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Glen Newey's Critique of Legitimacy. An Assessment

1. Introduction

At the beginning of *Real Legitimation, Anarchism and Power Loops*[1], Glen Newey clearly admits the provocative intent of the discussion that is going to follow: "the question I examine is how far legitimacy is destroyed by the use of force" (1). Given that force is a constitutive and ineliminable element of politics, Newey examines whether its use could be adequately disciplined by drawing clear boundaries between its admissible and inadmissible forms of use. The question, as Newey recognizes, is about the very possibility of offering a compelling theory of legitimacy. Are there any uses of force that we can deem legitimate, and hence acceptable, as opposed to illegitimate ones? Can we distinguish adequate forms of political relationships from inadequate – war-like – ones? The conclusion Newey draws is provocative and might sound unpleasant to all those who rely upon political theory to settle dilemmas of this kind:

> Justification cannot be what marks the distinction between politics and non-politics, because political life constantly and predictably calls into question, without definitively deciding, whether submitted justifications are indeed legitimating. The upshot is that force cannot, simply in the construction of politics, be subordinated to justification (2).

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[1] Published in this volume at pp. 1-19. From now on, all the references to Newey's *Real legitimation, anarchism and power loops* will be made by indicating exclusively the corresponding page numbers in this volume.

Newey's argument, then, challenges the idea that we can identify clear criteria to establish when force is legitimately employed and, correspondingly, to demarcate acceptable forms politics from mere warfare. Such a conclusion, Newey wants to argue, can be derived from a proper understanding of real politics and its dynamics – in fact, in Newey's own words, it is "force" that "destroys legitimacy".

Put in this way, the argument and its conclusion may leave some perplexed. In fact, the argument seems to rely on an unclear mixture of descriptive and normative elements. Newey's reference to the concept of legitimacy seems to oscillate between "legitimation" – meant as actual acceptance of the political authority – and "standards of legitimacy" – meant as normative criteria for the assessment of the acceptable uses of force. Moreover – as the above-mentioned thesis makes manifest – Newey identifies a strong relationship between these two senses of legitimacy (i.e. the descriptive and the normative one): the argument suggests that since politics affects the conditions upon which some justification can be the object of real legitimation (description), there is no way to identify stable criteria for defining legitimate political relationship from illegitimate ones, and hence of demarcating politics from war (normativity). In this sense, according to Newey, a theory of legitimacy can never achieve what it promises, namely providing us with stable criteria for discerning between admissible and inadmissible uses of force. Since politics redefines the conditions upon which a justification can be found legitimating, politics constantly interferes with theoretical definitions of the boundaries of legitimacy.

Admittedly, this argument works exclusively if we accept that some suitably defined descriptions of politics can ground political normativity – in the specific case considered, if we believe that actual or hypothetical conditions of legitimations have a role in determining the normative criteria for the legitimate use of force. But this is far from being obvious. So, should we interpret Newey's thesis about legitimacy as having just a partial, but also possibly controversial, validity?

In the following I examine the strength of Newey's general claim on legitimacy by clarifying how the interplay between facts and norms – i.e. between political reality and political normativity – should be interpreted, and what role it is supposed to play, in Newey's analysis.

In particular, my comment is structured in two main sections. In the first section I recall in a more detailed way Newey's argument in support of

his general conclusion, and I show that, despite its initial ambition, such an argument can counter only theories of legitimacy that consider actual or hypothetical legitimations as grounds of legitimacy. However, in the second section, I propose a new argument in support of Newey's general claim. In particular, I show that such a defence can build upon scattered suggestions already contained in Newey's discussion. For this reason, I argue that this second argument can be considered as a consistent elaboration of Newey's original project. I conclude by pointing out two further difficulties that Newey's project, if successful, is bound to face.

2. Newey's challenge I: How politics defeats legitimation

A major part of Newey's paper is devoted to a critical discussion of Bernard Williams's theorization of political legitimacy. This choice is certainly not coincidental: Williams's theorization of legitimacy is typically regarded as a realist account of political legitimacy which aims at overcoming the shortcomings of moralized accounts (Williams 2005; Sleat 2014). Hence, by critically engaging with Williams's attempt to define realist criteria for demarcating legitimate from illegitimate uses of force, Newey aims at making an indirect claim about political realism itself, about how its methods and consequences should be correctly understood. Indeed, since Newey's paper attempts to clarify how a proper understanding of political reality ought to affect our theorization of politics itself, Williams's proposal – which claims to give "a greater autonomy to distinctively political thought" (Williams 2005, 3) – constitutes the most useful target in order to emphasize how realist political theorizing ought to be conceived.

