Counterproductive constitutionalisation

Counterproductive Constitutionalisation

* I would like to thank Luís Duarte d'Almeida, Anthony Duff, Hans Lindahl, Cormac Mac Amlaigh, Claudio Michelon, Neil Walker, and all of the participants in the Law and Polity conference in Edinburgh for their invaluable comments and criticisms on this paper.

1. Introduction

The notion of "constitutionalisation", when applied to global governance institutions, has a number of different dimensions. One distinction commonly found in the literature is between the "institutional" (or "descriptive") and "normative" dimensions.[1] In its institutional dimension, "constitutionalisation" denotes a process of establishing a set of institutional mechanisms that increase the autonomy and effectiveness of governance institutions in certain characteristic ways (centralization, norm hierarchy and entrenchment, judicialisation and binding review, etc.).[2] Understood in this way, constitutionalisation can come in degrees, and can vary along three different axes: the independence of the institution in question; the density of its authority; and its scope, understood in terms of the range of activities it can regulate. The normative dimension of constitutionalisation, on the other hand, focuses on the ways in which these institutional mechanisms can, when set up in certain ways, increase the legitimacy of the institutions in question.[3]

---

[1] See e.g. Thomas Kleinlein, "Between Myths and Norms: Constructivist Constitutionalism and the Potential of Constitutional Principles in International Law", 81 *Nordic Journal of International Law* (2102) 79-132. Thomas Cottier and Maya Hertig, "The Prospects of 21st Century Constitutionalism", 7 *Max Planck Yearbook of United Nations Law* (2003) 261, at 279. See also Jean d'Asprement, "International Legal Constitutionalism, Legal Form, and the Need for Villains", in Anthony F. Lang Jr. and Antje Wiener (eds.), *Handbook on Global Constitutionalism* (Edward Elgar, 2017) 155, at 159.

[2] See e.g. Joseph Raz, "On the Authority and Interpretation of Constitutions: Some Preliminaries", in Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (OUP, 2009) 323, at 324-325.

[3] See e.g. Anne Peters, "The Merits of Global Constitutionalism", 16 *Indiana Journal of Global Legal Studies* (2009) 397; Anne Peters, "Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures", 19 *Leiden Journal of International Law* (2006) 579; Matthias Kumm, "The Legitimacy of International Law: A Constitutionalist Framework of Analysis", 15 *European Journal of International Law* (2004) 907.

Many authors acknowledge that these two dimensions are sometimes in tension; that success in achieving institutional constitutionalisation will create new demands for legitimacy. It is by attending to the normative dimension of constitutionalisation that these demands can be met – or so the argument runs. [4] In what follows, I will offer an account of why institutional constitutionalisation might actually be "counterproductive" in this sense of *decreasing* the legitimacy of the "constitutionalised" regime.

That "institutional" constitutionalisation can lead to a decrease in the *perceived* level of legitimacy of governance institutions seems uncontroversial. One plausible example is the judicialisation of dispute settlement in the global trade regime with the creation of the WTO (which, according to one commentator, "carried the potential to be a role model for the internal constitutionalization of international organizations"). [5] This included the creation of a standing Appellate Body, [6] and the removal of the power individual member states had held under the previous system to unilaterally block either the establishment of a dispute resolution panel, or the adoption of its report. [7] This increase in the autonomy and density of trade governance by the WTO went hand in hand with a significant increase in the scope of its authority, with the adoption of agreements relating to a wide range of previously uncovered activities (services, intellectual property rights, etc.). But a mere four years after its creation, the WTO Ministerial Conference was the focus of the events dubbed "the Battle of Seattle", in which tens of thousands took to the streets to protest, sometimes violently, the illegitimacy of the new global trade organisation. A recurring theme amongst many of the activists was the loss of national sovereignty; the fact that the WTO could compel its members to change democratically-adopted national regulations designed to

[4] See e.g. Kleinlein, *supra* n. 1, at pp. 86-99.
[5] Kleinlein, *supra* n. 1, at p. 80.
[6] DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994), Article 17.
[7] Ibid., Articles 16, 17(4).

