

What Does It Mean To Justify Democracy? Proceduralism, Instrumentalism and Independent Criterion

Introduction

We live under democratic regimes. We don't live too badly. We think this depends (in part) on the fact that we live under democratic regimes. Hence, we may find those regimes *good* in this respect. But is democracy really justified? And are we to take its outcomes as legitimate even though we may find them sometimes plainly wrong? In my paper I want to tackle these two related issues that concern democracy: its justification and legitimacy¹.

First of all, I intend to clarify a small confusion that happens to blur the debate: the one between single outcomes and democratic procedures. This may seem a minor point, but it is relevant if we aim to account for the so-called circumstances of politics (Waldron 1999). In order to understand why the fact that we disagree over some specific outcomes does *not* immediately give us reasons to disobey, we need to bear in mind that justification and legitimacy of a single outcome come quite apart. If that is the case, democratic legitimacy depends on the kind of procedure that issued legitimate outcomes².

Once we turn to the justification of democratic procedure, we are at a crossroads. There are two well-known broad approaches to the justification of democracy: instrumentalism and proceduralism. My second aim in this paper is to propose a new ground to draw a line between these two and to reframe such opposition as instrumentalism versus intrinsicism. While instrumentalism qualifies those accounts that view democracy as a contingent means to realize some further value or interest, intrinsicism takes democracy to be a necessary, though perhaps not sufficient, condition to the realization of other aims.

Therefore, I intend to argue that: (a) a proper justification ought to aim at making democracy possess the right to rule, and hence its outcomes legitimate; (b) a proper justification also requires to conceive an independent criterion that acts as justifier of democracy; (c) the connection between such criterion and democracy itself may be either necessary or contingent.

The paper is organized as follows. The first section regards the distinction between justification and legitimacy of outcomes. I start by categorizing four aspects in justification and legitimacy that ought to be analyzed together. I take Waldron's circumstances of politics to be a good reason to draw a line between the two and I argue that outcome legitimacy depends on the procedure that issues it. Section two introduces a reformulation of the possible justifications of democracy and proposes to

¹ In this paper, I take democracy canonically to stand for majority rule of decision-making and fundamental rights protection.

² As Peter argues, there are at least three grounds for legitimacy: consent, beneficial effects and democratic procedure. While the former identifies legitimate authority with individuals' consenting to it (and thus conveys no normative force); the second revolves around authority's beneficial consequences and requires people to obey authority insofar as it brings positive outcomes. My whole paper will stand within the third category and I won't discuss the other two.

use an independent criterion whose connection to democracy serves as qualifier of the justificatory approach. Finally, in section three I defend the relevance of my endeavor.

I

Both justification and legitimacy are multifaceted concepts that can regard different domains of normative political theory. First, we can say that a decision is justified or legitimate, and we mean different things by using one adjective or the other. But second, we can also question the justification or legitimacy of the authority that issues such decisions. We can then ask whether a certain procedure for taking the decision is legitimate or justified. Or, we can wonder whether the exercise of coercive power or political authority in the society we live in are justified or legitimate³. All these attributions are slightly different and help making the distinction between these two concepts more confused for those who address it. Therefore, it may be of some utility trying to specify what the objects to which ‘legitimacy’ or ‘justification’ is being predicated are⁴. We can distinguish among: (a) the object of justification/legitimacy, namely what is to be qualified as justified/legitimate; (b) the proper definition of justification/legitimacy, that is what we mean by saying that something is justified or legitimate, whether there are considerations in favor of x or x possesses a right to rule; (c) the grounds for qualification or the conditions which are to be met for the object to be justified/legitimate; (d) the consequence of such qualification, that is, the things that justification/legitimacy of a certain object entails.

For instance, when we talk of the object of justification we may refer to collective decisions and laws: a law is justified to us⁵ if we believe there are good reasons for supporting it concerning its merit and substance. On the contrary, when we say that a law is legitimate, we generally refer to the way it has been produced and we mean that this way was correct⁶. Second, the proper definition of legitimacy and justification is a matter of bitter debates and it is not easy to settle. To be sure, justification may refer to the presentation of objective considerations in favor of something or to a practice of self-clarification that starts with shared premises and attempts to arrive at a unique conclusion. On the other hand, we can interpret

³ As both Peter (2013, 2016) and Perry (2013) notice, there are at least two approaches to the problem of political legitimacy: the first is authority-based (Raz 1986, Christiano 2006, Perry 2013), while the second is coercion-based (Ripstein 2004, Rawls 1993, Peter 2008).

