Legitimate Authority: Too Many Gaps for One Concept to Bridge?

Alessandro Ferrara (University of Rome Tor Vergata)

What is legitimate authority, as opposed to arbitrary power? I want to revisit this classical topic of political philosophy with a multiple agenda in mind. If you take Freedom House's 2018 annual report, out of the 195 independent countries and territories reviewed, 88 or 45% (accounting for 39% of the human population and down from the 90 countries and 46% figures of 2013) can be counted as democracies. The rest falls under various labels: partly free regimes (58 or 30%), un-free regimes (49 or 25%) and within them the “worst of the worst” – Syria, South Sudan, Eritrea, North Korea. Can the same concept of “legitimate authority” account for democratic and non-democratic contexts past and present? What does it mean for non-democratic authority to be legitimate, if we take legitimacy in a normative sense, other than the Weberian and realist sense of authority merely being reputed legitimate? Finally, can one and the same notion encompass legitimate authority within and beyond the state?

I will start from what I take to be the most promising normative approach to the legitimacy of authority on offer today: Rawls's liberal principle of legitimacy as discussed in Political Liberalism. Rawls's approach can be defended, better than other normative accounts of legitimacy, against the accusation of “moralism” raised by sophisticated political realists (Williams) and agonists (Mouffe, Connolly); it is more consonant than its closer competitors (Dworkin, Habermas) with our philosophical intuitions; it is impermeable to the Schmittian mantra of “the political” because it never succumbs to the Kelsenian-Habermasian fascination with proceduralism; and can be recast as a special case of a broader normative notion of legitimacy capable of bridging the divide between democratic and non-democratic, national and supra-national authority.

1. A sophisticated normative approach to legitimacy

Today's normative approaches have come a long way from the classical versions. A major breakthrough occurs when, with his paradigm of “political liberalism”, Rawls breaks the spell of two powerful myths. The first is Plato's simile of the cave, which for over 2 millennia has placed legitimacy under the aegis of a truth located outside politics, out of the cave. In Political Liberalism the autonomy of politics from morality, long affirmed by Machiavelli, is complemented with a non-skeptic autonomy of politics from such an epistocratic notion of legitimacy. The second is the Hobbesian myth, as it were, of having politics revolve around the question of survival, the

---

protection of bare life and the fear of violence. In *Political Liberalism* we find a reformulation of what Williams' called the “first political question” (“the securing of order, protection, safety, trust, and the conditions of cooperation”) which combines the Hobbesian benchmark question addressed to authority (“Have you protected my life? Have you ensured order?”) with the Lockean benchmark question (“Have you safeguarded me against oppression?”). In fact, the Rawlsian fundamental political question, which opens *Political Liberalism*, is: “how is it possible for there to exist over time a *just and stable* society of free and equal citizens, who remain profoundly divided by reasonable religious, philosophical, and moral doctrines?”.

This reformulation dissolves Hobbes' priority of stability over justice and Locke's priority of justice over stability, while avoiding the pitfall, denounced by Williams in his posthumous *In the Beginning Was the Deed*, of forfeiting the autonomy of politics to epistocracy and moralism. Furthermore, Rawls's reformulation of the first political question responds to our late-modern context in two ways. First, the normative credentials of “justice as fairness” no longer depend on a foundational scheme, on its “being true to an order antecedent to and given to us”, be it a discursive or a more traditional transcendental principle, but rest on its being the political conception of justice “most reasonable for us”, given “its congruence with our deeper understanding of ourselves”. Second, legitimate authority is defined by the principle of liberal legitimacy: “our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason”.

This definition of legitimate authority prompts a doctrinal, so to speak, and a contextual comment. As to the doctrinal comment, Rawls's formulation speaks to us through what it does not say. The phrase “in accordance with a constitution” stands over against alternative formulations used in the past and still on offer in various places: for example, against the idea that political authority acts legitimately when it acts “in accordance with the will of the majority as expressed in the latest elections”, or “in accordance with what the public wishes, as attested by reliable polls”, or “in accordance with our political tradition”, or “in accordance with the Bible, the Qur’ân, or any other sacred text”. Furthermore, Rawls' formula requires that the constitution be endorsed, at least in its essential elements, by all the citizens as free and equal. Finally, the citizens’ endorsement of the constitutional essentials must proceed from principles and ideals acceptable to their common

---


5 Rawls, *Political Liberalism*, 137.
human reason. Consent must be based on considerations of justice as opposed to considerations of prudence, such as the fear of the consequences of refusing to consent. A constitution accepted out of preoccupation for the political consequences of conflict can at best legitimate a modus vivendi, perhaps a Hobbesian stable society, but cannot legitimize the authority structure of a “stable and just” society.

