

The Foundation of Legitimate States: The Problem of External Powers

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Problem, Aim and Significance

In normative theory it goes without saying that people should establish their own political orders. Perhaps the most famous expression of this moral intuition is found in the preamble of the American constitution. 'We the people ... establish this Constitution ...' began the founding fathers and sent a message to revolutionary movements throughout the world that people have a right to constitute their own states.

However, the creation of new states may sometimes involve actors with no intention of joining the future state as citizens. The US imposition of new regimes on Iraq and Afghanistan is one example and the UN administration of post-conflict societies in Kosovo and East Timor is another (Zaum 2007). Could such policy be reconciled with the conviction that people should establish their own political orders? If so, what is the underlying theory? If not, can the moral intuition be qualified and sustained? Or should we simply oppose certain foreign policies?

This project will develop normative theory so as to account for such questions. It will identify principles concerned

with how a legitimate state is constituted and assess the validity of their implications in the context of external powers. The aim of the project is to decide in what ways, if any, external powers can and cannot be used for the purpose of constituting legitimate states.

In addition, the project will undertake statistical analyses of the impact on democracy and constitutional stability of various ways in which a state has been constituted. Here the aim is to evaluate the relevance of an overarching normative assumption in the project – namely that the origin of a constitution matters for its legitimacy – with respect to two other aspects of legitimacy, i.e. democracy and constitutional stability.²

The project will add to existing knowledge by analyzing an issue which has not been systematically addressed in earlier contributions to political theory and international relations, and also by furthering a quantitative research agenda on the determinants of constitutional stability and democracy. The project transcends the boundaries between four academic disciplines: law, philosophy, political science, and peace and conflict research.

The main practical interest of the project is with clarifying some bases for political choice among alternative foreign and constitutional policies. Should the making of legitimate states be an aim of foreign policy? Should military violence be an option? In view of the effects on human lives of political decisions on such issues, I believe the project should be regarded as morally and politically significant.

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2 Due to cuts in the project budget by the funder this part of the project is unlikely to be executed absent new resources.

Previous Theoretical Research

To specify the field of research and its relations to earlier contributions some conceptual clarifications will be necessary. “External”, in the term “external power”, refers to a power which draws on resources outside the territory and people which is affected by the power. “Power”, in the term “external power”, refers to a capacity to realise the purpose ascribable to some entity, e.g. a state or a multilateral organization, or such entities themselves. According to this concept of power there is hence no necessary conflict of interest in power relationships (cf. Morriss 1987).

The term “constitution” as used here does not refer to a written document but to the basic political order of a state (which may be more or less accurately described in the written constitution). The “constituting of states”, or “the establishment of a constitution”, are terms used to denote an act of creation rather than the entity which is created; different stages of said act, such as the drafting and the ratification of a constitution, can be distinguished and are all relevant to the project. To simplify terminology, the phrase “the constituting of states” is used to cover both the constituting of new states, with a new delimitation of territory and/or population, and the establishment of new constitutions in existing states, with no such changes; this project will consider arguments relevant to both senses of the term.

Developments of existing constitutions (e.g. Ackerman 1991) will fall outside the scope of the project. This delimitation derives from the research issue of considering how political orders should be constituted (rather than managed once in place). Neither will the project cover the standard debate of the substance and procedures of already constituted powers (for

example Rawls 1972 and Dahl 1998). This delimitation is justified as the procedures and substance inherent in a constitution is not necessarily affected by the internal or external character of the constituent power. The content of a constitution may simply reflect the preferences of the constituent power, and such preferences may in turn vary among different external powers just as it may vary among internal and external ones. Hence a study of what powers have been constituted does not necessarily reveal anything about how internal and external constituent powers resemble or differ from each other in normatively central respects.

