Legitimacy and Politics

A Contribution to the Study of Political Right and Political Responsibility

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DEFINITION OF LEGITIMACY: THE RIGHT TO GOVERN

The problem of legitimacy, which is central in politics, is not the exclusive property of any one discipline. Philosophy and political science, law, sociology, and political anthropology have all made of it a privileged object of research. The breadth of the literature on this theme suffices to prove the point. With each discipline representing a specific way of understanding reality, it is not surprising that the various points of view being advanced offer marked differences. And if one compares the works of various authors or schools of thought, one finds, even within a given discipline, some major divergencies. Despite these, there exists a common ground for understanding: the idea of legitimacy concerns first and foremost the right to govern. Legitimacy is the recognition of the right to govern. In this regard, it tries to offer a solution to a fundamental political problem, which consists in justifying simultaneously political power and obedience.[1]

To justify power and obedience simultaneously is the first issue involved in the question of legitimacy. Upon this twofold demonstration depend both the right to govern and what results therefrom, political obligation. But in order for this operation to be successful, it has to fulfil at least three complementary conditions that have to do with the domains of consent, law, and norms, these being in reality indissociable. An examination of these three notions will allow one to see in what way they are constitutive of legitimacy.

Consent and legitimacy: from right to political authority

To define legitimacy as the right to govern assumes that consent plays a major role therein. A study of the public character of right allows one better to comprehend this argument.

[1] See Raymond Aron, *Democracy and Totalitarianism: A Theory of Political Systems*, ed. Roy Pierce, trans. Valence Ionescu (Ann Arbor, Mich.: Ann Arbor Paperback, 1990), p. 24.

From a general point of view, right serves to determine what is due to each individual, that is to say, it serves to establish the just portion that is to be attributed to him.[2] What is due to each person is precisely what is called 'his right'. Now, the right of an individual has meaning only in relation to an other. The very idea of right presupposes the existence of a community. In a world in which but a single person lived, right would have no room to exist. Indeed, as both the result of a conflict and its antidote, right is connected, on the one hand, to a state of competition between at least two persons for the possession of a given good and, on the other hand, to the creation of a relationship of coexistence.

From this perspective, the public character of right is clear and manifest. Its object being to coordinate the actions among individuals via laws that delimit what is inalienable and, by way of consequence, what has to be respected, right helps to set into place a network of sociability.[3] Such a network allows exchanges to unfold within a fixed framework and under the form of reciprocity, that is to say, in a tangling together of rights and duties. For, to each right corresponds a duty.

Obviously, this public space cannot operate without individual consent. It is, even, the product of the latter. Consent plays, in effect, a decisive role in the mechanisms of reciprocity. A right whose validity is recognised by no one does not possess, properly speaking, the character of a right. Its nature is to be a valid title of property that one enjoys in full security.[4] It has to be recognised in an incontestable manner. Nonetheless, everything that is granted to some being necessarily abandoned by the rest, the rights of individuals can be established only with the aid of a mutual limitation grounded upon a spirit of compromise and concession.

This is the reason why obligation is the sanction that attests to the effective actuality of rights: the feeling that we have a right *vis-à-vis* an individual signifies that we recognise his right – which presupposes, in turn, that this individual also credits us with having our right.[5] In other words, right is an understanding with the other about what constitutes each one's portion and about what is mutually due. In organising an ongoing relationship among individuals, right creates reciprocal expectations that the consent of each allows to be satisfied.

[2] See Michel Villey, *Philosophie du droit*, 3rd edn, 2 vols. (Paris: Dalloz, 1982), vol. I, *Définitions et fins du droit*, p. 146.

[3] For the public, because social, character of right, see Émile Durkheim's *The Division of Labor in Society*, trans. W. D. Halls (New York: The Free Press, 1984), p. 81.

[4] This is what Montesquieu had in mind when he defined freedom as 'that tranquillity of spirit which comes from the opinion each one has of his own security' (*The Spirit of the Laws*, trans. and ed. Anne M. Cohler, Basia Carolyn Miller, and Harold Samuel Stone (Cambridge University Press, 1989), p. 157).

[5] See John P. Plamenatz, *Consent, Freedom and Political Obligation*, 2nd edn (Oxford University Press, 1968), p. 85.

The importance of consent for right in general proves to be even more marked when it comes to the right to govern. Through the decisions they transmit, political institutions commit the society as a whole. Among these decisions, one can distinguish those that relate to the regulation or coordination of individuals or particular groupings and those that concern collective undertakings or actions that mobilise society in its entirety.[6] In this regard, political institutions settle conflicts that threaten the cohesiveness of the community both on the domestic level and on the foreign one. To enact a law, to render justice, and to conduct war are typically political activities. As guarantors of the public space, political institutions are at once the instrument and the expression of right. It is what offers these institutions a position of command and the monopoly on the constraints to be exercised. It is also what places consent at the centre of the right to govern.

Since political institutions act as guarantors of the public space – that is to say, of the relationships of reciprocity that exist among individuals within a given society – it is logical that the role they play in coordinating and in conducting collective affairs will have the character of law only to the extent that they have the accord of the population. The consent necessary to the routine exercise of right also assures its proper unfolding. That is all the more true as the defence of the interests of the community as a whole helps to ensure that the general conditions for the survival of the group will prevail, if need be, over this or that particular right.