⁴ We may hence distinguish among: (a) the object of justification/legitimacy, namely what is to be qualified as justified/legitimate; (b) the proper definition of justification/legitimacy, that is what we mean by saying that something is justified or legitimate, whether that there are considerations in favor of x or that x possesses a right to rule; (c) the grounds for qualification or the conditions which are to be met for the object to be justified/legitimate; (d) the consequence of such qualification, that is, the things that justification/legitimacy of a certain object entails. In this paper I will let aside the third requirement.

⁵ As for what concerns this paper, I need not make a distinction between externalist and internalist justification (see Gaus 1996).

⁶ The specific way does not matter here, it can be democratic, autocratic or teocratic, the point remains that the outcome is legitimate in virtue of the way it has been produced.

legitimacy in more than one way, naturally. For the sake of this paper, I will focus only on normative readings of legitimacy and notably on two of them: legitimacy as a liberty-right or legitimacy as a claim-right to rule⁷. In the first case, legitimacy boils down to justified coercion, as generally those who endorse such account takes legitimacy to apply to political power and to qualify political power as essentially coercive (Ladenson 1980, Rawls 1993, Buchanan 2002, Ripstein 2004, Estlund 2008, Peter 2008). On the other hand, legitimacy as a right to rule entails explicitly political obligation on the part of those subject to the legitimate authority and hence interpret legitimacy as a claim-right to which corresponds someone else's (subjects') duties (Raz 1986, Simmons 1999, Christiano 2006, Perry 2013)⁸. I do not intend to defend one reading over the other, as here I am concerned with the relation between justification and legitimacy. So all I have to say further in the paper applies to both accounts. Third, grounds for justification or legitimacy also greatly differ. On public reason accounts, it seems that the conditions under which we can say that a practice of justification has succeeded at least relate to, if they do not depend on, the capacity of justification to lead to consensus; while on objective view accounts, a justification is successful only if it leads to truth, irrespective of what those who participate in it think. On the side of legitimacy, instead, many different grounds have been proposed, ranging from consent, to beneficial effects, to the fairness principle or the democratic procedure. Finally, the consequences of a successful justification depend on the moral motivation view we endorse. If we have an internalist account of moral motivation, for instance, some course of action will be justified if it will accord to the agent's motivational set of reasons and hence a successful justification will be able to move the agent accordingly. Thinking of legitimacy, a claim-right view connects political legitimacy with obligation and thus takes it to entail a duty to comply on the subjects' part. All these dimensions are strictly connected and not all possible combinations are compatible. In this paper, I aim to uncover some relations between these dimensions, in particular concerning the relationship between justification and democratic accounts of legitimacy.

First of all, let us start with collective decision. We generally take a law to be justified if there are good reasons in its favor and unjustified in case there aren't. Nevertheless, a law may also be legitimate without being justified and this is when we think it possesses authority without being right or correct. In case of laws, the

⁷ For an essential analysis of the concept see Peter 2016. Any proper analysis of the concept of legitimacy is particularly troubling because it calls into question many other normative concepts that are deeply connected with it, like authority, political obligation and justice, as well as the very normative/descriptive divide. For this paper, I will focus on a normative interpretation of legitimacy, and let aside Weberian-like descriptive accounts of it. See Weber 1964.

⁸ In both case the literature makes vast use of Hohfeldian classification of rights, duties, power and liability, even though not all of them endorse the correlativity of right and duty view. See Hohfeld 1917, Whitely 1952-53, Hart 1955, Brandt 1964. Against the correlativity view see Lyons 1970, Feinberg 1966. It is important to notice that while it is true that liberty-right interpretations of legitimacy generally take it as applying to political power rather than to authority, it is not true that all applications of legitimacy to political power rather than authority interpret legitimacy as a liberty-right. Hence, the distinction between liberty-right and claim-right legitimacy is not equivalent to the distinction in the object of application of legitimacy, that is political power or authority.

