

The Doctrine of Sovereigns as Trustees of Humanity & the Jurisgenerative Capacity of Non-State Actors

A narrative about the nature of sovereignty that ties legitimacy to responsibility and attention to the needs of distant others provides the justification for “legislating for humanity” (LfH), a type of global governance action. In its most persuasive incarnation, LfH can be regarded as *politically* legitimate because it meets the republican requirement of nondomination rooted in Hannah Arendt’s “right to have rights”; it has the potential to be regarded as “legally legitimate” insofar as the norms it exemplifies become part of widely shared background understandings of legality, and engender a felt sense of obligation or bindingness among its addressees.¹

However, concerns about the absence of constraints and the danger of slippery slopes have inspired critics to condemn the unilateralism of this type of effort to address global bads. Skeptics worry that legislating for humanity (like the autonomous exercise of the responsibility to protect) could overlook the interests of affected individuals and political communities and/or undercut possible multilateral remedies to shared threats.

This project explores the perennial question that expresses these fears -- *Quis custodiet ipsos custodes?*² Specifically, this work investigates the viability of a particular means of “guarding the guardians” by assessing whether adequate conditions can be attached to LfH to ensure that it meets the requirements of James Bohman’s “democratic minimum.”³ To do so, LfH would have to be structured to include features of robust inclusivity and reciprocity that are required for the mutual construction of legal normativity between the authors and addressees of law. Such a reciprocal relationship is necessary if the political and legal rules at issue are to inspire a sense of *oughtness* or bindingness among those subject to them.

A key line of inquiry will explore the potential for intercultural legitimacy or legitimizability of a legal norm of LfH. A central challenge for a theory of sovereigns as trustees of humanity will be to identify methods of building a practice of legality around the norm of LfH that are inclusive of historically-marginalized political communities, including non-state communities. The legitimizability of LfH, in turn, is ineluctably linked to the question of which agents are eligible to exercise this authority, and why. How much flexibility regarding the *nature* of “trustees of humanity” does the practice of LfH allow? Some of the key political communities that might be expected to support or initiate unilateral efforts to remedy global bads, such as the environmental and human rights movements, are transnational and non-governmental in character. Yet although they are expressive of a broad, transnational (although by no means unanimous) social consensus, the jurisgenerative capacity of such non-state actors is still largely excluded from conventional theories of international political and legal obligation. This project aims in part to explore the potential for inclusion of non-state entities among the class of agents empowered to exercise trusteeship under the doctrine of trustees of humanity.

Notes

¹ The concept of legal legitimacy originates with Jutta Brunnée and Stephen Toope in *Legitimacy and Legality in International Law* (Cambridge, UK: Cambridge UP, 2010), 52-5.

² “Who will guard the guardians?” attributed to the Roman poet Juvenal.

³ James Bohman translates Arendt’s conception of a “right to have rights” into what he terms “the democratic minimum” in the context of transnational democracy in his *Democracy Across Borders* (Cambridge, UK: The MIT Press, 2007), 5.