



**INSTITUTIONS FOR
OPEN SOCIETIES**

Institutional Legitimacy in Open Societies

Think Paper Series #2

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IOS Think Paper by the Stream
Legitimacy and Institutions,
part of strategic theme
Institutions for Open Societies.

Editors of the IOS Think Paper Series:
Mark Bovens & Beate Volker

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Legitimacy as a key concern for institutions

Legitimacy is a key concern for institutions, defined here as ‘the humanly devised constraints that structure political, economic and social interaction’ (North, 1990: 97). Institutions that are not considered legitimate, by citizens, clients, members, users, or other stakeholders, will lack support and are hard to sustain. This can be the case for legal institutions, such as contracts and courts, for political institutions, such as parties and parliaments, for economic institutions, such as currencies, markets and corporations, and for social institutions, such as churches, social movements, and marriages. Legitimacy issues can occur in any society, western or non-western, but especially in open societies.

The norms and concerns that determine legitimacy may differ, however, across time, place, and perspective. Institutions that are considered legitimate by the ruling elites in a specific historical context and social setting, such as slavery in the 18th century Americas, or gender inequality in contemporary Saudi Arabia, are not considered legitimate in a modern liberal constitutional state. And, as we will show, different academic disciplines will focus on different aspects of legitimacy.

This ‘think paper’ tries to shed some light on the various dimensions of legitimacy that are relevant for institutions from the perspective of contemporary open societies. **The aim of the paper is to provide some conceptual distinctions**

and theoretical perspectives that can be helpful in analysing and assessing the legitimacy of specific institutions and arrangements in open societies.

It does so, firstly, by analysing various dimensions and forms of legitimacy and establishing which of these are specific for legitimacy in open societies. These analyses will be based on a variety of disciplinary perspectives, such as law, political science, political history, philosophy, psychology, economics, and sociology. This framework will then be applied to two cases, legitimate markets, and legitimate security in open societies. The paper also provides a preliminary bibliography.

On legitimacy: various foci and loci

Legitimacy is a key concept in the social sciences and humanities. Its use is widespread: Google provides no less than 39 million results for the word 'legitimacy'. Semantically, the concept of legitimacy refers to the right to exercise power. However, this 'right' can be based on various grounds.

DIFFERENT DISCIPLINARY FOCI

To begin with, different *disciplines* will emphasise different *sources* of legitimacy¹:

- *Lawyers* will emphasise the legality of power: is the allocation and exercise of power based on duly established laws and regulations?
- *Philosophers* will emphasise the ethical quality of the exercise of power: is it just and fair?
- *Political scientists* will focus on the foundation of power: is it based on free and fair elections?
- *Sociologists* will focus on the acceptance of power: is the allocation and exercise accepted by the relevant stakeholders in the society?²
- *Economists* will focus on the outcomes of the exercise of power: are the resources used in the most effective and efficient way?

These sources of legitimacy will not always run parallel: what is socially accepted is not always legally or ethically acceptable and vice versa. Elected officials, acting on the basis of public regulations, may not always be accepted as legitimate authorities by specific parts of the population, or in specific instances.

And informal leaders sometimes have more social legitimacy than official authorities. Crisis situations, social movements, or civil disobedience are a case in point.

DIFFERENT FORMS AND PHASES

In the literature various *forms* of legitimacy have been distinguished. The most well-known typology was made by Max Weber (1925/1985):

- Traditional legitimacy, in which power is accepted based on custom and habit.
- Charismatic legitimacy, which is based on the ideas and personal charisma of a leader.
- Rational-legal legitimacy, which is based on a system of institutionalised procedures and rules.

Another well-known distinction is between different *phases* in the policy process (Scharpf, 1999; Schmidt, 2012). These phases and relevant conditions are the following:

- Input legitimacy: this concerns the inclusiveness and participatory quality of the policy process, and focuses on the inclusion of all relevant stakeholders, based on democratic procedures, in the formulation of the policy agenda and in decision making.
- Throughput legitimacy: this concerns the procedural fairness of the policy process, and focuses on equity, due process, integrity, efficiency, transparency, and accountability.

¹ Based on (Bokhorst, 2014, p. 20).

² Compare Suchman (1995: 572-4): legitimacy is "the generalised perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions".



