

Legitimacy and Politics

*A Contribution to the Study of Political Right
and Political Responsibility*

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Introduction

What is political legitimacy? Under what conditions can one speak of a politically legitimate situation? Though simple in their formulation, these questions are nevertheless complicated. Providing satisfactory responses to them presupposes that one is able to surmount a certain number of problems, one of the foremost being the notion of political judgement.

Facing up to such a notion boils down, in effect, to appealing to a ‘faculty of judgement’ in the political domain. That faculty consists in evaluating the decisions and actions of rulers and institutions who are charged with ensuring that society runs well. It presupposes that the question of the criteria for political judgement has been elucidated – that is to say, that the conditions for the validity of those elements that allow for an evaluation of the just character of political relations have been established. Now, in what, precisely, do those conditions consist? Where are they to be found? How is one to assure oneself of their reliability?

Because of its complexity, the theme of legitimacy occupies a paradoxical position in contemporary political thought. On the one hand, it is granted that legitimacy is essential to the operation of political life. Legitimacy is therefore taken into account in analyses whose objective is to describe and to explain its mechanisms. And if one were to rank the terms to which political observers have recourse in their work, the word *legitimacy* would arrive in the top grouping. Only rarely do writings on this topic and observers of the political scene ignore this notion.

On the other hand, the treatment of the concept of legitimacy often brings out a certain reticence. Although legitimacy is indissociable from the faculty of judgement, most works and reflections that make use of it are loath to take into account the dimension of judgement it implies. They refuse to conduct research into the conditions for the right to govern by inquiring about the criteria used to evaluate political life. Max Weber’s analyses of legitimacy, as we shall see, have a great deal to do with this phenomenon.

The situation surrounding this question is therefore quite troubling. The importance of the notion of legitimacy is recognised, as is attested

to by the fact that the observers of political life cannot prevent themselves from referring to it. But this recognition goes hand in hand with a reluctance to broach the question of political judgement.

Thus, to the question ‘What is political legitimacy?’ is quickly added another one: How is one to explain the fact that, in contemporary political thought, the study of the idea of legitimacy does not seem to integrate any reflection upon the faculty of judgement in politics? This ‘oversight’, or ‘denial’, compels us to try to understand the signification of the notion of legitimacy from a relatively general point of view and to explain its paradoxical status in the field of contemporary political studies.

We shall begin by analysing a certain number of key themes regarding legitimacy. The examination of the question of legitimacy and of the faculty of judgement will then lead us into the heart of a history of ideas – but also a history of modern societies. On that basis, it will become possible to formulate some hypotheses, ones likely to allow us to surmount the aporias characteristic of the conventional approach to the topic of legitimacy.

Thus, in the first chapter we provide a definition of legitimacy and try to sort out its meaning on the political level. The idea of legitimacy is first of all defined in connection with the notions of consent, a network of norms – around which is made the pact [*accord*] among individuals in society – and law, which is conceived as a factor in the protection and promulgation of agreement [*accord*] about legitimacy. In the effort to understand the political from the angle of legitimacy, we seek from this perspective to set out the relationships of command and obedience in terms of right [*droit*] and to bring into play a dynamic of responsibility on the part of the governors and the governed – a dynamic that itself requires an idea of political judgement. This orientation, which places the accent on the search for the conditions political relationships are to fulfil in order to be seen to assume a right and just character, therefore breaks away from Marxist and positivist conceptions of political analysis.

The second chapter offers an account of the objections that have been formulated against analysing politics in terms of legitimacy, and shows their limitations. These objections lie at the heart of the paradoxical situation this notion finds itself in within contemporary political thought and can be entered under the following two headings: the theoretical and the methodological. A complementary relationship obviously exists between these two levels.

The theoretical objections consist essentially in rejecting the possibility of studying politics in terms of the right to govern. These objections are lodged either because the idea that legal action has any privileged

connection with the theme of justice is contested or because the consent of individuals is thought not to play any role therein, or because the problematic of legitimacy is likened to a moral perception of the political, whereas the latter is said to have strictly nothing to do with ethical principles.

The objections of a methodological order lie primarily in a challenge to the validity of approaching political reality from the standpoint of values. They are based on a sort of empiricism that is defined above all by a separation of facts and values. Such a separation rules out the possibility of implementing the faculty of judgement and of taking practical reason into account in any way.

Such criticisms, which basically stem from Marxist and positivist currents of thought, take us back to such classical authors as Machiavelli, Marx, and Weber as well as to some contemporary authors, in particular Pierre Bourdieu and Theda Skocpol. Criticisms of this sort have some serious drawbacks and contain some grave contradictions: while the field of law is not the paradise of fairness some people depict it as, it is not to be reduced for all that to a more or less disguised use of violence. It is appropriate to give things their due and to examine in what way the field of law does indeed authoritatively express, for those living in society, the idea of social and political justice and contributes towards its realisation. Moreover, the role played by individual consent cannot systematically be denied. It is one of the essential factors in political relationships. And furthermore, morality is not alien to politics. Without our being able to identify it strictly with ethical principles and actions, politics could not disregard morality completely without the risk of seeing relationships among the members of one and the same community turning into open warfare. Finally, as much on the theoretical as on the methodological level, the separation of facts from values seems neither possible nor desirable. The analysis of legitimacy must therefore be distinguished from a narrow empiricism or positivism.

Chapter 3 shows that these theoretical and methodological objections, which take up a considerable, though often diffuse, space in contemporary political thought, are set within a history of social theories and of modern societies. They are in line with the scientific conception of how to analyse social and political reality, as that conception was developed beginning in the seventeenth century under the influence of natural scientific study. Here, the reflections of Thomas Hobbes and Montesquieu serve as a point of departure. After the Age of Enlightenment, during which there was a convergence between theoretical reason and practical reason, a divorce ensued. Max Weber's reflections on the separation of facts and values is illustrative of this situation. But this division

between theoretical reason and practical reason would not have been possible unless societies themselves had gone through a crisis as to the groundedness of their own values and, by way of extension, of values in general. Now, while this crisis is in part the product of that characteristic movement by which the world we know breaks with the premodern one, it is also the result of the developmental process of the ideals of modernity. In developing and in seeking to fulfil their ambition of universality, these ideals are turned against themselves and come to pose the question of legitimacy as one of the central stakes in both political reflection and political practice: they constitute legitimacy at once as a point of origin and as a line on the horizon. In their reality, our societies cannot fully align themselves upon them both. Legitimacy becomes therefore a key problem of modern political life.