distinction between legitimacy and justification is evident and democracy-based accounts of legitimacy hold that the way a decision has been made determines its authoritativeness in a content-independent way. Probably, if we were to agree with every single collective decision, either because we take it to be intrinsically just or correct, or because we find it instrumentally useful to realize our aims and ends, no issue of political legitimacy would arise. We would just agree on the content of public decisions and act according to both such decisions and our own judgment⁹. A little thought-experiment may be of help here. If we lived in a very bizarre social world where we all agreed on every single issue and we knew that we so agreed, it seems like we would be able to act accordingly and harmonize spontaneously. To be sure, we would still have to take collective decisions in order to coordinate and hence would need a decision-making procedure of some kind. For instance, if we all knew that a certain mysterious machine always provides the right decision on every single issue, we would still make collectively binding decisions following a certain procedure, that is “Go and ask to the Mysterious Omniscient Machine”. If we were to know (and know that all of us know) that this is the best way to take correct decisions and if we were to agree that we always ought to respect correct decisions and we were spontaneously willing so to act, not only would we get along peacefully, but also we would probably can go without democracy. We would still make use of justificatory practices, in the sense of asking and giving each other reasons for our actions. In the mysterious machine case it would probably always be the same kind of justification. To a question like: “Why are you killing that lamb?”, the only answer would always be: “Because the Mysterious Machine told me to”. Or, if we were to agree on a procedure like “Each does as she pleases”, because all our actions and thoughts were to harmonize spontaneously, we would still not know why another person acted in a certain way, and it would make sense for us to ask each other reasons for our behavior. Despite publicly known agreement on every issue, we would still wonder why we do so agree. Individuals populating these counterfactual worlds would not know everything and hence they would need justification as a self-clarification practice, but their getting along peacefully would not hinge on it.

These would be very bizarre and perhaps boring worlds. Nonetheless, such counterfactuals tell us something about the concept of legitimacy. For they show that it possesses a particular standing because it involves the use of coercive power or the imposition of duties on people who are subjects to it and may disagree with the way that power is exercised. Let us take the two examples of possible definition of legitimacy. In both cases this notion serves to say that it is permissible for some entity to coercively impose decisions on or to demands compliance by others, whether they like it or not. As for legitimate coercion, it is easy to see why. Since coercion is generally thought to be a bad thing, it can be morally permissible only under certain circumstances and legitimacy is taken to identify what these circumstances are. On

⁹ In a relevant way, we could not be said to *obey* to anything, since we would respect the law willingly and spontaneously, even though this depends on what we take obedience to consist of and it is true only if we take it to require some sort of disagreement with the reasons behind the action made in order to obey.

the other hand, if we endorse a claim-right interpretation of legitimacy, the fact that a decision, a procedure, a political regime or an authority are legitimate entails that people under them are required to obey. While it can be the case that I willingly comply with decisions I agree with, the point of legitimacy is that it does not matter whether I do agree or not. Even though I think some collective decision is plainly wrong, if it is legitimate is nonetheless binding, hence I have to obey it¹⁰. Therefore, when we provide arguments for taking some entity as legitimate, we are also stating that this entity possesses a particularly strong right, that is, the right to coerce us or to impose duties on us. In our counterfactual examples, the fact that individuals agree over every single political issue and that are willing to comply entails that no exercise of coercive power and no imposition of duties is necessary, as people agree on what is right and act accordingly¹¹. Since we happen to regularly disagree over what is just or correct or useful, as well as we happen to have different aims, plans of life and worldviews, in order to get along together peacefully and to coordinate, we need to forego the *justification* of each and every collective decision, and instead assess the *legitimacy* of single decisions.

These are known to be the ‘circumstances of politics’ that Waldron set up by modifying Rawlsian ‘circumstances of justice’ (Waldron 1999; Rawls 1971, 1993). Waldron lays out two circumstances, which are the fact of disagreement and the need for cooperation, that together determine a switch from the justification of single outcomes to the justification of procedures that issue such outcomes. According to him, to the extent that procedures are justified, the outcome can be taken as legitimate in virtue of its being correctly lent out of a correctly followed procedure. Such switch from justification of particular decisions to procedures constitutes a sort of recognition of human limits and contingencies affecting our political life. The need for some sort of cooperation is such that we ought to do “as if” we all agreed on what binds all of us. Except that we do not agree. So factual circumstances require us to replace justification with legitimacy.

