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Carola Hesch

The Function of Political Authority

Peaceful Coexistence as the Measure of Legitimate Rule

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Preface

During the time of writing my dissertation, when people asked me what I was working on, they were intrigued to hear that my answer included the word "anarchism." In comparison, the interest I could spark by mentioning my results was rather underwhelming. The notion that political rule serves the task to provide internal and external order and security is quite uncontroversial. Moreover, the ideas that a justified regime must be liberal, that democracy is a better form of governance than autocracy, and that the government should provide everyone in the state with a social minimum, form part of the social consensus in most developed countries. Since the upshot of my research is so close to common sense, I was worried it might simply be trivial. When I voiced this concern to my supervisor, however, he reassured me that trivial is not the same as insubstantial.

Reflecting on this now, I feel that he not only renewed my motivation to continue my work but also had an important point. I believe that it is perfectly fine if philosophical investigations end up corroborating our intuitions, rather than leading to surprising results. This is because the results can support our intuition with well-founded arguments. My research does not provide people who share the social consensus with any reasons to change their convictions. I neither argue that all political authority is illegitimate and may be disobeyed nor, conversely, that only an absolutist Leviathan can save us from each other. What I did to come up with, however, are new and potentially better arguments for the convictions that most of us already have.

What is innovative in this thesis are not so much my results as the starting point of my investigation. Typical arguments for liberalism and democracy rest on the notions of pre-positive human rights and popular self-rule, respectively. Yet these conceptions are mere fictions, auxiliary narratives for promoting worthy ideas. Regrettably, there are no human rights where they are not enforced, and a people ruling itself is an impossibility, not least because it is a matter of political rule who belongs to the people in the first place. That these ideas do not withstand scrutiny makes them—and the liberal and democratic institutions they are supposed to ground—vulnerable for scepticism. Whereas I hold these institutions in high regard, I find the rationales given in their support wanting and even misleading.

My approach is revisionary not with respect to the claims I make about political rule, but insofar as I do away with narratives such as pre-positive rights, the consent of the governed, and popular self-rule. It may strike the reader as counterintuitive that I build my conception of justification exclusively upon individuals' costs and benefits. The prevalent notions, however, have all too often led philosophers to make outlandish claims, such as that governments lack political authority, and even to endorse philosophical anarchism. By developing an alternative route, I hope to have provided a firmer foundation for justifying the very intuitions we have concerning what characterises a justified constitution. This reinforces my confidence to defend liberal regimes and democratic governance, which we must never take for granted.

I would like to express my heartfelt gratitude to several individuals and groups who have significantly contributed to the completion of this thesis. To Laura and Lily, I am deeply appreciative of the countless hours spent co-working together, talking over tea, and providing each other with academic and emotional support during this challenging journey. I would also like to acknowledge all members of the *Glam Rock* group for fostering an environment of attentive listening, where doctoral researchers can test ideas and openly share their struggles.

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Finally, I would like to thank Christian for meticulously proofreading my work, serving as an intellectual sparring partner, offering valuable comments from a legal perspective, and hearing out all my doubts.

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1 Opening Remarks: The Need to Justify Political Rule

> Because no man has any natural authority over his fellow human, and because force produces no right, conventions remain as the only basis of all legitimate authority among men.
>
> — Jean-Jacques Rousseau, On the Social Contract ([1762] 2012, 167)

As a citizen or resident of a state, you have to abide by the law. You might dislike some of your state's particular laws and regulations or prefer them to be different. For instance, you may find it a nuisance that the tax law favours traditional marriage, or that highways are funded by taxes rather than tolls. Still, you are under an obligation to abide by the law because it is the law. The law is binding for all citizens and everywhere within the borders of the state, whether people like it or not. Only a few citizens, the rulers, can change the law according to their own ideas. This capacity is known as political authority. The law thus creates a gulf between the rulers of a state and the ruled. As part of the ruled, you and your co-citizens may wonder how the rulers come to enjoy political authority. And since the law demands a lot of you, you may also ask for a justification why you have to comply with its regulations. In the subsequent chapters, I will consider what political authority is and also how and to what extent it can be justified to individual persons.

To use a common metaphor, the law can be understood as the rules of the game of political life. That is not to say that it is fun to abide by the law. Rather, the law is a set of binding and established rules governing a politically organised society. In any game, it is essential that all players are playing by the same set of rules. Otherwise, they are not playing a game at all. If you believe we are playing mau-mau and I assume we are playing rummy, we discard our cards with no idea what the other one is doing and how to make sense of it. The same is true for sports games. If two teams meet on the playing field and they cannot decide whether to play basketball or volleyball, the result will be neither game but uncoordinated ball-tossing. In politics, the law sets standards for our behaviour, similar to the rules of a sports or card game, but more complex. The law may, for instance, set technical standards, organise the provision of public goods, and criminalise

acts considered as bad. The citizens and residents of the polity can be thought of as the players since they have to abide by the law.

In most formal competitive settings, there are also umpires or referees to ensure that players play by the same rules and do not deliberately break them to gain a benefit over their opponents. Rules that are not complied with by anyone are pointless. It makes no sense to stick by a rule if the other party faces no consequences for non-compliance. If you keep fouling me, I may be tempted to foul you back or decide to quit the game.

In the state, the role of the umpire is typically split between the judiciary, which adjudicates conflicts, and the executive branch of government that is tasked with law enforcement. Indeed, Jean Hampton (1986, 281–282) compares the agents of the state to a group of umpires hired to referee a baseball game while James Buchanan ([1975] 2000, 87–88) draws an analogy to an umpire being appointed by two boys who want to play with marbles.[1] Both emphasize that the umpire is assigned this task by the players themselves in order to arbitrate their game which they mutually chose to play. In these cases, the players benefit from having umpires who allow them to play the game they want to play in line with its respective rules. Thomas Hobbes ([1651] 1996, 239), too, suggests that the enforcement of law is analogous to ensuring a game is played according to the rules when he writes that "[i]t is in the Lawes of a Common-wealth, as in the Lawes of Gaming: whatsoever the Gamesters all agree on, is Injustice to none of them."

Yet when it comes to selecting a set of laws, the metaphor of the game seems overstretched. Firstly, there is no point in time when individuals jointly set up a polity as if they were starting to play "France" or "Australia" together. People become members of pre-existing states, usually by birth and sometimes by naturalisation.

Secondly, a legal order is not a fixed set of rules like the rules of badminton or chess. Even if an individual voluntarily joined a polity by becoming a citizen at some point, its laws may have undergone considerable changes in the meantime. The law is continuously amended and appended by processes of legislation. Legislation may either change existing law or regulate new issues. For example, many states in the Western world have adapted their family law to allow for same-sex marriage. These changes occurred in the 21st century to legal codes which had already been existing for decades or even centuries. Moreover, some cities have recently banned

1 The metaphor of the umpire is also used by Oakeshott (1991, 427). And Buchanan and Tullock ([1962] 1999, 80) equally liken the choice of a constitution to the adoption of rules for a game.

the use of electric scooters. There was no use for such legislation before the invention and large-scale roll-out of electric scooters. It is thus misleading to speak of a legal order as if it was a predetermined complex of rules which merely required umpires for enforcement. Rather, it is a constantly evolving body of rules.

This is where a third difference to the game situation enters the picture. Members of a polity do not devise their own rules like children playing marbles. Nor do they jointly decide to follow a given set of rules, like the rules of baseball. What makes a legal order exceedingly more perplexing than a game, apart from the stakes involved, is that some players determine the rules for everyone else. The power to make and to change law lies exclusively with government officials. These officials are legislators and, in common law countries, also judges. Legislators and judges typically make up only a tiny fraction of a polity's overall population. Even in a direct democracy, where all adult citizens serve as legislators, decisions are taken by majority voting. In virtually any polity, thus, some people live under some laws they did not choose themselves. Accordingly, it is simply not the case that "the Gamesters all agree" on the rules of the state.

Insofar as Hobbes's premise is not met, we cannot infer his conclusion. In other words, a legal order may be unjustified, even gravely unjustified, to some of those subjected to it because laws are made by other people on behalf of all. For example, legal rules may deny women the right to work and the right to own property. Laws may also systematically disadvantage minorities, e.g. by banning their customs or restricting their entry into certain professions.

Clearly, there is nothing in the nature of some people which designates them to be natural rulers, as the epigraph by Rousseau underlines. Legislators and other state representatives come to occupy their positions as a consequence of contingent political processes and the happenstance of individual ambition or heritage. These processes, too, follow a set of rules for what may be understood as the "meta-game" of the polity. I want to refer to this meta-game as the political *regime*. Among other things, the regime determines how governmental posts are allocated within a polity, how the government proceeds in making, adjudicating and enforcing law, and what may be regulated by law in the first place. Regimes can be roughly categorised as democratic and non-democratic. Non-democratic regimes may, for instance, be absolute monarchies or military dictatorships. Regimes also differ in many details. For instance, it is also a matter of the regime whether the polity is structured federally or in a unitary manner.

Democratic regimes may, moreover, differ with respect to parameters such as whether they have a unicameral or bicameral legislature, whether they are presidential or parliamentary democracies, and what is the respective electoral system.

The regime is not to be conflated with the state or with a government. A state is an independent political community within a defined territory.[2] A state's regime may change abruptly, for instance as a consequence of war or revolution. It may also undergo incremental changes through constitutional amendment and cultural evolution. The state as such can remain unaffected by such changes in the regime. *States* are characterised (1) by the overlapping, but not congruent, sets of citizens and residents; (2) by territorial borders; and (3) by a legal order which is enacted, adjudicated and enforced by the government.[3] Even though these points are also subject to change (necessarily so with respect to citizens and residents), there must be a continuity over time. Moreover, changes in any of those components are independent from changes in the regime. For instance, in the course of German reunification, the regime of the Federal Republic remained in place, while the territory to which it applied grew and the set of citizens and residents was extended.[4]

A *government*, on the other hand, is a group of people acting in the state's name and administering it by means of making, adjudicating, and enforcing law according to the rules of the current regime. The government may change while the regime stays in place. For instance, the Weimar republic was the regime of the German state during the interwar period. As a democratic regime, it succeeded the monarchic German Empire and preceded the totalitarian Nazi regime. During the 15 years of its existence, the Weimar republic had 21 governments, an indication that it was not a particularly stable regime.

2 Kelsen (1948, 380) likewise defines the state as a legal community, i.e. a set of individuals who stand in legal relationships to each other.

3 This is analogous to the legal doctrine formulated by Jellinek ([1900] 1959, 394–434) that states consist of three elements, namely a territory, a people, and political authority. A similar definition also is given in the Convention on Rights and Duties of States which was signed at Montevideo on December 26th, 1933. Article 1 names four characteristics of states, namely "(a) a permanent population ; (b) a defined territory ; (c) government ; and (d) capacity to enter into relations with other States." Article 3 of the convention, moreover, establishes that a state's existence does not depend on the recognition by other states.

4 The one-party regime of the German Democratic Republic, in contrast, ended.

Both the state and the government may be the subject of criticism. As a case in point, the USSR's government under Joseph Stalin was particularly cruel. And within the Basque and Catalan populations of Spain, there is much discontent with the extension of the Spanish state with respect to territory. In many societies, there are also debates who is to count as a citizen and whether dual citizenship should be available. Often, however, criticism is actually directed at the level of the regime, even if not explicitly mentioned. Take the example of South Africa during the era of apartheid. The succession of one National Party supermajority government by another did not change anything in what was problematic in South Africa. At the same time, the problem was not inherent in the existence of the South African state which continued to exist after the end of apartheid until the present day. It is the regime which puts governments in the position to rule others, even against their will. The state merely provides the setting of political rule. The premise of this investigation is therefore that with respect to the question of how political rule can be justified, the focus should be on regimes. Justifying the borders or membership rules in a state is an important, albeit a different justificatory question, and it contributes to analytical clarity in political philosophy to keep the vocabulary distinct.

In the following chapters, I will be concerned with the fact of political rule in the context of a regime and the possibility and conditions of justifying it. The ambition of governments to create legal obligations for the state's citizens and the residents of its territory is known as their claim to political authority or the right to rule. In Chapter 2, I will therefore provide a definition of practical authority in general, and political authority in particular, and demarcate it against the concept of power. Thereupon, I will address the challenge raised by philosophical anarchists that governments do not actually wield political authority but only masked power because they lack the moral right to rule. Insofar as philosophical anarchists doubt the existence of political authority and claim that the political authority which rulers pretend to wield is only spurious, their point is not only a moral but also an ontological one.

An implication of the position that authority only actually exists if it is a *moral* right to rule would be that the existence of the legal rights and obligations which rulers create by virtue of their political authority would, as a consequence, also depend on rulers' authority to create morally binding rights and obligations. This is in conflict with legal positivism, i.e. the position that the existence of law does not depend upon moral arguments but only upon social facts. Legal positivism is a useful stance to

take for criticising rulers and the law on moral grounds, precisely because it acknowledges that there may exist binding law which does not meet moral standards. Legal positivism subscribes to the so-called social thesis, according to which the status of law depends exclusively upon social, rather than moral facts. By understanding political authority as a moral right to rule, philosophical anarchists and other participants in the debate taking the same position put themselves in conflict with the social thesis.

Their rationale for understanding political authority as a moral right is arguably that political authority is a quality that enables rulers to create binding rights and obligations. Under the premise that only moral reasons can be binding, political authority must thus be a capacity to create moral reasons. I argue, however, that binding reasons need not be moral ones. Rules may also be conditionally binding, given a prudential consideration. For instance, if you want to play a game, you need to play by the rules of this game. The rules are only binding upon you as you are a participant in the game and take an "internal standpoint" towards it. Yet under this condition, they are binding for you indeed, and so is the authority of the umpire. Accepting the role of a citizen in a state can also be understood as participating in a game, the game of the state's current regime. It does not matter whether the reasons you have for playing the game are moral or prudential.

Like games, regimes are therefore *institutions* with a social ontology. I take institutions to be sets of cooperative and/or coordinative social practices which can be formulated as prescriptive rules. Institutions can exhibit different degrees of complexity, depending on how many social practices they include. An example for a coordinative social practice would be driving on the right side of the road. A cooperative practice would be to assist victims in an accident. Social practices may be either formal, resulting from authoritative design, or informal, originating in spontaneous evolution. They derive their stability from incentive structures. Coordinative social practices are self-enforcing, i.e. their existence gives people incentives to participate. Compliance with cooperative social practices is ensured by means of positive or negative sanctions. Institutions come in many different types which each serve a particular coordinative and/or cooperative function. Each type may be instantiated by a variety of tokens. For example, the Federal Republic of Germany is a token of the institutional type of political regimes. Complex institutional tokens also contain subordinate institutions. In the case of a regime, these include for instance the form of governance or a system of property rights.

Institutions give rise to rights and obligations. Informal rights and obligations belong to the overlapping spheres of etiquette and social morality. Social morality originates in cultural evolution and prescribes for members of a moral community how they are to behave in a variety of circumstances. It is enforced within the community by means of social ostracism and in this way guides the actions of its members. Legal rights and obligations, in contrast, are of a formal kind. Statutory, or primary, laws are created by the legislative branch of government, applying to the citizenry and within the territory of a state. They are enforced by the executive, ultimately by means of physical force. Legal orders, however, are also characterised by secondary laws which regulate how political authority and power are to be wielded. An example would be the rule that laws must be adopted by a majority of Parliament. Secondary rules may be either formal or informal. Taken together, the set of secondary laws can be understood as a regime's (de facto) constitution. Both primary and secondary laws are binding for people who participate in the legal order. The participation itself is prescribed by a coordinative rule. This convention is external to the legal system but a requirement for its continued existence.

Institutional rights and obligations are binding simply by virtue of an institution's existence. Yet even though the function of institutions is to create coordinative and cooperative benefits, the requirements to respect rights and fulfil one's obligations can impose significant costs upon people participating in an institution, and even upon those who refuse to participate. Whether the existence of institutions is justified, i.e. whether they are legitimate, is therefore the subject of Chapter 3. There, I develop a principle of legitimacy that can be applied to political regimes, but also to other institutions and social practices.

An account of justifying institutions cannot itself rely upon an institution. Otherwise, the justification for the institution which does the justificatory work would be circular, which is not a good basis to start from. Importantly, therefore, an attempt to justify institutions must do without references to consent or moral rights which are themselves informal institutions from the sphere of social morality. As cases such as the discrimination against homosexuals over centuries show, social-moral institutions may themselves be problematic. They stand in need of a justification just as legal institutions do. Instead, therefore, I suggest to base the justification of institutions on their function, which is the creation of cooperative and/or coordinative benefits. Taking a normatively individualistic approach, I understand an institution to be justified to exist, or legitimate, if it can be

justified in terms of nonnegative net benefits to each individual who incurs costs from its existence.

It is important to understand that only because people participate in an institution, it is not necessarily justified to them in a functional sense. People choose to participate in an institution if the outside option is worse. This outside option, however, may itself be shaped by the existence of the institution and the sanctions it imposes on those who try to leave it. Insofar as these sanctions may be coercive, participation must not be mistaken for justification. For instance, women may be forced to comply with sexist institutions which harm them because they would face even more harm if they resisted. Conversely, however, sanctions for non-participation may also be justified towards those who do not recognize the institution and the duties it imposes upon them. This would be the case if, all in all, they nevertheless benefited from the existence of the institution. For instance, if you are a thief but you benefit from the fact that stealing is prohibited, you may legitimately be sanctioned for stealing.

What matters for justifying an institution to an individual is thus not whether she benefits more from participating than from not participating, but whether she benefits from the institution's existence, compared to the absence of this institution and any other token of the same type. Insofar as an institutional token can be justified in this way to all individuals who incur burdens from its existence, it is legitimate according to my principle of legitimacy (PL) and I refer to it as *functional*, otherwise as *dysfunctional*. Institutions can also be functional or dysfunctional at the level of types. An institutional type is functional insofar as all individuals whose behaviour the institution claims to regulate find its function as such acceptable. Dysfunctional institutional types such as slavery can only have dysfunctional tokens. Functional institutional types such as marriage may have both functional tokens, which are justified, and dysfunctional ones, for instance forced marriage.

The functional conception of legitimacy is parsimonious in presuppositions. It relies exclusively upon individuals' costs and benefits as its normative foundation. Individual costs and benefits, however, are subjective and therefore hardly accessible from the outside. We thus need to make use of a proxy construction to determine the legitimacy of an institution. The tool I am using is the notion of the social contract. The idea is that a regime is legitimate if and only if individuals would unanimously consent to the creation of an institution in a counterfactual situation, or state of nature, without any institution of the type in question. Their consent can be seen as

indicative that they all benefit (or would benefit) in total from the existence of this institution. Insofar as the only assumption I make about the state of nature is that individuals decide on the basis of their costs and benefits, moreover, my approach can be counted among the contractarian branch of social contract theory.

Importantly, the social contract is a thought experiment, and individuals' consent is only hypothetical. Actual consent is not a requirement of functional legitimacy; it is neither necessary nor sufficient. If actual consent was a necessary condition, this would give people the opportunity to shirk their mutually beneficial duties in existing institutions by denying their consent. For instance, they could opt out of a tax scheme even if they benefited more from the public goods provided by the government than they would pay in taxes. This would go against the notion of fair play. Actual consent is not sufficient, on the other hand, because consent to an existing institution can hardly be guaranteed to be voluntary. Just as people participate in institutions which may be unjustified to them, they are also prone to give their explicit consent if the outside options are sufficiently repugnant. What the outside option looks like, however, may itself be a consequence of the institution's existence.

Apart from these considerations, hypothetical consent is also a more helpful criterion of legitimacy than actual consent when it comes to guiding practical action. Virtually all regimes lack their citizens' actual consent such that they count as illegitimate according to actual consent conceptions of legitimacy. Yet it is not clear which of these regimes may continue to exist or not, or whether they should be reformed and how. Functional legitimacy, in contrast, has clear practical implications. Tokens of dysfunctional institutional types should be abolished because they cannot be legitimate. Dysfunctional tokens of functional types, in contrast, should be reformed such that they become functional. Within functional institutional types, moreover, the same scheme should be applied to subordinate institutions, all the way down to single social practices. Even if it is not possible to directly change or abolish institutions, functional legitimacy allows for practical judgements and may guide the actions of activists and dissidents.

In Chapter 4, I return to the challenge of philosophical anarchism and discuss what can be derived from the functional approach with respect to the legitimacy of political regimes. If regimes turned out to be a dysfunctional institutional type, functional legitimacy would entail anarchism a priori. This is the position that political authority cannot be legitimate as a matter of necessity. On the functional account, the function of regimes

as an institutional type is to provide benefits of peaceful coexistence. This function is acceptable to all individuals who are subjected to the government's authority, even though a particular token may prove to be dysfunctional. Accordingly, political regimes are a functional institutional type and are thus not illegitimate a priori according to the functional conception of legitimacy.

Conceptions of legitimacy which build upon individual autonomy or pre-political (e.g. natural) property rights, in contrast, have an affinity to anarchism a priori. Political authority includes the right to impose obligations, which is not compatible with individual autonomy. Moreover, political authority comprises the meta-right to create and change rights, which is problematic if one considers rights to exist prior to any particular regime. I argue, however, that individuals in the state of nature would have no reason to give absolute priority to autonomy. Rather, they would weigh the costs of reduced self-determination against the benefits resulting from binding collective decisions. A right to property, moreover, is indeed to be granted by functional regimes. Yet the existence of the regime is not a means to the end of protecting property rights. If anything, it is the reverse. That a constitution guarantees a secure right to property is a means to the end of making the regime functional.

At the level of tokens, however, political regimes may indeed cut a bad figure. Governments may rule arbitrarily and cruelly. In a regime where parts of the population cannot be secure of their bodily integrity or the means of their own livelihood, surely benefits of peaceful coexistence do not accrue to all people who are subjected to the government's authority or power. Such regime-tokens are dysfunctional. What dysfunctional regimes have in common is that they are *illiberal*. In other words, dysfunctional regime-tokens do not subject the government to the procedural requirements of the rule of law, and they fail to grant individuals fundamental rights which protect their basic needs. Conversely, liberal regime-tokens where governments are constitutionally constrained and individuals are guaranteed basic rights count as functional and are justified to exist in this way. Since there are regimes which meet this criterion, functional legitimacy does neither entail anarchism a posteriori. This is the position that it is per se possible to justify political authority, but no existing or historical regime happened to be legitimate for contingent reasons.

The requirement that regimes must be liberal is rather vague, it seems, as a standard for reform. In particular, it does not provide us with an ideal what a regime should look like that is not simply justified to exist but

optimal. At the same time, individuals are able to rank their preferences for regimes in terms of the net benefits they yield. Thus, it suggests itself to use the thought experiment of the social contract not only to determine what regimes are acceptable, but also which one would be the best. Using a cost-benefit framework comparable to the one underlying the functional conception of legitimacy, this attempt has been made by Buchanan and Tullock ([1962] 1999). The setting is that individuals unanimously choose a constitution which allows them to make decisions at the operative level of politics with less than unanimity. In making their choice, individuals weigh the sum of the external costs from being outvoted in a collective decision against the internal costs which arise from lengthy bargaining. In this way, they identify an optimal decision rule which minimizes the total of both types of costs. This approach can also be applied to other specifics of constitutional design.

The problem with Buchanan and Tullock's model, however, is that it does not yield a unique outcome. Different individuals have different preferred decision rules which respectively minimize their overall costs. There is no reason to expect that they agree on one single constitutional design which benefits all of them most. Buchanan and Tullock address this issue by assuming that individuals decide under uncertainty, not knowing the cleavages that divide their societies. Thus, they minimise their expected rather than their actual costs. Expected costs, however, are the same for each individual and equal the costs of the average person. The assumption of a "veil of uncertainty" thus artificially creates consensus in the state of nature. That move has the consequence, however, that the constitution selected as optimal may *ex post* not be optimal for some or even for all individuals. Even worse, a constitution which is optimal on average does not guarantee functionality, i.e. that for each individual, the benefits they yield as a consequence of the regime's existence at least compensate the costs they incur.