As now defined, the issue of external constituent powers is situated on a common ground of political theory and international relations. While the merging of these disciplines into one has often been asked for (e.g. Anderson 2002), it has rarely been performed in analytical practice. Earlier contributions to the normative theory of constituent powers have focused almost completely on factors internal to the future state. This holds for classical contributions like Hobbes (1958), Locke (2000) and Sieyès (2003) as well as later contributors such as Habermas (2001), Näsström (2004), Kalyvas (2005), and Honig (2007). Rousseau (1992) and Arendt (1990) mention the role of external powers in the constituting of states but do not examine it systematically.

In studies of external powers, on the other hand, little or no attention is paid to the issue of constituent powers. Related research has covered humanitarian interventions (e.g. Hoffman 1997), ethical foreign policy (e.g. Chatterjee and Scheid 2003), justice among countries (e.g. Rawls 2001), the right to secession from existing states (e.g. Buchanan (1997), and international determinants of democratization

(e.g. Whitehead 1998), but none of these debates have contributed to a normative theory of constituent powers as defined above.

The only exception of which I am aware is Honig (2001) who examines the role of foreigners in the founding of democracies. However, her methodological approach is very different from the one proposed here. While Honig explores the role of foreigners in the bible, in Western-movies and in psychoanalytical interpretations, among other sources, my concern is with evaluating and constructing normative arguments by accounting for the questions and problems supplied by the *best theories available*.

Hence the research issue selected for this project appears to have a strong potential for allowing an original contribution to theory development.

Needless to say, the concept of legitimacy at use in developing these arguments is normative rather than descriptive, i.e. it is concerned with the justifiability rather than an empirically observable popular support of politics. However, one should notice that normative legitimacy may derive from real actions of real people, such as individuals' decisions to give up own power in exchange for security provided by a state.

Outline of Theoretical Inquiries

Could the operation of external powers in the constituting of states be reconciled with the intuition that people should establish their own political orders? To deal with this overarching question of the project I propose that we identify the underlying theories of this intuition, investigate whether those theories effectively preclude the operation of external powers, and then assess the validity of their

implications in the new context in the light of intuitions and arguments prevailing in the original context. More specifically, the possible conflict between moral theory and political practice can be considered in view of two issues dealt with separately below: Who may participate in the constituting of a legitimate state? How may a legitimate state be constituted?

Who may participate in the constituting of a legitimate state? The standard moral intuition as specified with regard to this question would be that only they should participate (possibly by means of representative institutions) who will become citizens in the future state. This idea can be grounded in theories within the social contract tradition (e.g. Locke 2000; Rousseau 1992; Rawls 1972; Habermas 2001) as well as in nationality oriented theories broadly conceived (e.g. Sieyès 2003; Mill 1991; Miller 1995; Smith 2003).

In the social contract tradition, the theoretical justification would be that the authors and the addressees of a constitution must overlap in order to guarantee collective self-determination (for example Habermas 2001). However, for the purpose of this project that assumption should itself be investigated. Is it possible to conceive of the relationship between collective self-determination and external powers as contingent on varying political conditions? May the two phenomena even be positively related? If so, are there any moral reasons to object to the operation of external powers in the constituting of states? In view of these questions my research will consist in considering real or hypothetical counterexamples to the assumed disjuncture between external powers and collective self-determination. It will also consider alternative normative principles to (or interpretations of) collective self-determination (e.g. Pettit 1997;

Sen 2002; Agné 2006a) and pursue thought experiments to elucidate moral intuitions in relation to such external powers as (hypothetically) enhance collective self-determination.

Vesting constituent powers in a nation internal to the future state, on the other hand, has been argued to create political unity and thereby to strengthen political agency (Sieyès 2003) just as in more recent contributions a common nationality has been argued to yield support for welfare solidarity (Miller 1995). To see the implications of such arguments for the legitimacy of external constituent powers one may ask: What political problems have theorists who attribute constituent powers to nations traditionally tried to solve? Are those problems equally relevant in the case of external constituent powers? Are there alternative means for overcoming such problems in the context of external powers? Exploring these questions will require, in addition to a close reading of nationality oriented theorists and investigations like those indicated in the previous paragraph, some familiarity with practical problems related to external constituent powers (for relevant case studies, see Whitehead 1998; Dobbins et al. 2003; Zaum 2007; Beetham unpublished).

