Legitimacy, Democracy and Justice: On the Reflexivity of Normative Orders[1]

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(Rough draft only.)

1. The question of the normativity of political orders is one of the oldest and most difficult questions in political theory. Ever since the controversy between Socrates and Thrasymachus, which continues to the present day, there is disagreement about how ambitious answers to this question should be and how far they can or should be removed from political reality (assuming for the moment that we know how this 'reality' should be understood) in order to avoid the twin extremes of utopianism and uncritical affirmation. Between these two poles, in modern political theory three notions in particular have been used in an attempt to achieve greater clarity on the normativity of political orders, namely, legitimacy, democracy and justice. It is commonly assumed that these three notions form a series with increasing normative content. The concept of legitimacy seems to involve less extensive normative investments than that of democracy, by contrast with which justice is not only regarded as the highest political good, but also seems to be in rivalry with the concept of democracy and to surpass legitimacy.

The question of how these three basic concepts of political normativity are related is not only of theoretical interest. For both within states as well as when it comes to the formation of transnational, international and supranational normative orders, it is important to clarify the normative order of these notions. No one who belongs to a political community can avoid these evaluative questions, any more than someone who takes a position on the reality of politics beyond the state. Here, research on International Relations touches shoulders with research in political theory so that that they must enter into a dialogue that calls for clarity on

basic conceptual questions.[2] In what follows, I try to give a *reflexive* answer to the question of the relationship between the above-mentioned basic concepts; the notion of reflexivity referring to the ability to ascertain the ultimate justifying reasons for the claim to normative validity. This is not just a virtue of theory, but also of practice, since practices and institutions can exhibit a reflexive character by allowing a critical stance on their justifiability.

2. A political normative order lays claim to *legitimacy*, that is, that this order is "rightful" (*rechtmäßig*). This claim is made towards those subjected to this order and towards others who are supposed to recognise and respect the order from the outside. If the claim is redeemed, then binding power exists and is generated. The formulation 'exists and is generated' is intended to indicate that this binding power always rests on an antecedent normativity and is not produced *ex nihilo*; it can nevertheless transform these foundations (more or less radically), for example, by changing the bases of legitimacy.[3] In accordance with the (simplified) formulation of recognition from the inside and from the outside, we can distinguish between *internal* and *external* legitimacy, and the one does not automatically stand or fall with the other.[4] The internal legitimacy of an order – its worthiness of being recognised and rightful – generates further legitimate norms, rules or laws through certain specified procedures. Viewed from the inside, therefore, the legitimacy of the *entire* order must be distinguished from the legitimacy of *individual* rules within it (overall legitimacy vs. individual legitimacy). However, the latter presupposes the former. The former, by contrast, is

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[2] For many years the work of Rainer Schmalz-Bruns, with its concentration on the question of the democratic potentials of a politics beyond the nation state, has featured centrally in this dialogue. See Schmalz-Bruns, *Reflexive Demokratie*; Schmalz-Bruns, 'Deliberativer Supranationalismus'; Schmalz-Bruns, 'The Euro-Polity in Perspective: Some Normative Lessons from Deliberative Democracy'; Forst and Schmalz-Bruns (eds.), *Political Legitimacy and Democracy in Transnational Perspective*. Other paradigmatic examples of such a dialogue are: Habermas, *The Postnational Constellation*; Zürn, *Regieren jenseits des Nationalstaates*; Scharpf, *Regieren in Europa*; Buchanan, *Justice, Legitimacy, and Self-Determination*; Buchanan and Keohane, 'The Legitimacy of Global Governance Institutions'; Habermas, *The Crisis of the European Union*; Cohen, *Globalization and Sovereignty*.

[3] 'Validity' and 'binding power' are the Weberian terms for this dimension of political normativity. Weber, *Economy and Society*, Ch. 1, §5, 'Legitimate Order'.

[4] On the complex relation between the two dimensions of 'internal political legitimacy' and 'recognitional legitimacy', see Buchanan, *Justice, Legitimacy, and Self-Determination*, chs 5 and 6.

preserved even if the latter occasionally fails, unless this failure points to structural deficits that place overall legitimacy in question.