Sacrificing functionality is arguably too high a price to pay for an ideal to be worth it. If we insist that each individual must yield nonnegative benefits, however, unanimity can only be achieved in a binary vote of acceptance or rejection in the state of nature. Thus, by giving priority to guaranteeing functionality over identifying a uniquely optimal constitutional design, the functional conception of legitimacy must content itself with defining a lower bound, rather than an ideal, for justified political organisation. Its main demand is merely that regimes must be liberal, which is consistent with a plurality of different regime-tokens.

Even though functional legitimacy has no ambition to formulate an ideal of political organisation, it nevertheless has implications for constitutional design. This is because regimes are highly complex institutions consisting of many subordinate institutions and social practices. These may each be evaluated separately in terms of functionality, both at the level of tokens and types. In Chapter 5, I therefore investigate what implications functional legitimacy has for three important elements of constitutional design, namely democratic rule, public spending, and federalism.

I argue that democracy, in contrast to autocracy, is a functional form of governance at the level of institutional types. This is because the function of democracy is to authorize new rulers in regular intervals and on a procedural basis, rather than for the social position they occupy, such as their position in the line of succession or their military rank. In the common form of majoritarian democracy, the procedural requirement is that rulers must be backed by a majority of voters, with majority relations being subject to shifts over time. In this way, democracy allows for non-violent changes of government which is a crucial benefit for everyone subjected to the state's authority. The function of democracy, however, is not popular self-rule. Even in a majoritarian democracy, the government comprises a small set of people, and they are elected only by a part of the population. Self-rule of individuals would only be possible in a unanimous direct democracy which is unattractive for other reasons.

The functionality of particular democracy-tokens depends upon the fate of minorities. On the one hand, societies may be divided by social-structural cleavages which create persistent minorities. In the limit, members of persistent minorities are never decisive on any issue. As in an autocracy, they are excluded from political authority in virtue of the social group they belong to, even though this only occurs accidentally. Yet in contrast to an autocracy, legislation in a majoritarian democracy is susceptible to public opinion. Members of persistent minorities and even of disenfranchised groups may make their case known to the public and may in this way non-violently influence policymaking. The existence of persistent minorities therefore does not make a token of majoritarian democracy illegitimate, as long as all individuals enjoy freedom of speech, as well as freedom of assembly and freedom of association.

What is fatal for the legitimacy of a regime with majoritarian democratic governance, however, is the presence of minorities who suffer intensely from being outvoted in a democratic decision, to the point that they are worse off than they would be in the state of nature. Such intense

minorities need not share socio-structural features; they may be created purely accidentally. Intense minorities may occur if democratic decisions do not underlie constitutional restrictions such as respect for individuals' fundamental rights. It is therefore not sufficient for the legitimacy of the regime that it be a democracy. Functionality is only guaranteed in a *liberal* democracy.

Another important element of constitutional design is given by the extent to which a government is authorized to raise its own funds in the form of taxes, mandatory fees, and social security contributions. Among the basic security rights that every liberal regime must grant its citizens is a right to property. This does not, however, amount to a right that their existing property claims remain unchanged. Whether existing property claims are the product of authoritative design or have an evolutionary origin, they are in any case the result of historical path-dependencies and need not be justified themselves. From a functional perspective, it does not matter whether individuals are made worse off by a policy compared to the status quo because the status quo is arbitrary and may be dysfunctional. Governments may in fact overcome dysfunctionalities in an existing system of property rights by engaging in redistribution and by raising taxes and contributions to provide goods and services. A protection for existing property claims, as called for by libertarians, may therefore perpetuate dysfunctionality rather than contribute to legitimacy.

A large public budget, however, may create many dysfunctionalities. People may be legally obligated to contribute to goods they do not use, such as car infrastructure, or services that are offered to others, e.g. subsidised childcare. On the one hand, such spending decisions may be justified even to those who are not the direct beneficiaries, through positive spillovers from which they benefit indirectly. On the other hand, even a public budget that includes dysfunctional policies may be justified in total. A budget is functional insofar as all individuals benefit from its existence, even if not each public good or service creates benefits for them which outweighs the costs. By requiring that every spending policy must be functional individually, many functional budgets would be ruled out. An exclusive focus on avoiding dysfunctionality might thus come at the cost at foregoing mutual benefits that would otherwise have been available. This is why functional legitimacy only requires that the public budget as a whole be functional, not every individual subordinate policy.

In large and heterogeneous societies such as most modern democracies, there will be many dysfunctionalities at the policy level. This is inevitable

insofar as people have incompatible values and preferences such that each way to regulate a contested issue imposes net costs on some group. Diversity thus comes at a high cost. One way to mitigate this cost, it seems, is by decentralising political authority in federal or polycentric systems. Decentralisation allows for adopting parallel regulations of the same issue within different sub-jurisdictions of the same polity. Insofar as people with similar values and preferences live within the same sub-jurisdictions, i.e. local sub-jurisdictions are more homogeneous than the polity as a whole, dysfunctionalities can thereby be reduced. This is often the case with respect to language and culture. Many societies, however, comprise territorially scattered minorities, e.g. ethnic, religious, or sexual minorities. In a decentralised political system, these groups may even be confronted with more radical local majorities who adopt more policies which impose net costs on them than the national majority would have done.

Homogeneity at the local level may actually come about by means of a self-selection of individuals into jurisdictions where the majority position is close to their own values and preferences. The mere existence of several sub-jurisdictions offers people an exit option from policies which they disapprove of. Jurisdictions may even have incentives to diversify their policies in competing for residents. Yet this opportunity is more a theoretical one. Moving among jurisdictions is very costly for individuals since they often need to leave behind dear ones and also their jobs and homes. At the same time, local jurisdictions are limited in what they may decide due to externalities to other jurisdictions as well as internal minorities. Since exit is costly and not even available to everyone, it is not an adequate substitute for a liberal constitution. This limits the potential of territorial decentralisation for reducing policy dysfunctionalities. Regimes may, however, additionally allow for a non-territorial plurality of law. As an institutional innovation, I suggest that legislatures might adopt parallel regulations for private contracts, e.g. for marriage or employment. Contracting parties would then be free to choose the one most amenable to them.

It turns out then that, on the policy level, functional legitimacy does not make outlandish demands to regimes and their constitutions. For modern states, it suggests a representative liberal democracy that provides public goods and may contain elements of the welfare state and federalism. The added value of this investigation into political legitimacy lies therefore not so much in novel and demanding claims. Rather, the contribution is in its foundational work regarding the ontology of normative phenomena and the functional approach of justifying institutions based exclusively on costs

and benefits for individuals, without relying upon notions such as consent, autonomy, or (natural) rights. Added to this should be the more practical accomplishments of vindicating the impression that governments wield authority without forfeiting the ambition to question its justification and providing guidance for institutional reform which does not rely upon an abstract ideal.

A short overview of this study's argumentation can be found in Chapter 6 where I use an example to sum up the main points and demonstrate how the anarchist's challenge that no government wields legitimate political authority can be answered from the perspective of functional legitimacy.

2 The Ontology of Political Authority: Institutional, Not Moral

> I'm always saying 'glad to've met you' to somebody I'm not at *all* glad I met. If you want to stay alive, you have to say that stuff, though.
>
> — J.D. Salinger, *The Catcher in the Rye* ([1951] 2001, 87)

2.1 Introduction

Rulers enjoy a great amount of power over the citizens and the territory of a state. They can enforce their demands by threatening a loss of status, monetary sanctions, and ultimately by brute force. Nevertheless, rulers hold that laws are not merely commands backed by threats. Rather, they claim to wield political authority, i.e. the right to make law which is binding for citizens and residents of the state. People in the state usually accept this claim to political authority and act as if they had an obligation to abide by the law. This is why rulers do not regularly have to resort to using force. Nevertheless, they are the most powerful agents within a territory, and their claim to authority may simply be a bluff to avoid people's resistance to their rule. If this was the case, governments would not wield political authority but only power, and citizens and residents would be deceived by the claim to authority. In particular, it seems questionable whether rulers have authority if they lack moral justification. In this chapter, I will investigate what political authority is, how it differs from power, and under which conditions governments actually wield it.

Consider the following case. You open a new business, say a bookstore. A few days after the festive opening, the local mafia boss pays you a visit. "Such a nice shop," he says. "It would be a pity not to see it thriving. Fortunately, I am here to offer protection for your lovely enterprise." You are not fooled by his bespoke suit, nor by his friendly demeanour. In fact, you are well aware that you are falling prey to a protection racket. You grudgingly accept.

The reason you accept this "offer" is obviously not that you have any use for his service. Rather, the prospect of taking a final and involuntary bath in the local river with your feet encased in concrete is certainly not enticing. Now imagine that you open the newspaper and read that your town council has voted to introduce a new tax for shop owners due to increased costs of

policing the town centre. In general, you abide by the law. Yet the reason for introducing this tax sounds unfair to you. For a moment, you wonder whether there is a way to evade this additional financial burden on your business. You figure, however, that few shop owners will find it worthwhile. Tax fraud is a serious offense, and those who take the risk are likely to be put on trial and charged with a hefty financial penalty or even a prison sentence. This reassures you in discharging your own tax obligation. So, you end up paying *both* the protection money and the tax.

As becomes apparent in the example, both the state and the mafia threaten the use of force if you fail to comply with their schemes. Famously, Max Weber ([1919] 2020, 158–159) even considers violence as the defining feature of a state. He holds that the state cannot be defined content-wise because there is no common function that all historic and existing states served.[5] Rather, Weber claims, the state must be defined by reference to its means, which is physical violence. Violence, however, is also the means of the mafia.

Yet there is a difference. The mafia does not claim to issue more than threats, even if it puts on a superficial façade of respectability. The mafia does not follow any law in dealing with its clients and victims. Neither does it claim to make law or other binding rules in the first place. The mafia may have sophisticated internal norms and regulations, but it does not claim authority over those who are subject to its threats. In contrast, the government does claim the political authority to make and adjudicate law,[6] in addition to threatening violence to enforce the law it makes. If you perceive the requirement to pay the tax exclusively as a threat, just as you succumb to the protection racket, then you do not actually recognize the town council's authority. That would require you acknowledge its act as a law which imposes fiscal obligations upon you.

Note that, insofar as you acknowledge the obligation to pay the tax, the threat of being penalised need not have any motivational force to comply with the law. It may of course reassure you that you will not be the only one contributing to the provision of a public good. The crucial point, however, is that if you acknowledge the state's claim to authority, you are tantamount

5 I will give an account of the state's function as providing peaceful and secure coexistence within a territory in 4.2.1.

6 See Buchanan (2002, 695), Green (1990, 240), Huemer (2013, 5), Raz (1990, 117), Simmons (2016, 16), Wendt (2018a, 11), Wolff (1998, 9). This is in contrast to Weber ([1919] 2020, 159) who holds that the state successfully claims the monopoly on legitimate (i.e. lawful) physical violence within a specified territory.

admitting that you discharge a legal obligation rather than merely yielding to the threat of force.

That citizens (and non-citizens, for that matter) grant a state to wield political authority is a common phenomenon. Nevertheless, political philosophers disagree as to whether states *actually* possess political authority. It may well be that citizens are mistaken about the grounds on which they ascribe authority to a state—or so some of them claim.

Underlying these concerns is the assumption that the existence of political authority is a matter of moral justification and independent from empirically observable behaviour. Accordingly, it is supposed to be possible that beliefs about political authority may be misaligned with reality. If this was the case, political authority would actually be spurious and the apparent difference to brute power of the mafia kind would not reflect a deeper moral reality. Were it not for mistaken beliefs of citizens, the government would be just another power-wielder—on a par with the mafia.

This is the position of philosophical anarchists who deny that governments actually wield political authority. One philosophical anarchist, Michael Huemer, even compares the state to a vigilante and doubts that the fundamental feature distinguishing both from each other—authority—is real. He claims "that there are specific features of the human mind and of the situation most people find themselves in that contribute to a *moral illusion* of authority" (Huemer 2013, 135, emphasis added). This allegation presupposes that authority, if it exists after all, is a moral sort of thing.

In the present chapter, I address what I understand as the first of two problems of political authority—the question of its ontology (the second being the problem of legitimacy, or justified existence). I will argue that political authority is not an illusion because it has an institutional rather than a moral ontology. In other words, the existence of political authority does not depend on the government's justification according to some moral standards but on mundane social practices. That is, political authority is an institutional phenomenon. Its existence depends on social, not on moral facts.

In the course of my argument, I do not dispute the widely held view that political authority is a right to rule. To be precise, I take political authority to be the Hohfeldian *legal power* (Hohfeld 1919, 36) to create rights and obligations for citizens as well as for all legal persons within its territory. As a starting point for investigating the ontology of authority, this definition is supposed to be as uncontroversial as possible. It remains neutral on the important point of what constitutes a right. Nevertheless, it establishes

that what is at stake is a normative phenomenon. Whereas authority is a *normative power*, it must not be confused with *power* as a motivational capacity to elicit a behaviour, in the form of threats or offers.

As the example of the mafia highlights, power can be wielded by agents of the state but also by criminal organisations. I therefore distinguish two forms of power. The mafia has what I refer to as *brute power* to coerce its victims, i.e. to blackmail and to bribe them. *Authorised power*, in contrast, is employed to enforce sanctions attached to the violation of obligations. Whereas authority puts an agent in the position to impose sanctions, it takes authorised power to enforce them. Power can thus be essential for the potency of rights and obligations, but it does not give rise to them. Conversely, authority does not entail authorised power, notwithstanding the fact that a government's authority may be in jeopardy when its grip on power loosens. For instance, the Pope wields considerable authority over Catholics all over the world, without being authorised to use any physical power against them. It is clear then that power and authority must be distinguished.

Moreover, I want to make the point that we must differentiate between authority as a social fact and *justified* authority. I will argue in this chapter that authority can exist as a power-right without being justified. Authority as such collapses neither into power nor into justified authority. It is a right to rule, but not necessarily a moral right to rule. Accordingly, statutory, or positive, law is neither a masked threat nor a moral obligation.

Naturally, it is undisputed that a government *claims* to make and enforce legal rights and obligations in the form of rules published in statute books. The obligation to pay taxes is a case in point. Nor can there be a doubt that most citizens *accept* their government's claim to authority and see themselves under an obligation to obey the law. Anarchists and other sceptics doubt neither the existence of law on paper nor citizens' recognition of the alleged authority. What they call into question is the normative bindingness of legal obligations if there is no moral obligation to obey the law. What is at issue, thus, is the question whether laws give rise to genuine rights and obligations, or whether legal rights and obligations are spurious and only being respected because citizens and residents falsely believe that the government enjoys a moral power-right and that, accordingly, they have a moral obligation to obey the law.

I argue that governments need neither claim a moral right to rule, nor do citizens need to believe in it for political authority to exist. This is because what distinguishes practical authority from power is not that the wielder of

authority has a moral right to rule, but that she is institutionally authorised according to the rules of the regime. The set of rules which define how rulers are authorised within a regime can be understood as belonging to its *de facto constitution*. The de facto constitution need not be enshrined in a constitutional document. The United Kingdom a case in point. It does not have a written constitution at all. Its constitution consists of unwritten rules that have evolved over centuries.

On the other hand, even if there is a constitutional document, its content need not be decisive for political life. This may be the case insofar as the constitutional document is in conflict with some laws and unwritten rules which actually determine how a polity is ruled. In Germany, during Nazi rule, the Weimar constitution formally remained in place, albeit undermined by newer legislation. Yet, National Socialism clearly was a completely different regime than the Weimar republic. For comparing the justification of these two regimes, it is thus the difference in effective rules that matters, rather than the formally identical constitution.

It is by accepting a regime's de facto constitution and playing by its formal and informal rules that citizens confer political authority to their government. Of course, they have prudential rather than moral reasons to accept the de facto constitution. These prudential reasons, however, can be distinguished from the offers and threats involved in the exercise of power. What matters for the decision to accept a constitution is that a sufficient number of citizens do so as well, such that there are no incentives to do otherwise. Instead of yielding to another's power, yielding to government authority and taking part in the regime thus means to participate in a *convention*, i.e. a self-enforcing social practice. This convention may also be described as adherence to a *rule of recognition* (Hart [1961] 2012) or a *Grundnorm* (Kelsen [1934] 2008). Insofar as citizens' beliefs are not relevant for conventional authorization, but only their behaviour, there is no leeway on this account for political authority to be spurious.

Social practices such as conventions form the building blocks of my social ontology of institutions. Depending on whether their function is coordinative or cooperative, social practices are either self-enforcing conventions, or they are defined by norms that require authorized power for enforcement. Moreover, social practices may either originate by evolutionary processes or by authoritative design. The sphere of social morality contains social practices which are cooperative and emerged from evolution. It is thus a subset of normativity. The sphere of statutory law forms a separate part of the normative realm, consisting of cooperative and coordinative

social practices which are the product of political design. The rules of the de facto constitution, moreover, have diverse origins. Among them may be relics from earlier constitutions, rules drafted by a constitutional convention, or practices that emerged from the routines of political life. The rule of recognition, moreover, is external to a given legal order. As a convention, it helps individuals to coordinate on a regime. By participating, they acknowledge that its rules are binding for them. If a rule of recognition is in place, the government wields authority.

From the perspective of philosophical anarchism, my approach to the question whether political authority exists may appear unsatisfactory because it sidesteps the problem of justifying political authority. The objection is correct. In fact, my point is that the ontology of normativity must be distinguished from questions of justification. The upshot of the argument in this chapter is, therefore, that in most states, officials indeed wield authority as a right to rule rather than brute power, even though this authority is merely conventional and may be blatantly unjustified. The reason is that other than in failed states, people coordinate on accepting the de facto constitution which authorizes the rulers.

Nevertheless, the mere existence of political authority is not indicative of its justification. What can serve as a criterion for justifying political authority and other institutions will be the subject of the subsequent chapter. In the remainder of this chapter, I will proceed as follows: In Section 2.2, I define the concepts of practical authority, and in particular its sub-form of political authority, before presenting the philosophical anarchist concern that de facto authority is actually spurious. In Section 2.3, I show that the assumptions underlying philosophical anarchism are in conflict with legal positivism and argue that political authority need not be moral to be binding, insofar as it is institutional. In Section 2.4, I set out my positivist ontology of institutions, based on different types of social practices. Section 2.5 gives an account of how the normative phenomena of social morality, law, and political authority can be understood in an institutional framework. The chapter ends with a short conclusion.

2.2 The Concept of Political Authority

2.2.1 *Practical Authority*

As seen in the mafia example, the crucial difference between a government and a criminal organisation is the former's claim to political authority.[7] But what is political authority? To begin with, political authority is a form of practical, rather than epistemic or theoretical authority (see also Simmons 2016, 13–14). An epistemic authority is an agent who possesses credible knowledge concerning some issue. If I treat a professor of physics as an epistemic authority with regard to the big bang, her account of the origin of the universe has a certain credibility to me. This does not put her in the position, however, to require me to practice my maths skills. I may consider this as a recommendation, but not as an obligation. The ability to create binding obligations—and rights—for others is what characterises *practical authority*.

Following a common practice in the literature,[8] I define practical authority as an agent's Hohfeldian normative power to create rights and duties or obligations (which I use more or less synonymously in the following) for a set of subjects and within a defined scope of issues.[9]

A Hohfeldian power is, crudely speaking, a meta-right. In his *Fundamental Legal Conceptions*, Wesley Hohfeld provides a categorisation of legal opposites and correlatives. His terminology is not only useful in the context of law, but more generally in the normative sphere of rights and duties. On Hohfeld's account, a *right* (in the sense of claim) is correlated with a *duty* and the opposite of a *no-right*. A *privilege*, in contrast, means that nobody else has an opposing claim. In addition to these concepts, Hohfeld also uses what may be referred to as second-order legal concepts (see also Wendt 2018a, 9), namely *power, liability, immunity* and *disability*. These correspond to rights, duties, privileges and no-rights, respectively, but they also refer to the creation and change of such first-order legal entitlements

7 As Schmelzle (2015, 190–92) points out, state actors are characterised by an institutional role which comes with the claim to supreme political authority, i.e. a monopoly to create binding norms for society. In contrast to warlords (or the mafia), state actors do not merely exercise violence; they rule.

8 See for instance Simmons (2016, 16) or Wendt (2018a, 9).

9 This is also similar to the definition given by Green (1988, 42) who understands authority as a triadic relation among a person wielding authority, a person subjected to it, and a scope of actions to which authority applies.

and restraints (Hohfeld 1919, 36). An agent wielding a legal power over an object is in the position to abandon her (claim-)rights, privileges, immunities and powers with respect to this object, as well as to create such rights for others. This may happen for example by contract or by means of authorisation or appointment (Hohfeld 1919, 50–58).[10]

Note that practical authority, on this account, is a quality of an agent who makes and changes rules, not of the rules themselves. In the political context, it is a quality wielded by state officials who occupy a role in government. In particular, authority is not a characteristic of the law, which is not an agent but a set of rules. Otherwise, there would occur the oddity of ascribing a right to rule to rules themselves (see also Brinkmann 2024, 29).[11] Instead, I will refer to rules, including laws, which addressees have a duty or obligation to obey, as *binding*.

Practical authority can take diverse forms, depending on the subjects and issues it applies to. For instance, parents wield practical authority over their children, putting them in the position to tell the latter to clean their room or to go to bed. This authority does not extend to other people's children. Moreover, parental authority is limited to issues related to the child's welfare. Likewise, a boss occupies a position of limited practical authority over her staff and not over anybody else such as customers. For example, my boss may require that my colleagues and I attend our weekly jour fixe. Yet she has no authority to command that Taylor Swift come to our jour fixe, or to tell me how to decorate my home. If your boss has a black belt in karate and bullies you into ceding your convertible to her for the week-end by threatening you with her martial arts skills, this is not an instance of authority but of brute power (see 2.2.2).

Political authority is a particular form of practical authority. To be precise, it is the practical authority wielded by representatives of the state who make, enforce and adjudicate formal law.[12] Compared with other

10 As Raz (1979, 19) points out, the ability to take on a voluntary obligation by entering a contract or making a promise is a power which individuals have over themselves.

11 Nevertheless, such a usage can be found in the literature. For instance, Coleman (2001, 71) uses the term *practical authority* to refer to the notion that law guides actions by means of giving reasons for action. Raz (1986, 70), too, does not distinguish in his terminology between the state, the government and the law and ascribes authority to all three of them.

12 The related term *political obligation* refers to the notion that citizens are under an obligation to obey the law made by a government which yields political authority. See for example Buchanan (2002, 695), Green (1988, 240), Huemer (2013, 5–6), Raz (1990, 115–116), Wolff (1998, 9).

forms of practical authority, political authority is special in that it is the supreme authority within a state's territory.[13] Political authority extends to all individuals and organisations within the territory, as well as to citizens that live beyond its borders. The scope of political authority is not as clearly defined as that of other agents wielding practical authority, such as bosses or parents. Rather, political authority legally defines the scope of such subordinate forms of authority. Accordingly, political authority is supreme within the territory to which it applies and independent from the legal systems applying to other territories (Hart [1961] 2012, 24–25). This does not mean that political authority is necessarily absolute or unlimited.[14] There may be constitutional restrictions with regard to what type of legislation on which kind of issues is permissible. Content wise, however, law may deal with basically anything which affects how people coexist with each other.

Not everyone is able to make binding law. If I tell my neighbours that I want them to put solar panels on their roofs, I do not create a new reason for them to act. This is even though I may have very good arguments on my side. Installing solar panels on roofs may be the correct thing to do for several reasons such as cutting the amount of fossil fuels burnt for creating electricity, reducing dependence from energy exporting countries or disburdening the electricity grit. It may also pay off financially. Yet my neighbours have these reasons already. Maybe they are not yet aware of all of them, so they may consider my words as a suggestion. Some may even decide to install solar panels for one of the reasons cited. Others may not even contemplate the idea at all. The fact that I want them to install these, after all, is irrelevant to their conduct. If parliament adopts a law requiring all homeowners to install solar panels, however, even the neighbours who did not opt for the installation yet will now have to get them. Members of parliament can make a binding law because, in contrast to me, they possess political authority which allows them to create legal duties.