protect domestic industries, or health or environmental standards.[8] This very power, of course, was key to the institutional constitutionalisation of the global trade regime. Thus, "the call for constitutionalism… sparked precisely the sort of contestation and politics that it [sought] to pre-empt."[9]

A similar (admittedly partial) story can be told in relation to the European Union. Doctrines such as "primacy" and "direct effect", introduced and overseen by the European Court of Justice, are widely considered key to the institutional constitutionalization of the EU.[10] Although these doctrines gave rise to little contestation at the time of their introduction (they were well established, for example, prior to the UK's joining the EEC in 1973), with the significant expansion in devolved consequences, starting with the Maastricht Treaty in 1992, the role of the ECJ increasingly became a focal point for those raising concerns about the overall legitimacy of the regional integration project. To see this, we need look no further than the debate surrounding the Brexit referendum and subsequent withdrawal negotiations: the power the ECJ was often cited as a key manifestation of the need to "take back control", to the extent that removing the UK from its jurisdiction has been one of the Conservative government's negotiating "red lines".[11] As with the WTO, then, we see that a process of institutional constitutionalisation, along the axes of autonomy, density and scope has led to heightened concerns amongst many as to the legitimacy of the "constitutionalised" sites of postnational regulatory authority.

---

[8] See e.g. the article by Anup Shah on the *Gobal Issues* website, "WTO Protests in Seattle, 1999" (2001) (http://www.globalissues.org/article/46/wto-protests-in-seattle-1999). See also the contemporaneous flyer entitled "The World Trade Organization's Threat to the Environment" (1999), available on the Seattle City Government's archives site (https://www.seattle.gov/Documents/Departments/CityArchive/DDL/WTO/flyer.pdf).

[9] Jeffrey L. Dunoff, "Constitutional Conceits: The WTO's 'Constitution' and the Discipline of International Law", 17 *European Journal of International Law* (2006) 647, at p. 649.

[10] See e.g. Neil Walker, "EU Constitutionalism in the State Constitutional Tradition", 59 *Current Legal Problems* (2006) 51, at 67; see also Cormac MacAmlaigh, "The European Union's Constitutional Mosaic: Big 'C' or Small 'c', Is that the Question?", in Walker, Shaw and Tierney (eds.) *Europe's Constitutional Mosaic* (Hart, 2011) 21, at 22-23.

[11] See Theresa May's speech at Lancaster House on the 17th of January 2017, transcript available at https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech.

My question here is not, however, the empirical one of how constitutionalised institutions are perceived. Rather, I want to ask whether these perceptions of illegitimacy are mistaken – either entirely (because they see illegitimacy reasons where there are none) or partially (because they get the balance of reasons wrong). I will offer a reason to doubt the first of these possibilities, and in doing so seek to clarify how we might investigate the second.

I proceed as follows. First, I set out what I mean by "legitimacy", to be clear about what it might mean for a process of (institutional) constitutionalistion to be (normatively) counterproductive in the sense outlined above. I will then isolate one reason why a governance institution might be illegitimate. My argument here focuses on a distinction between two different roles that consent can play in establishing legitimacy. I then tie this back to the context of postnational constitutionalisation. I conclude by sketching some implications of this for the potential of "constitutionalisation" to improve the legitimacy of global governance institutions.

2. Legitimacy

The account of legitimacy that I will rely on takes as basic the notion of legitimate *action*. Now, one thing we might mean by calling an action legitimate is that it is *justified*. There are two things that we might mean in saying that an action is justified: either that it ought to be taken, or that it is not the case that it ought not to be taken. Given that calling an action legitimate is also a less than full-throated endorsement of it (that is, that an action can be legitimate without it being the case that it ought to be performed), it makes sense to think of legitimacy-ascriptions as making the weaker of these two claims. On this account, then, an action is legitimate if it is not the case that it ought not to be taken.[12]

[12] See generally Euan MacDonald, "Legitimacy as Liberty" *Edinburgh School of Law Research Paper No. 2016/26* (2016) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2888548).

