

Governance and Legitimacy

Keynote Speech Held at the Opening
Conference of the Research Center (SFB) 700

Robert O. Keohane

Comments by Fritz W. Scharpf



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Robert O. Keohane

Introduction

I have been asked to speak on governance and legitimacy. I initially demurred, since your conference is on areas of limited statehood and my work is on global institutions. But Thomas Risse assured me that the literature on global governance is relevant, and that students of limited statehood may be able to learn from students of global governance. Since Thomas is very persuasive, and since I expect that the reverse is at least equally true, I agreed to come. What I will try to do is to propose some general standards for legitimacy in situations lacking both strong government and genuine democratic publics, and then to apply these standards to four different types of situation involving limited statehood. The standards that I will propose represent an adaptation of standards proposed in an article recently published by Allen Buchanan and myself (Buchanan/Keohane 2006)¹. Professor Buchanan should get credit for developing many of the arguments, but no blame for the way in which I have adapted them for this purpose.

My analysis tonight is normative but is linked to empirical issues. So let me first comment briefly on positive rather than normative issues. How should we understand governance in situations of limited statehood?

This afternoon Beth Simmons provided three features of situations that could be taken, in my view, to define situations of limited statehood: 1) no monopoly on force; 2) a lack of the credible rule of law; and 3) low ability to make coherent decisions for a collectivity. Of course, these conditions help to define a continuum between a positive ideal type of stable constitutional government, on the one hand, and a negative ideal type of statelessness, on the other. Situations of limited statehood fall toward the negative side of the continuum.

Situations of limited statehood call to mind Hannah Arendt's definition of power as *the capacity to act in concert*. In this sense, situations of limited governance are situations of *low power*. Much force may be in evidence, but there is little power in Arendt's sense. Here I want to support a point made by Georg Sorensen in his intervention this afternoon: we need first of all to understand weak statehood and its persistence. That is, if we understand why situations of limited power in Arendt's sense persist, we will more readily be able to understand, and to make judgments about, failures of governance.

In these situations of limited statehood, perhaps we should not entirely be asking: what collective decisions make sense in these circumstances? We might want to ask, equally, how indi-

¹ For citations to secondary materials, not found in this text, please see that reference.

viduals should be expected to act when collective decisions are not feasible. Hobbes may be as relevant as R. H. Coase and Douglass North, especially in situations toward the negative pole of statelessness. Hobbes famously described a “war of all against all” in such situations. Nothing is worse. If this is the alternative to poor governance in situations of limited statehood, it puts the issue of legitimacy in context. Governance will not be good. We need to ask whether it is acceptable.

‘Legitimacy’ has both a normative and a sociological meaning. To say that an institution is legitimate in the normative sense is to assert that it has *the right to rule* – where ruling is promulgating rules and attempting to secure compliance with them by attaching costs to noncompliance and/or benefits to compliance. Ruling in this broad sense does not require that the rules be backed by coercion, much less that the rule-maker claims a rightful monopoly on coercion within a jurisdiction, so it does not presuppose the state. An institution is legitimate in the sociological sense when it is widely *believed* to have the right to rule. Sociological legitimacy reflects the aggregate normative views of large numbers of people.

This talk is concerned with the normative dimensions of such institutional legitimacy: under what conditions should governance institutions, in situations lacking strong governmental institutions and democratic publics, be considered legitimate?

The normative standpoint that I begin with is liberal democratic theory, interpreted in a consequentialist way. Two fundamental principles of democratic people are that individuals ought to be free to make decisions for themselves and that they should be treated equally. It follows that where collective decisions are required, each person should have an equal voice. Furthermore, publics should be able to act collectively. A public can be defined as a set of people who communicate with each other and view themselves as a group that should be making collective decisions. In my view, it is desirable that publics be able to make such decisions, with each person having an equal voice. The liberal aspect of democratic theory requires constraints on those in power. At a minimum, institutions of governance should limit and constrain the potential for abuse of power, through a combination of checks and balances and accountability. Such accountability should whenever feasible include accountability to publics in freely contested elections under universal suffrage. When I say that I interpret liberal democratic theory in a consequentialist way, I mean that the ultimate justification of the liberal democracy is that it can be expected to provide better opportunities for individuals to lead autonomous lives in which they can fulfill their inherent capacities. If following liberal democratic norms *worsened* human opportunities for such meaningful lives, it would not necessarily be justified to do so.

It almost goes without saying that liberal democratic theory does not match well with the actual practices of situations of limited statehood. Liberal democratic theory certainly would not describe the situation of global governance, either. For someone who believes in democratic theory, but wants to be relevant to difficult situations such as these, the problem is how to *adapt* the very high standards appropriate to ideal democracies, in such a way that is relevant to these more troubled conditions.

