

Patterns of Legitimacy – An Introduction

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Legitimacy is a basic condition for any form of authority and thus a fundamental concept throughout the social sciences.¹ It describes citizens' acceptance and/or normative acceptability of the exercise of sovereign power.² As legitimacy is the basis and prerequisite of all state action, it should be the cornerstone of public law. Nevertheless, the concept of legitimacy receives relatively little attention in legal sciences. Instead, public-law scholars are primarily concerned with legitimation – which is traditionally constructed in a normative way, particularly via legal ties, hierarchies and rights of control.

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- 1 M Zelditch, 'Theories of Legitimacy' in JT Jost/B Major (eds.), *The Psychology of Legitimacy* (Cambridge University Press, 2001) 33 ff.; U Schliesky, *Souveränität und Legitimität von Herrschaftsgewalt* (Mohr Siebeck, 2004) 151 ff.; C Johnson/TJ Dowd/C L Ridgeway, 'Legitimacy as a Social Process' (2006) 32 *Annual Review of Sociology* 53; T Herbst/S Zucca-Soest, 'Legitimität als Forschungsgegenstand' in T Herbst/S Zucca-Soest (eds.), *Legitimität des Staates* (Nomos, 2020) 11.
- 2 M Weber, *Economy and Society*, Vol. I (ed. by G Roth/C Wittich, University of California Press 1978) Chapter III, 212 ff.; F Scharpf, *Demokratietheorie zwischen Utopie und Anpassung* (Universitätsverlag Konstanz, 1970), 21 ff.; VA Schmidt, *Europe's Crisis of Legitimacy: Governing by Rules and Ruling by Numbers in Eurozone* (Oxford University Press, 2022) 26.

I. Legitimacy Concepts

There are various understandings and patterns of legitimacy. In particular, a distinction must be drawn between normative and empirical understandings of legitimacy.³ In political sciences, normative legitimacy is also referred to as prescriptive,⁴ and empirical legitimacy as descriptive.⁵ Legitimacy in the normative or prescriptive sense, on the one hand, describes the extent to which an authority is worthy of recognition and acceptance on the basis of its compliance with procedural and substantive principles such as transparency, accountability, equity, human rights and democratic legitimation.⁶ Empirical/descriptive concepts of legitimacy, on the other hand, refer to the empirically measurable perceptions of those affected as to whether the authority of an institution is exercised in an appropriate manner.⁷ In sociology, in particular, the terms “acceptance” and “legitimacy” are sometimes even used synonymously.⁸ Naturally, normative and empirical legitimacy are interrelated, as the empirical inner basic acceptance of an authority is dependent on normative elements.⁹

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- 3 JHH Weiler, ‘In the Face of Crisis – Input Legitimacy, Output Legitimacy and the Political Messianism of European Integration’ (2013) 1 *Peking University Transnational Law Review* 292, 294 f.
 - 4 M Zelditch, ‘Theories of Legitimacy’ in JT Jost/B Major (eds.), *The Psychology of Legitimacy* (Cambridge University Press, 2001) 33, 47; T Herbst/S Zucca-Soest, ‘Legitimität als Forschungsgegenstand’ in T Herbst/S Zucca-Soest (eds.), *Legitimität des Staates* (Nomos, 2020) 11, 12.
 - 5 U Schliesky, *Souveränität und Legitimität von Herrschaftsgewalt* (Mohr Siebeck, 2004) 151; T Herbst/S Zucca-Soest, ‘Legitimität als Forschungsgegenstand’ in T Herbst/S Zucca-Soest (eds.), *Legitimität des Staates* (Nomos, 2020) 11, 12.
 - 6 M Zelditch, ‘Theories of Legitimacy’ in JT Jost/B Major (eds.), *The Psychology of Legitimacy* (Cambridge University Press, 2001) 33; J Habermas, ‘Zur Legitimation durch Menschenrechte’ in Habermas (ed.), *Die postnationale Konstellation und die Zukunft der Demokratie* (Suhrkamp, 1998) 170 ff.; S Bredt, *Die demokratische Legitimation unabhängiger Institutionen* (Mohr Siebeck, 2006) 40; N Petersen, ‘Demokratie und Grundgesetz’ (2010) 58 *Jahrbuch des öffentlichen Rechts der Gegenwart* 137, 142; B Peters, *Legitimation durch Öffentlichkeitsbeteiligung?* (Mohr Siebeck, 2020) 143 ff.
 - 7 J Tallberg/M Zürn, ‘The legitimacy and legitimation of international of international organizations: introduction and framework’ (2019) 14 *The Review of International Organizations* 581, 583.
 - 8 D Lucke, *Akzeptanz: Legitimität in der ‘Abstimmungsgesellschaft’* (Springer, 1995) 75 ff., 401 ff.; D Lucke, ‘Legitimation durch Akzeptanz’ (1996) 17 *Zeitschrift für Rechtssoziologie* 221 ff.
 - 9 For a political-science perspective, see M Zürn, *A Theory of Global Governance* (Oxford University Press, 2018) 62 ff. For a legal perspective, see U Schliesky, *Souveränität*

