

## LEGITIMACY: A MIRAGE?

### 1. FROM ETYMOLOGY TO SEMANTICS

The word “legitimacy” and its derivations (legitimate, legitimation, etc.) are widely employed in scientific language as they also are in current usage. In fact, we find them in several areas, from that of reasoning (“this conclusion is legitimate”) to that of law (“judgment of legitimacy”, “legitimate family”) and politics (“legitimate sovereign”). It is particularly in this latter domain, however, that they have their normal use as qualifications for power, and it is this particular aspect that I shall consider in this paper. In accredited political language “legitimacy” designates a principle, or criterion, of justification for power (acting and commanding) and, correlatively, of the obedience that is its due.

Recourse to a justification for power (and the correlative obedience) is necessary: simply because it exists, power establishes a relationship of superiority-inferiority or domination-subordination between those who hold it and those over whom it is exercised. It is an asymmetrical relationship that, considered in itself, is shocking, since superiors (governing) and inferiors (governed) are all human beings, none of whom is fatally destined

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to domination or subordination. Consequently, if power remains a pure *de facto* relationship, its full acceptance will be lacking, and it will be unstable. This is why its justification is imperative, in the interest itself of those who hold it. Now, according to the etymology of the word, to justify means to show that an action or a situation, or whatever, is just. In our case, it means that the asymmetrical situation established by the existence of power is just.

An observation on this subject will be opportune. Existence is not limited to the dimension of the instant (temporary) but extends into the dimension of duration: to say that someone exists is to say that he has a past from which he comes and that he is open to a possible future. Consequently, to justify power means to show that not only its origin but also its effective exercise in the dimension of duration is justifiable. This clarification is important, since all too often the justification for power has been limited to the sole question of its origin, its temporal exercise being ignored. However, the justification of origin does not necessarily imply the justification of exercise. Medieval thinkers saw that clearly and analytically distinguished justification for power as to its origin (*quoad titulum*, or *quantum ad modum adquirendae praelationis*) and as to its exercise (*quoad exercitium* or *quantum ad usum praelationis*). Thus, if power were to be fully justified, the two justifications had to be cross-checked, otherwise its existence would inevitably encounter disputes, and its stability would be precarious.

Now let us resume our etymological discourse. It is etymologically true that justification has as its goal to show that power is (or is not) just, but in what sense? In that of the value of justice (moral) or in that of the technical value of justice, which leads to a purely utilitarian interpretation? The question is resolved by recourse to the term of legitimacy, whose etymological meaning is "conformity to the law." Power that conforms to the law would thus be justified (shown to be just). Justification of power by its reference to law is all the more convincing since law also only exists in duration. Consequently, it is able to justify power by controlling it from its origin to its termination.

The etymological itinerary that we have just covered has reached its end, but it allows us to grasp the semantic message implied in

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the word “legitimacy.” It is the law that, bestowing the right to govern and the duty to obey, is alone able to justify the stability of the asymmetric situation implied in the relationship of power. Thanks to the law, this situation does not depend solely on the will of the one who seizes power but on a rule that is superior to the governor as it is to the governed.

The legitimacy (or legitimation of power) has a two-fold consequence. On the one hand it determines its submission with regard to the law, which excludes the justification of a power *legibus solutus*. On the other, it frees power from its dependence on material strength, a force that is always precarious and on which an illegitimate power depends. The classical analysis of the “*principati novi*”, developed by Machiavelli in *The Prince*, clearly shows this. Legitimization thus transforms *de facto* power into a *de jure* power. It follows that the *political* obligation is essentially a *juridical* obligation of a bilateral or synallagmatic type between governing and governed, which confers on the first the qualification of *authority*, in the classic meaning of the term, renewed in our times by such differing authors as Max Weber, Hannah Arendt and Bertrand de Jouvenal.