Political institutions radicalise in a systematic way the principle of mutual limitation of individual powers, upon which right is based. Far from imposing only negative obligations[7] – as is for example the case in civil law, where each is to remain in his own sphere and to respect the specific right of the other – political institutions require active participation from the members of the community. This contribution of cooperation prises individuals out of their immediate zone of interest and can go as far as the sacrifice of their lives, especially in time of war.

This possibility of a radical limitation upon individual freedom, which lies at the very heart of political life, engenders a need for consent in order to establish the right to govern. The dynamic of rights and duties presupposes the idea of an agreement about what is being abandoned. The result is that, the greater the obligation, the higher is the level of approval needed to establish a rights-based relationship. In order that

[6] Our remarks are inspired here by those of Jean-William Lapierre on political systems: *L'Analyse des systèmes politiques* (Paris: Presses Universitaires de France, 1973), pp. 34–35.

[7] See the remarks of Émile Durkheim on negative solidarity, in *The Division of Labor in Society*, p. 75.

the faculty of political command might be clothed in legal raiment and not be an unjust use of force, the degree and the value of consent has to be proportional to the breadth of the obligation being imposed. The existence of political right is tied to this equation.[8] Acting in the name of the group could not be a futile formula for a government based upon consent.

By setting political commands from the outset within a dimension of reciprocity, consent plays a key role in legitimacy, defined as the right to govern. It grounds the feeling of obligation and makes of political life a search for the rules and procedures through which the members of a community come to an understanding in order to be obligated. From this standpoint, and in contrast to political actions based exclusively upon violence, it justifies, within precise limits, a recourse to constraints. This justification does not eliminate the tension designated by the term *consent*. To consent is to accept a situation that includes a measure of renunciation, which is manifested in the duty to obey. It is in this sense that the rights-based relationship between the governors and the governed can be perceived in terms of political authority. The question of legitimacy leads to the problem of authority because the latter is a relation of command–obedience. What distinguishes the latter from the bond of domination–submission, which rests solely upon the relation of forces among individuals or groups, lies in the fact that to command and to obey together imply consent. This, indeed, is what Hannah Arendt suggests when she speaks of political authority:

> Since authority always demands obedience, it is commonly mistaken for some form of power or violence. Yet authority precludes the use of external means of coercion; where force is used, authority itself has failed . . . If authority is to be defined at all, then, it must be in contradistinction to . . . force . . . The authoritarian relation between the one who commands and the one who obeys rests . . . on . . . the hierarchy itself, whose rightness and legitimacy both recognise and where both have their predetermined stable place.[9]

Although the word *authoritarian* is generally taken in a pejorative sense, as a synonym for arbitrary violence, the notion of political authority is tied to legitimate power.[10] Because it is willed by those who obey, political

[8] Michael Walzer treats various aspects of this problem in his book *Obligations: Essays on Disobedience, War, and Citizenship*, 4th edn (Cambridge, Mass.: Harvard University Press, 1982). See, in particular, the following statement of his: 'In the context of consent theory, we do not say that the government is just, therefore the citizens are obligated, but rather that citizens have committed themselves, therefore the government is just' (p. xii).

[9] Hannah Arendt, *Between Past and Future: Eight Exercises in Political Thought*, 4th rev. edn (New York: Penguin Books, 1983), pp. 92–93.

[10] See the distinction François Bourricaud makes between good and bad authority, in *Esquisse d'une théorie de l'autorité*, 2nd rev. edn (Paris: Plon, 1970), pp. 10–12.

authority is a form of constraint that pertains to legitimacy. And it is this will that gives it its efficacy. Acting on behalf of the community, political authority formulates instructions to which those to whom these instructions are addressed conform. It is the right of decision and of action granted to a certain number of men and women; it is the personalisation of the rules the group agrees to ratify. Individuals adhere to it because they see therein both the spirit of the collectivity and the instrument for its preservation.

Consent intervenes at the foundation of legitimacy because it lies at the base of the relationship that is constitutive of right in general and political right in particular. To the extent that those who govern respect the rights of the members of the community, and discharge their specific duties, individuals consent to renounce some of their capacities for action and turn them over to political institutions. In other words, they recognise in the latter the right to govern. The identification of power with right endures so long as consent exists. If consent be withdrawn, that is the sign of a lack of political legitimacy.

Consent is consequently a necessary condition for the right to govern. Nevertheless, it is not a sufficient condition. Indeed, political legitimacy, which validates the relationship between individuals who command and those who obey, cannot rest solely upon consent as it has just been described. Consent sets in motion a procedure whose implementation presupposes some content to which it is fitting to refer and upon which an agreement must previously have been reached. That is why, while it is essential for there to be consent in order to establish political legitimacy, such an establishment can be brought about only in terms of values, which form the substance of rights and duties. This leads us to broach the second condition for legitimacy.

Norms, or the substance of political legitimacy

Legitimacy requires that one take norms into consideration, if only because one of its conditions is that an understanding has to be reached about what the activity of governing is to be. For, to govern is a *de jure* act only after those who command and those who obey have agreed with one another about those values politics makes it its objective to promote. This is what is shown when one analyses the connection between values and right, when one then analyses the connection that exists between values and the identity of a given society, and finally, when one analyses the relationship between political power and the normative aspect of values.