This means, of course, that in real-world politics the normative and empirical aspects of legitimacy are linked. It would be unrealistic to apply very high standards of democratic to global governance or situations of limited statehood. No feasible institutions would be legitimate. The concept of legitimacy would therefore provide us with little leverage for distinguishing among governance institutions, or even for criticizing them in a way that could lead to improvements. We are in the realm of second-best: or third or fourth best!

Three Desiderata

I will begin by offering three desiderata that, in my view, any set of standards for evaluating the legitimacy of governance institutions must meet. First, they must provide a basis for coordinating support for the institutions. Second, they should take justice into account but not identify legitimacy with justice. And third, they should enable us not only to evaluate the legitimacy of governance institutions in a static way, but to evaluate the path of institutional change.

(1) *Coordinating support*

Governance institutions are valuable because they create norms and information that enable actors to coordinate their behavior in mutually beneficial ways. They can reduce transaction costs, create opportunities for actors to demonstrate credibility, and provide public goods. However, an institution's ability to perform these valuable functions will depend in substantial measure on whether those to whom it addresses its rules regard them as binding.

Once an institution is in place, on-going support for it and compliance with its rules is sometimes simply a matter of self-interest from the perspective of states, assuming that the institution actually achieves coordination or other benefits that all or at least the more powerful actors regard as valuable. Similarly, once the rule of the road has been established and penalties are in place for violating it, most people will find compliance with it to be rational, from a purely self-interested point of view. But in global governance and situations of limited statehood, we cannot rely on self-interest, since penalties for non-compliance may often be unlikely. Hence legitimacy carries an especially heavy weight of institutional maintenance – precisely in situations where we might expect legitimacy to be low in the first place.

The general point is that judgments of legitimacy will depend significantly on our anticipation of what institutions will be regarded in the domain as legitimate. A set of institutions that matches less well to ideal democratic principles, but that performs a strong coordination function because its provisions resonate with widely-held beliefs, may be *normatively* superior – according to my consequentialist democratic theory – to a set of institutions that is more ideally democratic, but less in tune with prevailing beliefs.

I have stressed that agreement on standards for legitimacy can facilitate valuable coordination of support for governance institutions. However, if it becomes widely understood that an institution does not measure up to the standards, then the result may be lack of coordination, at least until the institution changes to conform to the standards or a new institution that better

conforms to them replaces it. The function of legitimacy judgments is to make possible coordinated support for institutions based on normative reasons rather than simply on grounds of self-interest, while at the same time supplying a critical, but realistic minimal normative standard by which to determine whether institutions are *worthy* of support.

(2) *Justice and legitimacy*

Justice is an ideal standard, whereas legitimacy expresses a threshold value, in a non-ideal world, for the conditions under which an institution has the right to rule. Justice and legitimacy are therefore closely related but they are not the same. Withholding support from institutions because they fail to meet the demands of justice would be self-defeating from the standpoint of justice itself, because progress toward justice requires effective institutions. To mistake legitimacy for justice is to make the best the enemy of the good. Yet if an institution is sufficiently unjust, whatever moral reasons there are for supporting it will be overwhelmed by its extreme injustice. To *remain* legitimate, a governance institution must provide for continuing deliberation about what justice requires and how the institution ought to contribute to it.

(3) *Dynamic Evaluation*

Finally, a relevant standard of legitimacy should take into account the direction of change. A variety of pathways may exist by which governance institutions may become more legitimate on consequentialist democratic grounds. It is possible that what seems to be a superior institution in a static sense will occupy only a local maximum, without the ability to improve; while what appears to be an inferior institution will have the capacity for improvement. Under such conditions, the institution with the capacity to improve might well be more legitimate, from a long-term perspective, even if at the moment it is somewhat inferior.

Four criteria

I now put forward four criteria for the legitimacy of institutions. The first of these criteria is *minimal moral acceptability*. Governance institutions, like institutions generally, should not persist in committing serious violations of human rights, injustices and if they do we should not take their rules as binding or otherwise support them. Unsurprisingly, there is disagreement among basic interest theorists of human rights as to exactly what the list of human rights includes and how the content of particular rights is to be filled out. However, there is agreement that the list includes the rights to physical security, to liberty, and the right to subsistence. Assuming that this is so, we can at least say this much: governance institutions, and institutions generally, are legitimate only if they do not persist in violations of the least controversial human rights.