Given that legitimacy and illegitimacy are contradictory concepts (that is, it is not possible for an action to be either both legitimate and illegitimate, or neither legitimate nor illegitimate), this implies that an action is *il*legitimate if it ought not to be taken. (Another way of putting this point is to treat "this action ought not to be taken" as equivalent to "this action is impermissible"; and "it is not the case that this action ought not to be taken" as equivalent to "the action is permissible". I will treat these expressions as interchangeable.)

It is certainly true that we do not limit our predications of legitimacy to actions. Importantly for our purposes, most *institutions* can also be thought of in terms of their legitimacy or illegitimacy. The institutions of global governance are no exception. To view "legitimate action" as *basic* in this context is to understand all of our legitimacy-ascriptions as reducible, in the final instance, into statements about legitimate actions. Thus, when we talk of a "legitimate institution" we could be saying one of a number of things: for example, that it was permissible for the founders to establish the institution in the manner that they did; or that the institution in question is, in general, permitted to govern in the manner that it does, or is empowered to do. For my argument to run, I do not need to claim that this is the *only* thing we might mean when predicating "legitimacy" of an institution. It suffices that this is one thing that we *can* mean.

Two final points on legitimacy. Firstly, it is common to understand our "ought"-claims as relativised to particular normative orders (e.g. moral, legal, prudential), and I will make that assumption here. Thus, using the sense of legitimacy outlined above, an action is *morally* legitimate if it is not the case that it ought, *morally*, not be taken; *legally* legitimate if it is not the case that it ought, *legally*, not be taken, and so on. Here, I am interested only in *moral* legitimacy and illegitimacy. This, I think, tracks the way in which the term is used in the literature on constitutionalisation.

Secondly, I talked above of a "decrease" in legitimacy; this might seem puzzling, given my suggested reduction of legitimacy-talk to overall "ought" claims. But there are a number of ways

in which legitimacy, on the account I am offering here, admits of degrees. For example, if talking of entities, it may simply be a matter of, of all the actions that it takes, how many it ought not to have taken. When talking of actions, whether individual or in the aggregate, it can refer to the overall weight of the applicable illegitimacy reasons (that is, the that support the judgment that it ought not to be taken). Put simply, an action is illegitimate if the applicable illegitimacy reasons, are stronger than the applicable legitimacy reasons (the reasons that support the judgment that it is not the case that it ought not to be taken). It can then be said to be more or less illegitimate as a function of *by how much* stronger they are.

3. Legitimacy-enhancing constitutionalisation

A constitutionalisation process can be a source of both legitimacy-enhancing considerations and illegitimacy enhancing considerations. Such a process is legitimacy-enhancing in the round if and only if its legitimacy-enhancing considerations are stronger than its illegitimacy-enhancing considerations.

There are two ways in which a constitutionalisation process can be a source of legitimacy-enhancing considerations (and everything I say holds, *mutatis mutandis*, for illegitimacy-enhancing considerations). It can contain elements that themselves count in favour of the actions of the institution being legitimate; and it can contain elements that cancel some necessary element of an otherwise-existing illegitimacy reason. I will call the former *illegitimacy deniers*, and the latter *legitimacy reasons*.

There are two main differences between these two types of consideration. Take illegitimacy deniers first. These remove from consideration things that would, in the absence of the denier, have been illegitimacy reasons (that is, reasons why the action in question ought not to be taken); but they are "spent" in so doing, they have no independent strength. Legitimacy reasons, on the

other hand, leave untouched any illegitimacy reasons; but they have their own strength that must be taken into account in the overall calculus.