How is it possible to surmount the aporias to which modernity is condemned as regards legitimacy? The last three chapters of the book attempt to answer that question. They offer three complementary paths of reflection, which deal with the relations between the idea of legitimacy, on the one hand, and the experience of history and of the community, on the other. By combining them, we can rehabilitate the roles of practical reasoning and the faculty of judgement in the analysis of social and political phenomena.

In Chapter 4, we establish that an authentic reflection upon practical truths has to break away from a scientific interpretation of history. From this point of view, the Marxist and Weberian conceptions of history are equally unreliable. Each one in its own way presents the risk of pegging the idea of legitimacy on that of legality. As for Carl Schmitt's theories, which are analysed as a prolongation of the path laid out by Max Weber, they offer a good illustration of the dangers to which one is exposed when one subjects law to the imperatives of politics. In any case, we shall see that the scientific, Marxist, and Weberian orientations all share a nostalgia for the absolute. That nostalgia forbids them to pose the question of truth within history in a way that would allow them to think legitimacy in satisfactory terms.

In opposition to these theories, it is emphasised in Chapter 5 that the exercise of the faculty of judgement in modernity – wherein the plural and shifting character of human reality and of the referential systems used to evaluate this reality occupy a place of key importance – necessitates a revision of our conception of history and of history's relations with social and political theory. This is indicated by two points of view, which are complementary. In the first place, while it is useful to take empirical data into account when reflecting upon legitimacy, it can be so only when such a practice is articulated in tandem with what are called *values*.

That is what bids us to remain attentive to the impact of values on the constitution of human phenomena and not to describe the axiological domain as irrational, the consequence of which would be to prevent us from being able to establish a hierarchy among its component parts. But it also implies the implementation of a neutral and objective point of view that integrates an engaged approach to human reality. In the second place, in order to deploy one's faculty of judgement, one has to shed light on the kind of relation that exists between the analysis of social and political phenomena and history. To render the criteria for judgement explicit, one must determine the domain within which the faculty of judgement is applicable. Here, in fact, it is a matter of being careful that the analysis of social and political phenomena and the evaluations of the right to govern that may result therefrom will not be established in terms of criteria that are alien to the situations under examination.

The sixth and final chapter shows that, in working out a theory of political deliberation, it is important to do so in connection with the meaning of the possible and of the necessary. This is a meaning with which individuals identify, and it is starting from this meaning that they evaluate their situation, asking whether or not it corresponds to their criteria for what is just and unjust. It is from this standpoint that the aforementioned reflections on history take on their full strength. Indeed, it is in questioning oneself about the way in which individuals recognise themselves in the values that define the identity of the society in which they live – indeed, it is in examining whether they consider the place reserved for them acceptable or unacceptable – that it is possible to go further in one's reflections on legitimacy. In other words, it is a matter of seeing how individuals position themselves within the community to which they belong. From this point of view, it is possible to explicate the legitimate or illegitimate character of a political situation by taking into account both the idea of right promoted by the identity of a given society and the attitudes of adherence or rejection individuals exhibit as regards this idea of right. The ruled may reject the way in which they are governed, and this opens up forms of contestation and, in some cases, more or less strategic forms of political change. Whether or not they do so depends upon the configuration of the relations of forces, and notably upon the chances opponents have to succeed in their efforts at contestation, as well as upon the (material and symbolic) cost such an undertaking represents. In any case, without necessarily witnessing radical upheavals, it is possible to spot indications of political legitimacy or illegitimacy through the ways in which, and the degrees to which, individuals invest themselves in the life of their society. This aspect of the question of legitimacy can be examined by analysing the process by which one passes

from demands that are discredited, even criminalised, by the existing authorities, to points of view that begin to be listened to and are ultimately legalised.

Of course, one has to assume some methodological and intellectual positions when following this line of research. In the first place, although the present work belongs to the field of political science, it does not limit itself thereto, and it also calls upon the disciplines of philosophy, sociology, and law. Indeed, by virtue of its configuration and its position, at the place where the social bond is brought together, the question of legitimacy has to be grasped from the outset in a pluridisciplinary perspective. Let us add that to a great extent the present book calls upon the history of social and political ideas. And yet, it is not for all that a matter of offering an exhaustive account here of these intellectual and historical phenomena for their own sake. Such phenomena are treated, rather, as revelatory indices of the movement that is constitutive of the problematic of legitimacy. In the end, it is also a matter, when studying the question of legitimacy, of taking seriously the normative dimension of human reality and of examining how one might rehabilitate that dimension.

These methodological and intellectual positions go to explain the dual nature of the present work. On the one hand, our investigation takes the form of a historical reconstitution or reconstruction. On the other, this reconstitution is placed in the service of an analysis of the conditions of possibility for a reflection upon practical truths. It is obviously not a question of proposing solutions and answers *in abstracto*. The objective, on the contrary, is to show that, far from forbidding one to question the faculty of judgement in politics or from rendering that questioning superfluous, historical rootedness urgently requires such questioning. To put it briefly: it is a matter of implementing a normative approach to the question of legitimacy, while endeavouring to set things in historical perspective.

From this point of view, the analysis proposed here offers an alternative to political reflection as it has been developed in a certain number of conventional ways.

