4 Security and Peace: Justifying Political Authority

> [The liberalism of fear] does not, to be sure, offer a *summum bonum* toward which all political agents should strive, but it certainly does begin with a *summum malum*, which all of us know and would avoid if only we could. That evil is cruelty and the fear it inspires, and the very fear of fear itself.
>
> — Judith Shklar, *The Liberalism of Fear* (2007, 10–11)

4.1 Introduction

According to the functional conception of legitimacy, an institutional token is legitimate if and only if its existence makes nobody worse off than they would have been without any token of this institutional type. Returning to the problem we started out with, the political authority of rulers over the ruled in the state, we can now ask how political regimes fare in terms of functional legitimacy. This question can be addressed both at the level of tokens and types. I will argue that functional legitimacy does not necessarily entail philosophical anarchism. The reason is that the function of political authority as an institutional type is to administer peaceful coexistence in a state. Nevertheless, if citizens and residents of a state are exposed to rulers' authority and power, they may be worse off than in the state of nature where all individuals are roughly equally vulnerable. What is decisive for the legitimacy of any particular regime-token which authorises rulers is thus whether the government is limited by a liberal constitution. Functional legitimacy does not, however, suggest any ideal constitution to strive for. Detailed matters of constitutional design are subordinate to the requirement that the constitutional order as such must be functional, i.e. liberal.

Let us go back to the example from the beginning of Chapter 2. After submitting to the mafia boss's racketeering scheme, your spirits were lowered further by reading the news that the city council levies a new tax on shop owners for policing the city centre. You know that, in contrast to the mafia boss, the city council claims to impose a legal obligation on you. And since you recognise your role as a citizen and the government's authority, you also have the political obligation to fulfil your legal duties.

However, even though you play by the rules, you may wonder whether the city council, and also your central government, is justified to wield political authority and thereby impose legal obligations upon you. Taking a functional approach to the justification of institutions, you want to know whether your state's current regime is actually legitimate.

Before turning to your particular regime, it is worthwhile to consider whether political authority can be justified at all. In other words, you want to know whether it is a functional institutional type. Denying this claim would commit you to the position that political regimes are illegitimate as a matter of necessity. Accounts of legitimacy have this implication, for instance, if they insist that people have a duty to be autonomous which cannot be trumped by other considerations, as Robert Paul Wolff (1998) does. From a functional standpoint, this is not the case. What matters is each individual's total utility, which may be influenced by a multitude of factors that have to be weighed against each other. For most people, autonomy arguably ranks high among these factors. Yet to enjoy their autonomy, they require some basic level of security which is absent in the state of nature.

It is arguably the function of legal orders to ensure individuals of this basic security within the state. This function is acceptable, even desirable, for everyone on whom the legal order imposes institutional burdens. Thus, legal orders are a functional institutional type. Moreover, the function of political regimes is to regulate how governments administer the legal order. This is arguably also a universally justifiable function. On the functional account, political regimes are thus not illegitimate a priori.

Libertarians, however, may identify the protection of individuals' property rights as the function of the state. Under that premise, it is also impossible to justify taxation against the taxed person's will. A libertarian taking this position may consider the authority of the executive and the judiciary as legitimate insofar as they enforce and adjudicate people's property rights. At the same time, she has to reject the claim that a government can be legitimately authorised to change citizens' property rights by means of legislation. Libertarians presuppose the existence of property rights in their account of political legitimacy. Yet formal property rights which are capable of enforcement and adjudication are only created by a government by means of political authority. As a part of the legal order, the function of property as an institutional type is to contribute to peaceful coexistence in a state by giving people secure claims to their belongings. On the functional account, a right to property is thus constitutive of a regime's functionality,

but it is not the function of the regime to protect people's pre-existing property rights.

Insofar as the functional conception of legitimacy does not entail anarchism a priori, we need to shift our attention to the level of tokens. Functional legitimacy may still turn out to entail philosophical anarchism, albeit only contingently. After all, it may well be the case that all existing or historical regime-tokens are or were dysfunctional, even though the institutional type would allow for functional tokens. This version of anarchism is thus a weaker claim that deserves scrutiny, even if the stronger version is ruled out.

The problem with political regimes is that, whereas they serve the function of providing peace and security, they may fail spectacularly at this task. By leaving the state of nature, individuals may in fact go from bad to worse. This is because governments wield a monopoly on power within their respective states. The threatening potential wielded by such a powerful agent by far exceeds what individuals have to fear from each other outside state structures. Whereas you may at least try to defend yourself against your neighbour, you are completely helpless *vis-à-vis* a government. A stable government is more powerful than the mafia, and political crimes can easily be worse than organised crime. Sceptics of political legitimacy could thus justifiably point out that Hobbes's solution to the insecurity of the state of nature is no solution at all. An absolutist Leviathan is a worse nightmare than the state of nature ever can be.

Insofar as all stable governments wield a monopoly on power, does the functional conception of legitimacy end up endorsing anarchism? No, it does not. This is because not all governments wield *unrestricted* power. There are regimes with constitutions which effectively subject rulers to procedural restrictions and grant individuals fundamental rights. Such regimes actually meet their function of creating benefits of secure and peaceful coexistence for people within their borders, and they do so without, in virtue of their existence, imposing costs on people outside these borders.[213] If you live under a regime where you are protected against arbitrary power and your most basic interests are guaranteed by fundamental rights, it is functional and your government is justified to wield authority. This demarcation criterion is not at all trivial. Many existing regime-tokens are

213 In a legitimate regime, the government must not only grant fundamental rights to its citizens, residents, and visitors, but equally to would-be migrants, as well as to foreign civilians and also to captured combatants, i.e. prisoners of war, in military conflict.

likely to fall below the functionality threshold. It is, however, sufficiently attainable such that functional legitimacy does not qualify as a philosophical anarchist conception.

A regime which constitutionally grants rights to bodily integrity and the means of their livelihood to all individuals without exception can be described as *liberal*. In a liberal regime, individuals are better off than they would be in the state of nature because they are protected against each other by the government, and against the government by their constitutional rights. This can also be expressed by means of the thought experiment of the social contract: all individuals would accept the creation of a liberal regime if they were presented with this opportunity in the state of nature.

The tool of the social contract, however, seems to allow for more than a binary distinction among legitimate and illegitimate regimes. It suggests itself to ask what particular regime individuals would choose if they could not only accept or reject proposals but were free to negotiate an agreement. Yet this question, apparent as it is, lacks a determinate answer. The problem is simply that individuals will not agree at all in a situation such as the state of nature, where nobody enjoys an advantage of bargaining power due to their institutional status. People have very different and even irreconcilable values and preferences. Since individuals in the state of nature must concur unanimously with a constitutional draft, everyone could veto proposals they dislike, thus blocking any chance to reach an agreement. The adoption of a social contract can therefore not be understood as a bargaining situation, but only as a binary choice.

To induce agreement on a unique social contract, we would need to abstract away from individuals as they are, placing them under a veil of ignorance (see Rawls (1971)) or uncertainty (see Buchanan and Tullock ([1962] 1999)). Yet this would undermine the very idea of the social contract. Insofar as individuals under the veil are alienated from their personal identities and preferences, we cannot infer from their consent that an institution is actually justified to them. In the case of a veil of uncertainty, individuals all choose what is best for the average person, i.e. what maximises aggregate utility per head. This has the effect that the resulting constitutional order need not even be functional. Functionality, however, must have priority over any attempt at optimising a regime. We should therefore not overstrain the social contract metaphor and be content with the fact that it yields a clear lower bound of legitimacy. Such a tolerance for different regime forms also fits well with functional legitimacy's liberalism.

In the remainder of the chapter, I will proceed as follows. In Section 4.2, I will consider whether political regimes qualify as a functional institutional type, demarcating functional legitimacy from inherently anarchist conceptions of legitimacy. Section 4.3 then turns to the level of institutional tokens. After discussing the threat emanating from governments with a monopoly of power, I will make the case for constitutionally guaranteed fundamental rights that protect individuals' basic needs. In Section 4.4, I will examine whether the thought experiment of the social contract can be used to derive a political ideal. I will argue that this is not possible without relying on the problematic tool of a veil of uncertainty or ignorance and that functional legitimacy prioritises a regime's functionality over its supposed optimality. Section 4.5 concludes the chapter with a short summary.

4.2 Political Authority as a Functional Institutional Type

4.2.1 *The Benefits of Peaceful Coexistence*

A fundamental question in political philosophy on which there is still no consensus is whether political authority can be justified at all.[214] The negative answer to this question amounts to a particularly stringent version of the anarchist challenge. Philosophical anarchists who take the stance that justified political authority is impossible can be referred to as *anarchists a priori*. Their position must be distinguished from the empirically informed claim that no actual regime, i.e. no existing token of the institutional type, happens to be justified.[215] The latter is known as *philosophical anarchism a posteriori*. Whereas both forms of philosophical anarchism conclude that all existing states lack justification, anarchism a posteriori does so for contingent reasons. Anarchism a priori, in contrast, presents this result as a logical necessity, following from the fundamental unjustifiability of political rule.

For functional legitimacy to be an anarchist conception of legitimacy a priori, it would need to be the case that political regimes are a dysfunc-

214 This lack of consensus may induce a certain discomfort. As Risse (2012, 305) puts it: "A grand project of modern political philosophy has failed: to establish that there ought to be states without leaving a nagging doubt, a suspicion that there might be no moral or rational reconstruction of the development of states."

215 The distinction between philosophical anarchism a priori and a posteriori was introduced by Simmons (1983, 795).

tional institutional type. Thus, regimes would need to be institutions such as patriarchy and apartheid which serve the function to attribute institutional power and authority to some people over others. Political regimes actually grant immense social power and authority to rulers by giving them control over the state apparatus. It is therefore understandable from a functional perspective that philosophical anarchists meet the idea that political rule can be justified with a good deal of scepticism.

On the functional account of legitimacy, however, what matters for classifying political regimes as a functional institutional type is whether the function of regimes is one that all individuals facing burdens from the existence of a regime could accept. In contrast to institutions such as patriarchy or apartheid, it is arguably not the function of political regimes to create an institutional status which exclusively benefits the status holders. That members of the government are authorised to rule is a means to an end. This end is to administer the legal order. It is exactly when regimes break down and governments fail to uphold order that people are particularly vulnerable to the brute power of warlords and militia leaders. The state of nature is a model for such a "failed state." It describes the counterfactual situation in which people would find themselves without a stable legal order (see 3.3.1).

The function of a legal order, including both primary and secondary law, is thus arguably to provide for peaceful human coexistence within the territory of a state,[216] allowing them to reap benefits from cooperation and coordination.[217] This is a function that all individuals can accept. The regime is a subordinate institution of the legal order, defined by secondary law. It regulates how a government may legislate, adjudicate, and enforce primary law by means of political authority. Without political authority, there can be no formal law. It is therefore the function of political authority

216 See also Pettit (2023, 7, 26) who characterises the function of the state as providing a legal order to protect citizens against each other and to defend this order against external threats. On my conception, it is the legal order which serves this function while the state is the political organization to which the legal order applies (see Chapter 1 for the differentiation between state, government, and regime).