13 Jellinek ([1900] 1959, 428–29) similarly distinguishes between disciplining and ruling authority. The latter, which is wielded by the state, is irresistible, he claims, since compliance can be enforced.

14 As Jellinek ([1900] 1959, 482) notes, political authority is not omnipotence, but legally bound. Yet neither are the legal restrictions absolute; they are also subject to authoritative changes.

2.2.2 *Power*

Power in the Hohfeldian sense is a normative phenomenon which is conferred by legal rules. An example would be a house-owner's legal power to lease, sell, or bequeath her house to other people, which is specified in private law. For reasons of clarity, I will from now on refer to Hohfeldian power as a *power-right*. Although Hohfeld writes in the context of law, power-rights need not be legal rights. They may also be social or moral power-rights. We must distinguish power-rights, which are normative powers, from what I will call *effective power*, i.e. the capacity to threaten or motivate people.[15] In contrast to effective power, practical authority is arguably a power-right to create rights and duties. In the mafia example (see 2.1) the mafia boss forces you to pay protection money by means of effective power, whereas the local government invokes its authority, i.e. power-right, to make you pay the tax.

Take another example: a teacher who has the authority (i.e. power-right) to set her pupils' homework. This need not entail, however, that she has the effective power to make them do the homework, e.g. if homework is not graded. If pupils nevertheless obey and do their homework, they recognize her normative power to give them tasks, rather than yielding to her effective power. In contrast, the school's bully may enjoy a considerable amount of effective power of pressuring the other pupils to buy him sweets, let him copy their homework, etc., although he lacks any normative power.

Importantly, by the term effective power, I here exclusively mean the ability to influence other people's behaviour through incentives and disincentives, not just any capacity. This means that the ability to inflict violence on people and things contributes to an agent's power, but it is not a form of power itself. Whereas it is common parlance to speak of the "power to lift a rock," in the context of this chapter, I use the term "power" only in this narrow, social, sense for reasons of conceptual clarity.[16]

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15 Hobbes ([1651] 1996, 62–63) works with a similar notion of power. For him, power consists both in someone's natural qualities and in their endowment with money, friends and social prestige. Everything that contributes to one's popularity or being feared, i.e. to one's influence over others, increases one's power on his account.

16 In German, the different usages of "power" come apart more straightforwardly: The power to impact physical objects is *Kraft*, which may also be translated as "force." In contrast, the power of setting (dis-)incentives, i.e. social power, is *Macht*. Only *Macht* is interesting to delimit against practical authority in the first place. I want to stay agnostic, however, in the debate whether power such conceived, both normative and effective, is better captured as *power over* other persons, or as *power to* make them

The important distinction here, I believe, is between the purely effective power wielded by the mafia boss and the combination of normative power, i.e. the power-right to rule, and effective power vested in the government. Formulations such as "the president has the power to veto a bill" or "the Prime Minister has the power to dissolve parliament" refer to officials' power-rights, i.e. their normative power. In contrast, "the police have the power to enforce law, if need be by means of violence" refers to the effective power which is required to make formal norms stable.

Effective power works by imposing positive or negative sanctions, i.e. incentives or threats. Accordingly, effective power may also be defined as the capacity to sanction behaviour. Sanctions are consequences which are attached to certain courses of action in order to create a reason for taking or avoiding these actions. Typically, sanctions are negative consequences. Accordingly, they impose costs on an action which is to be deterred, e.g. by means of threatening punishment for this option or through blackmailing a victim. In principle, positive sanctions are possible as well; they are merely more costly to implement. Positive sanctions may consist in making an alternative action (or all alternatives) more attractive, e.g. by bribing an individual or subsidising the option. A sanction does not restrict the addressee's freedom to choose in a deterministic way, but it creates new incentives which may affect the agent's overall order of preferences over strategies.[17] If sufficient negative sanctions are imposed to actually induce a certain behaviour, which would not have otherwise been taken, a particular exercise of effective power counts as *coercion*.

There appears to be a further way of exercising effective power over and above threats and offers, namely exerting influence over an individual's preferences, as Frank Lovett (2010, 75–76) points out. Changing (revealed) preferences, however, is exactly what effective threats and offers do: they make one option more attractive than another one which would originally have been chosen. We must be careful not to misunderstand what it means

behave in a certain way, or whether both terms are mutually reducible. According to Pansardi (2012), for instance, *power to* and *power over* refer to the same underlying concept of "social power" which can be expressed by either term. In contrast, Braham (2008, 12) argues that *power to* is more fundamental than *power over*. He claims that any ascription of *power over* is reducible to *power to*, which does not hold in the reverse: for certain instances of *power to*, an agent does not require the ability to make others act against their preferences. Goldman (1972, 262–63), on the other hand, claims that it is possible to have *power over* people's behaviour without having power with respect to their welfare.

17 See also Stemmer (2008, 149), Hindriks (2019, 129).

that someone's preferences have changed. For instance, introducing and enforcing a non-smoking norm at the workplace makes people stop smoking there, even though they still crave it. Thus, changes in preferences, which are mirrored in behavioural changes, need not reflect changes in values and desires but rather adaptations to incentives. What Lovett probably has in mind is being able to influence preferences by means of manipulating an individual's perceived pay-off for different options without attaching new consequences. That, however, amounts to enjoying the status of epistemic authority rather than effective power and therefore exceeds the scope of this chapter.

One last conceptual distinction is to be made. Effective power, i.e. the capacity to influence other people's behaviour, may either be *brute* or *authorised*. Brute power is exercised outside of an institutional framework, e.g. through blackmail and bribes. It is wielded for instance by a warlord or a member of a criminal organisation such as the mafia (but also by the school bully). The sanctions employed by agents wielding brute power need not be of a physical kind. Threatening to publish compromising photographs equally counts as a form of blackmail. Authorised effective power, in contrast, presupposes the social-moral or legal right to impose sanctions on an agent. It is thus wielded within an institutional framework such as a legal order, where sanctions may take the form of fines or subsidies.[18]

Even though authorised effective power entails that agents have the right to use effective power, it must be distinguished from practical authority as a normative power. Whereas practical authority is the right to create rights and duties, authorised power, as a rightful form of effective power, is the capacity-cum-right to enforce these rights and duties.[19] Governments usually wield both political authority and authorised effective power. Yet the rights to make law and to enforce it are often separated into the legislative and the executive branch, respectively. Practical authority and authorised power often go together, but they need not. In the informal sphere of social morality, all members of the moral community are authorised to enforce norms (see 2.4.3), even though no agent wields the authority to create new informal rights and obligations (see 2.4.4). Conversely, practical authority may exist without corresponding authorised power, as in the case of a referee. An

18 See also Lawless (2025, 1145) who notes that power which is not merely brute power is authorised according to rules.

19 Hampton ([1997] 2018, 90) uses the term "mastery" to distinguish the exercise of power in the political realm from political authority.

example from the legal-political sphere would be the International Court of Justice, which has the authority to decide cases but lacks the effective power to ensure that its decisions be implemented.[20]

2.2.3 *De Jure and De Facto Authority*

In the introduction to this chapter (2.1), I stated that governments must claim political authority as a means of being distinct from agents who wield brute power. Merely claiming the right to rule, however, cannot be sufficient for actually wielding political authority. Political authority is frequently contested. Claims to authority may be put forward by those who are not in government such as exiled monarchs, rebels, warlords, or presidents defeated at the ballot box. By which criterion can we determine that a claim to authority actually corresponds to an agent being in a position to make law and create duties? Is it merely success, i.e. being acknowledged as an authority by the ruled, as Weber ([1919] 2020, 159–160) suggests?

Arguably, someone who successfully claims political authority is able to make rules which count as laws within their polity. This may be considered as an exercise of authority. Many scholars, however, are unwilling to equate the fact of making rules which *count as* law with political authority as a right to rule. For this reason, a distinction between two kinds of authority is popular: *de jure* and *de facto* authority.[21] This distinction differs from the earlier one, namely between political authority and power. In contrast to power, de facto authority requires an accepted claim to political authority as a right to rule (see also Simmons 2016, 16). Yet like power, de facto authority is an empirically observable phenomenon, which leaves its normative status open. It may thus be questioned whether a government whose claim to political authority is accepted actually wields the right to rule. The proper power-right to rule, which the claim to authority invokes, is denoted in the debate by the term of de jure authority.

De jure authority is supposedly independent from de facto authority.[22] The idea is that in cases such as that of a government which has fallen victim to a coup, even though its capacity to make and implement law has

20 Insofar as the executive and the judiciary are separated, national courts also lack the direct effective power to enforce their rulings.

21 See for example Bellamy (2019, 229), Gaus (2011, 163), Raz (1979, 4), Simmons (2016, 16), Wendt (2018a, 5), Wolff (1998, 9–10).

22 See for example Raz (1979, 7–8), Wendt (2018a, 5–6).

been thwarted, nothing in its entitlement has changed. That is, the right to rule is unaffected by the effective ability of law-making.[23]

If de jure authority exists without de facto authority, the reverse might also hold. What if a government is recognised as wielding political authority by its subjects but actually lacks the right to rule? In this case, its supposed authority would be spurious.[24] The government would merely be thought to have political authority which it in fact lacks.

If political authority is spurious, then legal duties, in a sense, are so as well. True, such duties count as law within the polity. Yet at the same time, they are no real duties if there is no real political authority with the actual right to impose duties. For instance, if a government is not authorised to make law, its officials may threaten you with their power so that you pay your tax bill, but as with the mafia boss, you have no actual duty to do so. And since, as Fabian Wendt (2018a, 9) puts it, "[e]nacting laws simply means putting citizens under a duty to respect these laws," laws which do not entail duties are not actually laws either.

The alleged possibility of spurious political authority poses a fundamental problem in political philosophy. It is known as "the problem of political authority". Michael Huemer (2013, 5) phrases the problem as follows: "Why do we accord this special moral status to government, and are we justified in so doing?"

Huemer's formulation of the problem of political authority indicates a crucial attribute ascribed to de jure authority in the debate concerning the problem of political authority. De jure authority is supposed to be the government's *moral* power-right to rule,[25] that is the right to create not only legal but also moral rights and duties. It is also sometimes being identified with legitimate, in the sense of justified, authority (see for example Raz 1979, 4),[26] also known as *political legitimacy*.[27] Even though the term is

23 For an opposing view, see Gaus (2021, 88–89).

24 See Simmons (2016, 16), Wendt (2018a, 5).

25 See also Applbaum (2010, 221), Brinkmann (2024, 42–43), Cordelli (2022, 49), Simmons (2016, 16), Wendt (2018a, 11).

26 Garthoff (2010, 669–70) even identifies a consensus in political philosophy that legitimacy is normative authority which is the power to create moral obligations for citizens. In the following chapters however, I will use "legitimate" in the sense of an institution being justified to exist towards its participants. On this account, an agent may wield authority which is not legitimate.

27 Some authors do not understand political legitimacy as a (justified) power-right with a correlated obligation to obey, but merely as a Hohfeldian privilege (e.g. Buchanan (2002, 695) or Huemer (2013, 5–6)) or a permission (Peter 2023, 9–11) to rule. Yet,

political authority, the authority in question is therefore a *moral* one for many authors. On such a moralised reading, an acknowledged claim to political authority may indeed be spurious because de facto authority can clearly exist without entailing a moral right to rule and without being justified.[28]

The negative answer to Huemer's question, i.e. the denial of de jure authority, is known as *philosophical anarchism*.[29] In contrast to *political* anarchists, philosophical anarchists need not advocate abolishing states or political regimes. Nor need they deny that there are reasons to comply with the government's rulings. Philosophical anarchists generally acknowledge that there may be reasons to abide by the law, such as a natural duty,[30] a concern for other people's expectations,[31] or prudential considerations influenced by coercion, financial incentives or persuasion.[32] What philosophical anarchists deny is not that governments create reasons to act, e.g. in coordinating citizens' behaviour or threatening punishment for crimes, but that governments wield the power-right to create legal obligations which in themselves constitute reasons to act. In other words, they reject the claim that we must obey the law *because it is the law*,[33] even though they acknowledge that there may be other reasons to abide by the law.

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as Schmelzle (2012, 432–33) points out, the functions of the executive, legislative, and judiciary all presuppose that agents have Hohfeldian powers to make and apply binding norms. Thus, questions concerning the legitimacy of governmental orders refer to the legitimacy of relations of authority.

28 The moral right to rule, however, is not the only possible interpretation of de jure authority. Generally, de jure authority merely denotes authority which is wielded lawfully (indeed, de jure is simply "by law"). Similarly, in the case of a legitimate monarch, the attribute "legitimate" signifies that the monarch acceded to the throne as the next in line of succession in accord with hereditary law.

29 Proponents of this view include Fiala (2013), Green (1988), Huemer (2013), Simmons (1981a), and Wolff (1998).

30 See for instance Buchanan (2002, 703–704), Green (1988, 244–46), Simmons (1981a, 193).

31 See Simmons (1981a, 193–194).

32 See Green (1988, 87), Raz (1979, 243).

33 See for example Raz (1979, 26–27) who suggests that philosophical anarchists may consider requirements by an effective (but not justified) authority as first-order reasons but not as exclusionary reasons to act (for Raz's account of reasons, see 2.3.2).

2.3 A Positive Conception of Authority and Law

2.3.1 *The Social Thesis*

The proposition that philosophical anarchists defend is that citizens and residents of a state are not morally obligated to obey the law made by the government *qua* law. In other words, law is not by necessity morally binding. This is not very controversial. Disputing it would mean to reject the ontological position of *legal positivism*.[34] This is the view that the existence of law is independent from its moral credentials. Hence, the reality of legal duties does not hinge on a moral justification. In legal positivism, the status of law is considered to be a formal rather than a moral quality.

Legal positivism is an attractive theoretical stance because it permits scepticism about the justification of law without denying the existence and bindingness of law. After all, criticising unjustified law is particularly pertinent if and because it is the governing law in a state. Any such critique would be jeopardised by an account on which law is justified by definition. To be able to evaluate existing law as better or worse, one must therefore not collapse the notion of law with the concept of justified law (see also Kelsen 1948, 383).

In the words of H.L.A Hart ([1961] 2012, 185–186), whose classical account I will broadly adopt, this can be phrased as follows: "[W]e shall take Legal Positivism to mean the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so." For Hart ([1961] 2012, 207–208), the aim of legal positivists is to avoid the conceptual confusion of denying immoral laws the status of law, without calling into doubt that laws may *be* immoral.

Philosophical anarchism should not, however, be conceived as merely an elaborate restatement of legal positivism. In fact, the distinction between de jure and de facto authority which is popular among anarchists is even in tension with legal positivism. This is because de jure, or genuine, authority is supposed to be a moral right to rule. Empirically observable de facto

34 Pioneering contributions to the theory of legal positivism were made in the 20th century by Hans Kelsen and H.L.A. Hart. Contemporary positivists are, among others, Jules Coleman, Matthew Kramer, and Andrei Marmor, whose positions I will also discuss. Joseph Raz, moreover, is a (self-declared) legal positivist, but at the same time a prominent defender of the de jure/de facto distinction (see 2.2.3) and a critic of Hart.

authority, in contrast is considered to be spurious, i.e. not really existent, as long as its wielders lack such a moral power-right. Yet if authority must be a moral claim-right to make and enforce law, this would entail that consequently, real law must create moral obligations. In this sense, according to the underlying assumptions of philosophical anarchism, law which is not morally binding is only a masked threat. Such law does not entail binding duties; it is spurious law. That legal obligations must imply a moral bindingness is exactly *not* the legal positivist position (see also Kramer 1999, 78). Legal positivism is an attempt to disentangle the moral justification and the bindingness of law.[35]

In fact, the distinction between de facto and de jure law echoes the notion from natural law theory that some rules of a legal system are not law in a genuine sense because they fail to meet moral requirements (see also Kramer 2008, 249). In contrast, legal positivism differs from natural law theory insofar as it does not understand the normativity of law as a moral one but as resulting from social facts (see also Coleman 2001, 74–75).

Within legal positivist theory, the ontology of law is described by the *social thesis*. The social thesis, in its strong formulation, states that the existence of law is exclusively a question of descriptive, behavioural facts, rather than of moral argumentation (Raz 1979, 39–40). Under this assumption, de facto and de jure authority cannot come apart: A government has political authority if and only if citizens and residents of the state comply with the law it makes. The social thesis thus entails that de jure authority is nothing more or less than de facto authority. Under this assumption, it would be contradictory to claim, as philosophical anarchists do, that a government which is acknowledged to make law lacks political authority. Legal positivists who accept the social thesis may of course agree with philosophical anarchists that a government lacks the *justification* to wield political authority. This is really the core idea of legal positivism: Binding law need not be justified.

On Hart's account, a legislator's authority—her right to make law—originates in the general acceptance of a social rule according to which a

35 As Kelsen (1948, 388–90) observes, if there is supposedly "real" law apart from positive law, the question arises who decides whether positive law is in line with real law. Kelsen identifies two options, namely lawmakers (legislators and judges), or everyone. Even if individuals subjected to the law are ascribed the same epistemic authority as lawmakers, however, it is still the lawmakers who choose and implement the law since they enjoy practical authority. In effect, for Kelsen, the notion of "real" law thus only serves to justify positive law.

legislator is to be obeyed. Hart ([1961] 2012, 58) refers to it as the *rule of recognition*.[36] Whereas the existence of law depends upon the rule of recognition, this rule itself exists as a matter of fact, comparable to customary rules which do not form part of a legal system, Hart ([1961] 2012, 109–110) notes.

The rule of recognition need not confer absolute authority to rulers. It is compatible with constitutional provisions restricting the legislative's power (Hart [1961] 2012, 69). These rules are what Hart ([1961] 2012, 81) calls the *secondary rules* of a legal system.[37] According to Hart ([1961] 2012, 94–98), secondary rules consist of "rules of change" which authorise a legislator or legislating body to enact, change and abolish laws, and of "rules of adjudication" determining how and by whom authoritative decisions about the violations of primary rules are to be made, often accompanied by rules regulating sanctions. Secondary rules are those rules defining and regulating the power-right to create and change rights and duties. The set of all secondary rules can be understood as the polity's de facto constitution. The de facto constitution comprises the rules determining how a polity is actually being ruled, which may or may not coincide with the content of a constitutional document (see 2.1).

In contrast to secondary rules, *primary rules* are statutory laws which define citizens' and residents' legal rights and duties within the state. For a legal system to be in place, government officials who make and adjudicate law must comply with secondary rules, Hart ([1961] 2012, 112–117) insists. Obedience with primary rules on part of the citizens is necessary but not sufficient.

Importantly, on Hart's legal positivist account, the status of law is not dependent upon moral criteria. What is primary law in a particular state depends upon contingent secondary rules regulating the making and revision of law. For instance, if you want to cross a red traffic light at a deserted crossroads and I remind you that it is against the law, I am not implying that you are about to do something immoral. Rather, I mean that you are intending to violate the traffic code, which is part of the law according to

36 This roughly corresponds to a legal *Grundnorm* ("basic norm") in the terminology of Kelsen ([1934] 2008, 73). Kelsen ([1934] 2008, 78–79), too, stresses that the *Grundnorm* is not posited, i.e. made in the sense of positive law. In contrast to Hart, however, he claims that it must be presupposed (Kelsen [1934] 2008, 77). Hart understands the rule of recognition as a convention, which is also what I will defend later (see 2.5.3).

37 Pettit (2023, 48) refers to primary (legal) rules as decision-taker laws and to secondary rules as decision-maker laws.

our state's constitution. I may even add that although your action is against the law, I see nothing morally wrong with it. Legal positivism allows us precisely this: to differentiate between the bindingness of a law and moral evaluations.

2.3.2 *The Reasons Rationale*

Why do philosophical anarchists take an ontological stance on the existence of law when they first and foremost want to deny that there is a moral obligation to obey the law? After all, the claim that morally unjustified law is only spurious law is a major allegation which puts philosophical anarchism in conflict with the social thesis, and therefore with legal positivism. This is not a position to take without any need, in particular since anarchists appear to agree with legal positivists that human-made law may be morally reprehensible. Arguably, participants in the debate about political authority, including philosophical anarchists, intend to distinguish law from the mere demands of the mafia-boss and other power-wielders. In making law, after all, the government claims to give citizens and residents reasons to act in whatever way it demands, not unlike a common criminal. If the government is not restricted by moral demands, it simply appears unclear how legislation differs from exercises of power (see also Coleman 2001, 120–21).[38]

Underlying the position that political authority must be a moral power-right is thus a concern that legal obligations can only be proper, binding obligations if they are also moral obligations. This concern is arguably at the root of the philosophical debate on political authority.[39] Under the assumption that only *moral reasons* can be normatively binding, it is puzzling how citizens can be bound to obey the law made by their rulers. The rule of recognition, after all, merely gives individuals *prudential reasons* to abide by the law, i.e. they commend a way of action because it is in the agent's interest. Yet these are the same kind of reasons as given by a criminal's exer-

38 For instance, Thrasher (2024b, 63) explicitly writes that "[i]n a society of free and equal citizens, coercion needs justification to distinguish it from mere force." To take this view means to identify *authorised* power (see 2.2.2) with *justified* power. In contrast, I will argue below that authorisation is a matter of social practices and that it remains an open question whether authorised rule is also justified.

39 It is thus not peculiar to philosophical anarchists. For instance, Peter (2023, 12) claims that illegitimate political decisions are not binding, although she does not deny that decisions can be legitimate.

cise of power. Prudential reasons may obviously make individuals comply with the law, but, so the reasoning goes, they are supposedly incapable to create an *obligation to obey the law*.

The point is explicitly made by Leslie Green (1985, 343–344), who does not doubt that a rule of recognition is the basis of de facto authority. What he denies, however, is that its existence makes moral argumentation for de jure authority redundant. The decisive weakness of the rule of recognition, as identified by Green, is that it is a convention, which supposedly disqualifies it as a standard of de jure authority. Green (1985: 344) claims that it "was never a mystery anyway" why the rule of recognition is followed, namely because it is a convention. Yet this is arguably not a reason why it should be regarded as authoritatively binding.

The problem with conventions, according to Green (1988, 155–56), is that whereas they give individuals reasons to act, these reasons are of the wrong kind. Insofar as the reasons to follow a convention are prudential ones, he claims, they are reasons of the same kind as reasons to yield to power and thus categorically distinct from reasons to acknowledge government authority. Green (1988, 118) holds that conventions and the use of power can give individuals merely contingent reasons to act *as* demanded by a government wielding authority, but no reasons to accept its claim to authority and to follow its commands *because* it is an authority. In other words, his position is that prudential reasons only give individuals *incentives*, but no *obligations* to act. Green (1988, 225–30) claims that if a government wields not only power but political authority, there must be a genuinely *moral* reason to obey the law, not merely prudential ones. Also, he insists that the mere fact that some action is required by law must be a *moral* reason to perform it, and other reasons of subordinate importance, i.e. prudential ones, must be ruled out thereby.

In requiring prudential reasons to be ruled out by authoritative commands, Green follows Raz who distinguishes between *first-* and *second-order reasons*. Requirements by an authority, according to Raz (1979, 18), are reasons to conduct an action, i.e. first-order positive reasons for this action. At the same time, moreover, they are reasons not to act according to reasons speaking against that action, i.e. second-order negative, or *exclusionary* reasons. In Razian terminology, Green's argument against both conventions and sanctions can thus also be formulated as criticising that they create only first-order reasons to act (Green 1985, 343).

The distinctive feature of exclusionary reasons, as stated by Raz, is that they do not offset other reasons by changing the overall balance of reasons

weighed against each other. Instead, they eliminate certain kinds of reasons from the calculation altogether. Raz is somewhat vague about the type of primary reasons to be excluded and notes that the range of excluded reasons may differ between cases. Yet he emphasizes that what primary reasons are excluded by an authoritative requirement is a matter of kind, not of degree. At least the addressee's "present desires" must be ruled out as reasons for action, independent of their strength (Raz 1979, 22–23). This indicates that prudential reasons are of the kind to be excluded.