- First of all, it distinguishes itself from a positivist approach to political reality. Without denying, obviously, the usefulness of the latter approach, it contests that approach's pretensions to hegemony, which are the combined product of the ambient scientism, force of habit, and a certain intellectual laziness. These three factors have led researchers to turn away from basic questions,

whose complexity and nature entail provisional, ever-revisable answers and which, in another connection, go against received ideas within the French scientific community;

- Secondly, history is used here, but it is not studied for its own sake. Without contesting the role historical works play in reappropriating the past and in constituting our memory, it is just too easy a solution to ask oneself what so-and-so said, what he meant to say, what he thought, rather than to ask oneself what is to be thought in and for the present time. Certainly, we always reflect while aided by others, and with others. But when one reduces political reflection to dwelling upon the past, to commentary upon previous works, political thought itself atrophies. And yet, the present work also breaks away from the anti-historical temptation that frequently characterises philosophical works in the Anglo-Saxon world. A result of the legacy of English empirical philosophy (which, traditionally speaking, is not very history oriented), of the specific cultural background of the New World, and of the importance granted to analytical philosophy, that temptation ends up creating repetitious situations. One is reduced to various forms of historical ignorance and amnesia, which must be avoided as much as possible.
- Finally, to broach the question of legitimacy is to take the theme of right seriously and to interrogate oneself about the conditions that make for the just exercise of political command. To tackle this question is therefore to go against an orientation that has been cultivated to excess in certain French intellectual and academic circles: that is, a refusal to recognise the connection legal authority has with justice. This situation can be explained by the combined action of positivism, which does not connect law to the substantive dimension of values, and of Marxism, whose critique of legal authority is well known. But it can also be explained by the relationships that exist in France between law and the State, as well as by the resulting status legal training enjoys there. The fact that, inside the French Hexagon, law turns out to be intimately tied up with the State – a situation quite different from what obtains in the United States, for example, where the birth of the State does not proceed the unfurling of democratic ideals and where the State does not dominate civil society as much as it does in France – as well as the conservative tendencies of law schools, has not facilitated the flowering of a balanced form of legal reflection. It is, moreover, in part for this reason that the

philosophy of law remains a discipline that has hardly developed at all in France. To put it briefly: law has for a long time been either discredited or revered there, on account of its alliance with the State.

Reflecting upon legitimacy consequently amounts to taking an interest in law from a perspective that is not traditionally adopted in France. Of course, with the ebbing of left-wing ideologies, a growing number of serious works are today being devoted to law. Unfortunately, too often these works are content to adopt as their own an attitude that equates the State and law, sometimes they even go further and adorn the latter with all possible virtues, following in this way a see-saw movement that has become customary in the history of thought. It is more judicious, however, to ask oneself under what conditions law satisfies the requirements of justice.

To analyse legitimacy in connection with the dimension of values is to pose the question of the Good in politics and boils down to rehabilitating a normative type of reflection on politics – without, for all that, throwing overboard all the components of positivist analyses. In other words, it is a matter of setting political reflection back on the rails from which political realism, in particular, had driven it: those of responsibility and commitment [*engagement*]. While still being concerned with analysing and comprehending human reality, this approach also aims at fulfilling certain values, including dignity. Without proposing rules of thought and of conduct, one of the ambitions of the present work is, in effect, to show that it is neither possible nor desirable to exclude values, the faculty of judgement, and the question of the Good from political reflection.

In France, the role of formulating analyses that are expressive of value judgements is traditionally entrusted to the intellectuals. The race to strike a pose, as is encouraged by the TV economy, and the highly polemical character of debates over ideas in that country have reinforced this *de facto* situation. Researchers and academics find it all the more difficult to make their voices heard as their very conception of science tends to forbid them from taking a position. In such a context, the present work is animated by the concern to defend and to advance the idea that science is not indifferent to the world in which it evolves and that it attempts to contribute towards the betterment of that world. If we are to believe Marcel Mauss,¹ in science one cannot proceed too slowly, and in matters of practice one cannot wait; it is therefore by advancing at an average speed, which is imposed by taking these two dimensions into account,

¹ Marcel Mauss, *Œuvres*, 3 vols. (Paris: Minuit, 1981), vol. III, *Cohésion sociale et divisions de la sociologie*, pp. 579–80.

that political reflection will best be able to confront the truth and the world in which the truth unfolds.

To proceed in this way is therefore to take a detour in order to tackle those questions whose burning character is underscored by the course of contemporary political events. This is a detour that may seem quite long for someone who wants to have immediate answers. Experience shows, however, that patience and the establishment of some distance most often allows one to elucidate that which would not have been seen, had one cast too close and too hurried a glance.

1 What is political legitimacy?

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 obligations⁷ – 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 prisms 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 Koglar, 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 systematicity 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 *Rechtsstaat* [*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 legitimization 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 breach 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.

of necessity with the realm of freedom, that is to say, by passing from a coercive situation to a society without a State. In this logic of all or nothing, there does not exist, properly speaking, a right to govern. Law has no validity; it is only an illusion that masks exploitation. As for the realm of freedom, which comes about with the disappearance of social and political divisions, legitimacy does not constitute one of its stakes.

Nevertheless, the history of communism in the twentieth century has shown that it was more difficult than had originally been foreseen to eliminate political differentiation, and that a theory of emancipation that proposes to destroy the relationship of command and obedience could not succeed, and, by way of consequence, had to take the question of the right to govern into account. Once the end of history was recognised as not being imminent, proponents of Marxism–Leninism who did not abandon Marx’s eschatological vision and continued to condemn law as anachronistic and ideological⁶⁰ – favouring, instead, a kind of emancipation that would be rid of legal and moral rules⁶¹ – were led to broach both political differentiation and the problem of its legitimacy in contradictory terms. The rulers of the young Soviet Union required ever-increasing doses of the State in order to try to reduce disagreements and to attempt to attain a sort of total social homogeneity. The desire to make the instituting and the instituted coincide absolutely,⁶² accompanied by the persistence of the State and even its expansion, took the form of an authoritarian intervention on the part of the established political power in all domains of citizens’ lives. This omnipresence was presented not as coercion but as the expression of a society that was without division in actuality and in movement [*en acte et en marche*].⁶³ That is to say, the process of political differentiation was set within a totalitarian dynamic.⁶⁴

⁶⁰ In *The German Ideology*, p. 209, Marx and Engels state: ‘As far as law is concerned, we with many others have stressed the opposition of communism to law, both political and private, as also in its most general form as the rights of man.’