As Newey explains, Williams's theorization of legitimacy arises from what Williams sees as the fundamental trait of *political* relationships, namely their capacity to organize our collective lives by disciplining the use of force in a suitable way, in order to make it in some way acceptable to its subjects. Indeed, Williams claims that the first question politics is meant to answer is "the securing of order, protection, safety, trust, and the conditions of cooperation" (*Ibidem*, 3). In Williams's opinion, politics must be understood as being something different from sheer domination, as dominating relationships would simply replicate the problem politics is meant to answer. So, what does differentiate politics from sheer domination? Williams believes that the

answer must be found in the ability of regimes to answer a "Basic Legitimation Demand", according to which "the state has to offer a justification of its power to *each subject*" (Williams 2005, 4, original emphasis). The ability of a regime to meet the Basic Legitimation Demand is what allows us to define it as a *legitimate* political order (*ibidem*).

Newey's interest consists in scrutinizing the tenability of a project of this kind: is Williams able to find a justification which could allow us to differentiate politics from mere conflict? As pointed out, the justification offered for the use of force by the regime must be acceptable to its subjects. Notice that by "acceptable" Williams does not mean "actual" acceptance. Actual acceptance is neither necessary nor sufficient to define legitimacy because, on the one hand, subjects might be wrong in contesting the use of force by the regime and, on the other hand, their acceptance could be the fruit of manipulation by the governing power. Hence, Williams needs to identify criteria for the justification of legitimacy which would allow both to safeguard subjects' acceptance, but also to avoid the distortions of power. To this end, Williams proposes a Critical Theory Test to distinguish justifications that can ground claims of legitimacy (Williams 2002, 225-232 and 2005, 6; hereinafter CTT). The CTT consists of a *counterfactual* examination of claims of legitimacy: since "the acceptance of a justification does not count if the acceptance itself is produced by the coercive power which is supposedly being justified" (Williams, 2005, 6), we need to imagine alternative scenarios in which the supposed effects of power are absent and ask ourselves whether, in such suitably modified circumstances, the subjects would still accept the regime. While such counterfactual test cannot constitute a sufficient tool to establish the legitimacy of a regime, passing the CTT is a necessary step in that direction.

Yet, Newey claims that such a test, if examined carefully, cannot help us to distinguish cases of manipulated acceptance of power from genuine ones. The crucial problem, in Newey's opinion, is that there is no way to establish the truth conditions of the counterfactual claims examined by the CTT. First, there are always several different hypothetical scenarios which we could consider as good candidates for the counterfactual examination. Second, among those hypothetical scenarios, there are often many controversial cases – i.e. cases in which it is not clear whether the scenario depicted represents a legitimating political relationship. For, unless the counterfactual scenario represents an obvious example of extorted consent, it is not entirely clear how we are supposed to evaluate the reasons grounding subjects' acceptance.

According to Newey, the point is that an evaluation of the subjects' consent cannot be done independently from an assessment of the specific political context in which the justification is offered.

Indeed "the circumstances in which an act of consent would pass the CTT and thus confer legitimacy rather than merely reaffirming the fact of domination, defy pre-political formulation" (5). When controversial cases are under scrutiny, there is no way to establish, independently from the political circumstances themselves, whether people would accept the regime in the considered context, and whether they would do so out of spontaneous acceptance. In fact, subjects come to accept or reject the justifications offered on the basis of political commitments which precede the legitimation itself: "there is no reason to think that the reasons presented at this point can be purged of political content" (7). This is why, for Newey, there is no way in which the CTT could allow us to discriminate between genuine and false legitimations. The complexity and features of political reality do not allow us to define conditions for the acceptance of political power by abstracting from the actual political context in which the justification is offered.

But if hypothetical devices like the CTT are not good candidates for identifying criteria of legitimacy, maybe we should focus exclusively on actual politics. Maybe, that is to say, we should assess whether criteria for defining the admissible uses of force can be identified by examining real political relationships and the quality of the acceptance provided. An alternative strategy to demarcate politics from warfare could be to construe criteria of legitimacy starting from what, in actual contexts, we have reason to believe real agents would deem as an acceptable use of force. Could we identify the boundaries between politics and warfare by investigating the conditions of actual acceptance?

Despite overcoming the difficulties incurred by the CTT, even this solution proves unable to deliver substantive criteria for demarcating politics from warfare. Once again, Newey explains how this is due to some features of political reality, which disempower also this alternative theoretical strategy by making it unable to offer valid normative criteria for assessing legitimacy. To explain why this is the case, it is necessary to recall the idea of a *power loop* introduced by Newey in order to clarify the interaction between force, legitimation, and legitimacy.