- Output legitimacy: this concerns the problem-solving quality of the process, and focuses on effectiveness, and on the achievement of desired policy goals.
- Outcome-legitimacy: this concerns the social effects of the policy, and focuses on the achievement of desired social outcomes, such as safety, stability, or increase in wealth and health.

There is an abundant literature on the various forms and sources of legitimacy. Bokhorst (2014: 135) distinguishes no less than twenty different sources of legitimacy, depending on the disciplinary dimension and the object of legitimacy.

In empirical research, legitimacy can be both a dependent and an independent variable. Much of the literature is concerned with the conditions that explain why people consider institutions legitimate, such as the state, the police, or courts (compare Gilley, 2006; Johnson et al., 2006; Jackson et al., 2015; Jackson & Gau, 2016). Legitimacy here is often predicted by interactions with police, courts, and other actors. However, procedural justice and legitimacy can also be used to predict cooperation with the police and other compliance outcomes (compare Tyler, 1990).

DIFFERENT LOCI

Another issue concerns the *locus* of legitimacy. Various *types* of organisations can be identified, for which legitimacy and legitimising their actions is important:

- Institutions of government: legislative, regulatory, executive, and judicial authorities

- Non-governmental institutions: churches, NGOs
- For-profit institutions: corporations, corporate networks, global value chains
- Networks of public and private organisations: PPP

Public power is exercised at different levels: local, national, transnational, international. The *distribution of power* can give rise to conflicts of competence. An important issue in this regard is how the exercise of supranational power can be legitimised. Most theories of legitimacy focus on the exercise of public power by, and within, the nation state. Intergovernmental or supranational bodies, such as the UN, WTO and the EU, are increasingly exercising public powers, despite having limited connection to the nation state. How can this be legitimised? And does it make sense to speak of a global open society?

Another way to cut the cake of legitimacy is to look at the *level of institutional output*:

- Macro-level: general legal and institutional framework
- Meso-level: organisational policies and practices
- Micro-level: operational decisions and actions

Considered from this perspective, it becomes clear that power is exercised by different types of institutional actors: institutions, organisational units, individual professionals. Concerns of institutional legitimacy may entail different specific demands in relation to the level of institutional output and the type of institutional actor involved.



‘Why do people consider institutions legitimate, such as the state, the police or courts?’



‘Legitimacy in open societies is based on right rather than on might, and on equity and fairness.’

Institutional legitimacy in open societies

Any institutional exercise of power needs some form of legitimacy to be sustainable in the long run. In traditional societies, institutions will be legitimised by referring to age-old customs and sacred traditions. In closed and dogmatic societies, institutions will be legitimised based on divine revelations, charismatic commandments, or historical truths.

And in totalitarian societies, institutions will derive their legitimacy largely on the basis of outputs: maintaining law and order, and defending the society against enemies of the people, real or imagined. Open societies, on the other hand, rely, first and foremost, on input and throughput legitimacy. Legitimacy in open societies is based on right rather than on might, and on equity and fairness, rather than on 'bringing home the bacon'.

ON OPEN SOCIETIES³

The notion of an 'open society' is part of a longstanding liberal philosophical tradition that emphasises individual autonomy, liberty, and personal emancipation. The 'open society' is, first of all, a normative ideal that is based on the notion that the autonomy and rights of individual citizens deserve respect and are the ultimate basis for the legitimate exercise of public power. The notion of the open society also has a socio-cultural dimension. An open society is characterised by cultural openness, religious tolerance, and artistic pluralism. In an open

society, any religious, cultural, or ideological dogma can be the object of criticism and public scrutiny. Thirdly, the notion of 'open society' also has a more socio-economic ring to it. From this point of view, an open society is a society that is dynamic, heterogeneous, and inclusive. Open societies are characterised by high degrees of social mobility, low thresholds for citizenship, open borders, and a high tolerance for social, technological, and cultural innovation. The open society is, finally, also a constitutional model. The notion of an open society refers also to a specific form of public governance. In an open society, power is only legitimate if it is based upon specific procedures and exercised in accordance with explicit rules. This is the legal translation of the notion of a liberal democracy.

Within Weber's distinction of types of legitimate rule, the open society fits best with legal authority, rather than with traditional or charismatic authority. The legitimacy of public institutions is based on the quality of input and throughput and not only on their outputs and outcomes. Police forces that reduce crime rates by incarcerating suspected thieves without trial may be effective, but they lack input and throughput legitimacy.

