them, transparency is a useful device for evaluating the authority's compliance with their standard of legitimacy. According to this view, ILIs ought to be transparent not necessarily to their subjects, but to those actors who are best suited for making this assessment. Our approach is quite different. We believe that ILIs (and political authorities in general) ought to be transparent to every one of their

subjects. Our justification of transparency does not depend on its alleged usefulness for advancing legitimacy – subjects do not need to be especially good at assessing the authority's legitimacy. In our view, transparency vis-à-vis the subjects of authority is itself a necessary legitimacy condition in the absence of which ILIs cannot serve the reasons of their subjects properly.

Chapter V develops the implications of chapters II and III, and presents a vigorous notion of global democracy. I argue that global democracy should not be limited to the right of subjects to control and sanction their authorities, but should include the right of subjects to set the agenda at the level of overall goals. Our notion of global democracy differs from the ones defended by David Held, Philip Pettit, and Thomas Christiano. Pettit and Christiano argue for an international system of democratic states. Held, in contrast, defends the institution of a global authority in charge of promoting the autonomy of subjects. Our own approach takes a different path. According to our view, the activities of political authorities (both states and ILIs) ought to be restricted to those areas where they can be expected to help their subjects improve conformity with their reasons. In all other areas, subjects have the right to decide by themselves. Because of this restrictive approach, the legitimacy of political authorities depends on their ability to help their subjects to make use of that participatory right. The legitimacy of ILIs should therefore be found in their capacity to serve as global democratic instances where subjects can come together, deliberate, and make democratically binding decisions. Current circumstances do not allow for subjects to deliberate and make democratic decisions on a global level. In the light of these limitations, which are persistent and hard to remove, I argue that the legitimacy of ILIs should not depend on the full realisation of global democracy, but on their capacity to promote the incipient forms of global democratic deliberation that are currently available with the aim of achieving global democracy in the future.

Chapters IV and V are about reforming ILIs so as to make them legitimate. But there is a more radical form of criticism, one that denies that ILIs can ever come to be legitimate. This form of criticism is examined in the final chapter, VI. There, I argue against the idea that states enjoy a kind of sovereignty that grants their authority a privileged position vis-à-vis ILIs. I examine, and reject, two justifications of state sovereignty, a modern and a classical one. The classical account of sovereignty justifies the primacy of one, and only one authority (i.e. ultimate authority), as a necessary means for avoiding a conflict of competences between authorities that could lead to a fatal deadlock. According to this view, the only feasible alternative to a system of sovereign states (where none has ultimate authority over others) would be a global state with ultimate authority over all other authorities.

The modern understanding of sovereignty defends the primacy of states by invoking the value of self-determination. Modern states are, in this view, legitimate representatives of political communities. The ability of such communities to decide by themselves (represented by their states) is regarded as an expression of the values of freedom and autonomy. Because of these values, the decisions of political communities ought to be protected against the “foreign” intervention of ILIs. According to this modern argument, the representative relationship between a state and its political community, in addition to the value of a political community deciding on its own, is sufficiently important to justify state sovereignty.

The classical justification of sovereignty, with its focus on ultimate authority, is to be rejected because it represents the relations among authorities in a way that is not accurate. In order to make comparisons among authorities, we must unbundle their authority into the domains in which the authority operates and the attributes it has for doing so. Because of this, conflicts among authorities do not have to be all-pervasive. They can be localised, so that other aspects of the exercise of authority remain

unaffected. The modern justification of sovereignty, on the other hand, does not need to conflict with our conception of legitimate authority. After all, the Razian account is about serving relevant reasons for action. It is plausible to assume that the value of self-determination could figure among those relevant reasons in certain circumstances. So the argument for self-determination is not so much an argument against ILIs, but could be one in favour of them. The legitimacy of ILIs could well depend on their ability to protect and promote the value of self-determination (especially for the citizens of weaker states).

In writing this thesis, I have received plenty of support in a number of ways. My wife, Cornelia Krehoff, has always been there for me during the ups and downs of this long journey. From the very beginning of this project, I have had the unconditional support of my mother, Dorothea Wuest de Krehoff, and my late father, Bernd Gustav Krehoff. Without them, this would not have been possible. The Konrad Adenauer Foundation provided me with a generous doctoral scholarship for the last three years. I am very grateful to my supervisors, John Tasioulas and Dan McDermott, for the time and energy put into discussing this thesis and for forcing me to rethink so many arguments. Cécile Fabre and Rowan Cruft, my examiners, patiently helped me to realise the full dimension of this thesis and the ways in which the current text could be expanded in the future. Lesley Brown, my College Adviser at Somerville, gave invaluable advice and support from the early days until examination day. During various stages of this thesis, I have benefitted enormously from discussions with a number of persons. I am especially grateful to Alejandro Chehtman, Tom Douglas, Karla Frische, John Gardner, Rolf Geiger, Otfried Höffe, Dudley Knowles, Matthew Kramer, Daniel Loewe, Dani Rabinowitz, Joseph Raz, Massimo Renzo, Ben Saunders, Wolfgang M. Schröder, Nick Shea, Pablo Stafforini, Gerard Vong, and Bas van der Vossen. Finally, I would like to thank Fernando Muñoz Hernández for the many fantastic philosophical discussions that we had in the cafés of Tübingen, and for getting me into doing a doctorate in philosophy.

## I. Legitimate Political Authority

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This chapter is about the nature and the justification of authority, and political authority in particular, as laid down in Joseph Raz's service conception. According to this conception, the legitimacy of authorities depends on their ability to mediate between the subjects of authority and some of the reasons for action that apply to the subjects. As we shall see in this chapter, mediation is achieved if authorities serve the reasons for action that apply to them (the subjects) in a special way, namely by providing them with reasons for action that are both pre-emptive and content-independent. We shall also see that what distinguishes legitimate political authorities from other authorities is their right to rule, i.e. their moral right to claim an obligation to be obeyed by their subjects.

We have said that the legitimacy of authorities depends on their ability to serve reasons for action. Let us explain, first, what we mean by reasons for action, and, secondly, what we mean by reasons being served. Reasons for action are considerations that make choices intelligible and that count in their favour (Raz 2006, 1006). Reasons for action therefore have an explanatory dimension in relation to actions. An agent's desire to have gin and tonic, along with her belief that this stuff is gin, can explain why she mixed this stuff with tonic and swallowed it (Williams 2007, 292). Does she have a reason to act in this way if "this stuff" turns out to be not gin but poison? That would seem to depend on whether her belief is well-founded. If "this stuff" did not resemble gin at all – if it had another colour and a distinctively different smell, then it would seem that she had no reason at all to mix this stuff with tonic and drink it. She would then have acted

irrationally, and her action could not really be explained to others<sup>1</sup>. But suppose that the normal observer has no way of distinguishing “this stuff”, which turns out to be poison, from gin. In this case, the agent would appear to have a reason to drink this stuff<sup>2</sup>. She can explain her action on the basis of her desire and her (well-founded but wrong) belief that this stuff is gin (*ibid*). This is the internal perspective, based on the desires and beliefs of this agent.

But it also seems possible to adopt an external perspective – one that does not aim to explain why the agent acted as she did given her particular state of mind, but one that purports to say what she *ought* to have done had there not been the kind of epistemic distortions that lead her to have a well-founded but false belief. From this objective perspective, it seems clear that there was a reason for the agent *not* to drink this stuff (cf. Elster 2009, 3-4).

A distinction between the subjective and the objective level of reasons for action can also be drawn in the domain of morality. Suppose that I have found a wallet with a significant sum of money on the street. Suppose, also, that I have a moral duty to return the wallet to its owner. At the same time, however, I have a strong desire to keep this money in order to spend it on a luxurious vacation in the Swiss Alps. After some meditation, I decide to do the latter. In doing so, I have acted for a reason for action, and can therefore offer a perfectly rational explanation for my action. But once we switch from this subjective perspective to the objective one, we can say that, all things considered, I acted for the wrong reason given that the moral duty to return the money excludes my reason for having a luxurious vacation.

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<sup>1</sup> Perhaps the agent is delusional, in which case we could have an explanation for her behaviour (i.e. some mental disorder). While this could explain the agent’s behaviour it does not make it rational in any sense (“she could not help it”).

<sup>2</sup> Thus the reference, by some authors, to “motivating” or “explanatory” reasons as distinct from “objective” or “guiding reasons”, see Gardner 2007, 91-92; Parfit 1997, 99.

Raz's conception of legitimate political authority is based on the capacity of political authorities to serve not any kinds of reasons for action but those which exist from the objective point of view. Hence Raz's reference to reasons which "apply" to the subjects of authority independently of the authority, but also independently of what the subjects have consented to (Raz 1986, 80-94). Raz also believes that the reasons served by legitimate political authorities are –mainly, if not exclusively– moral reasons for action which have their source in "ordinary individual morality" (ibid. 72; cf. 3-4).

What does Raz mean when he says that authorities *serve* reasons? A reason for action is served if following the authority makes it more likely for the subject to *conform* to that reason, i.e. to meet the requirements of that reason. When it comes to moral reasons for action, there are different views on what it takes to meet the requirements of those reasons. According to Kant, actions lack moral worth unless they are performed with the proper motivation, namely out of respect (*Achtung*) for the moral law (Kant 1785, 400-401). In the *Postscript to Practical Reason and Norms* (1990), Raz takes this distinction into account by distinguishing between conformity and compliance. There, he argues that someone *conforms* to a reason for action (and this includes moral reasons for action) when she brings about the outcome required by that reason regardless of the underlying motivation. Helping someone who is in need only to obtain a generous reward would therefore conform to the moral reason to help. *Compliance* with moral reasons, on the other hand, obtains when helping is motivated by that reason for action (Raz 1990, 178-179). Raz does not make this distinction for his account of legitimate political authority. That seems to be a sensible approach. The problem of motivation is certainly significant for evaluating the moral character of a person (cf. McDowell 2003, 125-126). The legitimacy of political authorities, however, should not depend on the virtuosity of its citizens. All that legitimate political authorities can be expected to do is to help their subjects improve *conformity* (in the sense mentioned above) with their reasons for action. It is up to the subjects to decide

whether to follow the authority out of respect for the moral reason that the authority purports to serve. I shall therefore proceed on the assumption that the question of motivation is irrelevant for establishing whether a political authority is legitimate.

The phrase “more likely” indicates that whether an authority is legitimate or not depends on comparative criteria. Following the authority must make it more likely for the subjects to conform to their reason as compared to them acting on their own. Here is an illustration. Assume that I have a reason not to put others at significant risk when driving in the streets. Here is an authority, *x*, whose directives, if followed by me, make it more likely for me to improve conformity with that reason (as compared to me acting on my own assessment of the situation). That superiority is, special circumstances apart<sup>3</sup>, the basis on which the authority’s legitimacy is grounded.

The authority’s ability to help me improve conformity with my reason not to put others at great risk can be based on several capacities (cf. Raz 1986, 74-75). One of them would be epistemic superiority. The authority’s directives could be based on the conclusions of experts whose beliefs about road safety are likely to be more accurate than my own ones. Another factor that can be relevant for political authorities to help subjects improve conformity with their reasons is impartiality. This is especially relevant in the judicial domain. Referring a dispute to a judge does not always have to be based on the legal expertise of the judge. Imagine a dispute in which both parties are legal experts. They may decide to submit to the authority of a judge not because she is more likely to take the right decision, but because she is more likely to decide the case in an impartial way. It is, I believe, not hard to see how a strong personal interest in a certain outcome can distort one’s judgement. A third source of legitimacy consists in

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<sup>3</sup> In assessing the legitimacy of an authority there may well be relevant considerations other than the authority’s capacity to serve certain reasons. Just think of an authority that came to power through a bloody coup, or an authority that is excellent at promoting road safety but also involved in genocide.

relieving subjects from the burden of having to make too many decisions. Perhaps subjects have the knowledge to decide whether to install traffic lights at a busy intersection, or whether to build a new road, but they may simply not have the time to get involved with the huge numbers of minor, mostly technical decisions<sup>4</sup> that need to be made in order to keep modern societies running. It therefore makes sense to leave such decisions for authorities to be made.

Raz believes that the authority's capacity "to establish and help sustain conventions" is another source of legitimacy. In helping to solve coordination problems, authorities can supply the subjects with the "missing link in the argument" (Raz 1986, 49). Take the problem of having to decide between left-hand and right-hand traffic before any convention has been established. This is a typical coordination problem since its resolution does not obtain through making the right choice (we are assuming that there is no reason to prefer one option over the other), but in securing that most (ideally all) of the drivers make the same choice. A well-known and respected authority can make all the difference in such a situation by telling its subjects to drive, say, on the left side of the road<sup>5</sup>. In making a pronouncement, the authority makes one of the options salient. This is the "missing link in the argument", the crucial piece of information needed by the subjects when having to decide which side to driven on. If the authority is well-known and respected, subjects can act under the presumption that the authority's pronouncement will be followed by most (if not all) drivers. This solves the coordination problem – subjects know how they should act since they know how others can be expected to act. All this seems very plausible. But Raz is wrong in presenting the solution of coordination problems of this type as cases of *authoritative* interventions. In order to understand why Raz is wrong on this point, we need to explain, first, the particular way in which legitimate authorities help their subjects.

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<sup>4</sup> On the meaning of "technical" see chapter III, p. 66.

<sup>5</sup> It does not really matter which side is chosen, the crucial thing is that *a* choice is made.

The potential to serve reasons is not limited to authorities. If I am rich, I can help cyclists improve safety by giving out helmets on the streets for free. Even mechanical devices, such as alarm clocks, can serve reasons. Suppose that I have a reason to be in London at 7 in the morning. In order to conform to that reason, I need to take several intermediate steps, one of which is to wake up at 5 am in order to catch a train one hour later. Using an alarm clock makes it more likely for me to wake up at 5 am than hoping to wake up by myself. In that sense, the alarm clock has served my reason to wake up at 5 am, and also my reason to be in London at 7 am (cf. Raz 2006, 1017). What is, then, the distinctive feature of authorities?

Authorities operate by providing their subjects with reasons for action. These reasons can be contained in utterances of all kinds (e.g. prohibitions, permissions) which, for the sake of simplicity, we shall subsume as “directives” (cf. chapter II, p. 43). The reasons for action contained in directives are different from other reasons for action in virtue of their pre-emptive and content-independent nature. We have said that following a legitimate authority improves the likelihood of conformity with the reasons for action of the subjects. It does so in a special way, namely by displacing or *pre-empting* some of the subjects’ own reasons for action. The reasons pre-empted by authoritative directives are some of those which count against acting as required by the authority. In having to decide whether to put on my seatbelt when travelling by bus, I can have a whole set of relevant reasons. Raz calls these reasons *first-order* reasons. Some of them will count in favour of using the seat-belt, others against, and still others will be rather ambiguous. In the absence of other kinds of reasons, decisions are usually reached by balancing these first-order reasons against each other.

The scenario changes, however, with the introduction of another kind of reasons which Raz calls *second-order* reasons. First-order reasons are reasons that constitute our own

assessment of the situation. Second-order reasons, in contrast, are “any reason to act for a reason or to refrain from acting for a reason” (Raz 1990, 39). Directives are second-order reasons because they alter the balance of first-order reasons by requiring the subject to refrain from acting on some of these first-order reasons. If the transport authority is legitimate, then I ought to follow the norm to wear a seat-belt on the bus even if, on my balance of first-order reasons, I have reached the contrary conclusion. Given that the authority is more likely to be right, I ought to follow it and disregard my own, conflicting reasons. Authoritative directives do not, however, need to pre-empt all conflicting reasons. The legal prohibition to cross a red light might not pre-empt my reason to rush to a hospital in an emergency situation by crossing a red light at a deserted intersection with excellent visibility.

The second distinctive feature of authoritative directives is their *content-independent* nature. This means that having authority over subjects does not depend on the latter being able to assess the merits of the authority’s particular directives. If I know that, all things considered, the transport authority can be expected to improve road safety but find myself unable to see the merits of this particular directive to wear a seat-belt, then I should nonetheless follow this directive (cf. chapter IV, p. 96). If the case for legitimate authority can be made, then following the authority’s particular directives does not need to be based on anything more than the fact that the authority has said so (cf. Raz 1986, 35).

In order to avoid confusions, we should at this point briefly introduce Raz’s “dependence thesis” (Raz 1986, 42-53). The dependence thesis states the requirement that the directives of authorities ought to reflect the reasons that apply to the subjects independently of the authority. The directives, that is, “should require action which is justifiable by the reasons which apply to the subjects” (ibid. 51). The dependence thesis can thus be read as a necessary complement to the content-independence of

authoritative directives. When we say that subjects ought to follow the authority for the simple fact that the authority has said so, we should keep the dependence thesis in mind. Subjects ought to follow the authority not for some arbitrary reason, but to the extent that doing so is justified by the reasons for action that the authority purports to serve (see below, p. 37).

The special nature of the reasons for action contained in authoritative directives becomes clearer when we compare them to giving advice. In accepting someone's advice, I agree to include the relevant considerations in my deliberations. My friend's advice to wear a seat-belt is a reason that is to be added up to all other relevant reasons. If the advice is a very good one, it may eventually tip my balance of reasons in favour or against wearing a seat-belt. In that case, the advice would provide the decisive reason for action. But none of this means that advice has pre-emptive force. Very good advice can outweigh conflicting considerations, but it does not replace them. Accepting advice does not, in other words, require me to disregard conflicting reasons for action. Nor does advice count as content-independent. The whole rationale of giving advice is to enrich the argumentative basis on which decisions are made, thus improving the ability to assess the merits of a particular course of action.

A second implication that follows from Raz's characterisation of authority is that the scope of legitimate authority is limited to the type of reasons and the type of persons it can serve. Raz calls this a "piecemeal approach" (Raz 1986, 79-80). The transport authority has authority over reasons related to road safety, but not over reasons related, for instance, to the education of my children. In addition, practical authority is justified only to the extent that it can be expected to increase the likelihood of conformity with my reasons for action. This means that practical authority does not need to extend to everyone. The transport authority has no authority over me if I am as

likely (or more likely) to conform to my reason for action when acting on my own assessment of the situation.

Let us now return to the coordination problem as exemplified by the left-hand driving case. Leslie Green has argued that, in such coordination cases, the utterances of the authority do not have pre-emptive force and thus do not qualify as authoritative (Green 1988, 111-121). For an utterance to have pre-emptive force, it must alter the subject's balance of first order reasons, namely by excluding some of the contradicting first-order reasons. In coordination cases, however, there are no first-order reasons that the authority could pre-empt. Remember the situation of the agent who is about to decide on which side of the road to drive. What she needs in order to resolve the coordination problem is information regarding the behaviour that can be expected from other drivers. This information can be provided by an authority (or indeed any other actor) whose public pronouncement (e.g. that we should now all drive on the left side of the road) can be expected to be followed by most (if not all) drivers. What the agent does is to incorporate this information into her balance of first-order reasons. Once the pronouncement has been made, she has a good reason to drive on the left side of the road (and no reason at all to drive on the right side). There is no need for an authority to intervene in the subject's balance of first-order reasons since there are no reasons to be excluded (ibid. 113-114). It is therefore wrong to interpret the provision of information for the solution of this kind of coordination problems as authoritative reason-giving.

The left-hand driving case can be characterised as a *pure* coordination problem since no other considerations are involved. It is all about knowing how others are going to behave. There are, however, other types of coordination problems, which we may call *hybrid* ones, where coordination plays a role along with other considerations, including epistemic and motivational ones. One of these cases, also related to road traffic, shall be

used in chapter III (see p. 82): Subjects may have quite different views when it comes to decide about speed limits within urban areas. Some may be convinced that the current speed limit is sufficient for the purposes of road safety. Others may be ready to accept that a stricter limit is a better option but be prone to succumb to the temptation of driving much faster. In such situations, it may well be the case that subjects hold beliefs, at the level of their first-order reasons, which conflict with what the authority tells them to do. In such cases, the authority's directive to drive at, say, 30 mph within urban areas can help its subjects by pre-empting some of their conflicting reasons for action (based on the stubborn belief that 50 mph is slow enough, or the urge to drive faster than 35 mph).

Setting speed limits is not only a problem of coordination. The authority should be looking for the right speed limit, i.e. one that helps subjects in reducing the rate of accidents. But it is *also* a coordination problem. In the absence of directives, drivers would be free to act by their own balance of first-order reasons. Some would drive at 50 mph, others at 30 mph, and still others somewhere in between. This could lead to a serious coordination problem given that significantly different driving speeds lead to congestion. We can conclude that the legitimacy of political authorities depends on capacities such as expertise and impartiality, as well as on its capacity for solving *some* kinds of coordination problems, namely hybrid ones.

Here is Raz's own characterisation of legitimate authorities. Raz introduces a legitimacy criterion which he dubs the "Normal Justification Thesis or Condition" (NJT). For the Normal Justification Thesis to obtain, it must be the case

that the subject would better conform to reasons that apply to him anyway (that is, to reasons other than the directives of the authority) if he intends to be guided by the authority's directives than if he does not (Raz 2006, 1014).

This quote reveals that the relation between authorities and their subjects is a special one. The authority addresses its subjects through directives, which are themselves reasons for action, in order to serve other reasons for action, namely those which apply to the subjects anyway, i.e. even if the authority did not issue those directives. The quote also shows that the success or failure in helping subjects to improve conformity with their own reasons for action does not only depend on the authority's qualifications (such as its epistemic superiority, its impartiality, or its capacity for coordination), but also on its capacity to address the subjects in a certain way, namely by enabling the latter "to be guided" by the authority's directives. We shall see, in the course of this and the next two chapters, that enabling subjects to be guided in this way is more complex than it might seem at first sight. In the case of political authorities, it involves a series of considerations about the nature of moral obligations and how they can come to ground the authority's right to rule.

### ***The moral obligation to obey***

So far, we have spoken of authorities in a loose way. In order to clarify the notion of authority that we are interested in, we must distinguish, first, between practical and theoretical authorities, and, secondly, between practical authorities that can come to have the right to rule (e.g. political authorities) and those who cannot (e.g. doctors). Practical authorities serve reasons for action while theoretical authorities provide reasons for belief. Reasons for belief are reasons for holding or discarding certain beliefs (Raz 2006, 1032). Today's weather report indicates a rain probability of 90%. That gives me a reason for believing that it is going to rain – a belief that relies on the status of meteorologists as theoretical experts on weather conditions. It does not, however, give me a reason for action, i.e. a reason to do or refrain from doing anything. For that to be the case, my belief that it will rain would have to stand in a relevant relation to some of my reasons for action such as my desire not to get wet.

Practical authorities are not limited to political authorities. Parents have practical authority over the children, doctors can have practical authority over their patients, and a financial expert can have practical authority over investors (though Raz seems to reject the last assertion, see below). Political authorities are like all other practical authorities in that their justification depends on their ability to serve certain reasons applying to their subjects through authoritative directives. At the same time, they are different because they claim the right to rule, that is, the right to impose on their subjects an obligation to obey the directives of the authority.

Nothing of what we have said so far (including Raz's Normal Justification Thesis) justifies the right to rule. All that we have been able to show is that following a practical authority can be a rational thing to do. The authority's ability to raise the likelihood of compliance can give me a reason to follow the authority: my reason to be healthy gives me a reason to perform the actions which promote that reason. But this clearly falls short of establishing an *obligation* to obey the authority (Sadurski 2006, 388-389; Buchanan 2002, 692).

The obligatory nature of directives in the realm of political authority (and also in that of parents in relation to their children) can only be explained with recourse to reasons of a special kind, namely moral duties. Disregarding the directive of a doctor is seen as a legitimate option. We do not believe that there is an obligation to follow the doctor<sup>6</sup>. Of course, we can (and usually do) try to persuade friends or relatives who refuse to undergo treatment when this is considered necessary from a medical point of view. We hope that she will be able to overcome whatever reasons are holding her back, and eventually decide to follow the doctor's directive. If, however, she decides to refuse

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<sup>6</sup> This discussion is not about whether patients owe their doctors an obligation to obey, but whether patients have a moral obligation to follow the doctor in virtue of some moral reasons that apply to them.

treatment, we do not see ourselves as having the right to blame her for that<sup>7</sup>. Quite the contrary, we tend to feel that her decision should be respected.

Things are different when the relevant reason for action is a moral duty. At this level it is wrong to say that conformity with the reason is optional. The subject is *not* free to choose among different options in the same way as she is free to disregard the doctor's directives. Failing to do what is morally right is, exculpating circumstances apart, considered unacceptable. Unlike the case of the doctor, the rejection of moral duties cannot be justified with recourse to the agent's autonomy. The stickiness of moral duties, their persistent binding character 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 dire need [regardless of what you want]!"

The fact that there is no obligation to obey the doctor may suggest that the doctor is no practical authority at all but only a theoretical authority. Her utterances would then only be authoritative in that they provide reasons for belief but no reasons for action: I am more likely to have the right belief regarding the effects of sunlight exposure if I believe what the doctor says than by following my own observations and beliefs. That is, of course, possible, and it shows that doctors can indeed qualify as theoretical authorities. But can they also be practical ones? If the doctor was only a theoretical authority, then her utterances would not provide content-independent and pre-emptive reasons for action – for all practical purposes, they could only count as advice.

Andrei Marmor suggests that Raz has recently (Raz 2010a) adopted the view that practical authorities can only be legitimate if they help their subjects to comply with

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<sup>7</sup> We can think of exceptions: the father of a new-born baby can be said to act irresponsibly when refusing to undergo medical treatment. But then the blame would be related to the moral duty he has towards the new-born infant, not to some free-standing duty to preserve one's health.

obligations applying to them. Marmor argues that this change of view modifies his service conception of authority in an important way. The legitimacy of practical authorities would no longer be based on their ability to serve reasons for action, but on their ability to serve reasons for action of a certain kind, namely those which constitute obligations for the subjects (Marmor 2010, 8). But that is not quite what Raz says in this article (Raz 2010a). He rather suggests that having theoretical authority is insufficient for becoming a practical authority. His example is not that of the doctor, but that of a financial expert. Raz argues that the financial expert has no practical authority, but only theoretical. And that is so *even if* we make the authority of the expert conditional, i.e. if we accept that the authority of the financial expert is limited to financial matters.

Our test case is going to be one in which a potential investor consults the financial expert because making an investment figures among his personal goals. Raz believes that, even in such circumstances, the financial expert has no practical authority over the potential investor. The latter should “follow” the former, but only in a theoretical sense. That is, he should *believe* that he should invest in the fund designated by the financial expert, “and he should believe that because that is her [the financial expert’s] opinion and she is an expert” (Raz 2010a, 301). Once the subject has formed this belief, the financial expert “no longer meets the condition of the NJT” (ibid.). That is so because “[s]he does not know what he should do better than he does” (ibid.). Raz’s argument is not very clear at this point, but he appears to be saying that, because the subject already has the right belief, there is nothing in his balance of first-order reasons that the financial expert could improve through authoritative utterances<sup>8</sup>. Raz also argues

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<sup>8</sup> A related discussion can be found in *The Morality of Freedom*. There, Raz introduces Ruth (an authority on the stock exchange) and John (an authority on Chinese cooking). He says that neither Ruth nor John can have authority over others (i.e. practical authority) “because the right way to treat their advice depends on my goals” (1986, 64). But then he admits that, under appropriate circumstances (my goal is to prepare the best Chinese meal and to maximise my

that, for the financial expert to have practical authority, the situation would have to involve considerations additional to having the right beliefs, such as the need for coordination or for “concretizing indeterminate boundaries” (ibid.).

I believe that Raz is wrong in restricting the scope of the Normal Justification Thesis in this way. It is perfectly possible to think of circumstances in which the financial expert (and theoretical authorities in general) can qualify as practical authorities and do so in virtue of their theoretical knowledge. I agree with Raz when he says that the authority of the financial expert must be made conditional by “limiting her authority to what she knows about: financial matters” (ibid.). This means that the financial expert would have no authority over someone who has to decide between keeping her money and giving it away for a charitable cause. Making that decision involves considerations that go beyond purely financial matters.

But once we accept this qualification, there seems to be no reason why the financial expert could not, under appropriate circumstances, become a practical authority in addition to the theoretical one that she is in virtue of her expertise. Circumstances would be appropriate if making an investment is prudentially required, i.e. if making an investment is not merely one goal among many others, but the right thing to do when all goals are taken into account<sup>9</sup>. If prudence requires someone to make an investment in pursuit of a certain financial goal (e.g. saving for one’s retirement), then the agent does not merely have reasons for *believing* that she should invest as told by the expert – she also has a *practical* reason to accept the utterances of the expert as authoritative and make that particular investment. There seems to be nothing very controversial in

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savings), both Ruth and John would pass the test of the NJT and their utterances would have to be treated “in exactly the same way as one treats a binding authoritative directive” (ibid. 65).

<sup>9</sup> Christine Korsgaard writes: “The principle of prudence is often understood as a requirement that we should deliberate in light of what is best for us on the whole, or of what I will call our ‘overall good’, where that is conceived as a special sort of higher-order *end* to which more particular ends serve, in an extended sense, as means” (Korsgaard 1997, 217).

saying that having a reason to achieve a certain outcome implies having a reason to do what best leads to the achievement of that outcome. By asserting that the financial expert can have practical authority we do not, of course, say that the financial expert would have the right, as argued by Dudley Knowles (2010, 64), to *command* others to do something. All that we are saying is that the utterances of a financial expert can sometimes be both content-independent and pre-emptive.

What about Raz's assertion that the Normal Justification Thesis ceases to apply once the subject has formed the right beliefs? Raz is right in pointing to the existence of this phenomenon, but the case of the financial expert does not seem to be the appropriate one. We have already seen that there is no need for authoritative intervention in cases where subjects do the right thing by their own balance of first-order reasons. This is the case in situations of pure coordination given that the only reason to prefer one option over the other is the expectation that the other actors will converge on one of the options. There is no need to refrain from acting on conflicting reasons for action because there *is* no conflicting reason (see above, p. 15).

The case of the financial expert, however, is a very different one. Someone who is about to make an investment usually holds a number of beliefs about what to do with his money. These beliefs may be held very strongly (amounting to a firm conviction) or rather weakly (as when someone makes a guess). In any case, however, the intervention of the financial expert has the potential of altering the balance of first-order reasons in an authoritative way. Suppose that I believe that the best way of saving money for my retirement is by storing it under my mattress. The financial expert's saying that I should rather invest my money in a certain fund can –under appropriate circumstances– constitute a reason for me not to act on my belief that I should keep the money under my mattress, i.e. it is a pre-emptive reason for action. I follow the financial expert not because I am now an expert on the same level as she is (I

have not assimilated her beliefs), but because I recognise her ability to make better decisions. This means that my first-order reasons have not changed in any significant way. Because I am still unable to understand the merits of investing in that particular fund, my first-order balance of reasons will probably still point to the option of keeping the money at home. In accepting the expert's utterance as authoritative –i.e. as a second-order reason for action– I am allowing her reason for action to displace some of my own reasons for action. And I do so in virtue of her status as an expert, i.e. as someone who is more likely to have a body of correct beliefs. The situation that Raz has in mind –i.e. one in which the financial expert ceases to have authority over the investor because the investor already has the right belief– would only obtain if the investor decided to become a financial expert himself, thereby being able to form the right beliefs in assessing the merits of particular investment decisions.

The practical authority of the doctor can, I believe, be explained in the same way as that of the financial expert. A doctor is a practical authority in her domain of expertise. The reason why we can disregard her directive is not because she has no practical authority over health issues, but because there are *other* relevant considerations which compete with considerations of health. Changing an unhealthy lifestyle might be exceedingly burdensome for someone who has acquired deeply rooted habits over a very long time. Or think of someone who gets so much pleasure from smoking and drinking while having excellent conversations with friends that the risk of sickness and death can well be accepted. The doctor is an authority as far as improving health is concerned, but not so with regard to these other competing considerations. Decisions concerning the overall good involve more than just health considerations. Following the doctor's utterances will make it more likely for me to stay healthy than acting on my own balance of reasons. I should therefore accept her utterances as content-independent

and pre-emptive, and not merely as advice, but in a qualified sense, i.e. *as far as* the promotion of my health figures in my account of the overall good<sup>10</sup>.

Following Raz's own terminology, we can say that the doctor's utterances fail to qualify as *categorical* because their authoritative nature depends on the personal goals of the subject (Raz 1977, 223-224). We may thus call them *hypothetical*. If, all things considered, the promotion of your health fails to trump other considerations, then there is no reason for you to accept the doctor's utterances as authoritative in a practical sense. Note that the hypothetical nature of the doctor's directives does not undermine its authoritative status – it only makes it conditional. Under appropriate conditions, the doctor's utterances fulfil the two criteria for authoritative utterances, for they can be both pre-emptive and content-independent. They can be content-independent because they can exclude some conflicting reasons for action. In relation to the promotion of my health, the doctor's directive not to run a marathon can preempt my reasons to participate in that marathon. The directives of the doctor can also be content-independent since I do not need to be able to assess the relation between that particular directive and the promotion of my health in order to have good reasons for following the doctor.

Let us now look at the nature of moral duties, for they can explain how the directives of political authorities can be not only pre-emptive and content-independent, but also categorical. We have seen that the question whether reasons for action, such as the promotion of one's health, ought to be followed can depend on considerations about one's overall goals. Moral duties, in contrast, are categorical given that the question whether they ought to be discharged does not, normally, depend on the personal goals

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<sup>10</sup> None of this should be taken to mean that the doctor or the financial expert (or indeed any theoretical authority) require nothing but their theoretical knowledge to become practical authorities. As we shall see in chapter III, there may well be practical skills (especially communicational ones) that are relevant for the theoretical expert to be able to serve its subjects in a practical sense.

of the duty-holder. But that should not be taken to mean that moral duties are conclusive, i.e. that they always ought to be followed. It is perfectly possible to imagine situations in which a moral duty ought not to be followed all things considered. This can be the case in situations where there is a conflict of duties. My moral duty to keep my promise to be at my wife's birthday party at 5 pm ought not to be followed if I have a duty to help someone involved in an accident at the same time. In general, having a moral duty or a moral obligation should not be confused with having a conclusive reason for action. The latter can only be obtained through a process of internal deliberation where the relevant reasons are weighted against (some) other, contradictory reasons. Saying that someone has a moral duty or an obligation to do A is to say "that he stands in a certain relation to another person (or persons) and that there is a good reason (of a special sort) for him to do A" (Simmons 1979, 9).

So while the doctor's utterances are authoritative (i.e. pre-emptive and content-independent) but not categorical, moral duties are categorical. It is in virtue of the categorical nature of moral duties that political authorities can not only come to have authority over their subjects, but can also have the right to rule, i.e. the right to claim from their subjects a moral obligation to be obeyed. Their directives are therefore not only pre-emptive and content-independent, but also obligatory.