Concerning the contextual comment, Rawls's formula responds to adverse historical conditions for democracy typical of the 20th century: the immense extension of the electorates, which encourages “rational ignorance”; the institutional complexity of contemporary societies, which negatively affects the accountability of authority; the increasing pluralism of contemporary publics; the anonymous quality of the communication processes whereby public opinion is formed. Drawing on Ackerman’s “democratic dualism”, never truly metabolized by the competing Habermasian paradigm articulated in Between Facts and Norms, Rawls revisits the received standard of the “consent of the governed”. The standard should no longer be interpreted as requiring citizens to endorse all details of the legislative, executive and judicial activity of democratic institutions. We must settle today for a less demanding criterion that exempts single outcomes of such activity from direct justification: there will always be groups of citizens for whom some verdict, statute, or decree is unjust and coercive. And yet the consent of the governed remains the lodestar for assessing the legitimate exercise of democratic authority when properly reformulated as a judgment passed on the “constitutional essentials” with which all of the ordinary legislative, judicial and executive acts must simply be consistent. To recap, Rawls' principle of legitimacy represents the best understanding of the nature and limits of legitimate authority in a liberal-democratic polity.

Williams', Mouffe's and the political realist or agonist critics of “moralism” entirely miss their target with Rawls, mostly because they read him in the light of A Theory of Justice and not of Political Liberalism, and I leave their objections to be answered by those who believe in transcendental principles or in the idealized presuppositions of discourse. But Williams raises two quite relevant challenges that any normative conception of legitimacy must consider.

First, normative theories should account for how they could possibly convince also the non-liberal publics present in complex societies. Second, normative theories should embed differentiated accounts of legitimacy for modern and non-modern, democratic and non-democratic structures of authority. Only on the basis of a dubious philosophy of history could we imagine that human populations have lived in the throes of arbitrary power for millennia before liberalism arrived on the

scene. Normative theories should then account for what makes authority normatively legitimate in non-liberal polities.

2. Political justification for all the citizens

In response to the first challenge I suggest to expand Rawls' paradigm at four specific junctures. My first point is that to restrict political justification to the reasonable citizens alone paves the way to “liberal oppression”. We need to take up the challenge of making the partially reasonable citizens fully reasonable, and to this end we might want to complement public reason with conjectural arguments (confined by Rawls to a peripheral role) that offer to citizens who endorse partially reasonable conceptions internal reasons for accepting the burdens of judgment and the constitutional essentials.

Second, because there is no guarantee that conjectural arguments, given their hermeneutic nature, will deliver the desired result we need a Plan B for those cases when not all the citizens endorse the constitutional essentials “in the light of principles and ideals”. Applying domestically one important insight of The Law of Peoples, where the world looks like a multivariate political entity based on a mix of principled and prudential considerations, when conjectural arguments fail, we can still fall back on the idea of a multivariate polity, where some citizens embrace all the constitutional essentials in the light of principles rooted in their comprehensive moral conceptions (as in the standard version), while other citizens embrace some constitutional essentials in the light of principles and others out of prudence, and a third group of citizens embraces all of the constitutional essentials out of prudence. The legitimation of authority then follows a differentiated pattern, but still remains true to the mandate of protecting all citizens from oppression, defined as having to obey norms resting on principles one cannot endorse.