INSTITUTIONAL LEGITIMACY

On the *input-side*, the following general concerns are relevant when assessing the legitimacy of institutional power in open societies. Most of

these are concerned with establishing democratic control:

- Legality: the exercise of power should be based on general rules that have been established *ex ante*.
- Popular sovereignty: these rules have been approved by the electorate or by democratically elected bodies
- Fair and free elections: representative bodies are composed on the basis of fair and free elections
- Political rights: citizens have the right of assembly, freedom of speech, and universal suffrage.
- Respect for minorities: although decisions are made based on majority rule, the rights and interests of political, cultural, and religious minorities are protected.
- Inclusiveness: all relevant stakeholders have been included in the policy process

On the *throughput-side*, another set of general concerns are relevant for assessing the legitimacy of the exercise of power and the functioning of institutions in open societies. Most of these are concerned with preventing arbitrariness in the exercise of public power:

- Separation of powers: power is dispersed over different authorities, either in a strict separation or a model of ‘checks and balances’
- Judicial review: citizens have access to an independent and impartial judiciary that

has the power to review and redress administrative actions

- Civil liberties: citizens have the right of petition, habeas corpus, privacy, and property rights
- Responsiveness: policymakers are responsive to the interests and arguments of a wide variety of stakeholders and aim for high degrees of consensus.
- Procedural justice: individuals involved in administrative and court procedures are treated with respect, have a right to due process, and are provided with due explanations.
- Transparency and accountability: public bodies and private actors are transparent about their conduct and can be held accountable in a variety of ways.

Output and *outcome legitimacy* may contradict with demands of input and throughput legitimacy. The more open, deliberative, and participatory the process is, the less efficient and sometimes also the less effective it may be, at least in the short run. Likewise, too much attention for inclusiveness and co-optation of stakeholders may diminish throughput or output-legitimacy, because of the risk of bias, collusion, and clientelism. In this regard, institutions must handle the challenge of seeking to connect on the one hand, and remaining independent on the other.

³ See for a more extensive analysis of the notion of the open society the IOS Think Paper #1. This paragraph is taken from the paper of Mark Bovens in that volume.

‘Institutions must handle the challenge of seeking to connect on the one hand, and remaining independent on the other.’

Modern societies rest on the premise that public goals, such as equity, sustainability, and a variety of public utilities, can be realised by both public and private actors. Private corporations, such as banks, energy providers, media, and technology corporations, fulfil public tasks. Their activities also impact public interests. Many public services are provided via markets – and increasingly, transnational markets. This results in a public domain in which corporations and markets are both subject to, and sources of regulation and governance. Quality, safety, and security of goods and services are regulated through a myriad of public, private, and hybrid regulatory institutions. The legitimacy of these institutions raises a variety of questions for research.

MARKETS AS OBJECTS OF REGULATION

First, markets and corporations are subject to public regulation and enforcement, which raises legitimacy issues related to the intensity and stringency of this regulation. Here, social-economic, philosophical, and constitutional aspects of the open society, as described earlier, may generate tensions: from a socio-economic perspective, it may be most desirable to avoid stringent regulation of business activity to stimulate entrepreneurship, but this may conflict with the principles of a constitutional perspective on the open society, such as protection of citizens' rights, and an equitable and accountable exercise of power. Also, the global connectivity and free exchange enabled

by an open society in a socio-economic sense, may result in concentrations of power in the hands of global elites and a limited number of multinational actors, which conflicts with the contestability and methodological individualism central to Karl Popper's idea of an open society.

In an open society, market regulation is carried out in multilevel governance settings – national, European, and international. Here, legitimacy tensions can arise between various levels of governance, for example, when the legitimacy of EU regulation is questioned on a national level, or when governance gaps emerge in global settings. National economic interests can collide with supranational or global interests, calling the legitimacy of supranational regulatory regimes into question, and raising tensions between national and supranational policy and enforcement. Consumers can trust or distrust regulation and regulatory agencies at state or supranational level. And as citizens, they can question the legitimacy of regulation – or lack thereof. The legitimacy of international economic and regulatory institutions, such as the World Bank, IMF, the FATF (Financial Action Task Force), and of international treaties and conventions, is also fragile. The concurrence of national and international regimes may cause uncertainty, rule conflicts, or regulatory voids. In other words, in open, globalised societies, multiple legitimacy issues arise out of the interaction between various *levels* of regulation and governance.