The right to rule constitutes a special form of practical authority which does not arise in the case of the doctor or that of the financial expert. If they pass the condition stated by the Normal Justification Thesis, they are legitimate practical authorities. We can think of other practical authorities, such as football referees, where subjects are not only thought to have good reasons, but indeed a legal obligation to obey. That obligation can be explained by reference to the players' contractual obligation to abide by the rules of the game (cf. Raz 1977, 225). The class of practical authorities that have a right to rule is a different one. It is constituted by those persons or institutions that have the right to

claim a *moral obligation* to obey on the side of its subjects. Political authorities fall into this group along with other practical authorities such as parents.

Throughout this thesis, we shall distinguish between moral obligations and moral duties. Obligations shall characterise the normative relation between some practical authorities (political authorities in particular) and their subjects, whereas duties shall be used to characterise the moral reasons for action that apply to subjects independently of the authority. As John Simmons has argued that ordinary language reflects some significant distinctions between obligations and duties. Obligations are owed by a specific person to a specific person or group (or institution, we might add) whereas duties are owed by all persons to all others (Simmons 1979, 14-15). This distinction seems to fit well with our own. The law not to murder, decreed within the jurisdiction of a particular legitimate authority, would thus come to constitute an obligation which a group of subjects has vis-à-vis its authority. The duty not to murder – which the legitimate authority purports to serve through this law – applies, in contrast, to all human beings<sup>11</sup>.

In discussing the moral obligation to obey, we are not asking whether political authorities can be justified in enforcing compliance with the law, or in punishing subjects for their non-compliance<sup>12</sup>. We are only interested in the conditions under which the directives of the authority can be said to generate an obligation to obey on the subjects of authority. What follows from the breach of such an obligation, and who – if anyone – is entitled to take action against such breach is a different question. As a matter of fact, parents punish their children for non-compliance, and political

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<sup>11</sup> Simmons also believes that obligations always correlate with a right held against a specific person, namely the obligee (my duty to obey the authority would thus correlate with the authority's right to be obeyed) whereas duties correlate with rights held against all other persons (everyone has a right against me not murdering them).

<sup>12</sup> This distinguishes our approach from the one developed by Allen Buchanan. He identifies the legitimacy of international legal institutions with their moral justification in attempting to secure compliance (see p. 32 in this chapter).

authorities impose fines, withdraw rights, and punish their subjects for non-compliance with the law. But it is at least possible to imagine a world in which no sanctions exist. In such a world, authoritative directives would still generate obligations to comply for the subjects and subjects could discharge their moral duties by obeying the authority.

In comparing the doctor to political authorities, we have seen that authoritative directives do not have to ground an obligation to obey. Authoritative directives are generally binding on the subjects in virtue of their content-independent and pre-emptive nature. But these two features can only explain practical authority under the hypothetical proviso that the goal which the authority purports to serve is also the goal of the subject. The directives of political authorities are also binding, but they are binding in a categorical sense, i.e. their binding nature does not depend on the goals of the person to whom they apply. We have said that this characterisation –that of reasons for action being binding in a categorical sense– corresponds to moral duties.

What is, then, the relation between moral duties and the directives of political authorities? According to Raz's account of legitimacy, the task of political authorities is to mediate between subjects and their moral reasons for action. The rationale for having an obligation to obey a political authority is not to be found in the consent of the subjects of authority or in another form of allegiance, but follows from the bindingness of the moral duties that apply to the subjects independently of the authority. The obligation to obey the authority depends on the authority constituting a better way of discharging that moral duty. My moral duty not to put others at risk while driving can thus be said to *entail* an obligation to follow the rules of the road to the extent that this is a better way of discharging my moral duty. We can thus agree with Allen Buchanan when he says that the idea that we owe compliance to the government is "irrelevant" (Buchanan 2002, 695). Subjects do not ultimately owe compliance to their political authorities, but to the moral duties that apply to them. In this sense, the moral

obligation to obey political authorities is parasitic on the moral duties that apply to subjects independently of the authority.

Here is an example. Assume there is a moral duty to contribute to the provision of free basic education for everyone. The directives of an authority which satisfied the standard of the Normal Justification Thesis would have binding force on its subjects in virtue of the moral duty to contribute to the provision of free basic education, and in virtue of the fact that following the directives of that authority can be expected to be a better way of discharging that duty as compared to not following the authority.

Let us summarise: We have distinguished between two types of practical authorities, namely those whose directives are authoritative but not categorical, and those whose directives are both authoritative and categorical. The directives of the former type of practical authorities (e.g. doctors) are authoritative in a hypothetical sense, i.e. in relation to the pursuit of a particular goal by the subjects. This means that the directives of a doctor can qualify as authoritative, for they are both content-independent and pre-emptive, but only within the boundaries of the particular goal that her profession pursues, i.e. the promotion of health. Their authoritativeness depends on the coincidence of the goals of the authority with those of the subject. The directives of the latter type of practical authorities, in contrast, are not only content-independent and pre-emptive, but they are so irrespectively of the goals that the subject pursues. That is so because these directives constitute a moral obligation to obey for the subjects. We have also seen that this moral obligation is parasitic on the moral duties applying to the subjects independently of the authority. For the authority to succeed in claiming an obligation to be obeyed, it needs to have the correct purposes and capacities. Its purpose must consist in serving precisely those reasons for action that constitute moral duties for the subjects of authority. And its capacities must be

such that following this particular authority promises to be a better way of discharging those duties.

Of course, that cannot be the whole story when it comes to political authority. At the level of contents, we need to ask what class of moral duties should be served by a political authority. Many morally relevant actions do not enter the sphere of political authority. Many morally relevant actions do not enter the sphere of political authority. To break up a friendship in a perfidious manner may be morally condemnable but it is not regarded as a reason for establishing a legal rule on the conduct of friendships. Nor is it the case that all moral reasons are moral duties. Finally, there can be situations in which deciding by oneself is more important than achieving the right outcome. Think of a very good matchmaker, someone who is much better than the average person in predicting the chances of success for marriages. Could the matchmaker have legitimate authority over average persons, i.e. could there be situations where persons should accept the pairing recommendations of the matchmaker as pre-emptive and content-independent? The answer might be negative if we accept that choosing one's partner for life in an autonomous manner is valuable in itself and that, because of the intrinsic value of making a choice, the result (i.e. a happy marriage) is not all that counts. The answer has to be negative if it is the case that deciding for oneself is more valuable than achieving the right outcome. This is arguably the case in the matchmaker example. The matchmaker would never become a legitimate practical authority insofar as choosing one's partner by oneself is more valuable than increasing the likelihood of choosing the right partner. Raz has dubbed this the independence condition (Raz 1986, p. 57; 2001, p. 123; 2006, p. 2014). The Normal Justification Thesis does not apply wherever the independence condition applies.

### ***Legitimacy and the Normal Justification Thesis***

How are our considerations about the right to rule related to the main purpose of this thesis, i.e. to the legitimacy of political authorities? There is a direct connection between the right to rule of political authorities and their legitimacy. That is so because the right to rule is one of the constitutive features of political authorities – issuing directives that are meant to be obligatory for the subjects is part of what it means to be a political authority (cf. Raz 1986, 23-28). Some have argued that, while this may be true as an historical account as far as nation states are concerned, it does not apply to international legal institutions (ILIs). According to this view (which shall be explored in more detail in chapter VI), ILIs can achieve their goals without having to claim an obligation to be obeyed. While it is true that both states and ILIs can exercise *some* of their functions without having to claim an obligation to obey (a liberty-right may be sufficient), the obligation to obey is required when it comes to serve the kind of reasons that we have discussed here: reasons for action that constitute moral duties for the subjects of authority.

We saw before that reasons can be served in many ways, some of which do not even require the presence of an authority. We are dealing with authorities, and are thus interested in a special way of serving reasons, i.e. one that helps subjects to improve conformity with their own reasons for action by providing them with reasons for action on the basis of which subjects can follow the authority (this is stated in the Normal Justification Thesis, p. 16). There are, of course, many reasons for following the authority. The obligation to obey is only one of them, but its significance for legitimacy considerations can hardly be underestimated.

In the absence of an obligation to obey, subjects can, of course, be guided by other reasons for following the authority such as self-interest or sympathy for the political

leader. But relying on these reasons means that the legitimacy of the authority depends on contingencies such as the coincidence between the authority's goals and the interests of the subjects, or the ability of the political leadership to attract the sympathy of its subjects. The authority would not have legitimacy over those subjects whose interests and feelings do not give them a reason to follow the authority. This would be fatal when making decisions that need to be followed by a vast majority in order to be successful (e.g. decisions involving coordination) or when making unpopular decisions. The latter will inevitably be the case given that the legitimacy of authority does not depend on its ability to serve any kind of reasons, but those which apply to the subjects of authority objectively. The moral obligation to follow the authority is therefore not just an historical fact that we could well do without when it comes to new forms of political authorities, but a crucial element in the absence of which the legitimacy of political authorities rests on shaky grounds<sup>13</sup>.

There is a second, even stronger sense in which the absence of the right to rule damages the legitimacy of political authorities. Some reasons for action can be served simply by producing the right outcome. A train company can help me to conform to my reason to be in London at 7 am simply by getting me there. But things are different when it comes to moral duties. The purpose of the next chapter is to show that persons need to stand in a special relation to their moral duties in order to be able to discharge them – they need to be able to *respond* to those duties. The moral obligation to obey the authority plays a crucial role here, for it opens the way for subjects to respond to their moral duties. Subjects have an obligation to follow the authority precisely because that is a better way for them to discharge their duties. The absence of an obligation to obey thus indicates the inability of subjects to discharge their duties by following the authority. This means that the authority which lacks the right to rule can serve moral

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<sup>13</sup> For more arguments on the importance of moral reasons for achieving coordinated support see Buchanan and Keohane 2006, 410.

duties in a limited sense only. It can help in the achievement of the outcome required by the relevant reason (e.g. by providing public education) but it cannot help the subjects to conform to that reason (e.g. by helping them to discharge their moral duty to contribute to the provision of public education).

Our account of legitimate political authority is based on a framework (Raz's service conception) that is capable of explaining the phenomenon of practical authority in general, and that of political authority as a particular instance of the former. According to our account, a legitimate practical authority is an authority whose status of having authority over its subjects is justified. The element of justification distinguishes legitimate authorities from *de facto* ones. A *de facto* authority either claims to be a legitimate authority or is acknowledged by others to be a legitimate authority, or both (cf. Raz 1986, 46; Green 1988, 60-61). The normal way of finding out whether an authority is justified is by applying the Normal Justification Thesis, i.e. by asking whether the authority can help its subjects to improve conformity with their reasons in a special way (as specified in this chapter, p. 16).

Bas van der Vossen has criticised my account of legitimate political authority on the basis of its alleged inability to track legitimacy (van der Vossen 2008). Allen Buchanan argues in a similar vein: he rejects the applicability of Raz's service conception for legitimacy considerations (Buchanan 2010, 85). Both Buchanan and van der Vossen argue that having authority (as established by the Normal Justification Thesis) is not the same as having the right to rule. I agree. But they also argue –and here I disagree– that being a legitimate authority is to have the right to rule. There are different understandings of the right to rule. For van der Vossen, the right to rule includes a moral obligation, on the side of the subjects, to obey the authority (this is also our understanding of the right to rule). Buchanan proposes a different understanding of the right to rule as far as ILIs are concerned. It includes two elements: (1) The authority

must be morally justified in attempting to secure compliance, including the imposition of costs for non-compliance; (2) the subjects of authority must have substantial moral reasons for compliance (Buchanan 2010, 85). According to Buchanan, this view of legitimacy is superior to the Razian conception since “the mere fact that others would do better were they to obey one does not justify one’s attempting to rule over them” (ibid.). But that is a misrepresentation of the Razian account of authority.

Contrary to Buchanan and van der Vossen, I do not argue that having legitimate authority is the same as having the right to rule. In my understanding, having legitimate authority only means that the utterances of the authority are of a special kind for its subjects, namely content-independent and pre-emptive reasons for action. Nothing that has been subsumed under the right to rule by Buchanan and van der Vossen follows from our conception of legitimacy: (1) An authority can be legitimate and lack an obligation to be obeyed. (2) It can be legitimate and still have no right to attempt to secure compliance. (3) Subjects may have no substantial moral reasons to follow a legitimate authority. Take the case of the Chinese cook. She would only have authority over me if I had a reason (which does not, of course, need to be moral) to prepare a great Chinese dish by acting as she tells me to do, and if that reason was not defeated by other reasons (such as the value of learning to cook by myself). But even then, the authority of the Chinese cook does not mean much. It does not follow that I have an obligation to obey the Chinese cook. Nor does it follow that she is justified in imposing sanctions in the case of non-compliance. The assertion that the Chinese cook has authority over me should rather be taken to mean that, given my reasons for action, her utterances qualify as content-independent and pre-emptive, and that I have prudential reasons for accepting them as such. It is in this limited sense that the Chinese cook is justified in having authority over me.

This should not be taken to mean that the right to rule, understood as an obligation to obey on the side of the subjects, plays no role within our account of legitimate *political* authority. We have already said that the right to rule is critical for the legitimacy of political authorities. But I shall also argue, in contrast to Buchanan and van der Vossen, that asking whether an institution has the right to rule can be answered by asking whether it has justified authority over others. The method for assessing the legitimacy of *political* authorities is not different from the one for assessing other types of practical authorities. In both cases, the Normal Justification Thesis requires us to look at the capabilities of the potential authority for serving reasons. The right to rule is not a legitimacy consideration *additional* to the NJT, but it is parasitic on the reasons that the authority purports to serve. The right to rule obtains if the authority serves reasons for action that constitute moral duties for the subjects of authority. When it comes to such reasons, following the authority constitutes a moral obligation for the subjects insofar as that is the better way of discharging one's duties.

So both Buchanan and van der Vossen are right in saying that having authority in accordance with the Normal Justification Thesis may not be sufficient for establishing the right to rule. But they are wrong in believing that this insufficiency is problematic. Many potential authorities –such as the Chinese cook, or the doctor– do not need to have the right to rule in order to be legitimate. Buchanan and van der Vossen are also wrong in believing that the right to rule and the question of authority are two clearly different things. In the case of political authorities, having authority in accordance with the Normal Justification Thesis is sufficient for establishing the right to rule. The right to rule does not derive from some special features of the authority, but from the reasons that the authority purports to serve. So the right to rule is needed insofar as conformity with the relevant reasons for action includes discharging moral duties.

We should finish this section by noting the limited scope of our thesis. Reasons for action can be served in many ways, among which political authority is only one (cf. chapter IV, p. 110). We are thus interested in a particular way of serving reasons, one that is based on a relationship, constituted by two actors (the authority and the subjects), where one helps the other by providing reasons for action that serve as a guidance for the other to improve conformity with their own reasons for action. Moreover, we are interested in a special kind of reasons for action, namely those which constitute moral duties and can give rise to a moral obligation to obey. Our thesis has a limited scope, but the phenomenon that it explores –the phenomenon of legitimate political authority– is a highly relevant one. After all, states claim to have the right to rule. And the activities of ILIs are also meant to be binding in this sense insofar as they create, apply, and interpret international law. In stipulating legitimacy conditions for this particular phenomenon –i.e. the phenomenon of institutions that claim the right to rule and deal with reasons for action that fall into the domain of the political– we can provide a framework for assessing the system of international law from a philosophical perspective.

Legitimacy is not, of course, the only significant standard for evaluating political authorities, and ILIs in particular. A political authority that fails to be legitimate can nonetheless be very good at achieving certain outcomes, perhaps even better than the legitimate authority (cf. chapter IV, p. 110). But it would lack the moral justification for exercising authority. This lack of moral justification makes the authority a defective one. The authority that lacks this moral justification is unable to establish the particular, morally valuable relationship that consists in helping subjects to discharge their moral duties. The non-legitimacy of an authority can come in different forms. The lack of legitimacy of a brutal dictatorship is clearly different from the lack of legitimacy of an efficient ILI that is on its way to becoming transparent and democratic (see chapter IV, p. 99, and chapter II, p. 60). Because of the positive outlook in the latter

case, subjects may have a good reason to follow the ILI despite its lack of legitimacy at the present time.

***Does following the authority involve surrendering one's judgement?***

One of the most common objections raised against Raz's account is that it fails to address the subjects of authority properly. This kind of criticism is based on different arguments, but it converges on the assumption that, on Raz's account, subjects are expected to submit to their authority to a degree that is at odds with the moral standing of subjects (Waldron 1999, 95-101; Hershovitz 2003, 212-220; Darwall 2010; Soper 2002, 38-50; Einar Himma 2007, 142-144). We should note that the problem is not to be found in the notion of content-independence and pre-emption. After all, we have seen that ordinary morality requires persons to act in such ways. Someone who makes a promise is thereby bound to exclude some conflicting reasons and not to make her compliance with that promise conditional upon an assessment of its merits. That does not seem to be problematic in any way. The problem is not with content-independence and pre-emption as such, but in conjunction with political authorities. As remarked by Leslie Green (1988, 59), "[t]he case of authoritative commands is felt to be different simply because the power to cut off deliberation is in the hands of another person. This leaves one vulnerable to others [...]"

We have already seen that, according to Raz, subjects who are unable to assess the content of a particular directive can have a moral obligation to follow the authority simply in virtue of its saying so (this we called the content-independence of authoritative directives). We also saw that subjects can have the same obligation even if, on their own balance of reasons, they would have acted otherwise (that is the preemptive nature of directives). In the light of these assertions, it might appear, at first sight, as if following political authorities is a matter of blind deference to another person or institution. Dudley Knowles has argued that there is an inherent tension

between the nature of authoritative directives and the subject's ability to judge whether an authority is legitimate. His example is less drastic than ours, but it points in the same direction:

How can I check that a particular government decision concerning the licensing of a drug is motivated by a concern for citizens' health rather than by a desire to make economies in the health service, other than by working out for myself whether or not the decision not to license the drug is likely to promote my health? What then remains of the peremptory status of reasons for action adduced by authoritative directives? (Knowles 2010, 65)

The alleged problem disappears once we consider the different orders of reasons for action. We have already introduced the distinction between first-order and second-order reasons. But there are also third-order reasons. First-order reasons can be characterised as our ordinary reasons for or against doing something, and second-order reasons as reasons for acting or refraining from acting on our first-order reasons. Third-order reasons, in contrast, are reasons for acting or refraining from acting on second-order reasons.

Authoritative directives replace some first-order reasons for action because of their pre-emptive nature. In this limited sense, subjects can be required to surrender their judgment – they are required not to balance the authority's directive against their own conflicting reasons. But this surrender of judgment is only partial (cf. Green 1988, 108-109). We have already seen that authoritative directives do not pre-empt all conflicting reasons. The directive not to cross a red light might be disregarded under some special circumstances. But there is also the kind of reasons that results from an evaluation of the authority's purposes and capacities as required by the Normal Justification Thesis. These reasons are considerations about the authority's legitimacy and can thus provide the subject with reasons to follow the authority or not. These reasons can be labelled as third-order reasons – they are reasons to act or to refrain from acting on second-order reasons. Having a third order reason to follow a particular authority therefore means having a reason to accept the directives of that authority as authoritative. Thomas May

calls these third-order reasons “strategic”. I can accept a directive for the strategic reason that the authority qualifies as legitimate, i.e. that following the authority makes compliance with my reasons more likely than acting on my own balance of reasons<sup>14</sup> (cf. May 1998, 146). Note that there is no contradiction between the assertion that subjects are required not to act on some of their reasons and the assertion that subjects ought to evaluate their authorities. There is no contradiction because the evaluative requirements of first-order reasons can be separated from the evaluative requirements of the third-order level. Subjects can refrain from acting on some of their first-order reasons for action when it comes to follow a particular directive while, at the same time, acting on their own balance of reasons when it comes to assess the general ability of the authority to serve their subjects (cf. chapter IV, p. 97).

It is therefore possible to follow an authority without surrendering one’s judgement even if one is unable to assess the merits of the authority’s particular directives. I may have no clue about the reasons that militate in favour of prohibiting a certain drug, but follow the authority on the basis of reliable beliefs in the authority’s general capacity to improve conformity with my reason to stay healthy. I would then follow the authority for the strategic reason that their directives are part of a system of norms whose common and ultimate goal is to promote health, and that the authority represents the most promising way of improving compliance with that goal. This differentiation between directives and goals also explains why directives can be binding on the subjects even if they do not improve conformity with reasons. The legitimacy of political authorities does not depend on the merits of single directives, but on the question whether the authority can be expected to serve reasons all things considered. This is compatible with a situation in which, say, 30% of all directives turn out not to be helpful – what matters is the overall result.

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<sup>14</sup> There can, of course, be third-order reasons other than the belief in its legitimacy (following the authority to avoid torture would also qualify as a strategic reason).

Over the next two chapters, we shall provide some further arguments to show, in much more detail, why the participation of subjects is both possible and significant within Raz's account of legitimate authority. The intention of both chapters is to show not only that subjects can have plenty of participatory scope without undermining the content-independence and pre-emptive nature of authoritative directives. They are also meant to show that Raz's account, properly understood, ought to incorporate the ability of subjects to participate as a condition that is directly related to the legitimacy of political authorities.

## II. Moral Duties and the Obligation to Obey

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### *Locating the problem*

This chapter and the next one are concerned with the relation between the participation of the subjects and the legitimacy of authority<sup>1</sup>. In this chapter, I argue that authorities lack the right to rule unless subjects can form reliable beliefs about their activities. In the next chapter, I claim that we should be sceptical about the possibility of authorities having legitimacy regarding decisions that are essentially moral ones.

Both chapters endorse participation, but for different reasons and in different ways. The present chapter is concerned with the features of practical reasoning. What is a moral obligation? What does it require for an authority to succeed in imposing, on its subjects, a moral obligation to obey? We are concerned, in other words, with the relation between subjects and some of their reasons for action, and the way in which political authorities can mediate or obstruct that relationship. The arguments of the next chapter, in contrast, are about the possibility of moral expertise in the domain of political authorities. There, I shall draw a distinction between moral reasoning about overall goals and technical reasoning about the implementation of such goals. I shall argue that authorities can be expected to serve the reasons of their subjects in the latter domain, but not so in the former. I shall conclude that subjects should have the right to decide by themselves at the moral level of overall goals.

The arguments presented in this and the next chapter modify Raz's account to a significant extent. I want to show, against Raz, that participation stands in direct

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<sup>1</sup> From here on, any reference to authorities shall be taken to mean political authorities unless otherwise noted.

relation to the legitimacy of political authorities as measured by the Normal Justification Thesis. Authorities, that is, are impaired in their capacity to serve the reasons of their subjects unless the latter have the possibility of participation. Raz himself would probably not accept this claim, although he is aware that further explorations in this direction could be promising. In an article published in 2006, he expresses a worry regarding his conception of authority. He begins by stating:

The problem I have in mind is the problem of the possible justification of subjecting one's will to that of another, and of the normative standing of demands to do so (Raz 2006, 1003).

He then examines, and eventually rejects, two possible candidates for solving the problem: consent and "collective identities". In the final part of the same article, he concedes:

[T]he feeling persists that the solution to the moral question given before left some of our concerns unanswered (ibid. 1039).

In another section of that same article, there is a footnote where he refers to the significance of democracy. He acknowledges that "in many countries" democratic governments have "unique claims to enjoy some qualified or limited authority, either through their ability to produce beneficial results or because of their ability to give expression to people's standing as free, autonomous persons, or whatever other values they serve" (Raz 2006, 1031 fn.).

Our defence of participation (which includes, but is not limited to democracy), rests on a different strategy. Our argument does not depend on empirical claims according to which democracies produce better outcomes, or on some defence of autonomy, but on an examination of the conditions that need to obtain for authorities to be able to help their subjects conform to their reasons for action. Our modification of Raz's account of legitimate political authority is, however, a friendly one. We do not mean to reject the Razian framework, but to supplement it. We accept the standard of the Normal

Justification Thesis along with its assumption that the legitimacy of political authorities must be based on their capacity to help subjects improve conformity with some of their reasons. But we also believe that taking this condition seriously must lead to a defence of participation that stands in direct relation to legitimacy considerations – and that is something which Raz has not developed.

### ***The moral obligation to obey***

This chapter is concerned with the moral obligation to obey. According to Raz, any political authority (even a non-legitimate one) claims a right to rule, which is said to imply the obligation to obey on the side of the subjects (Raz 1986, 23-28). In the previous chapter, we saw that having the right to rule (and not merely claiming it) is a crucial condition for legitimacy to obtain. An authority which lacks the justification for claiming an obligation to be obeyed is deficient in two regards. First, its legitimacy is contingent as it depends on whether subjects happen to have non-moral reasons for following the authority. Secondly, an authority which does not have the right to rule cannot help its subjects to discharge their moral duties – in this chapter we shall see why this is the case.

We have also seen that the right to rule distinguishes political authorities from other practical authorities, such as doctors, whose directives can be binding but do not entail an obligation to obey for subjects. And it also distinguishes political authorities from entities such as criminal organisations which are not justified in claiming a moral obligation to be obeyed and thus depend on credible threats and their *de facto* authority<sup>2</sup>. In this section, I shall argue that the moral obligation to obey political

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<sup>2</sup> A *de facto* authority either claims to be a legitimate authority or is acknowledged by others to be a legitimate authority (or both, cf. Raz 1986, 46; Green 1988, 60-61). Criminal organisations, such as the mafia, often claim an obligation to obey from their “subjects” who, in turn, can develop the belief that the criminal organisation has the right to rule and therefore accept the demands of the mafia as pre-emptive and content-independent. Of course, none of this is

authorities depends, in a way that shall be clarified, on the morally binding character of the reason that the authority is meant to serve. The reasons to be served that we are interested in are the ones that constitute a moral duty for the subjects. In order to succeed in claiming an obligation to be obeyed, the authority must *mediate* between the subjects and their duties in a way such that the subjects can be said to have the obligation to discharge their duties precisely by following the authority.

To avoid confusion between the moral requirement to follow the authority and the moral requirement resulting from the reasons for action applying to the subjects independently of the authority, I have introduced two different terms in the previous chapter (p. 26). There, the moral requirement to follow the authority has been characterised as a *moral obligation* whereas the moral requirement to conform to the reasons applying to the subjects has been characterised as a *moral duty*. The dependence thesis (presented in the previous chapter, p. 13) suggests that the existence of an obligation to follow the authority must be parasitic on the existence of a moral duty. The Normal Justification Thesis, on the other hand, specifies the conditions for following the authority: I have a moral obligation to follow the authority only if doing so can be expected to be a better way of discharging my moral duty.

But before we go on to characterise the obligation to follow the authority and the duty to conform to a reason for action, we should note that the relation between political authorities and their subjects includes more than just the moral obligation to obey. Authorities help their subjects to improve conformity with their reasons for action not only by imposing obligations on them, they also do so by conferring rights, such as the

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sufficient for establishing a moral obligation to obey – not every *de facto* authority is a legitimate authority.

right to sign legally binding contracts or the right to drive a car<sup>3</sup>. And political authorities can have rights over their subjects even if the latter have no obligation. A state may have the right to restrict access to a vaccine to a certain group of citizens, but that does not have to correspond with any obligation on the side of the citizens (except for the obligation not to interfere with the authority). While it is right to say that “[o]rders and commands are among the expressions typical of practical authority” (Raz 1986, 36) it is nonetheless slightly misleading to reduce the interaction between political authorities and their subjects to the issuing of “directives” (cf. Raz 2006, 1025). That would seem to imply that political authorities communicate with their subjects *only* by ordering or commanding them in the form of prohibitions or obligations. Such an understanding would, as we have just seen, be too narrow if we want to include all the relevant activities of political authorities.

For the purposes of this thesis, however, we shall only be concerned with the reasons for action that have the potential of creating an obligation to obey on the side of the subjects<sup>4</sup>. These reasons are, as we saw in the previous chapter, moral duties. The central argument of this chapter is that political authorities cannot help their subjects discharge moral duties if they are unable to impose a moral obligation to obey on their subjects. The moral obligation to obey the authority obtains only if subjects are able to relate the directives of their authority to their own moral duties. For that to be the case, subjects need to be able to form reliable beliefs on the authority’s purposes and capacities. And we shall see that the inability of subjects to participate in this way can normally be traced back to the non-transparency of political authorities. An authority which fails to be transparent will thus not be able to mediate between subjects and

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<sup>3</sup> Some rights correspond to duties, others do not. My right to drive a car does not correspond to any duty for others (except for the obligation not to interfere). But my right to receive assistance in a situation of emergency corresponds to a duty for others to help.

<sup>4</sup> Leslie Green emphasises the significance of the problem of moral obligation for political authority: “[t]he problem of political authority is about the possibility of a particular ground of compliance – the belief that the state has moral authority, that it can create duties for us” (Green 1988, 87).

their moral duties. This failure of mediation is directly related to legitimacy considerations: non-transparent authorities are not only unable to claim an obligation to be obeyed – they are also unable to serve the reasons for action that constitute moral duties insofar as they cannot help subjects to discharge those duties. This failure is troubling because many important reasons for action that authorities pretend to serve are moral duties. Criminal law, for instance, depends in a crucial way on reasons for action that are moral duties. The ability of subjects to respond to their moral duties is an important feature of any criminal system in addition to those related to desirable outcomes. A criminal system that focuses only on certain outcomes (e.g. a lower rate of crimes) but neglects the significance of the relation between subjects and their reasons for action would certainly be deficient. The very idea of punishment would make little sense if it did not imply the possibility of offenders accepting their wrongdoing and going through a process of “secular repentance” (Duff 2001, 106-112).

In order to successfully claim an obligation to be obeyed, political authorities (and not just in relation to criminal law, but where moral duties are involved) must be shaped in a way such that subjects are able to get involved in a certain way. This modification is chiefly based on two argumentative steps. The first argumentative step is not particularly related to political authorities, but to moral duties (and obligations) in general while the second one is specifically about the obligation to follow political authorities. *First*, in order for subjects to have moral duties, they need to be in a position where they are able to grasp the normative nature of that duty and to respond to it. *Secondly*, in the context of the relation between authorities and their subjects, the latter will only be in such a position if they are able to form reliable beliefs about the relation between the activities of their authority and the reasons for action these activities are meant to serve. A non-transparent authority obstructs the capacity of its subjects to form such reliable beliefs and thus eclipses the moral duty of the subjects. This does not mean that subjects no longer have those moral duties. It rather means

that following the authority is not a way of discharging that duty. Let us now examine these arguments in detail.

### ***Conditions for having a moral duty and moral obligations***

This is not the place to provide an extensive account about the nature of moral duties and obligations. We will have to content ourselves with a simple characterisation – one that is plausible enough to capture its most important features. Someone who has a moral duty or a moral obligation is said to be bound by a moral reason for action (but not all moral reasons for action are moral duties). Being bound by a moral reason for action is stronger than just having a moral or non-moral reason. I can have a reason to wash my clothes, perhaps even a very good one (doing so would make life so much nicer for all the people around me), but that is not sufficient for saying that I am *bound* to wash my clothes. Nor is it sufficient that the reason for action that applies to me is a moral one. I can be in a situation where I have access to information whose publication could help to expose a corruption scandal while also putting my life and that of my family in danger. Because of the risky circumstances, I may have no moral obligation to make the information public but doing so would certainly be morally good. I would therefore have a moral reason for action but no obligation. Moral obligations, in contrast, are binding in a categorical sense (see p. 24). That would be the case if by washing my clothes I could avoid the outbreak of a deadly infection without putting myself at increased risk. Here, it would make sense to say that I am morally bound to wash my clothes. Avoiding the outbreak of a deadly infection is a weighty moral reason, but moral obligations do not have to be based on weighty moral reasons. Promises are thought to constitute moral obligations, but some of them (such as the promise to meet a friend for a coffee) do not seem to be especially weighty.

Moral obligations can be understood as demands placed upon persons (cf. Darwall 2007). In our scenario, it is the political authority which places a demand on its subjects

by claiming an obligation to be obeyed. That is not, of course, an exhaustive characterisation of moral obligations. Nor does it apply to all instances of moral obligations, for not every moral obligation comes in form of demands (cf. Sinnott-Armstrong 2008, 90-91). But this understanding does make sense in the context we are interested in, namely that of authorities issuing directives at their subjects.

How does a moral demand manifest itself? To tackle this question, we need to focus on the relation between a person and her reasons for action. An adult person normally has the ability to grasp, by herself, the relevance of reasons for action applying to her, and to respond in accordance with the demands of those reasons. This way of relating to reasons (not only moral ones) is the basis for explaining actions. An action signals a particular relationship between the agent and her reason for action. In performing an action, the actor *responds* to the reason by bringing (or trying to bring) about the state of affairs required by that reason while, at the same time, being disposed<sup>5</sup> to *attribute* the action to her reason for action (cf. Audi 1997, 80-85). The attributive element has an explanatory function. The subject is able to relate an occurrence to her, and to explain her action with reference to her reason<sup>6</sup>. She does so by interpreting the occurrence as a response to her reason for action. And her response is *guided* by the belief in certain actions as conducive to meeting the demands of those reasons.

There are, of course, many ways of responding to reasons. It is possible to act *on* a reason for action, in which case the reason is said to motivate the action (totally or partially). It is also possible not to act on a reason for action, but still be aware of its relevance. Take the reason to help a friend who needs help with her homework. I can

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<sup>5</sup> Talking about a *disposition* captures situations in which one is not aware of one's agency (such as absent-mindedly waving to a friend). After reflecting on that occurrence, however, the agent would be able to attribute the waving to one (or more) of her reasons for action (Audi 1997, 83).

<sup>6</sup> Some actions can be explained with reference to reasons that are objectively false. Bernard Williams' example of a person who drinks a glass of petrol because she confused it with gin is a telling case (see chapter I, p. 7).

keep my promise to help because I enjoy the chocolate cake she has made, while, at the same time, being aware that the promise I have made constitutes another reason for me to help her. That second reason may not have any motivating force on me (if she did not bake the chocolate cake, I would not help her and thus break my promise). Even so, in helping my friend I am fully aware that my action fulfils the demands placed upon me by the promise – in that sense, I can also be said to respond to my reason to keep my promise<sup>7</sup>.