217 Allen, Bertazzini, and Heldring (2023) provide empirical evidence for the hypothesis that the function of governments is to facilitate cooperation. Using data from ancient Mesopotamia, they show that polities were more likely to form where rivers had shifted away such that farmers had to cooperate in order to irrigate their fields. The authors understand their findings as a refutation of the hypothesis that the origin of states can be attributed to extraction.

to administer peaceful coexistence among a state's citizens and within its territory by means of formal law.[218]

That does not mean that before they had political authority, people lived in a war-like situation characterised by violence. Already the earliest human societies were formed, as Hume ([1748] 1994, 187) puts it, "for the sake of peace and order." In prehistoric times, the function of ensuring peaceful coexistence was served by social morality, [219] the emergence of which long predates political entities and states in particular. As the remaining tribal societies show, people can live together peacefully in small informal communities rather than in states with political authority and formal law. Within small and close-knit clans and tribes, peaceful anarchy can indeed be a viable option. There is little need for the authoritative creation of new rules, and social controls ensure compliance with the body of evolved social practices.

Even anarchic communities, however, must exert high internal pressure on their members (Shklar 2007, 18). The difference to regimes is that this pressure takes the form of threatening social ostracism rather than formal sanctions. The burdens on individuals may be very high in both cases.

Moreover, if peace is to be secured and cooperative benefits are to be achieved among larger populations with little societal cohesion, societies require political authority to regulate coexistence within a territory. From a certain size of population onwards, societies must thus make use of formal institutions to contain violence as a means of conflict resolution and to provide peace (North, Wallis, and Weingast 2009, 14).[220] To meet this aim is what governments are there for.[221] This is also in line with the point made by North, Wallis and Weingast (2009, 269). The authors emphasize that even "limited access orders," where elites divide rents among each other,

218 See also Schmelzle (2015, 195–96) who identifies three reasons for organising political rule in states: With their claim to supreme authority within a territory, states contribute (1) to unambiguousness of the political order and (2) to the reliability of its enforcement. Moreover, he holds that (3) the institutional status as public actor entails a duty of justification which is conducive to impartiality.

219 As Kitcher (2014, 221) points out, ethical rules serve the function of ameliorating social problems in human communities, albeit not always very reliably and efficiently. According to Sterelny and Fraser (2017, 984), too, one function of folk morality is to track the truth about social facts concerning human cooperation.

220 The Montevideo Convention on Rights and Duties of States also asserts that "[t]he primary interest of States is the conservation of peace" (article 10).

221 See also Oakeshott (1991, 428) who considers it to be the task of government to uphold peace by enforcing universal rules.

serve a function. Although such polities might seem inefficient from an outside perspective, they offer an answer to the fundamental problems of order and stability.[222]

The peace and order provided by stable governments are in many ways a prerequisite for achieving mutual benefits from cooperation and coordination in the first place. Most basically, by providing an institutional path of conflict management and controlling violence, the existence of a government wielding political authority within a state can enhance the prospect of survival for its subjects. As survival is the precondition for the realisation of any other interest, all individuals can be assumed to benefit from an increased chance of survival.[223] In particular, survival is also a prerequisite for cooperation and coordination in functional institutions.[224]

Beyond survival, peaceful coexistence is also a precondition for all higher forms of self-fulfilment to which human beings attribute value (see also Kitcher 2014, 316). In the economic sphere, moreover, orderly peace is a necessary condition for individuals having incentives to be productive. In Hobbes's famous words, life is "solitary, poore, nasty, brutish, and short" (Hobbes [1651] 1996, 89) in the state of nature. This is because, under circumstances of anarchic violence, individuals cannot be expected to produce anything they cannot secure for themselves. A political order where a stable government has a monopoly on power is therefore an important political

222 For a case study how the emergence of the territorial state is connected with rulers providing peace, consider the situation in the Holy Roman Empire in Central and Western Europe as described by Wadle (1995): In the Middle Ages, attempts to institutionalise peace were short-lived. Up until the 11th century, feuds were considered coequal to lawsuit. Only the *Ewiger Landfriede* ("eternal public peace") from 1495 generally and permanently banned feuds. Permitted legal action became restricted to taking one's opponent to court. The *Landfriede* also created the basis for an imperial superior court of justice. These developments heralded the consolidation of territorial states in the region. Similarly, Bates, Greif, and Singh (2002, 612) reconstruct how the English state emerged when the king provided public order by banning private wars such as blood feuds and started levying taxes for his peace services.

223 A better chance to survive social conflict does not prevent those who wish to end their lives from doing so. Thus, nobody is made worse off by it.

224 As Hart ([1961] 2012, 192) points out, survival is the presumed goal of any moral and legal rules for durable human coexistence: "We are committed to [survival as an aim] as something presupposed by the terms of the discussion [of human law and morals]; for our concern is with social arrangements for continued existence, not with those of a suicide club."

good (Olson 1993, 567).[225] In the same vein, North (1990, 35) diagnoses that "[o]ne cannot have the productivity of a modern high-income society with political anarchy."

That political authority, by administering peaceful coexistence, enables people to realise all sorts of benefits supports the notion that it constitutes a functional institutional type. The mere fact that political authority serves such a crucial function, however, does not rule out that rulers in some regime-tokens use their authority and power to repress some of their citizens and residents and even diminish their chances of survival (see 4.3.1).[226] Yet this is not part of political authority's function (see also Pettit 2023, 63); it is merely a side-effect. Taking a functional approach to political legitimacy, we can therefore reject anarchism a priori.

4.2.2 *The Incompatibility of Autonomy and Authority*

Functional legitimacy can reject anarchism a priori on the grounds that political authority serves the function of administering peaceful coexistence, which does not necessarily entail net costs for anyone. Conceptions of political legitimacy which are not based on costs and benefits, however, may come to a different conclusion. Notably, this is the case for approaches which measure political institutions by the standard how they fare with respect to promoting individuals' self-determination or *autonomy*. The problem is that granting someone else a right to rule me is conceptually at odds with maintaining my autonomy. To the extent that I acknowledge someone's authority over me in certain domains, I compromise my autonomy in these domains. Theorists who prioritise autonomy over all other values, like Robert Paul Wolff, must therefore be anarchists a priori.

On the basis of Kantian morality, Wolff (1998, 17) assumes that individuals are morally required to take responsibility and strive for autonomy. Any

225 This claim can be supported by formal models. As Olson (1993) argues, governments as "stationary bandits" provide the population with incentives to produce: In taxing their subjects, they take only so much that production pays off. "Roving bandits," in contrast, steal everything they can get hold of, which provides a strong disincentive to produce. Bates, Greif, and Singh (2002) conditionally agree: They argue that stateless societies are poor as long as private agents do not invest in violence themselves. A government who acts as a violence specialist can free up private resources by providing centralised enforcement.

226 See Matson and Klein (2022) who understand political authority as a Lewisian convention which is natural in Hume's sense: It is necessary to have some form of authority, even though a particular form may be suboptimal.

attempt to justify authority would be incompatible with this moral demand to be autonomous (Wolff 1990, 30). As Wolff (1998, 18) puts it, "The defining mark of the state is authority, the right to rule. The primary obligation of man is autonomy, the refusal to be ruled." Wolff's conception of political legitimacy is extreme but consistent. Under the assumption that political authority is only legitimate if individuals maintain their autonomy, political rule cannot be justified.

The notion of autonomy is also popular in the Rousseauvian strand of social contract theory. There, it is understood to be a requirement of political legitimacy that the regime confers political autonomy to citizens as an advancement compared to the *natural freedom*[227] of not being subjected to any laws and authority in the state of nature.[228] This freedom is natural not in the sense of a biological quality inherent to human beings. It merely describes the absence of institutional restrictions in the state of nature. The crucial assumption made by Rousseau ([1762] 2012, 172) and adopted by his followers in contemporary democratic theory is that naturally free individuals do not voluntarily accept a form of political association in which they are ruled by others. This is why, to be legitimate, political authority must not merely replace individuals' natural freedom. Instead, it must grant them *conventional freedom* in return.

This means that *qua* citizens, rather than merely being the subjects of political authority, individuals must at the same time be *sovereign* (Rousseau [1762] 2012, 233). Sovereignty is the quality accruing to the wielders of political authority.[229] For Rousseau ([1762] 2012, 185), citizens obeying a reciprocal act of sovereignty do not obey anyone else than their own will since "[…] obedience to the law one has prescribed to oneself is freedom" (Rousseau [1762] 2012, 176). Note that Rousseau makes a shift from the *negative* freedom[230] of the state of nature towards a *positive* conception

227 Before Rousseau, Hume ([1748] 1994, 187) already claimed that "[t]he people […] are the source of all power and jurisdiction, and voluntarily, for the sake of peace and order, abandoned their *native liberty*, and received laws from their equal and companion" (emphasis added).

228 Rousseau ([1762] 2012, 166–67), see also Manin (1987, 340).

229 As Bellamy (2019, 228–229) notes, the term pays reference to the idea that political authority is the *supreme* form of authority within a state.

230 For the distinction between "negative freedom" as non-interference by others and "positive freedom" as self-determination, see Berlin ([1958] 2002, 169).

of freedom as self-determination.[231] Indeed, Rousseau actually presents the preservation of individual autonomy, rather than individuals' unanimous assent, as the central legitimising feature of the social contract:[232]

> "How to find a form of association that defends and protects the person and goods of each associate with all the common force, and by means of which each, uniting with all, nonetheless *obeys only himself and remains as free as before*?" Such is the fundamental problem to which the social contract provides the solution. (Rousseau [1762] 2012, 172, emphasis added)

The requirement that each "remains as free as before" is extremely demanding. If a constitution was only acceptable for all individuals in the state of nature if they could maintain their natural freedom from authority, justifying a regime where some exert authority over others would be an impossibility. By demanding that each "obeys only himself and remains as free as before," Rousseau comes up with a legitimacy criterion for political authority which is not even compatible with the form of governance he henceforth aims to defend, namely direct democracy with simple majority rule (see Rousseau [1762] 2012, 232–38).

Although Rousseau maintains that self-rule can be achieved in a majoritarian system, majoritarian democratic decisions cannot guarantee the freedom of everyone. The problem is that democratic decisions are only conducive to *collective*, but not to *individual* self-determination.[233] A majoritarian democracy can thus at most be understood as enabling the collective entity of "the People," which must be presupposed in democratic decisions,[234] to rule itself. The People as an institutionally structured,

231 I am not discussing other normative accounts of self-determination which are not derived from the thought experiment of the social contract, such as Kant's conception of autonomy, as this would go beyond the scope of the present chapter.

232 This squares with Kelsen's ([1920] 2013, 28–30) observation that the concept of freedom is transformed in democratic theory away from a negative, anarchic non-subjection to social order towards political rule by majority decisions.

233 See also Brinkmann (2024, 216), Kelsen ([1920] 2013, 32–33). As I will argue in 5.2.1, it is also not the function of majoritarian democracy to enable individuals to rule themselves. The function of democracy, rather, is to authorise changing majorities to rule.

234 Who is to belong to the *demos* in the first place cannot itself be justified democratically because any democratic decision presupposes a set of people who are eligible to vote, which cannot include all those who are affected by the decision. This insight constitutes the so-called "boundary problem" in democratic theory that was first formulated by Whelan (1983).

organisational agent,[235] moreover, is itself defined by the secondary rules of a legal regime which are supposed to be justified to individuals in the social contract. At the pre-political stage of the state of nature, we can conceive of the people only in the plural as the subjects of political authority.