⁶¹ On this question, see Steven Lukes’ remarks in *Marxism and Morality*, 1st paperback edn (Oxford University Press, 1987), p. 57.

⁶² Here we are inspired by the analyses of Claude Lefort in ‘Outline of the Genesis of Ideology in Modern Societies’, in *The Political Forms of Modern Society: Bureaucracy, Democracy, Totalitarianism*, ed. and intro. John B. Thompson (Cambridge, Mass.: MIT Press and Cambridge: Polity Press, 1986), p. 222.

⁶³ See the remarks of Maurice Merleau-Ponty on the Moscow Show Trials: ‘Bourgeois justice adopts the past as its precedent; revolutionary justice adopts the future. It judges in the name of the Truth that the Revolution is about to make true; its proceedings are part of a *praxis* that may well be motivated but transcends any particular motives’ (*Humanism and Terror: An Essay on the Communist Problem*, trans. John O’Neil (Boston, Mass.: Beacon Press, 1969), p. 28).

⁶⁴ See Marc Richir, ‘Révolution et transparence sociale’, Introduction to Johann Gottlieb Fichte’s *Considérations destinées à rectifier les jugements du public sur la Révolution française* (Paris: Payot, 1974), pp. 13–14.

The analysis of power in terms of legitimacy is therefore to be distinguished from a political conception that knows only the alternative of force and ideality. In the latter case, the rejection in principle of the possibility of legitimating the separation between the governors and the governed entails, in reality, as Marxism–Leninism has shown, at the very least a paradoxical management of this separation. On the other hand, when one reflects upon the right to govern, one does not consider power by definition maleficent, nor, by way of consequence, does one consider the abolition of political differentiation to be a necessary prerequisite for a communitarian life grounded upon respect for the rights of individuals.

While the analysis of politics from the standpoint of legitimacy presupposes political differentiation, it nevertheless cannot be reduced to that. It does not uncritically swallow all forms of power, and it is not fundamentally conservative. On the contrary, starting with the governors–governed distinction, it examines those elements that can make that distinction acceptable, and it seeks to know whether political power is set within a relationship of reciprocity as regards the members of the community. If that is indeed the case, it goes on to analyse the terms of this exchange, which amounts to considering the political from the point of view of right and to questioning itself about the conditions for the constitution of political right. It then becomes a matter of asking oneself how a just political relationship is established, that is to say, how political institutions might express and guarantee the constitutive values of the identity of society. It is within this perspective of political justice, and even of justice *tout court*, that consent, norms, and the law have been discussed in the previous pages. The result may be summed up in the following proposition: for political differentiation to be legitimate, the governors have to possess a representative status *vis-à-vis* the community.

The justification of political differentiation is in effect tied to the function of representation. It is only upon this condition that the role of coordinating and directing a society may be considered legitimate and that it has some chance of enduring.⁶⁵ Taken in a general sense,⁶⁶ representation adopts the organisational modalities that correspond to the various

⁶⁵ See Jean-Jacques Rousseau: ‘The strongest is never strong enough to be the master forever unless he transforms his force into right and obedience into duty’ (*On the Social Contract, or Principles of Political Right*, in *The Collected Writings of Rousseau*, ed. Roger D. Masters and Christopher Kelly, trans. Judith R. Bush, Roger D. Masters, and Christopher Kelly, 8 vols. (Hanover, N.H. and London: University Press of New England, 1990–), vol. IV, p. 133).

⁶⁶ On the contribution the historical dimension of social and political reality makes to the diversification of formal truths, see Paul Veyne’s *Bread and Circuses: Historical Sociology and Political Pluralism*, trans. Brian Pearce, abridged edn (London: Allen Lane/The Penguin Press, 1990), pp. 293–94.

existing kinds of political systems and regimes; indeed, within such systems and regimes, these modes of organisation correspond to particular political situations. Representation also rests upon the feeling, shared by the members of the community, that the rulers embody the interests of the group and that, in the main, these interests guide their actions.

Representation therefore does not have to be reduced to the specific form given to it in modern society, and especially in liberal-democratic regimes, where it celebrates the autonomy and the reflective potential of both individuals and society.⁶⁷ The error, for example, would be to believe that it necessarily implies a delegation to several persons, or that it is constituted solely by a legislative assembly – whereas it is entirely possible that a single individual, the monarch for example, could represent the group.⁶⁸

Those who govern decide and act in the stead of individuals, in accord with them and for them, in proportions and under forms that vary according to the types of polity and according to the context. Thus, the unequal distribution of power, the mark of political differentiation, finds justification, and the position of dominance, by becoming the repository of the spirit of the community, acquires a *raison d'être*.

Representation expresses the political unity of the group as a whole. It is an existential reality that concerns the overall identity of society. To represent is to make manifest, through the intermediary of an individual or an institution, an existent though diffuse reality. Far from being only a symbol, representation is the concrete figure the group adopts, for lack of being able to manifest itself directly; it is the presence of the entire community qua political unity and political will.

For this reason, it can be stated that a characteristic of representation is its public dimension, which manifests itself through the fact that the members of a group recognise themselves in their rulers. This public dimension may even lead one to think that representation is grounded upon a phenomenon of identification, a notion that refers back, it is true, to a rather varied set of situations.⁶⁹ Nevertheless, whatever may be the ambiguities of such an identification, it allows one to understand the process whereby individuals come to consider their governors. If the governors are perceived as representatives of the community, that is because, to the extent that they defend and assure the promotion of the fundamental values of the group, the governed themselves identify with them.

⁶⁷ See, for example, Pierre Manent's 'Situation du libéralisme', his préface to *Les Libéraux*, 2 vols. (Paris: Hachette, 1986), vol. I, pp. 15–16.

⁶⁸ See Julien Freund, *L'Essence du politique*, 3rd edn (Paris: Sirey, 1978), p. 328.

⁶⁹ See Bourricaud, *Esquisse d'une théorie de l'autorité*, p. 161.