## 2. WHAT LAW?

The semantic message of the word “legitimacy” is quite clear; it is the law that is sovereign, not the holder of power (whether or not the authority): *Lex facit regem*, according to the famous medieval saying. But this message is only formally valid as long as the nature of that law has not been precisely stated. Classical thought (Greco-Roman and Christian) had no doubts in this regard. It was convinced of the existence of a law superior to the will of the governing as well as the governed, that is, the constituting elements of any political community, however they were divided. That law, being essentially supra-political, brought political order into a superior juridical and moral order that encompassed and ruled it, that is, legitimized it.

Historically, this law was conceived variously as supernatural, natural or rational. In the case of a global or universal political order, such as the *res publica christianorum* or the Christian empire.

it is the law of that order (subordinated to the supernatural or natural law) that confers legitimacy on the particular powers. With a famous formula, the great medieval jurist Bartolo da Sassoferrato established the hierarchy of this political system and thus its condition for legitimacy: "*Imperator est dominus totius mundi...alii [scil.: the kings] sunt domini particulariter.*" (*Ad Dig. Vet.*, I, D.VI, 1,1).

Within this cultural framework, having a homogeneous content beyond its particular variants, the foundation for legitimacy was coherently established. But things have changed since the classic conception of a law that is above politics and of a global political order has been questioned or rejected by a large part of modern thought (that Leibniz, in particular, did not fail to oppose on this point). A second intellectual phase of the idea of legitimacy appeared, centered on the problem of designing a more appropriate form to fit new ideas.

The various theoretical solutions for this problem keep in their form the subordination of power to law, transmitted by the semantic of the word "legitimacy" and by classical tradition. But the conception of law having changed, legitimacy acquired, as we shall see, another substantiating source. These solutions may be schematically reduced to four:

1) According to the theoreticians of the natural state, from Hobbes to Rousseau, the source of legitimacy is the original contract, whether it be a *pactum unionis*, a *pactum subiectionis* or a combination of the two. Of course, the contract is a juridical notion and act, but it is only the *form* assumed by the consensus of free *will* among the contracting parties, the individuals. The contractualization thus covers an effective voluntarism.

2) According to traditionalist monarchists, of whom Chateaubriand is by far the most brilliant literary representative, the source of legitimacy is the custom of legitimate hereditary succession (illegitimate heirs are excluded) of power, which has the advantage of guaranteeing its duration. The custom is also a juridical phenomenon but exists only thanks to a collective, though tacit, will.

3) According to a traditionalism that we may call republican, the legitimating law is the one dictated by the founding fathers of the

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political community (according to the non-contractual version of Rousseau's thought), by the Founding Fathers of the North American tradition, rejuvenated in our day by the public philosophy of Walter Lippman. There is no need to point out that once more it is the will that is the substantiating source of legitimacy.

4) According to the dominant contemporary juridical theory, the condition for legitimacy of power is the constitution, the supreme law of a land (Austin, Kelsen, Burdeau). The recourse to will seems to disappear here, but the word constitution and its purely formal notion are only covers for the substance of the will (for power) of the constituents.

The brief summary we have just presented clearly shows that all these theories attribute the effective source of legitimacy to will, although hidden under the cover of a pure judicial form. Would it not be more correct, therefore, to take off the mask and plainly say that it is political will that decrees legitimacy? This is of course a radical reversal of the classic relationship between the juridical order and the political order, since it is the latter that from then on would be superior to the first. This reversal has been brought about by the political theory of the sovereign people, whose projection into the domain of the theory of rights is juridical positivism, which has its foundation in the principle *rex facit legem* and not in that of *lex facit regem*.

We thus arrive at a purely political theory of legitimacy, freed from its dependence on juridical theory. It is the will of the sovereign people that legitimates the will of the constituents and, consequently, that of those who govern (whether it be by plebiscite, election or acclamation, as Carl Schmitt says) since it is the will of the people that makes the law. The Goethian *Zeitgeist* or the Hegelian *Weltgeist* having changed with the course of history, it seems useless to lament over the past or to deplore the distortion of the semantic message of the word "legitimacy". Historical reality means more than semantics.