Values constitute the substance of rights. The prerequisite for the existence of a right is a value. Indeed, given that a value, considered in a general way, states what is preferable,[11] it would be contradictory and even absurd to impose respect for what is not desirable, and therefore to erect it into a right. That would boil down, for example, to granting the right to theft, while recognising at the same time that theft is an act to be condemned.

Certainly, not all values engender rights. In order to acquire the status of a right, these values have to be estimable in absolute terms and thus inalienable.[12] Right is therefore established in relation to what is lived as a good. In relation to the latter, it is a means of making things official as well as a way of protecting and promoting them.

By being constitutive of the substance of rights, values provide a foundation for the meaning of law-based practice. Its threefold role of officialisation, protection, and promotion expresses a hierarchy between that which is preferable and that which is less so. Evidently, law-based activity can be accomplished only upon the condition that values are held in common, that is to say, asserted and recognised by a certain number of persons. This sharing of values allows there to be a compatibility among the actions of individuals, and exchange thereby becomes possible.[13]

It is also to this community of values that their content is tied. Held in common and being substantial, they are at once what permits exchange among persons and what is exchanged. Thus, the value of friendship is at the same time that which places two friends in relation to each other and the good they exchange between themselves.

This compatibility is nevertheless not necessarily an assurance of cooperation among individuals. It is often, in reality, even the cause of conflicts. Thus, competition is synonymous with divergencies in interests that lie upon one and the same scale of values. The search for profit, for example, engenders tensions between the concerned parties because they all see therein a good to be desired.

So, in order that commonly held values might really produce a cooperative relationship and not open the way to a multiplication of conflicts, it is essential that the determination of what is preferable, which right initiates, never make one lose sight of the rule of reciprocity. It is when

[11] See Niklas Luhmann, *The Differentiation of Society*, trans. Stephen Holmes and Charles Larmore (New York: Columbia University Press, 1982), p. 97.

[12] Starting from a reflection upon an economic approach to law, Ronald Dworkin mentions this problem in his article 'Is Wealth a Value?', in *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985). See, in particular, p. 264.

[13] See Talcott Parsons, *The Social System*, 1st paperback edn (New York: The Free Press, 1964), p. 52.

that rule serves as a paradigmatic reference that values give rise to obligation and not to opposition, thence constituting a factor of integration and not of disintegration. The preservation of the sociability embodied in the group depends upon it.

For a *de jure* situation to be set in place, it is presupposed that there are some values that make allowance for the existence of the public dimension. But this condition does not imply that the substance of rights and duties would be the same for all societies. The form of the public space varies according to the kind of society and the type of political organisation. Thus, although the question of the sharing of wealth is a preoccupation inherent in all life within a group, there exist various ways of allocating resources. The analysis of the terms of the relationship of reciprocity therefore has to take into consideration the tie that exists between the identity of a society and the values it promotes.

The identity of a group or of a society is what assures it its continuity and its cohesiveness. This identity has a two-sided character. On the one hand, social identity determines the way in which a society stands out from its natural environment. On the other, it establishes the way in which individuals belong to their society and, at the same stroke, sets down the conditions for their possible exclusion.[14]

Identity expresses the values of a given society, and it is from their identity that individuals draw out their own qualities, *qua* members of the community. These qualities are not solely modes of being. They are also manifested via actions that can take on a variety of forms. That is the reason why one can describe the identity of a society as the set of actions individuals attribute to one another within the group, at the different levels of its operation.

Values become institutionalised within what Talcott Parsons calls *action systems*. The individuals or associations that go to make up society act within the framework of these systems.[15] Nevertheless, among these values and these action systems, not all concern the structural organisation of the group. Only a tiny fraction of the culture and of the action system of the overall society is really decisive for its identity.[16] This fraction relates to essential values and basic institutions, which are the object of a consensus that lies beyond discussion and that have a type of validity that is foundational. For this reason, each member of the community, taken individually, will feel any destruction of or violence directed at these core values as a threat to his own identity. It is in connection with these core

[14] See Jürgen Habermas, *Zur Rekonstruktion des Historischen Materialismus* (Frankfurt am Main: Suhrkamp, 1976), p. 25.
[15] See Parsons, *The Social System*, p. 36. [16] Ibid., p. 47.

values that the personality of each person as well as the unity of the group are constituted and that it becomes possible to bring out for examination the different forms of collective identity.[17] At once the origin and the horizon of the life of the collectivity, they serve as fundamental norms.

Generally speaking, norms are, first, interpretive criteria that serve as elements for appraising and evaluating reality and, second, guides for action.[18] In this regard, all values contain a normative dimension. As soon as one of them is assigned to a form of behaviour or to an object, that value becomes, for those who adhere to it, a standard of evaluation in terms of which it is deemed fitting to act. There exists, nevertheless, a hierarchy of values, depending upon the extent to which they commit the overall operation of a society. The most universal values are obviously those that express with greatest force the identity of the group. Operating as fundamental norms, it is from them that – symbolically or practically, directly or indirectly – the other norms holding good within society derive.

Indeed, the relationships of reciprocity that exist among individuals in the various sectors of the community's activity are connected to the principles that give the community its specificity. In order that the preservation of the group's identity might be assured, the values that govern activities in the various sectors of society must not contradict these principles. This requirement helps to explain the impact of political institutions and accounts for both the possibility of the right to govern and political power as normative might.