Furthermore, a distinction can be drawn between procedural and substantial legitimacy. Procedural legitimacy requires due processes, which in democratic systems involves rules that ensure formal legitimation that guarantees the sovereignty of the people. Substantial legitimation, in turn, refers to material concepts of justice and in liberal societies especially encompasses fundamental and human rights.¹⁰

The distinction between procedural and substantial legitimacy is also linked to the differentiation between input and output legitimacy introduced by *Fritz Scharpf*.¹¹ Input legitimacy refers to the notion that decisions by authorities are legitimate if they reflect the preferences and interests of those concerned, which can be promoted by democratic processes, such as elections, representation and public participation (government *by* the people). Output legitimacy, in turn, refers to the effectiveness and efficiency of an authority's action in addressing the needs of the citizenry and improving public welfare (government *for* the people). However, output legitimacy and substantial legitimacy are distinct. Especially in complex regulatory contexts, there is usually not only one substantially legitimate solution. Rather, output legitimacy relies on procedural rules that promote rationality. Furthermore, substantial legitimacy can be constructed purely normatively, whereas output legitimacy points to empirical findings.

II. Research Potential of Legitimacy for Legal Sciences

The potential of the concept of legitimacy in public law is only reluctantly recognized.¹² For the legal sciences, the empirical concept of legitimacy can only be operationalised to a limited extent, as system acceptance is difficult to measure, fluid, and relative in nature, whereas norms are dependent on

und Legitimität von Herrschaftsgewalt (Mohr Siebeck, 2004) 150 f., 162; B Peters, *Legitimation durch Öffentlichkeitsbeteiligung?* (Mohr Siebeck, 2020) 143.

10 J Habermas, in Habermas, *Die postnationale Konstellation und die Zukunft der Demokratie* (Suhrkamp, 1998), 170, 173.

11 F Scharpf, *Demokratietheorie zwischen Utopie und Anpassung* (Universitätsverlag Konstanz, 1970) 21 ff.; F Scharpf, *Democratic Legitimacy und Conditions of Regulatory Competition*, in F Scharpf (ed.). *Community and Autonomy* (Campus Verlag, 2010) 173, 176.

12 M Ruffert, 'Comparative Perspectives of Administrative Legitimacy' in M Ruffert (ed.), *Legitimacy in European Administrative Law: Reform and Reconstruction* (Europa Law Publishing, 2011) 353 ff.

permanence and absolute validity.¹³ Therefore, at first glance, the normative concept of legitimacy seems more promising in legal sciences.¹⁴ A purely normative concept of legitimacy, however, can – from a positivist perspective – hardly be distinguished from the principle of legality.¹⁵ Therefore, the far greater innovative potential lies in a combined understanding of legitimacy that comprises both normative and empirical elements. Of course, empirical legitimacy must not be traded off against legality. In particular, fundamental normative principles may not be eroded in favour of supposed output legitimacy.¹⁶ However, openness to empirical findings can provide legal sciences with food for thought.