To see how deniers work, take the example of consent to something that would otherwise be a minor assault; being pushed, for example (perhaps as part of a playground game). One always has reason not to push someone without their consent. If the person consents, however, that reason ceases to applicable to the case in hand: the act of pushing them no longer stands in need of any justification. The question of whether or not one *ought* to push that person, however, remains open; and, crucially, the fact that they consent does not feature as a consideration with independent strength. Its force is spent in removing what would otherwise have been a conclusive reason not to. The fact that someone consents to being pushed is not itself a reason to push them; the mere negation of a reason-against is not a reason-for.[13]

Legitimacy *reasons*, on the other hand, do have independent strength; they *support* the claim that it is not the case that the action in question ought not to be taken. Whenever a legitimacy reason is present, for an action to be illegitimate there will have to be *il*legitimacy reasons present that are stronger than the legitimacy reason in question. Legitimacy reasons include any reason to perform the action in question. Where such a reason is present, but the action is nonetheless illegitimate, the explanation of that illegitimacy will have to include both the existence of an illegitimacy reason, and the fact that the illegitimacy reason is stronger than the legitimacy reason. If I promise to perform a certain action, for example, it may still, overall, remain the case that I ought not to do so; but the reason against my doing so will need to be stronger than the reason in favour created by my promise.

4. Counterproductive constitutionalisation

[13] On the difference between reasons and denials of reasons in general, see Jonathan Dancy, *Ethics Without Principles* (2004) pp. 44-45.

The "counterproductive constitutionalism" of my title is the opposite of legitimacy-enhancing constitutionalisation. It is illegitimacy-enhancing constitutionalisation. How might it happen?

Let's assume that to govern individuals in the relevant sense is to exercise legal authority in a manner that impacts upon their interests. It matters not for my purposes the legal system within which this authority is exercised, or whether it is exercised in many simultaneously. What does matter is that such exercises of authority are *transitive*: that is, if A exercises legal authority over B, and in doing so effectively[14] places B under a duty to exercise legal authority over C, then A has exercised legal authority over C – has governed C – even if this happens across legal orders. It is in this sense that even those intergovernmental organisations who directly govern only states can actually be understood also to be governing, in the final instance, private individuals.

My next claim is that there is always moral reason not to govern someone without their consent. I should be clear that by "consent" I am not referring to how that idea is usually deployed in discussions of governance and authority: something akin to a binding promise to do what the authority commands.[15] Consent of this sort would provide a direct legitimacy reason; but it is notoriously difficult to secure (and for good reason, given the long-term asymmetries of normative power that it purports to establish). This is not the role for consent that I have in mind.

Instead, I mean something closely analogous to the example above: a physical interaction that would, without consent, constitute a minor assault, but when consent is present creates no further demand for justification. Consent here is not "consent to be bound"; it is a positive mental attitude that can be withdrawn at any time and for any (or indeed no) reason; and the mere act of withdrawing it sufficient to generate the reason against the action in question. Note,

[14] By "effectively" I mean that B actually then proceeds to place C under the duty (and that this action is, in part at least, explained by A's governance of B); if not, the governance relation between A and C breaks down.
[15] See generally Harry Beran, "In Defence of the Consent Theory of Political Obligation and Authority", 87 *Ethics* (1977) 260.

however, that, in these contexts, lack of consent can readily be outweighed by countervailing moral reasons (e.g. if I need to push you out of the way in order to rescue somebody). My claim is that consent fplays the same role (an illegitimacy-denier) in both contexts.

To see this in the governance context, imagine a situation in which a group of individuals is governed by a given institution. Assume further that none of the individuals concerned have promised to obey the commands of that institution; but that only one does not consent, in the sense outline above, to its governance actions. If it seems plausible that there is an *extra burden* to be discharged with respect to the non-consenting individual in terms of the justification of the governance, then my claim that we have reason not to govern without consent should be equally plausible.

So how does this tie in to the legitimacy of global governance institutions? Note that all of the actual legitimacy-enhancing constitutions with which we are familiar share one important characteristic: they all express the rules and principles regulating governance actions to which the majority of the governed consent.[16] This is true of our choirs, our sports clubs, and our universities; it is also true of our political communities, up to and including our (legitimate) states. The majority need not, of course, actually *like* the constitution in question; indeed, it may find aspects of it abhorrent. What matters is only that they consent to being governed under its rules, and to seek to change it by the methods it provides for. Again, I am not claiming here that this consent can ground political obligation, or that it can be used to bind people to obey against their will. I am claiming, however, that consent-to-be-governed (in the sense analogous to consent-to-being pushed) is relevant to the question of the legitimacy of a governance institution: its absence is an illegitimacy reason with regard to the governance activities of that institution. In this regard, the actual content of the constitutional rules and principles is not