The identification of the members of the group with the governors is established on the basis of shared values. With rules playing the role of 'value-vectors',⁷⁰ the mechanism of identification renders individuals and the collectivity present to themselves. Although they do not manage the community directly, the governed see in political action a recognition of their individual existence and the sign of the collectivity's reality. The phenomenon of identification, which is found again at the heart of political representation and of its public dimension, contributes, in this way, towards providing a basis for political differentiation.

This process never entirely abolishes the distance separating the institutors from the instituted. As expression of the community as a whole and of its constitutive norms, the political representative is not exclusively a private person. Beyond the specific features that go to characterise him as a particular individual, he is an official personage.⁷¹ As such, in contrast to everyone else who does not have to expose his private life, what is personal to him tends to become public. The sphere of his private existence is reduced to a greater and greater extent as his public life grows ever larger. Thus, when the personal qualities of a ruler are praised or criticised, these qualities are praised or criticised less so in their private capacity than from the perspective of evaluating his abilities to work in the group's favour.

The political representative is a public figure before being a private person. But while the identification process brings him closer to the governed, it does not therefore cancel out the division separating him from them. To various degrees and in varying ways, this statement holds good for hierarchical societies as well as for egalitarian ones.

The public character of the political sphere, which keeps the political at a distance from the world of individuals, contains a complementary feature: power that is exercised for strictly personal ends cannot be legitimate. Indeed, as soon as public office is privatised – that is to say, as soon as it serves exclusively private interests – the right to govern is called into question. Whereas the apparatus surrounding the State is justifiable, to a certain extent, when it manifests the powers and grandeur of a society,⁷² and therefore of its members,⁷³ that is no longer the case when there exists

⁷⁰ We are freely inspired here by Henry Rousso's remarks on 'memory vectors' in *The Vichy Syndrome: History and Memory in France Since 1944*, trans. Arthur Goldhammer (Cambridge, Mass.: Harvard University Press, 1991), pp. 219–21.

⁷¹ On the dualism of the body in politics, see in particular the classic study by Ernst Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology*, 1st paperback edn (Princeton University Press, 1981).

⁷² Clifford Geertz points out that *splendour* is one of the three themes that go to make up the etymology of the word *State*; see his *Negar: The Theater State in Nineteenth-Century Bali* (Princeton University Press, 1980), p. 121.

⁷³ *Ibid.*, p. 129.

a systematic privatisation of political activity. Once the leaders abandon the principle of reciprocity and become strangers to the people they administer, the identification no longer operates. Every sign of opulence becomes the mark of excess and corruption. This reversal can ultimately make it impossible to provide a foundation for political obligation. It spells the end of the public dimension and, hence, of the governor in his capacity as a representative. Under these conditions, it is not surprising that, in order to distinguish themselves from a bourgeois power that was deemed to be corrupt, modern revolutionary ideals might have made of asceticism one of the virtues of the political good.⁷⁴

Legitimacy and political responsibility

As we have seen, the legitimate exercise of political power is inconceivable when viewed as something strictly private. In order for the members of the community to perceive the governors' position of command as being justified, that position must partake in some explicit way in a dynamic of the common good. The desire for personal success and the thirst for power offer no legitimacy for the rulers' actions. On the contrary, these rulers have to take the good of the group into consideration. In politics, the ambition of an individual becomes justifiable only when it is presented as serving the entire community; it is only when an ambitious person reveals himself to be a statesman authentically concerned with assuring the group's prosperity that his desire for success takes on a genuinely legitimate political value. In this way, legitimate political activity is inseparable from responsibility. The latter is the manifestation of a power that accepts the constraints imposed by the right to govern.

The first of these constraints relates to the fact that he who governs cannot restrict himself to existing for himself in an egotistical way.⁷⁵ Unless it is to relinquish all credibility, the established political power needs to justify itself as acting in the service of the group.⁷⁶ Here we have a

⁷⁴ On this question, see for example the remarks of Benjamin I. Schwartz, 'The Reign of Virtue: Some Broad Perspectives on Leader and Party in the Cultural Revolution', in John Wilson Lewis (ed.), *Party Leadership and Revolutionary Power in China* (Cambridge University Press, 1970), p. 161.

⁷⁵ See Paul Veyne, *Le Pain et le Cirque. Sociologie historique d'un pluralisme politique* (Paris: Éditions du Seuil, 1976), p. 662. [Translator/editor: The abridged English-language translation, *Bread and Circuses*, pp. 393–94, does not include the passage referred to here.]

⁷⁶ See Alexis de Tocqueville: 'In the feudal era, we looked at the nobility in more or less the same way as we regard the government today; one bore the burdens it imposed in consideration of the guarantees that it offered. The nobles had offensive privileges, they possessed burdensome rights, but they assured public order, dispensed justice, executed the law, came to the help of the weak, and ran public affairs. To the extent that the

general truth that concerns all regimes that wish to establish their own legitimacy. Every political ruler who seeks to prove he possesses the right to govern has to satisfy, to try to satisfy, or to pretend to satisfy the needs of the members of the community. Responsibility is a function of group service, which rests upon the rights of individuals and is expressed by a feeling of duty that is tied to the exercise of a public trust. It is, as a consequence, possible to affirm that political relationships that do not evade the question of legitimacy adopt, in one way or another, the form of a protective State.⁷⁷

This general truth may, quite obviously, admit of many variations. The idea of serving the group and the ways in which such service is fulfilled are not everywhere identical. The extent and the content of political responsibility, which are determined by the historical situation and the relations of forces, vary according to political systems and regimes.⁷⁸ Analysing political life in the Roman Empire, Paul Veyne points out that the king, like the pilot of a ship, is in the service of the passengers and that he would pass even more easily for being someone who is in their service had he been elected by them.⁷⁹ Let us take another example. In democratic regimes, the tasks that pertain to the responsibility of political institutions differ according to whether one is dealing with the Liberal State or the Welfare State. The quite lively controversies that take place between the partisans of one or the other of these two types of State are well known.⁸⁰ But whatever variations the notion of service may undergo, this notion becomes irrepressible as soon as the established political power is situated within the perspective of legitimacy.