A common source of discussion is whether legitimacy is a *descriptive* or a *normative* concept. The straightforward answer to this question is that the concept has descriptive and normative uses and it is important that they be distinguished. A complicating factor in this debate is that legitimacy, in its descriptive use, describes a normative state of affairs (rightfulness and acceptance – that is, the binding character of an order). Thus, the description deals with substantive normative circumstances, while nevertheless remaining a description.

More confusing than the descriptive function, however, is the normative function that the term acquires especially where the legitimacy of a normative order is affirmed or questioned (internally or externally). This seems to presuppose that in this use the term itself is normative in nature, and thus expresses an evaluation that it contains in itself. We need to be careful here, however, because it is rather the case (this, at least, is what I claim) that where legitimacy is used normatively in this sense, and possibly even as a battle cry, the normative content stems from *different* concepts or notions, such as God's will, stable order, legal security, freedom, democracy, equality or justice. This may refer to primarily procedural or substantive norms or values (even if this distinction is often overworked, because every procedural version also contains substantive normative notions). This means that the concept of legitimacy is *normatively dependent* (like others, such as toleration[5] and solidarity): where it has a normative content, either in theory or in practice, it derives this content from another, if you will, deeper 'source'. This does not preclude making a general connection between the concept of legitimacy and a 'public interest orientation', as does Michael Zürn; but it does mean that interpretations of what fosters the public interest can be traced back to other notions, and hence that legitimacy must be derived from further sources.[6] The concept of legitimacy itself is not sufficient to contain or evaluate these

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[5] On this, see Forst, *Toleration in Conflict*, §3.
[6] Thus also Zürn, 'Autorität und Legitimität in der postnationalen Konstellation', who makes an empirical distinction between seven such sources (47).

principles or values.

Thus, we must adhere to the classical Weberian notion, however this is to be qualified, that there is a great variety of reasons or motivations for legitimacy, depending on how the space of justifications is structured in each case – understood in the wide sense of 'noumenal power', in which 'belief' or 'feeling' can generate recognition and binding power in the sense of the acceptance of an order, because they are connected with normative conceptions and convictions.[7] In this way, historical conceptions of legitimacy can be understood and differentiated: the 'legitimate' monarch and his 'legitimate' successor, the 'legitimate' harmonious order according to Confucian or Platonic notions of the well-ordered polity, etc. There is always a conceptual core that holds these ideas together – *by legitimacy we mean in general the quality of a normative order that explains and justifies its general binding power for those subjected to it*. However, this *concept* of legitimacy becomes a specific *conception* only through further normative sources, which may be heterogeneous, like the narrative of the 'good ruler'. The concept of legitimacy is thus in the first instance descriptive. It owes its overlaying, more salient function of normative criticism or defence to other resources. If this is not made clear, then the normative force of the concept is only surreptitious. This occurs wherever it is not made clear which source is being used to enrich a conception of legitimacy, so that the concept itself seems to be sufficient to acquire a specific normative meaning.

3. The idea of *democracy* is regarded as the most important normative resource in modern societies for developing a conception of legitimacy.[8] It can be understood in more or less demanding ways, especially as regards the political reflexivity of its institutions and of the surrounding culture, as well as of its material preconditions. At its core is the idea that those who are subjected to a generally valid normative order must be able to be its co-authors (in its essential structures), specifically through real, critically testable procedures, and not just *in*

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[7] See Forst, 'Noumenal Power'.
[8] The most comprehensive treatment in social theory and philosophy is still Habermas, *Legitimation Crisis*, trans. Thomas McCarthy (Boston: Beacon Press, 1975).

mente. This includes representative procedures, insofar as they exhibit a corresponding degree of reflexivity that prevents institutions from becoming self-sufficient in ways that undermine the possibility of co-authorship. A purely 'output-oriented' form of legitimacy, therefore, scarcely merits the description 'democratic', even if it claims to achieve outcomes 'for the people'.[9] Democratic legitimacy, in whatever permutations of collective self-determination, is a specific variant of legitimacy that seems to rest solely on the binding power of the value of democracy.