Third, political liberalism can benefit from developing the notion of the democratic ethos inherent in it. The most insidious competitor of democracy on today's world scene is not secular dictatorship or authoritarian theocratic rule: both are easy to recognize. The most insidious competitor is “elective oligarchy”, a type of regime which can camouflage itself under the guise of elections and a perfunctory pluralism and freedom of the press. The best way to sort out these two forms of political rule is by reference not so much to procedure and rules – always at risk of being paid lip service to while being actually enervated – as to the public ethos that undergirds the operation of institutions. Now, since the time of Montesquieu and Rousseau the democratic ethos

---

7 For a position that entails this risk, see for example J.Quong, Liberalism Without Perfection (Oxford: Oxford University Press, 2011), 5.
9 For an extended version of this argument see A.Ferrara, The Democratic Horizon, 88-108.
has been the object of investigation and those two centuries of discussion have left a sediment in the guise of a list of democratic virtues that are integral to the democratic ethos, including a) an orientation towards the common good, b) a passion for equality, c) a passion for individuality, and d) the virtues of toleration, reasonableness, and civility emphasized by Rawls. That list urgently needs to be updated in the face of new inauspicious conditions confronting democracy in a global world where disembedded financial markets have come to exert a sort of renewed “absolute power” and where domestic hyperpluralism has brought significant segments of the citizenry to relate “prudentially” to some constitutional essentials (e.g., gender equality, freedom of conscience, the consequent ban on apostasy, etc.): a debate has been underway and the virtue of “openness” – understood as the quality of a public culture oriented towards accepting unconventional solutions and motivated by an attitude of receptiveness to novelty, of exploration of new possibilities for a life form or a social configuration – seems to be an ideal candidate for enriching our notion of the democratic ethos. Openness somehow addresses concerns for which other authors in recent years have suggested other democratic virtues, such as *agape*, *hospitality*, and *presumptive generosity*.

Finally, one of the problems with understanding democratic legitimacy as related not just to rules and procedures, but also to the ethos of citizens is that the democratic ethos has thus far been reconstructed along Western-centric lines – an unfortunate predicament which needs to be thrust at the center of a reflection on political liberalism. Then a *fourth* suggestion for expanding the framework of political liberalism, inspired by the studies on the Axial Age and on ‘multiple modernities’, leads to investigating whether democratic cultures anchored in different civilizational contexts may generate *multiple versions* of the ‘just and stable society of free and equal citizens’ at the center of political liberalism. In fact, an expanded version of political liberalism might want to keep the ‘democratization’ and ‘westernization’ of decent societies as separate as the research program of ‘multiple modernities’ has taught us to separate the ‘modernization’ and ‘westernization’ of traditional societies (conflated in one and the same notion by the ideological theories of modernization of the 1960’s).

---

10 For a more detailed discussion of openness and the democratic ethos, see A.Ferrara, *The Democratic Horizon*, 44-66.
11 Charles Taylor has suggested *agape* as an ethos revolving around the theistic intuition of a ‘divine affirmation of the human, more total than humans can ever attain’, see Charles Taylor, *Sources of the Self. The Making of the Modern Identity* (Cambridge, MA: Harvard University Press, 1989), 521. According to Taylor, however, the original meaning of agape needs to be properly recovered if an ethos inspired by it is to exert some influence on today’s democratic societies. As it is the case with Taylor’s *agape*, also Derrida’s ‘absolute’ or ‘unconditional’ *hospitality* is predicated against the idea of a philosophical ethics based on a principle or law and the subject’s ability to apply it. See J.Derrida, *Of Hospitality. Anne Dufournantelle invites Jacques Derrida to Respond*, (Stanford: Stanford University Press, 2000), 83. *Presumptive generosity*, rooted in the weak-ontological figure of foreknowledge of mortality, is meant by S.K. White as a virtue of limited scope and duration. See S.K. White, *The Ethos of a Late-Modern Citizen* (Cambridge, MA: Harvard University Press, 2009), 107.
This way of proceeding expands the Rawlsian program from being the narrative of the transition to liberal-democracy of some mainly Protestant polities where the echo of the religious wars of 17th century Europe still is audible, to constituting the framework in terms of which we can understand the transition to democracy of any society.

To offer one example of how this investigation could be pursued, in *The Democratic Horizon* I have distinguished four ideal types of democratic ethos by bracketing the many points of convergence, among the major historical religions, concerning the priority of the common good, the acceptance of pluralism, the desirability of collegial deliberation, the equality of citizens, the value of individuality and focus instead on two important points of dissonance: a) the idea of the priority of rights over duties and b) the role of political conflict within a democratic polity.