When we see the grievous injustices of our world and appreciate that ameliorating them requires institutional actions, we are quick to attribute obligations to institutions and then criticize them for failing to fulfill those obligations. However, it is one thing to say that it would be a good thing if a particular governance institution took on certain functions that would promote human rights; it is quite another to say that it has a duty to do so *and* that this duty is of such importance that failure to discharge it makes the institution illegitimate. It may be that the in-

justices we observe are due to fundamental conditions beyond the ability of any institution to control, and that attributing them to the institution is to confuse cause with effect.

In my view, the standard of legitimacy should require minimal moral acceptability, but should also encourage the possibility of *developing* more demanding requirements of justice for at least some of these institutions.

The second criterion is *comparative benefit*. The justification for having governance institutions is primarily if not exclusively instrumental: we value them principally because of the benefits they bring. 'Benefit' here is necessarily comparative. The legitimacy of an institution is called into question if there is an institutional alternative, providing greater benefits, that is feasible, accessible without excessive transition costs, and meets the minimal moral acceptability criterion. If an institution steadfastly remains instrumentally suboptimal when it could take steps to become significantly more efficient or effective, this impugns its legitimacy. In other words, when assessing the legitimacy of an institution we always have to ask: *as compared to what?*

In my scale of values, these first two criteria are the most important, the *sine qua non*. Regimes that fail on either standard are illegitimate. The next two criteria are important, but more a matter of degree. All governing institutions, even democratic ones, fail them to some extent. In situations of limited statehood, and globally, the conditions for receiving a high rating on these standards are rarely present, and one must expect to have to lower the bar to be realistic in one's application of democratic theory.

The third criterion is *institutional integrity*. If an institution exhibits a pattern of egregious disparity between its actual performance, on the one hand, and its self-proclaimed procedures or major goals, on the other, its legitimacy is seriously called into question. An institution is presumptively illegitimate if its practices or procedures predictably thwart the credible pursuit of the very goals in terms of which it justifies its existence. If an institution fails to satisfy the integrity criterion, we have reason to believe that key institutional agents are either untrustworthy or grossly incompetent, that the institution lacks correctives for these deficiencies, and that therefore the institution is unlikely to be effective in providing the goods that would justify taking its directives as binding.

Integrity and comparative benefit are related but distinct. If there are major discrepancies between an institution's behavior and its prescribed procedures and professed goals, then we can have little confidence that it will succeed in delivering the benefits it is supposed to provide. However, integrity is a more forward-looking, dynamic virtue than comparative benefit, which measures benefit solely in terms of the current situation. If an institution satisfies the criterion of integrity, there is reason to be confident that institutional actors will not only deliver the benefits that are now taken to constitute the proper goals institutional activity, but also that they will be able to maintain the institution's effectiveness if its goals change.

Minimal moral acceptability, comparative benefit, and institutional integrity are plausible standards for the legitimacy of governance institutions. All three conditions are always relevant, but trade-offs between them must frequently be made and as I have noted, minimal moral acceptability and comparative benefit are of the greatest importance. Gross violations of human rights cannot be countenanced. And how much we expect of an institution should depend, in part, upon how valuable the benefits it provides are and whether there are acceptable, feasible alternatives to it. For example, we might be warranted in regarding an institution as legitimate even though it lacked integrity, if it is nonetheless providing important protections for basic human rights and the alternatives to relying on it are grim.

My fourth and final condition for legitimacy is *epistemic quality*. At a minimum, the institution must not be based on beliefs that are not palpably false, and must report fairly accurately on its activities. Institutions based on racism, for example, are *ipso facto* illegitimate because beliefs about racial superiority are demonstrably incorrect. Institutions that systematically distort information so that it is the opposite of the truth – as in Stalinist Russia – are also *ipso facto* illegitimate. Legitimate institutions can survive widespread knowledge of their activities. To provide any assurance of epistemic quality, institutions also need to be, to a reasonable extent, accountable and transparent.

Accountability and Transparency

Accountability includes three elements: (1) standards that those who are held accountable are expected to meet; (2) information available to accountability-holders, who can then apply the standards in question to the performance of those who are held to account; and (3) the ability of these accountability-holders to impose sanctions: to attach costs to the failure to meet the standards. The need for information about whether the institution is meeting the standards accountability-holders apply means that a degree of transparency regarding the institution's operations is essential to any form of accountability.

Almost all institutions are accountable to someone – if only to the criminal gang or the “Godfather” behind the scenes. So accountability *per se* is not sufficient; it must be the right sort of accountability. At the very least, this means that there must be effective provisions in the structure of the institution for holding institutional agents accountable for acting in ways that ensure satisfaction of the minimal moral acceptability and comparative benefit conditions. Furthermore, there must be provisions for revising existing standards of accountability and our conception of who the proper accountability holders are and whose interests they should represent.