Newey defines a power loop as "a situation where a purported authority or its proxies tries to legitimate itself to those subject to its power, and the legitimation itself exemplifies this power-relation; so that the legitimation raises

the very question it seeks to settle" (11). This means that when a purported authority offers a justification for its power to its subjects, it engages in some sort of political action whose objective is to gain their acceptance. These actions might take different forms, but they all have something in common: they entail a manifestation of political power and an act of negotiation in which reasons for acceptance are offered to potentially dissenting parties.

The act itself of seeking a legitimation, then, "raises the very question it seeks to settle" because every attempted legitimation displays a new power relation and attempts to implement a new power equilibrium. Legitimations determine a substantive change in the political landscape, so that what was found acceptable before the justification was offered might change due to the effects of the legitimation itself. Therefore, Newey talks about *power loops*: because the very attempt by the purported authority to legitimize itself calls for a new legitimation.

This is how politics defies also this second strategy for demarcating legitimate from illegitimate uses of force and, relatedly, politics from warfare. Since the conditions which satisfy the requirements of actual legitimations constantly change through time, no substantive criteria for demarcating legitimacy could be issued by considering actual acceptance: any criteria of legitimacy would be doomed to be invalid since they would constantly be out of pace with political changes; and if applied, they would create the political conditions for their own defeat.

So, it seems that politics is responsible for defeating criteria for legitimacy grounded both on hypothetical legitimations and on actual ones. On the one hand, real politics makes the CTT necessarily underdetermined, and therefore unable to deliver substantive criteria for legitimacy. On the other, *power loops* leave criteria of legitimacy based on actual acceptability without stable grounds. Hence Newey's conclusion: "justification cannot be what marks the distinction between politics and non-politics, because political life constantly and predictably calls into question, without definitively deciding, whether submitted justifications are indeed legitimating" (2). Indeed, in both cases, theories of legitimacy are defeated by real politics because they cannot adequately cope with its complexity.

But does Newey's conclusion consistently follow from his analysis? Newey seems to suggest that his conclusion should apply to *every* theory of legitimacy. Indeed, his declared objective goes in this direction: "the question I examine is how far legitimacy is destroyed by the use of force" (1).

I argue, however, that Newey's conclusion can only partially follow from his arguments. As I recalled, the arguments in support of his conclusion are built on discussions of justifications of legitimacy which share a fundamental methodological trait: they ground legitimacy upon legitimation, i.e. they identify as criteria for legitimacy those justifications which – either in hypothetical or actual circumstances – could gain subjects' acceptance. However, is this the only or even the correct way to proceed? As long as legitimacy is conceived as dependent upon legitimation – namely on some specific feature of politics intended in a descriptive sense – Newey's trap seems inescapable. Yet, this is notably not the only way to go. Criteria of legitimacy could be conceived as independent from subjects' acceptance of political power; or they could be elaborated in idealized circumstances in which consent still plays a role, but it does so in a fictional environment which brackets real political dynamics.[2] For Newey's conclusion to be generalizable, the argument in its support ought to be able to counter methodologies of this sort as well.

3. Newey's challenge II: How politics defeats theories of legitimacy

The burden of the preceding argument might suggest that we interpret Newey's analysis as a demonstration of the failure of *some* theoretical strategies to justify criteria of legitimacy. In the following, I argue that this is not the only conclusion which is possible to draw from Newey's analysis. In fact, from Newey's discussion, it is possible to trace the necessary elements for construing an argument against theorizations of legitimacy broadly conceived.

For Newey's thesis to be generalizable, the argument in its support must also be able to undermine theorizations of legitimacy which do not rely on descriptive features of politics to define the criteria of legitimacy. But if such methodologies do not set some connection between politics in a descriptive sense and politics in a normative sense, how possible is it to demonstrate that "force destroys legitimacy" even in such cases? The argument we are looking for must shift from a theoretical analysis to a

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[2] For an exhaustive overview, see Peter 2017.

meta-theoretical one. As recalled, proposing a theory of legitimacy means selecting a certain conception of the uses of force which can be deemed admissible – i.e. a conception of the admissible forms of political interactions as opposed to mere conflictual uses of force. In other words, proposing a conception of political legitimacy means positively defining who is to be regarded as an enemy or a friend, selecting what forms of coercion regimes are allowed to use, and justifying the imposition of political force against dissidents. Similar efforts which aim to trace a clear divide between admissible and inadmissible uses of force have specific practical consequences in political circumstances. Newey displays these consequences – albeit rather unsystematically – throughout his discussion. Taken together, however, these give us a compelling reason to be suspicious of attempts to produce general theories of political legitimacy.