[16] It matters not, for my purposes, whether or not the individuals actually know or understand these rules and principles; what matters is their identification with the association. Of course, in many cases, such identification will be conditional upon an acceptable set of constitutional rules and principles, but this is by no means always the case, even for states.

directly important: what is doing this particular piece of legitimacy work is the mere fact that these are the rules that constitute and regulate the institution to whose governance activities most of the governed consent. And we do not tend to treat the fact that most people consent to be governed by the provisions of the constitution (whatever they are) as somehow secondary, some sort of bonus, to whose presence or absence we are largely indifferent so long as we get the constitutional substance and structures right. Domestically, any constitution that didn't play this role would not be readily thought of as legitimacy-enhancing.[17]

Of course, the content of the rules will often be important in securing that consent. For example, it is often the case now that, at the domestic level at least, most people would withhold their consent to be governed were there not regular elections to a representative law-maker. But note that, while the existence of democratic procedures may be important in generating consent of the type I have in mind, and voting in them may be indicative of it, they are neither necessary nor sufficient: not necessary, because there is nothing incoherent in consenting to governance even if we have no say in it whatsoever; and not sufficient, because there is nothing incoherent in withholding consent to be governed even in the presence of robust democratic procedures in which we fully participate.

Given all this, why might the core features of the constitutionalisation of the WTO and the EU identified at the outset have created new, or intensified existing, illegitimacy reasons? Take, to begin with, the WTO. If the point above about the transitivity of the governance relation is correct, we can see why the withholding of consent by private individuals to its governance actions can increase the illegitimacy reasons applicable to those actions, despite the fact that the WTO purports to regulate only the behaviour of its member states. When, for example, the

[17] If this doesn't seem right, imagine an association with a highly developed constitutional framework, setting out the rights and duties of all members, and limiting the powers of governance bodies – but to whose governance activities none of its members consented. We would, I think, tend to think of such governance as illegitimate – almost regardless of the actual substance of the constitutional arrangements. This is not to deny that such a body could be legitimate, but it would require an unusual set of circumstances for this to be the case.

Appellate Body finds that a particular piece of national legislation constitutes a technical barrier to trade, and the state in question changes its law as a result, the state will have exercised its legal authority in such a manner as to impact on the interests of a range of private individuals (including all of its citizens, given a suitably expansive notion of "interests") – that is, it will have "governed" them. If we combine the transitivity of the governance relation with the claim that there is always some moral reason not to govern individuals without their consent, then, wherever the ultimately governed individuals withhold their consent, there will be reasons not to govern them.

A similar point can be made with regard to the EU, although in that context, unlike the WTO, the introduction of the relevant "constitutional" elements significantly pre-dated the large expansion in the material scope of the competences to which they applied. The doctrines of supremacy and direct effect may not have been hugely controversial for the majority of ultimately-governed individuals when first introduced, but, when coupled with the major expansion in areas of competence begun with the Maastricht Treaty in 1992, they meant a significant intensification of the scope and depth of effective EU governance. With regard to those who already withheld their consent to being governed by the EU, this would have increased the number of non-consensual acts of governance to which they were subjected. And it is likely that the expansion in competences caused others to withdraw their consent, either immediately or over time.

These points can, I think, be made more generally, although space requires that it be done somewhat speculatively. Put simply, wherever processes of institutional constitutionalisation lead to global bodies being able to govern more effectively over a greater range of issues, we are likely to see more of those ultimately governed withholding their consent to more of its governance activities; which will, in turn expand the set of applicable illegitimacy reasons.

7. Reasons, overall

If, as I have suggested above, legitimate states usually do have the consent of the individuals they govern, and these states themselves consent to being governed by the WTO, does this not entail that those individuals also consent to the governance of the WTO? This points to a key asymmetry between the governance relation on one hand, and the consent-to-governance relation on the other: while the former is transitive, the latter is not. It is rationally possible for C to consent to being governed by B, and B to consent to being governed by A, without C thereby consenting to being governed by A. There is therefore nothing incoherent, for example, in believing it legitimate for the UK to be a member of the EU (and consenting to this) whilst believing the EU itself to be illegitimate (just as there is nothing incoherent about believing the decision of a particular judge to be illegitimate, but the actions of the court officers in enforcing it to be entirely legitimate).