The idea of a priority of subjective rights, qua prerogatives of the single individual against authority and potentially against the whole political community, over duties runs against the grain of religious approaches to communal life. This is true of a Muslim perception of the Western “rights-discourse” but it applies to many other religious cultures. Rights are invoked as a restorative concept after harm has been inflicted or a tort perpetrated. What remains difficult to metabolize is the idea of rights “in general”, as an unconditional prerogative of individuals before they become victims deserving compensation. The point is that such views are well represented also within Western culture. In the wake of the French Revolution, Edmund Burke and Joseph De Maistre reacted with repulsion to the “abstractness” of the rights of man as such and to the priority of rights over duty. Hegel too argued that the modern ethical life is traversed by a tragic tension between the “abstract” morality of the Kantian subject and the thick values embedded in the “Sittlichkeit”, i.e. in practices which contribute to the cohesion of the social fabric and embed a concrete, situated, “rational” normativity of their own. This emphasis on duties over rights can be found also in contemporary Western philosophy: some examples are a) Taylor's articulation of a notion of “duty to society”, of which the liberal “rights-discourse” becomes entirely forgetful, b) Böckenförde's preoccupation with the seemingly parasitic relation between liberal institutions and pre-liberal reservoirs, and c) the feminist opposition of an ethics of care versus one centered on rights. However, the most decisive evidence against understanding the priority of rights over duties as indicative of a dividing line between the West and the rest of the world comes from the very mainstream of Anglo-American moral philosophy – i.e., from utilitarianism. The formulations

---

of Jeremy Bentham and John Stuart Mill leave no doubt as to the fact that rights possess no normative cogency independently of their “social utility”. Even the 20th century distinction of “act” vs. “rule” utilitarianism, and “preference” utilitarianism, did not modify the picture. For all the philosophical effort gone into demonstrating that utilitarianism can accommodate rights, still the crucial assumption is that rights are planets that can only reflect a light coming from the star of social utility.

The other point of friction concerns the role of contestation within democratic life. Rights-centered democracies expand and institutionalize an insight that dates back to Machiavelli’s reflections on the positive role of the conflict between nobility and common people in the Roman republic. A confrontation of contending interests and values in the public arena is understood as a sign of a healthy democratic life and as leading to a better articulation of points of view, a better public choice and to the selection of a more efficacious leadership. When it functions within a duty-centered political culture, democracy has to meet the challenge of an ethos which is much more wary of the “disharmony” implicit in conflict, much more suspicious of the divisive potential unleashed by a plurality of organizations, parties, associations, newspapers, media. Political cultures nurtured within Catholic, Muslim, Confucian, Buddhist, Hindu religious backgrounds, and their secularized successors, even when they do prize pluralism, majority rule, the separation of powers, nonetheless do so with an instinctive aversion to conflict and contestation, to voting and coalition forming. The fear of divisions and conflict often paralizes the democratic institutions implanted in these cultures. Thus we can have consociationalist democratic cultures and democratic cultures that incline towards agonism.

Provisionally, then, the pluralization of the democratic ethos must start from construing four versions of it. The classical path, taken as canonical by reductive theories of democratization, combines an agonistic and rights-centered understanding of the democratic process and is most resonant with the Protestant and especially Puritan version of Christianity. However, agonism and the valuing of contestation could be combined with a duty-centered political culture, which emphasizes the social and political mediation of conflict over juridified litigation premised on the

---

17 Machiavelli, Discourses on Livy, Book 1, Ch. 2.
18 The idea of agonistic confrontation implicit in contemporary democratic views incorporates Simmel's view of conflict as not the opposite of social cohesion but as one of the forms of social cohesion. See Georg Simmel, “Conflict” (1908), in Conflict and the Web of Group Affiliations, transl. by R. Bendix (Glencoe: Free Press, 1964), 13-20.
19 Consociationalism is usually identified through the concurrence of features such as the presence of a “Grand coalition” ruling the country, of practice of mutually recognizing veto power among the major parties, strong proportionality in appointing people who belong to parties and factions to office and prominent positions, presence of locally autonomous government institutions.
“rights-discourse”. This combination can be observed in all forms of strong republicanism, endorsed by Machiavelli and Arendt, such as Athens and the Roman republic in ancient times, Harrington's Venice and Machiavelli's Florence before 1512, the Puritan republic of Cromwell, and in modern times is difficult to find except in transient stages of history such as the Paris Commune, the Kronstadt uprising, and the Spanish Republic at the time of the Civil War of 1936-39.