The political function of coordinating and directing society is legitimate only when it expresses the identity of society. But the legitimacy of power remains indissociable from the spreading [*diffusion*] of group values to the entirety of its action systems. Upon the achievement of this task of diffusion depends the right to govern as well as the status of the normative might of political power. The instructions communicated by the latter obligate individuals only to the extent that these instructions correspond to the identity of the community.

In order to contribute to the officialisation, protection, and promotion of the values that are essential to society – that is to say, to their institutionalisation in their quality as legal norms – the established political power has two types of institutions at its disposal: those that create the laws, for example parliaments or constitutional assemblies, and those that apply and ensure respect for these same laws, such as the courts and the

[17] See Émile Durkheim's remarks on common consciousness (*The Division of Labor in Society*, pp. 60–61).

[18] See Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System*, 2nd edn (Oxford University Press, 1980), pp. 123–24.

police.[19] It is the homogeneous relationship among social and political norms that brings about a continuity between society's values and its laws.[20] In this way, the laws are not only respected but also willed.

Let us put this idea in other terms: the function of legitimacy is to respond to the need for social integration proper to the identity of a society. One has to show how and why existing or recommended institutions have the capacity to organise political power in such a way that the constitutive values of social identity actually do structure reality. To attain this objective of legitimacy presupposes, obviously, a successful empirical outcome: the concrete reality of life within the community has to correspond, in credible proportions, to the stated founding principles. But this objective does not obtain independent of the justificatory force norms harbor within themselves. With political institutions standing as guarantors against all social disintegration by taking measures that are obligatory in character, the corollary of the exercise of power is the imperative to maintain society in its determinate identity. Here we have a criterion that allows us to appraise the legitimacy of political power.

As we have seen, consent does not suffice to engender the right to govern. Some allowance has to be made for values that fulfil the role of fundamental norms. In establishing the content of rights and duties, such values prompt individuals to action and to mutual understanding on the basis of society's identity. They are therefore a mark of political legitimacy and they allow one to understand the place assigned to law in the foundation of the right to govern.

Legitimacy and conformity to the law

The first feature mentioned by most dictionaries in their definition of legitimacy is the relationship that exists between legitimacy and the law. Legitimacy is presented as 'that which conforms to the law'. Still, one needs to be more specific about this idea of legitimacy's conformity to the law.

According to the information reported by those authors who have studied the origin of the word *legitimacy*, this word did not appear before the Middle Ages.[21] Nonetheless, its appearance was preceded by that of the

[19] Joseph Raz, *The Authority of Law: Essays on Law and Morality*, 2nd paperback edn (Oxford University Press, 1986), p. 105.
[20] Ibid., p. 100.
[21] For the history of the term *legitimacy*, the reader may refer in particular to Jose Guilherme Merquior, *Rousseau and Weber: Two Studies in the Theory of Legitimacy* (London: Routledge & Kegan Paul, 1980), pp. 2–3.

term 'legitimate' in classical Latin. The latter word served to designate what is legal – that is to say, what conforms to the law. It was used in areas dealing with legal matters and contained explicit political connotations. Thus, Cicero uses the expressions *legitimum imperium* and *potestas legitima* when he refers to legally established power and magistrates or when he distinguishes the legitimate enemy (*legitimus hostis*) from the thief or pirate because of the treaties signed with the former and because such treaties were valid as legal documents.

The signification of the word *legitimacy*, whose employment is observed for the first time in medieval texts, preserves the idea of conformity to the law. The political character of legitimacy is accentuated by a reflection upon the justification of the delegation of power.[22] Legitimacy is identified with the quality of a title to govern and is presented as a legally validated political activity. In this regard, the sovereign does not found the law but holds his authority on its basis. His designation as the sovereign is therefore subordinate to the law, which defines his powers and determines those conditions within which his will can command obligation.[23] After the decline of the idea of a divine guarantee, the development of modern constitutionalism and the growing rationalisation of law helped to expand the role of positive law and highlight the importance of the criterion of legality in the process of establishing legitimacy.[24] This development occurred to such an extent that legal positivism came to reduce legitimate domination to legal domination. Max Weber's analyses testify to this trend.

The dazzling sociology of law developed in Weber's *Economy and Society*[25] is principally a study of its process of rationalisation from charismatic, revealed, and therefore irrational law up to modern law, rational both in its rules of deduction and in its procedures, which becomes increasingly technical in character.[26] Weber describes this process as an inevitable movement towards formalisation, wherein ethical considerations and references to substantive justice tend more and more to be

[22] Ibid., p. 2.

[23] The reader may refer to the article by Jean-Fabien Spitz, 'Qu'est-ce qu'un État constitutionnel? La contribution de la pensée médiévale 1100–1300', *Critique* 488–89 (January–February 1988), 129–31.

[24] See Roberto Mangabeira Unger, *Law in Modern Society: Toward a Criticism of Social Theory* (New York: The Free Press, 1976), pp. 61–62.

[25] Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, ed. Guenther Roth and Claus Wittich, trans. Ephraim Fischoff, Hans Gerth, A. M. Henderson, Ferdinand Kolegar, C. Wright Mills, Talcott Parsons, Max Rheinstein, Guenther Roth, Edward Shils, and Claus Wittich, 2 vols. (Berkeley: University of California Press, 1978).