Majoritarian (direct) democracy is thus far away from the protection of individuals' natural freedom which Rousseau is looking for in the social contract.[236] Under the condition that the individual only leaves the state of nature for a regime where she *obeys only herself and remains as free as before*, no regime where some are ruled by others qualifies as legitimate. The assumption that a social contract is only acceptable if every individual wields political authority and is able to rule herself thus leads into anarchism a priori.

The only viable option to combine *individual* autonomy with political authority, which is also suggested by Wolff (1998, 23), would be a regime where political decisions are made by means of unanimous direct democracy (see also Kelsen [1920] 2013, 29). Unanimous decision-making grants every citizen a veto right against unacceptable options (see also Brennan and Kliemt 2019, 122). In this way, citizens (although not non-citizen residents) would still enjoy freedom from institutional burdens imposed upon them against their will. Thus, only unanimity can truly guarantee citizens freedom in the sense of individual self-determination.

As an illustration, suppose you are organising a workshop at a charming but remote venue with no restaurants around. Food must be bought by you in advance in order to cook on-site. Ahead of making the booking, you announce that you will ask all participants for their consent to the meal plan you devised. In this way, you assure them that you will serve food which everyone accepted. If you just arrived there with a carload of groceries, without asking for prior consent, there would be the chance the dinner would be in conflict with someone's kosher or halal diet, with their veganism or vegetarianism, or with any allergies or cases of food intolerance. Unanimity here confers a veto right to each participant, making it worthwhile for participants to join the event in the first place.

In the technical terms introduced by James Buchanan and Gordon Tullock ([1962] 1999) in *The Calculus of Consent*, collective action may entail

235 See also Pettit (2023, 198), Kelsen ([1920] 2013, 36).

236 Pettit (2019, 24), accordingly, contrasts the "republican ideal of individual nondomination" with a "nationalist ideal of collective or popular self-determination."

two different kinds of costs for individuals.[237] Subjecting an individual to a collective choice she did not consent to means to impose *external costs* upon her, whereas *internal* or "decision-making costs" arise in the course of finding an agreement (Buchanan and Tullock [1962] 1999, 45). Importantly, unanimity is the only decision rule for binding collective decisions which effectively protects individuals against the risk of external costs (Buchanan and Tullock [1962] 1999, 64). If collective decisions are made with a quorum below unanimity, external costs necessarily arise, as the dissenting minority is compelled to comply with the decision made by the majority (Buchanan and Tullock [1962] 1999, 89).

Unanimity in collective decisions is thus a powerful tool to protect individuals against choices which harm their interests and impose unacceptable external costs upon them. Yet arguably, it is too powerful a tool to be beneficial in many cases. If all individuals have a veto right for each decision, everybody may block the adoption of any new policy, using their leverage to extort special favours for themselves. In the limit, no decision at all can be reached, which might be the worst option for everyone. Some external costs are arguably well bearable, in particular if they are outweighed by the gains from authoritative decisions. Thus, a regime where authoritative decisions entail external costs need not be illegitimate on the functional account. This would only be the case if the externalities were to outweigh all benefits from the regime type in question.

In a unanimous direct democracy, individuals would fail to enjoy a major benefit of political authority, namely binding collective-decision-making, each time that an individual decides to use her veto power and block a collective decision. In other words, unanimity dramatically pushes up internal costs because collective decisions could become completely deadlocked. Buchanan and Tullock ([1962] 1999, 89) therefore conclude that the existence of internal costs of decision-making speaks against the unanimity rule from the individual's point of view. This makes intuitive sense. Individuals in the state of nature would not make their consent to a regime dependent on the fact that it preserves their natural autonomy if they could gain higher total benefits by compromising on autonomy. In some cases, it

237 *The Calculus of Consent* is an important point of reference for my own approach because there, Buchanan and Tullock also take an individualistic cost-benefit approach and use the thought experiment of a hypothetical constitutional choice situation. A main difference to functional legitimacy, however, is that Buchanan and Tullock assume that constitutional choice takes places under a "veil of uncertainty," which I will criticise in 4.4.2.

would be simply irrational to reject authority merely for maintaining one's autonomy. As Buchanan ([1975] 2000, 141) puts it, "[t]here is probably not a single person who values his own freedom of choice so highly that he would prefer a nation without traffic rules."

If political authority is vulnerable to be jeopardised by each individual, its function of administering peaceful coexistence is undermined by the impossibility to reach agreement. Such a regime is therefore likely not to be functional, i.e. it would probably not be unanimously accepted in the state of nature. Indeed, a regime where all political decisions must be made with unanimity may be even worse for individuals than the state of nature where they are on their own and can make private decisions. For instance, the participants at the workshop mentioned above might prefer to bring their own food to having and endless debate about which meal is to be prepared. Insofar as unanimous decision-making may come at the sacrifice of functionality, it cannot be required by a benefit-based account of legitimacy.

In this context, it is important to distinguish between unanimity as a criterion of legitimation *for* institutions and unanimity as a decision rule *within* institutions (see also V. Vanberg 2020, 354). Unanimous consent in the hypothetical choice situation signals that no participant yields net costs from the existence of an institution. This is why it serves as the benchmark criterion for functional legitimacy in the thought experiment of the social contract. The external costs arising in non-unanimous collective decisions within a regime, on the other hand, only make up one part of the individual's cost calculation when she considers whether it is worthwhile to have a regime. On the functional account, these external costs have to be weighed against the internal costs. The sum of external and internal costs from collective decisions must then be compared to the state of nature which is characterised by a high level of external costs from uncoordinated, private action.

What individuals are actually interested in when they enter the civil state is not avoiding all externalities but reducing overall *interdependence costs* (Buchanan and Tullock [1962] 1999, 46), i.e. the sum of external and internal costs in collective decisions. If there were no internal costs, the individual would indeed prefer the unanimity rule for all decisions in order to avoid the externality of being required to comply with decisions made by others (Buchanan and Tullock [1962] 1999, 89). The more individuals are needed to consent, however, the higher the internal costs of a decision will be. At some point, it may be profitable for individuals to incur external

costs and to accept a decision rule below unanimity in order to reduce decision-making costs (Buchanan and Tullock [1962] 1999, 60). Introducing less-than-unanimity decision rules reduces the incentive for individuals to start bargaining because the single individual becomes expendable for forming a winning coalition (Buchanan and Tullock [1962] 1999, 107–108).

Even in a majoritarian system, however, individuals may at least be protected against unacceptable external costs, namely by means of fundamental rights. In this way, decisions can be made at low costs while individuals obtain a veto right with respect to those collective decisions which affect their most fundamental needs. Returning to the dinner example, imagine you are now organizing an international conference with hundreds of participants at a secluded conference centre. If you grant every participant the right to veto your plan for the conference dinner, the result may be that all go to bed hungry because simply no agreement can be reached in time for the kitchen to order the ingredients and prepare the meal. Rather than giving everyone a veto, you can more efficiently protect individuals' dietary restrictions if you grant them *rights*, e.g. by instructing the kitchen that at least one dish must be kosher, halal, vegan, etc.

4.2.3 *The Role of Property Rights for Political Legitimacy*

Another conception of legitimacy that can be illustrated by the model of the social contract and that is susceptible to anarchism a priori is libertarianism. Libertarians assume that people have pre-legal rights to their own persons and external objects. These rights of non-interference with an individual's actions and resources, including their own bodies and minds, are ultimately conceptualised as property rights.[238] From this basis, libertarians derive an aversion against coercion, and in particular a pronounced scepticism towards political authority which is usually accompanied by strong confidence in the market. In other words, libertarianism is characterised by a presumption in favour of voluntary exchange rather than politically enforced cooperation.[239] In particular, libertarians tend to oppose taxation as a form of expropriation.[240]

238 See for example Buchanan ([1975] 2000, 14), Narveson (1988, 66).
239 See also Huemer (2013, 178), Narveson (1988, 165), Thrasher (2018b, 213–14).
240 Nozick (1974, 169) phrases his rejection of an income tax as follows: "Taxation of earnings from labor is on a par with forced labor."

If libertarians grant the legitimacy of political organisation at all, it is to the end of the adjudication and enforcement of these property rights (see also Levy 2018, 25). Libertarians may thus acknowledge the authority of the judiciary and the executive as a means to secure property rights. They will find it difficult, however, to ascribe the right to create and change laws to the legislative branch of government.

Libertarian theories may take different forms. Huemer (2013, 176), on his part, emphasizes that his libertarian account goes without controversial assumptions such as natural rights or a hypothetical contract. Instead, he claims that the core tenets of libertarianism are part of human beings' intuitive moral knowledge. Yet libertarianism does exhibit a certain affinity to contractarianism, which is reflected in a shared presumption against coercion and in the reliance upon normative and methodological individualism (see also Thrasher 2018b, 215). Moreover, it is not uncommon to use the state of nature as a starting point to derive libertarian political principles. Whereas Nozick (1974, 114–115) gives an invisible-hand explanation of the emergence of a minimal state from a Lockean state of nature by means of private contracts without any violation of rights,[241] Narveson (1988, 177) argues that a social contract guaranteeing Lockean property rights makes everyone strictly better off than they would be in the Hobbesian state of nature. A combination of Hobbesian and Lockean assumptions is arguably also at the basis of Buchanan's ([1975] 2000) two-stage contractarianism.[242]

Insofar as libertarians use the model of the social contract, they hold that individuals will only agree to a regime that honours and protects the rights which they, by assumption, already have in the state of nature. This rationale is popular in the Lockean tradition of social contract theory, which includes actual consent theories of political legitimacy.[243] In that strand of social contract theory, individuals' natural freedom is understood as constituting a pre-positive (often natural) *right to self-ownership*. This right is a right to negative freedom, as it is correlated with other people's duty not to interfere with one's body or property.

241 As Hampton (1986, 274) argues, Nozick's theory is an example for a contractarian account which does without an explicit social contract.

242 Note that Buchanan's two-*stage* contractarianism differs from the multi-*level* social contract theory developed by Moehler (2018). Moehler (2018, 158–160) criticizes that Buchanan requires individuals at the post-constitutional stage to accept the distribution of rights determined at the constitutional stage as given, without the epistemic capacity to judge its legitimacy. In Moehler's own theory, the justificatory levels do not depend upon each other.

243 See for example Beran (1987, 22–24), Simmons (1981a, 62–63).

On the account formulated by Locke ([1689] 2005, 271), the law of nature demands that "no one ought to harm another in his Life, Health, Liberty, or Possessions".[244] For Locke ([1689] 2005, 417), it is the task of government to promote citizens' benefit and to protect their property claims. When citizens all agree to authorise a government, they retain their natural rights and can be even more assured of their property (Locke [1689] 2005, 330–331), which makes it worthwhile for them to leave the state of nature. Locke ([1689] 2005, 324–325) himself understands political or civil society as characterised by the existence of political authority which makes laws, adjudicates conflicts among society's members, and enforces punishment in order to protect their property. The authority to make law is justified insofar as individuals authorise a legislative assembly to make binding decisions when they leave the state of nature (Locke [1689] 2005, 329–333). Even decisions concerning taxation are to be made by simple majority (Locke [1689] 2005, 362).