On the consociationalist side of the spectrum, “pure consensualist” democratic cultures combine aversion to conflict and a propensity for the centrality of duties over rights, as the case might be with the Islamic retributive and restorative understanding of rights, with the Confucian emphasis on harmony and with Buddhism: examples could be here the Malaysian form of democracy, and Taiwan's Buddhist-Thaoist culture. This could also be a possible avenue for a future Chinese Confucian democracy. On the other hand, democratic regimes exist, especially in Continental Europe, that formally endorse and prize the priority of rights but do so with a consociationalist bent and a strong aversion to democratic contestation: examples are Italy's formerly Christian-Democratic-dominated polity, pluriconfessional polities such as Belgium and Switzerland, and Germany's practice of “concertation” perhaps also belongs in this area.20

3. How is non-democratic legitimate authority possible?

Williams' second challenge concerns legitimate but non-democratic authority. Are the citizens of the states not counted among the 88 democracies credentialed by Freedom House in the throes of arbitrary power? How to distinguish those who indeed are in such predicament and those who instead are ruled by legitimate yet non-democratic authorities? Can we draw that distinction without falling prey to the realist conflation of legitimacy and belief in legitimacy?

One way of approaching the problem is by drawing on Rawls's notion of “decent societies”.21 It would be inconsistent to assume that the authorities ruling decent societies are entitled to make their countries co-signatories of the 8 principles of the Society of Peoples and at the same time are acting beyond the bounds of legitimacy. This strategy, however, leaves indeterminate the internal criterion by which a non-democratic society can assess the legitimacy of authority. In order to specify that we need to go back, once again, to Rawls's concept of legitimacy and rethink it as a special principle of legitimacy, applicable only to contemporary liberal societies. For all other societies, I suggest to amend it at three junctures.

20 Other interesting examples are half-way or semiconsociationalist cases such as Canada and Israel. See A. Lijphart, Democracy in Plural Societies. A Comparative Exploration (New Haven: Yale University Press, 1977), 119-33.
First, the central notion of a constitution can be understood as referring to the central institutional complex (Plato's and Aristotle's “politeia”) and its underlying principles, customary or codified.

Second, the requirement that “all” citizens as “free and equal” should be “reasonably expected” to endorse the essentials of the politeia must be modified when considering non-liberal polities. The legitimacy of authority need not be an all-or-none concept, but may admit of degrees. Citizens of a non-democratic polity may accept various kinds of inequalities connected with religious faith, gender, race, ethnicity, sexual orientation out of reasons of principle rooted in their comprehensive conceptions. This predicament makes the authorities that operate within that constitution non-democratic, but not illegitimate. On what basis? On the basis of their exercising power in accordance with principles embedded in the constitution and reflecting a more or less “non-egalitarian” conception of justice “most reasonable” not for us, but for all those included (as rulers or subjects) within the authority system. This view of legitimate non-democratic authority embeds a situated, non-perfectionist understanding of normativity: we liberal-democrats do not share the idea of justice, largely comprehensive and not political, that underlies their institutions but acknowledge, based on their accounts, that it is pro tempore “the most reasonable for them”, not just “what they believe to be reasonable”, and that structures of authority responding to it are locally legitimate not just in a de facto sense. We can freely voice our dissent, point to the discrepancy of such conceptions and the rights included in the Universal Declaration signed by many of these non-democratic polities, we can even use our political and economic leverage to create incentives for change, we can actively support the sectors of their citizenry who advocate democracy, but we cannot regard their structure of authority as on a par with a band of usurpers exercising arbitrary power. These considerations apply also to the peoples who are under “benevolent absolutism”.

Third, the basis for endorsing the essentials of the country's constitution-as-politeia can be expanded from “principled motivations alone” to a mix of principled and prudential motivations. This modification of Rawls's principle allows then for a range of degrees of legitimacy attributable to existent authority, without falling into the realist view (the view of justice reconstructed must still be “most reasonable for them”, not just believed to be reasonable) or into a liberal-centric normativism. The limit-case of constitutional essentials entirely endorsed by everyone solely on prudential grounds marks the extreme hypothetical case when authority borders on arbitrary power and is not fully legitimate.