Here, however, we must enquire further into the normative core of democracy. That democracy is a particular form of organization of *political* rule does not preclude, but instead presupposes, that its basic claim is *moral* in nature. This is the claim not to be subjected to any norms to which one could not have agreed as a free and equal person, both from a normative perspective (with a view to reciprocally and generally rejectable reasons) and from an institutional perspective (presupposing the existence of democratic, reciprocal and general practices of justification). Thus, every institutionalization of democratic practices of justification invariably involves an inherent critical-reflexive dimension, which interrogates both this procedure and its results concerning their justifiability. Thus, this critical reflection is both *immanent* to democracy (in accordance with its idea) and *transcends* it in its concrete, practical form. Democracy, properly understood, is necessarily a self-critical, reflexive practice.[10]

The moral claim on which democracy rests as a practice of justification is the right to justification. In the moral domain, this right asserts that nobody may be subjected to actions or norms that cannot be justified to him or her as an autonomous and equal justificatory authority. In the political context, this means that nobody may be subjected to a normative order of rules, norms and institutions that cannot be justified to him or her as an equal, autonomous subject of justification, which implies the basic claim to the establishment of a corresponding practice of justification. The principle that those subjected to norms must be

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[9] An example of such an approach is Scharpf, *Regieren in Europa*, 20–8.
[10] See Forst, *The Right to Justification*, trans. Jeffrey Flynn (New York: Columbia University Press, 2012), Ch. 7.

able to be the authors of these norms expresses a central moral idea, the idea of autonomy in a Kantian sense. In the political domain this becomes the idea of democracy as the expression of collective self-determination, keeping in mind the differences between morality and politics, which consist specifically in mastering social conflicts of interest and in the mode of validity of political-legal norms. These differences sometimes lead commentators to regard a negative claim – the avoidance of arbitrary rule or, in other words, of domination – as central in the political domain.[11] But this should not obscure the fact that to this corresponds a positive basic claim, namely, the claim to be respected as a person with a right to justification, which implies that the political order must not only protect, but must also express, the autonomy of individuals.

These reflections imply, in turn, that the demand for democracy is not normatively independent. The idea of democracy does not express a stand-alone 'value', but is instead based on the idea of autonomy, which undergoes a transformation in the political world. It has the essential meaning of avoiding social and political arbitrariness. These aspects point to the conceptual core of *justice*, which is the real contrasting concept to arbitrary rule and political heteronomy. Democracy, properly understood, is thus the political form of justice. It finds expression in the rule of democratically enacted law. Democracy, in its core normative meaning, is not just one, but *the* practice of political and social justice.

The concept of democracy is less amorphous than that of legitimacy. Nevertheless, it is normatively dependent on the concept of justice. Withholding democratic rights is a gross political injustice, and a democracy that does not endeavour to create justice in its procedures and results is not worthy of the name. According to this normative order of the concepts, a democratically elected government that undertook to change the preconditions for a democratic order with the aim of securing its own power permanently can be criticized as illegitimate, because it violates the imperative of justice to guarantee democratic practices of justification.

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[11] See, for example, Pettit, *Republicanism*, and Pettit, *On the People's Terms*. I discuss the differences between our views in 'A Kantian Conception of Justice as Republican Non-Domination'.

4. With this, the concept of *justice* takes centre stage, which is not at all surprising, since this is *the* basic normative concept with regard to political orders. To appreciate this, however, we must free ourselves from abridged understandings of justice that associate it in the Platonic sense with a fixed idea removed from democratic self-determination, or that are exclusively results- or goods-oriented and not only presuppose final patterns of distribution, but also the figure of a central unquestioned distributive authority.[12] Theories of this type fail to recognize that the real question of justice is that of the creation of a *basic structure of justification* (in the sense of what I call fundamental justice), according to which the relevant political and social institutions can dispel arbitrariness only if those subjected to norms can function as authors of norms within those institutions. The question of justice is that of the collective justifiability of political and social relations. The answer to it is the requirement to create a basic structure of justification in which the issue of justification becomes *practical* – not only as a question about the justifications that sustain relations of rule (including distributions), but specifically regarding the question of whether justification structures exist that allow dominant justifications to be scrutinized. The rule of arbitrariness, which justice is supposed to overcome, is rule without sufficient reasons and without adequate fora and procedures of justification. Domination must be diagnosed critically on both levels, that of existing (inadequate, possibly ideological) justifications and that of the lack of structures of justification.[13] To play off the former against the latter is an inadmissible abbreviation.[14]