To assess the reasonableness of the moral intuition mentioned at the beginning I will also examine arguments suggesting that external constituent powers are for some purposes preferable to internal ones. According to Honig (2001) the value added by foreigners in the constituting of legitimate government is their greater capacity for impartiality. To develop this kind of theory, and to evaluate its merits, it must however be confronted with objections typically absent in the kind of material covered by Honig, for example that political loyalty presumes a

common identity (e.g. Miller 1995; Smith 2003) and that external powers as they exist in today's world may generally be guided by an aim to protect or expand their own relative power (e.g. Waltz 1979) rather than by an aim to serve as impartial judges. On what ground is it possible for external powers to overcome such difficulties? If the difficulties prevail, what is the role, if any, left for external powers in state constituting? Here the research will consist in exposing the content of some yet undertheorized ideas and in evaluating the arguments in support of competing normative claims.

How may a legitimate state be constituted? In line with the moral intuition drawn upon above, a legitimate state should be constituted by a free choice rather than by some act of coercion. This position can be grounded in theories with different views on what subject should act freely – individuals (e.g. Rousseau 1992), nations (e.g. Sieyès 2003), or the representatives active in writing the constitution (e.g. Arendt 1990). In this literature it appears to be taken for granted that external powers are more or less equivalent with coercive powers. This is no strange conclusion within theories which also assume that the people should think only its own thoughts (Rousseau 1992) or that everyone affected by a decision should be able to participate in making it (Habermas 1996). However, in this project the relationship between external and coercive powers is a main object of investigation. Clearly, it has huge implications for the legitimacy of external powers. May we conceive of any circumstances under which people are significantly affected by an external power (which the people cannot control and perhaps not even affect) while they are still not coerced by said power? If so, are there any moral grounds on the basis of which

such powers can still be objected to? In relation to these questions my research will consist in considering real or hypothetical examples where the two concepts (external and coercive powers) may not overlap; assessing alternative normative principles of autonomy or freedom (e.g. Pettit 1997; Sen 2002; Agné 2006a); and elucidating moral choices with thought experiments.

A counterargument to the theory of legitimate states as founded on free or autonomous choice is that such principles are unable to create a legitimate constitution in the sense of an order with which citizens are actually loyal: the position that coercion or power could be replaced by a voluntary agreement among individuals may simply be a liberal delusion (cf. Schmitt 1985), a line of argument which has recently been investigated in the context of US foreign interventions (Agamben 2005; cf. Etzioni 2004). However, in this context the view of morality and freedom as irrelevant for the constituting of legitimate states prompts further investigation: the implication that states can only be constituted by power alone will remain in an international context – but here it will also follow that freedom and morality cannot be a concern even in the existing states and multilateral constellations which have the option *not* to operate external powers. The latter proposition is much stronger than the first one, and for the purpose of this project it should indeed be interrogated. Are there any preconditions for moral reflection which are absent in the deliberations of a government aiming to constitute a state on a territory outside its own? Does moral reflection necessarily weaken an external constituent power? Here the main approach of my research will be to evaluate the reasonableness of generalising a more nar-

row Schmittian position (i.e., that states can only be constituted by a supreme power) into a wider one (i.e., that constituent powers cannot be restricted by moral reflection even outside the state to be constituted).