[26] For a description of the different stages of this process of rationalisation, see ibid., vol. II, p. 882.

eliminated.[27] Rational law is a system within which decisions are made not in terms of concrete situations but by following abstract norms that obtain regularity and predictability. The greater the law's capacity to class the particular case under the general one, the more it constitutes a rational system. From this point of view, it is easy to understand why, according to Weber, Anglo-American law is not as rational as Continental law: its empirical character is the mark of a less elevated level of systematicality and rationality.[28] Rational law, being 'devoid of all sacredness of content',[29] therefore does not rest upon values. To this central feature of the Weberian sociology of law corresponds, at the political level, the thesis that the mere formality of the law of the State constitutes the foundation for legitimacy: 'Today, the most common form of legitimacy is the belief in legality, the compliance with enactments which are *formally* correct and which have been made in the accustomed manner.'[30]

The idea that, in the modern State, decisions made in conformity with a legal procedure suffice to establish political legitimacy, without there being a need to base these decisions on values,[31] is tied, for Weber, to the fate of modern politics. According to him, indeed, the impossibility of surmounting the antinomy between formal rights and substantive rights has entailed the ruination of all metajuristic axioms of right. The transformation of formal natural law into substantive natural law, principally under the influence of socialism, has been accompanied by a historicisation and relativisation of natural law, which has led to its annihilation.

Natural law having lost all credibility in constituting the basis for the legal system, the result has been a certain scepticism as regards the function and the groundedness of values.[32] This has allowed the development of legal positivism, which identifies rationality with legality. To this, according to Weber, is added the fact that, on the one hand, the choice of a system of values cannot be grounded – that choice expresses simply the vital interests of a subject who affirms his will to power – and that, on the other hand, the pretension to universality of different competing systems of values renders them irreconcilable.

Thus, formal legality, conceived as a type of legitimacy, plays in the political field the equivalent of the role attributed to objectivity in the

[27] Ibid., p. 657: 'The norms to which substantive rationality accords predominance include ethical imperatives, utilitarian and other expediential rules, and political maxims, all of which diverge from the formalism of the "external characteristics" variety as well as from that which uses logical abstraction. However, the peculiarly professional, legalistic and abstract approach to law in the modern sense of the term is possible only in the measure that the law is formal in character'.

[28] Ibid., p. 890. [29] Ibid., p. 895. [30] Ibid., vol. I, p. 37.

[31] Ibid., p. 36: 'It is by no means necessary that all conventionally or legally guaranteed forms of order should claim the authority of ethical norms.'

[32] Ibid., vol. II, pp. 873–74.

domain of the methodology of the social sciences.[33] Given that it is impossible to demonstrate the truth of value-systems and in light of their mutually conflictual relationships, this is the solution involving the lesser evil. By implementing a rational-legal form of domination, whose best adapted mode of organisation is the bureaucracy,[34] it keeps politics from becoming but a dead-end struggle among antagonistic representations of the world. Law is no longer the expression of founding principles and of a normative order. It is an instrument, transformable according to the needs of the moment, that is used in a formal and autonomous way in order to find a compromise among opposing interests.[35]

Weber's analyses dealing with legal positivism are indisputably quite penetrating. His remarks on the increasingly technical character of law and on the decline of value relations recall to mind the fundamental conditions for the development of societies. They connect up with Durkheim's analyses concerning the fact that political and economic functions, in breaking free little by little from the religious one, take on a temporal character that is expressed through a more and more technical and specialised sort of law-based activity.[36] Nevertheless, if Weber's remarks refer us back to Durkheim's analyses, we discover that the latter does not make of specialisation and the increasingly technical character of law an argument that could be used to diagnose its separation from values. For Durkheim, law has without a doubt lost in modern societies the sacred character it previously enjoyed in the primitive world, but it retains an essential social dimension and remains indissociable from the norms of the society in which it is practised.[37]

It is not obvious that one can pass from an analysis of the growing formalisation of law to the idea that political right functions, via a pure formalism, without any reference to values. What poses a problem for the role Weber assigns to legal positivism is that belief in legality could constitute an ultimate standard for political legitimacy. Moreover, although he defends the possibility of a purely formal conception of legality, at times he seems to hesitate.[38] In fact, defending the thesis that legal domination secures legitimation by its technical means alone boils down to thinking that the performances of the law render representations

[33] On this question, check out the remarks of Wolfgang J. Mommsen, *Max Weber and German Politics 1890–1920*, trans. Michael S. Steinberg, 2nd edn (University of Chicago Press, 1984), pp. 449–50.

[34] See Philippe Raynaud, *Max Weber et les dilemmes de la raison moderne* (Paris: Presses Universitaires de France, 1987), p. 193.

[35] Weber, *Economy and Society*, vol. II, pp. 875, 895.

[36] Durkheim, *The Division of Labor in Society*, pp. 119–20.

[37] Ibid., pp. 70–1.