Fin qui ****************************

4. Authority beyond the State
Finally, we need to address the problem of defining the legitimacy of authority beyond State borders, namely the legitimacy of supra-national authority of regional scope (such as that of the European Commission, Council, or Parliament) or of global scope (such as that of the Security Council of the UN, or of the WTO, or the ICC). Here we stumble upon another complication. Whereas authority within the State proceeds from government, authority beyond the State proceeds from governance. Because governance has notoriously been defined in dozens different, and sometimes conflicting, ways, because it seems to lack a negative counterpart, because it is used indifferently in the public forum and in relation to the management of private enterprises, influential authors have drawn the wrong conclusion that it is an empty signifier good for all seasons. This strikes me as a dubious move, because conceptual vagueness mostly reflects the ability of the defining subject and little else, and also because the technocratic degeneration of most of today's governance processes by no means exempts us democratic theorists from the challenge of sorting out democratic and neoliberal technocratic governance. Both governmental and governance-type authority aim at coordinating the political action of individual or collective subjects, but governance agencies often cannot sanction non-compliance in the way governments do through the force of law. Their sanctions are indirect and consist of a diminished chance of succeeding in the task that motivated the attempt to coordinate action in the first place.

If the capacity to coordinate the participants’ actions in the case of governance does not rest on sanctions or ultimately on the legitimate use of force of which the State, in the classical Weberian formulation, retains the monopoly, on what does it rest? My suggestion is that it rests on a softer kind of monopoly: the monopoly on the attribution of legitimacy. The point of governance is that only the coordinating agency can legitimate the actions of the coordinated participants. But whence can governance agencies derive their legitimacy? Here the modified Rawlsian principle of legitimacy proves fruitful again. Drawing on its underlying intuition, the first and tentative answer is that supranational structures of governance – which steer the interaction of a plurality of actors through soft law, the open method of coordination, best practices, benchmarking and moral suasion – are legitimate if and only if a) they are consistent with “constitutional essentials” which meet with the consent of free and equal citizens and b) some recognizable form of accountability remains in place. As in the case of non-democratic legitimate authority, the constitutional essentials may be ingredients of a politeia and not a formal document called the Constitution – and the EU certainly has a constitution in that sense, as J.Weiler has shown.22 Also the world has a constitutional core represented by the UNDHR and the Charter of the UN, and possibly much broader than that.

Second, democratic governance must be responsive to a political conception of justice “most reasonable” for all those included in the process, and third, like in the case of non-democratic legitimate authority, consent may proceed from prudence as well as from principled reasons. If these conditions are met, then no democratic deficit is involved in the fact that, at a supra-national level, action is coordinated via governance and not government – and we have a tentative criterion for sorting out technocratic neoliberal governance and democratic governance.

5. Conclusion

To conclude, Rawls's principle of liberal legitimacy draws the proper limits of democratic authority: authorities operating beyond the bounds of the constitutional essentials lose their legitimacy, despite the plebiscitary consensus that may temporarily bless their action.

The challenge of distinguishing arbitrary power and legitimate non-democratic authority can be met by making the Rawlsian principle of legitimacy a special case. Non-democratic political authority is legitimate when it operates in accordance with the principles that shape the polity's central institutions and derive from the conception of justice most reasonable for all the participants in the system of authority. Alignment with such normative backdrop distinguishes legitimate authority and arbitrary power in contexts historically or geopolitically other than our own. Thus the local limits to the exercise of authority are coextensive with the persistent alignment of governmental action with the view of justice. The same teaching is applied to supra-national governance.

Political liberalism so revisited can effectively counterattack “political realist” conceptions. By presupposing a Hobbesian priority of stability, political realists foreground the alignment of the authorities' conduct with the moral views of the powerful, more influential or majority sectors of the population. Instead, political liberalism offers a notion of legitimacy premised on the alignment of authority's conduct with the views not just of the more powerful, more influential or more numerous sectors but of each and every member of the society. Not in tracking transcendent principles, but in providing a non-ethnocentric critical edge and in its greater capacity for inclusion resides the appeal exerted by liberal-democracy on so many of those who don't live under democratic authority.

Finally, let me go back to the question in the title: too many gaps for the one and the same concept of legitimate authority to bridge? Based on all of the above considerations, my answer is: perhaps not.