Declining acceptance with a form of governance can, for instance, reveal that the respective normative construction to ensure legitimacy needs reform in view of a changing social context.¹⁷ Blind spots in the law – such as de facto power shifts and power imbalances – can thereby be revealed and made analysable for legal discourse. In this respect, a legal engagement with a legitimacy concept that is based on normative as well as empirical considerations opens up an innovative, interdisciplinary research field to current challenges for democracy. Unlike legitimation, legitimacy then not only refers to written norms and a normative set of formal rules of how things should be, but also directly involves social reality through the aspect of general acceptance by the people. Legitimacy is a fluid concept that is context-related and context-dependent.¹⁸ It is a flexible concept that can be adapted to different constitutional settings at the national level as well as to organisations beyond the nation-state.¹⁹ In addition, legitimacy can be

13 N Petersen 'Demokratie und Grundgesetz' (2010) 58 *Jahrbuch des öffentlichen Rechts der Gegenwart* 137, 143.

14 Cf. C Moellers, *The Three Branches* (Oxford University Press, 2013) 53.

15 F Müller, *Demokratie in der Defensive* (Duncker & Humblot, 2001) 61f.; for a discussion, see M Hailbronner, in this volume. See also A Somek, 'Legalität heute: Variationen über ein Thema von Max Weber' (2008) 47 *Der Staat* 428, 430 ff.

16 Cf. A Somek, *The Cosmopolitan Constitution* (Oxford University Press, 2014), 222 ff.

17 Cf. J H H Weiler, 'In the Face of Crisis – Input Legitimacy, Output Legitimacy and the Political Messianism of European Integration' (2013) 1 *Peking University Transnational Law Review* 292, 294. See also the contribution of G Schwan, in this volume.

18 See, from a historical perspective, T Würtenberger, *Die Legitimität staatlicher Herrschaft* (Duncker & Humblot, 1973) 300.

19 See the contributions of M Kotzur and B Peters, in this volume.

built on the basis of various sources.²⁰ In particular, it can incorporate both procedural and material concepts of justice and is open to different forms of government as well as different understandings of democracy.²¹ This makes it easier to compare different social systems using the concept of legitimacy rather than the formal concept of legitimation, which is linked to specific constitutional settings.²²

III. Legitimacy and the Threat of Populism

The think piece by *Gesine Schwan* addresses current threats to democracy and traces them back to legitimacy problems of representative democracy. Modern democracies are facing a growing crisis of legitimacy, as citizens increasingly feel disconnected and disengaged from the political process. According to *Schwan*, this decline in trust is a result of several factors, including globalization, the rise of market-driven policies and the resurgence of right-wing extremism. These trends have led to the sense that democratic institutions are unresponsive to the needs of ordinary people and prioritize the interests of elites and corporations.

By empowering citizens and ensuring that their voices are heard, *Schwan* seeks to strengthen the bonds of democracy and safeguard its future in order to supplement representative legitimacy. She advocates the expansion of direct citizen participation in decision-making, particularly at the local level. This can be achieved through various mechanisms such as municipal development advisory councils, participatory budgeting initiatives, and neighbourhood assemblies. These mechanisms empower citizens to have a say in how their communities are governed, fostering a sense of ownership and engagement in the political process that generates trust in democratic institutions. In addition to direct citizen participation, *Schwan* sees multi-stakeholder involvement in decision-making as crucial to strengthen democratic legitimacy. Multi-stakeholder participation encourages diverse perspectives from various sectors of society, including civil society organ-

20 See, e.g., the three types of legitimacy of M Weber, *Economy and Society*, Vol. I (ed. by G Roth/C Wittich, University of California Press 1978) Chapter III, 215 ff.

21 M Ruffert, 'Comparative Perspectives of Administrative Legitimacy' in M Ruffert (ed.), *Legitimacy in European Administrative Law: Reform and Reconstruction* (Europa Law Publishing, 2011) 353, 356 ff.

22 M Ruffert, 'Comparative Perspectives of Administrative Legitimacy' in M Ruffert (ed.), *Legitimacy in European Administrative Law: Reform and Reconstruction* (Europa Law Publishing, 2011) 353.

isations, businesses and labour unions. By bringing together a wide range of voices, multi-stakeholder processes can promote transparency, accountability and a common-good orientation in governance.

IV. Legality as a Threat to Legitimacy? Vermeule's Conception of the Administrative State

Alexander Somek's contribution analyses the relationship between legitimacy, legality and rationality in the context of *Adrien Vermeule's* conception of the Administrative State. *Vermeule* is famous, amongst other things, for complementing the traditional US-American procedural concept of legitimacy with substantive elements related to the common good.