For a ruler, political responsibility therefore involves, above all, the recognition of the public dimension of his activity. That is the reason why political sovereignty – that is to say, the set of powers at the disposal of those who govern – is not unlimited. For the ruler, not everything is possible. Preoccupied by his legitimacy, he is expected in the first place

nobility ceased to do these things, the weight of its privileges seemed heavier, and finally their very existence seemed incomprehensible' (*The Old Regime and the Revolution*, ed. François Furet and Françoise Mélonio, trans. Alan S. Kahan (University of Chicago Press, 1998), vol. I, p. 117).

⁷⁷ See Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983), p. 68.

⁷⁸ *Ibid.*, p. 91.

⁷⁹ Paul Veyne, *Le Pain et le cirque*, p. 662. [Translator/editor: Again, the abridged English-language translation, *Bread and Circuses*, pp. 393–94, does not include the passage referred to here.]

⁸⁰ See, in particular, Pierre Rosanvallon's book *La Crise de l'État-providence*, 2nd rev. and corr. edn (Paris: Éditions du Seuil, 1984), pp. 63–64, as well as Walzer's analyses of the problem of the social coverage of medical expenses in the United States, in *Spheres of Justice*, pp. 88–89.

to make decisions and to conduct actions that express a will not guided exclusively by his impulses and his interests. Without a doubt, political command has always been more or less discretionary in character, to the extent that the relationship of representation that exists between the governors and the governed is not entirely transparent. This fuzziness is due, in particular, to the fact that politics is played out in real time and that, even in advanced democracies, circumstances sometimes become pressing: one cannot consult everyone about everything.

That does not mean, however, that arbitrariness has a free field of manoeuvre. The decisions and actions of the ruler have to respect the rules of the game and take into account the needs of the community. There is no question of heeding one's own will alone, of ignoring procedures, and of launching programmes that go against the very survival of the group.

In another connection, let us note that the acknowledged tasks of the State constitute the touchstone of political responsibility. A governor's legitimacy is therefore evaluated not only upon the basis of his aptitude at deciding and acting in conformity with a society's current laws and with its fundamental principles but also upon the basis of his capacity to obtain effective results. It does not suffice to conform to the letter of those services the State is supposed to render to the community; they still have to be carried out in a credible manner.

The legitimate enjoyment of political command goes hand in hand with its limitation. The unequal distribution of power is justified only by the accomplishment of duties that are considered to be incumbent upon the government. The way in which political responsibility is assumed gives the rulers the right to govern. Far from being absolute, the kind of political sovereignty that accepts the constraint of responsibility is conditional.

To evoke political responsibility is to think that the governors do indeed have at their disposal powers of constraint *vis-à-vis* the members of the community but also that these powers are the mark of a limited sovereignty. The limits imposed upon the ruler set out the framework for legitimate activity, and respect for these limits constitutes at once the expression of responsibility and the instrument for its realisation. Outside these limits, it is just as much the sense of responsibility as the legitimacy of political action that find themselves called into question.

Since political sovereignty conceived in terms of responsibility is conditional, it is worthwhile for us not to lose sight of the aspect of *sanction* that results therefrom. Indeed, the idea of sanction is indissociable from political power as defined in terms of responsibility. A political command that is set within the perspective of the right to govern differs in this respect from absolute power, for the latter rejects any other law but its own and considers that there is no instance of authority by which it might be

judged. For this sort of political command, to agree to serve the community within the framework of determinate rules and principles implies a recognition that it is valid for it to be evaluated and a disposition towards allowing the results of its activity to be attributed to itself.⁸¹ What is understood here by the idea of sanction – namely, the possibility of a ruler being condemned for decisions and actions he has authored that have harmful effects throughout the group – is far from constituting a secondary feature in our conception of responsibility. On the contrary, sanctions play an essential role. Without them, and without the relation of cause to effect between a governor and a situation, the idea of responsibility remains abstract, indeed non-existent. In so far as a detrimental event is not tied to its author who, as such, is sanctioned, one cannot genuinely talk about responsibility. In recognising the fact that an individual answers for his acts and in translating this recognition into penal terms, sanctions constitute not only an indicator of responsibility but also that upon which the existence of responsibility rests. *A contrario*, when the decisions and actions of a ruler cease to be imputed to him, political responsibility itself vanishes.

As opposed to a form of political sovereignty that is based exclusively upon force and whose logic is manifested in a refusal to serve the community and to be considered as capable of being at fault *vis-à-vis* this community, the responsible governor grants the principle of blame. This principle does not contradict the notion of immunity. The latter is, in effect, in no way synonymous with licence or impunity. Immunity is involved as an active part of responsibility. The fact that, under certain circumstances and according to precise conditions, the rulers enjoy a situation of immunity is justified only by their status as representatives of the group's interests. It is solely in relation to the common good that immunity offers a protective role.⁸² This relationship must therefore be credible, and the individual benefiting from the guarantees immunity procures must not, through his conduct, violate the spirit and the ends of his society. In the contrary case, this protection is lifted and legal action becomes possible. The sanctions that ensue vary, obviously, according to the character and the gravity of the faults committed but also according to the identity of a society and to the kind of relationships that exist therein. Certainly, the more power is institutionalised in a democratic direction, the more the sanctions themselves and the ways in which these sanctions are applied – that is to say, also the conditions of immunity – are strictly

⁸¹ See Bourricaud, *Esquisse d'une théorie de l'autorité*, p. 442.

⁸² See, for example, the remarks of Jean Gicquel and André Hauriou about forms of parliamentary immunity, in *Droit constitutionnel et institutions politiques*, 8th edn (Paris: Montcrestien, 1985), pp. 853–56.

defined⁸³ and tend to be better respected. But, in various forms and to varying degrees, all political regimes seeking to establish their legitimacy are careful to set in place some mechanisms that limit their own might.

The importance of the notions of responsibility and sanction is tied to the effort to preserve the existing social and political organisation. These ideas cannot systematically be ignored without endangering the operation of the entire group. There are two reasons for this.

