

6 Conclusion: Answering the Anarchist

But however single acts of justice may be contrary, either to public or private interest, 'tis certain, that the whole plan or scheme is highly conducive, or indeed absolutely requisite, both to the support of society, and the well-being of every individual. [...] Tho' in one instance the public be a sufferer, this momentary ill is amply compensated by the steady prosecution of the rule, and by the peace and order, which it establishes in society. And even every individual person must find himself a gainer, on ballancing the account; since, without justice, society must immediately dissolve, and every one must fall into that savage and solitary condition which is infinitely worse than the worst situation that can possibly be suppos'd in society.

— David Hume,
A Treatise of Human Nature ([1739] 1960, 497)

In this study, I developed a functional account of the legitimacy of political authority. Political authority is a second-order right of rulers to create rights and obligations which apply to the citizens and within the borders of a state. People are subject to political authority insofar as they participate in the social practices which make up the institution of a political regime. Like other institutions such as marriage, regimes may be justified or unjustified to their participants. I refer to an institution as functional if each individual who incurs costs from its existence is at least compensated by means of benefits from coordination and/or cooperation. On the account defended here, an institution is justified to exist, i.e. legitimate, if it is functional. A political regime is functional insofar as all individuals who are subject to legal obligations yield benefits of peaceful and secure coexistence which are at least tantamount to their costs in return. This requires not only that a regime must be stable, but also liberal, granting individuals the rule of law and the protection of fundamental rights. Under these conditions, political authority is legitimate, although a regime's subordinate constitutional and legal institutions may also be dysfunctional, in which case the legal order should be reformed.

Suppose you are planning to build a house for yourself. Now the government adopts a law mandating that each newly built house must provide

a charging station for electric vehicles. Such a charging station increases the costs of your construction project, and it takes up valuable space you had intended to use otherwise. The new regulation thus imposes costs upon you. At the same time, there are no direct benefits to you. You have no driver's licence, nor is your neighbourhood particularly car dependent. Maybe the absence of a charging station would lead to a reduction in your house's resale value. But since you do not intend to move out ever again, this is a cost you are more than willing to take on. When you complain to your philosophical anarchist friend that you have to install that pointless charging station, she laughs at you, asking provocatively: "Do you *have* to install it, or does the government *force* you to do it?"

Like you, many people consider themselves to be subject to their government's political authority and under an obligation to abide by the law it enacts. In contrast, philosophical anarchists such as your friend deny that governments yield political authority and that there is an obligation to obey the law (2.2). I argued that your intuition that you have to abide by the law can be corroborated if we understand legal orders as institutions (2.3). Institutions are sets of cooperative and/or coordinative social practices which can be described by prescriptive rules (2.4). A legal order contains two types of legal rules, namely statutory, or primary, law and constitutional, or secondary, law. Secondary rules, which jointly make up the constitution, define the state's regime, i.e. how it is ruled (2.5.2).

In a stable regime, there is a convention, i.e. a coordinative rule, to recognize the government's claim to political authority. By participating in the convention and accepting the claim, citizens and residents jointly put government officials into the position of making, adjudicating and enforcing law in that state (2.5.3). The laws made by a recognized government are binding because everybody who wants to participate in the institution of the state needs to play by the rules of a legal order (2.3.3). This does not entail, however, that the laws, or even the government's authority, are justified.

A conception of legal orders as institutions implies legal positivism, i.e. the position that the existence of legal rights and obligations is determined by social rather than moral facts. This conflicts with philosophical anarchists' ontological position that there is no such thing as political authority, and also no obligation to obey the law, because rulers supposedly lack the moral right to rule (2.3.1). If you submit to the institutional understanding of regimes, you can retort to your friend that you indeed have to install the charging station insofar as you live in a stable regime, even though

you do not find the legal requirement justified. Now your anarchist friend might actually be pleased that the two of you have found common ground. Although you disagree about the ontology of your legal obligation, you both find it unjustified of the government to demand the installation of a charging station from you. She may therefore press you that, although you acknowledge the government's claim to authority, you should at least deny that this authority is wielded legitimately.