[38] Weber, *Economy and Society*, vol. II, p. 874: 'While it would hardly seem possible to eradicate completely from legal practice all the latent influence of unacknowledged axioms of natural law . . . '.

of legitimacy superfluous. It is to affirm that the efficacy of the State, observed on the formal level alone, and not efficacy such as it is perceived by those who participate in the life of society, produces legitimacy.[39] Now, the idea that legal procedures might be accepted without there being a need to justify them or to evaluate them is incompatible with the notion of legitimacy.

To elevate the positive-legal order to the status of the ultimate standard for political legitimacy implies a submission to the State that goes completely against the idea of legitimacy. Indeed, if what is legal is legitimate solely owing to the fact of its being legal, the result is a passivity with regard to power that is the opposite of the spirit of legitimacy. First, as Weber himself mentions,[40] 'the distinction between an order derived from a voluntary agreement and one which has been imposed' simply dissolves: there is no longer any room for obligation. Second, by limiting the process of evaluating laws to the examination of their formally correct characteristics, the reduction of legitimacy to legality empties this process of all meaning. It suffices that a law be adopted in conformity with accepted procedure for it to benefit from the label of legitimacy, whatever its content may be. Beyond the question of its success in achieving conformity, there can be no recourse to a judgement that a law is illegitimate or arbitrary.[41]

Under these conditions, the very idea of legitimacy is called into question, since one finds it impossible to account for conflicts between legality and legitimacy, conflicts that nevertheless give the theme of legitimacy its importance and its meaning. If the issue at stake is to gauge the validity of a legal order, that process cannot be carried out solely on the basis of the criterion for legality. Upon the distinction between legitimacy and the law and upon its maintenance depend the evaluation of the validity of the law and the decision whether or not to be obligated – that is to say, the possibility of the right to govern.

That legitimacy is not limited to the law and that legality does not suffice to establish the right to govern is shown also by the fact that the law cannot give rise all alone to a belief in legitimacy. One does not adhere to legality for its own sake. For there to be such adherence, it does not suffice that legality might exist and might produce formally correct statements. In this regard, the example of South America is instructive: in numerous countries on that continent there exists a legal culture that places the accent on the need to encompass all social relationships within a systematic legislative framework. The proliferation of laws, decrees, and

[39] See Habermas, *Zur Rekonstruktion des Historischen Materialismus*, p. 274.
[40] Weber, *Economy and Society*, vol. I, p. 37.
[41] Mommsen, *Max Weber and German Politics*, pp. 450–51.

ordinances, the ambition of which is to cover every aspect of social life,[42] does not imply for all that an adherence to legality. For, legalism remains theoretical – indeed, in most cases it is entirely unreal.[43] One can even advance the idea that the inflation of juridical means is greater where political institutions are not legitimate and do not have the capacity to win respect for the laws.

To put it in other terms, let us say that laying down the law [*dire la loi*] does not necessarily make legality synonymous with legitimacy. Without a doubt, it is of decisive import to follow the procedures that have been granted, but that is not enough. In reality, belief in legality presupposes the legitimacy of the legal order that lays down the law.[44] Procedure can legitimate only in an indirect way, through reference to already recognised instances of authority. By way of consequence, legality, or belief in legality, does not form an independent type of legitimacy,[45] but, rather, an indicator of legitimacy.

In this light, belief in legality necessitates two complementary conditions. In the first place, legal statements have to be in agreement with the constitutive values of the identity of society. These values being at once the sources and the guarantees of right, law can pass for being legitimate only on the condition that it be their emanation. It is therefore when legality expresses the identity of the group that it becomes possible to present legitimacy as conformity to the law. If legal decisions that are constraining, yet that are made independently of any violence or manifest threat, are legitimate, that is because they are considered to be the expression of recognised and accepted norms.

This agreement between legal statements and the constitutive values of society concerns all sectors of the community. It is essential in those areas of activity that have to do with the main aspects of the life of the collectivity, and, therefore, in the political field. In order for a law, which commits the overall organisation of a group, to be legitimate and to benefit from the support of individuals, the institutions that lay down and make the law must establish it in terms of the fundamental values of this group.

In the second place, legal statements have to contribute in a credible way to the achievement of society's values. If that is not the case, it leads

[42] See Kenneth L. Karst and Keith S. Rosenn, *Law and Development in Latin America* (Berkeley: University of California Press, 1975), pp. 61–62.

[43] See the article by Glen Dealy, 'Prolegomena on the Spanish Political Tradition', in *Politics and Social Change in Latin America: The Distinct Tradition*, ed. Howard J. Wiarda, 2nd rev. edn (Amherst: University of Massachusetts Press, 1982), p. 165.

[44] Jürgen Habermas, *The Theory of Communicative Action*, trans. Thomas McCarthy, 2 vols. (Boston, Mass.: Beacon Press, 1984), vol. I, *Reason and the Rationalization of Society*, p. 265.

[45] Ibid., p. 267.

ultimately to their rejection, and even to the discrediting of values themselves. When values are not given concrete form, they end up seeming unrealisable.

The fact that belief in legality presupposes the legitimacy of the legal order allows one to place the accent on the idea that the functioning of law depends more on the recognition of the validity of the constraint it imposes than on the formal conditions for its application. To affirm the contrary is to confuse the effect with the cause. This confusion is characteristic of those observers who limit their analyses to stable societies with a high level of institutionalisation.[46] That the application of the law issuing from legitimate political instances of authority does not encounter any major opposition would tend to prove that the applicability and the efficacy of the laws constitute a strictly technical problem, one internal to the formulation of legality.