Finally, and most of the time, we fulfil the demands of reasons without even being aware of those demands. Our everyday routine contains countless potential situations which are prohibited by morality. Most of the time, we conform to these prohibitions without even noticing their actual relevance. On the way to my student room I could set fire in the hallway, trip somebody up, turn on an empty electric kettle, put a metallic object in the microwave oven, etc. I observe all these prohibitions even if they never come to my mind because my only reason to go to my room is my desire to make a phone call. Even in those cases, there normally is a disposition to link the action to the reasons contained in the prohibitions. Those reasons have a backup function, which means that the agent is ready to draw upon them if necessary. If someone asked me why I moved into my room without setting fire in the hallway I can certainly quote my desire to make a telephone call. But unless I am morally deficient, my pool of reasons from which I am prepared to draw is much wider than my desire to make a telephone call. I would be outraged if my friend thought that only non-moral reasons, such as my desire to make a telephone call, could play a role in me not causing a fire. It is therefore wrong to assume that failure to draw upon a moral reason in bringing about the desirable result is equivalent to a lack of commitment to the relevant moral reason. The contrary could be true. My failure to draw upon the moral reason not to set fire can be

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<sup>7</sup> The possibility of this would be denied by internalism, at least in its motivational variant according to which a moral belief is intrinsically motivating.

due to the fact that that is simply not needed in the given circumstances. The moral reason not to set fire could, however, be mobilised if necessary, i.e. if my desire to make a phone call is insufficient for observing the moral prohibition. In that sense, it should be called a *backup* reason. I am prepared to draw on that reason as soon as it becomes necessary for doing what is right. Had I not had a desire to make a phone call but rather stumbled upon a match and toyed with the idea of lighting it, then the reason not to set fire would have gained relevance, i.e. I would have had to consider it and respond to it. It would also have gained relevance had I discovered a fire on the way to my room. This type of reasoning shows how moral reasons operate in the background of our everyday actions. Those moral reasons are normally available to explain our actions in a wider sense, through counterfactual assumptions.

This capacity, namely that of actors being able to grasp the significance of practical reasons and to use them as grounds and guides for their own actions, constitutes the basis for thinking of persons as having moral duties. Consider the case of someone whose intellectual deficiencies make it impossible for her to understand the meaning and normative implications of killing. For such a person, shooting at a person has the same moral significance as shooting at a wall. Because of her total incapacity, it is hard to see how we could think of her as having a duty not to kill. In what sense can we say that the moral reason not to kill *applies* to her, or, more importantly, that she is morally *bound* by it? Given her radical incapacity to grasp the moral dimension of killing, any attempt to establish a bond between the moral reason not to kill and the actions of that person appears futile.

The moral rightness or wrongness of someone's actions must depend, at least to some extent, on factors which are relative to the agent's capacities. It is an open question how strong that dependency should be. Consequentialists tend to focus not on the qualities of the actor, but on the results of someone's actions. But even that view cannot survive

without reference to agents and actions. The reason for this is not hard to see. Morality is concerned not just with good or bad occurrences, but with the things that persons do or refrain from doing<sup>8</sup>. Morality places demands on actors. It imposes tasks whose form and content are tailored for human beings<sup>9</sup>. Morality would defeat its purposes if it asked persons to do things which are not in their power, either because of their intellectual or because of their physical deficiencies. A duty to stop the sun from burning out in order to save generations in the very distant future makes no sense given that nobody –not even the leading expert in astrophysics– has the ability to even start thinking about possible ways of discharging the alleged duty to stop the sun from burning out. The demands of morality need to be concerned with state of affairs that are not only good, but *available* to persons.

There are at least two understandings of “available”: a narrow and a broad one. The *narrow* one excludes actions that are physically or mentally impossible to perform, such as preventing the sun from burning out or demanding an irreversibly amoral person to commit herself to a moral reason. The *broad* understanding excludes not only impossible actions, but also those which are possible but where it is impossible to form an intention regarding the required action. According to Antony Duff, acting with an intention to *x* is to act in order to bring about *x* (Duff 1990, 72-73). Think of a situation where I need to open a safe with a combination of four digits in order to activate an alarm which, we assume, is the only way to save another person from being killed. I have one try. Is it *impossible* for me to activate the alarm? Certainly not. I can enter some random numbers, and there is a small but nonetheless existing probability (0,01%) that I will get it right. However unlikely that is, it is nonetheless possible for

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<sup>8</sup> Onora O’Neill argues that actions are an important category for consequential ethics for two reasons: Human capacities, capabilities, and activities are likely to be part of what is judged to be good. And, secondly, consequential reasoning can only guide action (so as to achieve the desirable outcomes) if it operates in categories that are intelligible (and, I should add, achievable) for agents (O’Neill 1996, 70-71).

<sup>9</sup> Or, in a Kantian reading, for any being endowed with practical reason.

me to enter the right combination. I just need to give it a try. But is this sense of “possible” sufficient for saying that my failure to enter the right combination amounts to a morally wrong action? That would seem odd, and it leads to awkward conclusions. As a matter of fact, almost all our actions would be morally deficient given that we could all stop our ordinary work right now and start typing “the article that announces how to cure AIDS, the long-awaited Great American Novel, and the Islamic equivalent of Locke’s *Letters on Toleration*” (Wiland 2005, 357). While none of those achievements seem probable for most of us, they remain possible. All that we have to do is to assemble the right combination of words and sentences.

Why do we tend to think that tasks like these do not qualify as moral demands? One could assume that the problem here is the extremely low level of probability. Getting a four digits code right, or writing a revolutionary text by accident, is highly improbable indeed. Because of this, one might deem such demands to be too strenuous for any person. But that conclusion is wrong, for it assumes that morality cannot demand difficult tasks from us. Of course it can. If I deliberately push someone into a raging current, I have strong moral reasons, perhaps even an obligation to rescue that person even if (or perhaps precisely because) the current is extremely dangerous, and even if I am not a very good swimmer. The difficulties of performing the rescue, and the low probability of me being able to save that other person, are no good reasons for denying that such a moral reason exists and has normative bearing on me.

It is not the high improbability which calls into question the moral relevance of the other examples, but the impossibility to form an intention, i.e. the impossibility to act *in order to* bring about the desired result. No reasonable adult person with fully developed moral capacities can be expected to form an intention with regard to the tasks mentioned in those other examples (such as accidentally writing the article that announces how to cure AIDS). An intention is formed when someone’s actions are

*guided* by the requirements of the relevant reason. My moral reason to help a person from drowning does not only specify the result to be achieved (pulling her out of the water), but enables me to reason about the actions which are *conducive* to that result (such as jumping into the water, or calling for help), and those which are not (such as running away, or remaining passive). This guiding function of reasons is not limited to overall instructions, but serves as a yardstick for the context and the many stages into which the performance of an action can be divided and subdivided. After jumping into the water, I need to adjust my movements continuously in order to reach the other person as she floats away. Having reached her, I will have to find the best way of pulling her out. If I see a boat approaching, I should cry for help, and so on.

Compare this to the alleged moral reason to save a person from being killed by entering the right combination of numbers in order to activate an alarm. Here, the alleged reason fails to guide the actor. I certainly know that I need to enter a combination of four numbers, that only one combination will activate the alarm, and that I have only one attempt. However, I am unable to devise any meaningful strategy for performing the essential task. There is no evidence as to what combinations of numbers will be more conducive to activating the alarm, which means that I am unable to perform an action *in order to* enter the right combination (cf. Duff 1990, 56-57). Without the possibility of forming an intention, the demand to enter the right combination of numbers has no normative bearing on me. Again, it is *not* as if I did not have any moral duty at all. Knowing that activating the alarm is going to prevent someone from being killed gives me a strong moral reason to type some numbers. But the *essential* task, namely entering the *right* combination of four numbers, cannot be called a moral duty. I can only have a duty to enter *any* (i.e. a random) combination of numbers. More than that cannot be demanded from me. Note, again, that the problem does not rest upon the fact that success is almost impossible to achieve. It is the contingency, the accidental nature of a successful outcome which robs the actor of any capacity to act in

order to achieve the desired result. With a probability of 0.01%, we can expect one in 10,000 persons to succeed. But that person is not going to succeed because of her ability to grasp the normative requirements of a supposed reason for action and to act accordingly, but because of pure and simple luck.

The notion of persons being able to grasp the normative significance of their reasons for action and responding accordingly is not only important for explaining how moral duties can come to have normative bearing on persons. It is also significant for explaining the possibility of justified or excused wrongdoing. The point is interesting for the purposes of our thesis as one might be tempted to think that, despite one's incapacity to respond to the relevant reason, one can still breach an obligation through non-culpable wrongdoing. I shall argue that this view is wrong. We should start by noting briefly that the possibility of justified or excused wrongdoing is controversial. J. L. Austin, for instance, argued that justifying someone's behaviour is to deny its wrongness, while excusing that behaviour is to deny the actor's (full or partial) responsibility for it (Austin 1961, 124). More recently, Eduardo Rivera López has denied that morally wrong actions can ever be fully excused. According to Rivera López, being fully excused for doing X means, as a matter of necessity, that refraining from doing X was unachievable for that person (Rivera López 2006, 130). In this context, "unachievable" should not be taken to mean "very difficult to perform" but rather "too demanding" (ibid. 131). Morality is said to impose demands on persons. It imposes requirements which have the characteristic of being demandable (ibid. 128). An action which is too demanding, however, implies that it is "non-demandable" and therefore cannot be required by morality (ibid. 129). It follows that someone who is fully excused for her behaviour cannot be said to have done something wrong.

The problem with such general denials of justified or excused wrongdoings is that they fail to explain why many persons feel morally responsible even though they are –and

see themselves as– fully justified or excused for what they did. We can assume, for the sake of the argument, that Oedipus had no way of knowing that the man he killed was his father and the woman he married his mother. More than that: after being warned by the prophecy of the Oracle he took strong precaution in leaving his homeland. So he could not be held (fully) responsible for the fulfilment of the prophecy. Nonetheless, his self-inflicted torture can be interpreted as the admission of tremendous wrongdoing. But how could that be? Was Oedipus simply behaving irrationally? Was there nothing in his actions he should have felt bad about? Note that the phenomenon is also present in modern times. Persons who kill in self-defence are often deeply troubled by what they did, even if they accept that their actions are not blameworthy in a legal or moral sense.

According to John Gardner, such situations are better understood if we jettison the assumption that persons are justified or excused because they have no responsibility in doing what they did. Quite the contrary, they are justified or excused precisely because of their responsibility. Responsible agents are characterised as “those who are in a position to answer for their wrongs, or in other words to venture justifications and excuses for what they did” (Gardner 2007, 84). The difference between justification and excuse lies in the types of explanations offered for one’s behaviour. To justify someone’s wrongdoing is to cite reasons the agent had for doing what she did. Someone who kills in self-defence can thus justify her behaviour by pointing to the imminent threat to her own life.

Excuses, on the other hand, do not rely on reasons that militate in favour of what the agent did, but are to be found on the secondary level of “reasons the agent had for thinking that she had reasons for to do as she did, or reasons for being inclined or inspired or driven (etc.) to do as she did” (ibid. 86). Here, the explanation does not rely on direct reasons in favour of what the agent did, but –indirectly– on reasons that

favour beliefs, emotions or attitudes which can, in turn, motivate the wrongdoing. The agent who kills someone else after accidentally straying onto the set of an action movie may have very good reasons to believe that she had a reason of self-defence. But because of the wrongness of her belief, it would also be wrong to say that the agent was justified in doing what she did. Instead, she is excused because she had good reasons for thinking that there were strong reasons militating in favour of what she did. Excuses can not only be invoked in cases of wrong beliefs. Take the case of women killing their husbands after experiencing prolonged periods of domestic violence. Such women can be excused provided they had good reasons to be in a state of emotional distress on the strength of which they took that action (ibid. 86).

Despite their different rationales, both justification and excuse are strongly tied to responsibility according to Gardner's account. Responsibility is said to play a central role in explaining the possibility of both justified and excused wrongdoing:

[O]ffering an excuse is not a way of denying, but rather a way of asserting, one's responsibility. For having an excuse, like having a justification, is by its nature an affirmation of one's rational competence. Both justifications and excuses are rational explanations for wrongdoing. They explain why the agent acted as she did by pointing to reasons that she had at the time of her action (Gardner 2007, 86).

Gardner's argument defending responsibility serves to clarify the crucial importance of agents engaging with their reasons for action when it comes to explaining the many facets of wrongdoing. To be able to offer a justification or an excuse, agents need to show that, despite the adverse normative consequences of their actions, they had good reasons for acting as they did. They are able to answer for their actions because, in doing what they did, they responded to certain reasons. That brings us back to our earlier examples, where we tried to show that there can be no moral obligation to enter a right combination of numbers, or to find the cure for AIDS, precisely because the agents are unable to respond to those reasons for action. Someone who, in contrast, breaches her moral obligation for no good reason, but out of disregard or contempt for

the relevant norms and values, cannot rely on any justification or excuse. The same applies to someone who fails to show an appropriate commitment to the norms and values she was able to understand (Duff 1993, 360). In all such cases, the agent's wrongdoing is said to entail blameworthiness. She can be held responsible for failing to show an appropriate response to her moral duties.

Denying the capacity of a person to commit herself to moral values does not only deny responsibility, but is also said to be degrading (Gardner 2007, 85). Denying that the person who killed in self-defence is responsible for her wrongdoing (i.e. capable of answering for her wrongs) is to deny that person's rational capacities. It is to treat her behaviour pathologically, as an affliction, something for which she can offer no good reasons at all (ibid. 86).

### ***Introducing authorities***

In the previous section, we discussed the conditions under which subjects cannot be said to have a moral duty. Subjects who have no mental capacity to understand the normative significance of moral reasons cannot be said to have a duty to comply with those reasons. Nor can subjects confronted with demands they cannot adequately respond to be said to have a moral duty in relation to those demands. What happens with the introduction of political authorities? We have characterised the relation between a person and her reasons for action as an immediate one: the subjects have access to, and are guided by, their reasons for action. The introduction of authorities changes the landscape. The subjects of authority are not supposed to achieve conformity with their reasons for action in direct interaction with those reasons, but indirectly, i.e. by following the directives of their authority.

Authorities have a mediatory role. It is important to note that this mediatory aspect, which puts subjects in a position where they have to rely on the authority in order to

achieve or improve conformity with their reasons for action, is not intrinsically problematic. Content-independent and pre-emptive reasons for action do not only exist in the context of authorities. In making a promise, I am creating a reason for action that replaces some conflicting reasons and whose bindingness does not depend on my assessment of its merits. Being influenced by reasons for action that do not correspond to one's own, first-order level of reasons for action is not problematic as long as "one's ultimate self-reliance is preserved, for it is one's own judgment which directs one to recognize the authority of another, just as it directs one to keep one's promises, follow advice, use technical devices and the like" (Raz 2006, 1018). The role of political authorities becomes problematic when their purposes and capacities cannot be assessed by the subjects (this assessment corresponds to the level of third-order reasons, see chapter I, p. 37).

The previous quote shows, once again, that Raz does not say that authorities ought to be followed blindly by deferring one's own judgment. It would therefore be unfair to say that Raz wholly fails to recognise the significance of participation. In another section of his 2006 article, which is entitled "Reason and Knowability", he explicitly defends the ability of subjects to form reliable beliefs about their authorities:

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

Raz goes even further than that. The absence of a trustworthy belief in the authority's legitimacy does not only mean that it would be irrational, or not worthwhile, to follow the authority, but that the reasons for action contained in the authoritative directive "do not exist" (ibid. 1026). They do not exist because "[i]n general we have no reason to pursue the means unless they are worth pursuing, given the cost of doing so relative to

the importance of the ends" (ibid). The following case may help illustrate the point. Suppose that you are in a bar whose ceiling, unbeknown to you, is about to come down in any moment. A drunken man, whom you do not know, walks into the bar and yells at you. He tells you to leave the bar immediately. Do you have a reason to leave the bar immediately? I believe that you *do* have such a reason, even if you have no way of knowing that the ceiling is about to come down. But it does *not* follow that you have a reason to obey the drunken man – even if he happens to be a theoretical expert on the safety of buildings who, because of his expertise, recognises that the building is about to collapse. The reason to leave the bar exists independently of what the drunken man says to you, just as the reason not to harm others in the streets exists independently of what the authority says to you. The utterances of both the authority and the drunken man will become a reason for you only if they add something new to that already existing reason. And that would be their ability to help you, that is, to offer a way of improving conformity with those independent reasons.

One of the conditions needed for someone to have a reason to accept help is that she can form reliable beliefs about the plausibility of what the potential helper says and does. In the case of political authorities, subjects need to be able to form reliable beliefs as to whether following the authority is going to make them (the subjects) more likely to improve conformity with their reasons. Subjects who have no good reason to believe that their authority is able to offer that improvement have no good reason to follow the authority. It follows that the authority fails in its purpose to offer reasons for action, in the form of authoritative directives, capable of guiding subjects to improve conformity with their reasons. Raz is, therefore, well aware that the beliefs of subjects do play an important role in the context of authority.

His argumentation is, however, substantially different from ours in that he only offers a practical argument for subjects having epistemic access to the activities of the authority

whereas we argue that such access is directly relevant for the legitimacy of the authority. Raz says that reliable beliefs about the authority's legitimacy are important because they constitute the normal reasons for which subjects follow the directives of their authority. In Raz's view, having reliable beliefs is a requirement of practical reason for securing conformity with authoritative directives. Raz seems to think that subjects only have a reason to follow the authority if they are able to form reliable beliefs about the authority's legitimacy. But that seems doubtful as we have seen in the previous chapter (p. 30). It is easy to think of authorities whose directives are accepted as pre-emptive and content-independent by at least some portion of the subjects because of the fear of sanctions in the case of non-compliance, the charisma of the political leader, coincidence with self-interest, or because subjects measure the legitimacy of the authority by a standard that differs from the NJT.

Our defence of the ability of subjects to form reliable beliefs about the authority's purposes and its capacities is based on a different approach. We want to argue that helping subjects to discharge their moral duties is not simply a matter of making sure that they have a reason to follow the authority. In issuing authoritative directives, authorities must make sure that they do not block the access of subjects to their own reasons for action. It is at this point that the distinction between transparent and non-transparent authorities becomes relevant. Non-transparent authorities obstruct the access of subjects to their reasons for action to a degree where subjects become unable to respond to those reasons. Instead of mediating between subjects and their reasons for action, non-transparent authorities eclipse those reasons. The occurrence of such an eclipse shall constitute our characterisation of non-transparency. In other words, whenever we refer to non-transparent authorities we shall mean authorities that are shaped in a way such that the subjects are unable to form reliable beliefs about the relation between their reasons for action and the directives of those authorities. Our notion of transparency is, therefore, a relational one. Its point of reference is

constituted by the subjects and their ability to form beliefs vis-à-vis their political authorities and their own reasons for action.

An authority can fail to be transparent for different reasons. Its non-transparency can be deliberately chosen (e.g. by hiding or destroying essential pieces of information), or it can be the result of unintended circumstances (e.g. because making information available is incredibly costly, see chapter IV, p. 99). In the former case, we can say that the authority *prevents* its subjects from accessing their reasons for action. In the latter case, however, the authority is not engaged in promoting non-transparency and can therefore only be said to *obstruct* the relation between subjects and their reasons for action. In both cases, the result is the same one: subjects are rendered unable to get involved with their reasons for action.

The transparency of authorities, on the other hand, can also be either circumstantial or the result of active promotion. Take the directive not to murder. Here, the authority does not need to disclose additional information to enable subjects to see the relation between the law not to murder and their own moral reason not to murder. The directive “do not kill!” is more or less self-transparent<sup>10</sup>. On the other extreme there are directives which, when taken by themselves, do not reveal anything as to the reasons they are meant to serve. Suppose that the authority issues a series of directives requiring subjects to pay taxes without informing them about its spending purposes. Suppose, also, that subjects do not have alternative ways of forming reliable beliefs about where the money is going to (i.e. there is no relevant information in the public domain). In the absence of relevant information, subjects will be unable to form reliable

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<sup>10</sup> I say “more or less” because there are not only the paradigmatic cases of murder (where everyone agrees that the action qualifies as murder), but also those where the relation between the directive and the reason not to murder is far from self-evident. Take, for instance, the former principle of English law according to which there is no murder if death occurs more than a year and a day after the action. Another case in point is the controversy between those who think that abortion qualifies as murder and those who reject it.

beliefs on the relation between, on the one hand, the reasons for action that might be served by paying taxes and, on the other, the directives to pay taxes. They will be unable to respond to any of their reason when following the authority.

Why is the non-transparency of authorities problematic? It is perfectly possible to think of political authorities that are non-transparent and nonetheless very good at doing their job, perhaps even better than their transparent counterparts. The problem, however, does not lie at the level of serving reasons in general (we have seen that reasons can be served in ways that do not involve authorities), but at the level of *political authorities* serving reasons. At the beginning of this chapter, we said that political authorities differ from other authorities, such as doctors, in that they claim to have the right to rule. Subjects are not free to follow or disregard the directives of their political authorities. Rather, they are said to have an obligation to obey. As noted in the previous chapter, the dependence thesis shows that the obligation to obey depends on the reasons for action that apply to the subjects. The moral obligation to follow the authority is, therefore, parasitic on the moral duties of the subjects that the authority purports to serve.

In the previous section of this chapter, I tried to show that moral duties and obligations operate by placing demands on persons through practical reasons for action. These reasons have normative bearing on persons. Someone who has a moral duty or a moral obligation is required to perform a certain action, and failure to do so qualifies as moral wrongdoing. A demand, however, can only have normative bearing on persons if the addressee is capable of being bound by that demand. Demands which are impossible to perform, either because of the addressee's lack of mental capacities or because of the physical impossibility to realise that demand, are pointless. The same conclusion applies, as we have argued, to demands which the addressee cannot tackle because of

their irrational nature. This includes demands which can only be satisfied randomly (e.g. our case of someone who has to find the right combination of numbers).

A similar problem arises with the emergence of non-transparent authorities. They obstruct the relation between subjects and their reasons for action so that subjects can achieve conformity with their own reasons for action only accidentally. Like the person confronted with the task of entering a four digit code, the subject confronted with the directives of non-transparent authorities can only achieve the required outcome by chance. In following an authority without being able to form reliable beliefs on its purposes and capacities, subjects are cut off from some of their own reasons for action, namely those the authority is meant to serve. Subjects can, of course, follow the authority for other reasons, such as the charisma of a political leader or a desire to avoid sanctions.

By following the authority in such a way, they will eventually (if the authority turns out to be good at serving reasons) contribute to the achievement of the outcome required by the relevant reason (e.g. having paid taxes for no good reason, it turns out that subjects have contributed to the achievement of an outcome required by some of their moral duties). But that contribution will be accidental, i.e. it will not come about as a response to the relevant reason but because subjects happened to like the leader of the authority, or because they happened to fear the prospect of sanctions. The presence of these reasons stands in no relevant relation with the moral reason that is relevant here. That is what makes the action of subjects accidental. If the authority succeeds in serving reasons (e.g. to provide free basic education for everyone), that outcome cannot be interpreted as the result of subjects having had the chance to respond to their duty to help in the provision of education. And if the authority fails to serve reasons, the outcome cannot be interpreted as the result of subjects breaching the relevant duty.

It is not just that subjects cannot be blamed for the failures of the authority. Because of their inability to respond to the relevant reasons, subjects cannot be said to have committed any wrongdoing in the first place. Subjects are unable to answer for the moral quality of their actions since they are detached from the relevant reasons (and have no way of committing themselves to those reasons). Failure to respond to the relevant reasons should therefore not be understood in terms of justification or excuses, but in terms of lack of responsibility. To that extent, the subject can be compared to a person whose behavior can only be explained pathologically (Gardner 2007, 86). That would be the case if someone spilled hot coffee over someone else because of a muscular spasm which she could not anticipate nor control.

There is, however, one significant difference. In the pathological case, the lack of responsibility can be traced back to some mental or bodily deficits which prevent the actor, temporarily or permanently, from responding to her reasons for action. In the case of a non-transparent authority, it is the context, namely that of a non-transparent authority, which renders the subject unable to assume responsibility. Here lies the disruptive potential of political authorities. Their non-transparency destroys the binding force of moral reasons as far as following the authority is concerned, thus invalidating the moral rationale for having an obligation to obey that authority.

The lack of justification for non-transparent authorities to claim an obligation to obey has wide-ranging consequences for the relation between subjects and their reasons for action. Suppose that the *only* way I have for contributing to free basic education in my country is by following an authority which happens to be non-transparent. Here, the non-transparency of the authority causes a total eclipse of my moral duty to contribute to education, i.e. the authority fully blocks my capacity to respond to that reason. I still have, no doubt, a duty to contribute to the free basic education of everyone, and that

duty applies to me independently of the authority. But if a non-transparent authority issues a directive (e.g. to pay taxes) for the purposes of precisely that duty, its non-transparency makes it impossible for me to respond to my duty through paying taxes. It follows that I lack an obligation to follow the authority – and, in this particular case, I am left with no possibility to discharge my duty<sup>11</sup>.

Non-transparency can also prevent subjects from developing a commitment to the values expressed by the moral reasons that are to be served. In the absence of relevant information I will not, for instance, be able to pay taxes out of a genuine concern for the education of others. And that is problematic for it threatens an elemental feature of human communities, namely the possibility to express a shared commitment to the fundamental values contained in the reasons for action served by the authority (cf. Duff 2001, 59).

But non-transparency is not only damaging for the subjects. It also has serious consequences for the legitimacy of authorities. Non-transparent authorities are unable to help their subjects discharge their moral duties. The inability of non-transparent authorities to serve moral duties means that they cannot realise the service potential on which their legitimacy is grounded. And the failure of non-transparent authorities to justify their right to rule means that subjects can only have contingent reasons for following the authority (cf. chapter I, p. 30).

In this chapter, we have defended the ability of subjects to form reliable beliefs about their authorities as a condition that has direct bearing on the legitimacy of political

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<sup>11</sup> At other times, the consequences will be less dramatic as the eclipse will only be a partial one. There will be an alternative authority which is transparent (but perhaps not as good at serving the relevant reason), or I will be able to respond to my obligation, if only partially, without the intermediation of any authority. While I will not have an obligation to follow the non-transparent authority, I will nonetheless have the underlying moral obligation to which I can respond through these alternative ways.

authorities. Subjects, we have said, should have the chance to assess whether following the authority makes it more likely for them to improve conformity with their own reasons for action. What, however, if subjects fail to make use of this chance? Subjects may simply lack the motivation to evaluate their authorities. But such a failure would have no effect on the obligation of subjects to follow a legitimate authority in virtue of its capacity to serve the moral duties that apply to the subjects. That is so because the normative force of moral duties does not, of course, depend on whether persons are willing to engage with them. So the crucial question is not whether subjects actually respond to their moral duties but whether they are in a position to do so.

### III. Authority, Expertise, and Democracy

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This chapter examines the relation between expertise, democracy, and political authorities within Joseph Raz's account of legitimate political authority. I argue that the activities of political authorities can be divided into two domains: the technical domain and that of overall goals (a distinction not made by Raz). While it is not hard to think of political authorities having expertise and thus acquiring legitimacy in the technical domain, we should be sceptical regarding the possibility of expertise in the domain of overall goals. This scepticism should, however, not lead us to deny the possibility of legitimate political authority at the level of overall goals, but to rethink its role by emphasising the significance of democracy – more so than Raz is prepared to do.

In the previous chapter, we saw that Raz himself is willing to acknowledge the significance of democracy. He argues that democracy can be valuable “in many countries”, namely in those where it produces good results or helps to express the autonomy of persons (cf. Raz 2006, 1031 fn.). Our argument, in contrast, does not depend on empirical claims according to which democracies produce better outcomes, or on some defence of autonomy, but on a clear separation between those domains of activities where the authority can help its subjects to improve conformity with their reasons for action, and those where it cannot (and must therefore fail to meet the legitimacy standard set by the Normal Justification Thesis).

#### ***Overall goals and technical activities***

In the first chapter, we have seen that the legitimacy of political authorities rests on a variety of capacities. Political authorities can be legitimate because of their expertise, their impartiality, or their capacity for coordination. The domains of action we have

discussed so far included road safety, drug safety, and education. In all these areas, political authorities can gain legitimacy vis-à-vis their subjects because of some form of *advantage* resulting from their capacities. They can gain legitimacy because their advantage puts them in a position where they can help subjects to improve compliance with the relevant reasons for action.

In this chapter, we shall focus on the possibility of legitimacy through expertise. The central argument of this chapter is that there is one domain of political activities, namely that related to overall goals, where we should be sceptical about the possibility of expertise, and thus about the possibility of legitimate authority.

Our scepticism will, however, be qualified. We shall not reject the possibility of legitimate political authority at the level of overall goals altogether, but instead propose *democratic* authority as an institutional arrangement which takes this scepticism into account. For a start, however, we need to clarify the meaning of expertise and that of overall goals.

Let us start by explaining the distinction between technical activities and overall goals. The domain of overall goals comprises the kind of activities concerned with choosing and specifying the broad objectives that ought to be pursued in the political domain. Overall goals are always normative. They say how things ought to be – not necessarily how they are. Overall goals usually have moral implications. Political discussion is very often framed in concepts such as justice, fairness, individual responsibility, or solidarity. The type of practical reasoning that lies behind overall goals is, in one sense, abstract and principled given that it deals with these moral concepts. But reasoning about overall goals is also, and in another sense, applied. It is not limited to the significance of justice or solidarity in general, but examines the implications of these concepts within the particular society and institutional framework where the authority

operates. Specifying an overall goal implies, for instance, asking what justice means for our system of education, health, or public transport. Typical overall goals are thus related to questions such as whether to increase safety on the roads, make public health accessible to everyone, abolish the death penalty, or reduce the levels of environmental pollution. In all these cases, we are not going to deal with one single value, but with a plurality of values that do not only require adequate interpretation but can also conflict. How important is environmental protection as compared to the value of economic growth in developing countries? How important is an accessible health care system as compared to the value of saving future generations from unbearable burdens of debts? Choosing and specifying overall goals involves the complex task of interpreting and balancing values and their sometimes competing aspirations both in the abstract and with regard to specific political problems.

The activities concerning overall goals can be contrasted to technical reasoning. Here, the activity is not focused on the identification and specification of broad objectives, but on their realisation. Technical reasoning deals, for our purposes, with the means required for achieving overall goals. To clarify the distinction between the technical level and that of overall goals, it may be helpful to look at the different senses of “good” used by Immanuel Kant. He distinguishes pragmatic and categorical goods from technical goods (Kant 1785, 414-420; cf. Korsgaard 1997). Pragmatic goods are *good for someone*, and categorical goods are *good in themselves*, that is, they are morally good. Happiness is presumably good for everyone. Not lying is good in itself and thus morally good, at least according to Kant. Technical goods, however, are *good for something else*. Tools are paradigmatic cases of technical goods: a hammer is good for hanging up a picture (among other uses).

Note that the three senses of goods are *normatively independent*. An experienced torturer may be very good in the technical sense: She may be very effective in inflicting

pain on others. But that does not, of course, mean that her activities are pragmatically or even categorically good. Normative independence allows for a division of labour (cf. Höffe 2009, 277-284). A doctor reflects on the best ways of promoting health, not on the value of health itself<sup>1</sup>. It is the domain of overall goals<sup>2</sup> which is concerned with evaluating and specifying the normative assumptions that operate in the background of technical activities. Typical technical activities include analysing problems, making a diagnosis, drawing and assessing future scenarios, and issuing recommendations (ibid.).

We should be careful not to underestimate the value of technical activities. The activities that we have called technical certainly require a good degree of moral sensibility, creativity, and intellectual sharpness. That is so because the sense of technical that we are interested in applies not to instruments, but to persons and institutions. Their task is not merely to carry out certain functions, but to play roles. The technical goodness of a hammer or a light bulb can be understood in a purely functional way<sup>3</sup>. The goodness of a doctor depends, of course, on her ability to employ the right means. Someone with deficient fine motor skills is never going to become a good surgeon. But the good doctor also needs to have at least some social skills in order to treat her patients adequately and thus help them to achieve goals (see p. 79).

Nor do we want to argue that activities concerning overall goals and those dealing with technical matters are operationally independent from each other. Choosing and specifying overall goals is unlikely to succeed in the absence of technical guidance capable of explaining the complex patterns and constraints that govern public institutions related to health care, education, or defence. At the same time, technical

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<sup>1</sup> She can, of course, reflect on the value of health, but that would fall outside her scope of medical competence (see p. 23).

<sup>2</sup> Or, on the personal level, the domain of overall goods (see fn. on p. 21).

<sup>3</sup> The goodness of a light bulb can be defined by a set of technical criteria that are likely to include luminosity, longevity, and energy consumption.

activities depend on overall goals in a strong sense. An overall goal, such as the reduction of carbon dioxide emissions, can be achieved in several ways, some of which may be more appropriate than others. Reducing carbon dioxide emissions by expropriating all car owners is likely to conflict with the value of private property and does therefore seem less attractive than other, less drastic ways of achieving the same goal.

Our distinction between technical reasoning and reasoning about overall goals has a methodological purpose. We are interested in showing that there are two types of activities whose aims are different in a fundamental way. With that distinction in hand, we can proceed to examine the possibility of legitimate authority at each of these two levels with regard to expertise. We shall see that the possibility of legitimate authority through expertise is plausible in the technical domain but not so in that of overall goals.

### ***Experts***

In this section, I shall argue that there are good reasons for being sceptical about the possibility of legitimate political authority through expertise at the level of overall goals.

The difficulties in applying the notion of expertise at the level of overall goals are closely related to the problems associated with the concept of moral experts. The normative relevance of overall goals is usually moral (cf. p. 67). Justice, equality, solidarity, recognition – all these key concepts of politics are intrinsically moral. The question as to whether there are moral experts can thus help us to decide whether there are experts regarding the task of choosing and specifying overall goals. Joseph Raz rejects the possibility of moral experts straightforwardly:

[T]here are no moral experts. There is no moral science, no hidden, yet-to-be-discovered bits of moral evidence. There is a sense, though it is not easy to explain, in which morality is entirely on the surface, and the basic moral factors are available for all to see (Raz 1994, 93).

Raz's claim that "morality is entirely on the surface" is very strong and not very convincing. In an article published almost 40 years ago, Peter Singer mentions three arguments in favour of assuming that there *are* moral experts. First, he says, it seems obvious that some persons have more time to think about morally relevant issues. Secondly, some persons are in a better position to gather information and to choose the relevant evidence. Finally, Singer holds that some persons are more able to draw the right conclusions<sup>4</sup> (Singer 1972, 116-117). All three arguments are hard to deny. In one important sense, morality does not appear to be "entirely on the surface", but requires dedication and some argumentative skills. One cannot have a strong position on e.g. the moral relevance of harming animals without having spent at least some thoughts on the moral status of animals as compared to human beings. Also, it seems clear that some persons think harder and more sharply than others, and that some have better arguments than others. Compare the position of someone who thinks that harming animals is morally unproblematic as long as humans enjoy eating meat to that of someone else who has developed a consistent position on the moral status of animals and the conditions under which benefits for humanity can outweigh the protection owed to animals. It would seem that the second person is in a better position to elaborate on the arguments and facts that are relevant for determining the moral implications of harming animals. But that alone is not sufficient for establishing whether some persons are going to make better moral judgments than others.