Achieving transparency is often touted as the proper response to worries about the legitimacy of governance institutions. However, to suggest that transparency ensures legitimacy is inadequate. For transparency to be effective, information about how the institution operates must be accessible *at reasonable cost*; properly integrated and interpreted; and directed to accountability-holders who are adequately motivated to use it properly in evaluating the performance of the relevant institutional agents.

Legitimate governance institutions should possess three epistemic virtues. First, because their chief function is to achieve coordination, they must generate and properly direct reliable information about coordination points; otherwise they will not satisfy the condition of comparative benefit. Second, because accountability requires transparency, they must be transparent in sense of making information available about themselves. They must also have effective provisions for integrating and interpreting the information current accountability-holders need and for directing it to them. Third, and most demanding, they must have the capacity for *revising the terms of accountability* over time.

Even then, the effects of transparency will not always be benign. Indeed, under some circumstances transparency can have malign effects. As David Stasavage points out, “open-door bargaining...encourages representatives to posture by adopting overly aggressive bargaining positions that increase the risks of breakdown in negotiations.” Our claim is not that outcomes are necessarily better the more transparent institutions are. Rather, it is that the dispersal of information among a plurality of external epistemic actors provides some counterbalance to informational asymmetries favoring insiders. There should be a very strong but rebuttable presumption of transparency, because the ills of too much transparency can be corrected by deeper, more sophisticated public discussion, whereas there can be no democratic response to secret action by bureaucracies not accountable to the public.

Having articulated a set of standards for institutional legitimacy, I now argue that they meet the three desiderata for a standard of legitimacy I set out earlier. First, the standard provides a reasonable basis for coordinated support of institutions that meet the standard. It only requires a consensus on the importance of not violating the most widely recognized human rights, broad agreement that comparative benefit and integrity are also presumptive necessary conditions of legitimacy, and a commitment to inclusive, informed deliberation based on transparency and accountability. In other words, the complex standard steers a middle course between requiring more normative agreement than is available in situations of limited statehood and abandoning the attempt to construct a more robust, shared normative perspective from which to evaluate governance institutions.

Second, in requiring only minimal moral acceptability at present, the standard I have proposed acknowledges that legitimacy does not require justice, but at the same time affirms the intuition that extreme injustice, understood as violation of the most widely recognized human rights, robs an institution of legitimacy. Finally, by requiring a dynamic rather than simply a static evaluation of institutions – looking at pathways of institutional change as well as performance right now – the standard reflects a proper appreciation of the dynamic, experimental character of governance institutions in situations of limited statehood.

Applying the Standards

Setting out a set of normative standards for the legitimacy of governance institutions is only the easy part of the task. The difficult part is applying them to particular situations, in context.

The close connection between normative and empirical aspects of legitimacy means that the character of domestic publics, and their prevailing beliefs, will be crucially important in such applied evaluations. Since ideal democratic publics do not exist – certainly not in situations of limited statehood or globally – here will always be tradeoffs between closer approximation to democratic ideals and institutional robustness. Building stronger institutions is very likely to require normative sacrifices and *vice versa*.

At the global level, I am inclined not to apply the standards too strictly, since institutions are crucial for interstate cooperation, and cooperation is essential to achieve peace, prosperity, environmental protection, human rights and many other values that are extremely important. International institutions usually, it seems to me, meet the comparative benefit criterion since the alternative is often discord and unilateral or regional action. They never commit massive violations of human rights. They are more likely to *allow* such violations by others, as in Rwanda and now the Sudan – and this inaction should be severely criticized. The fact that an institution is weak does not make it illegitimate. If it did, the cure would be worse than the disease, weakening the institution further. Global institutions too often lack integrity, since hypocrisy is associated with dependence, and they are dependent on states, which themselves are often hypocritical. Such institutions have substantial transparency, more because they are too fragmented to keep secrets than because they systematically publicize relevant information. They are all quite accountable to someone – partly because they are weak – although rarely democratically accountable. In general, I see most multilateral institutions as seriously flawed on the basis of my democratic legitimacy standards, but not illegitimate. Insofar as collective choices are needed – whether one's own state should support the multilateral organization, my inclination is not to let objections on grounds of legitimacy get in the way, if the purposes of the activity are morally valid and the means chosen to achieve them seem appropriate.

In situations of limited statehood, the issue is more difficult. Four different sets of situations can be distinguished, as follows:

- States or multilateral organizations may have come to exercise rule over peoples a territory not legally their own, and may need to make decisions about whether to turn rule over to a government composed of residents of the territory.
- Outsiders may need to decide whether to recognize, or to aid, existing governments of other states, and may need to make judgments of legitimacy as part of this process.
- We may want to make historical judgments on situations in the past, such as the British colonialism in North America considered by the project on governance in situations of limited statehood.
- Outsiders or insiders may want to make judgments about the legitimacy of specific institutional arrangements such as public-private partnerships (PPPs).