Vermeule argues that belief in legality, which is one of the types of legitimate rule identified by *Max Weber*, is not enough to ensure the legitimacy of administrative action. Instead, he emphasizes the importance of rationality, which in his view is the basis for the legitimacy of modern bureaucratic rule. *Vermeule's* work is based on the idea that legality and judicial review are legitimising factors, but can also create irrational obstacles to purposive bureaucratic action. Particularly with regard to legitimate second-order reasons such as legal certainty or administrative efficiency, *Vermeule* advocates a minimum judicial review of administrative authorities. *Somek* rightly points out how slippery this slope is, and that *Vermeule's* conception actually bases legitimacy of agencies on the basis of authority which – thought through to the end – may lead to autocracy.

V. Legitimacy of International and Supranational Organisations

Another pattern of the legitimacy discourse arises from discussions at the inter- and supranational level. *Markus Kotzur* explores legitimacy principles in global governance. Given the polycentric organisational structure of international law, as well as the fact that the international order is built not only by democracies, but also by other state forms, substantial concepts of legitimacy are only viable to a limited extent at the international level. Global administrative law focuses on developing a set of procedural standards that can be applied to a variety of governance regimes. It addresses the legitimacy of global governance by examining the procedural dimensions of decision-making processes such as transparency, participation and review.

It also draws on principles of domestic administrative law, such as rationality, proportionality and the rule of law, to ensure that global governance is fair, accountable and effective. *Kotzur* argues that global administrative law is more likely to be successful if it is based on a concept of ‘contested legitimacy’, which acknowledges that there is no single set of values that can be used to justify global governance. Instead, global administrative law must be based on a process of deliberation and negotiation among different stakeholders. This process of contestation shall ensure that international law is responsive to the needs and interests of diverse constituencies, thereby helping to develop a more legitimate and accountable global governance system.

Birgit Peters also follows this idea of legitimacy as an open and fluid concept in her analysis of the European Union’s administrative law, although material values also form an important part of the legitimacy construct at the European level. *Peters* describes legitimacy as a process in which the sources of legitimacy are living principles. While debates on legitimacy have accompanied the European Union from the very beginning, *Peters* perceives today’s discussions as less fundamental and more linked to specific problems, such as the refugee crisis or the current rule-of-law crisis. Meanwhile, the European Union’s primary law is solidly based on the principle of dual democratic representation, participatory democracy, as well as the guarantee of fundamental rights, and may thus serve basic normative concepts of legitimacy. Furthermore, the transparency principle, public participation and cooperative administrative decision-making form cornerstones of the legitimacy concept in the European Union’s administrative law. In addition, further legitimacy requirements – such as sustainability and access to justice – emerge sector-specifically, which *Peters* exemplifies with reference to state aid and environmental law.

VI. Legitimacy in Times of Crisis

Finally, legitimacy discourses change in times of crisis. *Anna-Bettina Kaiser* discusses the impact of the COVID-19 pandemic on the separation-of-powers system in Germany. She specifically questions the narrative that the pandemic led to an ‘executive unbound’ in the sense of *Carl Schmitt*. Although she recognises that serious legitimacy problems occurred in the fight against the pandemic, and that more detailed legislation would have been desirable at times, she demonstrates that parliaments at federal and

state level were far from inactive during the pandemic. On the contrary, they took a stand and assumed responsibility in various ways. The courts did not fail either. Although the pandemic has clearly shown the limits of the principle of proportionality for the protection of fundamental rights in times of emergency, courts made very differentiated and balanced judgments on the measures to combat the pandemic, for example by invoking the principle of equality. Finally, *Kaiser* advocates strengthening the administration at the lowest levels in order to increase the general resilience and legitimacy of government action in times of crisis.

Michaela Hailbronner explores the role of output-legitimacy and effectiveness arguments in constitutional theory in times of crisis. She argues that, while a common view is that in modern democracies legitimacy is legality, there is a need to consider effectiveness arguments in public law. Hailbronner explores three distinct forms of effectiveness arguments – implied powers, arguments from failure and emergency arguments – and their relationship with legal changes. To this end, she embeds a historical perspective on legitimacy and shows how it has evolved over time, from being linked to the monarch's claim and commitment to public welfare to being connected to legality. Nevertheless, the dangers resulting from effectiveness arguments are recognised. *Hailbronner* suggests a middle path that acknowledges effectiveness as an important public-law value, especially in emergency situations, while upholding legality.

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