Elsewhere, moreover, Raz (1984, 130–31) notes that reasons for action can either be prudential, serving one's self-interest or convenience, or moral. A *duty* to act in some way, however, can only be established by *moral* reasons. Importantly, he holds that this pertains not only to moral duties, but also to legal ones. This would entail that a government which lacks the moral power-right to rule cannot impose legal duties and obligations on citizens, thus lacking political authority. Whereas it might formulate codified demands and refer to those as "law," individuals would not be bound to comply with these demands. They may comply for other reasons such as the desire to conform with a convention or the fear of sanctions. Yet these reasons would be of the same kind as the reasons why individuals yield to the threat of a mafia boss or submit to peer pressure. Therefore, Raz and the scholars following him consider such rules as not binding.

According to the rationale that rights and obligations must be moral reasons to be binding it is thus clear how de facto authority can be spurious. A government may claim to wield de jure authority, and individuals may wrongly believe its claim. Yet, insofar as the government lacks the moral justification to make law, its authority is only pretence, even though individuals act as if it had de jure authority, owing to this delusion.

On the account that many philosophical anarchists follow, it is thus citizens' *belief* that the government has justified authority which confers de facto authority to a ruling government and marks the difference to brute power as wielded by the Mafia boss. Similarly, Hume (1741, 49) notes that public opinion explains "the Easines with which the many are governed by the few" which would otherwise pose a puzzle. Accordingly, wielding de facto authority requires that individuals *believe* the government's authority to be justified and themselves to be under a moral obligation to obey.[40] Philosophical anarchist Robert Paul Wolff (1998, 75–78) even holds

40 See for example Green (1985, 329), Jellinek ([1900] 1959, 424), Simmons (2016, 16), Raz (1979, 9), Wendt (2018a, 5), Williams (2001, 25).

that if people become aware that the state is merely a social creation without moral justification, they are able to throw off the yoke of authority.

2.3.3 *The Rules of the Game*

If the reasons rationale described in the preceding section is true, de facto authority is not possible without ultimately falling back upon beliefs in the justification of authority and law. A government that wants citizens to obey the law would need to convince them that it is justified to rule. Under this assumption, legal positivism would not be tenable all the way down. This is because positive law would derive its validity from moral argumentation (even though the argument may be flawed), rather than from social facts, as the strong social thesis demands. Raz, himself a proponent of legal positivism,[41] indeed stipulates that de jure, i.e. legitimate, authority is conceptually prior to de facto authority because rulers must claim to be justified and citizens must believe this claim in order to yield to their authority (Raz 1979, 9).[42] Consequently, Raz holds that even legal positivists, while denying that legal statements are moral statements, acknowledge that law claims to be legitimate (in the sense of justified), and that a certain part of the population must accept this claim if law is to be effective (Raz 1979, 158–159).[43]

In contrast to the reasons rationale, I take the position that the bindingness of authority and law does not depend upon the *sort* of reasons which individuals have.[44] Consequently, the existence of de facto authority does not depend on the sort of reasons individuals *believe* to have. Rather, it suffices for authority to exist and law to be binding that individuals want to play by the *rules of the game* of the institution, i.e. the regime, for whatever reason they happen to have. Playing by the rules of a regime necessarily

41 At least, Raz (1979, 152) claims to understand law as a social fact.

42 Raz (1984, 129–31) also takes the not exactly positivistic position that "duty" means the same in legal and moral contexts, namely that one has a reason to act in this way and failing to do so would be wrong.

43 Legal positivist Coleman (2001, 133), however, doubts Raz's claim that law must claim legitimate authority in a moral sense. That law must be normative, creating duties and obligations, does not entail that this normativity must be a moral one. In the same vein, Kramer (1999, 78) notes that Raz's claim that legal obligations imply moral bindingness is in tension with legal positivism.

44 As Stemmer (2013, 137) points out, it is crucial not to conflate normativity, i.e. bindingness, and legitimacy. Normative rules give people reasons to act in a certain way, but a binding rule need not be legitimate.

requires accepting the government's right to rule within the boundaries of the state and over its citizens. Certainly, this is a form of de facto authority. And yet it creates binding prescriptions, albeit conditional on individuals wishing to play the regime-game.

Importantly, the fact that people yield to a government's authority because they want to play by the rules of the game shows that justified authority is not logically prior to de facto authority, as suggested by Raz. This is because in such a case, the acceptance of de facto authority does not depend upon beliefs about the government's moral justification. It is thus possible to conceptualise the existence of positive law without falling back upon moral arguments. For an illustration, take the following example from Václav Havel (1985, 27–28), the Czechoslovak dissident and later president:

> The manager of a fruit and vegetable shop places in his window, among the onions and carrots, the slogan: 'Workers of the World, Unite!' [...] I think it can safely be assumed that the overwhelming majority of shopkeepers never think about the slogans they put in their windows, nor do they use them to express their real opinions. That poster was delivered to our greengrocer from the enterprise headquarters along with the onions and carrots. He put them all into the window simply because it has been done that way for years, because everyone does it, and because that is the way it has to be. If he were to refuse, there could be trouble. He could be reproached for not having the proper 'decoration' in his window; someone might even accuse him of disloyalty. He does it because these things must be done if one is to get along in life.

Havel underscores that individuals such as the greengrocer need not believe in the slogans they put into their windows. He notes that they merely play by the "rules of the game," thereby upholding the system (Havel 1985, 31). Thus, the government need not give moral but only prudential reasons for them to acknowledge an obligation to act as it demands.[45] That individuals can have incentives to publicly express backing for a policy, even if they do

45 This is even the case with respect to the social-moral rules prevalent in one's own society. Lawless (2025, 1158) accordingly makes the point that individuals may have reasons to engage in social-moral practices even though they do not believe in them, nor care whether others believe that they do. And Sterelny and Fraser (2017, 982) also hold that morality exists as a matter of social cooperation, but independently from people's opinions. For an institutional conception of social morality, see 2.5.1.

not privately support it, is also demonstrated by Timur Kuran (1987) in his account of preference falsification.[46]

Beliefs may be of a certain indirect relevance for institutional stability. In fact, Havel goes on to argue that the "power of the powerless" (i.e. dissidents who want to change the regime for moral reasons) consists in breaking the rules of the game and openly exposing the system as a lie (Havel 1985, 42–43). What dissidents actually do, however, is more than changing beliefs about a regime's justification. They are also altering *expectations* about how other citizens *behave*, by giving an example that it is possible to live differently and to defy the rules. If a legal system is understood as public capital which can be eroded over time,[47] dissidents may be seen as agents causing erosion by undermining the rule of recognition and in this way the regime.

Thus, citizens need not understand the law as *morally* binding to consider it binding *as law*. What is more, governments may even communicate their demands merely as demands, without claiming a moral requirement (see also Kramer 1999, 89), and individuals may accept them as such without assuming them to be morally binding.[48] The important point is that they accept them as law, i.e. as rules belonging to the legal system of the state, rather than as idiosyncratic demands of a powerful agent. Power and de facto authority are two different things, although both rely on prudential reasons.[49] At the same time, we must not confound the authorisation of rulers to wield political authority with a justification.

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46 Kuran (1987) develops a collective decision-making model in which the individual cares mostly about her reputation (determined by her publicly expressed preference) and her integrity (determined by the distance between her public and private interest). She has no significant concern for voting for her private preference, as her impact on the social choice is negligible. Even though individuals may feel oppressed by an existing policy, they may choose to support it over time because this keeps up their reputation. Kuran cites the Indian caste system as an example for his theory. Even representatives of the lower castes exhibit supportive preferences for the system. This is amplified by open voting in caste leader meetings.

47 This suggestion is made by Buchanan ([1975] 2000, 156–59). Buchanan, however, taking a conservative stance, considers erosion merely as a threat to law abidance and not as a chance to overcome illegitimate regimes.

48 Whereas moral convictions certainly motivate to comply with criminal law, the case is different e.g. for commercial law, as Schmelzle (2015, 58–59) points out.

49 As a real-world example, consider Russia's invasion of Ukraine. The Russian state under the leadership of Vladimir Putin claims a right to rule both Russia and at least parts of Ukraine, clearly without being morally justified to rule either in any way. But whereas Russians comply with Russian law and submit to the Russian state's

What matters for the existence of legal obligations is not the *kind of reason* individuals have to comply with the law, but under which circumstances a rule *counts as law* in the state in question, given its current regime. The greengrocer clearly obeys the government because he has an incentive to, i.e. a prudential reason. The incentive, however, is a different one than merely yielding to the government's power. It is in his interest to play by the rules of the regime as specified by the de facto constitution which defines rules adopted by the legislative as law. In acting as the government desires, albeit for prudential reasons, he therefore does not yield to a threat but follows a rule.

Rule-following is characterised by an "internal aspect," which Hart ([1961] 2012, 55–57) describes in the following way: Individuals are conscious of adhering to a rule, and they have a "critical reflective attitude" towards the behaviour regulated by the rule, which is expressed in normative judgements and appeals if others fail to comply. A counterexample to rule-governed behaviour would be the collective behaviour of brushing one's teeth which is not dependent upon a rule but merely a shared habit (see Bicchieri 2005, 8–9 for the example). The internal aspect of rule-following is nothing else than recognising that one is bound by a duty or obligation. This duty can be binding without being a moral one.

Underlying the reasons rationale is the mistaken assumption that taking the internal standpoint with respect to a rule requires the conviction that the rule is a moral one or morally justified and that there can be no prudential reasons to do so. In fact, however, the internal standpoint towards moral rules is of a particular kind which does not generalise to other sorts of rules. It is characterised by internalised feelings of guilt and shame.[50] Human beings have internalised moral norms such that they do not need to be aware of a prudential reason in order to follow them.[51] This is an attitude children acquire in the course of their socialisation. Children learn

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authority, most Ukrainians in the territory claimed by Ukraine do not. Even in the territories occupied by Russian forces, compliance can often only be achieved by means of extortion at gunpoint. This, however, is an instance of brute power, not of authority. A critical mass of Russian citizens, in contrast, acknowledges the Russian government's authority to make law, although many of them may not believe in its justification. If we equate de facto authority with power, we cannot adequately distinguish between the two cases.

50 See Gaus (2011, 212), Hart ([1961] 2012, 179–180).

51 See also Binmore (1994, 289), Gaus (2011, 210 and 2021, 46–48), Kitcher (2014, 93–94), Moehler (2018, 6–7), Stemmer (2008, 179–180), Sterelny and Fraser (2017, 986), Ullmann-Margalit (1977, 172–173).

that they have a moral duty to treat others morally because they are being shamed for immoral behaviour. As they grow up, people generally come to develop feelings of guilt and shame. As adults, we feel remorse for behaving in an immoral way, even if we are unobserved and nobody else shames us. The internalisation of moral norms is very useful because societies depend upon their members behaving morally even when unobserved.

We can, however, recognise duties and obligations outside the moral realm as applying to us without having internalised them.[52] The internal standpoint can be internal to a set of rules one has a prudential reason to participate in. Think of an umpire for a tennis game. The players acknowledge an obligation to yield to her decisions because it is a prerequisite for playing tennis. They want to play tennis for pleasure or as professionals and therefore submit to the referee's authority. Their behaviour is disconnected from any feelings of guilt. Acknowledging the umpire's authority is part of the convention how the game is played. By playing tennis, the players take the internal standpoint to the rules of the game.

Analogously, acknowledging a government's claim to political authority is conditional on the purpose of participating in the state. The internal perspective on law is simply taken by those who accept the rule of recognition within a certain legal system (Hart [1961] 2012, 102–103). Citizens and residents usually have prudential reasons to participate in the regime which is in place in the state. Insofar as they do, legal rules are binding for them.[53] By virtue of participating in the convention of acknowledging the government's political authority, citizens treat legal obligations as obligations, rather than as masked threats. The social thesis can thus be vindicated by reference to the rules of the game. There is no necessity for moral argumentation to establish legal-political authority. The ontology and justification of law can be addressed as two separate issues, as suggested by legal positivism.

If government authority only depends upon prudential reasons to accept the rule of recognition, and not upon a belief in its moral justification, there is no such thing as spurious political authority. This is because a government need not even claim to wield justified authority in the first place. Rulers may still come up with what Williams (2001, 25) calls a

52 According to Pettit (2023, 51–52), people may even internalise the bindingness of law, although without feeling morally obliged to comply. This may be possible, but the stability of a legal system does not depend upon such internalisation.

53 But cf. Coleman (2001, 143) who denies that legal rights and duties only exist within the game of law.

"legitimation story," just like regimes give themselves anthems, flags and other symbols. Such a story, however, is not essential for making anybody abide by the law because it is the law. Citizens and government officials may all falsely believe the law to create moral obligations,[54] just as they may all be aware that they are playing a game, as in the case of the greengrocer. This does not detract from the existence and bindingness of law as the rules of that game or from the authority an agent enjoys within the game. The legal power-right to rule, i.e. to create legal duties, does only exist within the framework of the regime as the game, but it exists nevertheless.

The existence of political authority is independent from the validity of any moral argument because political authority is part of the regime as an *institution*. Institutions are sets of cooperative and coordinative social practices that can be described by prescriptive rules. The game of tennis can thus be understood as an institution, but so can a state's legal order. Havel's comparison of submission to a regime to playing by the rules of a game is therefore quite fitting. On an institutional account, what distinguishes a government from the mafia boss is not a claim to *legitimacy*, but simply its claim to make and adjudicate *law*, i.e. general rules belonging to the institution of a legal order, rather than threats. A government may, but need not, claim more than that. If the Mafia was capable to establish general, durable, and regular rules, such a set of these rules could be considered a legal system. Yet this is exactly *not* what the mafia, as an organisation of criminals, is doing (see also Kramer 1999, 96–97). Organised crime is in fact defined as defying the institution of law.

Another example for an institution is marriage. There are justified and unjustified forms of marriage, as there are justified and unjustified political regimes. Nevertheless, nobody would deny the reality of two people being conjoined in matrimony, or of the rights and obligations entailed by their status of being married. Understanding a political regime as an institution such as marriage thus puts us in the position to acknowledge the existence of binding law while being able to criticise a legal order as unjustified. In the following section, I will give an account of the social ontology of institutions.

54 As Kramer (2008, 246–47) points out, even though law exists only as a consequence of mental states of at least some officials, it is very well possible that all officials in a legal order are mistaken about the nature of a law and the implications it entails.

2.4 The Social Ontology of Institutions

2.4.1 *Structure*

What exactly are institutions? First of all, it is important to note that institutions are not to be confused with *organisations*. Organisations are groups of agents, which may be individuals and/or other organisations, structured by cooperative and coordinative rules. Thus, the state as a legally structured community is an organisation, whereas its regime is an institution. North, Wallis, and Weingast (2009, 15) define organisations in the following way:

> In contrast to institutions, *organizations* consist of specific groups of individuals pursuing a mix of common and individual goals through partially coordinated behaviour. Organizations coordinate their members' actions, so an organization's actions are more than the sum of the actions of the individuals.

Institutions, in contrast, are defined by Douglass North (1990, 3) as "the rules of the game in a society."[55] Similar to North, I conceptualise institutions as sets of social practices defined by prescriptive rules. My definition, however, aims to be more precise than North's account in two points. Firstly, I define institutions as social practices rather than rules because, based on rules alone, it is difficult to determine whether an institution exists. By focussing on social practices, I can say that existence of an institution depends on rules being *followed*, i.e. social practices of acting as required by the rule being in place.

Another refinement I suggest for North's definition concerns the internal complexity of institutions. On my account, not every rule describing a social practice needs to be an institution in itself. Instead, institutions are sets of social practices which may differ widely in their complexity. Whereas some institutions are defined by a single rule, such as driving on the right side of the road, others are more intricate. Legal orders, for instance, are highly complex institutions which contain a multitude of social practices. They even exhibit different levels of *subordinate institutions*. For instance, the public budget is a subordinate institution to the legal order. Within

55 A similar but more detailed account is given by Voigt (2013, 5) who defines institutions as "commonly known rules used to structure recurrent interaction situations that are endowed with a sanctioning mechanism." As I will set out in 2.4.3, however, a sanctioning mechanism is only characteristic for cooperative rules, since it is required to ensure the stability of cooperative social practices.

the budget, one subordinate institution is the tax law. The tax law contains subordinate institutions such as the VAT. There are, however, also laws specifying exemptions to the VAT. The institutional hierarchy can thus be moved down to the level of single social practices.

Institutions can exist, moreover, on different ontological levels. A particular institution which contains concrete social practices can be understood as a *token* of an institutional *type*. For instance, the Federal Republic of Germany is one particular token of political regimes as an institutional type, and the Weimar republic was another one. Institutional types are individuated by their function (see 2.4.2). In contrast, institutional *tokens* exist in space-time and constitute particular instantiations of types (see also Guala and Hindriks 2020, 14). Their existence depends on people's participation in the subordinate institutions and social practices which constitute this particular token.

Insofar as the existence of institutional tokens is a social fact, one may wonder how they fit with Hume's law that an *ought* cannot be inferred from an *is* (doing otherwise would mean to commit the naturalistic fallacy). The application of this so-called law is evident enough with respect to natural facts. Only because a male and a female gamete are required for human reproduction, this does not mean that sexual relationships must exclusively take place among partners of different sex. Institutions, in contrast, are more complicated. As sets of social practices, they contain social facts. However, these practices can be defined by prescriptive rules, i.e. rules that tell people what to do or not to do. Institutions thus entail at least one *ought* (or *must not*), which is derived from an *is*.

We must, however, clearly distinguish between an *internal* and an *external* perspective on institutions. Taking an external perspective, institutions can be studied and described by social scientists in a purely empirical manner as a set of *is*-statements about social practices, analogously to natural phenomena. For instance, scholars engaging in comparative religious studies may analyse and contrast different sets of religious dietary rules without understanding themselves as bound to any of them. Any *ought* which is implied by an institution has validity only from the internal standpoint within the institution. Importantly, that people have a binding obligation contingent upon their participation in an institution does by no means imply that this particular institution ought to exist and persist, or in other words that it is justified that people engage in these social practices. This would be a statement about an institution's *legitimacy* (see 3.2.1). Whatever position one takes on the matter of legitimacy, conversely, does not render

the rules of the institution less binding from the internal perspective of those who engage in the institution's social practices. This is why beliefs about a regime's justification do not directly affect governmental authority.

Institutions are only prescriptive from the internal perspective: Those and only those individuals who play the game, i.e. participate in the institution, must follow its prescriptive rules. In this context, it is helpful to recall the game metaphor. Watching a game of chess, you will have to admit that what the players are doing is a token of the game of chess. Acknowledging this, however, does not commit you to move your bishop only diagonally (if you are not playing, you do not even have a bishop, nor a board on which you could move it). In the same way, realising that vehicles in a particular country drive on the right-hand side of the street does not commit you to anything as long as you are not planning to use a road in that country. *Is* and *ought* are thus linked by the act of entering an institutional game, participating in its cooperative and coordinative social practices, and thus taking the internal standpoint.

The upshot of this reasoning is that since any *ought* is always conditional on a contingent institutional framework, no prescription is valid in an absolute sense. Indeed, nobody has to pay taxes as such. We only have to live with the consequences if our tax fraud is exposed and prosecuted and if our co-citizens shun us for being anti-social. Even the moral *ought* merely prescribes social practices which constitute a moral community's social morality and loses its binding effect for those who turn their back on their moral communities.[56]

2.4.2 *Function*

Institutional tokens can be individuated by the particular rules which constitute them. Tokens of marriage, for instance, may differ with respect to the rules defining which couples are eligible. Institutional types, in contrast, are individuated by the function which all tokens of this type serve. In the case of marriage, this function is to create a legal kinship relation among sexual and/or romantic partners. In general, all institutions create some kind of

56 As Wendt (2018b, 657–658) points out, individuals who are very powerful and have no altruistic preferences will not be deterred by social rejection and inner sanctions. He gives the examples of a drug lord and a dictator. Such people will indeed not feel bound by their respective society's social morality, although other members of these societies may of course criticise their behaviour on moral grounds.

benefits for at least some of their participants.[57] These benefits arise from coordination and/or cooperation. That institutions create benefits is the reason why they exist in the first place, i.e. their *etiological function* (Hindriks and Guala 2021, 2032–2033). All institutions serve some coordinative and/or cooperative function.[58]

Social practices can be distinguished by the sort of benefits they bring about. An example for a rule defining a coordinative social practice would be a dress code: As people generally want to avoid standing out in the crowd, everyone benefits from coordinating their outfit with others by following a dress code. The existence of a social practice such as wearing black at funerals or donning suit and tie in the office tremendously facilitates this coordinative endeavour, thus creating coordinative benefits. Cooperative social practices, in contrast, help individuals achieve cooperative gains which would not be available if everyone merely acted in their own best interest. By joint effort, people can create public goods such as a charity aiding those in need or tax-funded universal health insurance.

Reference to the function of institutions should not be mistaken for a naïve functionalism. That institutions serve a function does not entail that they are *justified*. It is important to note that cooperative and coordinative benefits arising from institutions need not be *net* benefits. There even are social practices which make everyone in a community worse off, such as a convention of smoking within a peer group (the cost of smoking to one's health arguably outweighs the benefit from coordination). Nor do benefits necessarily accrue to all participants equally, or at all. Institutions may discriminate against groups such as women or ethnic minorities. And even if they create net benefits, existing institutions need not be particularly efficient (see also North 1990, 25). The fact that institutions serve the function of creating benefits, thus, does not in itself provide a justification for the existence of any particular institution. It is simply that if an institution had never benefitted anyone in any way, it would in all probability have not come into existence. I will tackle the connection between an institution's

57 According to North (1990, 27), institutions exist to reduce transaction costs. He distinguishes two kinds of transaction costs: costs of estimating the value of goods and costs of enforcement of rights and contracts. The absence of costs may be framed positively as benefits.

58 See also Pettit (2023, 40–41), according to whom the function of norms is to create cooperative benefits for all individuals. Moreover, Schmelzle (2015, 62) notes that the function of political institutions is to make possible and to design processes of social coordination and cooperation. On my account, this applies to all kinds of institutions. For the particular function of political authority, see 4.2.1.

function and its justification in Chapter 3; here I am only concerned with functions in the context of institutional ontology.

Rules defining coordinative social practices are also known as *conventions*. Their implementation solves *coordination games* (Schelling [1960] 1980, 89) by guiding individuals' actions such that they coordinate on the same coordination equilibrium. David Lewis ([1969] 2002, 14–15) defines coordination equilibria as a set of strategies such that, had any agent chosen to act differently, none would be better off. Thus, neither could the agent herself improve her situation by deviating from a coordination equilibrium, nor would anyone else benefit from her acting differently.

On the seminal account by Lewis ([1969] 2002, 78), a convention is, roughly speaking, a coordination equilibrium which is (almost universally) complied with, such that agents expect others to comply with it, and such that they prefer others to comply with whatever coordination equilibrium is being complied with.[59] Robert Sugden (1986, 32–33), in contrast, defines a convention as a self-enforcing rule such that there could also be one or more other rules in this situation which would be self-enforcing as well. He also applies the term to rules which are not actually established but would be self-enforcing once there was a social practice to that effect. In the following, I will stay closer to Sugden's definition, referring to conventions as self-enforcing rules describing social practices which are equilibria to coordination games. Contrary to Sugden and closer to Lewis, however, I use the concept only with respect to rules which describe an actually existing coordinative social practice, not for unrealised equilibria.