Exercising Rule or Turning it Over?

The United Nations in Bosnia, and now in Kosovo, had to govern the country for some time, and in so doing, had to decide whether local governance institutions were sufficiently legitimate for power to be devolved to them. It is a pressing question right now whether the Kosovo Albanians would form a government for the whole area that, if given sovereignty, would meet the standard. My inclination is to answer this question in the negative, since there is no Kosovar public – Albanians and Serbs being too divided – and there is little evidence that such a government would follow minimal human rights standards toward the Serb minority. My formulation of legitimacy suggests that following human rights standards is more important than sovereignty and territorial integrity *per se*, and that Kosovo should therefore either be divided before sovereignty is given to the Albanian majority, or should remain in a quasi-sovereign status. An Albanian Kosovar government that fails to respect the human rights of its Serb population should not be recognized.

The United States faced a similar choice in Iraq when it returned sovereignty to an Iraqi government. The United States has to reconsider the legitimacy of the Shiite-led government every day, in deciding how much authority to give it over policing in its own territory. That government seems clearly to fail all of the standards I have enunciated. It either commits gross human rights violations, including torture and murder, or allows them to go unpunished. Indeed, its prime minister recently responded to accusations by a Sunni woman of rape by Shiite forces by trying, in all too familiar ways, to discredit the woman who brought the charge, rather than by undertaking a serious and impartial investigation. The government seems to provide fewer net public benefits than would be provided by a quite conceivable authoritarian government that kept sectarian groups under control. Its behavior continually belies the words of democracy and equal rights that its spokesmen, at least when speaking to the American public, mouth. If this government met the minimal moral acceptability and comparative benefit criteria, one might be inclined, on the theory I have outlined, to loosen considerably the standards for integrity, transparency, and accountability. But it fails the first tests.

Of course, to say that the Shiite-led government in Iraq fails the legitimacy test does not tell us what feasible government would pass it. Certainly Saddam's regime, with its minority rule and its systematic use of torture, terror, and murder, failed it flat. So does foreign rule by the United States, which can never be legitimate for Iraqis and therefore guarantees armed insurgency and all the brutalities, on both sides, that armed insurgency, supported by the population, against a militarily dominant occupier, generates. Since there is no coherent public in Iraq, with a sense of collective we-feeling, it is difficult to see the prospect for any government that meets the legitimacy standard. Not realizing that this would be the likely outcome of an invasion will be the enduring shame of the American and British political elites – not just the governments and parties and power but, with some honorable exceptions, the “political class” in general.

Faced with no good options, I am thrown back on the theological distinction between sins of commission and sins of omission. It is worse actively to commit injustice than merely to allow

it to happen, especially when one cannot make the situation better over the long run. United States troops are a target now for all sides, from Sunni insurgents to Shiite militants. Their vulnerability, and lack of ability to communicate effectively with Iraqis, ensures that they will continue to commit a number of injustices, largely as a result of understandable over-reactions under pressure. Hence their continued presence in the country for an indefinite period of time seems difficult to justify, in view of the difficulty that they could make the situation better over the long run. In my view, therefore, the United States should leave Iraq on a strict timetable of not more than one year. Other states in the region, and the Iraqis themselves, will have to take more responsibility to prevent disaster.

In Kosovo, by contrast, my judgment is that the United Nations should not hand over power to the Kosovar Albanians until a fair settlement is made for the Serbs, either letting their territory be part of Serbia or waiting for a Kosovar government that can credibly promise to protect their rights.

Supporting Governments?

The other public choice that could be affected by legitimacy judgments is whether to support a regime that has clear democratic deficiencies but is likely to be superior to any feasible successor. Consider the government of Pakistan under President Musharref. The government is non-democratic – but previous, nominally democratic governments had a feudal base, were very corrupt, and failed to maintain order in the country. It also appears to lack integrity and transparency, allowing its intelligence services, or branches of them, to support the Taliban while nominally joining the American-led War against Terror. However, it is easy to imagine a government in Pakistan that would perpetuate much worse abuses against human rights than the present government does – for instance, a government that was run by a ruthless military dictator repressing all dissent, or by Islamic fundamentalists. Indeed, such a government might well follow the Musharref government. So on the standard of comparative benefit, the Musharref government ranks higher than such a hypothetical regime, and might well pass the test.

I am not suggesting that actual policy is made only, or even substantially, on the basis of principles of legitimacy. With respect to American and European policies toward Pakistan, interests are trump. But I am suggesting that the standard of legitimacy that I suggest could justify support for the Musharref regime.