From his conception of the state of nature, Locke ([1689] 2005, Ch. XI) derives certain restrictions on the legislative's authority, such as the requirement to rule by standing law and a proscription of arbitrary power. For contemporary libertarian contractarians, however, limited government with the rule of law is not enough when it comes to transfers in individuals' rights. A libertarian contractarianism recognizes unanimous consent as the only permissible way of justifying any transfer in rights, not only on the private market but also with respect to political institutions (see also Thrasher 2018b, 221). Accordingly, Narveson (1988, 165) emphasizes that majority decisions form no exception from the presumption against political authority. Likewise, Buchanan ([1977] 2001, 181) notes that "[c]hange in an existing rule, or changes in a set of rules, finds a contractarian justification only on agreement among all participants." From this conviction, both are led in the direction of anarchism. Narveson (1988, 240) demands that government should regulate as few issues as possible and suggests private fundraising as an alternative to the provision of public goods by the state. And Buchanan ([1975] 2000, 118) ventures the thought that

> [t]he reasoning and philosophical anarchist […] becomes the only person who might construct the constitutional basis for a free society, who might

244 Contrast this with Hobbes ([1651] 1996, 91) whose "right of nature" is a right to self-preservation, owing precisely to the fact that there is no law in the state of nature.

> elaborate changes from an institutionalized status quo, changes away from rather than toward the threatening Leviathan.

Despite his sympathies for anarchism, Buchanan does not reject political authority altogether. Rather, he identifies two permissible functions of government, a judicial-executive and a legislative one. In its adjudicating and enforcing capacity, government takes the role of the *protective state* which has the function to implement citizens' rights which are defined by the *constitutional contract* (Buchanan [1975] 2000, 88). A polity's constitutional contract can be understood as the set of individual rights on which individuals agree in anarchy before engaging the protective state, i.e. the executive and the judiciary, as an enforcing agent.[245] The protective state thus takes the role of a referee for the rules of the game which have been chosen by the players themselves. It does not only enforce the constitutional contract but also *post-constitutional contracts* among citizens (Buchanan [1975] 2000, 88, 176). Post-constitutional contracts regulate the transactions of public as well as private goods within an existing constitutional order (Buchanan [1975] 2000, 41).

The legislative branch of government, or the *productive state* in Buchanan's terminology, has the task to broker post-constitutional contracts concerning the provision of public goods. In contrast to private goods, public goods can hardly be supplied efficiently by voluntary cooperation. As public goods involve transactions among all members of a given society, these contracts must be as encompassing as the constitutional contract, i.e. they must be concluded among all individuals of the society (Buchanan [1975] 2000, 43, 51). This means that, to ensure that everyone's property rights are protected, post-constitutional social contracts must be unanimously accepted, or at least acceptable, just as the constitutional contract (Buchanan [1975] 2000, 44–45). The legitimate role of democratic legislators at the post-constitutional level, as envisioned by Buchanan ([1975] 2000, 208), is accordingly restricted to reaching consensus on policies.[246]

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245 Buchanan ([1975] 2000, 92–93) describes several components of the constitutional contract: a disarmament contract, a definition of positive human and nonhuman property rights, an enforcement contract engaging and constraining the protective state, and the political contract, including decision rules for different public goods and a general demarcation between the public and the private sector. Moreover, Buchanan envisions tax rules to be defined within the constitutional framework.

246 It must be noted, however, that Buchanan's stance towards majority rule is somewhat ambiguous. At one point, Buchanan ([1975] 2000, 124) actually claims that

On Buchanan's ([1975] 2000, 148) account, no part of government is therefore authorised to create or change individuals' rights, which he all conceptualises as property rights, against their will (Buchanan [1975] 2000, 14). This is because individuals are only willing to leave the state of nature and disarm on the condition that they are granted protection of their previously defined property rights (Buchanan [1975] 2000, 107). The protective state in particular must not meddle with existing rights. Although Buchanan ([1975] 2000, 113) acknowledges that uncertainty about claims makes a judiciary necessary, he takes the position that courts and judges do not define rights but merely sort out conflicts concerning existing law.[247] Not even the productive state, however, is in the position to alter individuals' constitutional property rights, at least not without undermining these rights in the long run, he warns (Buchanan [1975] 2000, 107–110). Whereas Buchanan ([1975] 2000, 148) acknowledges that non-unanimous legislation interfering with individuals' rights does in fact occur, he warns that it cannot count as legitimate. Such legislative acts amount to violations of the constitutional contract which, according to him, is the only legitimate basis of government (Buchanan [1975] 2000, 107). Buchanan ([1975] 2000, 108) even goes so far as to claim that

> [t]o say that any act of government is legitimate because that act is sanctioned by a majority or a plurality of the community's members, or by a majority or plurality of their elected representatives in a legislature, or by their elected, appointed, or anointed designates in executive or judicial roles, is to elevate collective or governmental institutions and process to a position superior to content. Unconstitutional behavior cloaked in the romantic mythology of majority will or judicial supremacy in some circumstances may proceed further than behavior which lays no claim to procedural rights.

Even though he acknowledges the importance of having a government, Buchanan thus denies that political authority strictly speaking, i.e. the Hohfeldian power to create and change subjects' rights and obligations, can

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non-unanimous decisions at the post-constitutional stage are permissible, but only due to the high costs of unanimity.

247 Buchanan ([1975] 2000, 121) imagines the ideal protective state to be like a robot which is programmed to detect law violations and to enforce pre-defined sanctions. Indeed, for Buchanan ([1975] 2000, 208), judges who make law are a worse evil than politicians implementing their own value judgements. This is in contrast to the notion that—at least in common law—judges make law coequally to legislators.

be legitimate. For Buchanan, as well as for Nozick,[248] the only legitimate role of government is to protect pre-positive rights, which does not include any changes or the creation of new rights.

It is the assumption of pre-positive rights which leads libertarians down the anarchist road. Taking an institutional approach, we may distinguish two different forms of rights which vary with respect to their origins. On the one hand, there are social-moral rights which evolve evolutionarily. On the other hand, there are positive legal rights which are designed by the legislative and adjudicated by the judicial branch of government. As institutional phenomena, rights of both origins are social constructs and not natural,[249] although social-moral rights exist independently from political authority. Pre-positive rights can thus only be informal social-moral rights.[250] The latter, however, are not sufficiently specified to be adjudicated and enforced by the protective state.[251]

Whereas there may be informal practices of recognizing an individual's personal sphere of influence independently of political authority, fully-fledged property rights regimes are particularly complex formal institutions, designed and enforced by governments. Before the emergence of a political regime with a government, there are only informal, social-moral rights. Without detailed formalisation, these property claims are too vague to effectively coordinate individuals' behaviour in contentious situations.[252]

Even Locke acknowledges that only legally codified property rights exhibit sufficient precision to be unequivocally adjudicated. As Locke ([1689] 2005, 350–51) observes, the state of nature, while being a state of freedom, entails a high insecurity of property. The lack of a binding law, an impartial judiciary and the power for the enforcement of sentences motivate individuals to set up a state. This is exactly the reason why he suggests leaving the

248 Nozick (1974, 18) describes how a legitimate government could have emerged as a dominant protective organisation to enforce and adjudicate its members' rights.

249 See also Hume ([1739] 1960, 491) who emphasizes that property claims are not natural but defined by social rules.

250 See also Christiano (2004, 281), Gaus (2011, 465–467), Mackie (1990, 173–77), Pettit (2023, 276), Ripstein (2004, 32).

251 But cf. Narveson (1988, 86) and Simmons (2016, 126–127) who both assume that there can be informal property rights.

252 Similarly, Garthoff (2010, 675–81) argues that law solves the problem that morality underdetermines individuals' obligations. Law is required to coordinate individuals fulfilling their obligations by specifying the requirements of justice for a type of situations where this is not clear.

state of nature in the first place. A government thus has the task to *define* unambiguous property rights before it can even *protect* them.[253]

Secure property rights are among the basic institutional determinants which a regime must provide to foster economic prosperity (Acemoglu and Robinson 2013, 74–76). Without a clear definition of property rights, individuals will find it hard to conduct certain transactions. Even supposedly trivial ownership claims to a plot of land or a house require a high degree of specification in order to be tradable or acceptable as a mortgage collateral, not to speak of non-physical claims to intellectual property or complex financial products. Formal property rights are defined by a wide range of legislative rules and judicial decisions. And insofar as tax laws, too, contribute to defining ownership rights, it is erroneous to claim that taxation is forced labour or theft.[254]

Another important role of government for securing the voluntary exchange of property claims is to define the institution of the market in the first place. Even market exchange presupposes a political order. Not only is private property a legal institution,[255] but contracts must also be enforceable by the state to be motivationally effective. Political authority therefore cannot simply be exchanged for the invisible hand of the market. Contrary to libertarian imagination,[256] the market is not an uncoercive, i.e. property-respecting, substitute for political authority. Instead, any regular market is itself the product of authoritative design,[257] including the design of property rights. Black markets, in contrast, derive from spontaneous evolution. They are characterised by high insecurity of informal property claims which are also not enforceable.

That any justiciable formulation of property rights is contingent upon legislation does not mean that governments are justified to change or confiscate individual's property arbitrarily (see also Gaus 2011, 510–511). As I will argue in the next section, a legitimate regime must constitutionally grant individuals a set of fundamental rights, which includes a right to property. A regime where rulers may simply deprive individuals of all their

253 This resembles the position taken by Hobbes ([1651] 1996, 90) that the government's overarching power is a precondition for property.
254 See also Murphy and Nagel (2002, 74), Pettit (2023, 274–275).
255 See also Binmore (1998, 161), Olson (1993, 572).
256 See for example Huemer (2013, 146–148), Narveson (1988, 232–40), Nozick (1974, 169–172).
257 See also Binmore (1998, 161), Pettit (2023, 301–2).

belongings, undermining rather than guaranteeing public order,[258] can hardly count as functional. A constitutional right to property, however, is compatible with understanding property claim-tokens as positive,[259] which gives the government room for legitimate legislation (see 5.3.1). While recognizing the important role of property, functional legitimacy therefore does not succumb to anarchism a priori.

4.3 The Possibility of Dysfunctional Regime-Tokens

4.3.1 *Individual Exposure*

That political authority is not illegitimate a priori does not entail, however, that we can confidently reject philosophical anarchism. Only because it is functional at the level of institutional types, this does not imply that any existing token of political authority must be functional. It may actually be the case that there never has been a regime where each of its subjects obtained net benefits arising from peaceful coexistence. If this was the case, functional legitimacy would belong to the camp of *anarchism a posteriori*. Anarchism a posteriori is the position that political regimes can be legitimate but in fact never have been so (Simmons 1983, 795). It is thus a contingent form of anarchism, depending on what the state of the world is like.

From a functional perspective, anarchism a posteriori has a good deal of plausibility. It is not hard to name several regimes which, rather than providing their subjects with the benefits of peaceful coexistence, brought war, misery, and persecution upon them.[260] Political authority thus involves an enormous destructive potential. This is why Judith Shklar (2007, 11) warns against the "arbitrary, unexpected, unnecessary, and unlicensed acts of force and habitual and pervasive acts of cruelty and torture performed by military, paramilitary, and police agents in any regime." The cruellest crimes in history were arguably committed by governments and other political actors. This is no surprise since only agents who control an army,

258 See also Mackie (1990, 178), Narveson (1988, 209).

259 The German constitution, while granting a right to property, indeed stipulates that the content and limitations of this right are defined by primary law (Art. 14 (1) GG).

260 To name only a selection of the worst, one could think in this context of the Nazi regime in Germany, Stalinism in the Soviet Union, or the rule of the Khmer Rouge in Cambodia.

or at least a militia, are in a position to wage war and to commit genocide. As Huemer (2013, 109) puts it:

> No one has ever managed, working alone, to kill over a million people. Nor has anyone ever arranged such an evil by appealing to the profit motive, pure self-interest, or moral suasion to secure the cooperation of others – except by relying on institutions of political authority.