First, theories of legitimacy – even those that rely on abstractions to derive criteria of legitimacy – are always produced within certain socio-political environments. By being necessarily the fruit of an historically situated intellectual effort, theories of legitimacy are not immune to the effects of ideological distortions produced by power relations. In fact, theorists themselves are political agents who form their sets of beliefs about politics and normativity in a certain political context. Hence, the act of positively theorising criteria of legitimacy might reinforce pre-existing ideologies. Notice that this is not a mere theoretical consequence. Such processes of ideological reinforcement have severe political consequences, not least because criteria of legitimacy establish when coercion can be justified and exercised. By theoretically reinforcing ideologies, criteria of legitimacy can themselves become means of oppression. Newey points out the potential ideological effect of offering a stable criterion to demarcate admissible from inadmissible uses of force in some of his conclusive statements. As Newey, for example, puts it:

> I have argued that Williams's constructivism about politics shares more with 'liberal moralist' approaches to politics than is realistic. […] They share a substantive aim of putting politics onto a normatively committed footing, by excluding morally unjustifiable relations of domination. But they also share a method: namely the use of a normatively-motivated basis for partitioning politics and non-politics. […] To draw a bright line between 'politics' and 'war' risks simply replicating ideology and thus – ironically – domination. (17-18).

How so? As Newey recalls, offering a philosophical ground in support of a certain conception of the admissible use of force allows us to provide a rhetorical justification for the use of coercion. This is why theories of legitimacy can become political tools for the enactment and support of certain relations of domination. So, for example, describing a certain use of force as a "political" one as opposed to a "war-like" intervention can have the effect of preventing us from realizing something crucial about both politics and war – namely, that they are *both* forms of violence (17). In this way, legitimations, instead of allowing us to have a clear grasp of real political dynamics and to exercise a critical examination of power structures, can work as political tools to reinforce our positive attitude towards existing political orders. As Newey makes apparent in his discussion, the argument for the potential ideological, and therefore dominating, character of theories of legitimacy can also be supported in other terms. At some point, Newey considers the problem of political dissent:

> Consider the possibility of civil disobedience. […] Clearly one point at issue between authorities and protesters will precisely be whether the policy, law, etc., is substantively unjust, or whether it is legitimate. […] There seems little reason to say that the denial of legitimacy places these protests outside the scope of politics, let alone that they therefore belong to the sphere of 'war' (8).

Should these kinds of political interventions be described as illegitimate, or suspiciously portrayed as instances of war-like action? There seems to be something not entirely right in drawing such a conclusion on both a theoretical and a practical level. Drawing a line between acceptable and unacceptable forms of political interaction implies introducing evaluative criteria for demarcating acceptable forms of dissent from unacceptable ones. It implies an effort to distinguish those political claims it is admissible to fight for – and which means can be employed to that purpose – from those political claims that are inadmissible. In this way, theories of legitimacy set clear boundaries to political dissent. In sum, attempts to propose theories of legitimacy can be seen, on the one hand, as inescapably ideological, because they define *a priori* the sources of criticism against political power which can be taken into consideration; while, on the other hand, they can be seen as dangerously oppressive, as they justify the use of coercive force to manage illegitimate dissent. In both cases, endorsing a conception of legitimacy as a ground for acceptable

uses of force means leaving unheard, both on a theoretical and on a political level, all those criticisms that subjects might move against the political order and that fall outside the scope of legitimacy.

This brings me to a final remark. Newey seems to suggest that theorizing legitimacy leaves us with inadequate tools to understand our political circumstances. A fixed account of the criteria of legitimacy does not suit the complexity of political reality. Hence his shocking suggestion that any sharp divide between politics and warfare prevents us from dealing with actual conflicts. This is why Newey at some point recalls "the 'Not in my name' protests before the 2003 invasion of Iraq" and he points out that "whether or not the protesters are thought of as making a valid claim, it is not obvious that what they were saying falls outside politics merely because they were calling the war's legitimacy into question" (8).

In addition, by relying on theories of legitimacy to establish admissible political relationships, we might lose sight of crucial issues posed by political reality. So, for example, let's consider Newey's worries about the "move to the ideal" – namely "to ask what people would think in the absence of force." As Newey further elaborates:

> In general there is no reason to think that […] the answer in this hypothetical no-force environment would be in any way dispositive for how people should act. As the experience of force is not an aberration or singularity in politics, but a constant if not a constitutive feature of it, a retreat to counterfactual situations where it is absent seems to be precisely the wrong way of going about understanding it (16).