There is an important difference between marshalling the relevant arguments and facts, on the one hand, and performing moral judgments on the other. Think of the person who has gathered plenty of arguments and facts on the moral implications of

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<sup>4</sup> Singer says that this ability is based on the capacity to detect invalid inferences as well as on the "understanding of moral concepts and of the logic of moral argument" (ibid. 117).

harming animals. Does that automatically make her better in performing moral judgments? She can certainly be *helpful* to other persons by pointing out to facts and arguments that others did not see by themselves. But then her role would be that of an assistant, not that of a moral judge. There is an important difference between being a moral judge and being an assistant. The job of an assistant is essentially that of an advice-giver, it is to enrich the argumentative basis on which judgments are then made. It is not to make those judgments. Moral judges, in contrast, go one step further. And this step is required for experts to have legitimate practical authority. When we come to see someone as an expert endowed with practical authority we do not do so because of her capacity to provide us with arguments or factors that would help us to assess the situation by ourselves, but because of her capacity to perform judgments instead of us. This is captured by the conditions of pre-emption and content-independence that apply to authoritative directives (see p. 12). We must –for the purposes of practical authority– think of moral experts as persons who have (among other features<sup>5</sup>) a superior power of judgment in the sense that they are more likely to reach the right conclusions.

Singer's third and final claim is that there are persons with superior power of judgment. That claim seems plausible as well. There is no reason to assume that all persons are going to be equally good when it comes to decide, for instance, on the moral implications of the death penalty. The conclusions arrived at by different persons are likely to differ even when everyone has had the chance to consider the relevant arguments and factors. And some of the conclusions will be closer to what is morally

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<sup>5</sup> Julia Driver has noted that the condition of moral expertise needs to be supplemented by the aspect of trustworthiness. Satan would appear to have moral expertise to the extent that he possesses a great amount of moral sensitivity which allows him to discriminate between right and wrong by delivering verdicts which are reliably and consistently morally wrong (Driver 2006, 629-630). But it seems perverse to call Satan a moral expert in the full sense of the word. What is needed, then, and in addition to the possession of beliefs with a superior degree of justification, is a personal quality –a kind of commitment– which would allow others to trust the verdicts of moral experts.

good than others. So let us accept all three claims made by Peter Singer: (1) Some persons have more time to think about morally relevant issues; (2) some persons are better in gathering relevant facts and arguments; (3) some persons are better in drawing the right conclusions.

I believe, however, that one more argumentative step is needed for making the case for moral experts in relation to legitimate political authority, and that is the question whether those who are better in making moral judgments can be identified as such. Singer argues that all three personal properties are to be found in one type of person, namely the moral philosopher (Singer 1972, 116-117). That claim is not plausible, at least not for our purposes. While it would seem relatively easy to identify those who spend plenty of time thinking about moral issues (e.g. moral philosophers), it is not so obvious how we can identify those who are better in gathering arguments and facts (this role we have labeled as that of assistants), and it is even less clear how to identify those who are better in arriving at the right conclusions when it comes to choose and specify overall goals. What is more, belonging to the first or second group of persons identified by Singer should not be taken as a reliable indicator for affiliation to the third one. Someone with a DPhil in moral philosophy will have spent a considerable amount of time thinking about moral issues. But that does not seem to make her especially likely to have the right opinion on, say, abortion, or the death penalty as compared to the ordinary man who has no specialisation in ethical questions. Unlike in the technical domain, there is no high barrier of qualifications that stands between the ordinary man and the moral philosopher when it comes to engaging in a competent evaluation of these moral issues. An enormous amount of skills, time, and dedication is required for understanding technical problems. Because of the layman's inability to assess technical

problems, the boundaries between experts and non-experts are more or less clear and constant. In the domain of morals, in contrast, there does not seem to be such a divide<sup>6</sup>.

Take the domain of transport. It is perfectly possible to imagine a situation in which 70% of the population has thoughtfully considered what ought to be done at the level of overall goals: 30% of the population believes that the rules of the road ought to be reformed in favour of stricter standards of road safety, whereas 40% believes that road safety does not require additional regulation (and the other 30% does not have a formed opinion on that matter). In analogy to Raz's case of the expert pharmacologist who is not bound to an authority dealing with matters of drug safety (Raz 1986, 74), we can think of circumstances where the same applies to citizens confronted with the directives of their transport authority. Suppose that the transport authority decides to ban driving under the influence of alcohol. The authority would have no legitimate authority in this regard over those subjects who hold the firm moral belief that driving under the influence of alcohol amounts to recklessness, and who always act in accordance with this belief. The authority would lack legitimate authority over those subjects because following the authority on that matter cannot be expected to improve conformity with the relevant reasons of those subjects. But that alone is no objection to the possibility of legitimate political authorities at the level of overall goals. Political authorities –for instance, states– are never likely to have authority over *all* the persons living in a certain area. We can even think of an extreme scenario in which 99.9% of the population does not drive under the influence of alcohol because of their strong moral beliefs and only 0.1% does not believe so and is therefore going to improve its likelihood of driving safely by following the authority. There is no reason to believe that

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<sup>6</sup> This is not to say that some persons may need assistance in order to make sound moral judgments. Someone who is not an expert in biology is going to have difficulties in judging the moral relevance of stem cell research unless she is aided by a biological expert. But this form of support does not touch on the genuinely normative judgment. The capacity to grasp the value of autonomy, or that of life, and to balance conflicting values, does not seem to correlate with someone's professional qualifications.

the Normal Justification Thesis could not apply in this case. The authority would then only have authority over 0.1% of the population, but it could be perfectly legitimate nonetheless. In general, the legitimacy of political authorities does not depend on its subject-related authoritative scope (i.e. the number of persons its directives apply to), but on its issue-related authoritative scope (i.e. the likelihood of success in serving certain reasons for action).

The problem, then, is not to be found in the existence of competent persons that are not bound by authoritative directives. It arises because, at the level of overall goals, the boundary between competent and non-competent persons becomes blurry. Ordinary subjects with no special training can reach the right conclusions when it comes to decide, for instance, whether the moral reason not to harm others merits, all things considered, the reformulation of the overall goals concerning road safety. And having a special training in, say, moral philosophy does not seem to be an indicator for a superior capacity to perform that or other moral judgments. The group of those who are able to perform better moral judgments does not seem to be *identifiable* by any particular criterion. All that we can presuppose are very general criteria such as a normal capacity of moral reasoning, or a sufficient level of motivation to consider moral problems. It follows that those who are better in making moral judgments could be found almost everywhere, and, unlike in the technical domain, we do not really have a way of singling them out.

In the domain of technical activities, in contrast, we do have a methodology for assessing the likelihood of someone being an expert. Goldman names three criteria through which we can come to rely on experts (cf. Goldman 2001, 93):

- Track record. The candidate is evaluated by her performance in the past. Other things being equal, it makes more sense to believe someone who was successful

in the past than another candidate with no experience, or one with a negative track record.

- Contextual evidence. A candidate can be disqualified by factors which are not directly related to her expertise and capabilities. This includes interests and biases which might influence the decisions of the alleged expert.
- Credentials. One of the most popular forms of assessing the likelihood of someone's successful performance is by looking at the opinion of others who are themselves considered to be experts. This includes certificates issued by educational institutions and recognition by other experts (as expressed in publications, conferences, reference letters, etc.).

None of these criteria<sup>7</sup> seem to apply at the level of overall goals. The difficulties with applying the criteria that are used for identifying experts in the technical domain to the domain of morality can, I believe, be traced back to epistemological differences between both domains. In the technical domain, it is sensory data –obtained through direct or indirect observation– which allows us to formulate hypotheses about the causal relationship between different states of affairs. The moral quality of a situation, in contrast, cannot be perceived by our sensory organs. When it comes to grasp moral reasons, emotions seem to play a crucial role. One of these emotions is blame. When we evaluate an action performed by somebody else and find it to be morally wrong, we often consider ourselves to be justified in blaming that person. The feeling of blame is not immune to justification, but stands in a special relation towards morally wrong acts: it is considered to be an *appropriate* response to that type of actions. We blame persons who we think of as *blameworthy*. Feelings such as blame, remorse, or praise, which are instances of moral condemnation and approval, play a central role in the making of moral judgments. We believe that *genuinely* blameworthy actions are actions

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<sup>7</sup> Except, perhaps, for the second one, but that is a negative one. It does not contribute to the identification of experts, but to rule out some candidates.

that not only *cause* us to have the feeling of blame, but *are* blameworthy actions (cf. Wiggins 2007, 151). The moral wrongness of, say, torture, is constituted by some property of such action which *merits* the feeling of moral condemnation. It would therefore be wrong to say that something is morally wrong or right merely because of someone's feeling. But it would also be wrong to say that judging something to be morally wrong can occur independently of the feeling of moral condemnation. We cannot offer a full account of what it means to assess moral wrongdoing without reference to feelings of moral condemnation such as blame.

This is not to say that the perception and evaluation of moral wrongdoing involves nothing else but feelings such as blame. These feelings are subjected to a standard of appropriateness, and this standard applies both internally and externally. The internal standard is related to the contestability of moral judgments. One cannot honestly believe in the blameworthiness of  $x$  (i.e. the belief that  $x$  merits the feeling of blame) without also believing that morally competent judges would come to have the same belief regarding  $x$ . The external standard, on the other hand, postulates the existence of further conditions that need to obtain for an action to be morally wrong. The belief in a moral reason not to torture non-human forms of life can be justified by invoking the value of showing respect towards (some) non-human forms of life. Now, suppose that researchers find out that Descartes' belief, according to which non-human forms of life are nothing but machines, is correct (an implausible claim, I admit). Such scientific evidence would give us a strong reason to reject the existence of a moral reason not to torture non-human forms of "life". Blaming someone who "tortures" her dog would then be as inappropriate as blaming someone who "tortures" her vacuum cleaner (cf. Skorupski 1999, 43).

If these appreciations are correct, then moral judgments cannot be performed without the evaluative contribution of feelings such as blame, remorse, and praise. Someone

who is unable to have the feeling of remorse, or that of blame, is not going to be able to judge whether a particular situation merits any of those feelings. Such a person can, of course, become a formidable observer of social patterns of moral behaviour. She can learn which actions cause other persons to show feelings of moral condemnation or approval. She can also offer arguments and assert, for instance, that torture merits condemnation because it fails to respect the value of life. But all this would only be accessible to her through the external perspective of the observer. She would never be able to ultimately see just *why* it is that torture is considered to be morally wrong, or that generosity deserves praise. I say “ultimate” because there is a way in which she can see why torture, etc. are wrong. If she understands that people adhere to a moral principle such as utilitarianism, she can see that torture is wrong because, in the case of utilitarianism, it diminishes a certain good. But this only pushes the problem to a higher level, for she would not be able to see why this certain good (e.g. happiness) ought to be maximised.

This incapacity to have moral feelings would not be problematic (and it may even be a virtue) for a sociological observer who has the task of registering and classifying moral attitudes within a society. But it certainly is a problem when the task is a normative one, i.e. when decisions need to be made not on the basis of what is currently judged worthy of blame or praise, but on the basis of what *ought* to be judged worthy of blame or praise. Because of this, the sort of expertise that is relevant in the technical domain is no guarantee for a superior capacity to make moral judgments. We should not be looking for brilliant observers, but for persons with refined moral sensibility. This could explain why the criteria that are so useful for identifying technical experts (track-record, credentials) are not going to help us in the moral domain.

### ***Practical authorities***

We have argued that making better moral judgments is not sufficient for being the kind of moral expert that we are looking for. As an additional condition, we said, moral experts need to be identifiable. But we have not yet explained why the issue of identification is so important. The kind of moral expert required by our framework of legitimate authority is one who has the capacity to become a *practical* authority. And this requires both theoretical and practical expertise. Someone counts as a theoretical expert in virtue of possessing a body of beliefs whose accuracy is significantly above the beliefs of the average person (i.e. the non-expert). The practical expert, in contrast, qualifies as a practical expert in virtue of her ability to act in a way that achieves outcomes which are significantly better than those achieved by the non-expert<sup>8</sup>.

In the first chapter, we drew a distinction between theoretical and practical authorities. Political authorities qualify as practical authorities. Their task is to help improve conformity with some of the reasons for action applying to subjects, among which moral duties play a prominent role. In this chapter, we focus on the possibility of legitimate political authority through expertise. A political authority that is legitimate in virtue of its expertise must be a theoretical expert, but it must *also* be able to provide non-experts with reasons for action which, if followed, make the non-experts more likely to do what is morally right. This observation applies not only to political authorities, but to practical authorities in general. A doctor can be an excellent theoretical expert in virtue of her exceptional medical knowledge. But that is no guarantee for her success as the practical expert that she is supposed to be in exercising the profession of a doctor. She may have poor communicational skills, or even fail to see the moral significance of treating patients as autonomous persons that should be empowered to take ultimate decisions on their own. These deficiencies are

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<sup>8</sup> An aeronautical engineer counts as a theoretical expert in virtue of her body of beliefs regarding the construction and design of aircrafts. An experienced pilot qualifies as a practical expert in virtue of her ability to operate aircrafts.

likely to make her a bad doctor up to the point where she may not qualify as the practical expert which she has to be in order to qualify as a legitimate practical authority. Such a doctor would then be non-legitimate because of her failure to help promoting the health of her patients.

One of the conditions needed for being a practical authority in any domain of action is identifiability. The condition of identifiability means that subjects need to be able to form reliable beliefs about the authority's legitimacy, that is, its capacity to improve conformity with their reasons for action. We have seen, in the previous chapter (p. 58), that political authorities, and practical authorities in general, serve reasons in a special way, namely by *providing* subjects with reasons for action in the form of authoritative directives. To put it in other words: Practical authorities must give their subjects a reason for following the authority. We have also seen that there can be many reasons for following authorities, among which the belief in the authority's legitimacy is only one (p. 30). This means that subjects can have reasons to follow the authority, on the level of overall goals, even if they are unable (because of the problem of identifiability) to assess whether the authority has the ability to serve reasons at the level of overall goals. It is therefore possible, under appropriate circumstances, that subjects follow authorities who, as a matter of fact<sup>9</sup>, *are* better than their subjects in serving overall goals. Would the authority, under such circumstances, serve the reasons of their subjects at the level of overall goals in the way that it is supposed to? The answer must be negative because of the arguments advanced in the previous chapter. The authority is only going to be able to help its subjects to discharge their moral duties if it is able to present itself as a better way for them to respond to their duties. The authority must fail in this purpose if subjects have no way of assessing the authority's purposes and

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<sup>9</sup> This fact would not be accessible to the subjects, but only to a hypothetical omniscient observer (who would not have to deal with the problem of identifiability).

capacities for serving those reasons for action. This we have characterised, in the previous chapter, as a situation of non-transparency.

The crucial difference between this chapter and the last one concerns the type of non-transparency we are dealing with. In the previous chapter, we presented non-transparency as a deficit that is to be remedied. We argued that, in order to become legitimate, political authorities ought to provide their subjects with the kind of information that is needed for the subjects to form reliable beliefs (and we shall say more about this in chapter IV). In this chapter, we have seen that the goal of transparency is attainable only at the technical level. At the level of overall goals, in contrast, there is no way of forming reliable beliefs about the authority's capacities in serving reasons for action. We are thus confronted with a failure that cannot be tackled by reconceiving the role of legitimate political authorities and their institutional design. Because of the authority's essential shortcoming at the level of overall goals, we are better advised in rethinking the role of subjects vis-à-vis their authorities.

### ***Democratic authority***

In the last chapter, we said that expertise is *only one* relevant consideration when it comes to determine legitimacy. Impartiality and the capacity for some forms of coordination were mentioned as further criteria. Of these two criteria, coordination seems to play a crucial role not only at the technical level, but also at that of overall goals. In order to see this, we just need to ask what would happen if there was no legitimate political authority at the level of overall goals. According to Raz's account, the directives of legitimate political authorities ought to be followed even if subjects would act otherwise by their own assessment of the situation. This is the pre-emptive character of authoritative directives. In the absence of legitimate political authorities, subjects would have the responsibility to act by their own assessment of the situation. What would this mean in practice?

Suppose, as we did before, that 30% of the subjects supports stricter standards for road safety while 40% is against it and another 30% does not have a formed opinion on that matter. If acting on this matter was left to the subjects alone, we would have a situation where some stick to stricter speed limits while others do not, where some respect stricter alcohol limits while others do not, and where some pay the penalty for breaching rules while others do not. That does not only lead to a situation of blatant unfairness. It also leads, as we saw in chapter I (p. 15), to serious problems of coordination. Just imagine two drivers in the same narrow street – one believing that the proper speed limit should be 20 mph and the other believing that 40 mph is slow enough. Or think about criminal law. Fidelity to the individual assessments of the subjects would mean that only those who have been manifestly in favour of the death penalty are liable to be condemned to death while those who have been against it will never have to face the death penalty. The same would apply to other forms of punishments and offences. We would end up with a highly dysfunctional penal code.

These cases illustrate the need for collective convergence on overall goals. We need a mechanism for selecting among competing overall goals and for making them binding on all subjects. We are now in a position to reformulate the condition under which a political authority can be legitimate at the level of overall goals: An authority is going to be legitimate at this level not because of its expertise, but because of its ability to contribute to the selection of overall goals.

We are now left with two arguments. The first one has an anti-authoritative pull, while the second one has an authoritative pull. The anti-authoritative argument is the sceptical argument defended throughout this chapter. There are no good reasons for believing that political authorities can be reliably better than their subjects in identifying and specifying the overall goals that ought to be pursued in the political

domain. This is an argument against including the identification and specification of overall goals within the range of actions that can be justified with the Normal Justification Thesis. It follows that an authority which pretends to have competence for deciding which overall goals to pursue would be exceeding its legitimate functions and, therefore, acting in a non-legitimate way. Because of the latter, the sceptical argument also serves as a positive argument in favour of granting subjects the prerogative to decide on their own. Note that the positive argument follows naturally from the negative one. In the absence of good arguments for placing subjects under the directives of authorities, subjects obtain the right (and responsibility) to decide on their own assessment of the situation (this right is best understood as a liberty-right, see p. 118). The exclusion of the authority and the inclusion of the subjects are two sides of the same coin.

The authoritative argument, on the other side, says that overall goals cannot be realised unless we have a mechanism for selecting among competing goals and making the selection binding on every subject. At some point, deliberation must make way to collectively binding decisions if we are to avoid the total fragmentation of a political entity. The argument is an authoritative one because, as we have just seen, the mechanism of selection needs to operate in the language of authoritative, that is, preemptive and content-independent directives. The authoritative argument shows why it would be wrong to say that legitimate political authority has nothing to do at the level of overall goals.

Are these two arguments fully or partially irreconcilable? I believe that both arguments can be fully respected by designing political authorities in a way such that the material task of reasoning about and choosing overall goals is left to the subjects, whereas the rather formal task of guarding rules and procedures which determine how goals are to be selected and made binding is left to the authority. Both activities are clearly distinct

from each other: The authority would have no competences for telling its subjects which goals they ought to prefer, or how they ought to specify them.

While both activities are distinct, they are not independent from each other. In order for the scheme to work, there needs to be a correspondence between both activities. The procedures for selecting and implementing overall goals have to be designed in a way such that they capture and respect the opinion of the subjects. It would make no sense to have a procedure which selects the goal that has received the weakest endorsement by the subjects. On the other hand, there are different procedures for capturing the opinion of the subjects. This is why choosing a procedure has direct implications at the level of overall goals – it is not a purely technical activity whose goodness could be separated from normative questions. The procedure according to which each person has one vote competes, for instance, with the proposal to give extra votes to cultural minorities. Then there is the question of what we mean by “the opinion of the subjects”. Do we mean the aggregation of individual interests, or do we want to defend a deliberative model in which subjects enter a competition for the best arguments? All these questions will have to be left unanswered here – we shall deal with them in our chapter on global democracy (V). What I have tried to show here is that we need *some* model of democratic participation that is able to capture the opinion of the subjects in order to settle the role of subjects and that of political authorities at the level of overall goals<sup>10</sup>.

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<sup>10</sup> Since choosing the model of democratic participation has direct implication at the level of overall goals, it might seem more accurate to leave *that* decision to subjects as well. But this entails an infinite regress, for we would need a model of participation for that decision as well. This is why political authorities must have *some* scope for making morally substantive decisions under the premise that the chosen model of participation is sufficiently sensitive to the opinion of the subjects (so that subjects are themselves able to change the model of participation through subsequent deliberation and elections).

### ***Some implications***

In this chapter, I have presented a substantive alternative to Raz's view on democracy. At the beginning of this chapter, we saw that Raz sees the value of democracy in its contingent ability to improve results or to give expression to the value of autonomy. I have argued for a different strategy, one that focuses on the limits of authority that result from Raz's service conception. Drawing a distinction between technical reasoning and reasoning about overall goals has been methodologically helpful, for it has helped us to separate the area in which authorities can be expected to make better decisions than their subjects from that other area where they cannot be expected to do so. The former is the technical domain while the latter is that of overall goals. We did not say that political authorities can never be better than their subjects when it comes to choose and specify overall goals. We said, instead, that there are no criteria on the basis of which it would be possible to determine which authorities can be expected to do better than their subjects at the level of overall goals. This we called the problem of identifiability. It means that, at the level of overall goals, we should regard political authorities as non-transparent – no matter how much they do to be transparent in other regards. It is at this point that our argumentation is connected with the arguments presented in the previous chapter: Because of their non-transparency, political authorities lack legitimacy at the level of overall goals.

One important thing to note is that the conclusions of this chapter are not categorical. This marks an important difference to the previous chapter. There (in chapter II), we said that transparency is a *necessary* condition for political authorities to be able to help their subjects in discharging their moral duties. That is, of course, also the view defended in this chapter. However, I do *not* say that political authorities can *never* be legitimate in the substantial domain of choosing and specifying overall goals. That is so because, in exceptional circumstances, it is possible to form reliable beliefs about the

authority's capacity to make better decisions concerning overall goals. Think of societies with appalling levels of poverty and crime, or countries which are in a permanent state of civil war. In such places, many subjects have to fight a daily battle for survival which leaves them with little time, or motivation, or both, to reason about the broad objectives they ought to pursue as a political entity. Or think of societies in a state of moral bankruptcy such as Germany in the aftermath of the Second World War. In such cases, there may well be an authority, constituted by foreign or neutral actors, which is likely to fare better in choosing and specifying overall goals, at least in the short run<sup>11</sup>. The problem of identifiability thus vanishes in such extreme situations. We could say that such authorities have moral expertise, but in a rather awkward sense.

The following analogy may help to illustrate the point. In a world where, by some strange disease, everyone except me suddenly becomes unable to perform the movements required for making use of screwdrivers, I would automatically become a practical "expert" in many fields where the use of screwdrivers is required. That is so because expertise is a comparative notion. In a situation where nobody but me has the ability to assemble furniture, it is a trivial truth that I am more likely to succeed in these activities than anybody else even if, under normal conditions (i.e. where others have the ability to use screwdrivers), I am worse than the average person regarding these activities. That is like winning a game by walk over. Because of the comparative element of the Normal Justification Thesis, it is possible to imagine situations where political authorities are legitimate in choosing and specifying overall goals. We should keep in mind, however, that under normal conditions, where subjects are not extremely troubled or morally compromised, there are no good reasons for believing that authorities will do better than their subjects at the level of overall goals. This absence of good reasons grounds the scepticism which I am advancing. Unlike in the technical

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<sup>11</sup> But even in such scenarios it is unlikely that *all* subjects are going to be unable to make morally sensitive decisions. The authority would thus not have authority over all its subjects (see p. 72).

domain, there is a strong burden of justification when it comes to make the case for authorities being superior in the domain of overall goals.

The argument for democracy presented in this chapter does not rely on the popular assumption that democratic governments produce better results than non-democratic ones. Instead, I have relied on the rather simple argument according to which subjects are responsible for deciding by themselves if the case for legitimate authority cannot be made. I have also argued that this freedom is constrained by the need to select among conflicting overall goals, and to make the chosen goals binding on all subjects. Both arguments, taken together, show what role political authorities should play at the level of overall goals, and why their legitimacy depends on democracy in a crucial way.

The aim of these first three chapters has been to show in what sense the involvement of subjects is related to the legitimacy of political authorities. The first chapter examined Raz's account of practical authority, and political authority in particular. The second and the third chapter were meant to show why Raz's considerations on the involvement of subjects need to be expanded if political authorities really are to serve the moral duties that apply to their subjects. Chapter II defended the transparency of political authorities as a necessary condition for political authorities to be legitimate. And this chapter argued that political authorities can normally be expected to lack legitimacy at the level of overall goals. The conclusions of both chapters open the way for subjects to get involved with the activities of their authorities, although in different ways. Chapter II says that subjects ought to be able to form reliable beliefs about the authority's legitimacy so that they are able to respond to the moral reasons that the authority purports to serve. The degree of involvement defended in chapter II is comparatively weak, for it only requires the subjects to have epistemic access to relevant information. This chapter, in contrast, defends the ability of subjects to

participate by choosing and specifying overall goals – not just the ability to form certain beliefs.

Over the next two chapters, we shall examine the implications of both forms of involvement for the institutional design of political authorities, and ILIs in particular. We shall see, in other words, what it takes for political authorities, and ILIs in particular, to achieve the degree of transparency and democratisation that is required for them to be legitimate.

## IV. Transparency

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This chapter builds on the conclusions of the two preceding chapters, II and III. In those chapters, we argued that subjects need to be able to form reliable beliefs about their authorities for the latter to be legitimate. Chapter II was about the ability of subjects to respond to the reasons that the authority is meant to serve. If the authority fails to enable subjects to respond to these reasons, then political authorities lack the moral right to claim, on the side of the subjects, an obligation to be obeyed, and are thus significantly impaired in their capacity to serve reasons. The focus of chapter III, in contrast, was on the ability of subjects to assess the capacities of the authority in one specific domain of action. There, we said that there are different kinds of reasons for action that are relevant in the political domain. We divided them into two classes, namely those concerned with overall goals, and those dealing with technical matters. The purpose of that chapter was to show why we can expect political authorities to help their subjects to improve compliance with technical reasons, but not so with regard to overall goals. Because of the latter, we argued, subjects should have no obligation to follow the authority when it comes to choose and specify overall goals, but should rather have the right to decide by themselves on these matters.

The arguments offered in chapters II and III were not identical. Chapter III defended the democratic participation of subjects in choosing and specifying overall goals instead of their authorities, whereas chapter II defended the ability of subjects to respond to their reasons for action as a condition that is necessary for having moral duties and obligations. Both chapters, however, have one thing in common, and it is on this common feature that the present chapter is built. Both chapters defend the condition of subjects having epistemic access (in the form of reliable beliefs about the authority's purposes and its capacities) as a legitimacy condition. This subject-

centeredness should be regarded as a central element within the service conception of authority, even though it represents a modification to what Raz himself says. After all, the service conception of authority grounds the legitimacy of political authorities on their ability to improve outcomes in a certain way. It is based on the assumption that political authorities help their subjects by providing them with reasons for action, in the form of authoritative directives, which have a guiding function for the subjects. Chapters II and III elaborate on this point in different ways, but both affirm the value of subjects getting involved in the activities of their authorities as something that is directly connected to legitimacy considerations.

How are the preceding chapters connected to the present one? In this chapter, we are going to examine some institutional implications that can be derived if we accept the shared conclusion of chapters II and III. We shall be looking, in other words, for practical arrangements that help to ensure that the authority succeeds in serving its subjects by allowing the latter to evaluate the authority's purposes and its capacities. While this chapter is based on the conclusions of the two previous chapters, it goes beyond them by introducing transparency as an institutional feature whose implementation will grant subjects the kind of epistemic access that we have argued for. In this sense, the present chapter is a direct continuation of the two preceding ones.

In explaining the features of transparency, we must also explain what we do *not* mean by transparency. In order to clarify our conception, we shall therefore examine a paper, published by Allen Buchanan and Robert O. Keohane, which also defends transparency as a legitimacy consideration in the domain of international legal institutions (ILIs). But the paper defends transparency on quite different grounds. The most substantial difference between our account of transparency and the one elaborated by Buchanan and Keohane is to be found in the emphasis placed on the participation of subjects. Buchanan and Keohane regard transparency as an arrangement that is useful for

furthering the authority's legitimacy. In their view, the legitimacy of such authorities depends mainly on their integrity, their capacity to provide benefits, and their avoidance of grossly immoral actions. For them, the role of transparency is a heuristic one. Transparency is regarded as a useful device to evaluate the authority's compliance with the standard of legitimacy. Because of this approach, subjects do not play a primary and irreplaceable role vis-à-vis their authorities. Authorities should be transparent not necessarily to their subjects, but to those who are best equipped to evaluate their legitimacy.

Our justification for transparency is quite different. The condition of transparency is meant to ensure, in a few words, that subjects have access to the information that is required for forming reliable beliefs about the authority's purposes (the reasons that the authority purports to serve) and its capacities (the likelihood of success in serving reasons). Once this kind of information is available, subjects are put in a position where they can judge the evidence against the standards established by the Normal Justification Thesis. Subjects can then form reliable beliefs about the authority's legitimacy by judging whether following the authority makes them more likely to improve conformity with their own reasons for action (i.e., those which the authority is meant to serve). According to our view, the condition of transparency vis-à-vis the subjects of authority is *itself* a legitimacy condition since we argue that there can be no obligation to follow the authority unless subjects are able to form these beliefs. Unlike Buchanan and Keohane, we do not make the value of transparency conditional upon its usefulness for achieving any further goal. Notwithstanding these differences regarding the justification of transparency, we shall see that our characterisation of transparency is very similar to the one provided by Buchanan and Keohane.

### ***The nature of transparency***

The role of legitimate political authorities can be understood as that of mediators. In helping to improve conformity with reasons for action, the authority mediates between its subjects and the reasons for action applying to them. In chapter II, we saw that mediation of this kind requires the ability of subjects to form reliable beliefs about the relation between the reasons that the authority purports to serve and the authority. The ground for this requirement was also explained in chapter II: Subjects cannot be said to have an obligation to follow the authority if they are unable to respond to the reason for action (i.e. the moral duty) that the authority is meant to serve. Responding to reasons for action involves, among other things, acting intentionally. The relevant reason for following a legitimate authority is to be found in the capacity of the latter to serve reasons. Subjects respond to their own reasons for action by endorsing an authority which they can expect to provide help in improving compliance with precisely those reasons.

Subjects will be unable to respond in this way if they are unable to see which of their own reasons for action is meant to be served by the authority. When asked, for instance, to pay my taxes I need to know what the money is being used for (e.g. public education). Therefore, the sense of transparency we are interested in requires the accessibility of information about the connection between the directives of the authority and the reasons for action that the authority is meant to serve. But the requirement of transparency must include more than just information about which reasons the authority purports to serve. Having reliable beliefs about the reasons that the authority purports to serve is insufficient for evaluating whether, by following the authority, I can expect to discharge my moral duty (e.g. to support public education). What is needed in addition is information about the authority's capacities. This requirement is likely to include the authority's track-record, its reputation among

experts, its professional qualifications, etc. The reliable belief that a certain authority is quite good at, for instance, preventing epidemic diseases must be complemented by the standard established by the NJT according to which the legitimacy of political authorities results, among other things, from their comparative goodness in helping subjects to improve conformity with their reasons for action (see chapter I). An authority that is quite good at preventing epidemic diseases may lack legitimacy if, other things being equal, there is another authority that is even better at doing the same job (more on this in chapter VI, p. 155). Conversely, it may be the case that an authority qualifies as legitimate according to the NJT even if it is not very good at doing its job – in the absence of better alternatives, it may still be the best available option. Let us recapitulate. The endorsement of the authority by the subjects as a response to their moral reasons requires reliable beliefs about what the authority purports to do (i.e. what reasons it intends to serve), and how strongly it can be expected to succeed at it. Note that, so far, our characterisation of transparency does not conflict with the one offered by Buchanan and Keohane. For them, transparency obtains if accurate information about the authority's performance is available, accessible at a reasonable cost, integrated and interpreted in a proper way, and directed to the relevant actors (Buchanan and Keohane 2006, 427).

In our understanding, failure in transparency amounts to a failure in mediation between subjects and their reasons for action. This means that the relation between subjects and their reasons for action becomes obstructed. In such a situation of obstruction, the possibility of improving conformity with reasons for action is blocked because subjects are unable to identify the relation between the authority and the reason for action it purports to serve, and are thus also unable to form an intention regarding the moral duty contained in the reason for action that the authority was meant to serve. We said, in chapter II, that where there is no possibility of forming that intention, there cannot be a moral obligation to follow the authority. Subjects cannot

have a moral obligation to follow the authority because that obligation hinges on the duty contained in the reason for action that the authority was meant to serve. The authority can only have the moral right to claim an obligation to be obeyed if its directives constitute a better way for subjects to discharge the duty contained in the reason for action applying to them (this comparative element is established by the Normal Justification Thesis). The authority's ability to help subjects to discharge their duties cannot be conceived of in isolation from the subjects' ability to form reliable beliefs about the authority. Think of a moral duty to help others in achieving a decent standard of living, and a non-transparent authority that is outstandingly good at, say, fighting malaria. It would be tempting to assume that this non-transparent authority can meet the legitimacy standard embodied in the Normal Justification Thesis simply in virtue of its outstanding capacity to fight malaria. But such a reading ignores that helping subjects to improve compliance with their moral duty to help others is not only a matter of achieving the right outcome. The non-transparent authority is unable to help its subjects to discharge the moral duty contained in the reasons that the authority purports to serve. Non-transparency can thus be characterised as a situation in which political authorities do not make relevant information accessible to their subjects. Information is relevant if it is necessary for ordinary subjects to be able to form reliable beliefs about the authority's likelihood of success in helping subjects to discharge a particular moral duty. In a situation of non-transparency, the service potential of the authority cannot be tapped.

We have characterised the requirement of transparency as the ability of subjects to form reliable beliefs about their authority's purposes and its capacities. But what does this imply in practice? Will authorities have to change their whole operating structure in order to fulfil our transparency requirement? The first thing to note is that the requirements for meeting the condition of transparency are likely to vary from case to case. A law not to murder, for instance, would not seem to require further explanation

for subjects to be able to see the connection between that authoritative directive and their own moral reasons for action. The authority would be transparent in this regard, not because of its institutional design or any other particular effort it makes, but because the directive does not require anything further to be made transparent. It is self-transparent (cf. chapter II, p. 60). While this authority would be transparent in relation to its purposes, it may well be non-transparent regarding its capacities. That is, subjects may be unable to form reliable beliefs about the authority's capacity to organise and maintain a just system of criminal law and therefore not have an obligation to obey.