The first reason concerns the fact that the imperative of social peace leads one to think in terms of responsibility and sanction. Thus, differing, for example, from the psychoanalyst and the sociologist, whose work has often had the effect of showing how different determinations may reduce or eliminate free will and, by way of consequence, responsibility,⁸⁴ the jurist is much more reluctant to consider an individual who commits an offence as not being responsible for his act. Save for extreme cases,⁸⁵ the jurist cannot simply jettison the notion of responsibility, and it is only in relation to responsibility that he considers any external causes that may have contributed to a person committing an offence – at best, in light of attenuating circumstances and under the same heading as the particular conditions within which the fault was actually committed.⁸⁶ That does not mean that he would be deeply servative or reactionary. His role is to guarantee order and, from this standpoint, he has to assign responsibility and to sanction breaches thereof.

In order to safeguard cooperative relations within society, in order to avoid any uncertainty as to who is the author of an offence and to prevent the absence of sanctions from leading to the dissolution of the notions of fault and responsibility, which would thus be an invitation to further disorders, the jurist has to establish the responsibility of the individual who is judged guilty. And the jurist must punish him accordingly.

The second reason accounting for the features of responsibility and sanction that are crucial to the preservation of the group's organisation is more directly political in character. To the extent that the idea of responsibility, as applied to those who govern, has for its corollary the existence of limits for which political action must make allowance, these limits no

⁸³ See, in particular, the reflections of Dennis F. Thompson concerning political immunity in a democratic regime, *Political Ethics and Public Office* (Cambridge, Mass.: Harvard University Press, 1987), p. 79.

⁸⁴ For a view of responsibility based upon freedom defined as autonomy, the reader may refer to Immanuel Kant's *Critique of Practical Reason*, trans. and intro. Lewis White Beck (London: Collier Macmillan, 1956), p. 104.

⁸⁵ See the remarks of Herbert L. A. Hart on offences committed by children and persons impaired by mental illness, in *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press, 1968), pp. 183–84.

⁸⁶ For example, with or without premeditation.

longer have any meaning when their transgression entails no sanctions. And when a situation of immunity provided for by a political regime is transformed into systematic impunity, responsibility is emptied of its content. Sooner or later, it is not only the rulers but also the political institutions as a whole that lose their credibility. In excessively protecting its own rulers, the political regime only ends up making itself fragile.⁸⁷

It is fitting, however, to note that even those governors who do not make force into the sole source of their power are often more reluctant to take their failures upon themselves than they are to claim their successes as their own. In this way, it is probably not an exaggeration to say that many of these people dream of passing themselves off as the exclusive authors of whatever is good while never being held responsible for things that go wrong.

Here, the rulers call upon various procedures designed to distract others from lodging criticisms. They endeavour to preserve their credibility by depicting everything that they do not succeed in resolving as a problem that does not pertain to their responsibility.

Thus, politicians today love to boast that they themselves have generated good economic results, yet they do not hesitate, when the figures look bad, to reject any cause-and-effect relationship between their actions and these negative numbers. Invoking the heavy constraints imposed upon national and international systems – which are of a financial, economic, or some other order – they attempt to show how little influence they have over events.

These diversionary tactics are not unrelated to the most perverse kinds of social mechanisms. This is what persuades us that they have their share of bad faith. Such procedures designed to distract can also include the naming of a scapegoat⁸⁸ – for example, immigrants who are accused of being responsible for unemployment – and can sometimes lead to witch hunts and persecution, as is testified to, in particular, by the political use of anti-Semitism.

The ambiguity and the reluctance, evinced by those who govern, *vis-à-vis* responsibility and sanctions, as well as the diversionary tactics to which they have recourse, call forth two sets of remarks. Without overestimating the importance of the decisions and actions of the governors as regards society's orientations and its actual operation, and without failing

⁸⁷ See Denis Richet, who speaks of a climate wherein absolutism may seem, in the short run, to be reinforced and even strengthened, but wherein, at an underlying level, things are really being undermined. Richet concludes: 'The more absolutism is reinforced, the further it is weakened' (*La France moderne. L'Esprit des institutions* (Paris: Flammarion, 1973), p. 57).

⁸⁸ On the relationship between bad faith and the scapegoat phenomenon, see René Girard, *Le bouc émissaire* (Paris: Librairie Générale de France, 1989), p. 179.

to recognise the weightiness of the constraints they may run up against, we can nevertheless state that there exists an individual, and irreducible, dimension that plays a non-negligible role in the organisation of community life. That a statesman responds for his acts does not require that he be freed of all constraints but rests, rather, simply on the choices he makes among several possibilities within a determinate environment.⁸⁹ Thus, when a ruler allows himself to be placed within the perspective of legitimacy, he cannot in principle escape his responsibilities. In seeking not to pay the price imposed by the logic of the right to govern, and in yielding to the temptation to make excuses for himself and to grant himself impunity, he sets himself upon the road to illegitimacy.

This is all the more clear when a governor takes responsibility or shuns it according to the advantages he hopes to draw from one or the other position. For, such behaviour is inconsistent and ultimately irresponsible. A moment arrives when the political cost of his opportunism and demagoguery becomes higher than that of accepting responsibility, in success as well as in adversity. Systematic recourse to expedients, the search for immediate benefit, and political scheming endanger society's present as well as its future. After all, such behaviour tends to encourage feelings of disaffection from political institutions on the part of the members of the community.

In this regard, it is clear that the governors' sense of responsibility does not work without a comparable sense on the part of the governed. Legitimacy signifies that rulers and ruled are responsible to each other, before each other.⁹⁰ This is true to such an extent that in a society where those who govern indulge in an egotistical and complacent use of power, the responsibility of the individuals who make up the group becomes of essential importance. Such responsibility consists in the evaluation of governmental action and in the defence, within the limits imposed by the identity of society and by its relations of forces, of what they consider to be their rights and their freedom. And from this standpoint, the governed have to assume their duties towards the governors only to the extent that the latter assume theirs.

In carefully watching over the relationship of reciprocity that exists between political institutions and the community, and in avoiding all the while the temptation to attribute to the rulers more power than they have, each one of the governed looks with as much care after his own fate as after that of the other members of society. In the end, he contributes to the preservation of the entire group.⁹¹ The duty of each one of the governed is therefore to remind the governors constantly of their duty.