Outline of Empirical Inquiries

A possible counterargument to all of the theoretical approaches presented above is that the historical origin of a state is irrelevant for its legitimacy, either because the decision to establish a constitution is itself necessarily unconstitutional (cf. Rousseau 1992; Honig 2007), or because the origin of legitimacy is with the procedures (e.g. Dahl 1998) or the content (e.g. Rawls 1972) of politics once the state has been constituted. To somewhat assess the reasonableness of such an objection I will investigate empirically the effects on democracy and constitutional stability of different ways in which a state can be constituted. The general idea is that the theoretical approach of this project, as focused on constituent powers, gains relevance if variation in State Origin has robust and significant effect on Democracy and Constitutional Stability. If effects are weak or absent, the relevance of the theoretical contribution of the project will be limited to the actual time when states are constituted. In addition, the empirical part of the project will address gaps in an empirical research literature pointed to in a section below.

Design, Variables and Units of Analysis. Legitimacy is often associated with, though not exhausted by, constitutional stability. This is implicit for example in Arendt's (1990) view that the American Revolution was more successful than the French in establishing a legitimate constitution: while the American constitution has last-

ed to date, the French lasted only a few years and was then followed by unusual constitutional instability. This opens the possibility of using empirical methods to assess the effect of alternative historical origins of a state for a specific aspect of its legitimacy, namely constitutional stability. The units of analysis are made up of all countries (at individual years) in the Polity IV dataset since 1945 which have experienced a polity change (defined in accordance with the Polity Change Score in Polity IV). The two main independent variables will be treated as dichotomies: polity change in conjunction mainly with (1a) internal powers or (1b) a mix of internal and external powers; (2a) peaceful means or (2b) a mix of peaceful and violent means. Dichotomies are preferred here to simplify data-collection in this mainly theoretical project and to avoid distinctions of questionable theoretical interpretation. (It may be noticed that I hope to undertake a full-size empirical analysis of the matter once this project is completed.) The main dependent variable, Constitutional Stability, is an index which adds one point for each five year period without polity change after the polity change of a given year (models with different time horizons will be developed to check robustness). Because it does not add much work, I will also undertake analyses with Democracy (as defined in Polity IV) as a dependent variable, for the purpose of indicating legitimacy, though the validity of this indicator is more problematic and interpretations must be more restricted.

Operationalisations. The (dichotomous) variable External Powers is assigned a positive value if the polity changes in conjunction with the operation of any external powers for the purpose of bringing about a new regime. This may include various measures directed at polity change

such as institutional assistance and dialogues, conditionality, and military force, but relationships with no direct political aim, such as humanitarian aid or trade, are by themselves insufficient for a positive value. The (dichotomous) variable Political Violence is assigned a positive value if any intended party to the future constitution is affected by inter-state or intra-state violence causing human death. The project will investigate and elaborate on different benchmarks for the scope of violence required to assign a positive value to this variable

Data and methods. Data for the dependent variable, as well as standard control variables, is supplied by the Polity VI dataset. For the independent variables, I will draw on earlier data collections (as archived for example by APSA at www.nd.edu/~apsacp/data.html) and supplement them with secondary sources. The effects of the independent variables will be estimated by regression analyses and tested against a counterfactual expectation of constitutional stability derived from countries with similar levels of economic development (for a similar approach to the explanation of democracy, see Buene de Mesquita and Downs 2006). The project will also employ Qualitative Comparative Analysis (Ragin 1987) to identify configurations of conditions for constitutional stability of particular relevance for future case studies and theory development.

Contribution to debates in empirical research. The main reason for undertaking an empirical study in this project is to assess the relevance of the theoretical investigations described in previous sections. However, the intention is also to contribute to an empirical research literature in two respects: first, the study broadens the field for empirical researchers by unfolding

empirical claims in philosophical arguments; second, the study pursues a critically replicating function by specifying concepts which have been confused in even the methodologically most advanced earlier empirical contributions (the concepts of external power and coercive or military politics are not employed or distinguished by for example Przeworski 2000; Pickering and Peceny 2006; Buene de Mesquita and Downs 2006). More elementary, the quantitative approach of this project is better suited to control for alternative explanations than an earlier generation of case studies (e.g. Whitehead 1998; Dobbins 2003). Hence there is a void to be filled even in the empirical literature by the contributions of this project.

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