‘In an open society, market regulation is carried out in multilevel governance settings – national, European, and international.’

MARKET ACTORS AS REGULATORS

Legitimacy issues also arise regarding market actors as regulators. Historically, markets have always been governance institutions, with a variety of bodies that regulate trade based on informal practices, social norms, and formal rules. The legitimacy of these norms and bodies was traditionally primarily a concern of the parties directly involved in the trade of the market in question. However, as external effects of economic activity have become more prominent, self-regulation of markets has become a public affair. The norms and rules governing markets can provide legitimacy to these markets and the actors participating in these markets.

The introduction of market mechanisms in previously publicly regulated sectors and the privatisation of state monopolies, but also the calls on business to focus on corporate social responsibility, exemplify the move to public governance by the private sector. The legitimacy of private actors' regulatory activities and the balance between public, binding regulation, and private, more voluntary self-regulation, also raises questions. On the one hand, self-regulation is more legitimate from the perspective of market participants, and norms crafted by market participants can be better tailored to specific circumstances than public regulation. On the other hand, self-regulation can exclude interests of those not represented in the process and tends to be less transparent and accountable than public regulation.

As states and markets become more intertwined, the influence of private market regulatory actors on public interests becomes increasingly

prominent – as can be illustrated by the role of credit rating agencies in rating the solvency of national states. This has placed the procedural (throughput) legitimacy of these private actors under a magnifying glass and illustrates the legitimacy issues that can arise out of the intertwinement of public and private forms of governance.

The impact of corporations, and in particular multinational corporations, stretches far beyond their economic impact: they are political institutions with global power and impact on democracy, justice, and equality (Ruggie, 2017). The execution of this power is particularly problematic from a throughput perspective on legitimacy. Global corporations often operate in states where the rule of law is weak, and their activities sometimes compromise the rule of law. When corporations become too powerful, the checks and balances necessary for a democratic society are jeopardised. Corporate activities are often not transparent, accountable, or fair, and their actions are not democratic, nor are they responsive to citizens, or always respectful of civil liberties.

It is also interesting to note that Weber's concepts of charismatic, versus rational-legal legitimacy, is relevant with regard to the relation between corporations and states: in modern, open societies (in the socioeconomic sense), some corporations, and corporate leaders, have attained iconic status – think of Facebook and Zuckerberg, Apple and Steve Jobs, or Starbucks – giving them discursive power and legitimacy that often exceeds that of politicians, which puts rational-legal forms of legitimacy that are associated with the rule of law at risk.

‘When corporations become too powerful, the checks and balances necessary for a democratic society are jeopardised.’



The legitimacy of modern, centralised states rests on the premise that strong governments are the most effective actor for providing security. Yet the provision of security by the state can be at odds with the preservation of the privacy and liberty of individual citizens. This raises the question what distinguishes security policies in open societies from those in closed societies. Furthermore, the state has become increasingly reliant on private companies and community groups to police the digital and physical realm, undermining the credibility and legitimacy of the present security contract between the state and society.

LEGITIMATE SECURITY IN OPEN VERSUS CLOSED SOCIETIES

The provision of security can be considered as the original legitimisation for the creation of modern centralised states. Writing in a Europe ravaged by wars and uprisings, Thomas Hobbes argued that people could only escape this ‘nasty, brutish, and short life’ (1660: 88) if they submitted to a social contract where a Leviathan state would guarantee their collective survival in exchange for their individual freedoms.

States in both closed and open societies rely on the provision of security for their output legitimacy. The current authoritarian regimes in Russia and China stake their legitimacy on the successful avoidance of lawlessness and war. Similarly, the liberal democratic regimes of

France and Belgium had to regain the trust of their populace when the countries were hit by a seemingly unstoppable series of ISIS-inspired terrorist attacks in 2015–2016 (Noordegraaf et al., 2017).

The distinction between legitimate security in closed versus open societies arguably lies in the importance attached to throughput and outcome legitimacy (Scharpf, 1999; Schmidt, 2012). In the centuries after Hobbes, the Leviathan in open societies has been chained by notions of civil rights, due process, and *Rechtsstaat*. These constraints limit how the state can act, even in times of crisis. For example, the German constitutional court ruled that the government cannot shoot down a hijacked passenger plane potentially crashing into a city centre, as this would entail the state sacrificing the lives of the innocent few for the sake of the many (Noordegraaf et al., 2017). In open societies, how security is provided is equally important as whether security is provided, at least in theory.