This thesis is so widespread that it is in this spirit that the jurists of South America (to take up that example once again) drone on about the respective merits of a presidential system versus a parliamentary system as ways of ensuring political stability and democracy. The chronic instability of the political regimes in that region shows, however, that neither of these two forms of government is up to the task of resolving anything more than problems of detail and that it is above all on the legitimacy of the political institutions themselves that the efficacy of one or another form of government depends. In order for the comparison of the respective merits of the parliamentary system and the presidential regime to possess some real usefulness, it would be necessary first to have a consensus about the identity of society and about the need to instaurate political institutions that respect and assure the promotion of democratic values.[47]

It is therefore principally from legitimacy that the law draws its efficacy.[48] Whatever the formal qualities of a constitution might be, the latter is incapable of moulding political reality and of serving as a genuine criterion for political actions so long as the rules and procedures it implements do not correspond to the fundamental interests of the community.[49] The authority of the law – or, if one prefers, its effective operation – rests

[46] On the notion of institutionalisation, the reader may consult the remarks of Samuel P. Huntington in *Political Order in Changing Societies* (New Haven, Conn.: Yale University Press, 1968), p. 12.

[47] See Juan Linz's article on 'Democracia presidencial o parlamentaria. Hay alguna diferencia?', in *Presidencialismo vs. Parlamentarismo: Materiales para el estudio de la Reforma Constitucional* (Buenos Aires: Editorial Universitaria de Buenos Aires, 1988), pp. 42–43.

[48] See Raz, *The Authority of Law*, pp. 28–29.

[49] See Jürgen Habermas, *Legitimation Crisis*, trans. Thomas McCarthy (Boston, Mass.: Beacon Press, 1975), pp. 100–01.

upon the belief that legality is the expression of the values of the society. The law contributes to the 'rule of law', a rights-based State, a *Rechtstaat* [*l'État de droit*], but it cannot, all alone, invent it.

In order for the idea that legitimacy is conformity to the law to be defensible, legality has to correspond to the interests of society. It is upon this condition that conformity to the law is a criterion of legitimacy and gives rise to an adherence or to consent on the part of the members of the community. Just power is indissociable from legitimate law. While the fundamental values of the group and the consent of individuals determine the groundedness of the origin of power, the law, thus understood, establishes the precise conditions for its effective exercise within the framework of a *de jure* relationship. From this point of view, it provides some stability for the asymmetric relationship constituted by the command relations between the governors and the governed.

Distinguishing itself from the kind of power an individual grabs by force, legitimate law delimits in a concrete way rights and duties, sets boundaries that are not to be exceeded, and appears as a rule that stands above both the governors and the governed. It is what allows one to say that it is not he or she who holds power, but the law, that is sovereign. *Lex facit regem*, to use the famous medieval saying.

In conclusion, the law really is a condition for legitimacy. Nonetheless, it shares this status with individual consent and society's fundamental norms. Not being an independent type of legitimacy, it has to be justified. In order for legality to intervene in the legitimation process – that is to say, in order for conformity to the law to be indicative of a *de jure* government – the laws must be in accord with the values in which the governed recognise themselves.

Political legitimacy henceforth appears as recognition of the justice of the values a government puts into effect with the help of laws. Thus, it lies at the base of the right to govern and of the organisation of political activity into a *de jure* system of right. Being the expression of the political good, legitimacy boils down to presenting those political institutions it justifies as the best ones possible, indeed, as necessary.

This first approach to the question of legitimacy nevertheless still leaves certain features in the shadows, starting with the political signification of legitimacy.

POLITICAL SIGNIFICATION OF LEGITIMACY

To analyse what legitimacy signifies politically consists in studying what the conception of a political relationship as a *de jure* relationship implies.

From this perspective, it is appropriate to concentrate on three notions that are presupposed in the idea of legitimacy: political differentiation, political responsibility, and political judgement.

Political differentiation and legitimacy

The mechanism of political legitimacy aims at establishing recognition for the right to govern. It is therefore not a matter of doing away with the existence of power. On the contrary, the division that separates those individuals who command from those who obey is that upon which the logic of legitimacy rests. The signification of the right to govern is connected in the first place with this division.

In order to understand how a theory of legitimacy is based upon the separation of the governors and the governed, one must first distinguish it from those political views that find it impossible to justify the power of the State. One must then underscore the fact that the study of political life in terms of legitimacy is equivalent to an analysis of those conditions the division between the governors and the governed has to fulfil in order to be set within the framework of a *de jure* relationship. Finally, one must mention the phenomenon of representation as the essential aspect of the constitution of legitimacy.

Power is obviously not something specific to political life. It plays a major role in the organisation and operation of most groups and associations, be they of an economic, military, or some other sort of order. Its importance is nevertheless heightened in the political field. On account of their functions of direction and coordination, political institutions exert an influence that guarantees the other forms of power and, by the constraints their prerogatives permit them to impose, constitute a major source for (real or potential) limitations on individual freedom. It is for these reasons that political power can be the object of systematic opposition and be considered as being unjustifiable in principle. The need to work for its disappearance or for its destruction proves to be the logical result of this critical attitude.