In light of the political crimes of the twentieth century, it may even be doubted whether a political authority is indeed preferable to the civil war of the Hobbesian statue of nature.[261] Hobbes, on his part, stretches the argument for political authority too far indeed. He concludes from the legitimacy of the institutional type that any stable token is legitimate as a consequence. Anticipating the charge that life under a sovereign is actually miserable, Hobbes ([1651] 1996, 128–129) counters that civil war is far worse and that human lives can never be without any inconvenience anyway.[262] For Hobbes ([1651] 1996, 233–234), the main advantage of any regime consists in rulers' wielding of stable authority and subjects' unwavering deference to their authority, irrespective of the particularities of constitutional design:

> For the prosperity of a People ruled by an Aristocraticall, or Democraticall assembly, cometh not from Aristocracy, nor from Democracy, but from the Obedience, and Concord of the Subjects: nor do the people flourish in a Monarchy, because one man has the right to rule them, but because they obey him.

Hobbes's lack of concern for constitutional restrictions becomes particularly apparent in his discussion of "commonwealth by acquisition," which he distinguishes from "commonwealth by institution" (or "political commonwealth") that is created by means of a voluntary contract in the state of nature. In contrast, a commonwealth by acquisition is created by means of

261 This question is raised for example by Fiala (2013, 197) and Kukathas (2003, 264–265).

262 North, Wallis, and Weingast (2009, 269) make a somewhat similar point when they point out that citizens of wealthy and peaceful democracies may tend to forget at times that in a failed state or under conditions of civil war, life is precarious and that peaceful coexistence in a stable order is the fundamental function of all political organisation.

force (Hobbes [1651] 1996, 121).[263] According to Hobbes ([1651] 1996, 139), the acquisition of a commonwealth can be either hereditary or occur by conquest.

On a descriptive level, Hobbes's point is valid: Certainly, conquerors and even usurpers may wield political authority when the population of the respective state recognizes their claim of making law rather than threats. Yet insofar as a commonwealth by acquisition does not need to stand the test of being accepted in the state of nature, this recognition has no justificatory significance. A government by acquisition may in fact be dysfunctional, making individuals even worse off than they would be in the state of nature. By failing to distinguish between regimes that are acceptable in the state of nature and those that come about by brute power, Hobbes surrenders the normative force of his argument. Without even showing awareness for his move, he turns from justification to positive-sociological analysis (see also Hardin 2014, 88). Citizens' and residents' submission to force does not have the legitimating quality which voluntary acceptance in the state of nature has (see also Hampton 1986, 170). It only shows that a ruler is able to rule, not that she is *justified* to do so.

Subjects to governmental authority and power are worse off in a regime which does not grant them rights and may even seek to kill them than they would be in the Hobbesian state of nature. This is because the state of nature, while being a state of war, is characterised by rough equality among individuals. As Hobbes ([1651] 1996, 87) notes, in the state of nature, everyone can hope to attain scarce goods and to overpower their rivals. Against a government with a monopoly on power, however, the individual is ultimately powerless since nobody can incite a revolution on their own (see also Buchanan [1975] 2000, 19). Moreover, she also lacks any rights against the Hobbesian Leviathan who wields absolute authority (see also Buchanan [1975] 2000, 66–67).[264] This means nothing else than that the sovereign remains in the state of nature towards the subjects. Locke ([1689]

263 Hobbes ([1651] 1996, 141) holds, however, that a commonwealth by acquisition is not established by the mere fact of defeat but by a covenant, just as a commonwealth by institution.

264 Hobbes ([1651] 1996, 151) actually grants individuals the right to resist all commands of the sovereign which threaten their self-preservation, such as killing or hurting themselves, to endure an attack, or to refrain from eating or drinking. This is not a constitutional restriction, however, but merely an acknowledgement that individuals will not voluntarily act against their own self-preservation. It does not limit rulers' power to inflict harm on individuals, and even their authority is only affected in the de facto sense that it is not possible to order someone to kill herself.

2005, 326) therefore has a point when he argues that installing an absolute government does not end the state of nature but perpetuates it, insofar as there is no instance which may settle disputes among the absolute sovereign and the subjects.[265]

By linking the normative value of a regime to the absolute power of the sovereign, rather than its acceptability in the state of nature, Hobbes undermines his point that people want to have a ruler as a means to their peaceful coexistence.[266] In the end, Hobbes is only concerned with the stability of a regime, not with its function. Yet the form of security which Hobbesian individuals crave is not the hard hand of an absolutist Leviathan but a constitutional order that guarantees them a life no worse than the state of nature.[267] A government by acquisition, ruling with unrestricted power, is incapable of providing this desideratum and may even impose net costs on individuals. Hobbes thus overstates the benefits of stability per se and understates the dangers that come with an absolute government, compared to the state of nature (see also Nagel 1995, 151).

In contrast to Hobbes, functional legitimacy is not a position which claims that *all* stable forms of exercising political authority are justified, merely because they belong to a functional institutional type. Rather, for each authority-token, we must look at the particularities of the regime's constitution. Regimes with a de facto constitution that authorises the government to terrorise the population are clearly dysfunctional and ought to be changed. There is reason to think, however, that functional legitimacy would classify at least some existing regimes as legitimate, due to their successful provision of peace and security for all individuals. Given this premise, functional legitimacy is also not an anarchist position a posteriori.

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265 Locke ([1689] 2005, 328) criticises the idea that only absolute monarchy can offer a remedy to the misery of the state of nature with the following analogy:

> As if when Men quitting the State of Nature entered into Society, they agreed that all of them but one, should be under the restraining of Laws, but that he should still retain all the Liberty of the State of Nature, increased with Power, and made licentious by Impunity. This is to think that Men are so foolish that they take care to avoid what Mischiefs may be done them by *Pole-Cats*, or *Foxes*, but are content, nay think it Safety, to be devoured by *Lions*.

266 Hampton (1986, 201–207) holds that Hobbes's subjectivist and individualistic approach based on self-interest cannot succeed in establishing the authority of an absolute sovereign since individuals would not give up their ultimate goal of self-preservation.

267 Kavka (1986, 435) therefore argues that Hobbes's theory allows for far more liberal rights than Hobbes himself is willing to grant individuals towards their state.

4.3.2 *The Case for Limited Government*

Regime-tokens where rulers wield absolute authority are dysfunctional because individuals are even more helpless than they would be in the state of nature. A legitimate legal order must therefore not only protect individuals against each other, but also against governmental authority and power. This means that rulers must be subject to the secondary legal rules of an effective constitution which ensure that they use their authority and power only to create order, but not to prey on the state's citizens and residents. In other words, legitimate political authority can only be wielded by a *limited government*.

The argument for limited government can be made within the thought experiment of the social contract. As Locke ([1689] 2005, Ch. XI) points out, nobody has arbitrary power in the state of nature, so individuals will not accept it in the civil state. A concrete demand voiced by Locke is that the government must rule by standing law, not by decrees, because individuals leave the state of nature in order to have written rules that are common knowledge. In addition to limitations on the legislative, moreover, a functional constitution must also include procedural rules which predictably regulate the power of the executive and the authority of the judiciary. For instance, it must make procedural provisions in case of conflict, such as the right to a fair trial and against unlawful detention. Taken together, such procedural restrictions on governmental authority may be captured under the notion of the *rule of law*, in contrast to the rule of men. The central idea behind the concept is that the government is not above the law and that law must treat every agent, including government officials, equally.

A more detailed account of the rule of law is given by Raz (1979, 213–218). According to him, the notion implies that law can guide subjects' behaviour. Raz lists eight principles which follow from this basic idea: (1) laws should be prospective, open, and clear, as well as (2) relatively stable, and (3) law-making should also be subjected to open, stable, clear, and general rules. Moreover, (4) the judiciary's independence must be guaranteed, (5) the principles of natural justice (i.e. fairness norms for adjudication) must be observed, (6) the courts should have review powers with respect to these principles for the rule of law, (7) the courts should be easily accessible, and, finally, (8) law-applying organs must not use their discretion to subvert the law.

The demands of the rule of law may appear trivial. Yet a regime which lives up to this ideal poses a stark contrast to a regime which is charac-

terised by the "rule by law" of a Leviathan as envisioned by Hobbes. In such a regime, the government is authorised to wield unrestricted sovereignty and absolute power.[268] Hobbes's ([1651] 1996, 224) argument against subjecting the sovereign to civil laws is that the sovereign cannot be subjected to him- or herself. And if the sovereign was subjected to a second-order sovereign, that would trigger an infinite regress. Yet this argument rests on the assumption that a legal order is designed and enforced exclusively by a sovereign. Secondary rules, however, do not originate in the government's authority, but in a complex mixture of such factors as precedent, decisions adopted by a constituent assembly, and the daily practice of government officials. Moreover, secondary rules derive their stability not from sanctions enforced by the executive, but from the interplay of governmental organs with each other and the public. For these reasons, constitutions may well regulate the authoritative creation of primary law without leading into a circle or an infinite regress.

The rule of law is a crucial formal requirement for any legitimate regime. This is because arbitrary legislation and adjudication provide neither coordinative nor cooperative benefits to citizens (see also Pettit 2023, 62), which makes it dysfunctional per definition. It is therefore at least a necessary condition for peaceful coexistence that authority and authorised power be exercised in a predictable and impartial way.[269] Yet the rule of law alone is not sufficient for functionality. Formal constitutional rules for the exercise of political authority, even if they are very detailed, do not necessarily ensure that a regime outperforms the state of nature for each individual who is subject to political authority. A functional constitution need not only be effective in restraining the government; it must also meet substantial requirements in the form of protecting individuals' most basic interests by means of fundamental rights.[270]

One need not subscribe to a Lockean account of natural rights in order to acknowledge that a functional regime must constitutionally guarantee

268 Hobbes ([1651] 1996, 222) even identifies granting the sovereign insufficient power as a disease which may cause the state's demise.

269 In the same vein, Raz (1979, 221–222) argues that whereas the rule of law does not guarantee human dignity, violating the rule of law necessarily entails an infringement upon human dignity by creating uncertainty and/or frustrating expectations.

270 Hayek ([1979] 1998, 109–111) claims that fundamental rights serve the function of preventing arbitrary coercion. That political authority and power are not wielded arbitrarily, however, only means that that the government is bound by pre-determined rules. Fundamental rights are necessary to ensure that individuals do not incur net costs from a regime.

fundamental individual rights. The requirement of fundamental rights can also be derived from a Hobbesian state of nature. This is because, whether individuals have natural rights or not, they certainly have *natural needs*.[271] The most fundamental need individuals have is arguably their survival, or, in Hobbes's ([1651] 1996, 117) terms, "the foresight of their own preservation." These needs are at risk in the state of nature. Since individuals have natural needs, a regime must grant them *institutional rights* protecting their needs in order to qualify as functional, i.e. as unanimously preferable to the state of nature where there are no formal rights.[272] In the terms of the contract metaphor, one can say that individuals would only consent to a constitution granting them fundamental rights which protect their basic needs.