Of course, all governance bodies must sometimes govern the non-consenting; it cannot be the case, on this basis alone, that all governance bodies are illegitimate. If every instance of governance-without-consent generates an illegitimacy reason, then the greater the degree of consent amongst the governed, the lower the weight of the corresponding illegitimacy reasons. If, then, a governance entity with wide-ranging legal authority has only the consent of its member states and, perhaps, the ruling elites within them, but not the majority of individuals, then the weight of the combined governance-without-consent illegitimacy reasons will be relatively high. If consent is more widespread, the weight of this set of reasons will be much lower – and thus much more easily outweighed.

It is this that makes the EU such an interesting case: far more than any other large-scale supra-state governance entity, it has been successful in fostering a genuine sense of European identity among significant swathes of the governed, which usually cashes out in consent to its governance

structures – its constitution.[18] Put simply, the EU has developed a constitution that, for many EU citizens at least, performs the same consent-garnering function that successful domestic constitutions do. But this alone is not sufficient to render it legitimate. We cannot say with any certainty that those that do so consent constitute more than a significant minority of the EU-governed. In any event, that consent is an illegitimacy denier, and not a direct legitimacy reason: the mere fact of consent by some, even the vast majority, of the governed cannot be used to offset the lack of consent by others. And it is far from clear that other elements of the "normative dimension" of constitutionalisation – things like transparency requirements, participation rights, and respect for human rights and the rule of law – themselves function as legitimacy reasons that can be used to justify governing the non-consenting, rather than as illegitimacy deniers. There seems nothing unreasonable in refusing to consent to a transfer of governance powers to a supranational institution merely because that institution would *also* protect our human rights and observe the rule of law.

Two more optimistic points are worth making in conclusion. As noted, the lower the level of governance-without-consent, the weaker the set of illegitimacy reasons that have to be offset. And where a governance by a given institution is necessary to pursue a genuinely common good, this does seem like the kind of legitimacy-reason that can effectively outpull the non-consent of some, perhaps even many, to being governed. Indeed, something of this sort seems to be at work when we affirm the legitimacy of State governance of those who do not consent to its activities (as anyone who wishes to continue to believe in the possibility of actual legitimate States often must). I will leave open the question of how this balance of reasons cashes out in

[18] I cannot explore this connection in any detail here; suffice it to note that, while identification with a political association *need* not entail any level of consent to being governed by it, it would seem odd – somewhat incoherent, in the absence of unusual circumstances at least – to identify as a member of a political association but not consent, in general, to its governance of us. This seems to hold *a fortiori* for supra-state political associations, where the identification is more likely to be conscious and voluntary than e.g. in the national setting.

the current EU, save to note that it has made strides down this path that seem orders of magnitude greater than any other large-scale supra-state governance entity.

The second point is that if we understand the role for consent in securing legitimacy as I have outlined (that is: consent as an illegitimacy denier, rather than a legitimacy reason), we may have more reason to be positive about the chances of securing it at the global level. The prospects for securing consent-as-promise-to-obey there seem dim; much dimmer even than at the national level. But this is in part precisely because it establishes a relationship of political authority, and thus arguably a moral power to bind, regardless of the subsequent consent of the individual governed. If, on the other hand, we understand the role of consent here as analogous to consent-to-minor assault, things are different: yes, it is a much less robust, less stable, form of legitimacy-enhancing consideration; but perhaps much easier to come by for that very reason. As noted above, many of our legitimacy-enhancing domestic constitutions seem to successfully garner this kind of consent from the majority of those they govern, even if none of them have actually promised to obey. Perhaps, at least, when viewed in this light, grand projects for the robust democratisation of global governance institutions might come to seem unnecessary; which, given their implausibility, might warrant greater optimism for the prospect of legitimising governance beyond the state.