Depending on her theoretical background, she might claim that a government cannot legitimately rule a state if it violates citizens' autonomy (4.2.2), disregards their property rights (4.2.3), or simply lacks their actual and voluntary consent (3.4). In response, you may point out to her that property rights and consent are institutions themselves which impose institutional requirements on you to act in certain ways. For this reason, you may ask for a justification why the rules of these institutions are binding for you. For instance, you may ask why you should respect your neighbour's property claim to the company she inherited from her forebears. Insofar as other institutions themselves stand in need of a justification, invoking them as the standard for justifying the institution of political regimes would beg the question (3.2.1). This includes the informal rights and duties from the institutional realm of social morality (2.5.1).

The same is not true for autonomy since autonomy is a value rather than an institution. It strikes you as odd, however, to grant absolute priority to the value of autonomy. There are many instances where you happily concede some of your autonomy because you get something which is more valuable to you in return. For instance, when you get married or when you sign your employment contract, you ceded some autonomy to your spouse or to your employer, respectively. This enables you to enter a legally recognized committed relationship, or to take on a job which supports your living. Each time you enter a contractual relationship, e.g. when you rent a flat or engage a dog sitter, you incur institutional obligations which curtail your autonomy. These inroads into your autonomy are worthwhile for you insofar as you take on obligations voluntarily (which cannot always be presupposed even if you gave your consent, e.g. in the case of a job). Your autonomy is also limited by certain requirements of social morality, such as the prohibition to lie. These are obligations you did not take on yourself. Nevertheless, you are glad that there is social morality, and you believe that you and others benefit a good deal from its rules.

Even though you value autonomy as such, you are willing to trade it against institutional benefits (4.2.2). Thus, you find benefits in general more

fundamentally valuable than the specific value of autonomy. This is why you find it most adequate that a justification of institutions is given to you in terms of net benefits, i.e. the benefits you gain minus the costs you incur from being bound by institutional requirements. Insofar as the benefits an institution yields to you are not negative, one might say that the institution serves a function for you. If this is the case, the institution's existence is arguably justified to you (3.2.1).

All the other individuals who follow the rules of an institution and participate in its social practices may of course ask for such a justification, too. The mere fact that they participate does not entail that the institution's existence is justified to them (3.2.2). Even those who choose not to participate but nevertheless incur institutional burdens, such as sanctions for non-compliance, may raise the question of justification. According to my definition, an institution is *functional* in the sense that it can be justified to all of them by invoking its function if and only if no individual incurs higher costs than benefits from its existence (3.2.3). If an institution is functional, nobody has a reason to complain about its existence, so we may consider it legitimate.

The functional principle of legitimacy may also be illustrated by the thought experiment of a hypothetical social contract. An institution is functional if and only if all individuals who incur costs from its existence would agree to its creation in a counterfactual situation where neither this institution exists, nor any other institutional token which serves the same function (3.3.1).

Coming back to your anarchist friend, you may point out that you are confident that the regime you live under, e.g. the Federal Republic of Germany, meets the functionality standard. All citizens and residents benefit from living in a state with a stable and liberal regime where they can be assured of peace and security (4.2.1). True, some of the laws are not to everyone's liking. Insofar as a law's existence imposes net costs on somebody, it is even dysfunctional. But that does not overshadow the fact that you benefit tremendously from living within a state with reliable institutions where you can be sure of your life, bodily integrity, and the means of your livelihood, none of which would be the case in the state of nature, i.e. a failed state. The important thing in a liberal and therefore legitimate regime is that although the government is authorised and empowered to impose costs on you, it is subject to constitutional rules, including the commitment to grant fundamental rights to all individuals with whom its officials interact (4.3.2).

Assuming that the Federal Republic of Germany is a liberal regime which creates net benefits of peaceful and secure coexistence for its citizens and residents and at least no positive costs for anyone else, you will grant the current federal, *land* and local governments not only to wield authority, but to do so legitimately. Thus, you acknowledge that the respective government is justified to pass a law requiring you to install a charging station in front of your new home, even though you do not think this law in itself is justified to you. Your anarchist friend may find that inconsistent: How can it be justified that you are bound by a law which is not justified to you? Your reply is that there is a hierarchy of justification. A single law is a subordinate institution to the legal order which includes both the constitution and all particular policies. If the legal order as such is justified, so is the constitutionally defined authority of the government to make, adjudicate, and enforce law. This includes dysfunctional laws, as long as they do not jeopardise the regime's functionality as such.