⁸⁹ This is quite obviously not specific to political action and holds for every kind of activity.

⁹⁰ See Bourricaud, *Esquisse d'une théorie de l'autorité*, p. 443.

⁹¹ See Walzer, *Obligations*, pp. 22–23.

As we have seen, the unequal distribution of political power can be justified only thanks to the office of service rulers assume in relation to society. This office, whose content is determined by the ends and the rules a community gives to itself, implies that, far from being unconditional, political sovereignty has limits. The rulers do not benefit from any status of impunity. The evaluation of political institutions pertains therefore to the problematic of legitimacy, and it raises the question of political judgement.

Legitimacy and political judgement

The notion of judgement has a bad reputation within the scientific world in general and in the world of the social sciences in particular. But as legitimacy is indissociable from the responsibility of political institutions, this notion is an unavoidable one. It prompts one to examine the process by which one evaluates, in connection with the relationship of reciprocity between the established power and society, the rulers' activities, and then to analyse how this process is inscribed within an enquiry as to the rightful foundation of the relationship between the governors and the governed. Finally, the notion of judgement leads one to underscore the importance the status of individuals takes on within the group.

Political reciprocity is always accompanied by an evaluation of the activity of the rulers. The issue at stake in this evaluation is to gauge the claim to right that political command possesses. The result is a judgement, an essential one, that seals the fate of obligation. If the evaluation is positive, obligation is guaranteed. On the other hand, if it is negative, it is expressed, when the occasion presents itself, via attempts on the part of the members of the group either to supply modifications to the details or to make radical changes in the ways society is coordinated and directed.

The process of evaluation and judgement of governmental action has two components. The first concerns the mechanism of evaluation itself. The second is tied to the status of the individual who makes the evaluation.

To evaluate the role of the rulers from the standpoint of legitimacy is to ask oneself whether that role can be characterised by a *de jure* relationship, and therefore whether it is grounded. The appraisal and judgement of political institutions together constitute an enquiry into the rightful foundation of the relation between the governors and the governed. This enquiry includes three complementary levels.⁹²

⁹² We are inspired here, in part, by Gilles Deleuze's analyses of the notion of *grounding* in *Difference and Repetition* (London: Athlone Press, 1994), pp. 272–74.

The first of these levels involves asking oneself what the essential principles are that serve as founding values and that determine at once the origin and the horizon of signification and validity to which political reality has to conform in order to be legitimate. Indeed, in order to be justified, the organisation of the community as it is put into effect by the political authorities has to be in agreement with the originary principles and partake of and aid in the realisation of the qualities they affirm. This required agreement between founding values and political reality has a certain number of implications – including, in the first place, the fact that the fundamental principles render political representation possible. In playing the role of benchmarks, ones that indicate what the relationship between the governors and the governed has to be in order to be grounded, these principles in effect orient the decisions and the actions the rulers have to take in order to have a representational role.

The result is that the correspondence between values and political reality must not, in order to be the expression of legitimacy, be limited to a mere declaration of intention but must be, rather, a concrete defence and promotion of those values at the level of the organisation of the group. That is all the more the case as the originary values and the prescriptive dimension they express not only are not alien to the reality they legitimate but are, on the contrary, interpreted as the very essence of this reality and as its ideal manifestation, that is to say, that towards which it tends. That is why, for instance, the principles of liberty, equality, and fraternity, which are constitutive of the French political identity, cannot be normative without being, to a certain extent, descriptive. If liberty, equality, and fraternity are values that must be defended and promoted, if they are duties that each person owes to himself and to others and that democratic institutions owe to the governed, that is because they are recognised as rights that, as such, correspond to the ‘being’ of the French citizen. In short, the originary principles allow a person to form for himself an idea both of what reality is and of what it has to be.

The second level of the mechanism of evaluation consists in the effort to relate political reality to the originary principles and to examine whether, in its multiple manifestations, it can be inscribed and, by way of consequence, comprehended within the categories that serve to define those principles. In other words, it is the search for an analogy or a kinship between political reality and the values that are supposed to regulate that reality. Whereas the first aspect of this evaluation bears on what political institutions are to be and what they are to do, having made allowance for the founding principles, here the attention is concentrated on concrete political reality. What exactly do the rulers do? Up to what point are they achieving the values that constitute the horizon of signification and

validity of the society within which they decide and act? This connection is crucial, since it leads to the ultimate level of the process of evaluation, namely judgement.

Indeed, the first two levels of the mechanism of evaluation combine in a third: political judgement. After the affirmation of the need for some conformity between the fundamental principles and the political field, and the comparison of values with concrete reality, which gauges whether political diversity is really integrated into the framework afforded by these values, the act of judging finally becomes possible.

Judgement is the culminating point for this evaluation procedure. It is the faculty whereby one states whether a political situation is legitimate or illegitimate. Establishing distinctions and hierarchies, it takes a stand concerning the degree to which the principles are fulfilled in reality. If there exists a credible analogy between political reality and originary values, there is legitimacy. If that is not the case, a negative judgement is pronounced that the institutions in question are illegitimate. Nonetheless, while we have a satisfactory understanding of the way in which judgement results from the act of relating principles to reality, it is important not to neglect the importance of the status of the individual in this process of evaluation.

In fact, the judgement expressed by the governed concerning the rulers' legitimacy cannot be dissociated from the status they occupy within a given society: it is in gauging the benefits that correspond to their status and in considering the way in which those who govern discharge their responsibility towards them that the members of a group judge the rulers' role. In so far as political institutions carry out their function to the satisfaction of each person or social category, those institutions are regarded favourably. In the opposite case, institutions are criticised and conflicts may arise. If no area of understanding is to be found, blocs of frustration form. The consequences for the stability and the legitimacy of the regime depend upon the breadth of frustration and upon the confrontations that ensue.

Judgement concerning the exercise of political power is therefore the logical translation of one's conception of the power to command in terms of legitimacy. From this perspective, the right to govern is measured by the capacity of statesmen to show that their stature attains the heights of the values that ground their community. The legitimacy of those who govern depends upon their aptitude to assume those responsibilities that are considered to be incumbent upon them.