Although I will not try to give a detailed list what fundamental rights are required for functionality, it seems highly plausible that individuals at least care about the security of their own survival, bodily and mental integrity, and livelihood. Thus, Locke's ([1689] 2005, 271) account of natural law that "no one ought to harm another in his Life, Health, Liberty, or Possessions" apparently captures the inviolable core of individual protective rights required for secure and peaceful coexistence, although constitutions and international conventions may of course define further individual rights.[273]

What distinguishes the functional case for individual rights from libertarian accounts is that the reason why individuals are to be granted

271 According to Gosepath (2005, 166), social contract theories are all based on the "neediness" of individuals.

272 Similar arguments are made by other authors. Moehler (2013, 36–39), for example, claims that Bayesian agents at the constitutional stage would demand protection of their individual survival and physical integrity. Klosko (1987, 247), too, acknowledges that human beings have basic physical needs which must be met for all individuals in order for life in society being acceptable to them. And according to Gaus (2011, 357–358), "each agent […] must have assurance that her basic welfare interests—bodily integrity, health, the absence of severe pain, absence of psychological torture and distress, reasonable security of necessary resources—are not set back severely by the agency of others."

273 For instance, I would not argue that a functional regime must grant a right to marriage, which is article 12 of the European Convention on Human Rights (ECHR). A legal order without the formal institution of marriage or where marriage is not universally accessible, may nevertheless be functional. That notwithstanding, granting individuals a right to marriage may be a means to eliminate a subordinate dysfunctionality in an already functional regime. This holds in particular if the right extends to couples of all genders (which is, however, not the case for article 12 ECHR).

inalienable rights is *not* to preserve their pre-existing natural rights. Instead, the argument is simply that individuals must have strong positive rights guaranteed by a legal order to be better off than in the state of nature. Contractarianism thus gives an account of why individuals *should have* rights, rather than presupposing rights as natural (see also Thrasher 2018b, 218–219). In this context, the notion of "natural rights" is adequate only insofar as it is natural for individuals to *want* fundamental rights and to demand them from a justified regime.[274]

This is apparently also the way in which Hart ([1961] 2012, 193–99) refers to "natural law." For Hart, the minimal core of natural law is given by basic facts about human nature, namely their roughly equal vulnerability and potential to violate others, their limited altruism, their dependence on scarce resources, and their propensity to defect in cooperative arrangements. These facts, he argues, make it naturally necessary for positive law to include protections for individual persons, their property, and the honouring of promises. Hart's account closely resembles functional legitimacy in that his premises are orthodox Hobbesian, but the protection rights he derives from them have more Lockean reminiscences.

Insofar as functional legitimacy requires that regimes (1) have the rule of law and (2) grant fundamental rights, we can establish that a functional regime must be a *liberal* regime.[275] This requirement is arguably met by some existing regimes, including the Federal Republic of Germany. At the same time, many former and current regimes undoubtedly fail to meet the standard insofar as they deny at least some individuals fundamental rights and/or subject them to an arbitrary exercise of power. The criterion of functionality is thus not as weak as it may appear, particularly in contrast to consent. At the same time, it is not too ambitious. Whereas the consent criterion entails anarchism a posteriori, indiscriminately classifying all existing regimes as illegitimate, functional legitimacy allows us to meaningfully

274 See also Nagel (1995, 140) who does not consider individual rights to be natural but notes that the social practice of respecting rights which protect their fundamental needs is very natural to human beings. In the same vein, Mackie (1990, 178) claims that "there is no natural law of property; but there is at least in Hobbes's sense a natural law that there should be some law of property."

275 Vallier (2018b, 121) raises the concern that individuals in the state of nature might accept an illiberal constitution if the alternative is to have no constitution at all. On the functional account of legitimacy, however, this is not the case because illiberal regimes do not securely outperform the state of nature from the perspective of each individual who incurs institutional burdens from their existence.

compare regimes by distinguishing between functional and dysfunctional political orders based on whether they are liberal or not.

4.4 The Priority of Functionality over Optimality

4.4.1 *A Constitutional Choice Situation*

Functionality, although being a substantive criterion, makes only minimal demands on a regime. This is sufficient to answer the binary question of legitimacy, i.e. whether a regime is justified to exist at all.[276] The demand that functional regimes must be liberal is not very conclusive, however, when it comes to reforming or comparing already liberal regimes.[277] Yet insofar as social contract theories, including functional legitimacy, are based on a calculation of costs and benefits, which are scalar concepts, they may allow not only for a binary classification of (potential) regimes but also for a ranking. Individuals in the state of nature do not only evaluate regimes as acceptable or not. They also have preference orderings with respect to which one of the acceptable regimes should preferably be implemented. If individuals could not only accept or reject a given constitution but collectively decide on its specifications, it seems, the resulting regime would not merely be legitimate. Rather, the constitution that would be collectively chosen by individuals in the state of nature would be an ideal to strive for when it comes to designing and reforming real-world constitutions.

The constitutional choice situation can be imagined as in the model by Buchanan and Tullock [1962] 1999) who also take an individualistic cost-benefit approach.[278] In *The Calculus of Consent*, they develop a model of constitutional choice where individuals bargain about the constitutional rules for their society. The fundamental idea of Buchanan and Tullock's

276 For an argument that legitimacy is a binary, not a scalar concept, see Brinkmann (2025).

277 Munger (2018, 43) criticises that Hobbes only argues that political order is better than the state of nature but gives no criterion to choose one order over another. The functional account may face a moderate version of this criticism insofar as it makes no further demands on regimes than the rule of law and fundamental individual rights.

278 Since costs and benefits can be measured on the same scale, Buchanan and Tullock ([1962] 1999, 44–45) formulate their model exclusively in terms of costs. They explicitly acknowledge, however, that individuals engage in collective action both to reduce costs and to gain benefits.

analysis is that from the individual's perspective, those rules are optimal which minimise her respective costs of social interdependence. These costs are determined by the sum of two components (see 4.2.2). On the one hand, they contain external costs which the individual suffers from being outvoted in collective decisions. Such externalities from collective action would be present, for instance, if an individual wanted her taxes to be spent on more police services, but the majority decides to build a swimming pool instead. On the other hand, the internal (or decision-making) costs of bargaining for reaching an agreement also figure in the costs of social interdependence. Internal costs arise when agents whose assent is required to make a decision block the whole procedure because they want to negotiate more favourable conditions for themselves. For instance, a small coalition partner may make the parliamentary approval of the budget conditional on funding for its pet project, thereby holding up the parliamentary process.

Buchanan and Tullock presuppose that the constitution to be chosen will be a democratic one, although decisions are not necessarily to be made by simple majority but potentially with a higher, or even lower, quorum.[279] Introducing their model in Chapter 6 of *The Calculus of Consent*, they discuss at length the constitutional choice of an optimal decision rule for direct democracy. Subsequently, they broaden their analysis in the ensuing chapters to include constitutional design elements typical for modern democracies, such as representation, bicameralism,[280] and the effect of a directly elected president.[281] As decisions made with respect to one of these

279 Since the optimal quorum might even be below 50 percent, Buchanan and Tullock are not committed to a *majoritarian* democratic decision rule. As Buchanan and Tullock ([1962] 1999, 81) point out, under the respect of minimising overall interdependence costs, the majority rule is completely unremarkable, like any other rule apart from unanimity.

280 Buchanan and Tullock ([1962] 1999, 231–33) point out that, whereas a second chamber necessarily increases internal costs, it may reduce externalities if representation follows a different rationale in both chambers, e.g. geographical versus functional. This is because larger coalitions are required, reducing the individual's risk of having her interests ignored in political decision-making.

281 According to Buchanan and Tullock ([1962] 1999, 246), a directly elected president functions like an additional chamber where all voters are represented by one representative. Alternatively, both a second chamber and a president can be conceptualised as *institutional veto players* in the sense of Tsebelis (2002), i.e. as agents who need to approve of a policy change. Veto players raise internal costs because their agreement must be secured for the adoption of new policies. From the individual's perspective, adding another veto player is therefore only worthwhile if it pays off in terms of reduced externalities.

matters have an effect on the costs arising in another dimension, no choice can be made in isolation.

In the model, all individuals taking part in the constitutional choice have their own cost functions, based on their needs and preferences. Moreover, to calculate their cost functions, individuals must also take exogeneous parameters about their societies into account. For one thing, overall group size plays an important role. Larger groups have higher internal costs of decision-making (Buchanan and Tullock [1962] 1999, 106), at least for direct democratic decisions. In a group of only ten individuals, a 90 percent decision rule will therefore be far more feasible than in a society of millions. Another factor driving both external and internal costs is the heterogeneity of interests and values. In pluralistic societies, individuals will assume others to make more decisions adverse to their interests which raises expected externalities. At the same time, individuals conjecture that it will be more difficult to reach agreement such that expected internal costs are high as well (Buchanan and Tullock [1962] 1999, 115).

With respect to the optimal decision rule, the individual's calculation is the following: If a small percentage of the population may unilaterally decide to engage in collective action, the risk of being subjected to externalities is very high for her. External costs decrease with the share of individuals who need to agree to collective action and are zero for unanimous decisions (Buchanan and Tullock [1962] 1999, 64). As more people need to assent, however, it gets more and more difficult to reach an agreement. Thus, internal costs increase, possibly exponentially (Buchanan and Tullock [1962] 1999, 68). The prospect of high internal costs therefore speaks against decision rules too close to unanimity.

A way to address the issue of soaring internal costs in large groups is to opt for representative rather than direct democracy (Buchanan and Tullock [1962] 1999, 212). A system of representation requires further specifications, such as rules of choosing representatives, the definition of constituencies and the size of the subset which will be elected as representatives. All these questions can be analysed within the model framework of external and internal costs. Buchanan and Tullock ([1962] 1999, 212–16) theorise that the individual incurs higher externalities from representation the lower the share of representatives is relative to the overall population. At the same time, larger representative assemblies have higher internal costs. Larger societies should therefore elect a smaller percentage of their members as representatives than smaller ones, they argue. Additionally, they find that proportional representation closely approximates unanimity in the choice

of representatives such that a majority of representatives does indeed speak for a majority of the overall electorate (Buchanan and Tullock [1962] 1999, 221–22).

Given that all individuals at the constitutional stage are able to calculate their respective cost functions for all relevant dimensions of constitutional design, they should each be able to produce a personal ranking of different possible regimes based on the respective costs they would incur. Yet individuals still need to come to a joint understanding which regime to select for their society. This is arguably the critical part because different individuals stand to incur different amounts of social interdependence costs from the same regime. Insofar as their rankings differ, there must be a way for them to arrive at a unique alternative which they all agree to be the best one. If all individuals simply insist on the regime which entails the highest benefits for themselves, they will end up in deadlock because the constitutional decision must be unanimous.

For Buchanan and Tullock, however, reaching agreement at the constitutional stage is not an issue. They argue that the constitutional choice is detached from the political process where conflicts of interest are present (Buchanan and Tullock [1962] 1999, 249). As Buchanan and Tullock ([1962] 1999, 110) emphasize, the constitutional choice is a choice *among rules*, in contrast to decisions *within* the rules of an existing legal order. The rules chosen at the constitutional stage are to be applied to all sorts of political decisions at the post-constitutional stage and must prove optimal over the whole series of possible decisions. This variation of political decisions, Buchanan and Tullock ([1962] 1999, 285) claim, makes it possible that individuals at the constitutional stage, acting in their own best interest, choose impartial rules. Even if particular political decisions are zero-sum games, Buchanan and Tullock ([1962] 1999, 253) argue, the abstraction at the constitutional stage allows for an exchange of interests, leading to a mutually beneficial outcome.