The fact that subordinate institutions in a functional regime may be dysfunctional, however, is nothing that you simply have to put up with. It is a ground for legitimate criticism and something that activists and interest groups may invoke when calling for changes of the legal and constitutional rules. The functional account of legitimacy can in this way offer guidance for practical political action. Whereas your anarchist friend deplores that the government's claim to authority is illegitimate, you can give a more differentiated analysis, arguing that the regime as such is functional and therefore legitimate but that it includes dysfunctional subordinate institutions that ought to be abolished or changed (3.4.3).

In its analysis of existing and potential institutions, the functional account proceeds top-down. The first question to be asked is whether an institutional token belongs to a functional or a dysfunctional type. If it is an instantiation of a dysfunctional type such as slavery, it ought to be abolished because no token of slavery can ever be legitimate. Regimes, however, qualify as a functional type because their function of administering peaceful coexistence within a state is acceptable to the individuals who are bound by the institutional obligations deriving from second-order legal rules. Insofar as unrestricted governments pose a grave threat to individuals' security, however, only liberal regime-tokens are actually functional (4.3.2). Illiberal ones should be reformed such that they become liberal and therefore functional.

Functionality is a minimal criterion of legitimacy, not an ideal of political order (4.4.3). Within a functional regime, there may also be dysfunctional

institutional types. An example would be aristocracy, which has the function to grant special social and political powers to a hereditary class. Such dysfunctional types at the subordinate level should be abolished. Moreover, subordinate institutions may belong to a functional type but may be dysfunctional at the token-level. For instance, marriage is a functional type, but some of its more traditional tokens are not. In this case, the subordinate token should be reformed. This procedure can be applied downwards until the level of simple social practices is reached. Priority should be given, however, to eliminating higher-level dysfunctionalities.

A very important subordinate institution in any regime is the form of governance. A regime need not be governed democratically in order to be functional. Democratic governance, however, is a functional institutional type, whereas autocratic governance is not. Citizens and residents benefit from the regular non-violent changes of power on a procedural basis which are provided by democracy (5.2.1). To accommodate disenfranchised residents and members of persistent minorities, however, democracy-tokens must allow for freedom of speech, association, and assembly to be functional (5.2.2). Crucially, moreover, a democratic regime is only functional if it is also liberal, i.e. if the constitution ascribes fundamental rights to individuals and the government adheres to the rule of law (5.2.3).

A subordinate constitutional institution that is arguably more controversial than democracy is the raising and spending of public funds. On the functional account of legitimacy, this practice is also functional at the level of institutional types. In the state of nature, there are no limits to preying on others. If people are to accept a legal order with a system of property rights, they would demand a guaranteed social minimum in return which is provided by means of taxes or mandatory social insurance. Governments may also use their authority to redistribute property claims which are themselves unjustified (5.3.1). Functional legitimacy, moreover, considers public budget-tokens as legitimate as long as all individuals who need to contribute benefit in total from the public goods and services provided (5.3.2). If each spending policy needed to be functional in its own right, people would forego many opportunities for coordinative and/or cooperative benefits.

Diverse societies with a complex legal order always exhibit some irresolvable dysfunctionalities at the level of primary law. Their prevalence might be reduced to some degree by means of political decentralisation (5.4.1). Insofar as policy preferences are not necessarily territorially concentrated (5.4.2) and moving among jurisdictions is costly (5.4.3), however, the po-

tential of geographical decentralisation for eliminating dysfunctionalities is limited. A novel but promising innovation would be to allow for more parallel legislation within the same territorial area when it comes to the requirements of private contracts (5.4.4). Such innovative paths are worthwhile to pursue from a functional perspective. Whereas your anarchist friend philosophises about the illegitimacy of the regime, you can make suggestions for functional, that is mutually beneficial, institutional design.