This judgment may make the standard seem too flexible. I do not think, however, that it is. Consider Zimbabwe. The Mugabe regime is clearly illegitimate on the basis of the standards I have enunciated. It lacks integrity, accountability and transparency – but so do some regimes that I have reluctantly concluded are “above the bar”. The regime violates human rights in flagrant ways, although in this respect, many regimes worldwide seem worse. It is on the comparative benefit criterion that the crucial failure occurs. Robert Mugabe himself demonstrated over the course of many years that Zimbabwe could be governed by a much better regime, which provided more material benefits, and greater protection of human rights, than the current regime.

His own past regime therefore offers proof that the current Zimbabwean regime fails the standard of comparative benefit and is therefore illegitimate.

An Historical Example: The Early American Experience

The leaders of this project are interested in situations in the relatively distant past, such as British colonialism in North America, so let me comment on one set of historical questions, having to do with the treatment of native Americans – Indian tribes – by Britain and the United States between 1750 and 1850.

Britain was allied with some Indian tribes, such as the Iroquois, while its French enemy was allied with others. Considerable fighting occurred on the frontier, with massacres occasionally taking place on both sides. Britain, however, sought to prevent white settlers from breaching boundaries between their land and that of the Indians. They were not very successful in this regard, as white settlement increased, but British policy was sufficiently pro-Indian to generate resentment by the English-speaking inhabitants of the colonies.

With American independence, policies became more pro-settler. Early Federalist governments nevertheless sought to control settler depredations, but by the time of the Andrew Jackson administration, beginning in 1829, that policy changed. Jackson, who had made his reputation fighting Indians, successfully sought the forcible removal of the Five Civilized Tribes from their ancestral lands in the Southeast. In what became known as the Trail of Tears, many innocent Indians died.

So with respect to the treatment of the Indians, how do British colonialism and American frontier democracy stand up to the criteria of legitimacy that I have outlined? On the *minimal moral acceptability* criterion, Britain passes and Jacksonian America fails. On the *comparative benefit* criterion, Jacksonian America also fails. Both British rule and Federalism rule were vastly superior for the Indians – the original occupants of the land.

Only on the integrity and accountability-transparency criteria does Jacksonian America do well – but as I have argued, this is not sufficient for failure on the two principal criteria. Jackson and his allies were frank about their policies. President Jackson said in a message to Congress in December 1830:

„What good man would prefer a country covered with forests and ranged by a few thousand savages to our extensive Republic, studded with cities, towns, and prosperous farms, embellished with all the improvements which art can devise or industry execute, occupied by more than 12,000,000 happy people, and filled with all the blessings of liberty, civilization, and religion?“

The Jackson Administration regarded treaties not as moral obligations but as matters of expediency. As expressed by Government George C. Gilmer of Georgia:

„Treaties were expedients by which ignorant, intractable, and savage people were induced without bloodshed to yield up what civilized peoples had a right to possess by virtue of that command of the Creator delivered to man upon his formation – be fruitful, multiply, and replenish the earth, and subdue it.“²

Even some adored American statesmen adopted similar attitudes, before Jacksonian democracy. The American negotiators at the Treaty of Ghent in 1814, led by John Quincy Adams and Henry Clay, said the following in defense of their policies of seizing Indian lands and violating treaty obligations:

“They will not support that [Great Britain] will avow, as the basis of their policy towards the United States, the system of arresting their natural growth within their own territories, for the sake of preserving a perpetual desert for savages.”
(American State Papers: 1814)

Deciding on Specific Institutions

Finally, under what conditions are such institutions as public-private partnerships legitimate in situations of limited statehood? I suggest, rather tentatively in view of my lack of empirical knowledge, that the standards of legitimacy I have suggested could also apply here. *Minimal moral acceptability, comparative benefit, integrity, and epistemic quality* (including transparency and accountability) all seem relevant to the analysis of such institutions. Once again, the comparative benefit criterion is crucial: *as compared to what?* Since costs and benefits are at issue, introducing a political economy perspective into the project, if possible with some applied economists involved, would seem highly worthwhile.

Conclusion

I have proposed a standard of legitimacy for governance institutions and have given some examples of how I think it should be applied, globally and in situations of limited statehood. Global institutions are relatively new and still evolving; in situations of limited statehood, governance institutions are often very new and changing very fast. Under these conditions it is difficult to make firm judgments. Nevertheless, I hope that a principled proposal for a standard of legitimacy such as the one I have suggested could, if it garners sufficient support, serve as a focal point for provisional support while at the same time providing guidance for improvement and leverage for stimulating institutional change. In view of the choices that need to be made on a continuing basis, there is an urgent need for a shared evaluative perspective that is sufficiently critical, yet not so demanding as to make coordinated, normatively-based support for governance institutions under difficult conditions unlikely. My hope is that the standards I have proposed this afternoon could constitute a first step toward meeting this need.