A different case of non-transparency would be that of an authority which requires its subjects to pay a tax without letting them know what the money is being used for. Here we have a clear example of a directive that is non-transparent given the inability of subjects (in the absence of further information) to identify the reasons that the authority is meant to serve. The authority would have to take additional steps in order to ensure that subjects are able to see the connection between the directive and their own reasons for action.

It is important to note that the sense of transparency defended here demands more than the authority simply disclosing relevant information. The purpose of transparency is, as we have said, to enable subjects to form reliable beliefs about the reasons for action that the authority is meant to serve. If this condition is taken seriously, the relevant information should be accessible even to those citizens who lack the financial or intellectual means to access and interpret the relevant information. The first condition could be met by making the information available for free or at a reasonable cost (cf. Buchanan and Keohane 2006, 427). The second condition will be met if subjects with average intellectual capacities are able to understand and assess the authority's activities even if they have no expertise whatsoever in the domain of

activity of the authority. Making this possible may not be an easy task. After all, the technical goodness of an authority is no guarantee for its goodness in communicating with its subjects. An ILI may be brilliant in, say, organising a functioning system of epidemic prevention, but at the same time terribly bad in explaining to its subjects what it is doing and achieving. Our notion of transparency is therefore likely to require many authorities to make significant changes to their structure, e.g. by creating a new department for external communication, or by being much more open to the media.

We should also be clear about what we do *not* mean when we talk about transparency. We do not mean to defend a very *thick* notion of transparency. According to this notion, subjects would have to be able to gain insight not only into the reasons for action that the authority purports to serve and its capacities, but also into its particular directives. The thick notion of transparency is not required and even undesirable by the Razian standard of legitimacy. Authoritative directives are content-independent, which means that the justification of authority does not depend on the ability of the subjects to assess the merits of particular directives (see chapter I, p. 13). This makes perfect sense. If subjects acted on the basis of their own assessment of each authoritative directive, the likelihood of improving conformity with reasons for action would decrease, thereby defeating the whole purpose of having legitimate authorities (Raz 1986, 67-69). Part of the attractiveness of having practical authorities is to be found in their capacity to relieve subjects from the extremely demanding decision-making requirements of modern societies by improving the subjects' ability to act in accordance with their reasons for action.

But how can we ever come to evaluate the legitimacy of political authorities if we are supposed to follow the authority even if we acted otherwise on our balance of reasons? This might look like a contradiction at first sight, but the problem can be resolved by looking at the two different levels of reasons to follow the authority. First-order

reasons are reasons that constitute our own assessment of the situation. Second-order reasons, in contrast, are “any reason to act for a reason or to refrain from acting for a reason” (Raz 1990, 39). Accepting a directive as authoritative involves treating it as a second-order reason in the latter sense because it requires the subject to refrain from acting on her balance of first-order reasons. The second-order reason is a reason to follow the directive even if my own balance first-order reasons would require me to do the contrary (Raz 1990, 41-43).

Take the example of road safety and a directive requiring passengers to wear a seat-belt on a bus. Accepting that directive as authoritative implies following it even if, by my own balance of first-order reasons, I reach the conclusion that not wearing a seat-belt would be the better decision. Examples like these demonstrate how an authority can pre-empt one’s countervailing reasons for action. This does not, however, imply that second-order reasons have the final say on the question as to whether to follow the authority. There is a third layer of reasons which has been introduced in the first chapter (p. 37). Subjects can refrain from acting on their own balance of reasons when it comes to follow a particular directive while, at the same time, acting on their own balance of reasons by performing an assessment of the general ability of the authority to serve their subjects. If the latter assessment is positive, I can accept the directives of the authority as authoritative for the strategic reason that doing so is going to improve conformity with some of my reasons for action.

Returning to our example, one can say that a directive regarding the use of seat-belts on buses can be accepted for the strategic reason that it is embedded within a system of norms whose common and ultimate goal is to improve road safety. While a subject does not need to assess whether a particular directive contributes to that ultimate goal, she should assess the soundness of that ultimate goal –in our example road safety– and whether the authority can be expected to improve overall compliance as compared to

acting on one's own estimation of the reasons. This leaves space for the fact that legal organisations commit mistakes. A law requiring me to wear a seat belt while riding on a bus may not improve road safety, but the system of laws regarding road safety can make a significant positive difference as compared to there being no laws at all. So the question is not whether a single directive improves conformity with some of my reasons, but whether the system of directives does so.

### ***Putting transparency into practice***

How would transparency look like in practice? Should the responsibility for making information available always rest entirely on the authority? It would be wrong to think that the achievement of transparency is a generally easy task. In chapter III, we characterised the interaction between authorities and their subjects as a process in which subjects choose overall goals and are then responsible for endorsing the authority which is most likely to help them implement these goals. It would, however, not be accurate to think of this interaction between overall goal-setting and their implementation as a one-time transaction where subjects communicate with their authority about which goals ought to be pursued, then commend their implementation to the best candidate, and evaluate the authority once it has finished to do its job. Such a view is much too simple to capture the complexity that is inherent to such processes. We saw, in chapter III, that the task of implementing overall goals is likely to raise many challenges in the course of which it might be necessary to clarify the implications of an overall goal, or its relation to other overall goals. Whenever these clarifications are needed, the authority will have to consult its subjects. On the other hand, it would be naive to think that the subjects' task of choosing and specifying overall goals can succeed without the provision of assistance by those who have experience in their implementation. After all, the normative requirements that derive from overall goals are supposed to be subjected to feasibility conditions. A debate on, say, improving the quality of public education is likely to be influenced by technical information on the

current number of available teachers and their salary, the estimated demand for teachers, the correlation between social background and performance, and –not least– the budget available for spending on education. In the light of these demands, political authorities may therefore need to invest plenty of time and resources in order to be transparent to their subjects.

Depending on the kind of activity performed by the authority, transparency may be a very costly and time-consuming task. ILIs are particularly burdened given that their subjects are distributed across the globe. The difficulties of making relevant information available and intelligible to all those subjects can hardly be underestimated. In such circumstances, the ILI may simply lack the financial or personal resources to be transparent. Therefore, and depending on the particular circumstances, it can make sense to distribute the responsibility for achieving transparency on more than one shoulder. In addition to the cooperation of the international institution, there might be an organisation, funded by the contribution of states, which specialised in assisting international institutions in providing the kind of information that is necessary for reaching transparency.

A similar, context-sensitive approach should be taken with regard to the consequences of political authorities failing to comply with the standard of the NJT. After all, political authorities can fail to be legitimate in different ways. An authority which not only fails to be transparent, but is also committed to immoral goals, can be called *illegitimate*, meaning that its activities stand in contradiction to the model of a legitimate authority, and therefore merit disobedience. An authority which fails to be sufficiently transparent, but whose overall goals are generally in accordance with morality, and whose activities are helpful for its subjects in many ways, could be called *non-legitimate*, meaning that its activities fall short of the standard of legitimacy. In that case, there may be other good reasons, such as the outlook for the authority becoming

democratic in the near future, or the lack of better alternatives, which could nonetheless justify following the authority. In circumstances where the authority's failure is not particularly grave, the authority could be required to promise to take additional steps to improve its future performance. In more serious circumstances, such as a corruption scandal or the deliberate refusal to be bound by the normative requirements of the overall goals, subjects could have the right to sanction their authority and, in the most extreme cases, withdraw their support on a temporary or permanent basis.

### ***The value of transparency***

The value of transparency is nowadays widely acknowledged, especially in connection with debates on democracy and global governance. The popularity of this concept makes it the more important to specify the sense in which we believe transparency to be important, and to differentiate ourselves from other approaches. This shall now be done by examining an article written by Allen Buchanan and Robert O. Keohane which explores the connection between transparency and the legitimacy of ILIs (Buchanan and Keohane 2006).

Buchanan and Keohane examine, and defend, participation at the level of ILIs<sup>1</sup>. The legitimacy standard proposed by Buchanan and Keohane rests on three substantial criteria, namely "minimal moral acceptability", "comparative benefit", and "institutional integrity". The first criterion asserts that international organisations "must not persist in committing serious injustices" by violating human rights such as the right to physical security, freedom from slavery, and the right to subsistence (ibid. 419-420). Because

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<sup>1</sup> Buchanan and Keohane do not refer to ILIs, but to "global governance institutions", which are said to include "a diversity of multilateral entities, including the World Trade Organization (WTO), the International Monetary Fund (IMF), various environmental institutions, such as the climate change regime built around the Kyoto Protocol, judges' and regulators' networks, the UN Security Council, and the new International Criminal Court (ICC)" (ibid. 406). I therefore assume that Buchanan and Keohane would see ILIs (as we have characterised them on p. 1) as instances of global governance institutions.

their criterion is meant to be limited to “the least controversial human rights” (ibid.), Buchanan and Keohane believe that widespread agreement can be reached regarding the acceptance of this legitimacy standard. Their strategy deliberately avoids the question whether there are other injustices which should be included as criteria of legitimacy. By applying this strategy of circumvention, Buchanan and Keohane hope to escape, or at least attenuate, the problem of moral disagreement (ibid. 420). Comparative benefit –their second criterion of legitimacy– rests on the assumption that the justification of ILIs resides in their capacity to “provide benefits that cannot otherwise be obtained” (ibid. 422). The third and final substantive criterion – institutional integrity– deals with the question whether an organisation can be trusted in the long run (ibid. 422-424). The *Oil-for-Food* scandal is portrayed as a case in which the United Nations showed no institutional integrity. In general, institutional integrity is absent when there is “egregious disparity” between the performance of the authority and its self-proclaimed procedures or goals (ibid. 422).

Having introduced these three substantial criteria that constitute their standard of legitimacy, Buchanan and Keohane move on to discuss two problems of application. First, they argue that assessing whether an institution meets these criteria requires plenty of information about the performance of the institution and the available alternatives. Problems will arise if institutions are unwilling, or incapable, of providing this kind of information, or if the information is not accessible in a way which is understandable even to non-experts. This is the problem of “factual knowledge” (ibid. 425). The second problem that arises in trying to apply the three criteria is that of “moral disagreement and uncertainty” (ibid.). Even if Buchanan and Keohane were right in holding that agreement can be reached regarding the most serious injustices (something which can be doubted), there could still be disagreement on the question whether some institutions (e.g. the International Criminal Court) should embrace “higher moral standards” (ibid.). In addition, Buchanan and Keohane say that there is

uncertainty regarding the role that ILIs should play, i.e. what competences and responsibilities they should have.

Buchanan and Keohane argue that the proper way of dealing with these problems is by introducing transparency, along with accountability, as institutional features that are said to constitute the “epistemic-deliberative quality” of ILIs (ibid.). Buchanan and Keohane’s characterisation of transparency, whose basic features we have adopted, has already been presented above. But they also introduce accountability as a condition that is additional to transparency. They understand accountability as “a gauge of legitimacy”. It includes (1) the standards which the authorities are expected to meet, (2) information available to the accountability holders which enables them to measure the authority’s performance by the established standards [this is provided by the transparency condition], and (3) the ability of accountability holders to impose sanctions in case the authority fails to meet these standards (Buchanan and Keohane 2006, 426). They also argue that a broader understanding of accountability must include the ability of subjects to change the very terms of accountability. The authority should, in other words, permit “principled, factually informed deliberation about the terms of accountability” as well as the revision of (a) the standards of accountability, (b) the definition of who the accountability holders are, and (c) the interests that these should represent (ibid. 427). This broad understanding of accountability is said to be instrumental in the light of moral disagreement and uncertainty. The ability to change the terms of accountability is seen as the proper channel to resolve disputes about “what constitutes appropriate accountability” (ibid. 427).

Our own notion of participation does not include accountability, but is limited to transparency. That is so because most of the functions attributed to accountability (at least in its narrow understanding) by Buchanan and Keohane can be found within the Normal Justification Thesis. The NJT is our “gauge of legitimacy” – it is the standard that

a legitimate authority must normally meet. Our approach does not deal with potential sanctions against political authorities that fail to meet the legitimacy standard. This omission, which distinguishes our account from Buchanan and Keohane, is not due to some belief that sanctions are not important, but rather due to the limited scope of our approach. Our aim in this thesis is to establish the conditions under which political authorities, and ILIs in particular, are legitimate. We do not deal with the measures that ought to be taken (or not) once an authority is found to be non-legitimate (cf. chapter I, p. 26).

We can thus not only say that our characterisation of transparency is very similar to the one defended by Buchanan and Keohane, but also that some important elements of their notion of accountability can be found in our account. We, too, understand transparency as the broad availability of information that is relevant for assessing authorities. And the Normal Justification Thesis provides the standards against which the authority can be judged. Despite these similarities, there are significant differences between Buchanan and Keohane's paper and our own approach regarding the justification of transparency. For them, transparency is valuable insofar as it helps to advance conformity with the three criteria of legitimacy mentioned above (minimal moral acceptability, comparative benefit, and integrity), improve the standards of legitimacy, increase public acceptance of the authority, and reduce moral disagreement and uncertainty. In order to achieve all these goals, international institutions must be transparent not to anyone, but to those actors who can be expected to make the best use out of these participatory opportunities. According to Buchanan and Keohane, international institutions should be linked to a "transnational channel of accountability" constituted by "external epistemic actors" (ibid. 432). These actors are said to include "individuals and groups outside the institution in question who gain knowledge about the institution, interpret and integrate such knowledge, and exchange it with others, in ways that are intended to influence institutional behavior" (ibid. fn.).

Non-Governmental-Organisations, also known as NGOs, are presented by Buchanan and Keohane as one important instance of external epistemic actors (ibid. 428).

There are significant differences between their approach and our own: We do not affirm that transparency is going to lead to greater comparative benefits, improve the authority's integrity, or contribute to avoiding the violation of basic human rights. Nor do we argue that transparency has a tendency to reduce moral disagreement or moral uncertainty. We do not need to make these affirmations because our justification of transparency is not instrumental, i.e. it does not depend on its alleged tendency to improve outcomes. According to our understanding, legitimate political authorities owe transparency to their subjects. They owe it to their subjects not because the latter are supposed to be especially good at supervising and reforming their authorities (perhaps they are not), but because the reasons that the authority purports to serve are the reasons of the subjects. And these reasons can only be served if their holders have the chance to get involved with them.

Despite these significant differences, it would be premature to disregard Buchanan and Keohane's justification of transparency. After all, it could make sense to endorse the arguments of Buchanan and Keohane as considerations that are *additional* to our own. If transparency can ensure that political authorities do a better job, then that would offer an independent justification (i.e. one that is not correlated to our justification) to prefer transparent authorities to non-transparent ones. Buchanan and Keohane offer a number of arguments in support of their claim:

- Transparency as an evaluative *proxy* for establishing whether the authority is meeting the conditions of minimal moral acceptability, comparative benefit, and integrity. While it may be difficult to directly assess the authority's performance regarding these three criteria, the authority's failure to disclose relevant

information is said to provide “good reasons to believe the institution is not satisfying the three criteria for legitimacy” (ibid. 429-430).

- Transparency as a facilitator of *monitoring* and *criticism* through external epistemic actors, especially through “independent” NGO’s. Buchanan and Keohane endorse a model in which these actors gather groups of experts and specialise on certain types of issues such as human rights and the environment. Such a division of labour would, according to the authors, make it very difficult for ILIs to flout the standard of legitimacy and go unnoticed (ibid. 429-430).
- Transparency as an instrument of *innovation*. The establishment of “inclusive, informed deliberation” is believed to have the effect of resolving, or at least reducing, moral disagreement and uncertainty (ibid. 435). One of the disputes that Buchanan and Keohane have in mind concerns the question as to whether ILIs should simply conform to the requirement of minimal moral acceptability, or whether they should also be expected to meet higher moral standards (ibid. 425).

Are these arguments convincing? Take the “proxy argument”. Is the absence of essential information a reliable indicator for the shortcomings of an authority? It is easy to imagine an international legal organisation in, say, the field of health care, that does a very good job but fails to communicate its results in a way that is widely accessible and understandable. It is also possible to imagine an institution which does a rather poor job in the field of health care but has a very professional and well-equipped department of public relations which makes all the relevant information readily and freely accessible. Buchanan and Keohane seem to imply that an authority which fails to provide relevant information is attempting to hide something from the public<sup>2</sup>. But that may not be the case. Making information available to a wide public in a way such that

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<sup>2</sup> See, for instance, the analogy they provide in support of their argument: “A potential buyer of a used car would be justified in inferring poor quality if the seller were unwilling to let him have the car thoroughly examined by a competent mechanic” (ibid. fn. 31).

even non-experts can assess its performance can be tremendously costly, especially if it is about explaining highly complex or obscure issues on a global level (cf. p. 99). Another aspect to be considered is that of comparability. The criterion of comparative benefit requires the establishment of unitary standards on the basis of which the performance of different organisations can be contrasted. The authority could simply lack the money or the human resources, or both, to be sufficiently transparent in this sense. All this shows how much more than simple disclosure of information is needed for an authority to be genuinely transparent.

The other thing to note are the difficulties surrounding the notion of “external epistemic actors”, such as NGOs. We have seen that Buchanan and Keohane characterise these actors, rather vaguely, as any “individuals or groups outside the institution in question” whose purpose is to gain, interpret, integrate and exchange information about the institution in order to influence its behaviour. Perhaps the main problem with these external epistemic actors is that they are not supposed to be transparent –at least not in the sense defended here– to the transnational civil society they are supposed to represent (cf. Goodhart 2005, 9). This is certainly no reason for blame. Institutions such as NGOs are, after all, not meant to be under democratic supervision. This is not to say that they do not respond to anyone (they may be transparent to their donors, or to a supervisory board, or to their members). Nor is it to say that they will be unwilling or unable to perform the informational and interpretive task envisaged by Buchanan and Keohane. But the absence of transparency raises the serious question why these epistemic actors should not be exposed to the same problems that are said to afflict ILIs. These institutions are said to be prone to “favouring insiders” (Buchanan and Keohane 2006, 431) and to “exclude consideration of the interests of certain groups” (ibid. 433). Buchanan and Keohane believe that the epistemic actors are going to help to “ensure more inclusive representation of interests and preferences over time” (ibid. 434). But why should that be so? Civil organisations

such as NGO's are usually constituted to defend particular values, not to defend the broad range of goals that may be derived from a particular problem. The job of Greenpeace is to influence politics and public opinion in favour of protecting the environment. It is not to find the best ways of reconciling the protection of the environment with other, perhaps conflicting values such as economic growth. So it may well be the case that the external epistemic actors –which, remember, are not supposed to be transparent– are going to be particularly interested in influencing ILIs so as to promote certain valuable goals over others (which might not be represented by any external epistemic actor).

Also, one can ask why inclusive and informed deliberation is supposed to have the tendency of resolving or reducing moral disagreement and uncertainty. It is possible to imagine the exact opposite, namely a situation in which moral differences are reinforced and accentuated as more and more points of view have to be taken into account. Another thing to be considered is the distinction between acceptability and justification. An argument which is persuasive to a degree that it meets with the approval of all participants may nonetheless be unjustified<sup>3</sup>. Overcoming moral disagreement through “inclusive and informed” deliberation cannot, therefore, be equated with moral progress. Buchanan and Keohane seem to neglect this possibility. Their reference to deliberation is almost exclusively linked to “the attempt to construct a more robust, shared moral perspective from which to evaluate global governance institutions” (ibid. 435).

It also seems as if Buchanan and Keohane's reliance on experts is excessively optimistic. Their belief in the beneficial effects of transparency is partially grounded in the characterisation of external epistemic actors as agents which are able to monitor

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<sup>3</sup> This point has been raised by Joseph Heath against Habermas' contention that a certain type of consensus, arising from the persuasive force of an argument, is the criterion for rightness (Heath 2001, 223).

and criticise the activities of international institutions by drawing on groups of experts (ibid. 430). This suggests that legitimacy assessments are primarily a matter of expertise. However, as I tried to show in chapter III, we should be sceptical about the possibility of expertise in the domain of moral reasoning. While experts certainly play a fundamental role in the technical domain, there does not seem to be a set of criteria by which we could come to identify experts for solving the kind of problems which Buchanan and Keohane have in mind, namely moral disagreement and moral uncertainty (cf. chapter III, p. 75).

The previous considerations are intended to cast some serious doubts on the justification of transparency as provided by Buchanan and Keohane. Their approach aims at justifying transparency with its alleged tendency to improve the authority's performance as judged by their legitimacy standards, and to allow for the emergence of new, morally improved legitimacy standards. Attractive as their approach is, it is hard to see why we should give up some of the objections raised earlier, according to which transparency could, under certain circumstances, increase the degree of moral conflict and uncertainty, thus exacerbating instead of solving the problem of legitimacy presented by Buchanan and Keohane. This is not to say that the presence of transparency can *never* be expected to improve the authority's performance. We only say that its justification does not seem to work for ILIs in general. What would be needed, then, is a case-by-case approach. Our own justification, in contrast, can claim general validity. That is so because we do not attempt to justify the value of transparency with its (allegedly beneficial) consequences. Our justification of transparency is based on the insight that political authorities would fail to be legitimate if they did not allow their subjects to get involved in a way that requires transparency. In the second and third chapter, we argued that the ability of subjects to get involved in the activities of their authorities is crucially related to the legitimacy of those authorities. In chapter II, we emphasised the importance of subjects being able to

respond to their reasons for action for the authority to succeed in serving moral duties. Our argument there did not depend on the assumption that the ability of subjects to engage with their reasons is going to yield any beneficial results apart from the intrinsic value of subjects engaging with their reasons for action.

The purpose of our investigation is, therefore, different from that of Buchanan and Keohane. Both their approach and our own one are about legitimacy and transparency, but the understanding of legitimacy differs significantly. For Buchanan and Keohane, there is no necessary connection between the participation of the subjects and the legitimacy of ILIs. For them, legitimacy depends on whether the authority is sufficiently good at providing benefits, avoiding the violation of basic human rights, and avoiding discrepancies between its performance and the goals it has proclaimed. The role of external actors (which do not need to be the subjects) is to help the authority in conforming to these conditions, and in establishing better standards. In our understanding, however, the ability of political authorities to provide benefits is inseparably linked to them being transparent to their subjects. We have insisted that political authorities have to be seen as intermediaries whose job is to mediate between subjects and their reasons for action by providing subjects with reasons for action in the form of authoritative directives. The condition of transparency is crucial because it enables subjects to be guided by these reasons for action, thus allowing the authority to exercise this mediatory function. Our defence of transparency does not depend on the subjects being especially good, or especially motivated, at assessing their authority. We have only said that, for the authority to be legitimate, it must give subjects the chance to participate in certain ways. The legitimacy of the authority does not depend on how subjects make use of that chance. This means that, contrary to Buchanan and Keohane's account, political authorities would have to be transparent to their subjects even if the latter were very bad at evaluating the former, and even if NGOs were much better at doing so.

We have not been looking for the *best* model of political authorities – not even for a fairly good one. Our thesis is about legitimacy (cf. chapter I, p. 32). Our aim has been to establish the conditions that are fundamental to the authority's legitimacy, i.e. to its moral justification for having authority over its subjects. We are aware that legitimacy does not cover all the normative aspects surrounding political authorities: Any authority that is legitimate because it is good at helping subjects to improve conformity with some of their reasons for action could, and probably should, have the aim of doing much better. But this standard, which we may call the standard of excellence, goes beyond considerations of legitimacy. In this sense, the standard of legitimacy for political authorities should not aim too high. The work it can be expected to do is to establish whether a person or institution has the moral right to wield authority over its subjects. Not more and not less. It is therefore perfectly possible to imagine an entity which, though it fails to qualify as legitimate political authority, is nonetheless very good –perhaps even better than the legitimate authority– at achieving certain outcomes. Just think of a very rich and well-equipped charity organisation sponsored by Bill Gates. Imagine, further, that the power and skills of this organisation are so strong that it can easily surpass the performance of states and ILIs in, say, the field of combating malaria. Is there any reason to assume that the charity organisation is illegitimate if we employ Buchanan and Keohane's threefold legitimacy standard consisting of minimal moral acceptability, comparative benefit, and institutional integrity? It seems perfectly possible to imagine that this charity organisation could meet all three standards.

According to our approach, in contrast, the charity would clearly fall short of being a legitimate political authority. For the charity to have legitimate authority, it must not only be able to improve outcomes, but do so in a special way, i.e. by providing potential subjects with reasons for action on the basis of which subjects can improve conformity

with their own reasons for action. Potential subjects must, in other words, be able to see why following this charity can be expected to help them in discharging some of their moral duties. In the absence of this enabling condition (for which transparency is required), the charity could not provide this kind of help. Charitable organisations do not, normally, pretend to be political authorities. Unlike political authorities, they do not claim that you or I have a moral obligation to support them, just as we do not claim to have the right to assess their activities and performance. And even when we say (perhaps rightly) that there is an obligation to spend money for charitable causes, we do not mean to say that there is an obligation to support a *particular* organisation or a particular cause, or that a particular charitable organisation has the right to address potential donors as if they had an obligation towards it. Note that we are not saying that Buchanan and Keohane affirm that a charity would qualify as a legitimate political authority (in all likelihood, they would reject that claim). We are only saying that their threefold standard of legitimacy does not appear to be able to capture the distinctive feature of political authorities as opposed to other organisations that are also in the business of serving reasons for action (such as charity organisations).

### ***Transparency – and democracy?***

This chapter would remain incomplete if it did not consider the status of democracy within the general framework of this thesis. After all, it would be slightly odd to write about political authorities and the involvement of subjects without taking democracy into account. Buchanan and Keohane are well aware of this. They say that “democracy is now widely thought to be the gold standard for legitimacy in the case of the state” (ibid. 416). But what about ILIs? Buchanan and Keohane do not argue that democracy should not be the “gold standard” at the global level. Rather, they say that, for different reasons, global democracy is unfeasible at present and for the foreseeable future (ibid.). This leads them to reject the “domestic model” of democracy, and to come up with their alternative conception of legitimacy which has been discussed here – one that does not

require democratic participation of subjects (ibid. 417). This is not to say that Buchanan and Keohane's model of legitimacy contains no democratic elements at all. The participation of democratic states plays a significant role along with the involvement of civil society. Buchanan and Keohane argue that the transnational channel of accountability (p. 103) ought to include national legislatures which should be in charge of sanctioning international institutions that fail to satisfy the legitimacy standard (Buchanan and Keohane 2006, 431). They also say that the standard of legitimacy ought to "*promote* the key values that underlie demands for democracy" (ibid. 417), although it does not become entirely clear what is meant by this (cf. ibid. 434-435).

Within our own account, the relevance of democracy follows from the arguments developed in chapter III, where we argued that subjects ought to have the right to choose and specify overall goals by themselves. The exercise of this right is what we understand by democracy. Transparency, as we have seen above, plays an important role in facilitating the interaction between subjects (choosing overall goals) and the authority (implementing those goals). Transparency, however, is insufficient for democracy to work. For that to be the case, subjects must not only be able to access information about the purposes and activities of their authorities; nor is it enough if they have the right to sanction the authority in the case of non-compliance with our legitimacy standard. In addition to all that, subjects must have the right to set the political agenda by deciding about overall goals and assigning their implementation to an appropriate authority. In the following chapter, I shall argue that the legitimacy of ILIs should not only be measured by their transparency, but also by the efforts they undertake to promote democracy within the limits of what is possible at the present time. I shall argue that there can be institutional arrangements which, if implemented, would constitute first steps towards a global democracy. At the same time, I shall argue that the responsibility for the implementation of global democracy must be shared

between subjects and their authorities. Because of this, we should be careful not to interpret the current democratic deficit at the global level as an indicator for the non-legitimacy of ILIs.

## V. Global Democracy

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This chapter is about the relation between democracy and legitimacy at the level of international legal institutions (ILIs), and its institutional implications. The chapter is divided into *three* main parts.

The *first* part characterises our account of democracy as first outlined in chapter III. Democracy is often understood as the ability of subjects to contest their authorities by monitoring their activities, exercising control, making demands, imposing sanctions, or refusing to obey the authority. All these attitudes are primarily reactive ones. They are responses to what the authority does or fails to do. The right of subjects to react to their authorities in these ways has already been discussed, and partially defended, in chapter IV. The condition of transparency, as presented in that previous chapter, establishes the right of subjects to gain insight into the activities of their authorities in order to form reliable beliefs about their purposes and capacities.

Our understanding of democracy demands more than just transparency. While it presupposes the ability of subjects to evaluate their authorities, it goes beyond that by defending the right of subjects to be the primary actors in the domain of overall goals. Democracy is meant to grant subjects the right to set the political agenda by choosing and specifying the overall goals that ought to be pursued. The added value of the first part of this chapter shall consist in exploring the conditions that need to obtain, in general (i.e. not only at the level of ILIs), for subjects to have the right to choose and specify overall goals. We shall propose a particular form of democracy, namely deliberative democracy, as the best way for dealing with the tension between subjects having the right to choose by themselves, and, on the other hand, the need for collective convergence on overall goals (cf. chapter III, p. 81).

The *second* part of this chapter focuses on the relation between democracy and ILLs. We shall examine the positions of David Held, Philip Pettit, and Thomas Christiano, all of whom argue –albeit in different ways– for a model of global democracy that is based on the model of democratic states. David Held advocates a cosmopolitan democratic law and a global political authority. Held’s criterion of legitimacy is autonomy and democratic autonomy in particular. According to Held, ILLs are legitimate to the extent that they are able to promote autonomy. Held argues that a whole array of rights, ranging from civil and political rights to social and cultural rights, is required for the promotion of autonomy, and that these rights can ultimately only be upheld through a global political authority which would include a global democratic assembly. Thomas Christiano, on the other hand, agrees with the current state-based model of democracy in a fundamental way. He believes that international law would be democratically legitimate if all states were “highly representative” and participants in a “fair system of voluntary association” (Christiano 2010, 126-127). Philip Pettit also centres his discussion on global democracy on the current system of states. For him, democratic legitimacy in the international domain depends on the democratic legitimacy of its member states, the protection of these states against domination, and giving each state “equal and effective control over how it operates” (Pettit 2010, 155). All three approaches have their main focus on questions of institutional design. They either seek to reform the current system of states (Pettit, Christiano), or to reproduce state-based institutions on the global level (Held).

Our own criterion of legitimacy is not only focused on institutional design, but also assigns a critical role to the values that underpin our understanding democracy. This is not to say that questions of institutional design are of little importance. After all, this thesis is about the legitimacy conditions of ILLs. In our view, however, the democratic legitimacy of ILLs depends, in a crucial way, on the promotion and protection of the

right of the subjects to choose and specify overall goals. We shall argue that a system of democratic states, as favoured by Pettit and Christiano, would be insufficient for the realisation of global democracy as it would not allow for democratic deliberation and decision-making across national borders. Held's account, on the other hand, must also be rejected for our purposes.

We do not argue –as he does– in favour of *expanding* the activities of ILLs to the promotion of autonomy, but on *restricting* them to only those domains of actions where they can be expected to help their subjects improve conformity with their reasons. The responsibility for promoting autonomy, and any other value that may be relevant in the political domain, would therefore be shared between the subjects and their authorities. According to our account, subjects are responsible for choosing and specifying the values represented by overall goals. Political authorities, in contrast, are responsible for implementing the decisions of their subjects at the technical level, and for the democratic process that leads to such decisions.

For this division of labour to work, subjects and authorities need to stand in a relation of permanent cooperation. Political authorities should not only respect democratic decisions made by their subjects, but also help to create the conditions for democracy to prosper. Authorities are responsible, at the very least, for not interfering with the subjects' rights of political participation, including their right to vote, to form a political initiative or party, and to run for a political post. In addition, and because of their coordinative competences (which are usually superior to those of their subjects), political authorities should be responsible for organising and supervising the democratic processes of deliberation decision-making in accordance with the possibilities that are currently available.

This leads us directly to the *third* and final part of this chapter, which deals with the practical implications that follow from our considerations for the domain of ILLs. The legitimacy of any political authority depends on its capacity to help its subjects improve conformity with their reasons for action. In the case of ILLs, however, we face the difficulty of not having a global democratic order wherein subjects can exercise their right to democratic self-determination. It would be wrong to conclude that ILLs cannot be legitimate unless their subjects are fully able to determine overall goals by themselves. Our argument for democracy, as defended in chapter III, is a *comparative* one<sup>1</sup>. The argument that political authorities cannot be presupposed to be legitimate at the level of overall goals rests on the assumption that subjects are unable to identify those who could help them to improve conformity with their reasons at this level. The scenario changes, however, if subjects are partially or totally unable to choose and specify overall goals in the first place. In such a situation of partial or total inoperability, it seems clear that the authority can help. Subjects are more likely to improve conformity with their reasons for action at the level of overall goals if they allow an authority to take part in choosing and specifying overall goals than if they refuse to. This assertion is trivial, for the alternative (subjects deciding completely on their own) would have to fail given the condition of inoperability. The mere capacity of political authorities to make decisions in good faith would thus seem to be enough for outperforming the subjects. After all, the alternative to choosing overall goals in a non-democratic way would be not choosing overall goals at all.

But we must also keep two things in mind. First, the justification for ILLs deciding at the level of overall goals instead of their subjects is provisional, for it obtains only as long as subjects are unable to realise their right to decide on their own. Secondly, we should bear in mind that the latter assumption, i.e. that subjects are unable to realise their

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<sup>1</sup> Whereas the argument for transparency does not rest on any comparison, but qualifies as an unconditional requirement for legitimacy to obtain (see p. 138).

democratic right, is a strong one, and quite unlikely to be fully true. Even if subjects are currently unable to deliberate and decide democratically on the global level, a first step can be made through small-scale deliberative experiments known as “minipublics”, or through dispersed methods of deliberation (more on this in the final section). ILIs are not only required to respect and support these incipient democratic channels of decision-making on the global level, but also to take them as starting points for encouraging further, global democratic deliberation. We can thus measure the legitimacy of these institutions by their success in including subjects in their activities, and promoting democratic decision-making, if only on a small scale. These are achievements that can, under current conditions, be expected from ILIs and their subjects. They should therefore play a role in determining the legitimacy of ILIs.