### 3. IS A POLITICAL FOUNDATION FOR LEGITIMACY POSSIBLE?

Lamentations set aside, none the less the fact remains that the

conclusion toward which modern thought tends (but not exclusively) is far from being satisfying. Like the *Zeitgeist*, the will of the people is neither easily determined nor univocal. Consequently, power may appear legitimate to some and illegitimate to others. The majority principle, to which we usually refer in order to resolve the question, greatly attenuates the disturbing side of this flaw but eliminates it only in practice: it alone does not guarantee that quantity means truth (Molnar is right in reminding us of this); it only means power. Now it is precisely the material strength of power that should or should not be legitimized. We thus enter a first vicious circle.

In addition, the majority principle cannot be actualized, passing from the domain of the abstract to that of the concrete, except by a law that establishes it and thus legitimates it. But the condition of legitimacy of this law is the will (majority) of the people, who in their turn need to be legitimized. We are thus enclosed in a second vicious circle.

With regard to the great historical truth of popular sovereignty (that I am far from disputing) these difficulties may appear as due to a hair-splitting and belated juridical formalism. In any case, I shall leave them aside. But another difficulty arises: by its nature, will is changeable. The original contract is revocable: Hobbes and Spinoza have frankly admitted this. Custom may fall into disuse, through a change, however slow, in the tacit will that supported it. The will of the constituents is constantly questioned by the will of successive constituents chosen by the same people, whose will has changed direction following a change in the *Zeitgeist*. In short, freed from the law, which at least obliges it not to be contradictory, (Kant, whose modernity is beyond question, reminded us of this function of the law), the will is free to contradict itself; it is arbitrary and unstable. But legitimacy, we well know, is not the business of a moment: it has meaning only in duration. On the other hand, the will needs only to have a quantitatively sufficient force at its disposal to impose changes. A third vicious circle is thus added to the other two and confirms the *impasses* in which we stumble about.

Is there a way, then, to establish the legitimacy of power (as far as its origin and exercise are concerned) on the basis of a fact, political of course, but objective and stable? A way that would

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permit an exit from the dilemma of a changing and capricious will (“such is my pleasure”, was the formula used by the absolute kings) and pure imposed force? All the more so since, as we have seen, there is a short-circuit between will and force, one without the other being pure abstraction.

In my opinion, it is not a matter of rejecting the will of the people, which besides is not a modern invention. In spite of their factual limits, the Athenian democracy and the Roman republic were based on it. The Middle Ages also had recourse to it and gave it an incisive formula, whose value extends to our day: *quod omnes tangit, ab omnibus probetur*. What seems necessary to me, beyond any political engineering, is to discern a strictly political criterion (thus without necessary reference to the law, as it is conceived today) which would legitimize both power and the popular will, removing them from the arbitrary.

Molnar again proposes to us the classic idea of the *common good*, stressing its legitimizing capacity. I agree with him. But to grasp the existential (and not just ideal) significance of this notion, we must elucidate it with the phenomenological definition of the structure of “politics,” of the political community.

At the level of phenomenal observation the city appears as *citizenry*: it is only the ensemble of the citizens. At the deeper level of phenomenological analysis, that which discerns the *meaning* of empirical facts (their “spirit,” we would say following Montesquieu), the citizenry appears as a *supra-individual identity* of a group of human beings. Each of them is an “I”, identified in its own subjectivity by its psychosomatic structure (by its face, Emmanuel Levinas says, more humanly), but at the same time he is part of a “we”: we Italians, we French, and so on. One can only say “we” when one perceives a common supra-individual identity, which is a *natural* given acquired by the chance of birth within a group: do we not say that a foreigner acquires citizenship through “naturalization”? But it is also inextricably *cultural*, being molded by a language, customs, values, history, that are proper to *we* and determine the Weilian “roots” of the *I*. More general than the individual identity but still particular because of the specificity of a culture, the supra-individual identity signifies the belonging of the *I* to the community through co-belonging to the *we*. The citizen is a co-citizen.