2 Both quotes are from Prucha (1962: 242).

Legitimacy in Normative and Positive Theory: Comments on Robert O. Keohane

Fritz W. Scharpf

As was to be expected from its author, this is an excellent paper – thoughtful, clearly argued and convincing as far as it goes. I have no disagreement with its substantive propositions on the legitimacy of governing institutions. Instead, my comments will address some of the meta-theoretical or methodological issues relating to the role of these propositions within the context of SFB 700 and its research program on “Governance in Areas of Limited Statehood”

My first comment responds to Keohane’s own doubts about the assumed parallelism between the focus of his own current work on the legitimacy of global governance institutions and issues of legitimacy in areas of limited statehood. In my view, these doubts are justified for two reasons: First, where they are effective, global institutions are secondary governments which depend on primary governments at the national and sub-national levels for the implementation and enforcement of their decisions. In other words, they generally do not have to face the target populations of their policies directly. As a consequence, the requirements of their legitimacy may differ from, and may be less stringent than the standards applied to primary governments.¹ Keohane seems to acknowledge as much when he denies the possibility of legitimate local or national governance institutions in areas like Kosovo or the Iraq because, in the absence of a “coherent public” and a “collective we-feeling”, there could be no accountability. For institutions of global or even European governance, by contrast, there is no claim that their legitimacy should depend on the existence of coherent publics or collective we-feelings.

Moreover, in our normative evaluation of global or European institutions, there is no question that we are also entitled to apply our own standards of legitimacy. Since these secondary governments claim authority over our own primary governments, and thus indirectly over us, we should of course judge their legitimacy by our own lights. But it should also be understood, as Keohane points out, that these will be our standards for *secondary* governments, and that we would not, and should not, hold the EU or the WTO to the same standards that we apply to our primary governments. It is less self-evident, however, that our own standards are equally relevant for judging the legitimacy of primary governments other than our own.

Keohane approaches this question by distinguishing between a “normative” and a “sociological” meaning of legitimacy. The former refers to arguments asserting the “right to rule”, whereas the latter would ask whether an institution “is widely believed to have the right to rule”. He also suggests, however, that these empirical beliefs must themselves be about the normative right to rule, rather than merely beliefs about others’ opinions. That is indeed so. Nevertheless, it is also true that legitimacy beliefs have varied, and do vary, across time and space, cultural and religious traditions, and across contemporary political ideologies.

¹ That is different in cases of humanitarian intervention by the UN, NATO or the EU – whose legitimacy, as Keohane points out, must then be judged by the standards that apply to primary governments.

Now, Keohane's paper is meant as a contribution to the normative, rather than positive, theory of governance institutions. By itself, that would not rule out attention to the variance of legitimating arguments. Even if we should share Max Weber's view of the irreducible pluralism of normative orientations, normative research could still clarify the premises and explore and compare the implications of belief systems other than our own. Keohane, however, has opted for a monistic approach which, at the same time, claims universal relevance. His starting point is a commitment to the normative standpoint of "liberal democratic theory, interpreted in a consequentialist way". I see no reason to dispute the implicit claim that this position, and the emphasis on liberty, equality, checks and balances, accountability and universal suffrage, could and would find broad support in all advanced Western democracies. Yet Keohane also acknowledges that "it almost goes without saying that liberal democratic theory does not match well with the actual practices of situations of limited statehood".

But this is meant as a concession to problems of feasibility, rather than as an acknowledgment of normative pluralism. Moreover, feasibility is to be understood in the context of a research program which equates "limited statehood" with a lack of effective governing capacities: At the extreme, "failed" states are totally incapable to implement and enforce their policies, whereas in "weak states" and "threshold countries", the effective powers of governments are somewhat greater, but still incomplete in comparison to the Western model (Risse/Lehmkuhl 2006: 10-12). If under these circumstances one should nevertheless wish to evaluate the legitimacy of existing institutions, it is clear that liberal-democratic standards cannot be fully applied: They would indeed, as Keohane says, "provide us with little leverage for distinguishing among governance institutions, or even for criticizing them in a way that could lead to improvements. We are in the realm of second-best, or third or fourth best."

As a consequence, Keohane proposes to relax – step-wise, presumably – the requirements of the liberal-democratic model to a point where their realization would seem feasible in the context of existing governing capacities. His main point, however, is that there must also be an absolute minimum standard, below which the legitimacy of governing institutions must be denied, regardless of all considerations of feasibility. The explication and illustrative application of these minimum requirements is the main subject of Keohane's contribution, and I find his arguments in this regard highly persuasive. What I find more debatable are the reverse implications of the logic of his argument.