However, contrary to what Waldron seems to hold, this does not settle all disputes and especially does not *forgo* justification at all. In fact, if it is undoubtedly true that matters of justice are controversial, as Waldron reproaches to Rawls, it is indeed also true that matters of procedures and of procedural fairness are controversial as well¹². Perhaps we can safely say that democracy is at least morally permissible, if not plainly the best possible decision-making procedure. But, even if we can hope to reach such unanimous consensus, which is unlikely if we confront

¹⁰ Raz takes this to be a property of authority, that of issuing content-independent and pre-emptive reasons for action (Raz 1986, 2006). However, if laws can be legitimate even though unjustified, then content-independence qualifies also legitimacy even when it does not apply to political authority.

¹¹ To be sure, sanctions are necessary to back up political decisions because of the particular instability that others’ noncompliance may generate. This means that coercive power would be necessary even in case we all knew and agreed on what is right or wrong, simply because we could not be ensured of people’s compliance otherwise. The fact that human nature can be morally flawed, however, is a contingent fact that I will set aside for the aim of this paper. Let’s imagine for the sake of the argument, then, that people spontaneously do what they believe it is just and agree to.

¹² On this see Enoch 2007 and Christiano 2000.

ourselves with all human societies, still there would be room to argue over which kind of democracy would be the best or most suited to us. Thus, in order to argue for a more populist, more ‘epistocratic’, more liberal or more majoritarian democracy, we would better focus on which characteristics are fundamental in the justification of democracy we all pretend to accept. Since consent on procedures does not occur, procedures as well ought to be justified. If the argument is sound, then, legitimacy is not independent from justification, contrary to what John A. Simmons affirms. Simmons’s main point is that any kind of justification consists in “the impersonal presentation of objectively good reasons or good arguments to a conclusion” (Simmons 1999, 762). Hence, when justifying a political regime, we must conceive of ourselves as engaging in the enterprise of giving reasons to take such regime as “prudentially rational, morally acceptable, or both” (Simmons 1999, 740). On the contrary, to argue for the legitimacy of a state entails a very different conclusion, whilst requiring a very different activity. In fact, since political legitimacy concerns a “complex moral right to be the exclusive imposer of binding duties to its subjects, and to use coercion to enforce these duties” (Simmons 1999, 764), it cannot be vindicated without reference to individual subjects’ consent to it. Therefore, according to Simmons, while justification asks only for objective considerations that are true or false irrespective of what people feel about it, the legitimacy of a political regime cannot uncouple from people’s effective consent to the regime’s ownership and exercise of such a right.

However, Simmons appears to mistakenly conflate two things. Since he tackles the justification of the state, he does not pay heed to the distinction between the justification of single political decisions and of procedures. More than that, he admits that single decisions may be perfectly justified without this entailing that the authority or procedure that issued them is legitimate. Thus, he does not put in question practical consequences of justification, as the fact that we ought to do what is just. For the sake of the argument, let us assume that we always ought to respect and obey a justified decision and that we would agree with people coercing us to do so if we were so fool as not to comply ourselves¹³. The fact of disagreement entails that no single political decision will be perceived by all to be justified and since we need cooperation nonetheless, we ought to turn to the way the decision is taken in order to see whether it can be seen as legitimate, although unjustified, by all. What Simmons claims is that the only way a procedure can be legitimate in such sense is if it has been consented to. However, this concerns the ground of legitimacy, which Simmons identifies only with actual consent. But the fact that justifying the objective value of a regime is different from justifying its exercise of legitimate power does not amount to saying that any form of justification is not a good ground for legitimacy. In the former

¹³ This is indeed a relevant idealization. However, since most theories of democracy seem to deal with people interested only in justice, however conceived, such idealization, either right or wrong, is a quite common feature in democratic literature. The question of coercion is different, though. I may agree that we ought to do what is just and I may think I have a duty to do what is just without this entailing that someone else, like the state, has a right to coerce me to do what I ought to. This seems to be the point of most anarchist theories and certainly Simmons’s. I think that the need of cooperation here plays a role, but I cannot deal with this problem here.

case, Simmons can be taken to state that justification as providing reasons to think that something is just is different from providing reasons to think that something is legitimate and hence has a right to rule. I do endorse such a claim. However, then Simmons reads this claims as implying that justification is not a good ground for legitimacy. But this seems unwarranted. While a regime can be just without having the right to coerce me¹⁴, it is not necessarily the case that the only way a regime can acquire such right to coerce me is through consent. A good justification of a political regime can entail that such regime possesses this right, but it does so only if it addresses the problem of the regime's legitimacy rather than its value.