An example for a purely coordinative game would be a party dress code. Suppose that guests do not care whether they are expected to wear cocktail or casual. In this case, both equilibria are equally good for everyone. This is not a given, however.[60] In coordination games of the type "Hi-Lo," one of two equilibria has higher payoffs for all, e.g. if the casual dress code is far more comfortable to wear. Provided that all agents coordinate on cocktail,

59 In more detail, the definition by Lewis ([1969] 2002, 78) states that a regularity R qualifies as a convention if (1) conformity to R is almost universal, (2) there are almost universal expectations that all others conform to R, (3) preferences about action choices in the situation are almost universally shared, (4) given that conformity to R is almost universal, almost all agents wish any non-conforming agent to conform, and (5) in case there was almost universal conformity to an alternative regularity R' in the same situation, almost all agents would wish any non-conforming agent to conform to R'.

60 For detailed descriptions of different sorts of coordination games, see Guala (2016, 25–28).

however, nobody would benefit from any one agent's unilateral deviation. There is nothing to be won for anybody if you show up in casual clothes at a party with a formal dress code.

In other coordination situations, one party benefits more from a particular equilibrium than the other. In the two-person case, such coordination games are known as the "battle of the sexes," where each of both equilibria favours one of the players more. For instance, introverted people might prefer a casual dress code whereas extroverts may love to shine in more dashing attire. Generally, strategic interaction situations can be envisioned on a continuum, with pure coordination and identical interests on one side of the spectrum and pure conflict with zero-sum payoffs on the other side (Schelling [1960] 1980, 84). The games in between may be referred to as "mixed-motives game" (Schelling [1960] 1980, 89) or as "impure coordination games."[61]

All conventions are social practices solving coordination problems, some of which exhibit conflicts of interest. Additionally, Cailin O'Connor (2019, 19–21) introduces a further helpful distinction. She differentiates between correlative and complementary coordination problems. With correlative coordination problems, individuals need to coordinate on the *same* action, whether they receive the same payoff for it or not. An example would be that both spouses go to the cinema, even though one might have preferred the opera. If there is a complementary problem of coordination, however, interacting individuals need to take *different* courses of action. O'Connor gives the example of dancing tango, where one partner must step forward and the other back if the dance is to be successful. Another example would be division of labour: One partner cleans the dishes and the other wipes them dry. Complementary coordination problems therefore give rise to a differentiated behavioural pattern rather than a uniform behaviour. This is important because such patterns may form the basis of discriminatory social practices, giving rise to questions of justification.

Whereas conventions are rules defining coordinative social practices, I use the term *norms* to refer to cooperative rules. By cooperation, I mean a strategy of foregoing one's first best interest when this leads to a higher outcome for another player.[62] Thus, I do not understand the term "norms"

61 See Schelling ([1960] 1980, 89), Ullmann-Margalit (1977, 78).

62 This stipulative definition may be counterintuitive because it also categorises participation in exploitative institutions as "cooperation" on part of the exploited. It is, however, difficult to come up with a term that squares with intuition in all cases.

to be equivalent to prescriptive rules in general but more narrowly only to those rules that prescribe a cooperative behaviour.[63] Norms apply to *cooperation problems*. The most well-known account of such a problem is probably given by the so-called Prisoners' Dilemma which has its name from the story used to illustrate it.

The story goes as follows. Two suspects are being separately interrogated by a prosecutor. Each is given the same choice: "Either you confess the bank robbery you are suspected of, or you keep quiet. If both of you confess, each will go to prison for five years. If both of you keep your mouths shut, both of you will receive a one-year penalty for a minor crime we have evidence of. If, however, one of you confesses as a witness against the other, the confessant will go free, and the charged defendant will end up with a prison term of ten years." The exact penalties do not matter. What is important in this story is that, whatever the other one does, it is rational for each suspect to confess.[64] Thus, confession is the dominant strategy: Both confess, i.e. fail to cooperate with each other in the Nash equilibrium.[65] As the example of the criminals shows, cooperation need not be morally valuable. Criminals and oligopolists may also cooperate among each other.[66] The point is merely that it is in each player's interest that the other choose a cooperative strategy.

Generally, cooperation problems are characterised by the fact that the only Nash equilibrium is non-cooperative. This is independent of the number of participants. Accordingly, problems with the provision of public goods such as the "tragedy of the commons" count as cooperation problems, too. The tragedy of the commons arises if multiple agents benefit from a public good to which contributions are voluntary. For example, all

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Since the situations in question are technically known as cooperation games, I refer to the strategy as cooperation.

63 My use of the term thus differs from the one employed by Bicchieri (2005, 2–3) who distinguishes "social" norms from "descriptive" norms, i.e. conventions. I find her terminology unfortunate because both conventions and norms are social in that they define social practices. Moreover, conventions are not merely descriptive rules such as regularities. Like norms, they prescribe a certain behaviour, e.g. "drive on the right side of the road."

64 Ullmann-Margalit (1977, 30–37) gives another illustration of the problem: Two mortarmen may withstand the enemy if they shell him together. If both flee, they will be taken prisoner, and if only one flees, he will survive whereas his comrade will die.

65 A Nash equilibrium is a strategy profile such that no player has an incentive to change their strategy given that others hold on to their strategy (see Rasmusen (2009, 27)).

66 This is pointed out by Ullmann-Margalit (1977, 43–44). As she notes, the effect of anti-trust laws is therefore to keep players in prisoners' dilemma structures.

peasants of a village let their livestock graze the jointly owned pasture (the commons) more than would be sustainable to maintain it. The reason is that, independently of what the others are doing, each individual peasant has incentives to let her cattle graze more rather than less. Other prominent examples for the tragedy of the commons would be air pollution or overfishing. All these cases can be considered to be multi-party prisoners' dilemmas.

Note that the choice agents face in the prisoners' dilemma is not between mutual cooperation and mutual defection. Only mutual defection is feasible to achieve (Binmore 1994, 204).[67] Given the payoffs as they are and anticipating that other parties have no incentive to cooperate, the individual agent only faces the choice between ending up in mutual defection (by defecting herself) or unilateral cooperation. Being the only one who cooperates, however, is her worst outcome: it means that her cooperative efforts will benefit the other player(s), while she does not benefit from their cooperation. Mutual defection, in contrast, is only the second-to-worst (or third best) outcome. The second-best outcome, mutual cooperation, is not available due to the structure of the game. As, understandably enough, nobody wants to be exploited, no agent can be expected to cooperate.[68] It is only against the background of existing cooperative social practices that we have the intuition that the players ought to cooperate.

2.4.3 *Stability*

Although the function of creating cooperative and/or coordinative benefits may explain why an institution came into being, it does not tell us why it persists. Claiming otherwise would be committing the *functionalist fallacy*. This term is used by Vanberg and Buchanan (1988, 138–139) to point out that the usefulness of a normative order must not be taken to imply that individuals have reasons to comply with it. Nevertheless, institutions can prove remarkably stable. Most of our extant languages and many religions have existed for hundreds, if not thousands, of years and are anything but on the brink of extinction.

67 As Binmore (1994, 161–162) notes, any sympathy for other players, as well as commitments such as promises, are already reflected in the game's payoff-structure.

68 Although it may appear differently, the prisoners' dilemma does not constitute a paradox, as Gaus (2011, 72) notes. Defection is the one and only rational option to choose for each player.

Insofar as institutions are made up of behavioural phenomena, that is social practices, an institution is stable if a critical mass of individuals participates in (almost) all the social practices forming the institution.[69] This is the case if individuals are motivated to follow the respective rules defining the cooperative or coordinative behaviour. In technical terms, the existence of a social practice depends on a "participation constraint" being met (see 3.2.2). The participation constraint requires that the incentives to comply with the rule at least be equal to the incentives for non-compliance for enough individuals to hit the target of a critical mass. Stability of institutions is thus a matter of incentives, not of individuals' values and beliefs.[70]

Taking the position that normative rules and institutions consist of social practices requires us to accept that they may fail to be binding if the incentives to participate in the respective practices are too weak for too many people. An *incentive*, as it is taken here, is a *pro tanto* reason to act. That is a reason to act in a specific way which must be weighed against other competing reasons to act differently. A *reason* is, broadly speaking, what makes ways of action more or less attractive and may thus motivate agents to choose an action.[71]

Incentives are taken here in a very broad sense. They are not confined to prospects of material gain. Individuals may be motivated by concerns for the well-being of other people or for their personal integrity, provided they care for these things. The important point, however, is that if any motivation to comply with a rule is absent, the respective social practice cedes to exist. In a strategic situation of cooperation or coordination, an agent's incentives depend on what she expects the other parties to do, as a consequence of what they expect her to do and so forth (see Schelling [1960] 1980, 86). A rule is effective if the overall incentives of all agents are structured such that compliance with the rule constitutes a Nash Equilibrium, i.e. if it is every agent's best strategy given what the others are doing.

69 Note that submission to an authority need not be universal. To maintain a legal system, it suffices that a dominant fraction of society takes the internal standpoint to law. As Hart ([1961] 2012, 200–201) notes, some members of society, e.g. those who belong to oppressed groups, merely acquiesce to the law without recognising any duty to obey. Others, such as criminals and dissidents, do not even bother to comply.

70 This is in contrast, for instance, to the position taken by Thrasher (2024b, 76).

71 According to Stemmer (2013, 139–40), reasons consist of the conjunction of two facts: a subjective fact, which is given by a person wanting something, and an objective one, which constitutes a necessary condition for achieving what this person wants.

The position that the stability of a normative institution depends on incentives is not only an admittance to theoretical coherence. It also fits empirical observation quite accurately. The case of human rights constitutes a sobering example. Human rights rhetoric is simply cheap talk if the institution of human rights is not sustained by social practices, as there are no natural human rights.[72] Undoubtedly, people all over the world *deserve* to have human rights and it would be desirable if such rights existed universally. To claim that they do exist as of now (as, for instance, Christiano (2015, 461) does), however, is merely a denial of reality. As Brennan and Kliemt (2019, 109) put it, "To distribute virtual rations of a loaf of bread that nobody baked will feed nobody. Likewise, a belief in natural rights will not help anybody in the real world unless somebody is willing to act upon that belief." In other words, the postulation of rights alone does not confer any benefits; it is crucial that other individuals respect them (see also Narveson 1988, 173).

The structure of incentives to comply with a rule depends on the function of the social practice in question. Conventions are—by definition—self-enforcing and reinforcing. Once a coordinative social practice exists, all those who are affected by the situation in which a convention is performed have an incentive to comply. In any type of coordination game, the mere fact that a social practice exists is a sufficient incentive for agents to comply – even if some or all of them would prefer an alternative practice.[73] The cost an individual faces in case of non-compliance would be failed coordination. Their conventional nature actually explains why many traditions have proven so stable over time (Schelling [1960] 1980, 91).[74] Even harmful coordinative social practices are stable because no agent has an incentive to deviate.[75] For instance, wearing high-heeled shoes is damaging to the foot. If, however, it is part of a strict dress code, e.g. for stewardesses, deviation

72 See also Buchanan and Powell (2018, 306–307), Binmore (1998, 274), Gaus (2011, 429), Stemmer (2008, 273).

73 See Hardin (2014, 84), Stemmer (2008, 204), Sugden (1990, 781–782).

74 Hayek ([1979] 1998, 155) explicitly cautions that although institutions are merely contingent cultural phenomena, they cannot be discarded at will.

75 This is the sense in which conventions are arbitrary. It therefore misses the point when O'Connor (2019, 26) argues that conventions can be more or less arbitrary. Working hours during the day (her example) may be particularly salient as a pareto-superior equilibrium, but this is not less arbitrary than what people wear to work. Conventions are arbitrary insofar as individuals would comply with them given that others do so, even if there would be an alternative convention preferred by participants.

would require a change of profession—a cost not many people are willing to bear.

Norms, in contrast, are not self-enforcing. A mere sign proscribing walking on a lawn, for example, does not create any incentives to keep off the grass. Coordination games may only be solved by means of sanctions,[76] which may be either externally imposed or internalised by agents (Ullmann-Margalit 1977, 116–117). Strictly speaking, a norm does not even *solve* a prisoners' dilemma because the game has no other possible outcome than mutual defection. Rather, an effective norm *transforms* the prisoners' dilemma situation. This occurs if the incentives which players face are changed by means of sanctions, incentivising them to choose a different strategy.

Relying upon the threat of sanctions appears to imply that individuals only comply with norms if they have to fear sanctions, not because they realise the worth of public goods or the morality of not harming others. Yet this would be a distorted picture. For those who take the internal standpoint towards an existing norm, for whatever reason, sanctions play a subordinate motivational role. This is because they acknowledge the norm as binding. For instance, the house rules in your apartment building may require low volumes after 10 pm to protect tenants' night-time peace. This may restrict you to listening to music only via headphones at night. If you take the internal standpoint to the house rules, you change your behaviour not so much because you are afraid of neighbours calling the police or complaining with the housing company. Rather, you feel that you have a duty to be quiet at night. Sanctions alone motivate people to choose an action only in case they have no other motives to do so.[77]

76 This is why Gauthier's idea of "morals by agreement" is not a viable option. Gauthier (1986, 117) argues that mutual defection in the prisoners' dilemma can be avoided if individuals do not choose their strategies separately but agree on a common strategy of cooperation. Gauthier (1986, 167) claims that individuals should adopt a conditional disposition to follow a joint strategy if others do so as well and if they gain at least as much as if everyone followed an individual strategy. Alas, a disposition to constrained cooperation does not do away with the need for sanctions. As individuals are uncertain about others' behaviour, they may still find themselves not cooperating in equilibrium. As Binmore (1994, 26–27) points out, if players were able to commit to a joint strategy, they would not be playing the prisoners' dilemma any more. Another problem with conditional cooperation is that if dispositions are deliberately chosen, they can also be discarded at will, even though Gauthier (1986: 182) claims otherwise.

77 This point is also made by Stemmer (2013, 104).

The existence of sanctions, however, is crucial because it generates the public belief that everyone has *some* reason to comply with a norm. This is important to solve the assurance problem arising in former prisoners' dilemma situations which have been transformed by a norm.[78] In contrast to the prisoners' dilemma, cooperation in an assurance game situation is rational if players can trust each other (Moehler 2009, 310). In the case of public goods, for example, the state can assure all those agents who are willing to contribute, given that others do so as well, that contribution is rational because not doing so will be punished. Without sanctions, agents can never be sure whether others will also comply with the norm of contributing, or rather enjoy a free ride.[79]

This is arguably also why Hume (1741, 84–85) claims that for designing a constitution, it is reasonable to assume that every individual is a villain (or knave) against all empirical facts: A norm must give even the greedy and the selfish a reason to participate in social cooperation in order to protect everybody else from losing out from unilaterally cooperative behaviour which is not reciprocated.

Legal sanctions are enforced by the executive branch of government wielding authorised power, as described in Section 2.2.2.[80] They involve the threat, and ultimately the use, of physical violence.[81] In the case of moral norms, in contrast, enforcement power is distributed among the members of the moral community. Informal sanctions take the form of social ostracism.[82]

Only because social-moral norms work through informal sanctions, however, it would be a grave mistake to believe that they do not require enforcement. Christina Bicchieri (2005, 20–21), for example, understands moral norms as unconditional, to the point that she claims that the moral norm against killing people would deter homicide even in a Hobbesian

78 This is even acknowledged by prominent scholars in the Kantian tradition: According to Rawls (1971, 576), a society's stability rests the more on sanctions the fewer individuals exhibit a moral sense. Habermas (1997, 148) also notes that by imposing sanctions for deviant behaviour, the law substitutes the uncertain motivation of rational morality with prudential reasons. Therefore, legal sanctions ensure that norm-complying behaviour is reasonable.

79 See also Buchanan ([1975] 2000, 152), Gaus (2021, 181).

80 Binmore (1994, 32) claims that laws are only conventions. Many laws, however, define formal norms which must be enforced by means of sanctions.

81 See also Gaus (2011, 47), Hart ([1961] 2012, 85–86), Kelsen ([1934] 2008, 37–38).

82 See also Narveson (1988, 125), Stemmer (2008, 306–307). Voigt (2013, 6) similarly distinguishes between *external rules*, which are enforced by an outside agent, and *internal rules*, which are enforced by the members of a society.

state of nature (which illustrates the ultimate absence of any institutions). What motivates compliance with moral norms on her account is the belief in the legitimacy of the norm. This is implausible because in strategic situations, agents make their actions conditional on considerations about the behaviour of others, even if they believe that a different practice ought to exist (see also Gaus 2011, 170–171). An example is the practice of corruption which people participate in even though they deplore it. In a cooperation game, there is simply no basis to expect others to follow a norm which is not yet existent, even if a good case can be made for introducing it. If people follow the norms of social morality even without external sanctioning, they do so because they have internalised sanctions and would experience feelings of shame and guilt for breaking them (see also Sugden 1986, 177).

2.4.4 *Origin*

Institutional rules can have different origins. That you need to stop at a red traffic light is determined by your country's traffic regulations. Legislators wielding political authority once decided to introduce a set of legal rules of the road, making this behaviour obligatory. Not all social practices of the road are of a legal nature, however. Giving signals with one's hands or by means of the headlight flasher are informal social practices of coordination which have emerged spontaneously, without interference by an authority. In fact, a large amount of social order is structured by such evolved rules (see also Sugden 1986, 54).[83] There are thus two different origins of social practices: Spontaneous evolution and authoritative design.

Evolved social practices are arguably of a more basic kind than those resulting from authoritative decisions. Apart from being historically prior to designed rules,[84] they are not completely substitutable by them.[85] Moreover, attempts to replace evolved rules with designed ones may go awry (see Sugden 1986, 175–176) when they do not effectively change the incentive structure. Some evolved practices are also subject to authoritative regulation. In this case, the relation between evolved and designed rules may be

83 Hume ([1739] 1960, 490) also gives languages and money as examples for institutions with an evolutionary origin.

84 As North (1990, 38) points out, within primitive societies lacking politically authorised enforcement, informal norms help people to avoid being caught in prisoners' dilemma situations.

85 See also Buchanan ([1975] 2000, 150), Guala (2016, 7).

complementary, substitutive or conflicting (Voigt 2013, 11). That murder is prohibited both by law and by (evolved) social morality is an example for a complementary relationship. Notably, either route, evolution and design, can lead to both conventions and norms. I therefore categorise prescriptive rules as set out in Table 1, sorting by origin and by their coordinative or cooperative function. In the table, there is also an example given for each type of rule.

Table 1: A matrix of rules concerning social practices.

		Function	
		Coordination (Convention)	*Cooperation* (Norm)
Origin	*Spontaneous* (Evolution)	Custom (funeral dress codes)	Informal norm (charitable donations)
	Design (Authority)	Decree (office dress codes)	Formal norm (social insurance)

There is a tendency to use the term *convention* only for such coordinative rules which have evolved spontaneously.[86] In the terminology used here, however, all coordinative social practices qualify as conventions, whether they are the product of evolution or design. Following Edna Ullmann-Margalit (1977, 90–91), I will use the term *custom* to refer to those conventions which have evolved spontaneously,[87] and the term *decree* for those coordinative social practices which have been designed by an authority. An example for a custom would be wearing black at a funeral, whereas an office dress code mandated by the management would be a decree.

Customs are thus coordinative social practices which originate in evolution. They can emerge when one coordination equilibrium becomes *salient* in a population. The term salience was introduced by Thomas Schelling ([1960] 1980, 54–75). A salient equilibrium is always unique. Moreover, it is outstanding in a way that individuals expect others to perceive it as outstanding and to expect everyone else to perceive it in this way, too. An example given by Schelling ([1960] 1980, 55–56) is the problem of meeting someone in New York City without knowing the exact time and place. He provides anecdotal evidence that many people would be able to coordinate on meeting at the information booth at Grand Central station at

86 See for example Stemmer (2008, 200–202), Sugden (1986, 145–146).

87 Matson and Klein (2022, 7), in contrast, refer to conventions which originated spontaneously as "emergent conventions."

noon. Salient features of an equilibrium may be simplicity or, in repeated games, precedent. The coordination solutions which stand out in this way may, however, attach unequal costs to one party or overly high costs to all which may raise questions of justification.

In contrast to the intricate evolution of customs, the origin of decrees is fairly straightforward. Once an agent wielding de facto authority issues a rule which solves a problem of coordination, all its subjects have a reason to comply. The fact that the rule comes from the authoritative agent automatically makes it salient. If corporate management issues a dress code, all employees have sufficient reason to expect that others will don whatever attire is detailed there. In this way, the presence of an authority can solve coordination problems (another example being on which side of the road to drive).

Evolution and design are also the two possible origins when it comes to norms. In my terminology, the term *informal norms* is reserved for evolved cooperative rules.[88] It is thus not synonymous to all kinds of evolved rules, including customs (as used e.g. by North 1990, 4). Informal norms can explain why people cooperate even if there are no formal rules requiring them to do so. An example for an evolved norm would be the social-moral norm to donate money to charity, in contrast to the legal norm of paying taxes. Generally, social morality is a subset of evolved and cooperative social practices (see 2.5.1).[89]

Although the beginnings of social morality date back to unrecorded prehistory, Philip Kitcher (2014) gives an extensive account of how it *could* have evolved.[90] What he identifies as the seed of humanity's "ethical project" is that chimpanzees, bonobos, and human ancestors live in groups of mixed sex and age, where they need to be able to practice altruism (Kitcher 2014, 17). Whereas the psychological disposition to altruism regularly fails, human beings do not need to spend as much time on restoring

88 For successful examples of informal cooperation, see Ostrom ([1990] 2005).

89 Sugden (1986, 160–161) considers moral norms to be conventions of reciprocity. This parlance, however, is not compatible with the categorisation provided here. I use the term "conventions" for social practices that solve coordination games. Moral norms, however, emerge as solutions to cooperation games. The evolutionary origin of moral norms does not make them conventions. This is even more so since conventions, on this account, can be the product of design as well.

90 What is striking, however, is that Kitcher frequently refers to campfire discussions where rules, as well as religions, are invented. This would be an authoritative, rather than an evolutionary mechanism. The evolutionary aspect of moral norms would then be restricted to competition among different moral communities.

peace (by means of grooming each other's fur) as their ancestors and primate relatives because they have developed the ability to follow rules (Kitcher 2014, 68–69).[91] It is their disposition to follow rules which makes humans cooperate on a regular basis.[92] Thus, cooperative behaviour has its basis in social learning during human infancy and adolescence.[93]

In its most primitive form, the internalisation of rules apparently works through fear of punishment. Kitcher (2014, 93–94) notes, however, that at more advanced stages of development, other emotions may come into play such as guilt, shame, but also identification with a community and its values. Moreover, Kitcher (2014, 112–15) suggests that deities and supernatural forces can function as "unseen observers" ensuring that individuals comply with rules even when they are alone. With trade comes the need to have rules also for the interaction with outsiders to one's social group. Division of labour, moreover, gives rise to the cultivation of virtues and the emergence of complex institutions such as property, while also being the seed of inequality (Kitcher 2014, 124–31).

Since the stability of cooperative social practices hinges on the assuring function of sanctions, informal norms can only evolve together with a sanctioning practice. Such a practice can arise if a prisoners' dilemma is played repeatedly. As the so-called folk theorem of evolutionary game theory states, cooperative outcomes are achievable without external enforcement if a game is repeated infinitely. This is because iteration introduces the possibility to sanction defective behaviour by denying reciprocation in subsequent rounds, which can establish cooperation as an equilibrium in an infinitely repeated version of the game.[94] Moral norms, as evolved cooperative rules, thus rely upon a social practice of sanctioning. The emergence of emotions such as anger at defectors can play a useful role in this context. Even though a disposition to punishment is damaging to the individual in the short term, it can prove profitable in the indefinitely repeated prisoners' dilemma (see also Binmore 1998, 342). This is a further explanation of how moral norms become internalised.

91 See also Sterelny and Fraser (2017, 984–85) who claim that there were evolutionary incentives, in the form of cooperative and coordinative benefits, to internalise moral norms.

92 Heath (2008, 186) accordingly claims that people do not care about cooperation as such, but only about rule-following. They cooperate insofar as it is required by rules and compete if rules prescribe competition.