A (common) mistake is to respond that this is to confuse 'legitimacy' with 'justice'. Legitimacy, so the objection goes, is responsible for producing and justifying political rule,

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[12] On this, see Forst, *Justification and Critique* (Cambridge: Polity, 2014), Ch. 1, and Forst, 'Transnational Justice and Democracy'.

[13] On this, see Habermas, *Legitimation Crisis*, 113: 'A social theory critical of ideology can, therefore, identify the normative power built into the institutional system of a society only if it starts from the *model of the suppression of generalisable interests* and compares normative structures existing at a given time with the hypothetical state of a system of norms formed *ceteris paribus* in a discursive manner' (emphasis in original). Habermas goes on to speak of the '"injustice" of the repression of generalization interests' (ibid.).

[14] As is nevertheless done by Neyer, *The Justification of Europe.* For a critique, see Forst, 'Justice, Democracy and the Right to Justification: Reflections on Jürgen Neyer's Normative Theory of the European Union'.

justice for distributing scarce goods.[15] It is indeed correct that the question of legitimacy is not necessarily connected with that of justice, because legitimacy is a descriptively flexible and normatively dependent concept. But not to regard the basic claim to democratic justification (where it is raised) as a political requirement of justice is not plausible, because this claim is a matter of overcoming or avoiding political arbitrariness. It is likewise impossible that a non-democratic regime could give rise to social justice.[16] Justice cannot be produced by unjust means. Even the most well-meaning paternalistic system that bestowed favours on its citizens and was able to raise the standard of living significantly would still be an unjust system (albeit one that had clearly brought about social improvements). The injustice of paternalism cannot be made good by material improvement. Nor can a state that seriously violates social justice be legitimate (in the normatively ambitious sense), because social injustice is a specific form of political repression insofar as it is structurally based.

5. It may appear arbitrary to regard the concept of legitimacy, but not the concept of justice, in this way as dependent and historically variable. What is the reason for this difference? It is indeed true that both concepts have a central meaning that remains constant. In the case of legitimacy, this core meaning relates to the binding power of an order; in the case of justice, it relates to ensuring that arbitrariness is avoided in the same order and in the creation of a corresponding order of justification. The former, however, allows for greater variability than the latter. There are many ways to generate binding power, but not equally as many to put an end to arbitrariness. The latter reflects critically on the former, and therefore represents a higher-level normative reflection. From the participant's perspective, affirmation or critique of legitimacy is dependent on other resources, whereas the same does not apply to justice. Here the question has direct implications for practice, because it radicalizes the issue of justification *for us*. We have a different relation to the question of the binding power of an order than to the question of its justice. Justice ultimately binds us for the sake of those who

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[15] Thus Caney, 'Justice and the Basic Right to Justification', and in response Forst, 'Justifying Justification: Reply to My Critics'.
[16] Thus Pettit, *On the People's Terms*, 130.

suffer injustice; their moral claim does not leave us at liberty to answer the question of justice descriptively or arbitrarily. To put it metaphorically, there is a goddess of justice, but not of legitimacy. That is just another way of expressing the higher-order binding force that justice possesses. Normatively speaking, every notion of legitimacy must submit to it.

6. A variety of theories of legitimacy nevertheless assert that the concept of legitimacy has *its own* binding force. I will select just one of them for discussion. According to Bernard Williams, legitimacy exists when a successful response is given to the 'first' political question of the creation of a stable social order. For this purpose he defines a *basic legitimation demand*, according to which a legitimate normative order must provide a justification to *every* person subjected to it ('has to offer a justification of its power *to each subject*').[17] This need not be a justification that is equally acceptable to all or that treats everyone as an equal justificatory authority; but 'something has to be said'[18] to those who are not treated as equals and towards whom legitimacy is asserted. As far as it goes, this could still cohere with a descriptive notion of legitimacy, depending on what it means to cite a ground of legitimacy towards subjects who as a result are still able to regard themselves as subjects and not as enemies of the state or as 'radically disadvantaged'.