It is true that we disagree over what decisions are the right ones. It is also true that we do disagree over what procedures, or at least what forms of democratic procedures, are the best ones. When we aim to justify democracy as a legitimate regime, though, we ought not to focus on why democracy has value or on what makes it a good thing. We ought to provide reasons why democracy has the right to rule.

II

Once the focus is perspicuously set on procedures, there is a sort of embarrassment in still hearing talks over proceduralism and procedural values. As a matter of fact, normative theories that plan to justify democracy are usually divided in two broad categories: instrumentalism and proceduralism. However, since both of them deal with procedures, as it is manifest so far, both accounts cannot but be 'procedural' in a way, as these are the objects they set up to justify. How can then proceduralism be a meaningful account of justification for a procedure?

Hoping to shed some lights, I will now reframe the traditional distinction just mentioned in a distinction between instrumentalism and 'intrinsicism'. While the former account, as it is well-known, justifies democracy as a means to realize something else, the latter justifies democracy in virtue of some value democratic procedures embody. I think that this distinction hinges on the existence of an independent criterion, and in particular on the relationship between said criterion and democratic process itself.

Let us start with instrumentalism. Instrumentalists take democracy to be a means to something else, which is the 'real value' they are after. It can be equality, as it is with Richard Arneson (2003), or it can be some moral virtue democratic process which allows citizens to realize through participation, with John Stuart Mill (1861). Be it the outcome or the by-product, still democratic procedure is taken to be the best way to achieve such result. However, democracy does so only in a contingent way: it is because nowadays contingent conditions that democracy appears to be the most suited way to achieve the justifying value. Even though we do not foresee when, still it is possible for us to realize the very same things without any use of democracy. It is

¹⁴ Or without me having a duty to obey to it.

not that such justification is piecemeal, as Thomas Christiano claims¹⁵, because we can consistently take it to be valid for all subjects and for all outcomes. In fact, any instrumentalist account, so long as it proposes a justification of democratic *procedures*, will confer legitimacy to democratic outcomes in virtue of being produced by the appropriate procedures and will justify these procedures because they tend to produce on average outcomes that respect the relevant value that works as independent criterion of justification. It would make little sense to justify a procedure in virtue of its granting only and all just results, at least because the first wrong outcome would destroy the whole justification of a procedure. What we ought to take instrumentalism to hold, then, is that democratic procedures are justified insofar as they represent a contingent means that on average produces results (be they direct outcomes or by-products) conforming to the relevant value or set of values that instrumentalists take to justify democracy.

On the contrary, intrinsicism conceives the relation between the independent criterion and democracy in a quite different way. The kind of value that justifies democracy is here necessarily achieved through democracy. Hence, democratic procedures play a determinant role, as they represent a necessary condition for the justifying value, whose fulfillment cannot be obtained without democracy. It is still a procedure-independent criterion, for it means to justify the procedure itself, but it is a criterion that, though may be theoretically conceived as distinct from democracy, cannot be realized without democracy being realized. In a way, democracy may be said to embody such value and thus cannot be left aside if we want that value to become real. We can take some values to be more prone to intrinsicist justifications rather than others: for instance, mutual accountability or fairness or political equality, insofar as they concern the kind of relations citizens should enjoy with one another, seem more suited than some moral perfectionist virtue or negative freedom. But this fact does not make them essentially procedural, because the essence of a value does not depend on the way it is used within a philosophical theory.