### ***Deliberative democracy***

Our defence of democracy, as presented in chapter III, is based on the argument that there need to be good reasons for placing subjects under the authority of political authorities. In that chapter we argued that, in the absence of such good reasons, subjects retain their right to decide on their own. The right of subjects to decide on their own can be characterised as an original right because any restriction to it requires justification. The presence of a legitimate political authority provides the justification for such a restriction. Someone who, for some reason, is not subjected to the directives of an authority *retains* her original right to act on her own assessment of the situation. The expert pharmacologist (cf. chapter III, p. 74) does not need to provide any arguments for justifying his right to decide by himself – it is enough to show that he is not subjected to the directives of the authority dealing with matters of drug safety. This is not to say that the right to decide by oneself should be left entirely unspecified. The right to decide by oneself is not meant to include the liberty to do whatever one wishes to do. Subjects are bound by their reasons for action –and moral reasons in particular– irrespective of the presence or absence of political authorities. I have a moral obligation

not to murder even if I find myself in a place where there is no legitimate authority or no law prohibiting murder. In the absence of binding authoritative directives, the task of acting in conformity with my reasons for action is left to me alone. In such a case, my responsibility to conform to my reasons for action does not have the support of a helping authority and its directives. In a place where there is no system of public education, families would bear the full responsibility to educate their children. The right to decide by oneself is thus best understood as a Hohfeldian liberty-right (cf. Knowles 2010, 24-25). It establishes that subjects are under no obligation to follow the authority on these matters.

Chapter III defended the right to decide by oneself on the basis of legitimacy considerations. The reason for placing subjects under the authority of political actors is, according to Raz, its legitimacy, i.e. the capacity of the authority to help its subjects improve conformity with their reasons for action. As we saw in chapter III, there are good reasons for being sceptical about the possibility of political authorities providing help of this kind in the domain of overall goals. Given this scepticism, we argued, subjects ought to retain their right to decide on their own at this level. The argument was labelled as “anti-authoritative” (cf. chapter III, p. 82). The practical implications of this argument are demanding for two reasons:

First, and as we have just seen, the right to decide on one’s own does not free subjects from their responsibility to conform to their moral reasons for action. Quite the contrary: in the absence of a political authority capable of helping them by serving their reasons for action, subjects are left alone with their responsibility to act as they are morally required to do.

Secondly, we should be aware that there is a potential tension between the right to decide by oneself and the need for collective convergence on overall goals (this was

also discussed in chapter III, p. 83). Convergence is necessary because no political entity can function in the absence of an institutional arrangement that allows for a selection among different goals and for making these choices authoritatively binding on the subjects. In a scenario in which some subjects favour higher speed limits while others favour lower ones, none of the two overall goals is going to be realised unless one of them is chosen and followed even by those who disagree or do not have a formed opinion on this matter. The challenge, therefore, consists in finding a democratic decision-making procedure in which both the right of every subject to decide by him- or herself *and* the need for convergence on overall goals can be incorporated and respected.

Much depends on whether we find a satisfactory solution, i.e. one that eliminates or at least ameliorates the tension. After all, our defence of democracy would make little sense if it replaced the unjustified domination by one actor (political authorities) with the unjustified domination by another actor (e.g. the majority of subjects), or if it led to a situation where the right to choose by oneself comes at the high price of anarchy. We should be looking for a model of democracy that fulfils two conditions. First, it must be inclusive and authoritative in allowing ideally all subjects to participate, as authors, in the making of decisions which, once made, become binding on all subjects. Secondly, it must respect Raz's premise that subjects have reasons for action that apply to them objectively (see chapter I, p. 8). Rather than understanding democratic decision-making as the imposition of the interests of some over those of others, or as the accommodation of different interests through mutual bargaining, we should look at it as an inclusive process of reasoning. The aim of such a process would be to assess a given position by weighing the reasons that speak in favour or against it. So if there were two positions, A and B, with 50% of the participants' actual preferences in favour of position A and the other half favouring B, the ideal outcome would not necessarily consist in a solution that realises both A and B (thus satisfying the actual preferences of

the participants), but in assessing both positions and opting for a solution that is considered to be the best one in the light of the relevant values (even if that should imply choosing A instead of B, or a third alternative, C). This is what we mean when we say that democracy ought to be understood as a process of reasoning (cf. Parkinson 2006, 2-5).

Such a process of reasoning would respect the right of participation by granting each subject not only the right to cast her vote when it comes to make a decision, but also the right to be heard and respected by the other subjects. This framework would give everyone the chance to argue for their point of view and to put it up for debate. Subjects are therefore able to participate, as authors, in the process of decision-making. By ensuring that each point of view is publicly exposed and debated before it is put to vote, it becomes harder for a position that is completely unacceptable to gather sufficient support. If there is sufficiently strong deliberation, the untenability of that position should become evident. With such procedures at hand, subjects may also find it easier to accept the decision of a majority even if they do not agree with it, especially if their own decision has been seriously considered beforehand.

The success of democratic deliberation is going to depend, to a great extent, on the willingness of the subjects to engage in such a process of reasoning. A majority whose only purpose is to make its preferences prevail regardless of any other considerations is likely to use its democratic right of participation in order to overrule the minority without even considering their arguments. Of course, such a scenario cannot be ruled out. The increased responsibility of subjects entailed by their freedom to choose at the level of overall goals also increases the possibility of abuse by the subjects. There are forms of avoiding the worst cases of domination, for instance through a charter of basic rights which could prevent the worst forms of injustice, or through the possibility of individual appeal to a court of justice that defends such a charter.

The focus of this thesis is on the legitimacy of political authorities, and ILIs in particular. So far, we have seen that the responsibility of subjects in choosing and specifying overall goals represents a major challenge for the subjects. But it is also a challenge for political authorities. Their job is to help subjects improve conformity with their reasons for action – and one of the strengths of political authorities (as compared to subjects acting on their own) is their capacity for organisation and coordination. Our proposal therefore amounts to a division of labour where subjects choose and specify overall goals while political authorities create the institutional and procedural conditions that are required for deliberation to succeed.

### ***The insufficiency of international democracy***

According to the Razian framework of legitimacy, any reference to the *subjects* of ILIs (and all other political authorities) must ultimately be aimed at those persons to whom the relevant reasons for action apply. But that is not, of course, the legal understanding of subjects in international law. As a matter of fact, the primary actors in international law are states, not persons. The usual way to create, support, and modify ILIs is through the consent of states. And whether an international institution has jurisdiction over states normally depends on whether the incumbent state has subscribed to that institution. For reasons to be exposed in the next chapter, this state-centred view is at odds with the Razian account of legitimate political authority. The task of legitimate ILIs is like that of any other political authority, namely to help improve conformity with reasons for action that ultimately apply not to states, but to persons. This view does not seem to be at odds with common sense. The World Trade Organisation (WTO), for instance, deals with the rules of economic trade between states. But when we say that the liberalisation of trade is good (or bad), we usually refer to the implications such a measure has for the subjects living in the affected states. We have in mind issues like economic prosperity, agricultural interests, or environmental deterioration. It thus

makes sense to say that, while the *prima facie* goal of the WTO is to deal with the rules of trade between states, the relevance of these goals cannot be understood unless considering their relation to the various reasons for action that apply to the persons living in those states (cf. Raz 1986, 5).

This clarification, however, does not yet show why it is that the central role of states in international law is fundamentally misguided. Perhaps the most obvious –but by no means only– problem faced by the current system of public international law is its non-discrimination between democratic and non-democratic states. The subjects of non-democratic states are thus often bound to ILIs and norms because of the consent of a government whose agenda they were not able to influence. Both Philip Pettit and Thomas Christiano argue that the non-democratic nature of many current states constitutes one of the main obstacles for democratic legitimacy at the global level (Christiano 2010, 124-125; Pettit 2010, 152-153). The other significant obstacle pointed out by both Christiano and Pettit is that of states being dominated by other states or by international institutions. Christiano argues that the power of some states allows for “hard bargaining” against weaker states. Christiano’s example is that of trade agreements between the United States and economically small countries. The “dire need” of such small countries makes it very hard for them to reject the conditions of trade dictated by the United States, especially if the United States increases the pressure by credibly threatening to walk out (since it does not have much to lose, as opposed to the small country). Christiano does not say that agreements signed under such conditions are not voluntary, but he argues that they constitute a “fundamental violation of norms of fair exchange” (Christiano 2010, 125-126). Pettit draws a similar argument with regard to ILIs. A state that is a member of the World Trade Organisation (WTO) can be “coerced into compliance” when its panel rules against that member state (Pettit 2010, 156). The formal right of member states to exit the WTO does not guard them against domination. Pettit believes that, by entering organisations such as

the WTO, states “lock themselves into potentially dominating sources of influence and control” (ibid.).

It is interesting to note that both authors confine their discussion on global democracy to the role of states, as if democratic states were the only channel for global democracy to flourish. They both affirm the possibility of global democracy in a hypothetical scenario in which all states are sufficiently representative and free from domination by other states or ILIs.

I believe that Christiano’s and Pettit’s approach fails to recognize the significance of democracy across national borders. Their understanding of democracy is that of global decision-making through national democracies, and may thus be characterised as international democracy. Our understanding of democracy includes global decision-making through democratic procedures that go beyond national boundaries, and can therefore be dubbed transnational democracy. I shall argue that the hypothetical scenario outlined above, in which all states are democratic and free from domination, would not be able to produce the kind of democratic legitimacy that we defend. This claim may be surprising. After all, a perfectly democratic state does ensure the participation of subjects in public international law through a chain of representation: International legal organisations are democratically accountable to states which, in turn, are accountable to their subjects. In this way, subjects are able to exert indirect influence over ILIs (cf. Keohane and Nye 2002, 234-235). Supporters of free trade could, for instance, give their vote to a political party which promises to support the Doha Development Agenda at the World Trade Organisation. In a perfectly democratic state, voting would not, of course, be the only mechanism of participation. There would be other democratic means such as holding a referendum, filing a petition, forming a civil initiative, or running for a public post. All these mechanisms show how subjects

can get involved in choosing and specifying overall goals, which are then left for ILIs to implement.

Important as this form of participation is, it is nonetheless insufficient for ensuring the kind of democratic decision-making that we have defended in the previous section of this chapter. There, we have argued that the right of each subject to participate in choosing and specifying overall goals depends on the existence of a joint process of deliberation where every subject has the chance to present their own arguments to the other subjects. We have also seen that the subjects of ILIs are persons, not states. But who are these persons?

In order to answer that question, we need to be clear about the nature of legitimate ILIs (cf. Held 1995, 235-237 for a similar approach). There are at least two conditions that need to apply for any institution to qualify as an ILI. First, the class of subjects to which the reason for action that the institution purports to serve applies must be distributed across the globe as distinct to regional, national or local distribution. Secondly, the institution must be able to help its subjects by providing them with reasons for action, in the form of authoritative directives, capable of guiding them to improve conformity with their reasons (cf. chapter II, p. 58). This condition follows from the Normal Justification Thesis.

Let us illustrate the case with the Natural Duty of Justice defended by Allen Buchanan (2004, 85-98). According to Buchanan, every human being has a moral duty to help making sure that the basic human rights of other human beings are not violated. So the first criterion for identifying ILIs clearly obtains in this case since the Natural Duty of Justice applies to every human being, and not just to those living within a certain state or region. Applying the second criterion (i.e. the Normal Justification Thesis) is a matter of empirical research, supported by the condition of transparency. We would need to

examine which of the available institutions offers the prospect of helping subjects in discharging the Natural Duty of Justice, or some aspect of it, on a global scale<sup>2</sup>. We cannot answer that question here, but it is plausible to assume that an ILI could do better than states when it comes to serve at least *some* aspects of the Natural Duty of Justice, namely those that are of global relevance. This could include coordinative tasks (e.g. the establishment of internationally binding standards, the organisation of help across the boundaries of states, or the resolution of disputes among states). The crucial question here is: What would democratic participation have to look like when it comes to choosing and specifying overall goals which, like goals pertaining to the Natural Duty of Justice, concern the reasons for action of subjects across national borders?

The model of democratic states presented above is unsatisfactory in such cases because it leads to an arbitrary fragmentation of the process of democratic deliberation and decision-making. The state-based model of democracy confines deliberation within national borders, therefore precluding non-nationals from participating. Democratic decisions are tainted by the problem of exclusion since citizens of a democratic state come to make decisions without having to take into account the arguments of non-citizens. The problem of exclusion is a problem of legitimacy because those subjects who do not happen to be citizens of that particular democratic country are unable to participate, as authors, in the process of choosing and specifying overall goals. This inability affects the right to decide by oneself. Subjects who do not belong to that democratic country are confronted with decisions pondered and adopted by other subjects in arbitrary isolation.

Imagine a scenario in which subjects deliberate about the content and implications of basic human rights and, in the context of this deliberation, need to decide on whether

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<sup>2</sup> On how to deal with situations where there is more than one authority capable of serving reasons, see chapter VI, p. 153.

to reform the international rights of refugees. Think, first, of a country haunted by terrorism, civil war, or by an oppressive regime that persecutes minorities. Some citizens of that country will have a strong, morally justified, interest in finding shelter as refugees in another country. If someone asked them to expose their arguments, they would be able to tell of atrocities that violate, in many ways, the basic human rights defended by the Natural Duty of Justice. They would also be able to justify their desire to start a new life at a new place where they no longer have to fear for their lives. These are all, I believe, serious arguments that speak in favour of granting robust rights to refugees. Now imagine the second scenario of deliberation. Think of a comparatively rich country, such as Switzerland, Germany, or the United Kingdom, whose citizens live in a safe environment and do not have to fear persecution. Democratic deliberation in any of these rich countries is ultimately going to be based on the points of view of the citizens of these countries. It is only natural to assume that this debate is going to be quite different than the debate among potential refuge seekers. The citizens of rich countries may be aware of the dramatic situation of refuge seekers, but are also going to worry about the economic and social costs of accepting refugees, and they may be irritated if they find out that they have been accepting more refugees than their neighbouring countries. The latter happened in Germany in the early 90s. As a consequence, the German parliament modified its asylum laws in 1993. Since then, asylum is denied to asylum seekers who, on their way to Germany, have travelled through a country which is seen as safe. These persons are sent back into these safe countries without any chance to apply for asylum in Germany. This modification, along with other factors, has led to a dramatic reduction of application seekers over the last 15 years.

Amartya Sen has argued that “[t]he reach of public reasoning may be limited in practice by the way people read the world in which they live” (Sen 2009, 168). The illustration he provides is that of a society which has few female scientists. Citizens living in this

society observe –rightly– that there are few female scientists. On the basis of this observation, they may draw the –wrong– conclusion that women are bad at science (ibid. 162). One way to confront such wrong beliefs is by “going beyond the positionality of local observations”, for instance by considering societies where women have more opportunities to engage in academia, thus producing excellent female scientists (ibid.). A similar argumentation can be applied to our case. The citizens of rich countries make the –correct– observation that granting asylum can have some negative effects on their own well-being. But they are wrong in concluding that, because of these burdens, they have no obligation to grant robust rights of asylum to refugee seekers. In going beyond the “positionality” of their local observation, i.e. by observing not just their own financial burdens but also the miseries of persecution, they may weigh their arguments differently and thus arrive at a different conclusion.

The restriction of democratic deliberation to the citizens of a country (or those of a regional institution such as the European Union) is problematic whenever the process of democratic deliberation and decision-making fails to include all the subjects that ought to have a say in choosing and specifying overall goals. It makes sense to confine deliberation about, say, the construction of an opera house or the establishment of a pedestrian area to the city or local area in which such projects are to be realised. After all, these are reasons for action that apply only to the citizens of a city, or a region<sup>3</sup>. As far as legitimacy considerations are concerned, there is no need to include those whose reasons are not meant to be served since they do not qualify as subjects of the relevant authority. Moreover, reasons for action which, like the Natural Duty of Justice, have global implications may also have purely local implications. The right of refugees, for instance, surely is a global matter when it comes to set international standards. But

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<sup>3</sup> But note that such decisions cannot be made in complete isolation from other, non-local aspects. They must be based on previous considerations that transcend the purely local domain. One question that would have to be asked previously is this: How much money should we spend on local purposes, and how much should we spend on projects abroad?

there may well be other aspects of it which are of exclusive concern to the citizens of a particular state, e.g. due to historical circumstances. One example for this would be the special immigration rights conferred by the German state on Jews moving from the former Soviet Union (where they were persecuted and discriminated against) to Germany.

So there are good reasons for confining some democratic processes to the local and regional level. Our argument, however, is that these restrictions are to be abandoned when it comes to make globally relevant decisions. This clearly is the case with some important aspects of the Natural Duty of Justice which, remember, is about securing basic human rights. These rights are likely to include the freedom from persecution, so the right of refugees would be directly relevant here. Any democratic deliberation on reforming the internationally recognised rights of refugees (as laid down in the Geneva Convention) would have to be open for every human being since they all have the moral duty to help as established by the Natural Duty of Justice.

One objection to our rejection of state-based democracy for global problems would consist in pointing out that, under the assumption that *all* states are democratic, the problem of non-participation does not really arise because all subjects would have the chance to participate through the states they are nationals of. Those who are at risk of being persecuted could not bring forward their arguments in, say, Germany or Switzerland, but they could do so within their own country (again, under the hypothetical proviso that all countries are democratic) and would thus not be excluded from participation. But this approach does nothing to solve the fundamental problem mentioned above, namely that decisions are made without having to take into account the points of view of all those to whom the relevant reason applies. That problem is not going to be solved through the expansion of the current model, i.e. through more state-based democracy. With such an arrangement, the excluded subjects would be able to

“retaliate“ against the rich countries by deliberating and deciding without having to take into account the points of view of the citizens of, for instance, Germany and Switzerland. But two wrongs do not make one right, at least not in this case. The solution to our problem of democratic exclusion cannot consist in adding up exclusion against exclusion (as if one could compensate the other), but in having a deliberative framework that is open to *all* the subjects to which the relevant reason for action applies.

### ***A global democratic authority?***

When it comes to the Natural Duty of Justice and its global implications, we would need a global democratic forum in which every human being has the right to democratic participation, making sure that everyone has the chance to be part of the process of choosing and specifying overall goals. This is not to say that state-based democracy, or any other non-global forms of democracy, ought to be rejected. We are only saying that state-based democracy is insufficient when it comes to deal with those overall goals that concern reasons for action that apply to subjects globally. In such cases, the decisions reached within national or regional democratic frameworks would have to be reconsidered within a framework of global deliberation.

There are different suggestions for overcoming the deliberative deficit at the global level. One of them is the creation of a global parliament. The campaign in favour of a United Nations Parliamentary Assembly (UNPA) argues for the creation of an assembly, initially constituted by members of national parliaments, which would run in parallel to the current General Assembly. Advocates of this campaign propose a gradual approach where the UNPA would first have a merely consultative status and, if the project proves successful, become an authority and have its representatives directly chosen by the citizens of the world. One of the current institutions that could evolve into a United Nations Parliament is the Inter Parliamentary-Union (IPU), established in 1889 with its

headquarters in Geneva. The parliaments of 155 countries (as of October 2010) are currently members of the IPU (including countries with dubious democratic reputations such as China, Iran, and Zimbabwe, but excluding the United States of America). Regional parliaments such as the European Parliament, the Andean Parliament and the East African Legislative Assembly are associate members of the IPU. The IPU has a governing council constituted by three members from each national parliament. Attached to the governing council are 11 committees and working groups, each of them focussing on a particular topic including peace and security, democracy and human rights, and sustainable development. The IPU has permanent observer status at the United Nations, and cooperates with the UN and some of its agencies. The resolutions of the IPU are not legally binding. Members of the IPU, however, are said to have a “duty” to submit resolutions to their respective parliaments and to “stimulate their implementation” (article 7 of the IPU’s statute<sup>4</sup>).

David Held believes that the creation of a directly elected world parliament “is an unavoidable institutional requirement” (Held 1995, 273). His justification for global democracy is, however, quite different from our own. Held’s criterion for political legitimacy is the autonomy of subjects. For him, autonomy is “the basis on which public power can be justified”. Autonomy includes the “capacity to reason self-consciously, to be self-reflective and to be self-determining” (ibid. 151; cf. 157). By self-determination Held means the ability of subjects “to choose freely the conditions of their own association” (ibid. 145). That is, in other words, “the ability to judge, choose and act [...] upon different possible courses of action in private as well as public life [...]” (ibid. 146). His characterisation of autonomy, however, does not stop there. Held also asks:

What arrangements have to be made, what policies pursued, in order to render citizens free and equal in their determination of the conditions of their association (ibid.159)?

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<sup>4</sup> <http://www.ipu.org/strct-e/statutes-new.htm#7> (accessed 20 October 2010).

Held argues that self-determination does not only conflict with “the severest forms of inequality” such as slavery, apartheid, and racism (ibid. 167), but also with “the asymmetrical production and distribution of life-chances which limit and erode the possibilities of political participation” (ibid. 171). Held locates seven “sites of power” where such life chances are generated and distributed: Body, welfare, culture, civic associations, economy, coercive relations and organised violence, and legal and regulatory institutions (ibid. 192-193). The chances to exercise self-determination are framed in terms of rights corresponding to each of these power sites. The first power site (“body”) includes *inter alia* the rights to “physical and emotional wellbeing” as well as the right to a “clean, non-toxic, sustainable environment” (ibid.). The fifth power site (“economy”) is said to include the right to a “guaranteed minimum income”, and the seventh power site (“legal and regulatory institutions”) the right to “adequate and equal opportunities for deliberation” as well as the right to direct and indirect involvement in political bodies. The right to democratic participation, as defended in this seventh and last power site, plays a privileged role in Held’s account. It is in a democratic structure, in which people are able to participate by deliberating collectively about matters of public concern, where the principle of autonomy can be realised (ibid. 155-156). The sum of rights located in the seventh power site constitutes “the democratic public law” (ibid. 190-201). Held starts by applying the democratic public law to nation-states only, but then moves on to what he calls the “cosmopolitan” level by revealing the shortcomings of nation-states under current conditions. The move from state-based democratic public law to cosmopolitan democratic law is motivated by Held’s analysis of globalisation and the dependencies it creates:

In the context of regional and global interconnectedness, however, people’s equal interest in autonomy can only be adequately protected by a commitment from all those communities whose actions, policies and laws are interrelated and intertwined. For democratic law to be effective it must be internationalized. Thus, the implementation of a cosmopolitan democratic law and the establishment of a cosmopolitan community – a community of all democratic communities – must become an obligation for democrats, an obligation to build a transnational, common structure of political action which alone, ultimately, can support the politics of self-determination (ibid. 232; cf. 89-96).

Once implemented, cosmopolitan democracy would cause the nation-state to “wither away”, although it would not become redundant (ibid. 233). In Held’s model, states would be just one legitimate political authority among others. His approach is based on the idea of subsidiarity. States should deal with problems which primarily affect people within their territory, and which are best solved by single states. Regional and global political authorities step in where states find themselves unable to solve problems alone (ibid. 235-236). At the same time, Held’s cosmopolitanism envisions a legal hierarchy with cosmopolitan law at the top of it. Cosmopolitan law “demands the subordination of regional, national and local ‘sovereignities’ to an overarching legal framework [...]” (ibid. 234; cf. 270-278). The implementation of this overarching legal framework is incomplete without the institution of a global assembly of directly elected representatives (ibid. 273). The task of the global assembly would be one of “framework-setting” (ibid. 274) while the implementation would correspond to the non-global authorities (ibid. 274-275). At the same time, any decisions made by the global assembly on the “core issues of cosmopolitan democratic law” would be legally binding on the non-global level “independently of any further negotiation” (ibid.).

James Bohman has referred to the tension in Held’s account between self-determination and the overarching legal framework. According to Bohman, the primacy of the global legal framework in Held’s account precludes the possibility of deliberation “about the nature of democracy itself” (Bohman 2007, 41-42). But I believe that Held would have an answer to Bohman’s objection, for he believes that the basic features of the democratic law that he defends would be acceptable to all participants in a sufficiently deliberative and sufficiently democratic environment, thus reconciling the democratic and legal aspirations of his account (Held 1995, 160-172).

A more significant difficulty with Held’s account is to be found in his adoption of autonomy as the criterion of legitimacy for political authorities. It is unclear how the

many aspects of autonomy that Held introduces are supposed to be crucial for legitimacy considerations. Held argues that the legitimacy of political authorities depends on their ability to enable subjects to live autonomous lives. His characterisation of autonomy includes, as we have seen (see p. 131), the “capacity to reason self-consciously, to be self-reflective and to be self-determining”. But this characterisation alone is much too weak for supporting any legitimacy standard. It is too weak because it is almost impossible to prevent persons from having and making use of these capacities. Even a slave would be able to act autonomously in this sense (cf. Raz 2010b, 326). Unless his master puts him in a comatose state, he certainly enjoys the capacity to reason self-consciously, to be self-reflective and to be self-determining. The slave would even be able to exercise these capacities to some extent – he would, for instance, be able to make use of his capacity of self-determination when having the choice between obeying his master or not. Held would not, of course, be satisfied with such an answer. He is interested in a thicker notion of autonomy. Even though Held starts with a general account of autonomy, he derives all sorts of rights from this concept (p. 132). In the later chapters of his book, he tends to conflate autonomy with what he calls “democratic autonomy” (Held 1995, 156). The following quote is illustrative:

To the extent to which democratic public law is upheld, the basis is created for legitimate rule. Public power, in other words, can be conceived as legitimate to the degree to which it recognizes the *principle of autonomy*; that is, to the degree to which public agencies can be said to promote and enhance *democratic autonomy* (ibid. 157; italics added).

So when he refers to e.g. self-determination, we should read *democratic* self-determination. But this specification only leads to another problem since we now need to ask why it is democracy, and not any other expression of autonomy, which should qualify as a principle of legitimacy. Does democratic autonomy bear greater normative weight than other expressions of autonomy? That does not seem to be so. My right to democratic deliberation and to elect public officials does not, by any means, appear to

be as morally significant as my right to be free from bodily harm, my right to choose a partner and start a family, or my right to choose a profession. My right to democratic participation seems even less significant if we can think of a benevolent dictator who denies democratic participation but takes every step to ensure the well-being of her subjects (cf. Griffin 2008, 242-255).

Held's defence of autonomy as a legitimacy condition is based on a genuine worry, namely that subjects are not going to be able to make use of their right to democratic participation if they lack the opportunities that are immanent to his conception of autonomy. Someone who, for instance, does not enjoy "physical and emotional well-being" would have her democratic right affected (cf. Held 1995, 192-193). If that was true, Held could have a strong argument for placing autonomy at the heart of his account. But this view runs into the same problems that we described above. If Held wishes to defend the mere *ability* to act autonomously, then physical and emotional well-being would not appear to be enabling conditions. Held says that, in the absence of a right to free reproduction, or indeed any other right that follows from his conception of autonomy, the democratic process is going to be "one-sided, incomplete, and distorted" (ibid. 190-191). But why should that be the case? It seems perfectly possible to imagine a couple which has little or no freedom of choice regarding procreation (perhaps because the state makes it exceedingly costly to have more than one child) participating in a democratic deliberative process, engaging in discussion, making their arguments heard, and persuading others to change their mind on restrictions to human reproduction or any other relevant political topic.

If, on the other hand, Held wishes to defend not only the ability to act autonomously, but a broad and vigorous exercise of autonomy, then it seems that we could probably all agree with Held in that not being allowed to have more than one child constitutes a significant restriction of one's personal autonomy. But so do other situations, such as

signing a work contract for ten years, or having a dominant mother (Raz 2010b, 325). Not every situation that restricts one's exercise of autonomy would seem to merit the existence of a right aimed at eliminating that restriction. In our account of legitimacy, it is the task of the subjects to find out, in a process of democratic deliberation, which restrictions of one's autonomy merit the implementation of a legal right, and which of them do not.

Held's worry is that the quality of democratic deliberation is going to be profoundly affected if subjects lack a whole catalogue of rights, such as the right to free reproduction. We have seen that, while the absence of such a right would certainly affect the autonomy of the affected persons, it does not seem to affect the right to democratic participation as extensively as David Held believes in saying that the process would be "one-sided, incomplete, and distorted" (Held 1995, 190-191). That would be the case if women were denied the right to participate, including their right to discuss and to be heard, to enter political parties and civil associations, and to cast their free votes in electoral processes. The case of a political authority which claims to be democratic and, at the same time, only accepts the decisions of their male subjects, is a clear example for a significantly distorted democratic process. An authority which proceeds to implement the overall goals chosen and specified by their male subjects would lack legitimacy because it would fail to respect the original right of *all* its subjects to decide on their own.

The same cannot be said with regard to decisions that appear to be wrong but have nonetheless been chosen within a democratic framework of deliberation. The success of the Swiss referendum on banning the construction of minarets is likely to violate the right to freedom of religion, but that alone would not –at least not in our account– taint the legitimacy of the authority which respects that decision and implements it (in this case, the Swiss state). Because of the division of labour on which our account is based,

the responsibility for wrong decisions at the level of overall goals would hit the subjects, not the authority (cf. p. 116).

Having examined the basic features of Held's cosmopolitanism, we can now compare it to our own approach. There are plenty of ideas in Held's cosmopolitanism which fit well with our project. Held succeeds in showing why some of the most pressing problems of our time cannot be solved by states alone. And his notion of subsidiarity plays a central role in our defence of a multi-levelled global order (to be outlined in our last chapter). Like Held's account, our own also opts for a model of democracy which does not regard decision-making as a process of bargaining among participants with fixed preferences but as a deliberative process in which subjects are prepared to leave their actual preferences aside if they can be persuaded that other courses of action are the better ones, e.g. because they are morally preferable. There is, however, a striking difference between Held's justification for democracy and our own. According to Held, the legitimacy of political authorities depends on their ability to secure and promote the autonomy of subjects. The realisation of this condition depends not only on the existence of democratic rights of participation and deliberation, but also on a whole array of economic and social rights (including the right to a clean environment and the right to a minimum income).

Our condition of legitimacy, in contrast, is less demanding because we have argued for a shift of responsibilities at the level of overall goals. This shift has its origins in the observation that political authorities do not appear to be able to serve their subjects in all the domains that are politically relevant, and that, because of their lack of legitimacy in the domain of overall goals, they should *abstain* from making authoritative claims in this area. By refraining from acting authoritatively in the domain of overall goals, political authorities leave these issues to be decided by the subjects. Any discussion about the value of autonomy, and the rights that ought to be derived from that value,

would have to be located at the level of overall goals. The legitimacy of political authorities does therefore not depend on their ability to choose the value of autonomy and specify its implications in terms of legal rights. That would be the responsibility of subjects. The legitimacy of political authorities depends not on their ability to choose and specify overall goals, but on their capacity to provide a democratic framework and to implement the overall goals that have been chosen and specified by the subjects.

In arguing for a shift of responsibility from political authorities to subjects, we have also moved away from the primarily institutional focus of Pettit, Christiano, and Held. All three of them argue that the attainment of global democracy is, first and foremost, a matter of having the right kind of institutions. Pettit and Christiano think of a global system of democratic states that are free from domination<sup>5</sup>. Held, on the other hand, argues for a strong and centralised global authority that is to act as guardian and executor of the overarching legal framework of cosmopolitan democracy. Our own approach is different in that it does not reduce the achievement of global democracy to the construction of a particular institutional framework. Our primary focus is on the ability of subjects to deliberate and decide by themselves. The legitimacy of ILIs, and political authorities in general, obtains in virtue of their ability to help their subjects in these ways. It is perfectly possible to imagine democratic deliberation occurring outside the well-known domain of state-based democratic procedures or that of a hypothetical global parliament. And it is plausible to assume, at least *prima facie*, that there can be more than one institutional arrangement for enabling subjects to decide democratically. Amartya Sen suggests that we should regard democracy not only (and

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<sup>5</sup> Others have argued that, for different reasons, democracy is more or less inextricably linked to the nation-state and can therefore never be realised at the global level. This view leads to different conclusions: Robert Dahl argues that, even though “international decision-making will not be democratic“, ILIs may still yield enough benefits to merit approval (Dahl 1999, 23). Jeremy Rabkin, on the other hand, mounts a radical defence of what he calls “the American idea of sovereignty” (Rabkin 2002, 45-70). That sovereignty is already violated if states subscribe to ILIs, such as the World Trade Organisation, which have the power to rule against the American state (e.g. by majoritarian decision-making, or through an appellate body *ibid.* 218-232). See also Manent 2007, and Keohane and Nye 2002. More on this in chapter VI, p. 163.

perhaps not even primarily) as the exercise of free elections, but also as an exercise of “public reasoning” and “tolerance of different points of view” (Sen 2009, 333; cf. McGrew 2002, 158-159). If we do so, we might be able to gain a wider understanding of democracy, one that would include a much wider array of socio-political constellations as democratically relevant<sup>6</sup>. Jürgen Habermas, who has argued that there can be no legitimate political authorities without democratic discourse, takes a similar stance when it comes to global democracy. While he accepts that democratic deliberation cannot replace conventional procedures of representation and decision-making, he also argues that more emphasis should be placed on deliberative considerations such as a functioning public sphere, the accessibility and quality of discussion, and the discursive character of opinion and will formation (Habermas 1998, 166; 2001, 110<sup>7</sup>). Such a change of view offers new approaches to the question of legitimacy. Habermas writes that “[s]upposedly weak forms of legitimacy then appear in another light”.

In the following section, we shall suggest a way of assessing the legitimacy of ILIs in the light of the previous considerations. Our approach shall defend a cooperative model in which both subjects and the authority share responsibility for the achievement of overall goals.

### ***The legitimacy of international legal institutions***

We should now be able to provide an answer to the question that is immanent to the title of this thesis: When are ILIs legitimate? Are current ILIs, such as the World Trade Organisation, or the International Criminal Court, legitimate? If our criterion of legitimacy was the one deployed by Held, then our answer would be much easier. The

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<sup>6</sup> Sen quotes Nelson Mandela’s autobiography in which he remembers the meetings that took place in his local town during Mandela’s early childhood. Mandela describes those meetings as “democracy in its purest form” since „everyone was heard, chief and subject, warrior and medicine-man, shopkeeper and farmer” (ibid. 332). According to this reading, there would be place for democracy (albeit only locally) even if the state is fiercely undemocratic (as the apartheid regime certainly was).

<sup>7</sup> English edition.

current system of ILIs has clearly failed in securing and promoting the autonomy of all human beings, so none of the current ILIs would appear to be legitimate in Held's sense.