This is not, of course, to say that every theory of legitimacy resorts to idealizations of this sort; rather, it is to say that normative systems are built by selecting a certain methodology and certain assumptions as relevant in order to derive the correct conception of legitimacy to endorse. Such preliminary process of selection of the relevant methodology and assumptions upon which to build a theory of legitimacy, and that constitutes a necessary step for the construction of every normative system – let's call this the *normative framework* of a theory –, is what can represent a fundamental problem for political theorizing. By defining a *normative framework*, political reality (or some aspects of it) can be regarded as having normative relevance *as long as* their relevance has been recognized by the normative framework of the theory. This means that normative systems – and *a fortiori* theories of legit-

imacy – are normatively insensitive to all those features of political reality which have not been included in the *normative framework*.

We could deem this way of reflecting normatively about politics as an inadequate (yet not inconsistent) way of proceeding because, when we reason politically, all aspects of political reality seem to have some importance to us – like the complexity of the circumstances encountered, the values at play, the claims subjects raise, the possibilities open to us, and so on. In the above-mentioned example, Newey discusses theories of legitimacy that are insensitive to the reality of the "experience of force". He argues that these would offer an inadequate way to reason about legitimacy because they would not provide an answer to one of our most pressing political problems, namely how to make sense of, and cope with, the experience of political coercion. Notice that Newey is not making a point about the consistency of theories of this kind, he is rather emphasizing their inadequacy in addressing what we regard as a crucial political problem. Yet, *normative frameworks* impose constraints on the aspects of political reality we could deem normatively relevant. According to Newey, this cannot be the correct way to go, if we want to reach well-formed, critical, and responsible, judgments about the fundamental political question "What do we do?" (11). Newey's article can be read as an invitation to turn our sight from theory to reality in order to recognize that political theory must look at political reality to be appropriately conducted.

At the beginning of this section I said that if we want to generalize Newey's thesis according to which force can destroy legitimacy, we have to look for an argument able to demonstrate that the very attempt to propose theories of legitimacy should not be pursued. Indeed, I pointed out that the analysis should be conducted on a meta-theoretical level, as opposed to a theoretical one. To this purpose, I have made a number of digressions into Newey's discussion of legitimacy with the aim of showing how the very attempt to theorize legitimacy could have a concrete political impact, by reinforcing ideologies or fostering domination, and can be an inadequate way to conduct political reflection. In other words, the arguments put forward were intended to show the *undesirability* of reflecting upon legitimacy by looking for systematic normative theories of it.[3]

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[3] Such critical take against systematizations and normative theories is common in realist political thought. For similar arguments, see Geuss 2010, 1-16 and Williams 2006, 155-168.

Are these arguments conclusive if the aim is to generalize Newey's thesis? In a sense, they are not. They do not demonstrate the inconsistency of theorizing about legitimacy generally, nor do they positively defend an alternative method for reflecting about legitimacy in a normative sense. However, they offer us some persuasive reasons to think that elaborating theories of legitimacy might not be the way in which we would like to conduct political reflection. This is all we need to provide sufficient support for Newey's thesis in the present context. Let us bear in mind that the whole point of Newey's analysis is to give priority to real politics over abstract systematizations in political theory. If examining the effect of theories of legitimacy over politics can persuade us that theorizing about legitimacy could be dangerous or inadequate, this could be a perfectly good reason in Newey's perspective.

Conclusion

I have argued that Newey's thesis about the effects of force on legitimacy can be effectively generalized if we move the analysis from a theoretical to a meta-theoretical level. The meta-theoretical argument claims that, although we could consistently offer theories of legitimacy able to demarcate acceptable from unacceptable uses of force, we should better avoid systematizations of this kind in political reflection. I conclude by mentioning two problems that Newey's project incurs, and that should be the object of future investigations by scholars.

First, Newey claims that a sharp divide between politics and war cannot be drawn and emphasizes the extent to which politics and war share common means, namely the use of force. But this thesis is still underdeveloped, and it might sound – paradoxically – quite unrealistic, if not further discussed. As Newey admits, there are certainly many diverse forms of political violence and there is reason to believe that they will have different normative implications; hence, it would be crucial not to reduce them under the single umbrella category of "form of violence". Such differences ought to be carefully take into account and discussed.

This brings me to the second point. As Newey correctly points out, the central question of politics is "What do we do?". Newey, then, believes that a crucial part of political life consists in figuring out how the use of force

should be managed. Newey does not think that we should refrain from reasoning practically, or from exercising some form of normative reflection. However, in this paper, Newey's conclusions are mainly negative. Yet, if it is not the case to reason about legitimacy by providing a theory of it, how are we supposed to normatively reflect about legitimacy?

These are just some of the issues Newey has contributed to open and that will be worth exploring further.

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