If the goal of democratic theorists is to justify democratic procedures and in particular their right to issue decisions that we all ought to obey, they cannot do so without making reference to something else. To be sure we can all agree that democracy is the best decision-making procedure and we can also think that from this fact its legitimacy stems. In this case the endeavor of justification would amount to some sort of self-clarification practice (Rawls 1993), where we try to see what we find really valuable in democracy and take for granted that, insofar as it is valuable, democracy is also legitimate. However, if democracy is to be justified as a *legitimate* decision-making procedure, such justification ought to address people who disagree. For these people are the ones who mostly need some form of justification, since they may be forced to obey to decisions that they not only find wrong, but also illegitimate, since they are produced by a procedure that they see as unjustified. Any convincing

¹⁵ Thomas Christiano proposes to draw a distinction between piecemeal and holistic justifications and states that instrumentalist justification will depend on the subject and on the class of decisions taken, thus being piecemeal, while proceduralist accounts are holistic, because they ground democratic authority in the same way for all citizens (Christiano 2006).

justification of democratic legitimacy, then, ought to be given in terms of something else. Otherwise it would not justify anything at all¹⁶. Instrumentalism and intrinsicism achieve this aim in different ways. While the former (Perry 2012) takes democracy to be justified because of some value that democracy realizes only contingently, the latter takes democracy to be necessary in order to realize the justifying value. This means that without democracy, intended as a certain decision-making procedure characterized at least by a right to an equal say, the justifying value, such as political equality, cannot be realized.

There is an important thing to notice, though. The fact that democracy is necessary for the realization of a certain value does not mean that democracy is justified in any possible world. There are the circumstances of politics Waldron outlines to be taken into account. Democracy hence is not justified under whatever circumstances. As we have seen, were we to agree on everything or were we to possess a Mysterious Machine (were we even in the condition of not needing others' help to live a decent life), we could take collective decision without democracy and it is not the case that chosen procedures would be unjustified only because they would not be democratic. Therefore, the fact that we disagree on what outcomes count as justified, as well as on what procedure count as justified, is fundamental in any justification of democracy.

III

The distinction I proposed does not radically change the categorization of available accounts for the justification of democracy. Still, it aims at three, it seems to me relevant, things. First, it elucidates the difference, which is sometimes blurred, between the justification of outcomes and the justification of democracy. While the former is necessarily piecemeal because it deals with individual outcomes of democratic procedures, the latter is necessarily holistic, as it claims to be valid for the whole decision-making process. Moreover, even though instrumentalists still make reference to the quality of outcomes, they still take outcomes to be legitimate (although they can sometimes be unjustified) in virtue of democratic procedures that produce them, as any other form of proceduralism.

Second, this paper means to make clearer the goal that any justification of democratic procedures ought to set up for itself, that is that democracy possesses the right to rule. Moreover, it does so by making reference to some independent, justifying criterion. So-called proceduralists ought not try to call for procedure-dependent virtues of democracy (Peter 2007, 2009), but should rather focus on further reasons to embrace the kind of (theoretically) independent values for which democracy constitutes a (practically) necessary condition. It is not neutrality over

¹⁶ As I intend to stay neutral concerning the debate between public reason theorists and objective reason theorists, I do not ask that the 'justifying' be less controversial than the 'justified'. It is enough for my argument to say that it needs be something different. It is up to the theory of justification one endorses to assess the value of justification if it makes reference to something more controversial to justify something less controversial.

substantive values that qualify democracy as legitimate. For the distinction between substantive and procedural value is confusing when talking about procedures and if we lack a good justification for democracy, we lack legitimacy of democratic outcomes thereof.

In conclusion, it seems to me that the distinction proposed in this paper, rather than being merely reconstructive, fulfills a conceptually analytic role, as it helps to reformulate the distinction between instrumentalism and proceduralism while holding the focus over the justification of procedures. Moreover, since the task of justifying democracy as a decision-making procedure is due to the fact that we disagree over what are the best outcomes, any such justification of democracy ought to provide reasons to take the outcome as legitimate although unjustified. But this amounts to saying that democracy is a procedure which has the right to rule, that is the right to coerce people or to impose duties on them. Therefore, if a justification of democracy aims at lending legitimacy to democratic procedures and outcomes, it cannot do so without making reference to a certain independent criterion, whose truth or acceptance is necessary for people, who at first disagree also with the justification of democratic procedures, to recognize or accept democratic legitimacy.

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This does not amount to state that no decision-making procedure would be necessary. To be sure, in order to coordinate our actions, we would need a procedure to take collectively binding decisions. Nevertheless, if we were to agree on every single decision and we knew that we do so agree, I do not think democracy would necessarily be the only justified decision-making procedure. Let us look closer at this statement.