93 See Binmore (1998, 313), Gaus (2021, 46–48), Hayek ([1979] 1998, 156–157).

94 See for example Binmore (1998, 265), Gaus (2011, 89).

Whereas informal norms develop over generations, *formal norms* are the product of design by an agent wielding practical authority. The prime instance of formal norms are laws defining a cooperative social practice as defined above. For instance, a government may create a tax scheme which formally requires all citizens and residents to pay taxes for the provision of public goods and services, such as policing or social insurance. There may also be formal norms at the workplace or among the tenants of an apartment building. What characterises formal norms is that they define a cooperative social practice and that they have been created by an agent or a group of agents authorised to do so. When formulating a norm, agents wielding practical authority also specify sanctions for breaking the norm.

2.5 Institutional Rendition of Rights and Duties

2.5.1 *Moral Rights and Duties*

If we understand morality as an institution, moral rights and duties actually exist. Yet they do so in the same sense as obligations of politeness: as informal social requirements. In German society, for instance, it is as true that you must keep your promise to meet me for dinner as it is true that you must say *danke* when someone hands you a piece of cake. Both obligations are constituted by stable informal social practices which can be described as rules,[95] the former belonging to the mostly cooperative realm of social morality and the latter arguably to the mainly coordinative realm of etiquette.[96] Social-moral practices can also give rise to rights as the correlates of moral duties, e.g. my right that you go out for dinner with me. Importantly, moral rights are subordinate institutions within the

95 See also Stemmer (2013, 134-3) who conceptualises a right as a normative status which is created by a rule.

96 From a consequently positivist perspective, we can understand moral rules as binding within the game of social morality. Yet even legal positivists tend to shy away from making the existence of moral norms exclusively dependent upon social practices. Marmor (1998, 526), for instance, claims that the existence of a convention depends on a social practice, whereas the existence of a moral norm does not. Similarly, Coleman (2001, 86) holds that moral rules need not be practiced in order to exist because they give moral reasons anyway.

larger institutional framework of social morality, and their recognition is conditional on a given society and compliance with its rules.[97]

On an institutional account, moral truths are thus social facts about what rights and duties there are within a particular moral community, as the consequence of social practices. They are not facts concerning the value of these practices.[98] Accordingly, the institutional approach is not a normative, but a descriptive account of morality.[99]

Not all obligations of social morality can even be clearly distinguished as such within the wider sphere of social rules of which they form a subset. A requirement such as "Do not lie to others when it is to your own advantage" is obviously a moral norm. But what are we to make of "Bring a gift to a birthday party," or the fact that you have to perform some silly task when you lost a wager? There are also prescriptions of etiquette, such as greeting acquaintances, knocking at someone's door before entering, or letting people get off the bus before stepping on. Other social prescriptions are particular to a family or workplace, such as bringing a cake when it is your birthday. Whereas a failure to comply with these rules may not necessarily count as immoral from a theoretically informed point of view, people will often react with similar social sanctions as if a moral rule was violated, starting with a sneer and ending with the exclusion from the group.

This is even the case for informal rules which can be considered detrimental to moral goals, whether one understands them as moral or simply as social rules. An example would be honour codes that specify duelling or chastity.[100] At any rate, it would be a grave misconception to suppose that only such informal rules were normatively binding which are prescribed by

97 See also Binmore (1998, 182), Hayek ([1979] 1998, 172), Stemmer (2013, 57). Pettit (2023, 259–60) even refers to the belief in natural (moral) rights as the "Cheshire cat fallacy." Rights follow from rules; they are only the grin of the actual cat. As they are more salient, however, people mistake them for the real thing.

98 Note that the "pragmatist naturalism" put forward by Kitcher (2014, 210) relies on a normative (in the sense of evaluative) notion of ethical truth, yet one that is logically posterior to the concept of moral progress, which constitutes its limit value. Another naturalist but normative notion of moral truth is provided by Sterelny and Fraser (2017, 985) who understand moral truths as ideal maxims that, if followed, tend to maximise cooperative benefits.

99 As Handfield and Thrasher (2019, 4) point out, descriptive definitions state what behavioural code is being treated as overriding in a given population, whereas normative definitions make a claim as to what should be treated in this way.

100 Handfield and Thrasher (2019, 15) argue that insofar as honour norms facilitate cooperation, they form part of morality.

a particular moral theory, such as Kantian deontology or act utilitarianism. The very point I want to make about institutions is that, once an institution exists, its rules are binding whether we like it or not.

The function of social morality as an institutional type is to regulate the coexistence of the moral community's members in an informal way. Social morality is thus not to be confused with an individual's personal morality, which can be understood as ethics in the sense of how to lead one's life (see also Narveson 1988, 123–124). Personal morality is a separate dimension of morality, distinct from duties but also from supererogatory virtues, both of which are more or less social phenomena (see also Hart [1961] 2012, 182–84). Personal values can provide orientation for important life choices. Moreover, committing to a cause one considers worthy can confer a sense of meaning to one's life. A personal morality, however, is unable to guide the behaviour of one's counterparts in human interactions,[101] since it lacks a social component *per definition*. For instance, I may be convinced that everyone has a right to a quiet nap between 1 and 3 pm, and I may avoid any noise during that time. Yet as long as others do not share my conviction, there will hardly be any quiet.

There is, however, a tendency to consider morality as voluntarily chosen, in contrast to laws which derive from political processes which are ineluctable and external to the individual (see for example Nagel 1995, 25). In fact, however, the gulf between formal and informal norms is not as wide as it may seem. Both are norms, solving cooperation problems by means of sanctions (see also Narveson 1988, 119). What makes the normative status of formal norms such as laws more mysterious at first sight is rulers' overt reliance on power for enforcement. Yet power is not absent in the realm of social morality, either. It is merely dispersed among members of the moral community. In fact, social morality can be highly coercive for individuals who do not conform to it (see also Stemmer 2013, 58).

Social morality is often subject to parochialism, i.e. the belief that one's own norms are the only real norms, and to moralisation, i.e. the perception of norms as essential and not conventional (Thrasher 2018a, 196). The process of internalisation may lead to the naïve idea that moral norms are objectively or naturally valid and intuitively accessible,[102] notwithstanding the fact that intuitions may diverge considerably among individuals.[103] The fact that people are aware of the wrongness of an action, however, does not

101 See also Binmore (1998, 372), Gaus (2011, 231–233).
102 See also Binmore (1998, 313), Mackie (1990, 45), Stemmer (2008, 318–319).
103 See also Hardin (2014, 82), Narveson (1988, 110–115).

mean that they have an insight into moral reality. Rather, they react in an emotional way shaped by their socialisation (see also Kitcher 2014, 181–82).

In addition to internalised feelings, morality can upon reflection also be considered as a social construct without incoherence or risk to stability. From this perspective, moral rules may simply be considered as creating cooperative benefits. Such would be a rather unimpassioned attitude to take with respect to, morality, but it does not jeopardise the stability of morality if people understand it as an institution serving a function.[104] In contrast to the case of religion, awareness of its evolutionary nature need not undermine the benefits of morality (see also Sterelny and Fraser 2017, 983). It may even help moral activists to better understand how moral norms can be changed. Note, however, that, insofar as informal rules emerge over a long time horizon in the course of social evolution, social-moral norms cannot be changed abruptly.[105]

One great difficulty with an understanding of morality as a collection of higher truths rather than a set of social practices is that it lacks an account of how morality can motivate actions. That is, it remains unclear why we should comply with its requirements.[106] Not so with an institutional understanding. As an institution, social morality consists of social practices which individuals have incentives to engage in. Evolved social practices of punishment give individuals strong reasons to comply, since they want to avoid social ostracism.[107]

Social-moral norms are therefore what Kant ([1785] 2019, 44) refers to as "hypothetical imperatives." They are of the type "if you want *x*, you need to do *y*," where "being a member of this moral community" can be substituted for *x*.[108] Social-moral norms may appear to be unconditionally binding, or "categorical imperatives." Yet the if-clause is hidden in the institutional

104 Individuals taking this position still value the kind of cooperation which morality makes possible. They may also cherish the moral intuitions they grew up with. Contrary to Gauthier's (1986, 319–39) conjecture, an instrumental view on morality does not imply that it would be rational to get rid of one's moral feelings and dominate others if possible.

105 It is sometimes denied that social-moral rules can be changed at all. As Hayek ([1979] 1998, 167) expresses it: "Ethics is not a matter of choice. We have not designed it and cannot design it." Hart ([1961] 2012, 175–78), moreover, notes that moral rules are "immune from deliberate change."

106 See also Gaus (2011, 5), Mackie (1990, 49), Narveson (1988, 115–17).

107 Referring to social enforcement, Gaus (2011, 181) notes that "it is entirely unremarkable that normal humans care about [moral rules] and have reasons to follow them."

108 See Binmore (1998, 292), Stemmer (2013, 23), V. Vanberg (2018, 549).

structure: I must keep my promise *if* I want to be a moral person, *if* I want to remain a member of the moral community.[109] Hypothetical imperatives easily bridge the divide between *is* and *ought*.[110]

Another serious issue with an objectivist understanding of morality is that people may have no scruples to impose their own values upon others, regardless of their interests, when they hold them to be objectively true (see also Stemmer 2013, 95). This can easily lead to oppression in the name of morality. For example, homosexuality is considered immoral by some religious communities, even in countries where same-sex marriage is formally legal. When homosexuals suppress their inclination, they yield to the threat of exclusion. Accordingly, Gaus (2011, 5) cautions: "Just as political philosophers are rightly sceptical of political authority and insist that it be justified, so too should moral philosophers critically examine the authority [i.e. bindingness] of social morality."

2.5.2 *Legal Rights and Obligations*

Let us now turn to law. Philosophical anarchists hold that law is not binding if the government lacks the moral right to rule the state. On the positivist institutional account presented here, in contrast, legal rights and obligations exist if and only if they are established by formal rules which form part of a binding legal order, i.e. the set of all primary and secondary legal rules of a polity. What does not matter for the existence of legal rights and obligations is whether there is a corresponding *moral* right or duty to act in this way (see also Coleman 2001, 72). For instance, in a country where the legal order contains regulations for street traffic, there is a legal obligation to stop at a red traffic light. This applies even if the moral rules of the society in question know no such obligation.

As detailed above (2.3.3), laws that are valid within a legal system differ from orders backed by threats insofar as the agents who make and enforce them are authorised within the respective regime. Officials in the executive are authorised to enforce existing laws by means of formal and ultimately coercive sanctions (although sanctions would not technically be required

109 For a morbid example, consider a person who is planning to end her life being overrun by a train. She does not care whether she may owe it to other members of her moral community to step back from her plans to avoid trouble for commuters because she does not want to remain a member of the moral community.

110 See also Binmore (1994, 11–12), Mackie (1990, 65–66), Hayek ([1973] 1998, 80).

to create or stabilise decrees). Members of the legislative (and partly the judiciary and the executive) are authorised to decide about changes in the existing set of law.[111] Legislation may take place within certain confines, such as fundamental rights, and by an established procedure, e.g. majority voting in parliament. The procedures and limits of law-making, as well as the transfer of authority to a government, are regulated by the secondary rules of a legal order. Secondary rules can be either conventions or norms, depending on their function. For instance, the rules defining the electoral system are coordinative rules, whereas rules defining fundamental rights are cooperative. The set of secondary rules in its entirety forms the state's de facto constitution and defines its current regime.

The de facto constitution is an aggregate of designed and evolved rules. Even if there is a written constitution, not every detail of how governmental organs act and interact is codified. Much of that has evolved spontaneously over time. Evolved rules not only complement the designed parts of a constitution. They also function as constraints concerning which secondary legal rules may feasibly be implemented in the first place (see also Voigt 2013, 13). This is because, in case of conflict among formal and informal secondary rules, political agents follow spontaneously evolved rules rather than remaining true to the constitutional document.[112] A de facto constitution can therefore be understood a *spontaneous order* in Hayek's ([1973] 1998, 36–46) sense, i.e. as a set of rules which are at least partly the product of evolution.[113]

The existence of a regime entails that citizens—but importantly also government officials—have obligations to abide by secondary rules. There is a *legal* obligation for citizens and judges to honour the constitution, just as players and referees in a football game must abide by the rules of football. Yet the rules of football themselves give no reason to play football

111 As Kelsen (1948, 381) notes, the common parlance that the state makes law actually means that individuals following legal (constitutional) rules make law.

112 See Hart ([1961] 2012, 176–177), Hayek ([1979] 1998, 26), Voigt (1999, 284).

113 The spontaneous components of de facto constitutions can also explain how legal orders can be binding in the first place. As Green (1988, 147) points out, legal rules can only resolve prisoners' dilemmas if the prisoners' dilemma of establishing political authority has itself been solved through a different mechanism than authority. This is indeed the case insofar as the bindingness of the earliest constitutional rules can be explained by evolutionary processes. Gaus (2011, 460–62) accordingly criticises that anarchist scepticism about the bindingness of political authority and positive law testifies to a lack of recognition for informal, evolved rules.

rather than chess, just as there is no legal reason to consider one rather than another constitution as binding.[114] Secondary rules therefore do not prescribe acceptance of the regime itself, but only how to behave within a regime one already accepts. Compliance with a regime is prescribed by what Hart calls the rule of recognition (see 2.3.1). For the reason just given, the rule of recognition is not another secondary rule.[115] It must be considered external to the de facto constitution.

2.5.3 *Political Authority and Obligation*

A government has the right to rule, which is correlated with a political obligation to obey the law, if it is authorised by the de facto constitution of an extant regime. From a positivist institutional perspective, a political regime is in place if and only if there is the social practice among citizens and residents of the state to abide by its rule of recognition and to acknowledge the de facto constitution as binding (see 2.3.3).[116] Participating in the rule of recognition in a political regime is the rational thing to do given that other citizens, and importantly officials, do so as well. For instance, in a country that has adopted a republican political system and rid itself of its monarchy, even a monarchist will find it advantageous to recognize the republican regime and to submit to the authority of the new government. Failure on her part to do so will not confer any authority to the former monarch, but it will merely get her into conflict with the now existing authorities.

The rule of recognition is thus a convention.[117] It creates coordinative benefits by enabling individuals within a state to yield benefits abiding by the same set of secondary rules of political organisation. If everyone insisted on their own preferred set, there would merely be chaos. Nevertheless, the underlying coordination game is clearly one with conflict, since people

114 For the comparison with a game of football, see Marmor (1998, 530).

115 This is in contrast to what Hart ([1961] 2012, 58) claims.

116 Hampton ([1997] 2018, 107–108) uses the term "governing convention" which, however, refers to the legal order in her terminology, rather than to the rule of recognition.

117 De facto constitutions may forfeit their validity over time or in the course of extraordinary events. For example, a successful revolution substitutes the old legal order for a new one (see also Kelsen ([1934] 2008, 78–79)). And a usurper or a conqueror who manages to stay in power may gradually come to enjoy authority as a convention of obedience evolves. In these cases, the rule of recognition changes from one convention to another.

can have very different ideas how political life should be organised. Moreover, that an individual participates in a rule of recognition does not even entail that she benefits from the existence of the current regime. It merely means that she would be worse off not to participate in the convention, given that others do so (see 3.2.2).

Insofar as rulers have the state's coercive power at their disposal, they barely even need to rely on subjects to accept their claim to political authority and to take the internal standpoint to law at all.[118] This is why authoritarian governments and dictators may rule almost exclusively by force, relying only on the support of a small elite or "winning coalition."[119] Even in the case of an oppressive regime, however, a single individual has no incentive to unilaterally reject the government's authority to make, adjudicate, and enforce law. This is because a revolution constitutes a public good which must be jointly provided (see also Voigt 1999, 291). Therefore, most people normally acknowledge the existing de facto constitution, irrespective of their preferences and moral views.

The notion that the rule of recognition is merely a convention seems to be in conflict with the very idea of recognition itself. Can it really be the case that we comply with the rules of a given regime not for the merits of this regime, but only because we want to coordinate with other individuals in the state? Even outspoken legal positivists are uncomfortable with this idea. Jules Coleman (2001, 94–98), for instance, criticises that the acceptance of a legal system does not necessarily solve a coordination game with conflict. He thus disagrees with Hart's implicit position that the rule of recognition is a Nash equilibrium in a battle-of-the-sexes game. Rather, Coleman understands compliance with the rule of recognition as a "shared cooperative activity. Such activities are characterised by a system of attitudes referred to as "shared intentions." The rule of recognition then becomes binding insofar as officials engaging in a shared cooperative activity enter into commitments to the activity.

It may also be questioned whether the rule of recognition actually solves a coordination problem. This point is made by Andrei Marmor (1998) who claims that the rule of recognition does not qualify as a Lewisian convention. He suggests that not all conventional rules are solutions to coordination problems, giving the example of chess which is played for

118 See also Hardin (2014, 90), Hart ([1961] 2012, 202).

119 For a detailed account of how (authoritarian) governments stay in power, see the selectorate theory by Bueno de Mesquita et al. (2003).

its own sake. Marmor refers to such practices as *autonomous*. Other instances of autonomous practices are etiquette, fashion, or artistic genres such as opera. Marmor distinguishes *constitutive* conventions which give rise to autonomous practices from *coordinative* conventions which solve coordination games. He holds that people engage in constitutive conventions because of the values they embody and the human needs they serve, whereas they comply with coordinative conventions merely because others do.[120] Importantly, Marmor understands rules of recognition as constitutive rather than coordinative conventions.

This distinction seems to result from a confusion between the rules *of* a game, which may be conventions or not, and the reasons *for playing* the game. In the case of the state, the rules of the game are secondary rules, whereas the reason to play the game is given by the conventional rule of recognition.[121] A rational person will acknowledge the bindingness of a constitution and the authority of a government because she could only be worse off if she deviated unilaterally. With respect to chess, in contrast, the reason to play it is usually not given by a convention (or a norm), but by the pleasure a player derives from the intellectual challenge. We may, however, also engage in a game of chess because we signed up for a competition or because we promised it to a friend. In these cases, a rational person would have binding reasons to play chess. Still, these reasons are different from the rules of the game which are only binding within the game itself.

In the state, accordingly, the reason to abide by the secondary law of the constitution cannot itself be a legal or constitutional obligation. Starting from this observation, however, it can be argued that the reason cannot be conventional, either, but must be based on the merits of the legal system, i.e. the function it serves. Thus, apparently, it must be a moral or political reason (this is claimed by Marmor 2009, 164–68).[122] Alas, even though institutions *exist* because they serve a function, a rational person's reasons for

120 See also Marmor (2009, 40–41).

121 Marmor (1998, 527–28) certainly confuses the rule of recognition with secondary legal rules when he claims that it would be odd to say that continental legal systems, lacking the institution of precedent, have an unsolved coordination problem. As he points out, the lack of precedent as a legal figure results from the history of continental systems. However, the institution to acknowledge precedent is not the rule of recognition but a secondary legal rule. Moreover, we must distinguish between the evolutionary origin of a rule and its coordinative or cooperative function.

122 Similarly, Dickson (2007, 399) holds that since there are no legal reasons to accept a rule of recognition, the reasons to do so must be moral reasons. Yet even though the rule of recognition is neither legally nor morally binding, it is binding as a convention.

participation in an institution need not be related to the institution's function. Individuals may have incentives to participate in an institution even if they do not benefit from its function themselves (see 3.2.2). Conventions are self-enforcing social practices, and their existence is a mere social fact. We must therefore not commit the mistake of confusing the *existence* of political authority with its *legitimacy*. What makes an institution legitimate is the question to which I will turn in the next chapter.

2.6 Summary

In this chapter, I suggested a solution to the ontological problem of political authority, arguing that the political authority claimed by governments and acknowledged by citizens is actual authority and not spurious. The ontological problem of political authority emerges because philosophical anarchists claim that governments wield only de facto but not real, or de jure, political authority. If de facto authority is not real, however, it ultimately collapses into social power, i.e. the capacity to make effective threats and offers.

The reasoning behind the conjecture that de facto authority is spurious is that the authority that governments claim to wield must be a morally justified authority. This standard assumption is based on what I termed the reasons rationale, the idea that citizens and residents only have reasons to submit to a government's claim to political authority and to acknowledge legal obligations if the government has the moral right to rule them. Insofar as people mistakenly believe that the government is justified to rule the state, its de facto political authority is only spurious, but not de jure authority.

The problem with the reasons rationale is that it undermines legal positivism, i.e. the standpoint that the bindingness of law is independent from any moral argumentation. Instead, legal positivism adheres to the social thesis which states that the bindingness of law exclusively depends upon social facts. By arguing for the institutional nature of political regimes and law, I provided a defence for legal positivism. This is important because the *normative* problem of political authority builds upon the observation that the law made and the authority wielded by governments are not necessarily justified, which is a tenet of legal positivism. This is problematic exactly because laws are actually, although only legally, binding.

I made the point that de facto and de jure authority do not come apart because the recognition of a government's claim to authority is not based

on individuals' beliefs in the regime's legitimacy. Rather, it is motivated by the fact that people want to participate in the "game" of the legal order and benefit from having legal rights. This presupposes that they play by the rules of the game, i.e. the secondary rules which constitute the regime's de facto constitution. If a government is authorised to rule according to the constitution, playing by the rules requires recognition of its authority. This recognition confers de facto authority to rulers. Yet this is the only authority that they need to claim to make binding laws, at least within the "game" of the legal order. De facto authority is therefore not spurious; it is part of the rules of the game of a legal order.

Insofar as a legal order can be compared to a game, it qualifies as an institution. I defined institutions as sets of social practices which can be stated as prescriptive rules and provided an overview of their social ontology. Institutions may be more or less complex, and they can exist on two different ontological levels, namely tokens and types. Institutional types are individuated by the particular function they serve. In general, institutions serve the function of creating coordinative and/or cooperative benefits. Accordingly, social practices may be either coordinative or cooperative. Coordinative social practices, or conventions, are self-enforcing. Thus, once a coordinative social practice exists, individuals have incentives to participate in it. Cooperative social practices or norms, in contrast, need to be enforced by means of sanctions, and be it only to assure all participants that others have incentives to comply. Both conventions and norms may originate either in spontaneous evolution or in authoritative design, giving rise to informal or formal rules, respectively.

Both social morality and legal orders can be understood as highly complex institutions which consist of a multitude of subordinate institutions and social practices. These practices can give rise to rights and obligations, both in the informal and the formal sphere. The government's right to rule, i.e. political authority, derives from the secondary rules of a legal order, which can also be understood as the de facto constitution of the state's regime. The regime is in place insofar as citizens and residents of the state acknowledge the constitution and play by its rules. That they do so is itself subject to a social practice, albeit to one which is external to the legal order. This social practice, which is known as the rule of recognition, is a convention. Once it is in place, people comply with it and recognize the existing regime because their alternatives would be worse. The existence of a regime and the reality of a government's authority within it, however, does not entail that it is justified to exist, i.e. legitimate.

3 Benefits, Not Consent: The Legitimacy of Institutions

> The state exists for the sake of man, not man for the sake of the state.
> — Verfassungsausschuss von Herrenchiemsee,
> *Entwurf eines Grundgesetzes* (1948: 61).[123]

3.1 Introduction

Normative phenomena such as rights and duties derive their existence and bindingness from institutions. What remains an open question, however, is whether it can be justified that people have these rights and duties. People who participate in an institution such as a political regime do not only want to know what rights and duties they *have* within this institution. They also want to know whether it is *justified* that there is such an institution which confers certain rights and duties to them and others. In the particular case of the state, we want to know as citizens and residents how it can be justified that rulers have the right to rule us and that we have the duty to obey them. This question refers to the *legitimacy* of institutions, i.e. the justification of their existence. The present chapter aims to provide an account of institutional legitimacy which answers to people's question for a justification of their own institutional duties in terms of the costs and benefits they individually obtain from participating in an institution.

Imagine a housewife in 1960s Germany. She is considering taking up a job as a bank clerk, the profession she trained for prior to getting married. Her former employer has expressed interest in getting her back on the team. Before they can come to an arrangement, however, she needs to consult her husband. He is not amused. "Who will cook my dinner, take care of the children, and dust the furniture if you work in a bank? Darling, your place is in the home. I won't grant you permission to engage in paid employment."