    At this point, however, Williams takes an important step in the direction of a more pronounced normative conception of legitimacy. He regards this as a moral conception, by which he means a morality 'inherent' in politics, though he does not explain this further; in any event, the corresponding understanding of politics is as a result morally charged. Williams asserts that the exercise of power and domination alone do not provide any justifying reasons for rule over others. Thus, he formulates the '*critical theory principle*, that the acceptance of a justification does not count if the acceptance itself is produced by the coercive power which is supposedly being justified'.[19] This is a thoroughly plausible principle – but one that makes a normative investment in the notion of legitimacy that derives from

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[17] Williams, *In the Beginning Was the Deed*, Ch. 1, p. 4.
[18] Ibid., 5.
[19] Ibid., 6.

other sources, namely, a certain understanding of justice that springs from the right to justification. This, therefore, is the resource that also drives this principle far beyond Williams' 'basic demand for legitimacy', because as a result any justification becomes vulnerable in principle with respect to social asymmetries stemming from relations of domination. Why would those subjected to an order call for just 'a' reason for rule and not for sufficient, reciprocal-general reasons?

Here the conceptions of legitimacy of Williams and Jürgen Habermas overlap. However, the latter explicitly traces the notion of legitimacy back to a critical and reflexive discourse principle that connects democracy and justice by overcoming inadequate and ideological forms of justification.[20] As Habermas put it in an early formulation: 'How would the members of a social system, at a given stage in the development of productive forces, have collectively and bindingly interpreted their needs (and which norms would they have accepted as justified) if they could and would have decided on the organization of social intercourse through discursive will-formation with adequate knowledge of the limiting conditions and functional imperatives of their society?'[21]

7. It seems obvious at this point to proceed from the analysis of the quality of justification that appears to reside in the concept of legitimacy to a moral right to justification, in order to develop the thesis that this represents the analytical development of a conceptual truth implicit in the concept. I do not follow this path, because I doubt, as stated at the outset, whether the concept of legitimacy yields this of itself. The question of legitimacy is of course a question of justification, but to answer it in a democratic, egalitarian and reflexive way is a question of justice in political contexts. Only in this light is justification conceived as a comprehensive political practice of self-determination through justification procedures that produce democratic legitimacy. Then we call that normative order *legitimate* that exhibits, or credibly aims to realize, *fundamental justice* within a basic structure of justification, and we call those norms and laws legitimate that arise in this context. They remain such even if they

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[20] See Habermas, *Legitimation Crisis*, trans. Thomas McCarthy, 112.
[21] Ibid., 113.

do not reach a level of full justice that exceeds fundamental justice. Laws that do not realise justice completely are illegitimate only when they violate fundamental justice.

8. In these brief reflections, starting from the concept of legitimacy, I worked my way with the help of a radicalisation of the question of justification to the more substantive normative concepts of democracy and ultimately of justice. These form a series in an order of justification practices that exhibits an increase in reflexivity. This means, however, that there is a further basis of this order of the concepts, namely, *justifying reason*. As a form of practical reason, this involves the imperative that norms that claim to be equally binding on all must be justifiable to all as free and equal persons. To this correspond categorical duties of justification, which in the political domain call for democracy as an indispensable practice of justice.

Has the investigation by now completely detached itself from political reality, as Thrasymachus would say, and arrived in the abstract space of reasons? Yes and no. The political space of justifications is both abstract and concrete: the critical question concerning better justifications for a normative order is a very concrete one that dissidents always raise; the contents and forms of this demand for justification vary, but their structure does not. The question of legitimacy is driven *by these actors* in the direction of democracy and justice, not based on a philosophical abstraction. To engage in critical theory is to express the truth of these demands in abstract as well as concrete ways. Justifying reason can become practical as a result, albeit primarily in the mode of critique.

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