Buchanan and Tullock ([1962] 1999, 78) model this abstraction of constitutional rules from the disagreements of day-to-day politics by assuming that individuals are *uncertain* at the constitutional stage how their interests relate to other members of society. That individuals make their constitutional decision under a "veil of uncertainty" has the effect that they all have an interest in choosing impartial rules in the apprehension to fare best with them in the long run. In fact, thus, all individuals, by acting egoistically, minimise the *same* cost function, which Buchanan and Tullock ([1962]

1999, 96) claim is the best for the group. In this way, a unique decision on the optimal regime can be reached.

4.4.2 *Artificial Consensus under the Veil of Uncertainty*

Uncertainty at the constitutional stage has the effect of delivering consensus on a uniquely ideal regime, but only insofar as it artificially establishes a harmony of interests. Individuals all minimise the same cost function simply because they do not know how particular constitutional rules will play out for them at the post-constitutional stage. The veil of uncertainty has the effect of alienating them from their normal selves and their personal cost-benefit calculations. Once the veil of uncertainty is lifted, individuals might find that another regime would have been optimal for them. It can thus be questioned whether the regime which is optimal *ex ante*, at the constitutional stage, can also be justified to individuals *ex post*, at the post-constitutional stage of political conflict, or whether the alienation caused by the veil undermines the justificatory potential of their hypothetical consent.

Buchanan and Tullock ([1962] 1999, 80–81) take the position that decisions made under the veil of uncertainty are justified to individuals insofar as majorities alternate randomly over different decisions in society. They explicitly caution that individuals might only consent to a regime as long as no particular coalition foreseeably dominates the political process, stressing that their theory is not applicable to societies which are deeply divided along "racial, religious, or ethnic" lines.[282] Their case for the ideal constitution thus rests on the empirical premise that majorities in a given society *actually* alternate, granting every individual an equal prospect of having their preferences implemented. The presence of permanent cleavages, Buchanan and Tullock ([1962] 1999, 251) worry, would make it impossible to reach consensus on any constitution because some groups may be permanently excluded from decision-making and dominated by others. Buchanan and Tullock ([1962] 1999, 285) even diagnose that "[i]f identifiable and permanent coalitions are expected, genuine constitutional process, as we have defined this term, is not possible."[283]

282 According to Buchanan and Tullock ([1962] 1999, 80–81), if a multitude of individuals and groups can meaningfully be referred to as a society, membership in social sub-groups must be fluctuating and open to change.

283 A similar position is taken by Vanberg (2000, 22) who holds that non-unanimous decision rules at the post-constitutional stage are only constitutionally acceptable

Given the pluralistic structure of existing modern societies, this conclusion would be devastating for the possibility of designing legitimate constitutions. Fortunately, the worries are exaggerated from the perspective of functional legitimacy. The presence of persistent cleavages as such does not pose an unsurmountable obstacle for the functionality of a democratic regime (see 5.2.2). This is because the benefits from making decisions collectively and at a low cost may outweigh the externalities of collective action, even for those individuals who always find themselves outvoted. At the constitutional stage, individuals do not care how often they are decisive in political decisions. Instead, they ask themselves whether their subjection to political authority creates sufficient benefits to be preferred to the state of nature of exclusively private action. Such is the case if private action has high externalities which could be drastically reduced by the creation of political institutions.

Under the Hobbesian assumption that, due to pervasive uncertainty, life in the state of nature is "solitary, poore, nasty, brutish, and short" (Hobbes [1651] 1996, 89), a legitimate regime must at least bring about the fundamental benefit of peaceful coexistence (see 4.2.1). This benefit accrues equally to the majority and to minorities, even if they are persistent. A religious group, for instance, might prefer different legislation concerning public education, family law, and public holidays than the mainstream of society. Nevertheless, its members may still value living within a liberal democracy with the rule of law and an effective, non-corrupt legislation and prefer it not only to the state of nature but also to a dysfunctional theocracy. Accordingly, the presence of persistent minorities, even though they are systematically outvoted, does not rule out that a regime can be legitimate.

An alternation of majorities, which the veil of uncertainty is supposed to model, is therefore not required for a majoritarian regime to be functional. On the downside, however, its presence is not sufficient for functionality, either. Since the veil of uncertainty alienates individuals from their own interests and leaves them no other choice than to reason identically, it is not at all clear whether the regime identified as optimal at the constitutional stage does actually yield net benefits to all individuals. Instead, it frames the question of constitutional choice as a cost minimisation problem of the average person, a construct which may have no real counterpart in the society to which the constitution is supposed to apply. Even though

for everybody if no group will systematically and permanently be ruled against its interests.

a regime may minimise costs on average, some minority of individuals may incur excessive costs from decisions taken under such an "optimal" constitution (see also Holcombe 2018, 88–89).

Individuals are vulnerable in collective decisions, to the point that an adverse decision may make them worse off than they would be in the state of nature (see 5.2.3). A government may, for instance, create high average values of benefits by adopting a policy of expropriating wealthy individuals and redistributing their assets among the rest of the population.[284] Even more drastically, a government may persecute and kill members of a minority in order to harvest their organs.[285] If individuals are compelled to consider social rather than private costs, the protection of minorities is liable to be sacrificed for supposed optimality.

Take the example of a society ridden with gang violence. A political leader starts locking up people denounced as gangsters, without the need for evidence and without a trial.[286] Murder rates drop steeply, and the economy finally gains momentum. The bulk of society is enormously better off, while inmates starve and lack any perspective of freedom. The leader's rule is dysfunctional insofar as prisoners are made worse off by political authority than they would be in the state of nature. It not implausible, however, that a such policy which sacrifices the welfare of some for the greater good of others would be adopted if the constitution was designed with the aim to minimise average costs.

The veil of uncertainty thus loosens the rigorously individualistic demands of the contractarian paradigm according to which a regime must be justified to all individuals who incur costs from its existence. Effectively, the veil substitutes the contractarian argument for a utilitarian one where the individual's utility is not incommensurable but part of the aggregate social utility. Under the veil, by minimizing average costs, individuals in fact do nothing else than calculating expected utilities across the boundaries of individual persons. If individuals do not know their own identities, they

284 Popper ([1945] 2013, 368) gives the example that "[t]he majority of those who are less than 6 ft. high may decide that the minority of those over 6ft. [sic!] shall pay all taxes."

285 The Chinese government actually has been accused of harvesting the organs of acolytes of the Falun Gong cult in a report by the United Nations' Special Rapporteur on Torture, Manfred Nowak (2008, 47–49).

286 This scenario bears some similarity to the rule of Nayib Bukele, El Salvador's president, as described by The Economist (2023).

cannot avoid costs to themselves.[287] This might have the consequence that individuals or groups who lose out in total from the existence of a legal order may be without advocates at the constitutional stage insofar as nobody expects to end up in their place.[288]

Buchanan and Tullock ([1962] 1999, 92–95) themselves recognize that their model entails something akin to interpersonal comparisons of utility. Indeed, their argument that uncertainty induces fairness[289] comes remarkably close to Harsanyi's (1955) take on utilitarianism, which is aimed to deduce a utilitarian principle from individualistic premises. According to Harsanyi (1955, 316), an individual's preferences are "ethical" if they are "impersonal." This, he claims, is the case if an individual has to choose a social situation under conditions of uncertainty, where all social positions have the same probability of being the one to end up with.[290]

The assumption of equal probabilities, however, is in fact a utilitarian premise (see also Moehler 2016, 354). Insofar as Buchanan and Tullock make the same assumption, their apparently optimal regime may be far from ideal for many individuals at the post-constitutional stage. It is therefore a misconception that uncertainty induces fairness by obstructing individuals from pursuing their self-interest, as Buchanan and Tullock suggest. To the contrary, insofar as the veil alienates individuals at the constitutional stage from their post-constitutional interests and needs, there is no mechanism that ensures that these interests and needs are being considered.

One way to avoid that individuals at the constitutional stage end up making utilitarian calculations of aggregate utility is suggested by Rawls (1971) in *A Theory of Justice*. His constitutional choice situation, which he calls the "original position," is carefully designed to rule out utilitarian

287 Narveson (1988, 153) claims that minimising average costs is compatible with a contractarian approach when individuals are indeed randomly situated, giving traffic as an example. If the costs to be incurred from collective decisions are higher, however, even a random distribution of individuals and preferences runs the risk of dysfunctionality.

288 See also Mackie (1990, 95), Müller (1998, 15), Sugden (1990, 785).

289 This argument is repeated by Vanberg (2000, 23; 2020, 354).

290 As Gaus and Thrasher (2015, 57) as well as Moehler (2013, 28–30) argue, the assumption that individuals under uncertainty would ascribe equal probability to all social positions does not follow from Bayesian decision theory which Harsanyi claims to employ. Moehler (2013, 28–33) even argues that Harsanyi's impersonality constraint and his equiprobability assumption are conceptually at odds with his employment of Bayesian agents because Bayesian agents per definition maximise their *own* utility, from which they are obstructed by impersonality.

outcomes. To this end, Rawls (1971, 137) assumes even narrower restrictions on individuals' information set than the veil of uncertainty. Under his *veil of ignorance*, the parties who are about to conclude a social contract know nothing about their own personal preferences, social conditions, and natural endowments. The parties are not even aware of their personal conception of the good or their propensity to take risks. They only have knowledge about general findings of the social sciences and are aware that the "circumstances of justice"[291] obtain.

Moreover, Rawls (1971, 152–156) stipulates that under the veil of ignorance, there is no information on probabilities, that individuals care more for achieving a certain minimum than for gaining the maximum, and that the situation is one of substantial risks. He notes that these are exactly the conditions of under which an individual deciding under uncertainty would not choose to maximise her expected payoffs but rather follow the *maximin rule*. The maximin rule ranks options based on the value of the worst possible outcome, irrespective of the likelihood of ending up there. The original position is designed in this way because it has the effect that individuals prefer Rawls's two principles of justice to the principle of utility.[292]

Rawls's ideal regime is thus not utilitarian. But neither is his method of arriving at it contractarian. This is because his normative conclusions do not rest on cost-benefit calculations of individuals in a hypothetical state of nature. Rather, his carefully drafted and moralised model of the "original position" does all the normative work. Like contractarians, Rawls (1971, 584–585) ascribes mutual disinterest and a lack of moral motivations to the parties in the original position for reasons of clarity. He makes clear, however, that the choice situation is not morally neutral. The moral constraints are merely worked into the design of the original position. The veil of ignorance excludes considerations which Rawls (1971, 18–19) claims

291 Following Hume, Rawls (1971, 126–28) defines the "circumstances of justice" by the following conditions: In a world of moderate scarcity, mutually disinterested persons, each vulnerable to all others, benefit from cooperating but are in conflict about how to distribute these benefits.

292 Rawls (1971, 60) states his two principles of justice as follows:

> First: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.
>
> Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.

are widely accepted to be irrelevant in choosing principles of justice.[293] In fact, however, this means that it is designed such that rational individuals would choose liberal and egalitarian principles.[294] Equality is thus not an output of the Rawlsian contract but an input (see also Dworkin 1973, 530–32).

The problem with the veil of ignorance is that the parties' choice cannot provide an independent argument why institutional design should follow liberal and egalitarian principles insofar as it presupposes them. When the original position already contains moral intuitions concerning fairness, this actually undermines its role as a highest instance to decide contested issues of fairness and justice.[295] If the specifications of the counterfactual choice situation already model particular social-moral intuitions, such as the parties' ignorance in Rawls's original position, social contract theory loses much of its appeal as an ecumenical approach to legitimacy (see also Moehler 2018, 113).