Let us assume that the relationship between the husband and wife is one of marriage in all relevant aspects. By rendering their signatures on a document, following a predetermined procedure in the registrar's office,

123 Own translation. In the German original: "Der Staat ist um des Menschen willen da, nicht der Mensch um des Staates willen."

they legally entered into wedlock. Additionally, a priest married them in a ceremony at the local church. Both wear a ring as a symbol of matrimony and share a surname. The husband provides financially for his wife and children and enjoys tax benefits in return. All these formal and informal social practices are constitutive for the institution of marriage at this time and place (although only the part at the registrar's office is legally required). Among these social practices are also certain legal rights accruing to the husband, e.g., to determine the family's place of residence or to bar his wife from working outside the home. Thus, she rings up her former employer and declines the offer.

According to the account of institutions I set out in the previous chapter, the husband's authority is real, creating binding obligations, because it is an institutional fact. That does not tell us anything, however, as to whether his authority, or the institution of marriage in general, is also *justified* to the wife.

Note that on the account I have so far advanced and defended, legitimate authority is not equivalent to de jure, i.e. binding authority.[124] De jure authority, that is the meta-right to create binding rights and obligations, can exist regardless of being justified, or even held to be justified, to those subjected to it. It may exist merely by virtue of its acceptance being required by an institution's rules of the game. In the previous chapter, I argued against the claim that governments lack de jure authority, which is put forward by philosophical anarchists. My ontological point was that philosophical anarchists conflate de jure political authority with a *moral* power-right, i.e. the right to create moral rights and obligations. Instead, taking a legal positivist position, I argued that political authority exists as a *legal* power-right that is different from brute power if and only if people in the state abide by the rule of recognition.

I did not, however, challenge the moral concern underlying philosophical anarchism, namely that there is something problematic with a government wielding political authority per se, even if we have reasons to comply with the laws it enacts. What I identified as the normative problem of political authority is exactly that rulers may derive real authority from a regime which is not legitimate, i.e. justified to exist. Likewise, the husband's authority derives from an institution the existence of which stands in need of justification.

124 This is in contrast to a typical usage in the literature which I described in 2.2.3.

The question of the legitimacy of institutions is indeed an important one, also and in particular from a legal positivist perspective. This is because legal positivism implies that people can have legal rights and duties, even though they *should* not have them from an evaluative standpoint. As set out in Section 2.3.3, institutions are binding as the rules of the game, not *qua* legitimacy. If you want to play the institutional game, you can only do so by abiding by the rules of the game. The rules are constitutive of the game; so playing the game is by definition abiding by its rules. Even outrageous social practices can be prescribed by binding requirements if they form part of existing institutions. This is why it is so important not only to know whether someone has a particular duty, but also whether the institution that entails this duty is legitimate. If an institution has been identified as illegitimate, this serves as a strong foundation for criticising it. Moreover, from a more practical perspective, the question of legitimacy also matters as a benchmark for abolishing or reforming existing institutions and for creating new ones.

To begin with, we first need to determine what exactly must be shown to be legitimate. Is it an institution such as political regimes or marriage per se, i.e., as institutional types? Or is it a particular institution such as the Federal Republic of Germany or marriage in our unhappy 1960s housewife example? The latter would be examples of institutional tokens. There are countless possible tokens of an institution. For instance, in the 2020s, the institution of marriage is still in place in Germany. Yet the social practices constituting this current institution differ in important respects from those observed during the mid of the 20th century. Among other things, adultery is no longer a criminal offense, whereas marital rape has become so. Marriage is also no longer exclusively a union between a man and a woman but open to adult couples of any gender. Moreover, none of the partners has the unilateral right to decide about the place of residence or occupation of their partner. There are many more manifestations of marriage as an institutional type across states, nations, cultures and eras.[125]

Given that differences among instantiations can be far-reaching, what is it that all tokens of the same institutional type have in common? Following Guala and Hindriks (2020), I individuate institutional types by their function. All institutions serve a certain etiological function as a *raison*

125 For instance, marriage-tokens may or may not involve practices such as divorce, paying a dowry, or polygamy. Also, tokens differ with respect to who is eligible to be married, e.g. only adults, heterosexual couples, or people from the same religious community.

d'être for at least some of their participants. Otherwise, they would not have come into existence. This function is coordinative and/or cooperative, depending on whether the social practices constituting the institution involve conventions, norms, or both.

The central function of marriage is to establish a particular relation of kinship which is exclusively institutional and does not originate in birth (aptly captured in the English language by the term "in-law" for family relations created through marriage). This main function is highly general and does neither entail nor exclude additional functions such as the raising of children. As marriage is an institutional relationship among sexual partners, offspring may often be involved. Yet elderly, infertile, and (in recent times) homosexual partners may also get married. Childrearing is therefore not the main function of marriage, although an important implication of marriage is that children born in wedlock are officially related to both partners and their respective families.

Note that serving an etiological function alone does not imply that an institution is beneficial for its participants. An institution may in fact make all participants worse off than they would be in in its absence. This is the case if the usefulness of its function is outweighed by the harm it causes, e.g. in the case of a hazardous dare performed as a rite of passage. There is a coordinative effect among the members of a peer group, but this could have also been achieved, for instance, by wearing the same kind of clothes.[126] With a sufficiently dangerous dare, the harm to the participants' health is far more substantial than the coordinative benefit achieved.

Moreover, an institution's coordinative or cooperative benefits need not accrue to each participating individual. Institutions may be lopsided, providing benefits exclusively to some of their participants while only imposing costs on others. Think of a caste system which excludes certain groups of people from particular occupations and from social power while granting access to others. This institution serves a function, but the function only benefits the upper castes.

Even though institutions may harm some (or even all) participants compared to a situation in which they are absent, such institutions can be stable. Individuals participate in an institution if and only if they prefer participation over non-participation. Yet this may also be the case if disobedience is judged to have even more adverse consequences than compliance with harmful rules, which is arguably not sufficient for an institution's legit-

126 A rite of passage is arguably a Hi-Lo coordination game (see 2.4.2), where the low equilibrium may actually yield negative benefits.

imacy. A participant who incurs net costs from the institution's existence will only concede that she has a reason to comply with the institution's rules *given its existence*. She will deny, however, that the existence of the institution as such is justified to her. Since each participant may equally call the legitimacy of an institution into question on these grounds, I will endorse a principle of legitimacy that states that an institution is legitimate if and only if it creates nonnegative benefits for *all* individuals incurring institutional burdens, irrespective of whether they choose to participate or not.

In principle, questions of legitimacy can be tackled at the level of both institutional tokens and types. It is fruitless, however, to consider the legitimacy of an institutional token if the institution has been found to be illegitimate as a type. A practice such as racism is arguably illegitimate in every instance because it imposes burdens upon a group of people without compensating them by means of benefits. This is the very function of racism. Such a function cannot be justified to all individuals who incur burdens from the existence of racism within a society.

The case of marriage is different: establishing an institutional kinship relation among sexual partners is a function which is not generally illegitimate. It may indeed create benefits for all parties involved. Some tokens of this institutional type, however, may pose grave issues of legitimacy. This is the case for forced marriage, particularly involving children. Very lopsided, that is patriarchal, tokens of marriage can also leave women worse off than they would be without any instantiation of marriage in place at all. Patriarchy is arguably also a practice that subjugates a set of people without compensating them for their burdens and therefore illegitimate at the type-level. Yet marriage itself can also take forms that avoid patriarchal patterns. Therefore, the institution is not by itself illegitimate, but only in some instantiations at the token-level.

Whether a token of marriage is legitimate is notably not determined by the fact that partners *consent* to get married. People may consent to marry because their parents threaten to put them into a monastery if they refuse, because they are pregnant and do not know how to support the child on their own, or because they need a residence permit in a country. Yet under such circumstances, taking a vow only indicates that the outside options are worse than participating in marriage, not that the existence of the institutional token itself can be justified to both partners. The practice of taking a vow is part of the institutional token of marriage, but it cannot justify it because it is only a formality and may not be a free choice. Similarly, an

oath of citizenship may be part of a regime's social practices. This practice, however, does not at all imply that the regime makes all of its subjects better off than they would be in some kind of state of nature. Consent need not track an institution's function of providing coordinative and/or cooperative benefits to participants. And not only may people consent under pressure. They may also deny their consent to an existing institution where everyone yields net benefits, simply because they want higher benefits for themselves.

If we are interested in whether an institutional token is justified or not, what matters is whether individuals consent to its *creation*, when no alternative token of the institutional type exists. For an already existent institutional token such as marriage in Germany in the 1960s, this question can only be raised hypothetically. Thus, we have to ask whether people who incur burdens from the institution's existence *would have* consented to its creation. These people are not necessarily only those who currently participate in it. An unmarried mother who faces social and legal stigmatisation may also incur costs from the existence of a particular token of marriage. Since she does not realise net benefits, this token is not justified to her. What is important is not whether she participates but that she would not face this burden if there was no instantiation of marriage at all. Other tokens may not come with such costs for non-participants and may therefore be justified to them.

In this chapter, I will proceed as follows: In Section 3.2, I will introduce my functional conception of institutional legitimacy, demarcating it against the notion that by participating in an institution, people acknowledge its legitimacy. Building on these elaborations, I will formulate a functional and individualist principle of legitimacy. In Section 3.3, I will set out how the functional conception of legitimacy can be illustrated by the thought experiment of a social contract, locating my approach in the contractarian tradition of the social contract literature. Section 3.4 discusses the merits of relying on hypothetical consent to a social contract in a counterfactual state of nature, compared to the criterion of actual consent. I will argue that hypothetical consent captures the fairness of existing institutional requirements, models voluntariness, which is hard to achieve under real-life conditions, and has practical implications for dealing with existing institutions based on their legitimacy. Section 3.5 provides a short summary.

3.2 Justifying Institutional Burdens to Individuals

3.2.1 *A Functional Conception of Legitimacy*

Institutions entail requirements for those who play by the rules of the game. These requirements can take the form of duties and obligations, or of more general behavioural prescriptions such as donning suit and tie in the case of a dress code. Compliance with institutional requirements imposes burdens upon participants which they would not incur if they had not chosen to play by the rules of the game. For instance, those who remain unemployed are free from the requirement to follow the orders of a boss, which they may dislike. Insofar as these requirements are burdensome, however, people may ask how the requirements can be justified to them. This question is particularly relevant for institutions such as political regimes or traditional marriage where some people are required to yield to the authority of others. Yet it is in no way restricted to these cases. People may also ask for the justification of a universal convention such as shaking hands, e.g. because they mind the hygienic implications of touching other people's hands.

In the following, I will use the concept of *legitimacy* as an evaluative term to refer to the justification of institutions.[127] As a modification to Rawls (1971, 3), I hold that legitimacy (rather than justice) is "the first virtue of social institutions."[128] Whereas the concept of legitimacy denotes

127 This means that I understand political legitimacy as referring to the legitimacy of political *institutions*. These are most notably political regimes (see Chapter 4) but also subordinate constitutional institutions (see Chapter 5). I do not, however, understand political legitimacy as a feature of political *decisions*. Peter (2023, 13–14), who focuses on the legitimacy of decisions in contrast to decision-making bodies, believes that this framing is merely a methodological question. It does, however, have substantial implications. The functional account of legitimacy which I am developing in this section is only applicable to institutions, not to singular decisions, because only institutions have functions. Her focus on decisions, moreover, helps explain why Peter (2023, 91–101) suggests a conception of political legitimacy which has an epistemic and a voluntarist ground, as decisions are influenced both by an agent's will and her knowledge. (It also explains why she gives lexical priority to the epistemic component, since we typically want to make the right decisions.)

128 See also Larmore (2020, 83) who emphasizes that the state's primary function is not to establish social justice but to provide order. For Kukathas (2003, 260), too, the fundamental question of political philosophy is the question of political legitimacy, rather than the question whether a society is just. Such a conception of legitimacy is in contrast to Brinkmann (2024) who understands legitimacy in terms of justice. His notion of justice builds upon the primary values of welfare and dignity as well as other secondary values, such as democracy, and entails moral rights of individuals.

the justifiability of an institution's existence, *justice* is an evaluative term for distributions, i.e. the distributive dimension of institutions, actions and outcomes. Thus, an institution may be legitimate even if it is neutral in terms of justice, simply because it does not deal with distributions. For instance, traffic regulations may be legitimate, i.e. a justified institution, even though they cannot actually be described as just. The term legitimacy can be used with respect to all sorts of institutions. *Political legitimacy* refers to the legitimacy of political regimes in particular.

After defining the *concept* of legitimacy, I will now turn to the question which *conception* of legitimacy to apply in order to judge the justification of institutions. First of all, I take it that institutions must be justified *to all individuals incurring burdens* to be justified at all, i.e. legitimate. This is a *normatively individualistic* position. Normative individualism is the contention that the relevant unit at which a justification is to be directed is the individual.[129] The reason for adopting normative individualism as the normative basis for an account of institutional legitimacy is formulated concisely by Føllesdal (1998, 199):

> The only ultimate bearers of value are individual human beings. Thus arguments regarding the legitimacy of social institutions (including associations and nation-states) must be made in terms of how they affect the interests of all affected parties.

Insofar as all individual participants face burdens from institutional requirements, they all have a claim to ask for a justification of these burdens. And since all participants may ask for an institution's legitimacy, a justification must be given to all of them.[130] This justification, moreover, must be one that each individual can accept. Otherwise, she can always claim that the institution is not justified *to her*.

Rawls (1971, 363) himself also ascribes legitimacy to a regime in virtue of its justice, although he does not formulate a conception of legitimacy.

129 Vanberg (2004, 154) defines normative individualism in the context of evaluating political regimes as "the assumption that the desirability and legitimacy of constitutional arrangements is to be judged in terms of the preferences of, and the voluntary agreement among, the individuals who live under (or are affected by) the arrangements."

130 A similar point is made by Gaus (2011, 268) who holds that the public to which a rule has to be justified is defined by the participants of the social practice that the rule regulates.

Moreover, the conception of institutional legitimacy I want to put forward in the following draws upon the function of institutions.[131] In the most general formulation, the function of institutions is the creation of coordinative and/or cooperative benefits (see 2.4.2). Benefits and costs are understood here in a very broad sense as everything that increases or diminishes a person's utility. The terms are thus not restricted to monetary values—and also not to Rawlsian primary goods.[132] If there were no benefits to be gained, institutions would not have evolved or been created.[133] It is thus the benefits of coordination and cooperation which people ultimately care about in institutions. We may talk of institutions such as marriage as if they had a value on their own. Yet ultimately, the value of marriage is that it enables partners to enter into a committed partnership which is recognised by the government, enabling them to coordinate and cooperate with each other, as well as with other members of society.

A great merit of the functional approach to institutional legitimacy is that it does without demanding presuppositions. The justification of institutions cannot itself rely upon institutions, as this would be circular. This does not only rule out the formal institutions of a legal order, but also institutional phenomena from the sphere of social morality such as moral rights. Social morality provides a helpful institutional framework to justify our behaviour in everyday life. Yet insofar as it is also an institution, it also stands in need

131 Common alternative conceptions of (political) legitimacy are based upon hypothetical or actual consent, the principle of fair play, or the "normal justification thesis" suggested by Raz (1990, 129–130). For an introductory overview of common theories of legitimate practical authority, see Wendt (2018a). A very different take on the matter, moreover, is provided by Fossen (2024) who understands political legitimacy as an existential predicament and discusses what it means to make judgments of legitimacy rather than offering criteria for a legitimate regime.

132 Rawls (1971, 62) defines primary goods as material and immaterial goods virtually everybody strives for. There are both social primary goods, such as rights, income, or self-respect, and natural primary goods, such as health or intelligence, which withstand the forms of redistribution available for social goods.

133 Apart from an institution's *etiological* function, that is the benefits which explain its existence, Hindriks and Guala (2021, 2036) also identify a *teleological* function, i.e. its contribution to a certain value. Whereas the etiological function explains the existence of an institution, they claim, it can be evaluated by reference to its teleological function. I do not make this distinction between different types of functions since I conceptualise both the reason of their existence and the legitimacy of institutions in terms of benefits.

of a justification.[134] Moreover, the criterion for justifying institutions cannot itself rely upon institutions since that would be circular.

Consent, too, is an institution and thus stands in need of a justification. The option of binding ourselves by means of consent is only available for us because corresponding social practices are passed on over the generations and acquired in childhood (Pitkin 1966, 46–47). The function of consent is to enable individuals to waive their moral or legal rights, e.g. in the case of medical interventions, or to take on new obligations by entering into binding commitments, e.g. in the case of marriage. Justifying the bindingness of consent in a particular case by referring to an earlier instance of consent would beg the question why that instance of consent is justified. Ultimately, invoking earlier and earlier instances of consent would lead into an infinite regress.[135]

No such problem of circularity or an infinite regress arises for a justification which evaluates institutions in terms of the coordinative and/or cooperative benefits they provide for their participants and everyone else who incurs institutional burdens. Without invoking other institutions, such as altruistic norms prescribing selflessness, which would themselves need to be justified, the only justification of an institution's existence that a prudentially rational individual is going to accept is that it yields benefits to her.

I am not, however, formulating a *functionalist* conception of legitimacy. What I take to be functionalism is the position that an institution is justified by virtue of the fact that it serves or once served a function. Such a function, however, may just be to create privileges for a particular social class, at a cost to everyone else. That an institution *has* a function thus provides an explanation but not a justification of its existence. Since their function of creating benefits is the reason why institutions exist at all, a functionalist account of institutional legitimacy would need to classify all existing institution as justified, simply in virtue of their existence. In this way, the justification of institutions would be reduced to the social fact of its existence. It is, however, exactly because institutions exist that participants may ask for a justification of their institutional burdens. Merely pointing out to participants that an institution exists because it serves (or once

134 As Moehler (2018, 147–148) points out, that the rules of social morality originate in social evolution rather than political authority can only explain but not justify them.

135 Stemmer (2013, 3–5) makes the same point with respect to the institution of contractual agreement.

served) a function would beg the question why it should be justified to them.[136] It is important here not to commit the naturalistic fallacy and infer an *ought* from an *is* (see 2.4.1).

Institutions are tools, like knives, which may be more or less beneficial, or even harmful, for their participants. Pointing out that an institution has *some* function need not be a justification that satisfies all its participants. Individuals who incur costs from an institution's existence want to know that overall, the institution creates benefits *for them*. I therefore refer to an institution as *functional* if and only if the burden it imposes on individuals can be justified to *each of these individuals* with coordinative and/or cooperative benefits they receive in return.[137] According to this functional conception of legitimacy, a functional institution is legitimate, but it is not sufficient for functionality that an institution serves a function. Even overtly discriminatory and harmful institutions have a function; this is why they exist and persist. Yet their function is to create benefits for only some of their participants, while others face nothing else than burdens. The continued existence of an institutional token must therefore not be misinterpreted as a sign that this institution serves a function for everyone who incurs an institutional burden.

Discriminatory institutions need not be the product of malign intention. Although such institutions can of course be actively created, they may also emerge as the result of social evolution (see also Buchanan and Powell 2018, 253–254), and their beneficiaries need not even be aware of it. Examples for discriminatory institutions are patriarchy, caste systems, nobility, and racism. The function of these institutions is to create a higher social rank with a particular practical authority and social power for a defined subset of the population, e.g. men, members of high castes, nobles, or a particular

136 This position is also taken by Greene (2019, 214–215) who claims that "[w]hen we are in the domain of social practices, we cannot evaluate their legitimacy without first identifying an implicit claim about their purpose, their *raison d'être*. In these cases, I suggest, legitimacy depends on recognition by participants that this claim has been fulfilled."

137 Pettit (2023) also emphasizes that regimes must be functional. In contrast to the usage here, however, he employs the term to denote a regime's stability (by virtue of providing benefits of security to citizens), rather than its justification. As I will discuss in the next section, individuals can have incentives to participate in an institution even if it is not justified to them. Pettit's notion of functionality is thus not even a minimal criterion of legitimacy; it is not related to legitimacy at all. Nevertheless, Pettit (2023, 262–63) holds that in order to be functional in his sense, a state must guarantee some substantial and equal rights at least for the citizenry (which need not include all residents).

ethnic group. Those against whom this discrimination is directed will typically not give an affirmative answer when asked whether they benefit from the institution (even though they may, as a result of internalisation).

It is not uncommon for institutions to exhibit discriminatory characteristics. These are grounded in the salience of obvious asymmetries between players. Exploiting asymmetries may be mutually beneficial, insofar as it may help individuals to coordinate on a social practice when they have partially conflicting interests.[138] For instance, at a crossroads, everyone would like to go first, but more importantly, they want to avoid a crash. Attributing the right of way to vehicles coming from the right, which exploits an asymmetry between vehicles coming from different sides, achieves this coordinative function and thus yields coordinative benefits.

Agential features that break symmetry may, however, also consist in traits such as gender or ethnicity (Sugden 1986, 92–93). Such features are highly salient. Yet by using them to coordinate, they become institutionalised themselves as social categories, e.g. when the biological feature of sex forms the basis of the institution gender, or when the category "race" is constructed from external features such as skin colour. The emergence of such categories may then lead to forms of discrimination that lack coordinative value for those affected by it.

To understand the evolutionary origin of gender as a social category, it is helpful to turn to Cailin O'Connor's (2019) account. She considers gender as an evolved behavioural pattern, building upon but distinct from biological sex differences, which solves a population-wide complementary coordination problem (see 2.4.2).[139] The emergence of the social category gender with the types "woman" and "man" is capable to transform the complementary coordination problem of dividing household labour into a conditional correlative coordination game. That means that all individuals follow the same rule which conditions their behaviour by type, such as "step

138 Skyrms (1996, 66–79) argues that in iterated mixed-motives games, a *correlated equilibrium* in pure strategies becomes available by assigning strategies to players based on a salient feature that breaks symmetry. The advantage of such a correlated equilibrium is that, although introducing inequality, it yields higher average payoffs than playing mixed strategies. As Hindriks and Guala (2021, 2030) note, a correlating device such as a traffic light extends the set of possible strategies by conditioning behaviour.

139 O'Connor (2019, 98) notes that gender is particularly likely to emerge as a social category because the marker of biological sex is highly salient due to its reproductive role, but also because the population is evenly divided between males and females, and households typically consists of one adult member of each type.

forward if you are a woman and back if you are a man" in dancing. To make coordination even easier, types are emphasized by means of ostentatious signals. Individuals then use these type-signals to condition their behaviour in coordinative situations (O'Connor 2019, 38–43).

Whereas social categories are conducive to efficient coordination, they also invite discrimination because individuals cannot simply change types (O'Connor 2019, 53). What is more, once social categories such as gender exist, they also allow for unequal outcomes in distributive bargaining games where inequality does not serve a coordinative function such as the division of labour (O'Connor 2019, 107–11). Thus, a society may become permeated with sexist social practices which cannot be justified to women on the basis of any benefits they would gain.

For instance, informal institutions such as foot binding, female genital mutilation,[140] or honour killings[141] may lead to the mutilation and even murder of women. The burden which women suffer from these institutions is brute violence to which they are being passively subjected. In these cases, women who are killed and mutilated by their own families are victims, rather than participants in institutions. It is the relatives who participate in social practices of murdering and injuring their own daughters and sisters, to restore family honour or ensuring them a good match. A mutilated girl need not take the internal standpoint and acknowledge any institutional requirements but may still ask for a justification for the harm she suffers as a consequence of the institution's existence.

140 Mackie (1996) compares the historical practice of foot binding in China and female genital mutilation which is still practiced in parts of Africa. Both are similar insofar as they are or were informal social practices, performed by women to restrict other women's (mostly their own daughters') sexuality in order to ensure prospective husbands of the paternity of the woman's future children. According to Mackie, the background is that in unequal, polygynous societies, men have difficulties to control the fidelity of their wives. Families will subject their daughters to such damaging practices as foot binding and female genital mutilation in the hope to marry them off to the men with the highest status.