Compared to Held, our own standard of legitimacy is less demanding. It is therefore not clear if any of the currently existing ILIs are legitimate by our own standard (that would require some empirical research about particular institutions). We can say, however, which factors need to be taken into account in order to perform that legitimacy assessment. The question about legitimacy –not only for ILIs, but for political authorities in general– is ultimately a question about the authority being able to help its subjects improve conformity with their reasons for action. The contribution of this thesis has consisted in showing why Joseph Raz's account of legitimacy needs to be modified so that the participation of subjects plays a greater role than the one acknowledged by Raz. Political authorities, we said in chapter II, cannot help their subjects to discharge their moral duties unless the latter are able to form reliable beliefs about the relation between the directives of the authority and their own reasons for action. In chapter III, we argued that subjects ought to have the right to decide by themselves when it comes to choose and specify overall goals because the authority cannot be expected to help them improve conformity at this level. Chapter IV introduced transparency as an institutional feature that allows for subjects to form reliable beliefs about their authorities. Assessing the legitimacy of ILIs thus involves examining their degree of transparency. It may, in practice, be difficult to establish a threshold of transparency below which the authority no longer qualifies as legitimate. We should also note that transparency qualifies as a necessary condition of legitimacy. Either subjects have the information which is relevant for them to form reliable beliefs or they do not. In the former case, the authority can exercise its authority legitimately while in the latter case it cannot.

Things are different with the second element of participation, democracy. A democratic deficit must not necessarily render the authority illegitimate. Our defence of democracy was based on the observation that political authorities cannot be expected to be able to help their subjects improve conformity with their reasons at the level of overall goals. Because of this observation, we argued that the task of choosing and specifying overall goals ought to be left to the subjects. An authority which insists on choosing and specifying overall goals instead of their subjects would be transgressing the limits of what it is entitled to do according to the Normal Justification Thesis, and thus be acting illegitimately. But that should not be taken to mean that a political authority engaged in choosing and specifying overall goals is *always* going to act illegitimately. Just think of an entirely hypothetical situation where, for some reason, all of the subjects are permanently unwilling to reason about overall goals – suppose that they have absolutely no interest in politics. In such a scenario, almost any authority choosing and specifying overall goals would be helping its subjects to improve conformity with their reasons. All that we need to assume is that the authority is sufficiently benevolent and reasonable in choosing overall goals so that their subjects are indeed more likely to improve conformity with their reasons by following their authority than by not doing so (which would mean doing nothing at all, cf. chapter III, p. 85).

Admittedly, this scenario is not very plausible – even in the most catastrophic circumstances, there should be a minority interested in and capable of reasoning and deciding about the goals that ought to be pursued. But the inability of subjects to choose and specify overall goals must not be due to their lack of personal capacities. It could also be the result of structural limitations – and that would appear to be the case when we think about global democracy. I am interested in deliberating and deciding about the Natural Duty of Justice, and its global implications, along with my fellow human beings all over the world. But I currently have no way of doing so, at least not democratically. I can join a non-governmental organisation, such as Amnesty

International or Human Rights Watch, or I can use some of the many channels of communication offered by the Internet to deliberate along with other, similarly interested persons all over the world. But none of these forms of participation would come even close to a framework that is truly democratic, i.e. open to all subjects and equipped with the rules and normative powers that are necessary to make its decisions legally binding.

The responsibility for global democracy to succeed is shared between subjects and their authorities. This shared responsibility becomes clear when we consider that, in our account, subjects and their authorities must stand in a relation of permanent cooperation. Subjects are responsible for identifying and specifying overall goals while political authorities are responsible for implementing these goals. Several implications follow from this approach. Political authorities need to be transparent, so that subjects are able to supervise their authorities and keep track of their performance in serving overall goals. Subjects, on the other hand, carry the responsibility of choosing and identifying overall goals, and selecting the appropriate authorities for their implementation. We have argued that the task of choosing and specifying overall goals should be carried out in a democratic process that is both deliberative and inclusive, thus giving all the subjects the chance to make their arguments heard in front of the other subjects. We have recognised the danger of a majority circumventing the deliberative requirement by refusing to accept the arguments of others and imposing its preferences over a minority. The possibility of such abuse could be reduced by implementing basic rights that could not be overridden by a majority and whose aim would be to protect minorities from the grossest violations of their integrity and well-being.

We should, however, bear in mind that such failure to deliberate democratically counts as a failure of the subjects, not of the authority. A similar conclusion would have to be

drawn if subjects were, for some reason, unwilling to deliberate about overall goals. Our conception of global democracy can only be realised if subjects are prepared to assume the responsibility for deliberating and deciding about overall goals at the global level. Authorities can change many things by organising and implementing a system of global democracy, but the substantive task of democratic deliberation rests entirely on the subjects.

It is possible to imagine how a global referendum on, say, climate change could be organised. It is also possible (if not realistic) to imagine that states are prepared to accept the results of that referendum as legally binding on them. It is more difficult, however, to imagine a process of truly global deliberation taking place ahead of the voting. For the process to be democratic, it would have to involve a fairly representative portion of the global population coming together in transnational places of deliberation (physical or virtual) in order to exchange their own arguments with those of others while looking for the most convincing position. That does not look like a feasible option for the moment. Because of these obstacles, it currently does not seem appropriate to condition the legitimacy of political authorities, and ILIs in particular, to the implementation of global democracy. Things may well change in the future, and ILIs may well play an important role in bringing about this change, but as of now it does not look as if subjects were able to realise (i.e. to make use of) their right to choose and specify overall goals at the global level by themselves.

Authorities are therefore justified *to some extent* in choosing and specifying overall goals in an authoritative way. ILIs can be expected to meet the standard of the Normal Justification Thesis in choosing and specifying overall goals insofar as they can guide subjects to improve conformity with their reasons for action. This justification is, however, a provisional and a qualified one. It is provisional because it can only persist as long as subjects are unable to make use of their right to choose and specify overall

goals on their own. The justification is, secondly, qualified as we do not argue that political authorities are justified in choosing and specifying overall goals completely on their own. That would only be the case if subjects were completely unable to participate in choosing and specifying overall goals. But that is not plausible if we assume that democracy amounts to more than the formal procedures of elections and representation enshrined in the modern nation-state. Wherever there is a possibility of subjects participating –via some form of democratic deliberation or decision-making– in choosing and specifying overall goals, the authority is required to respect and promote that form of participation.

It would therefore be wrong to conclude that ILIs should settle back and wait for a global democratic framework to be established somewhere in the distant future. It takes two –the subjects and their authorities– for democracy to work. Subjects cannot succeed if their authorities are unwilling to cooperate. While authorities cannot be made responsible for the failure of the subjects to accept a deliberative democratic order, or to make proper use of it, they share the responsibility with their subjects to pave the way for such an order to succeed. They are particularly responsible for helping their subjects to make better use of their right to decide by themselves by deploying the competences that are specific to authorities, including the ability to coordinate and to organise. Authorities, and ILIs in particular, can thus be said to play a vital role in encouraging democratic deliberation through the organisation and promotion of networks where subjects can meet, express their views, and are encouraged to make recommendations. This kind of contribution by the authority is directly related to legitimacy considerations. In fostering the ability of subjects to decide on their own, the authority is helping them to improve conformity with their right to democratic participation.

There are several options for political authorities to form such networks aimed at promoting deliberation at a level that transcends national borders. We shall take a brief look at some of them over the last few pages of this chapter.

John Parkinson has divided the process of democratic deliberation into four “decision stages”: definition, discussion, decision, and implementation (Parkinson 2006, 169). There are various ways of incorporating subjects into these decision stages, especially into the first and the second one (definition and discussion). The World Trade Organisation, for instance, has been hosting a “Public Forum” for the last four years. Civil society organisations including NGOs, labour unions, journalists, and academics, are invited to participate by conducting discussion panels with a topic of their choice<sup>8</sup>. The results of these discussions are, of course, not binding, but they can be helpful for the first and second decision stages by giving civil society the chance to raise issues and initiate deliberation.

The so-called Open Method of Coordination (OMC) offers another chance of including subjects in the process of decision-making. The OMC, which is used within the European Union, has been applied for the discussion of political issues such as unemployment and poverty reduction. Its method consists in combining centralised and decentralised instances of decision-making. Broad overall goals (e.g. full employment) are chosen centrally by European institutions. These goals are then left to the single member states to be specified, not in isolation from each other, but subject to the mutual review and criticism among member states and European institutions. At the same time, the initially defined broad overall goals are reviewed on a periodical basis by the actors that established them, thus allowing for the insights gained during

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<sup>8</sup> See [http://www.wto.org/english/forums\\_e/ngo\\_e/forum10\\_background\\_e.htm](http://www.wto.org/english/forums_e/ngo_e/forum10_background_e.htm) (accessed 20 October 2010).

the process of specification to feed back into the characterisation of the goal itself (Cohen and Sabel 2004, 782).

This division of labour creates an environment that is favourable to the establishment of not one, but many scenarios of deliberation at the different stages of the process. Deliberation about the specification of broad overall goals can thus be “highly dispersed and distributed” (Bohman 2007, 86) allowing for local deliberation within well-established political communities. At the same time, the danger of deliberation becoming parochial is attenuated by the existence of a collaborative process that transcends national borders, and whose task is to compare, review, and eventually correct the different local perspectives. The Open Method of Coordination thus offers an interesting perspective on the problem of how to reconcile the need for transnational decision-making with the current democratic deficit of regional institutions such as the EU and, needless to say, ILIs. To be democratic, however, the OMC would have to give up its restrictive approach to participation. Currently, the main deliberative actors within the OMC are experts and administrative agencies (ibid. 87). For the OMC to be not only deliberative, but also democratic, it would have to be open to “ordinary” citizens.

One way of achieving this is through “minipublics” – small groups of citizens chosen either randomly or as representatives of other citizens. Parkinson (2006) distinguishes between different types of minipublics. One of them is citizens’ juries, which were developed independently in the United States and Germany in the 1970s. They typically consist of 16 members who are chosen in accordance to demographic criteria that may be significant for the issue to be discussed (such as age, gender, or ethnicity). Citizens’ juries deliberate and make recommendations on policy problems. Their attributes include the right to summon other persons in order for them to present their experiences and perspectives to the jury. Another type of minipublic is “deliberative

polls”, which were originally designed by the political scientist James S. Fishkin for the NHS in the United Kingdom. Deliberative polls consist of three stages. In the first stage, a random selection of citizens is asked to answer a survey with questions on a particular topic. In the second stage, these citizens are invited to a conference where they are informed about the topic and get the chance to discuss it with panels of experts. In the final stage, citizens are asked to fill out the survey for a second time. The results of this second poll are supposed to have recommending force. The purpose of such a deliberative poll is, according to Fishkin, to show what the electorate would think if it were not merely asked to cast a vote, but to go through a process of “intense” deliberation (Fishkin 1993). Another approach, which was used in the development of the so-called “NHS Plan” by the Department of Health, consisted in combining the micro- and the macro-level of deliberation. Postcards were distributed to hospitals, surgeries, and retail stores asking citizens to name “the top three things which you would think would make the NHS better for you and your family” (Parkinson 2006, 15). The Department of Health received nearly 200’000 replies, which were processed in order to sort out the most important concerns. These concerns were then brought forward to a series of working groups made up of NHS staff, doctors and nurses, and patients. These groups “worked on the detail of the plan” and kept on working during the implementation of the plan (ibid. 16).

Given these various possibilities, there is no reason to dismiss global democracy as a project doomed to fail. Global democracy is certainly far away from being realised, but this should not be taken to mean that ILIs have no way of remedying their democratic deficit. The legitimacy of ILIs should be measured not by the realisation of global democracy (that seems unfeasible for now), but by their efforts and achievements in promoting incipient forms of transnational democratic deliberation such as the ones presented above. That would not be too much to ask for.

## VI. Sovereignty

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The previous two chapters have been about transparency and democracy as two institutional arrangements that are relevant for assessing the legitimacy of international legal institutions (ILIs). Transparency and democracy certainly play a significant role in current debates about the legitimacy of ILIs but they do not exhaust them. There is a deeper form of criticism raised against ILIs, and the system of public international law in general, which does not admit that the legitimacy problems of ILIs can be solved through institutional reform (e.g. by making them more transparent and democratic) but argues that ILIs should *never* be allowed to have the same authoritative standing as states. Such discrimination comes in different forms (we shall only examine two of them), but the shared implication of most of these critiques is that the authority of states is unique in a way that puts them in a privileged position vis-à-vis other political authorities. The current doctrine of public international law seems to reflect this view in maintaining that states play an exclusive and foundational role in public international law (Warbrick 2003, 206). The primacy of states over other authorities is often expressed by using the concept of sovereignty. And even those political philosophers who do not explicitly argue for the primacy of states often simply identify political authority with states. Debates about the legitimacy of political authority are thus often limited to the role of states<sup>1</sup>. The implicit assumption here seems to be that states are the paradigmatic instances of political authority.

Why do states continue to enjoy such prominence in current debates? This is especially odd if we look at the recent developments in public international law and consider the significant expansion of ILIs and their scope of activities over the last decades.

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<sup>1</sup> For instance Wellman 1996, Christiano 2004, Estlund 2008.

The argument that the authority of ILIs should somehow be subordinated to the authority of states does not necessarily imply that ILIs have no significant role to play. It is perfectly possible to defend state sovereignty and, at the same time, argue in favour of the *non-authoritative* roles of ILIs, e.g. in facilitating coordination among states, monitoring relevant developments, or providing help to those in need. All this can arguably be achieved without granting ILIs the normative powers of a political authority. We are not, however, interested in *all* the valuable activities that can be performed by ILIs, but only those concerning the domain political authority. Our focus is, in other words, on the normative power of ILIs to make authoritative pronouncements, i.e. pronouncements that are both pre-emptive and content-independent. Within the international system, it is public international law that has the status of authoritative pronouncements (Tasioulas 2010, 97-98). An ILI that has legitimate authority would thus be one which is morally justified in creating, applying, and interpreting international law<sup>2</sup> (cf. p. 1).

Raz has not, to my knowledge, discussed the implications of his service conception of authority for ILIs, although others have done so (cf. Tasioulas 2010; Besson 2009). As we have argued in the second half of this thesis, there is no reason why the service conception should not be applicable to ILIs. After all, the decisive criterion for determining the legitimacy of a putative authority is to be found in its capacity for serving certain reasons. The Razian account contains no default assumption in favour of states. This openness is, I believe, a great advantage in the light of the actual global challenges. Global crime, epidemics, migration, poverty, and massive human rights

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<sup>2</sup> Some have argued that (a part of) public international law is not really law because there is no coercive institution (such as the state) that could enforce compliance. While we should accept that compliance plays an important role for the legitimacy of public international law (which deals, to a great extent, with matters of coordination), we must reject the assumption that coercion constitutes the only way of securing compliance. As noted by Thomas M. Franck, “most states much of the time act in conformity with a quite sophisticated set of international rules” (Franck 1990, 34). Franck believes that international law is capable of securing compliance by exerting a “compliance pull” which is not based on its (non-existent) enforcement mechanisms, but on its legitimacy (ibid).

violations illustrate the shortcomings of states and the need for considering alternatives. Suppose that a state fails in helping its citizens after a natural catastrophe has ravaged the land, and that there is an alternative candidate capable of doing better than the state. According to the Razian approach, the capacity of that alternative candidate could constitute a *prima facie* reason for transferring the authoritative competences of the state (or parts of them) to the candidate that is able to fare better in the domain of disaster relief, or to find some arrangement where states and ILIs can come to share their authority (more on this later).<sup>3</sup>

What are, then, the reasons of those who reject the scenario of states having to compete with ILIs on the basis of the same criterion of legitimacy? Pluralism, parochialism, and exceptionalism are some of the notions involved in these debates. We cannot explore all of them here<sup>4</sup>. This chapter examines, and refutes, two arguments that have been put forward to justify the primacy of states over ILIs. Both arguments revolve around the difficult notion of sovereignty. The first argument rests on what we shall call the *classic* justification of sovereignty, as defended by Thomas Hobbes among others. The classic account of sovereignty justifies the primacy of one, and only one authority, as a necessary means for avoiding an infinite regress which could lead to a potential deadlock among competing authorities. According to this view, the only alternative to a system of sovereign states (where none has ultimate authority over others) would be a global state with ultimate authority over all other authorities. I shall argue, along with Christopher W. Morris, that the notion of ultimate authority is conceptually unclear since the relations among authorities are best described as multiattributive and multidimensional. This means that comparisons among authorities must be qualified. Authorities are normally not superior to each other in an ultimate sense, but only with

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<sup>3</sup> Other reasons such as the cost of switching from one authority to another would, of course, also have to be considered before denying legitimacy to the state in this affair and assigning it to another institution.

<sup>4</sup> For an overview see Tasioulas 2010.

regard to the specific dimension(s) they operate in and the specific attribute(s) they have for doing so.

The second argument is to be found in a *modern* understanding of sovereignty, one that defends the primacy of states by invoking the value of self-determination. According to this view, modern states are the legitimate representatives of political communities. The ability of such communities to decide by themselves (represented by their states) is seen as an expression of freedom and autonomy, the protection of which is believed to be more important than the achievement of right outcomes. The representative relationship between a state and its political community, in addition to the value of a political community deciding on its own, is said to be sufficiently important to justify state sovereignty.

Let us now examine both arguments in more detail.

### ***Classical sovereignty***

The notion of sovereignty is usually related to political authority. In the usual understanding of the concept, sovereignty refers not to any political authority, but to the authority of states. We do not attribute sovereignty to the United Nations or to the World Trade Organisation despite the fact that these institutions are political authorities to the extent that they create, apply, and interpret international law. Another thing to note is that sovereignty has always had a comparative element denoting not just any form of state authority, but superior or exclusive, though not necessarily unrestricted, state authority<sup>5</sup>. State-centeredness and authoritative primacy, two central notions of sovereignty, have been defended on conceptual grounds for a long time. According to the classic justification, sovereignty is necessary

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<sup>5</sup> The etymology of “sovereignty” can be tracked back to the Latin word “superanus” which roughly means “superior” (Ilgen 2003, pp. 9-10).

in avoiding an infinite regress or a deadlock between different competing authorities (more on this on p. 153).

Sovereignty is a heterogeneous concept not only in terms of its justification, but also with regard to its different contexts of application (Lapidoth 1995). 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 distinction available. By sovereignty we can either mean the authority of a state which does not need to be representative, or that of a people whose interests are to some degree represented by the state (this is often called popular sovereignty). Sovereignty can be used descriptively to point out the power and recognition a state actually enjoys (its *de facto* authority, see chapter I, p. 32), but it can also be used normatively to refer either to the legal norms that are meant to protect a state or to the moral rights that states supposedly enjoy. The assertion: “the sovereignty of Ecuador was violated by the invasion of Colombia” can be understood in all these different senses, and none of them needs to entail the other.

In order to avoid confusion, it is important to keep in mind these different meanings of sovereignty, and to be clear about the meaning that we are interested in. It is often argued that the process of globalisation has eroded sovereignty by placing states in a situation where they can no longer afford not being members of ILIs such as the World Trade Organisation. 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. Quite the contrary, a defender of sovereignty might argue that this is a reason not for giving up sovereignty but for fighting against those aspects of globalisation which undermine sovereignty. We are only interested in

sovereignty from the normative perspective of morality. We shall be asking whether the sovereignty of states can be morally justified. Our conclusion will be that it cannot.

“Classical sovereignty” is a model of sovereignty attributed to Thomas Hobbes and Jean-Jacques Rousseau, among others (Morris 1998, 174). This model rests on the assumption that the authority of sovereign states should be *ultimate*, which implies several conditions. An ultimate authority has the *highest* authority within a hierarchy of authorities. It rules *directly*, permeating every level of this hierarchy, and there is no intermediate authority able to interfere<sup>6</sup>. Its rule is *final*, which means that its decisions are not open to further appeal. Ultimate authority is also said to be *supreme*, meaning that it is entitled to regulate all other authorities within its jurisdiction, as well as human behaviour (cf. Raz 1990, 150-152). And, finally, the classical account of sovereignty holds ultimate authority to be *absolute*, i.e. *unconstrained*, *inalienable* and *indivisible*, which means that it cannot be delegated or divided (Morris 1998, 177).

The question is not whether a state with all these characteristics has ever existed. We are interested in knowing why these conditions are postulated in the first place. What is their justification? 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, those constraining laws must be interpreted, applied, and enforced by another authority. Because of its constraining power over the former, the latter authority is to be considered ultimate – unless it is itself constrained, in which case there would need to be a third authority, and so on (Pogge 1992, 59; 2002, 178-179). We need an

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<sup>6</sup> This feature becomes clearer when contrasted against the background of the medieval system where political authority was fragmented and decentralised (Morris 1998, 33-36).

ultimate authority, one which is not subjected to any constraining laws and to other authorities, in order to stop the infinite regress. Or so it would seem.

The argument for an ultimate authority is closely related to the need for having a mechanism for the resolution of conflicts. The underlying idea is that only an ultimate authority (in the senses described above) will be capable of resolving a serious conflict of competences. For it is easy to imagine a struggle between two political actors, both having authority over a certain domain of action, and both claiming the exclusive right to operate in that domain. In the absence of an ultimate authority, it would seem that a deadlock is indeed inevitable. Unless one of the parties is prepared to abandon its claim, the situation will be one of inertia. A legal system that knows no ultimate authority is said to contain a fatal flaw given that the situation of inertia cannot be overcome unless there is a third actor able to settle the conflict in a way which is itself not subject to dispute. Thus, the argument goes, there needs to be an ultimate authority which does not have to respond to any other authority.

Nothing that has been said above is necessarily related to states. We could imagine a non-state actor, such as the United Nations, endowed with ultimate authority. But because of the massive normative powers that ultimate authorities are supposed to enjoy, it is hard to see how the United Nations could become anything less than a global super state were it to have ultimate authority. The classic justification of sovereignty entails a crude dichotomy both at the domestic and at the international level. At the domestic level, the alternative is between a situation of anarchy, in which authorities eventually reach an insurmountable deadlock, and a scenario in which one single actor enjoys ultimate authority. At the international level, the dichotomy is between a global state of nature in which no state is subjected to the claims of other authorities nor to those of public international law, and a global super state with ultimate authority over all nation states (cf. Horn 1996).

Such an approach is insensitive to a multi-level conception of authority where the activities of authorities are genuinely shared between local governments, states, regional institutions, and ILIs (cf. Hooghe and Marks 2001). The Razian understanding of legitimate authority, in contrast, would seem to fit especially well with the notion of shared authority. We have seen that Raz's service conception confers legitimacy in virtue of the ability to serve reasons. We also said that the criterion for legitimacy is based on a comparative judgment. Legitimacy obtains if subjects can form reliable beliefs about the authority's capacity to serve their reasons as compared to their own capacity. This means that one should not follow the authority once and for all but rather in virtue of its capacity to serve a specific number of aspects of a specific number of reasons for action. Subjects may thus follow the state on some aspects of some of their reasons for action and follow ILIs on others.

But what if subjects are confronted with more than one authority conforming to the legitimacy standard of the Normal Justification Thesis? That might not be a problem if these authorities serve different aspects of the same reason. Two authorities –a state and an ILI– can serve the same reason (e.g. preventing epidemics) but in different regards (one is in charge of national vaccination campaigns while the other one identifies and responds to global outbreaks of diseases). In these cases, there may be no conflict between the directives of each authority. But think of two authorities issuing conflicting directives, e.g. both asking subjects to make a financial contribution for exactly the same purpose. Raz argues that, in such a situation, “we must decide, to the best of our ability, which [authority] is more reliable as a guide” (Raz 2006, 1021<sup>7</sup>).

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<sup>7</sup> The *guiding* aspect of legitimate authorities is outlined in the Normal Justification Thesis as presented in his 2006 article (it is not mentioned in his earlier texts). In that article, Raz says that an authority meets the conditions of the NJT if the subject “would better conform to reasons that apply to him anyway [...] if he intends to be guided by the authority's directives than if he does not” [...] (ibid. 1014; cf. chapter II, 57).

It is not clear why Raz only considers reliability as a criterion for deciding between conflicting directives. The authority's capacity to serve reasons would seem to be another significant criterion. We can imagine a situation of conflict between two authorities where the first one provides very reliable guidance (perhaps because it is well-known) whereas the second one is less reliable. Subjects should definitely go for the first authority if both of them can be expected to do an equally good job at serving reasons. But what if the second one can be expected to fare much better than the first one? Suppose that both authorities compete for managing a sovereign wealth fund. The first one uses a strategy that can be expected to increase the fund's value by 3% on average whereas the second one has a different strategy that can be expected to increase the value by 8% on average. The first authority is more reliable (its returns have never been below 2.5%) whereas the second one is less reliable (in some years, its strategy has even produced negative returns). Which of the two authorities should be the legitimate one? According to Raz, we should go for the first one because it is more reliable in its ability to serve reasons. But that is not convincing. A rich state that seeks to increase its fortune in the long run and is prepared to take some risk may well do better in choosing the authority with the less reliable strategy because it can be expected to deliver significantly higher results. Reliability is certainly an important factor for deciding which authority to follow. But it cannot be the only one within a conception of legitimacy that is built on the capacity of the authority to do better than their subjects.

Let us now return to the classic justification for sovereignty. I shall argue that it is misguided for two reasons. First, there do not seem to be criteria sufficiently clear for determining whether an authority is ultimate. Secondly, the concept of an ultimate authority paints the wrong picture of the way in which authorities relate to each other. The activities of political authorities can be unbundled into the domains in which they operate and the attributes they have for doing so. Because of this, the danger of a fatal

deadlock among authorities is much smaller than argued by the defenders of classic sovereignty. Instead of a fatal deadlock, we should expect a conflict limited to the specific area in which it occurs. Conflicts, then, are not all-pervasive. They do not have to infect the whole scope of authority. They can be localised so that other aspects of the scope of authority remain unaffected. Let us take a closer look at this.

Imagine a state, say Peru, which is a member of the International Criminal Court (ICC). It has subscribed to, and ratified, the Rome Statute and has therefore submitted itself to the ICC's jurisdiction to investigate, prosecute, and take legally binding decisions regarding crimes against humanity, war crimes, and genocide committed in Peruvian territory or by Peruvians abroad, unless the alleged crime is genuinely being investigated or prosecuted by Peru's domestic courts. How can we, adhering to the catalogue of criteria listed by Morris (p. 153), determine who has *ultimate* authority in this case? The answer seems to depend on the criterion that we use. The ICC can be said to have *final* authority because a sentence passed by Peru's courts can be reversed by the ICC, whereas Peru cannot reverse a sentence passed by the court of the ICC. But then the ICC cannot be said to have *supreme* authority over Peru since it cannot regulate Peru's jurisdiction, not even with regard to crimes against humanity, war crimes, and genocide. Peru is entitled to investigate, prosecute, and decide such cases on its own, i.e. independently of the ICC. Even once a verdict has been reached, the ICC is bound to respect it unless it considers that Peru did not carry out a genuine process (art. 17 of the Rome Statute<sup>8</sup>). Only then can the ICC re-open the case, investigate it on its own, and eventually pass a sentence overruling Peru's verdict. The authority of the ICC cannot therefore be said to be supreme since its right to circumscribe the authority of Peru is limited to an extremely narrow range of events. Nor does the ICC have *direct* rule, at least not in the sense that no other authority is able to interfere. The Rome

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<sup>8</sup> <http://untreaty.un.org/cod/icc/index.html>. Accessed 20 October 2010.

Statute enables the Security Council to stop the ICC from investigating or prosecuting a case for a whole year (art. 16).

We can start to see that the notion of ultimate authority, as presented above, misses the reality of relations among authorities. It is highly unlikely that any political authority will be able to fulfil all the conditions enumerated by Morris. But there is a more modest understanding of ultimate authority, one that might be appealing to the defenders of classical sovereignty. While admitting that the ICC has authority over Peru in some respects but not in others, the defender of classical sovereignty could come forward with a second-best strategy. She could argue that not all conditions enumerated by Morris need to be fulfilled in order to determine whether an authority is ultimate or not. She could instead ask us to perform an overall assessment where the different criteria of sovereignty (p. 153) are weighted against each other, and then decide who has ultimate authority in this modified sense. An authority would be ultimate not to the extent that it fulfils all the criteria stipulated above, but enough of them so as to trump the authority of its competitors in the case of conflict. But this presupposes transitivity among the different criteria. It presupposes, that is, the possibility of comparing all the criteria on a single value scale. Suppose that having final authority is valued with 2, supreme authority with 1, and direct authority with 0,5. In that case, an authority which has final authority, but lacks supreme and direct authority, would trump over an authority which has supreme and direct authority, but lacks final authority. In order to find out which authority is ultimate, we would have to be able to assign some weight to each criterion for each authority, and ensure that all criteria are fully comparable among each other. It is not hard to see why this is a bit unrealistic. How should we compare e.g. the significance of supreme authority with that of direct authority with regard to the avoidance of a deadlock? But there is another reason for rejecting the possibility of ultimate authority, namely the complex nature of the activities of political authorities. Authorities can be recognised as having superior

authority over other ones, but their superiority normally applies with regard to only *some* aspects of their activities. An authority can be ultimate in one respect but not so in another. Once we start to analyse the scope of authority and divide it into its different components, the idea of ultimate authority becomes redundant for all practical purposes.

The first thing to note is that every statement about an authority enjoying greater authority over another needs to be qualified. Imagine a situation in which the ICC, having followed all the procedures established by the Rome Statute, asks for the extradition of a Peruvian citizen but meets with disapproval of the Peruvian government. Here, it would seem clear that the ICC enjoys superior authority over Peru. The ICC's scope of authority comprises an entitlement to request an extradition<sup>9</sup>. Peru could object to this request for different reasons, but article 119 of the Rome Statute assigns the settlement of such disputes to the Court of the ICC.

However, the ICC can request the extradition of suspects from *some* other authorities, namely those states which have subscribed to the Rome Statute. It can do so with regard to only *some* specific situations, namely those in which citizens of the member states are officially suspected to be involved in certain crimes, and where the domestic courts have been unwilling or unable to prosecute the relevant case in a genuine way. Making assertions of superior authority therefore says very little about the overall relation between the ICC and Peru. Such assertions are certainly insufficient for assigning ultimate authority to the ICC. The high level of specificity that is innate to claims of superior authority shows that relations among authorities are not properly assessed in an overall manner encompassing the whole scope of authority, but have to

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<sup>9</sup> I am assuming, for the sake of the argument, that the ICC is legitimate and that its entitlements are therefore legitimate.

be evaluated with regard to the specific ways in which the scope of authority manifests itself (Morris 1998, 183-184).

This qualification applies not only to comparisons between states and ILIs. One of the central features of modern states is the division of powers. Here, any assessment of the authority that a state enjoys will have to begin by disentangling the complex nature of its scope of authority and its relation to other authorities within the same jurisdiction. Claims of superiority will therefore be true only with respect to a certain power within the state and a certain aspect of its scope of authority. The legislative power is bound to respect, and not interfere with, the interpretation and application of the law as performed by the judicial power, whereas the latter has an obligation to respect, and not interfere with, the law-making capacity of the legislative power.

Considering the previous arguments, we are now in a position to see why the recourse to an ultimate authority for avoiding a deadlock between different, non-ultimate authorities is ill-conceived. Thomas Pogge has argued that the successful history of division of powers at the level of states has proven that “what cannot work in theory works quite well in practice” (Pogge 1992, 59). Having considered the complexity of the scope of authority and that of power relations among authorities, we can now add that, even in theory, sovereignty, understood as ultimate authority, is an unsuitable concept. The plurality of aspects into which relations among authorities can be divided explains why it is possible to have several authorities, none of them ultimate, working in different or even the same domains without there ever being the danger of a deadlock.

This does not, of course, mean that the possibility of conflicts can be banned. It is easy to imagine a dispute between authorities arguing about their competences for solving a problem. For the defenders of classical sovereignty, such a conflict would have to be interpreted as a fatal flaw that can only be remedied by the introduction of an ultimate

authority. In the absence of such an authority, we would face a state of inertia in which both Peru and the ICC are rendered incapable of action. This picture would be a frightening one if it was accurate. Fortunately, it is not. The notion of an authority being ultimate, i.e. enjoying superiority over all other authorities, and in all regards, is not made for this world. Its unfeasibility is no coincidence but results from the complexities of having authority. Examining the scope of authority involves analysing the dimensions in which the authority operates and the attributes it is endowed with. This unbundling of the scope of authority allows for qualified comparisons among authorities, but not normally for the overall comparison required by the defenders of classical sovereignty<sup>10</sup>. Two authorities in the same jurisdiction may operate in completely different dimensions. Imagine, for that case, one authority regulating telecommunications and another one regulating public swimming pools. It goes without saying that the former has superior authority over the latter with regard to issues of telecommunications. The same strategy of unbundling can be applied to authorities who operate in the same subject area. Both the ICC and Peru have certain competences for judging international crimes such as genocide and crimes against humanity. But they differ in the attributes they have for doing so.

The fragmentation resulting from the multidimensionality and multiattributivity of relations among authorities does not only reveal the failures of sovereignty. It also discloses the solution to the problem which motivates the defenders of classical sovereignty, namely the possibility of a deadlock among authorities<sup>11</sup>. We have seen that a deadlock is a serious threat under the assumption that conflicts among authorities always concerns the entire scope of authority. That assumption becomes

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<sup>10</sup> It is, of course, possible to imagine an authority that is superior to another authority in every single aspect of its scope of authority. While this remains a possibility, it does not seem very feasible within the current international system. Nor is it desirable by the Razian standard of legitimacy (for it is unlikely that there could be one authority capable of best serving all the reasons of all subjects in the political domain).

<sup>11</sup> My arguments here draw heavily on the analysis of authority into different dimensions, and its implications for the theory of sovereignty, developed in an unpublished paper by Bas van der Vossen.

untenable once we accept that a conflict with regard to one aspect of authority can be entirely unrelated to other aspects. So the ghost of a fatal deadlock evaporates. We should rather expect local conflicts which do not have the potential of threatening all the operations of an authority.

Moreover, these conflicts can be submitted to a third party with final authority to solve the dispute. Since the scope of authority can be divided into its different components, it follows that this third party does not need to have ultimate authority in order to be able to settle the conflict. Its only superiority over the other two authorities may consist in its power of arbitration for this kind of conflict. The Rome Statute provides for such a mechanism in article 119, which entitles the Assembly of States Parties to refer disputes between member states related to the Rome Statute to a third party which is the International Court of Justice.

Our strategy of unbundling the scope of authority into its different aspects fits very well with Raz's service conception of authority. According to the service conception, having legitimate authority is never an unrestricted entitlement, but always limited in two ways. Authority is limited to the range of issues for which it is qualified, and it is limited to the group of subjects that can be helped by the authority. This means that the scope of legitimate authority does not extend beyond particular areas where the authority is able to help its subjects (e.g. road safety, education, health) – any extension would have to be justified by other considerations related to those other domains.