Furthermore, states differ in their view on outcome legitimacy. In closed societies, the ultimate aim of the regime is arguably to protect the current societal order. The conservative juntas of 1970s Latin America claimed they had to seize power to stop socialist revolutions, while the current Socialist regimes in Venezuela and Cuba defend their authoritarian traits with the need to protect society against capitalist forces. In open societies, states are supposed to provide

⁴ Drafted for this IOS think paper by the core members of the Security for Open Societies hub at Utrecht University: Scott Douglas, Beatrice de Graaf.

security in the service of liberty, using its strength to protect the freedom of speech, the right to assembly, and other liberties that actually promote the continuous debating and changing of the societal order.

ONGOING LEGITIMISATION IN OPEN SOCIETIES

In practice, the legitimisation of security is not so straightforward in open societies. The assessment of the output and throughput legitimacy is complex and contested. We know relatively little about the effectiveness of security measures such as drone targeting, data-analytics and counter-radicalisation (e.g. Crenshaw & Lafree, 2017; van Um & Pisiou, 2015), even while governments massively invest in these interventions. If societies want to weigh whether the outputs legitimised the costs, we need to overcome our lack of insight into the effects of complex security measures (Bures, 2012).

Moreover, liberal democratic governments in open societies can be observed to transgress individual rights in the name of collective security. The administration of George W. Bush defended the imprisonment without due process of ‘enemy combatants’ in Guantanamo Bay with the argument that a new type of terrorist threat demanded new types of measures. The Dutch local police force routinely barred protestors against the monarchy on King’s Day with the argument that they posed ‘a threat against public safety’.

The difference between closed versus open societies may not be that states in open societies always balance the costs and benefits of security provision, or never transgress civil rights, but that open societies offer opportunities for recourse and correction. Former detainees of Guantanamo Bay have been awarded damages in the UK. The Nationale ombudsman in the Netherlands has pushed for more effective protection of the right to protest (De Nationale ombudsman, 2018).

In line with Popper’s view on open societies, legitimate security is not produced by getting everything right, but by acknowledging the fallibility of humans and institutions, by creating spaces for open enquiry, and opening pathways to correct faults. Importantly, this process of ongoing legitimisation is not automatic, but requires constant effort and vigilance on the part of citizens and their leaders.

TOWARDS NEW FOUNDATIONS FOR LEGITIMACY

Looking ahead into the 21st century, the question can be raised whether ongoing tweaks and corrections to the security contract will suffice. As in Hobbes’ day, the world is facing fundamental shifts in the sources of insecurity and security. States feel a psychological and political impetus to build an ever stronger ‘national security state’ to uphold governmental power and legitimacy to fight new threats, while

‘In practice, the legitimisation of security is not so straightforward in open societies.’



at the same time their capacity to effectively provide security is decreasing as they become reliant on non-state actors.

For example, the government is unable to police the full extent of the digital realm, instead tasking private companies such as Google and Facebook with ensuring the content they facilitate is safe. In the physical realm, citizens organise themselves into neighbourhood WhatsApp groups or online search parties to police their communities (Starbird et al., 2014). These non-state actors become providers of security without clear mechanisms to ensure the legitimacy of their actions.

The tension between the felt obligation to protect citizens against new threats and the inability to actually provide security could push states to limit liberties in an attempt to retain control. One escape from this trap may be to revisit the security contract underpinning modern states since Hobbes. The old contract between state and citizens, promising absolute security in exchange for absolutist powers, no longer holds. A new legitimate security contract would have to incorporate the multitude of different actors involved in co-producing security, secure the core ideals of liberty, introduce a more realistic notion of security, while restoring the trust and relations between governments, citizens, and non-state actors.

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Institutions for Open Societies
Think Paper Series #2, November 2020.

Editorial board: Mark Bovens and Beate Volker

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Institutions for Open Societies Think Paper Series (ISSN 2666-8483; E-ISSN 2666-8491) is a publication by strategic theme Institutions for Open Societies of Utrecht University. Wittevrouwenstraat 7bis, 3512 CS Utrecht.

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