It is this identity that expresses the existential reality of the common good: it *is* the essential common good of the community. When it is lacking, the community is a mere form without substance or dissolves into a chaotic aggregation of root-less individuals. In the light of what I have just said, it would however be erroneous to believe that it is a matter of the good of a “whole” superimposed on the individuals who form it: the “great whole” of which individuals are only the “fractions”, according to the less than felicitous metaphor of Rousseau. This good is *common* because the supra-individual identity belongs to each *I*, a living part of *we*, of which it integrates the individual identity, making way for the real individual. It is only the good of the community because it is *common*, that is, because thanks to it individuals communicate with each other and coexist.

In addition, on the one hand the common good implies the participation of all in the existence of the political community of which they are members—since it is the personal good of each of them—and it thus justifies turning to the will of the people: *quod omnes tangit, ab omnibus probetur*. On the other hand, it gives this will a permanent reference point (the supra-individual identity being only ephemeral), thus removing it from volubility and the arbitrary. Now, since any social organization needs some form of power, this will be legitimate when it is in origin the projection of the common good and, in its exercise, the operative incarnation of the common good. This appears therefore as the existential foundation and criterion of the justification that legitimizes power and transforms it into authority. The power that preserves and increases the common good is authority: legitimate power.

#### 4. THE PLACE OF THE RIGHTS OF MAN

The conclusion to which my reasoning has arrived allows a development that may offer a solution to the question, brought up by Molnar, of the place of the rights of man within the community.

If a supra-individual identity integrates the personal identity of the real individual, the latter cannot be deprived of it by power (which alone has the capacity) without undergoing a serious detriment to his personality. The right to this identity is thus *the*



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fundamental right of the citizen, one he will not lose unless he is personally responsible for a crime against the community, which would mean a crime against his own identity. Exile is the most coherent punishment of this crime on the political level (and dramatically more human), from Greek ostracism and Roman *aquae et ignis interdictio* up until our day. Power loses its legitimacy when, except for *this* crime, it does not respect the fundamental rights of the real individual. (Let us note in passing: the other rights of the citizen are grafted on to that one and draw their criterion of legitimization from it). It is not a matter of a purely subjectivist claim, since the ignoring of this personal right implies a serious blow to the *we* itself, whose existence and vitality are dependent on the faithful and harmoniously creative contribution of the different *I*s. This is why the fundamental right of the citizen is implied in the idea of the common good and shares its nature of a condition for legitimacy of power. The *I* and the *we* belong together.

It is at the deep level of co-belonging that the majority principle plays its legitimate role. The individual does not have the right to impose his particular idea of the common identity and the common good on that of the majority, if it is not shared. But when he no longer shares these or when, in his opinion, power betrays them, he has the right, disregarded by totalitarian regimes, to freely go into exile. Let us not forget that this is a decision that brings with it a deep transformation and one that is often painful for the personality. But under the conditions given above, it is a legitimate decision.

Is this right of the *citizen* one of the rights of *man*? Undoubtedly, since the citizen is a man, and thus it is the man himself whose personality is affected when his fundamental right as a citizen is violated by power, whether it be internal or external.

But even though the respect for this right is a condition of the legitimacy of power, it is not the foremost condition. In spite of all its existential and coexistential value, the supra-individual identity does not exhaust the humanity of the citizen: his quality of being coexistential is not limited by belonging to the political *we*. It extends to belonging to the entire world of humanity. To be in the world means to participate in the life of the world where the other, aside from his political persuasion, is fundamentally, through his

ontological structure, an *other I*, an I just as I am. It is this structural parity that makes communication between men, and their reciprocal recognition as men, possible, according to the purest Christian traditions. Now, the citizen is, and remains, beyond all cultural, sociological and historical differences, a man.

But then political power, the power of the community (which by its nature and culture distinguishes itself from any other community) will not be fully legitimate until it respects the universal openness of the citizen-man. That means recognizing, beyond the rights of the citizen, the rights of man, principally the fundamental right to be recognized in his dignity and never to be used as a simple means to an end.

Political analysis finds the essential rapport (which it had set aside) of legitimacy of rights in the form of those of the citizen and more essentially those of man. Of course, a strictly political reflection cannot determine what the rights of man are. This is a task that belongs to an anthropologically-based juridical thought. In any case, the community cannot refuse to recognize these rights without transforming the human condition from one of peace to one of war, internal and external.

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