The reason why Rawls (1971, 167–168) sees the need to design the original position in a way that the principle of average utility has no chance of being chosen is that he considers the parties' choice to be binding for individuals at the post-constitutional stage. If the parties chose the principle of average utility, he fears, some individuals would run the risk to end up being slaves due to the principle. The way around such a conclusion, he claims, is to ensure that the original position is designed such that the principle of average utility is not chosen in the first place.

The argument that the choice situation must be adapted lest individuals become bound to intolerable institutions, however, is based on a misconception of hypothetical contractarianism. In contrast to actual contracts, a hypothetical contract cannot bind anyone. A hypothetical contract does not provide any additional reasons for action in favour of an institutional arrangement, over and above the reasons that independently speak in favour of a particular set of rules (see also Dworkin 1973, 501). It merely explicates and illustrates these reasons. The idea of hypothetical contract theory is thus merely to show that certain rules are or would be good for individuals to have. It does so by pointing out that the people to whom the rules apply

293 A similar position is taken by Maus (2011, 41) who claims that fair rules can only be decided *ex ante*, under conditions of ignorance of concrete social conflicts.

294 Greene (2016, 78–79) therefore criticises contractualism for its overly "partisan" approach: Notions of democracy and liberalism are already woven into the very idea of hypothetical consent, she notes.

295 See also Binmore (1998, 59), Gaus (2011, 278).

would agree to them. For the argument to work, however, the people who consent must be the same ones who are or would be bound by the rules.

Any consensus on an ideal regime under a veil of ignorance or uncertainty is artificial because the parties consenting to a constitution are artificial. This is regardless of whether they are all duplicates of the average person or idealised reasoners without access to their idea of the good and their propensity to take risks. Both the utilitarian approach taken by Buchanan, Tullock, and Harsanyi and the contractualist version by Rawls streamline individuals in the hypothetical choice situation into identical versions of the same artificial person. They do so because social contract models can only provide consensus on a unique solution under the condition of assuming away individual diversity (see also Thrasher 2024a, 210). By abstracting from people's different social situations, interests, and needs, however, the most valuable information entailed by hypothetical consent is lost: that those individuals who actually incur institutional burdens yield nonnegative benefits from an institution.

4.4.3 *Functionality as a Minimum Criterion*

Without assuming a veil of uncertainty or ignorance, the thought experiment of the social contract does not yield a unique ideal for constitutional design. Yet insofar as a veil even obscures information on whether a constitution is functional, sacrificing uniqueness is arguably the lesser evil. Hypothetical consent tracks functionality if and only if individuals at the constitutional stage are the same persons as those who incur institutional costs. This is not guaranteed if artificial reasoners try to find the ideal constitution. For identifying whether a regime meets the standard of functionality, what matters is not more and not less than that individuals in the state of nature would unanimously accept a given constitution in a binary yes/no vote.

To ensure that the regime chosen at the constitutional stage is mutually beneficial, the tool of a veil of uncertainty or ignorance is thus neither a necessary nor a sufficient condition (see also Müller 1998). It is not necessary because individuals who know their interests and social position will veto any regime that imposes net costs on them. It is not sufficient, moreover, because a constitution chosen under uncertainty may lack liberal protections for individuals' basic interests. Without a veil, in contrast, people will insist on being granted fundamental rights and the rule of law, even though they will find it difficult to agree on much else.

This means that the state of nature cannot productively be imagined as a bargaining situation since there is no reason to expect that individuals who are aware of their different cost functions will reach unanimous agreement on a single constitution in finite time. From a functional perspective, the model of the constitutional stage is therefore much more conducive for measuring regimes by the minimal standard of legitimacy rather than for identifying an ideal constitution, or even a conception of justice.[296] By any means, it cannot be the goal of constitutional design to aim for an ideal which pleases everyone equally. An ideal which all individuals alike consider ideal is prone to be unattainable. This is in particular the case for complex institutions such as legal orders as a unique ideal is even elusive for many cases of making and reforming primary law.

Consider the case of a small village which is accessible via a country road. Villagers in their cars, pulling out onto the road, got involved in some severe accidents until the district council finally decided to do something about it. The first institutional solution they came up with was a stop sign. Thanks to this coordination device, villagers would only pull out once the road was clear, which lead to a dramatic decrease in accidents.

After some time, however, complaints started to reach the council. Commuters grumbled that on a bad day, they had to wait for ten minutes before being able to pull out, wasting precious time, nerves, and fuel. As a next step, therefore, the council installed a traffic light. Originally, red and green phases were pre-programmed, alternating on a set schedule. The traffic light was welcomed as an improvement by villagers but lacked popularity with users of the main road who would often find themselves waiting at a red traffic light without any cars pulling out of the road accessing the village. When technology allowed for it, therefore, the traffic light was retrofitted to react to the traffic flow. Once a car was waiting to pull out

296 In an apparently very similar vein, Thrasher (2024b, 80) suggests that the social contract should merely be used as a tool to evaluate the legitimacy of constitutions because social contract arguments for a conception of justice do not appeal to all individuals in diverse societies. Rather than formulating criteria for a just society which are then used as the basis of legitimacy, he argues, the social contract should be applied as a test to judge the legitimacy of a rule of recognition and also of rules of change and adjudication which entail an "institutional conception of justice." Nevertheless, Thrasher is still committed to the idea that the constitutional choice situation is one where individuals bargain about a set of rules rather than voting in a yes/no decision. Thus, his approach is much closer to Buchanan and Tullock than to functional legitimacy. He even claims that the procedure of justifying secondary rules has an inbuilt veil of uncertainty, which he considers to be an advantage for enabling a diverse set of people to choose constitutional rules.

of the village, the light on the main road would turn red immediately; otherwise it was green. Villagers now were very happy. The users of the main road, on the other hand, were somewhat placated compared to the situation before. Nevertheless, they would have preferred a return to the stop sign which gave them priority on the road.

The function of traffic signals such as stop signs or traffic lights is to prevent accidents by coordinating the behaviour of traffic users. In the above case, all three institutional approaches to the traffic situation in the example fulfilled that function and conferred net benefits to all traffic users. Nevertheless, no solution was considered the ideal institutional setup by both groups alike. When it comes to possible constitutions, different individuals and social groups are even less likely to agree on an optimal blueprint. This is tolerable insofar as they all can veto options that are inacceptable to them, ensuring that the constitution creates net benefits for everyone.[297]

Moreover, even though it does not provide a unique ideal, functional legitimacy can in fact offer guidance for constitutional design and reform. Liberal and therefore functional legal orders may differ widely at the subordinate level of secondary rules, and even more so with respect to primary law. These subordinate institutions themselves may be analysed with the lens of functionality. The practical implications of functional legitimacy apply here as well: Dysfunctional institutional types should be removed and tokens reformed, even if the regime on the whole is legitimate. Rather than aiming for an ideal, a functional take on constitutional design should thus be concerned with identifying lower-level dysfunctionalities and recommending ways of avoiding, removing, and reforming dysfunctional subordinate institutions. This is precisely what I will turn to in the following chapter.

297 In contrast, Schmelzle (2016, 172) argues that utility arguments cannot justify any particular political institution in the face of reasonable disagreement. Such a justification, he claims, can only be procedural. Functional legitimacy, however, only entails that an existing institution (independent of its historical origin) should rather continue to exist than be abolished. To make this point, reference to costs and benefits is sufficient; no procedural argument is required. This notwithstanding, procedural approaches like democracy (see 5.2.1) may be fruitfully employed when it comes to changing existing institutions or creating new ones.

4.5 Summary

The function of legal orders is the provision of peaceful and secure coexistence for the subjects of a state and the individuals within its territory. The function of political authority, moreover, is to administer this peaceful coexistence by means of making, adjudicating, and enforcing formal law. These functions are acceptable for all individuals who suffer burdens from the existence of a legal order and a government. Legal orders and political authority are therefore functional institutional types. This means that it is principally possible that there are also functional tokens of legal orders and of political authority. Accordingly, functional legitimacy does not entail anarchism a priori, i.e. the position that legitimate political authority is impossible.

An affinity to anarchism a priori is exhibited, in contrast, by conceptions of political legitimacy which build upon the notions of individual autonomy or pre-positive, e.g. natural, (property) rights. Political authority, as the right to rule, per definition authorises rulers to impose requirements and obligations upon subjects, and to change their (property) rights. Insofar as a regime is considered to be legitimate if and only if individuals are free from externally imposed obligations, or retain their pre-political property rights, respectively, it cannot be justified to have a regime where there are rulers and ruled. Under this assumption, legitimate political authority may only be wielded unanimously. On the functional account, however, the value of freedom from external obligations must be weighed against the benefits from cooperation and coordination which result from binding collective decisions. A right to property, moreover, must be constitutionally granted in legitimate regimes, but this does not rule out that individual property claims are the product of positive legislation.

Even though functional legitimacy acknowledges that regimes can be legitimate, it does not infer legitimacy from the mere fact that a regime exists and is stable. Thus, it does not succumb to the fallacy committed by Hobbes who derives the legitimacy of the tokens from the type's legitimacy. Only a limited, or liberal, government can provide individuals with a level of security that is preferable to the state of nature. Under an absolute government, individuals are completely helpless because they cannot even defend themselves, as they could do in the state of nature.

A limited government must not only protect individuals against each other but also abstain from wielding power and authority arbitrarily. The government must thus be subject to the rule of law. Moreover, the de facto

constitution must guarantee individuals that their basic needs are not being violated by any branch of government. A functional regime is thus a liberal one which is characterised by the two necessary conditions of the rule of law and fundamental individual rights. Since this standard happens to be met by some existing regimes, functional legitimacy is also not an anarchist position a posteriori.

The demand that regimes must be liberal in order to be legitimate is a minimum requirement that does not specify further which form an ideal regime should take. It is therefore tempting to take the thought experiment of the social contract further and to ask not only what regimes would be acceptable for individuals in a binary yes/no vote, but also which one they would choose if they had the opportunity to bargain. Since individuals have diverging preferences, however, this endeavour will only yield a unique solution if they are made artificially equal in the constitutional choice situation. This may be achieved, for instance, by assuming that individuals are uncertain about their society's cleavage structure, as Buchanan and Tullock ([1962] 1999) suggest.

Uncertainty, however, leads individuals to calculate not their real but their expected utilities which amount to the utility of the average person. In this way, all protections against inacceptable externalities from collective decisions are lost. Since individuals do not aim for their own utility (which they cannot know by construction) but for that of the average person, they are not able to veto any violations of their own basic interests. Thus, insofar as the regime chosen under the veil of uncertainty aggregates the utility of different individuals without ensuring that each individual gains nonnegative benefits, it cannot even guarantee functionality.

From the perspective of functional legitimacy, the fact that a regime is functional trumps all other considerations of institutional design. In particular, it takes precedence over the question which regime would be ideal. This is not a weakness but an advantage of a conception of legitimacy, which should be first and foremost concerned with the question which regimes are justified to exist, rather than which ones are ideal. It also fits well with functional legitimacy's substantive requirement that a legitimate regime must be liberal. This is because liberalism is characterised by a tolerance for a plurality of organisational forms, as long as individuals enjoy a protection of their fundamental interests against governmental power.