If the minimum standards are reached by relaxing the requirements of the Western model in response to given deficits of governing capabilities, it also seems to follow that standards must again be raised to require closer approximations of the model if governing capabilities are seen to increase – from failed states to weak states and in threshold countries. In fact, Keohane says as much when he talks about the "pathways [...] by which governance institutions may become more legitimate on consequentialist democratic grounds". But this raises an obvious problem: By any standard, Singapore does not seem to be a case of "limited statehood". Similarly, Saudi Arabia or Iran seem to have considerable governing capacities, and even North Korea, while lacking many capabilities of modern statehood, would probably not be classified as a "failed

state” without an effective monopoly of violence. Yet none of these regimes could be described as approximations of the liberal-democratic model. By the same token, it is at least not certain that increasing governing capabilities in areas of limited statehood would put failed states on a “pathway” toward liberal democracy. For all we know, the normative goal of institutional development could also be the ideal Islamic theocracy or a variant of autocratic paternalism.

In his normative discussion, Keohane makes no allowance for such possibilities. In the logic of his argument, Western standards may have to be relaxed for reasons of feasibility, but they cannot be replaced by non-Western criteria of legitimacy. In other words, at all levels of institutional development, non-Western regimes would have to be classified as being non-legitimate.² In purely normative discourses, we are of course free to argue for a position of monistic universalism – just as Islamic fundamentalists are free to define all Western regimes as illegitimate. But would that be equally acceptable when normative discourses are transposed into policy recommendations, and when the postulated illegitimacy of a target regime may be used as an argument that could justify armed intervention – or suicide attacks, for that matter? I am confident, however, that in the role of a consultant Keohane would invoke a wide range of additional arguments before arriving at policy recommendations and, in any case, this is not an issue I want pursue here.

Instead, I am concerned about the relationship between normative analyses and empirical research, or more specifically, between normative and positive theorizing, in the context of the broader research program. Even though we are free to opt for a monistic approach in our normative theory of legitimacy, we are not similarly free to disregard the existing plurality of legitimating beliefs in our positive theories.³ In a definition widely used at the Berlin conference, “legitimacy” refers to patterns of voluntary compliance that are based on a sense of normative obligation, rather than on sanctions and control. So understood, the concept defines a factor that may greatly reduce the costs, and increase the effectiveness, of governing. It may thus affect the success or failure of given governance institutions, and it may help to predict their resilience under pressure and their responsiveness to externally introduced changes. But in order to arrive at these explanations and predictions, we need to identify the legitimating beliefs that are in fact held by the target populations of the regimes studied. If these are ignored in normative analyses, the relationship between the normative and positive theorizing could only be one of mutual irrelevance.

In my view, that would be unfortunate. The empirical research program of SFB 700 could be sensitized to possible differences in legitimacy beliefs by comparative normative analyses that would identify the presently competing political philosophies, and spell out their implications

2 By contrast, John Rawls – to whom Keohane referred in the discussion, and who surely is deeply committed to the values of liberal democracy – does make allowance for a second category of legitimate, but non-liberal governance which he calls “decent peoples” – and which are to be distinguished from illegitimate “outlaw states” (Rawls 1999).

3 If we did, we might repeat the errors of explanation and prediction that had caused the rapid demise of the unidirectional “Modernization” theories of the 1960s, cf. Hagopian (2000).

for judgments on the legitimacy of governing institutions. In light of the pragmatic aspirations of the program, it would also be interesting to learn about areas of normative overlap – propositions, that is, that are derived from differing normative premises but appear to be sufficiently similar to facilitate agreement on common standards of legitimacy. Conversely, empirical research could contribute to comparative normative analyses by identifying governance practices and institutions which are in fact considered legitimate by their respective constituencies. In this fashion, it might even be possible to contribute to Keohane's primary interest in minimum standards of legitimacy by identifying the lowest common denominator of normative propositions and empirical beliefs about legitimate governance institutions.

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Research Framework of the Research Center (SFB) 700

Governance has become a central theme in social science research. The Research Center (SFB) 700 *Governance in Areas of Limited Statehood* investigates governance in areas of limited statehood, i.e. developing countries, failing and failed states, as well as, in historical perspective, different types of colonies. How and under what conditions can governance deliver legitimate authority, security, and welfare, and what problems are likely to emerge? Operating since 2006 and financed by the German Research Foundation (DFG), the Research Center involves the Freie Universität Berlin, the University of Potsdam, the European University Institute, the Hertie School of Governance, the German Institute for International and Security Affairs (SWP), and the Social Science Research Center Berlin (WZB).

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