The defenders of the classic notion of state sovereignty follow a different logic. They argue that substantial considerations à la Raz (i.e. who is able to better serve certain reasons) need to be preceded by the question of which entity is to have ultimate authority within a given jurisdiction. Unless that question is solved, they argue, the

coexistence of more than one authority within a given jurisdiction will always entail the danger of a fatal deadlock that threatens the functioning of the political system.

Having exposed the shortcomings of this view we can now jettison the notion of sovereignty understood as ultimate authority. We have seen that the quest for ultimate authority is both misguided and unnecessary. But our conclusions are not merely negative. Once we abandon the idea that there always needs to be an ultimate authority within a given jurisdiction, we are well placed to discover the advantages of a system of multi-level governance. Legitimate political authority would then be a predicate reserved for the actor who is best fitted for serving a set of reasons applying to the subjects. If the ICC has the best credentials for dealing with international crimes (for certain areas of action) then it would have legitimate authority (over those areas of action) to deal with international crimes. Legitimate authority is not inherited by tradition, but has to be earned in the light of the problems to be solved. If implemented, this model could give way to a deep transformation in the global political landscape. We could witness the emergence of a new system in which states would no longer play an exclusive foundational role, but would have to compete for every aspect of their scope of authority with other actors at the local, regional, and global level. The permanence of states as we know them would depend on their ability to deliver satisfactory results as compared to alternative candidates.

### ***Modern sovereignty***

The second argument in favour of state sovereignty does not need to deny the possibility of states and ILIs operating on an equal footing, sharing their authority on the basis of the same criterion of legitimacy. While it does not need to reject this possibility, it also argues that we are well advised to reject such a scenario for normative reasons. These reasons are to be found in the moral value of political communities making decisions on their own. The ability of political communities to

decide by themselves is said to express the value of autonomy and freedom. The point has been made by Jeremy Waldron in his discussion of Raz's service conception. There, Waldron examines the normative status of parliamentary decisions and argues that the question whether they deserve respect does not depend on their substantive merits:

[A] piece of legislation should be treated, not just as an enactment of the current majority, but as something that stands for the time being in the name of the whole community. Once voted in the legislature, it is entitled to whatever respect that communitarian status confers on it, without regard to –indeed bracketing away from– the substantive merits of its content (Waldron 1999, 101).

Thomas Nagel (2005, 29) also argues for the exceptional character of nation states although he does so in a different way. He asserts that states are unique in that their citizens hold “sufficiently compatible” values and interests. This compatibility, which is said to be exceptional as it rests on “historical contingencies”, permits “common allegiance to a single legal authority for the settlement of their inevitable conflicts over what the rules should be to which everyone is subjected” (ibid.). The single legal authority is “the sovereign” and, because of the allegiance that it enjoys, it “has the right to make and enforce law and the citizens are obliged to obey, even if they dislike the law [...]” (ibid.). Nagel does not mean to say that such allegiance is impossible to reproduce at the international level. But he believes that, because of its exceptional character, it is unlikely to occur. The European Union is presented as the most promising attempt to erect a single legal authority on the regional level. Nagel attributes the achievements that have been reached so far to the ability of the “bureaucrats in Brussels” to “impose” their “will” on the member states. But Nagel also makes clear that the European Union will only succeed if it is modelled like the nation state, i.e. as the one single authority entitled to settle conflicts among member states and to impose its will on dissenters. For that to be the case, the citizens of Europe would have to be willing to give up their national sovereignty to a significant extent and show the kind of allegiance that is based on common values and interests. Nagel doubts, in any case, that the European model has the potential of becoming much more

than a “freetrade zone” (ibid). It is not hard to see that Nagel’s argumentation builds on some elements of the classic defence of sovereignty in order to defend a modern one. The classic element is to be found in the assertion that there needs to be one single authority (the “sovereign”) that has the final say when it comes to resolve conflicts. The modern element can be found in his assumption that the sovereign authority is justified because of the consent of the citizens as expressed by their allegiance to the sovereign.

Similar arguments can be found among those who, like Jeremy Rabkin, Paul W. Kahn, and John R. Bolton, defend the supremacy of the constitution of the United States over international law. Jean-François Drolet has examined these positions (which he dubs “neo-conservative”). He says that they regard the United States as a historical community with its own sets of values which sustains the belief in the “exceptional character of America’s political experience” (Drolet 2010, 549). The emergence of ILIs is seen as a menace to the sovereignty of the United States. The prospect of having to obey “alien” norms, made by ILIs or a majority of other states, is regarded as a threat “to the very existence of the American regime and its transmission to future generations” (ibid. 554).

The Razian account of authority, with its focus on the ability to serve reasons, would appear, at first sight, to ignore the significance of self-determination. Consider the case of a democratic state with plenty of good intentions and high acceptance among its citizens, but capacities that are quite poor if compared to other organisations. Because of such deficit, it seems possible that citizens could suddenly find themselves owing obedience not to their own state, but to a foreign state or an ILI – depending on which of them is best suited for serving the reasons for action that are at stake. It would therefore appear as if the Razian account is completely insensitive to the values of autonomy and freedom at the level of political communities. Such criticism must, however, be qualified. We saw, in the first chapter, how Raz acknowledges that

deciding for oneself can sometimes be more important than achieving the right outcome. He has dubbed this the independence condition (see p. 29). In circumstances where the independence condition applies, the Normal Justification Thesis is rendered inoperative. There is no reason to assume that the independence condition in Raz's service conception of authority could not also apply to political communities.

We should note, secondly, that one of the virtues of Raz's account is to be found in its inclusiveness regarding the reasons that ought to be served. If self-determination is as significant as its defenders argue, then it is certainly going to play an important role among the reasons for action that apply to the subjects of authority (and which the authority ought to serve). The legitimacy of political authorities is therefore going to depend, among other considerations, on their ability to serve the values that underpin self-determination. Raz himself believes that there can be a right to national self-determination (understood as self-government) that "rests on an appreciation of the great importance that membership in and identification with encompassing groups<sup>12</sup> has in the life of individuals" (Margalit and Raz 1990, 456-457). The concession of this right is said to depend upon whether the state shows respect for the fundamental rights of its inhabitants and the "just interests of other countries" (ibid.).

The inclusiveness of the service conception is especially relevant at the level of public international law. There is no necessary incompatibility between public international law and the self-determination of states (cf. Tasioulas 2010, 113). The laws prohibiting the use of force and other forms of intervention into the "internal affairs" of other states are made to protect precisely the kind of values that some believe to be threatened by international law (ibid).

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<sup>12</sup> Encompassing groups are groups that meet a series of conditions. They are groups which have a common character and a common culture; membership must be a matter of mutual recognition; the group must be historically significant; and membership must be a matter of belonging instead of achievement (Margalit and Raz 1990, 443-447).

This will not, of course, satisfy those who argue for a more radical position according to which the self-determination of states constitutes a moral right that should *always* prevail over public international law. The radical position must, however, face three objections.

*First*, the relation between international law and the right to self-determination should not be understood as mutually exclusive, but as complementary. Self-determination does not refer to the *de facto* capacity of the most powerful states to make their will prevail over less powerful ones, but to a moral *right* that each state has. Because of its character as a moral right, self-determination must be thought in conjunction with a moral duty, on the side of all states, to abstain from performing actions that violate the right to self-determination of other states<sup>13</sup>. International law would not be needed if this right (and its corresponding duties) was respected by all states to a degree that no intervention of any international authority helps to improve compliance with that right (and its corresponding duties). But that is hardly going to be the case in a world with striking imbalances of power and sharp international conflicts.

Some accept the need for a global authority but deny that this should happen through international law and its institutions. They argue that, because the current system of public international law is deeply defective, we should leave the resolution of international problems to the one remaining superpower, the United States. According to this view, the United States have a unique combination of power (military, economic, political) and values (democracy, liberty) that qualifies them, like no other authority, to take the lead in resolving global issues (Tasioulas 2010, 103-105). States would thus

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<sup>13</sup> The alternative, namely to understand self-determination as an unrestricted right, is simply inconsistent – in the absence of duties, the claims of each state would collide with those of others. In this sense, the right to self-determination would resemble Hobbes' "right to every thing" in the state of nature (Hobbes 1651, 14, 4). This right, it turns out, is a right to nothing, for each claim deriving from that right is overridden by the "right to every thing" of all others.

find themselves having an obligation to obey the authority of the United States in virtue of their capacity to serve the right to self-determination. But this view must face substantial objections. Even if we accept that the United States have only the best intentions and do not succumb to the temptations of power<sup>14</sup> it does not necessarily follow that they will be able to serve the right reasons in the international domain. Remember the remarks made by Amartya Sen about the “positionality of local observations” (see chapter V, p. 127). We live in a world in which there is a significant amount of disagreement when it comes to specifying and facing the most pressing problems of our times. There may be many reasons for this disagreement, but one of them could be found in Sen’s argument according to which living in a particular place at a particular time can produce epistemic distortions because one is not confronted with other perspectives (Sen 2009, 168). Because of these potential limitations, it is highly unlikely that there could be one country that is significantly better than all others at choosing the right reasons, specifying and serving them. It seems more plausible to opt for an international institution (which does not have to be the United Nations) capable of providing an incipient global democratic forum as defended in the previous chapter.

The *second* objection to the radical position concerns the implausibility of counting self-determination as an absolute value which can never be trumped by other values. This is not plausible at the personal level. In the first chapter, we saw that deciding for oneself can sometimes be more valuable than achieving the right result (cf. chapter I, p. 29). But this does not, of course, apply in all situations. Breaching a moral obligation cannot normally be justified by invoking the value of autonomy. A similar argument can be made at the level of political communities. Consider a scenario in which a substantive

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<sup>14</sup> This is, of course, all but self-evident. It is therefore curious that Rabkin sees the danger of impartiality only with regard to international institutions. “Even if the outside arbiters claim to be interpreting or applying international law, why should outsiders be more trusted to interpret or apply that law than one’s government?” (Rabkin 2005, 237) A state that is truly committed to justice does not need, in Rabkin’s view, a “foreign” authority that tells “them” how to act (ibid. 236-237).

majority of citizens decides to ignore the interests of a minority (e.g. illegal immigrants) – interests which are essential to their well-being and constitute sufficient grounds for placing the majority under a moral obligation. The fact that this decision represents the will of a political community does not seem to make it any better, or any more acceptable. Why then assume, as Waldron does, that decisions made by political communities merit respect “independently of their substantial merits” (Waldron 1999, 101; see p. 164)? It makes more sense to say that the value of self-determination ought to be determined on a case-by-case basis, taking into account the particular constellations. In some of these constellations, self-determination may well be more important than achieving the right outcome (the independence condition would hence apply). In other situations, self-determination could play a more or less significant role along with other values (so that the legitimacy of authorities might depend, among other considerations, on their capacity to protect and promote self-determination).

The *third* and final objection to the view that the self-determination of states should always impose itself over international law has to do with the –erroneous– identification of self-determination with the self-determination *of states*. The radical defenders of state sovereignty seem to imply that the *only* genuine instance for persons to deliberate and make decisions at the political level is constituted by states. But this is simply not plausible, for it ignores the existence of problems whose resolution is of vital concern to subjects across national borders. Take human rights, environmental protection, or international criminal justice. The political community of a nation state cannot be the only relevant instance for deliberating and deciding about such issues. Human rights, environmental protection, or international criminal justice are not the problems of the citizens of the United States of America, Germany, or the United Kingdom – they are the problems of humanity.

I have argued, in the previous chapter (p. 128), that such problems can only be adequately addressed if they are also discussed in a global forum, i.e. one that is open to all human beings. Confining deliberation to national borders leads to a situation of exclusion in that it fails to consider the points of view of non-nationals. This exclusion need not worry us if the problem to be solved is a national one (Europeans might think what they want about the electoral system of the United States but it does not really matter). But when it comes to other, truly global problems, the alleged self-determination of national communities is little more than a pretext for exclusion. After all, the values that are usually cited along with self-determination – values such as autonomy and freedom – indicate that self-determination amounts to more than simply deciding whatever one wishes to decide. In saying that political communities have a right to self-determination, most authors defend the value of political communities being able to determine their own fate. Self-determination is, essentially, about communities being able to shape their own history.

Some problems, however, are clearly not specific to the history of a particular political community but of a universal nature. A proper understanding of self-determination must, under such circumstances, go beyond the nation state and open the way for a global form of self-determination. This is not to say that problems such as human rights, environmental protection, or international criminal law have no place for discussion within political communities. We saw, in the previous chapter (p. 128), that one and the same problem can be discussed at different levels and under different aspects. Deliberation, that is, can be dispersed and distributed within a proper framework of coordination. There is no need to exclude the national (or the local) levels of democracy. And there is no contradiction in saying that one and the same person can make use of her democratic right to participation vis-à-vis multiple political authorities. The fact that there are no truly transnational political institutions in front of which subjects could make use of their democratic right to participation is no

counterargument. It rather shows the need for the democratisation of ILIs as argued in the preceding chapter.

### ***Conclusion***

We started this chapter with the remark that debates about the legitimacy of public international law, and ILIs in particular, are not always about how to make the international system more transparent and democratic. There is a deeper form of criticism, one that denies that ILIs can ever come to have the kind of legitimacy that states are supposed to have. This view is often based on the normative notion of state sovereignty according to which the authority of states ought to be superior to that of ILIs.

We examined two justifications for state sovereignty, a modern and a classical one. The classical one is based on the assumption that, wherever there is more than one political authority, the question of who has ultimate authority must be resolved. It must be resolved because, in the absence of an ultimate authority, there can be a conflict of competences which leads, in the last resort, to a fatal deadlock where no authoritative decisions can be taken. We have tried to show that, in many cases, no ultimate authority seems to exist. Overall comparisons between authorities involve a series of considerations, and it is unlikely (though not impossible) that there could be an authority which trumps all its competitors in every aspect. Authorities typically operate in different dimensions, and they do so with different attributes. It is precisely because of this differentiation within the scope of authority that the lack of ultimate authority does not have to lead to a fatal deadlock. Multiple authorities can coexist even when none of them has ultimate authority because it is possible to specify their unique scope of authority. The possibility of conflicts among these authorities cannot, of course, be ruled out. But there is no reason to believe that a fatal deadlock is inevitable in the absence of an ultimate authority.

This view is akin to our own model of legitimate political authority. We have argued for a model in which states and ILIs can come to enjoy legitimate authority *alike*, based on the Normal Justification Thesis as a shared criterion of legitimacy. In our model, the legitimacy of political authorities is *always* qualified, both with regard to their activities (they only serve the reasons, or aspects of them, for which they are competent enough) and with regard to their subjects (they only have authority over subjects who can expect to do better by following the authority). I have also argued that the Razian account of authority offers a powerful way of envisioning a legitimate international order. That order would be composed of multiple actors –states and ILIs alike– each of them enjoying legitimacy in different regards.

The pessimists who deny that ILIs can ever come to have the same kind of legitimate political authority as states are, in a sense, quite right. ILIs should not come to enjoy the sovereignty that states currently enjoy – that would lead to a world state where many of the current problems are reproduced on a global scale. We should rather jettison the classical notion of state sovereignty. Our primary focus should not be on a particular kind of political authority, but on the reasons for action applying to the subjects and, in virtue thereof, on the institutions (be it states, international institutions, or some other forms of political authority) that can be expected to serve them best. The focus on the subjects and their reasons for action leads us to the second justification of state sovereignty, the one we have dubbed the modern one.

The modern justification of state sovereignty also argues for the primacy of states but it does not have to rely on the arguments provided in support of the classical justification of state sovereignty. The modern justification can accept the possibility of an international order where states and ILIs share legitimate political authority on an equal footing – it does not need to invoke the spectre of a fatal deadlock. Its defence of

sovereignty is rather based on the argument that the ability of political communities to decide by themselves merits to be protected. This protection is said to extend to nation states insofar as they are believed to be the genuine representatives of those political communities. That, by itself, is no argument against the legitimacy of ILIs, nor does it conflict in any fundamental way with the service conception of authority. The service conception can accommodate the value of self-determination both by accepting that deciding for oneself is sometimes more important than achieving the right outcome (in which case the NJT does not apply), and by reflecting the value of self-determination through the reasons for action that the authority ought to serve.

But there is also a more radical justification of state sovereignty, one that argues that the decisions of nation-states should *always* prevail –even if they are at odds with the norms of public international law– because of a moral right to self-determination. But this position is wrong in assuming that the right to self-determination and international law must exclude each other. I have tried to argue, in contrast, that international law serves the right to self-determination, especially for those countries which do not have the power to protect their right by their own means. An ILI could therefore gain legitimacy by protecting the right to self-determination of all countries impartially and effectively.

We should not, however, think of this ILI as composed by a panel of experts who decide, all by themselves, on the content of the right to self-determination and its legal application. That would go against our defence of democracy as presented in chapter V. The act of choosing and specifying the right to self-determination should, ideally, be framed in a democratic process that includes all the citizens of the world since the right to self-determination affects the reasons for action of all human beings (see chapter V, p. 125). The legitimacy of an ILI that pretends to serve the right to self-determination is

therefore going to depend, among other considerations, on its capacity to promote transnational forms of democratic deliberation.

Another problem with the modern version of state sovereignty in its radical form is its failure to admit that the value of self-determination competes against other values. In some circumstances (when moral obligations are breached), the right to self-determination might not justify the decisions of a political community. Here, ILIs can play a significant role (along with states) by helping subjects to discharge their moral obligations in the best available way. Finally, we have seen that problems of global relevance (such as environmental protection) should not be taken to be the exclusive concern of particular political communities, but rather involve all human beings. State sovereignty, understood as the self-determination of political communities within the limits of the nation state, is one category for dealing with such problems – but not the only one.

This chapter has presented a critique of sovereignty. What is our conclusion? Should we reject sovereignty altogether? Or should we rather keep a modified version of sovereignty, one that is not focused exclusively on states? Throughout this whole thesis we have been concerned with the involvement of subjects in the activities of political authority. Our aim has been to show why and how the legitimacy of political authorities, and ILIs in particular, depends on the involvement of subjects. Not only have we defended the ability of subjects to form reliable beliefs about the purposes and capacities of their authorities, but we have also said that subjects ought to have the right to participate democratically by deliberating and taking decisions at the level of overall goals. This latter form of involvement –democratic participation– would appear to be, for all practical purposes, nothing else than another modern version of sovereignty, i.e. the right of the subjects of authority to decide by themselves. But this is not correct. The right of subjects to decide by themselves that we defend is not based

on any assessment of the value of self-determination for political communities, but on the more simple argument that, in the absence of legitimate political authorities, subjects are under no duty to obey the authority and thus have a liberty-right to make decisions on their own (cf. chapter V, p. 118).

This right does not affirm that making decisions is more valuable than achieving the right outcomes. It rather asserts that, in the absence of legitimate political authorities at the level of overall goals, subjects carry the entire responsibility for compliance with their reasons for action at this level. The right is based on a comparative assessment. It exists only as long as political authorities cannot be expected to help their subjects improve compliance with their reasons. Because of this comparative element, our right is qualified (cf. chapter III, p. 85). Subjects who abuse the right to decide by themselves (e.g. by persecuting a minority or starting a war) might eventually forfeit it and find themselves under an obligation to obey an authority that is more reasonable than they are. The other significant difference between the notion of sovereignty examined in this chapter and our notion of participation is to be found in its scope. National sovereignty is about the self-determination of political communities at the level of states. The form of democracy that we have defended is not focussed exclusively on the nation state. Depending on the kind of reasons for action to be discussed, the participation of subjects must be local, national, regional, or global.

None of what has been said here amounts to a denial of the value of political communities deciding for themselves. Our account of participation shows why democracy is relevant for legitimacy assessments in a way that does not depend on the value of self-determination. Our account is, in this sense, neutral with regard to self-determination (in its moderate version). Moreover, we have seen that the service conception of authority would be able to accommodate a moderate version of self-determination, especially at the level of ILIs. Only the radical version of self-

determination, according to which self-determination should always trump public international law, is at odds with our concept of legitimate political authority.

## ***Bibliography***

**Audi, Robert 1997:** Acting for Reasons. In: Alfred R. Mele (ed.): The Philosophy of Action. Oxford: Oxford University Press.

**Austin, John 1961:** A Plea for Excuses. In: Philosophical Papers. Oxford: Oxford University Press. 123-152.

**Besson, Samantha 2009:** The Authority of International Law: Lifting the State Veil. In: Sydney Law Review, Vol. 31. 343-380.

**Bohman, James 2007:** Democracy across Borders: From Dêmos to Dêmoi. Cambridge (Mass.): The MIT Press.

**Buchanan, Allen 2002:** Political Legitimacy and Democracy. In: Ethics, Vol. 112 (July). 689-719.

**2004:** Justice, Legitimacy, and Self-Determination. Moral Foundations for International Law. Oxford: Oxford University Press.

**2010:** The Legitimacy of International Law. In: Samantha Besson and John Tasioulas (eds.): The Philosophy of International Law. Oxford: Oxford University Press. 79-96.

**Buchanan, Allen and Robert O. Keohane 2006:** The Legitimacy of Global Governance Institutions. In: Ethics & International Affairs, Vol. 20, No 4. 405-437.

**Christiano, Thomas 2004:** Authority. In: The Stanford Encyclopedia of Philosophy. <http://plato.stanford.edu/entries/authority/>. Accessed 1 July 2008.

**2010:** Democratic Legitimacy and International Institutions. In: Samantha Besson and John Tasioulas (eds.): The Philosophy of International Law. Oxford: Oxford University Press. 119-137.

**Cohen, Joshua and Charles F. Sabel 2004:** Global Democracy? In: N.Y.U. Journal of International Law and Politics. Vol. 37 (2004-2005). 763-797.

**Dahl, Robert A. 1999:** Can International Organizations be Democratic? A Skeptic's View. In: Ian Shapiro and Casiano Hacker-Cordón (eds.): Democracy's Edges. Cambridge: Cambridge University Press. 19-36.

**Darwall, Stephen 2007:** Moral Obligation and Accountability. In: Russ Shafer-Landau (ed.): Oxford Studies in Metaethics. Volume II. Oxford: Oxford University Press. 111-132.

**2010:** Authority and Reasons. Exclusionary and Second-Personal. In Ethics, Vol. 120. 257-278.

**Driver, Julia 2006:** Autonomy and the Asymmetry Problem for Moral Expertise. In: Philosophical Studies 128. 619-644.

**Drolet, Jean-François 2010:** Containing the Kantian Revolutions: A Theoretical Analysis of the Neo-Conservative Critique of Global Liberal Governance. In: Review of International Studies, Vol. 36. 533-560.

**Duff, Antony 1990:** Intention, Agency, and Criminal Liability: Philosophy of Action and the Criminal Law. Oxford: Basil Blackwell.

**1993:** Choice, Character, and Criminal Liability. In: Law and Philosophy, Vol. 12, No 4 (November 1993). 345-383.

**2001:** Punishment, Communication, and Community. Oxford: Oxford University Press.

**Einar Himma, Kenneth 2007:** Just 'Cause You're Smarter than Me Doesn't Give You a Right to Tell Me What to Do: Legitimate Authority and the Normal Justification Thesis. In: Oxford Journal of Legal Studies, Vol. 27, No. 1. 121-150.

**Elster, Jon 2009:** Reason and Rationality. Princeton: Princeton University Press.

**Estlund, David 2008:** Democratic Authority. A Philosophical Framework. Princeton: Princeton University Press.

**Fishkin, James S. 1993:** Democracy and Deliberation: New Directions for Democratic Reform. New Haven: Yale University Press.

**Franck, Thomas M. 1990:** The Power of Legitimacy Among Nations. Oxford: Oxford University Press.

**Fricker, Elizabeth 1995:** Telling and Trusting: Reductionism and Anti-Reductionism in the Epistemology of Testimony. In: Mind, Vol. 104, No. 414. 393-411.

**Gardner, John 2007:** Offences and Defences. Selected Essays in the Philosophy of Criminal Law. Oxford: Oxford University Press.

**Goldman, Alvin 2001:** Experts: Which Ones Should You Trust? In: Philosophy and Phenomenological Research, Vol. 63, No. 1. 85-110.

**Goodhart, Michael 2005:** Civil Society and the Problem of Global Democracy. In: Democratization, Vol. 12, No. 1. 1-21.

**Goold, Benjamin J. 2002:** Privacy Rights and Public Spaces: CCTV and the Problem of the "Unobservable Observer". In: Criminal Justice Ethics, Winter/Spring. 21-27.

**Green, Leslie 1988:** The Authority of the State. Oxford: Oxford University Press.

**Griffin, James 1998:** On Human Rights. Oxford: Oxford University Press.

**Habermas, Jürgen 1998:** Die postnationale Konstellation. Politische Essays. Frankfurt am Main: Suhrkamp Verlag.

*English:* 2001: The Postnational Constellation: Political Essays. Cambridge: Polity Press.

**Heath, Joseph 2001:** Communicative Action and Rational Choice. Cambridge (Mass.): MIT Press.

**Held, David 1995:** *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance*. Stanford: Stanford University Press.

**Hershovitz, Scott 2003:** Legitimacy, Democracy, and Razian Authority. In: *Legal Theory*, Vol 3. 201-220.

**Hobbes, Thomas 1651:** *Leviathan*. Edited by J.C.A. Gaskin 1996. Oxford: Oxford University Press.

**Höffe, Otfried 2009:** *Ist die Demokratie zukunftsfähig? Über moderne Politik*. München: Verlag C. H. Beck.

**Hooghe, Liesbet and Gary Marks 2001:** *Multi-Level Governance and European Integration*. Oxford: Rowman and Littlefield Publishers.

**Horn, Christoph 1996:** Philosophische Argumente für einen Weltstaat. In: *Allgemeine Zeitschrift für Philosophie*, Vol. 21. 229-251.

**Ilgen, Thomas 2003:** Reconfigured Sovereignty in the Age of Globalization. In Thomas Ilgen (ed.): *Reconfigured Sovereignty: Multi-Layered Governance in the Global Age*. Hampshire: Ashgate Publishing. 6-35.

**Kant, Immanuel 1785:** *Grundlegung zur Metaphysik der Sitten*. Edited by Bernd Kraft and Dieter Schönecker 1999. Hamburg: Felix Meiner Verlag.

*English:* *Groundwork of the Metaphysics of Morals*. Edited by Mary Gregor 1997. Cambridge: Cambridge University Press.

**Keohane, Robert O. and Joseph S. Nye Jr. 2002:** The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy. In: Robert O. Keohane (ed.): *Power and Governance in a Partially Globalized World*. London: Routledge. 219-244.

**Knowles, Dudley 2010:** *Political Obligation: A Critical Introduction*. Abingdon: Routledge.

**Korsgaard, Christine 1997:** The Normativity of Instrumental Reason. In: Garret Cullity and Berys Gaut (eds.): *Ethics and Practical Reason*. Oxford: Oxford University Press. 215-254.

**Lapidoth, Ruth 1995:** Redefining Authority. In: *Harvard International Review*, Vol. 17, No. 3. 8-13.

**Manent, Pierre 2007:** *Democracy without Nations? The Fate of Self-Government in Europe*. Wilmington, Delaware: ISI Books.

**Margalit, Avishai and Joseph Raz 1990:** National Self-Determination. In: *The Journal of Philosophy*, Vol. 87, No. 9. 439-461.

**Marmor, Andrei 2010:** The Dilemma of Authority. In: University of Southern California Legal Studies Working Paper Series, No. 66. The Berkeley Electronic Press: <http://law.bepress.com/usclwps/lss/art66> (accessed on 19 July 2010).

**May, Thomas 1998:** *Autonomy, Authority and Moral Responsibility*. Dordrecht: Kluwer Academic Publishers.

**McDowell, John 2003:** Virtue and Reason. In: Stephen Darwall (ed.): Virtue Ethics. Oxford: Blackwell Publishers. 121-143.

**McGrew, Anthony 2002:** Democratising global institutions: possibilities, limits, and normative foundations. In: James Anderson (ed.): Transnational Democracy: Political spaces and border crossings. London: Routledge. 149-170.

**McLeod, Carolyn 2006:** Trust. In: The Stanford Encyclopedia of Philosophy. <http://plato.stanford.edu/entries/trust/>

**Morris, Christopher 1998:** An Essay on the Modern State. Cambridge: Cambridge University Press.

**Nagel, Thomas 2005:** The Need for Nations. In: The New Republic, 27 June, p. 29.

**O'Neill, Onora 1996:** Towards Justice and Virtue. A Constructive Account of Practical Reasoning. Cambridge: Cambridge University Press.

**Parfit, Derek 1997** (with John Broome): Reasons and Motivation. In: Proceedings of the Aristotelian Society, Supplementary Volumes, Vol 71. 99-130.

**Parkinson, John 2006:** Deliberating in the Real World: Problems of Legitimacy in Deliberative Democracy. Oxford: Oxford University Press.

**Pettit, Philip 2010:** Legitimate International Institutions: A Neo-Republican Perspective. In: Samantha Besson and John Tasioulas (eds.): The Philosophy of International Law. Oxford: Oxford University Press.

**Pogge, Thomas 1992:** Cosmopolitanism and Sovereignty. In: Ethics, Vol. 103, No. 1. 48-75.

**2002:** World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms. Cambridge: Polity Press.

**Rabkin, Jeremy A. 2005:** Law without Nations? Why Constitutional Government Requires Sovereign States. Princeton: Princeton University Press.

**Raz, Joseph 1977:** Promises and Obligations. In: P.M.S. Hacker and Joseph Raz (eds.): Law, Morality and Society: Essays in Honour of H.L.A. Hart. Oxford: Oxford University Press. 210-228.

**1986:** The Morality of Freedom. Oxford: Oxford University Press.

**1990:** Practical Reason and Norms. Princeton: Princeton University Press.

**1994:** Ethics in the Public Domain. Essays in the Morality of Law and Politics. Oxford: Oxford University Press.

**2001:** Liberty and Trust. In Natural Law, Liberalism, and Morality: Contemporary Essays, ed. Robert P. George, 113-130. Oxford: Oxford University Press.

**2006:** The Problem of Authority: Revisiting the Service Conception. In: Minnesota Law Review, Vol. 90, No. 4. 1003-1044.

**2010a:** On Respect, Authority, and Neutrality: A Response. In: *Ethics*, Vol. 120 (January). 279-301.

**2010b:** Human Rights without Foundations. In: Samantha Besson and John Tasioulas (eds.): *The Philosophy of International Law*. Oxford: Oxford University Press.

**Rivera-López, Eduardo 2006:** Can There Be Full Excuses for Morally Wrong Actions? In: *Philosophy and Phenomenological Research*. Vol. 73, No. 1 (July 2006). 124-142.

**Sadurski, Wojciech 2006:** Law's Legitimacy and 'Democracy-Plus'. In: *Oxford Journal of Legal Studies*, Vol. 26, No. 2. 377-409.

**Sen, Amartya 2009:** *The Idea of Justice*. London: Penguin Books.

**Simmons, A. John 1979:** *Moral Principles and Political Obligations*. Princeton: Princeton University Press.

**Singer, Peter 1972:** Moral Experts. In: *Analysis*. Vol. 32, No. 4. 115-117.

**Sinnott-Armstrong, Walter 2008:** Is Moral Phenomenology Unified? In: *Phenomenology and the Cognitive Sciences*, Vol. 7, No. 1. 85-97.

**Skorupski, John 1999:** *Ethical Explorations*. Oxford: Oxford University Press.

**Soper, Philip 2002:** *The Ethics of Deference: Learning from Law's Morals*. Cambridge: Cambridge University Press.

**Tasioulas, John 2010:** The Legitimacy of International Law. In: Samantha Besson and John Tasioulas (eds.): *The Philosophy of International Law*. Oxford: Oxford University Press. 97-116.

**Van der Vossen, Bas 2008:** On Legitimacy and Authority: A Response to Krehoff. In: *Res Publica*, Vol. 14. 299-302.

**Von Hirsch, Andrew 2000:** The Ethics of Public Television Surveillance. In: Andrew von Hirsch, David Garland et al. (eds.): *Ethical & Social Perspectives on Situational Crime Prevention*. 59-76. Oxford: Hart Publishing.

**Waldron, Jeremy 1999:** *Law and Disagreement*. Oxford: Oxford University Press.

**Warbrick, Colin 2003:** States and Recognition in International Law. In: Malcolm D. Evans (ed.): *International Law*. First Edition. Oxford: Oxford University Press. 205-267.

**Wellman, Christopher H. 1996:** Liberalism, Samaritanism, and Political Legitimacy. In: *Philosophy & Public Affairs*, Vol. 25, No. 3. 211-237.

**Wiggins, David 2006:** *Ethics. Twelve Lectures on the Philosophy of Morality*. Cambridge (Ma.): Harvard University Press.

**2007:** A Sensible Subjectivism? In: Russ Shafer-Landau and Terence Cuneo (eds.): *Foundations of Ethics. An Anthology*. Oxford: Blackwell Publishing. 145-156.

**Wiland, Eric 2005:** Monkeys, Typewriters, and Objective Consequentialism. In: *Ratio*, Vol. 18, No. 3. 352-360.

**Williams, Bernard 2007:** Internal and External Reasons. In: Russ Shafer-Landau and Terence Cuneo (eds.): *Foundations of Ethics: An Anthology*. Oxford: Blackwell Publishing. 292-298.

***Abstract***

Thesis title: The Legitimacy of International Legal Institutions  
Author: Bernd M Krehoff, Somerville College  
Submission for the degree of Doctor of Philosophy in Philosophy  
Hilary 2011

This thesis is about the legitimacy of political authority in general and international legal institutions (ILIs) in particular. It is divided into two parts with three chapters corresponding to each part. The first part presents an account of legitimate political authority that is based on Joseph Raz's service conception of authority but also makes some important modifications to it. The central claim of the first part is that the legitimacy of political authorities in general, as measured by the standard of Raz's Normal Justification Thesis, depends in a crucial way on the ability of the subjects to get involved –more so than Raz is prepared to admit– in the activities that are relevant in the political domain.

The thesis offers a general account of legitimate political authority, i.e. one that is valid for any type of political authority. The second part, however, examines the implications of this account for the legitimacy of ILIs. These are non-state authorities, such as the World Trade Organisation or the International Criminal Court, that deal with problems of global political relevance. Because of this global approach, the subjects of ILIs (i.e. those whose reasons are to be served by the ILI) are not confined to the boundaries of regions or states, but distributed across the world. ILIs operate by creating, interpreting, and applying public international law.

Despite some striking differences between ILIs and other types of political authority (particularly states), I argue that they all ought to be measured by the same standard of legitimacy, namely the Normal Justification Thesis. But I also argue that the requirements for meeting this standard of legitimacy may vary according to the type of political authority (especially with regard to the requirement of democracy).