In this regard, the positions defended, on the one hand, by anarchism and, on the other, in the writings of Marx and Engels, represent the most severe attacks brought to bear against political power identified with the State. Indeed, although the differences are great between the anarchist and Marxist conceptions of power,[50] what they nevertheless

[50] For a glimpse of the differences between Marxism and anarchism on the question of the State, see in particular Leszek Kolakowski, *Main Currents of Marxism: Its Origins, Growth and Dissolution*, trans. P. S. Falla, 1st paperback edn (Oxford University Press, 1981), vol. II, *The Golden Age*, pp. 19–21, 198.

have in common is a tendency to criticise political institutions in such a way as to collapse the terms of discussion. In the first place, both confuse state power in a fundamental way with its contemporary historical realisation, the bourgeois State. In the second place, they collapse the State into political or governmental power. In doing so, they broach political relationships either in terms of the relation of forces or in terms of ideality, and they reject in principle every political form that implements a relationship of command and obedience. This leads them to leave in the shadows the question of right and to fail to treat the problem of legitimacy.

In advocating the disappearance of the State, anarchism eliminates what constitutes the very issue of modern political philosophy, namely, how it is possible to reconcile the exigencies of individual autonomy and freedom with the constraints connected with the operation of political institutions.[51] Anarchism purely and simply gives up on trying to find any area of understanding between the individual and the State. Considering power to be pernicious and thinking that all evil comes from impersonal institutions,[52] it interprets past history as a process within whose framework individuals have constantly been prisoners of the State. The latter, which serves only to defend privileges and social ties based upon constraint,[53] must be destroyed.

From this perspective, political power cannot in any case enjoy a legitimate status. It constitutes only a system of infringement upon the individual rights of the majority, for the benefit of a minority.[54] Since nothing could justify political differentiation, it is a matter of abolishing all organisational structures that go beyond the level of direct democracy and of arriving at a complete decentralisation of public life. For anarchism, it is in leaving human beings free to act according to their inclinations that they will become capable of forming harmonious communities.

The Marxist critique of political differentiation is more nuanced, but it leads in principle to the same rejection of political authority. Indeed, while Marx thought that the reorganisation of society after its break with capitalism does not imply the liquidation of the central administration of resources and production,[55] and while he thus opted for a unitary and not communalistic management of communist society,[56] it remains no

[51] See Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974), p. 4.
[52] See Kolakowski, *Main Currents of Marxism*, vol. II, p. 20. [53] Ibid., p. 198.
[54] See Robert Paul Wolff, *In Defense of Anarchism* (New York: Harper & Row, 1976), pp. 71, 112–13.
[55] Kolakowski, *Main Currents of Marxism*, vol. II, p. 20.
[56] On the tension, within Marx's work, between those texts that may be described as statist and those that are communalist, see Pierre Ansart, *Idéologies, conflits et pouvoir* (Paris: Presses Universitaires de France, 1977), pp. 197–99.

less the case that in his view the State as an instrument of coercion is still a transitory formation. History's finality merges with its destruction.

With the abolition of class struggle, the State is destined to disappear. The overcoming of alienation, which implies a total transformation of human existence via the reconciliation of the individual with himself and with his world, passes by way of the elimination of the division between the public sphere and the private sphere. In destroying the class system and the system of exploitation, communism eliminates the need for political institutions and political authority. It puts an end to the difference between civil society and the State, to the oppressive political relationship between the governors and the governed.

For Marx, in contrast to the liberal views of the advocates of Enlightenment, social harmony is obtained not through legislative reforms designed to attune individual forms of egotism to the collective interest but by destroying those antagonisms that originate in the division of labour. Once these antagonisms have disappeared, voluntary solidarity, and not the legal and constraining regulation of institutions, allows one to assure the harmony of human relationships. The end of social inequalities sounds the death knell of political differentiation.[57] The rigid assignment of social and political roles that was the mark of alienated societies will no longer exist.[58] Individual conflicts lose their *raison d'être*. Each then has a responsibility to deploy his abilities to the greatest extent possible, heading in a direction that is necessarily constructive from the collective point of view.

For anarchism as well as for Marxism, it really is a matter of denouncing the bourgeois State's lack of legitimacy and of contributing towards the instauration of a just society. But their theoretical view is in no way set within a logic of legitimacy, conceived as the justification of political differentiation. In reality, the very word does not enter into their vocabulary. Marx's supporters do not miss a beat in presenting this notion as one belonging to a bourgeois theology that is by and large outdated.[59] In establishing that the State has nothing to do with the general interest and that it is exclusively the product of the economically dominant class, they dismiss the possibility of reflecting upon political right. State power being a tool of oppression, it is of no use to seek to ground it in law. The sole political act that is liberatory consists in replacing the realm

[57] See Karl Marx and Frederick Engels, *The German Ideology: Critique of Modern German Philosophy According to its Representatives Feuerbach, B. Bauer and Stirner, and of German Socialism According to its Various Prophets*, in *Collected Works*, 47 vols. (New York: International Publishers, 1975–), vol. V, p. 380.

[58] Ibid., p. 47.

[59] See Henri Lefebvre, *De l'État*, 4 vols. (Paris: Union Générale d'Éditions, 1978), vol. IV, *Les contradictions de l'État moderne. La dialectique et/de l'État*, p. 97.