141 Handfield and Thrasher (2019) discuss the emergence of honour codes. They argue that "norms of purification," an extreme case being so-called honour killings, serve the function of a costly signal. A family thereby indicates that even though one of the daughters behaved "dishonourably," the other children are still good candidates for marriage. Such a signal is economically and/or biologically important for the family (see also Thrasher (2018a)).

3.2.2 *The Participation Constraint*

Institutions may fail to be justified to non-participants who incur costs from their existence. It is important to note, however, that merely because a person participates in an institution and acknowledges institutional requirements, this does not entail that the institution is justified to her. Indeed, by choosing to participate, she obtains institutional benefits which would otherwise not be available to her, and she reveals that she values having these benefits more than the alternative. Individuals who participate in an institution thus have a preference for participation over their respective outside options.[142]

If the housewife from the 1960s asks her friend how it can be justified that her husband has the right to keep her at home, the friend might retort: "Since you wanted to get married, you now need to obey your husband. You get the benefits, so you also have to bear the costs. These are the rules of the game." Among these benefits is the fact that her husband is obligated to provide for her and their children. At the same time, however, she incurs costs in the form of institutional requirements that are also part of the "rules of the game." For instance, among the housewife's costs from marriage is the fact that she must obey her husband's authority. That cost may be quite substantial to her and only worth bearing because, in her society, the alternatives are even worse.

She might thus reply to her friend that she did not even want to get married. The reason she did so in the end was that unmarried women suffer a huge disadvantage, and even more so if they are mothers. Outside of marriage, in contrast, the housewife could have achieved the benefit of working as a bank clerk (although with few prospects of career advancement). A cost would have been that she could not have had children without incurring social stigma and legal as well as financial disadvantages for herself and her children (for instance, they could not have been their father's heirs). Since she wanted to escape her strict parents and to have children of her own, getting married was the best available alternative to her, even though it was by no means an alternative she liked.

142 Note that preferences differ from desires. As Gaus (2011, 311) points out, it is possible to prefer one bad option to another, while desiring none of them. Heath (2008, 23), moreover, stresses that desires can be in conflict with each other, e.g. for going to the cinema and staying home. A preference, in contrast, uniquely identifies what an individual likes best, all things considered, in a given situation.

To motivate participation in an institution, it is accordingly sufficient that the combined benefits and costs from acknowledging institutional requirements outweigh the combined benefits and costs from not participating. In technical terms, an individual *i* decides to play by the rules of an institutional game *x* if the institution meets a *participation constraint* for her. That is the case if the total utility U_i she can achieve from participation outweighs the total utility she could gain from not participating. The individual's utility U_i can be understood as the sum of the costs (i.e. institutional burdens) and the coordinative and/or cooperative benefits the individual *i* realises in each scenario. Formally, this relation can be expressed as

Participation Constraint (PC): *Ui* (participation in *x*) > *Ui* (no participation in *x*)

If PC would entail functionality, then every existing institution would be justified to all participating individuals by virtue of its continued existence. However, this is in conflict with the fact that individuals may continue to participate in an existing institution, thus perpetuating its existence, even though the existence of the institution serves no function for them.[143] This may occur insofar as the costs from non-participation are a consequence of the institution's existence, such as sanctions for non-compliance.[144] In this way, the utility from non-participation may be even lower than from participation, even though, in the absence of the institution, the individual would not benefit from its introduction. Since defiance of patriarchal (and other discriminatory) norms is punished by social ostracism, and in some countries even by formal sanctions, most women in patriarchal societies prefer to play by the rules of the game and to submit to men's authority. They can deny, however, that the existence of patriarchy is therefore justified to them, since they are worse off with patriarchy than they would be without it.

For an individual to accept an institutional token as justified to her, she must be better off given its existence than without it.[145] Thus, she must

143 Gaus (2011, 435) actually holds that informal norms which oppress women or ethnic groups are not capable of maintaining their status as norms. However, discriminatory institutions are not inherently unstable. To the contrary, once they exist, they may be hard to abolish because people have incentives to participate.

144 Lawless (2025, 1157) also observes that some social norms which exist because they benefit some, but not all, members of a society can persist because those who benefit are in the position to make deviance costly.

145 See also Gaus (2011, 237) whose notion of the "eligible set" contains those and only those rules which are pareto-superior to having no binding rules in these types of

yield *net* benefits from the token's existence. In other words, the sum of benefits and costs she obtains due to the existence of the institutional token must not be negative. It does not suffice that she yields benefits from participation compared to non-participation once the token is already in place. Rather, the baseline of comparison must be a situation where the token in question does not exist, nor any other token of the institutional type. Insofar as there already exists a token of the type in question, the situation of comparison must be a counterfactual one which abstracts from reality in this respect. If we think about introducing a new institution, in contrast, we can take the world as it is now as our baseline. In the case of marriage, the relevant baseline would be a counterfactual scenario where there is no formal and/or informal form of marriage. For political authority, the non-institutional outside option would be some kind of state of nature without formal institutions and authorised power.

Such a non-institutional baseline is required because the question is whether, from the perspective of the individual, this token serves the function of its respective type or not. If there was another token of the same type, her evaluation would depend on whether she can achieve more benefits than with this other token. If these benefits were high, she would reject many functional ones. For instance, women today would not approve of the introduction of a more traditional form of marriage because their own benefits would be lowered by such a measure. In the counterfactual situation, however, they might be in favour of it because they benefit from the possibility to create an institutional kinship relation to their sexual partner. This would mean that the institutional token serves a function for them, although their benefits could be higher with an alternative token.

If the existing token was very oppressive to the individual, however, she would even prefer a small reduction of costs without the prospect of net benefits. For instance, a woman might prefer a token of marriage where she is allowed to work without her husband's consent, although marital rape is not criminalised. In this case, the benefits from having the institutional token would not outweigh the burdens she might incur. Even though the new token is better for her than the old one, none is actually worthwhile for her to have at all.

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situation. In contrast to the hypothetical contractarian approach followed here (see 3.3.2), however, Gaus takes a public reason approach which works with idealising assumptions concerning the individuals to whom a rule must be justified. I argue against idealisation in 4.4.3.

In either case, the individual's judgment would not tell us whether the token to be evaluated actually solves a problem of coordination and/or cooperation from her perspective. It merely contains the information how it fares compared to the existing institutional setup. Only the fact that individuals would prefer to have an institutional token compared to such a non-institutional scenario is indicative that she actually benefits. Taking its existence in real life as given, she may prefer to participate in an institutional token to not participating. But she may always challenge the claim that the token is legitimate based on the net costs she incurs from its existence.

Accordingly, the housewife could dispute her friend's assertion that the existence of marriage in 1960s Germany is justified to her, even though she participates in it. The benefits are enough to incentivise her to get married. Yet they need not be sufficient to justify to her that there should be this token of marriage in the first place. This is because the burdens of unmarried motherhood, which form part of the costs of non-participation, are a consequence of the fact that this particular institutional token of marriage is in place. That the benefits of getting (or remaining) married are higher than the alternative does therefore not entail that the existence of this token of marriage serves a function for her. It only means that now that the token is in place, it is worthwhile for her to play the game and abide by its rules, i.e. to get married and to recognise her duties as a wife.

This is somewhat similar in the political sphere. Given the existence of a regime, playing by the rules of the game and acknowledging the legal order as binding is usually more attractive than defiance. A benefit which people gain from acknowledging a legal order is the possibility to claim legal rights, e.g. to property. Those who do not recognise the rulers' authority and the law's bindingness, however, do not merely forego legal benefits. They are being threatened to comply with brute power when the executive gets hold of them. This prospect may be worse for them than a situation where no regime exists and thus no rulers wield authorised power.[146]

Just as an institution may be unjustified to people who participate in it, it can also be legitimate to impose costs on those who do not acknowledge institutional requirements, choosing not to participate in an institution.

146 Pettit (2023, 145–46) claims that for citizens to accept a sovereign's authority rather than yielding to his or her power, they must gain some benefits, e.g. of coordination, from the legal system. If they are merely afraid of the consequences of non-compliance, there is no acceptance, he holds. Yet for some people, the fact of avoiding sanctions may already be enough benefit to incentivise them to play by the rules of a regime-game, even though they will not consider it as justified.

This is because it is possible to benefit from an institution without acknowledging a duty to participate in it.[147] For instance, you may deny that you have a duty to assist an injured person, even if it comes at a low cost to yourself. This duty, however, is arguably justified because you benefit from the prospect of being helped and possibly saved when injured, while the costs to you are moderate (per definition).[148] So it is justified to convict you for failure to render assistance if you let a person die whom you could easily have saved. Similarly, a free rider on public transport may legitimately be fined if she benefited from the ride, although she may not recognise a duty to buy a ticket. Thus, an institution is not justified to individuals insofar as they participate in it and recognise institutional duties, but insofar as they benefit from the institution's existence.

3.2.3 *The Principle of Legitimacy*

So far, it has been established that a functional justification of an institutional token's existence to an individual must invoke the benefits she obtains due to its existence. Moreover, these must be net benefits compared to a counterfactual baseline scenario without any token of this institutional type in place. Combined with the individualistic requirement that, to be legitimate, an institutional token must be justified to each individual who may ask for a justification because she incurs institutional cost, this leads to

> *Principle of Legitimacy (PL)*: An institutional token is legitimate if and only if its existence does not impose positive costs on any individual, compared to a counterfactual situation without any tokens of the respective type.

Note that PL is a condition of Pareto indifference compared to the situation where no institutional token of the type in question exists. On the functional account, legitimacy is measured in terms of costs and benefits, but these are not aggregate benefits but the benefits of discrete individuals. Thus, functional legitimacy is not a matter of charging up the benefits of one

147 Among those who do not recognize the legal order are criminals who break primary law, terrorists who fight the constitution, and illegal migrants who cross the state's border without authorisation.

148 It is debatable, of course, how high costs may become before such a duty cannot be justified any more.

group against the costs of another.[149] That is to say, PL is not a utilitarian principle. This follows from the assumption of normative individualism. Even though functionality is a matter of costs and benefits, benefits must at least equal costs for each participating individual. The single individual is not impressed by the fact that an institution creates a high total amount of legitimacy, as long as she faces net costs. Thus, a social practice which benefits a large majority at the net expense of a small but oppressed group is as dysfunctional as one which oppresses a great number to the benefit of a narrow, privileged elite. As long as the institution is not redesigned to compensate those realising net costs for the existence of the institution, it is illegitimate.

PL is also not an egalitarian principle. Beyond the requirement that nobody must be worse off with an institution than without any token of this type, there is no specification how benefits are to be distributed among participants. Accordingly, battle-of-the-sexes conventions constitute functional social practices, even though one party achieves higher gains than the other. This is why traditional forms of marriage may indeed be legitimate, on the condition that women are still better off than they would be without any token of marriage as an institutional type at all. This may be doubted in the case of our housewife, since marital rape was not a criminal offense in Germany in the 1960s. Arguably, the fact that rape is not punishable as rape if it occurs within marriage makes women worse off than they would be without marriage. This would mean that such tokens of marriage are *dysfunctional*.[150] In the end, however, it is an empirical question how high individuals evaluate certain costs and benefits and how they weigh them against each other.

What also does not matter for functionality is whether a pareto-improvement to this institutional token is possible, i.e. if there is a way to change the social practice(s) such that all participants would be better off by means of saving opportunity costs.[151] Conventions which form suboptimal equilibria

149 In contrast, Hampton ([1997] 2018, 98–99) holds that political authority is justified if the moral costs it entails are smaller than the moral costs of having no authority, but she does not rule out an aggregation of costs across individuals. This is an important difference to my approach.

150 My use of the term "dysfunctional institutions" bears some similarity to how O'Hara and Ribstein (2009, 21) employ of the term "bad laws" for laws which impose net costs on parties subject to these laws.

151 But cf. Gaus (2011, 434–43) who, in the context of social morality, identifies three different types of "bad" rules: (1) unjustified self-enforcing equilibria, (2) unjustified

in Hi-Lo games, such as awkward dress codes, are therefore functional as well, as long as individuals are better off with them than without any coordination, independent of how they would benefit from more comfortable alternatives. A special case of dysfunctional informal institutions are those which are detrimental to *all* their participants. These include practices that are induced by peer pressure, such as substance abuse,[152] unprotected sexual intercourse, criminal conduct, or high-risk dares as passage rites. The desire to conform can induce individuals to engage in practices which, in total, do them more harm than good, even though they gain some benefits of coordination within a peer group.

The criterion of functionality is applicable both to institutions as sets of social practices and to individual social practices in isolation. In particular, it may be the case that an institutional token which is by and large functional can include some dysfunctional social practices. This is not uncommon. Consider again the running example of marriage in 1960s Germany. Even under the assumption that both men and women obtain net benefits from entering this legal kinship relation, it may still be the case that some of the social practices associated with the institution are harmful overall to women. Among these harmful social practices are arguably the husband's right to veto his wife's paid work outside the home and his sole right to determine the family's place of residence. Women would be better off without these social practices, even if it was the case that they benefited in total from the existence of marriage. In the same way, a legal order which includes a dysfunctional institutional token of marriage can still be legitimate as long as the legal order as such is functional. The more complex an institution, the harder it will be to avoid any dysfunctional social practices or subordinate institutions (see 5.4.4). However, even though they can be individually criticised as illegitimate, dysfunctional subordinate institutions do not necessarily impair the legitimacy of the institution itself.

Moreover, a functional institutional type may also have dysfunctional tokens. An institutional type is functional if and only if its function is one which does not entail net costs for any individuals. In other words, its function must be acceptable to all individuals who incur institutional burdens. On this account, marriage is a functional institutional type. The creation of an institutional kinship relation among sexual partners a such

equilibria kept up by punishment, and (3) non-optimal moral equilibria, i.e. rules that are not Pareto-optimal.

152 Pettit (2023, 42) also gives the example of drinking heavily in a peer group for a harmful rule.

is a function which can serve all participants in the institution without imposing costs on non-participants. Thus, the institution of marriage is not inherently unjustified, although it has been historically associated in many cultures with patriarchy.

Nevertheless, some tokens of marriage are clearly dysfunctional. Forced marriage, for instance, comes with net costs for the victims of such an oppressive institution. Moreover, the benefits of creating an institutional kinship relation among sexual partners can only arise among adults. All tokens of marriage involving children as spouses are therefore dysfunctional and unjustified. It may even happen to be the case that all tokens of a functional institutional type which have been realised as of now are dysfunctional and thus unjustified. For instance, all existing tokens of marriage may be too patriarchal to count as functional. Insofar as the function of marriage as a type is functional, however, it would be theoretically possible to create a functional token.

In contrast, there are also institutions which are unjustified at the level of types, such as slavery, apartheid, or patriarchy.[153] The whole function of such institutions is to oppress or downgrade a set of people who incur net costs from the existence of the institution. As dysfunctional institutional types are unjustified, any possible token of them is unjustified as well. Since it is the function of slavery to exploit the slaves' labour to the benefit of the masters, there is no instance of slavery that could be justified to slaves.

3.3 Legitimacy as Hypothetical Consent to a Social Contract

3.3.1 *The Notion of the Social Contract*

On the functional account of legitimacy introduced in Section 2 of this chapter, legitimacy is defined in terms of the costs and benefits that individuals face as a consequence of an institution's existence. This is in

153 The claim that institutional types may lack justification is challenged by Guala (2016, 199). He holds that normative evaluations can only be appropriate at the level of tokens whereas institutional types may only be described but not evaluated. Yet this claim comes at the huge cost of not being able to condemn institutions such as slavery as dysfunctional. With respect to slavery, Guala (2016, 5) is even committed to saying that it is at least slightly beneficial for slaves, claiming that the noninstitutional alternative would be genocide. This is an ad hoc assumption without empirical foundation. Moreover, it diminishes the suffering of slaves to claim that they benefited from the existence of the institution of slavery.

line with the idea that an institution's function, i.e. the reason for its existence, is to create coordinative and/or cooperative benefits. If we want to identify which institutions are legitimate and which are not on this account, however, we face a practical obstacle. Since costs and benefits are subjective evaluations of individual people, their values are not actually accessible from an outside perspective. We thus need to rely on an auxiliary device, namely the thought experiment of a *social contract*. The functional conception of institutional legitimacy can therefore be understood as a generalisation of hypothetical social contract theory.

To illustrate what counts as a legitimate constitution for a regime, hypothetical social contract theory uses the metaphor of the social contract which is unanimously ratified by all individuals in the state of nature. The state of nature is not a historical phase of human evolution.[154] Rather, it is a counterfactual situation where no state-token, and therefore also no regime, is in place. Since individuals would only accept the creation of a new institution which makes them at least as well off as they are without it, unanimous hypothetical consent to the social contract in the state of nature tracks functionality. It entails that no individual yields net costs from the regime's existence. The fact that the adoption of the social contract must be unanimous means that everyone has a veto to block a constitution which is not acceptable to them.[155]

Note that the role of the hypothetical social contract is *not* to explain why people are bound by the rules of a regime (or any other institution). As discussed in Chapter 1, institutional requirements are binding for those who participate in the institution and therefore need to abide by the rules of the game. The hypothetical social contract, in contrast, *illustrates legitimacy*, i.e. what it means that a regime is a Pareto-improvement compared to the state of nature. By agreeing to a social contract, individuals in the state of nature reveal that they would be at least as well off under the regime it defines as they are under their current circumstances. This is the difference to the participation constraint (see 3.2.2): Individuals do not only prefer to

154 This is not a new interpretation of the concept of the state of nature. Already Hobbes ([1651] 1996, 89–90), who conceptualises the state of nature as a state of war, notes that the state of war does not describe a phase in history. He claims that civil war can bring about the state of nature even where people used to live under a government. Hume ([1739] 1960, 493), moreover, stresses that the state of nature is "a mere philosophical fiction, which never had, and never cou'd have any reality."

155 Popper ([1945] 2013, 108–109) claims that hypothetical social contract theory captures the idea that the state is a means to the end of protecting weak individuals.

participate in an institution given its existence; they also prefer its existence to its non-existence.[156]

The thought experiment of the social contract can easily be adapted to all other types of institutions apart from political regimes, e.g. marriage. To that end, the state of nature merely has to be exchanged for the counterfactual scenario where no token of the respective institutional type is in place. What remains the same is that all individuals who incur costs from this token would need to consent to its introduction.

Hypothetical social contract theory may also be employed for evaluating the legitimacy of social moralities and their respective institutions and social practices.[157] Whereas the function of political regimes is to ensure peaceful coexistence within a state (see 4.2.1) as a political organisation, the function of social morality is to regulate human coexistence within moral communities.[158] These communities need not coincide with the population of a state. Moreover, they typically exist on different scales or levels.[159] Lower-level moralities can be exclusive and lay claim to regulating the lives of their members quite closely. For evolutionary reasons, such moralities are likely to require larger sacrifices from the individual, thus being more utilitarian than the morality of the wider society (Binmore 1994, 24). In the extreme case, people may even be required to sacrifice their lives for the community. This clearly makes the individual worse off than she would be in a fictitious pre-moral state where she is at least granted the possibility of

156 Lewis (2002 [1969]: 92) also notes that in the case in which a convention stabilizing a sovereign's rule exists but some or all individuals would prefer the state of nature to this status quo, the convention is *not* a social contract.

157 Stemmer (2013), for instance, adopts the *prohibition of oppression* (own translation) as a social contract criterion for the evaluation of social-moral norms. The prohibition of oppression requires that moral norms must serve the interests of all members of the moral community to which they apply. In a similar vein, Hart ([1961] 2012, 181–182) identifies "some form of prohibition of violence, to persons or things, and requirements of truthfulness, fair dealing, and respect for promises" as basic requirements of morality. These standards must be met if living in human societies is to be acceptable, he claims.

158 Narveson (1988, 148) identifies two reasons why humans need morality: (1) because they are vulnerable to others, and (2) because they stand to gain from cooperating with each other.

159 See also Gaus (2021, 59–60), Moehler (2018, 14–15), Stemmer (2013, 44–45).

self-defence. Since individuals would not consent to their creation if they did not exist yet, such moral rules are dysfunctional.[160]

The most inclusive moral community is humanity as a whole. This is the level at which most theories of morality are located. At this high level, however, with such a wide set of addressees, there are only a couple of rules which could be justified by means of a social contract, including e.g. the rule not to kill others except for self-defence. As has been suggested by Moehler (2018), such instrumentally justified higher-level rules can be used as a means of conflict resolution if evolved lower-level moralities diverge.[161] Since they are justified to all rational agents, they may be legitimately applied even in societies characterised by deep moral conflict and also across different moral communities.

3.3.2 *Functional Legitimacy as a Contractarian Approach*

There are many social contract theories in the history of political philosophy, notably those of John Locke ([1689] 2005), Jean-Jacques Rousseau ([1762] 2012), and Immanuel Kant ([1795] 2011). The functional conception of legitimacy, however, forms part of a particular tradition of social contract theory which dates back to Thomas Hobbes ([1651] 1996, 70). What is unique about Hobbes's approach is not the notion of the social contract, but that he relies strictly on a cost-benefit approach to justifying political authority and a stable government, without making further normative assumptions, e.g. concerning individuals' rights or autonomy. For Hobbes, political authority is justified exclusively because it is more in people's interest to have it than to remain in the state of nature. That it is in their interest follows from his modest empirical assumptions of resource scarcity, a universal human desire for continuous preference satisfaction or "Felicity" (Hobbes [1651] 1996, 70), and roughly equal human vulnerability translating into roughly equal strength (Hobbes [1651] 1996, 86–87). In the

160 Among dysfunctional elements of morality which prioritise the collective over the individual are honour codes. For an analysis of how honour codes relate to morality, see Handfield and Thrasher (2019).

161 Building upon his model of *homo prudens*, who has an interest in long term cooperation which outweighs the interest in non-cooperation in any specific case, Moehler (2018, 125) formulates what he calls the "weak principle of universalisation" as a higher-order principle for resolving conflicts among lower-level social moralities. In short, it can be stated as "in cases of conflict, each according to her basic needs and above this level according to her relative bargaining power."

state of nature, without a stable government, these circumstances combined lead to a situation of mutual distrust.

As long as there is no "common Power to keep them all in awe" (Hobbes [1651] 1996, 88), people are therefore miserable, living under the constant fear of violent death in the state of nature which is a state of war of all against all.[162] Importantly, the state of war is characterised by a general disposition to violence rather than by concrete acts of fighting. Due to the total absence of security, the state of war precludes investments in technological progress. People's incentives to leave the state of nature and to seek peace are the prospect to get past the constant fear of violent death, the interest in a better life, and the hope to acquire desired goods by means of labour (Hobbes [1651] 1996, 89–90).

With his interest-based argument, Hobbes initiated the *contractarian* tradition within the broader sphere of social contract theory. What contractarians all have in common is that, starting from modest and purely empirical assumptions, they put forward theories of politics and/or morality which address the problem of long-term peaceful cooperation and argue in terms of individual costs and benefits.[163]

A comprehensive contractarian theory close to the spirit of Hobbes has been developed by public choice economist James Buchanan ([1975] 2000).[164] I will discuss his two-stage social contract in more detail in the following chapters. Another economist and game theorist, Kenneth Binmore (1994, 1998), has worked out an evolutionary contractarianism. Distinguishing between the game of life and the game of morals, he aspires to provide both an explanation and a justificatory criterion of social practices. Ryan Muldoon (2016) also puts forward an evolutionary social contract theory based on Hobbesian assumptions. And Jan Narveson (1988) uses Hobbesian contractarianism as a basis to argue for libertarianism. Without using the label "contractarian", Hart ([1961] 2012, 193–98) also employs a

162 As Narveson (1988, 136–137) points out, Hobbes does not assume human beings to be antagonistic, i.e. to aim at harming each other. Their individual aims are merely contingently conflicting. It requires rules for them to coexist in peace, but peace is not an impossibility.

163 I do not count David Gauthier (1986) among the contractarian camp, even though he identifies his own approach as Hobbesian. Whereas his theory aims at the realisation of cooperative benefits, he does not pay sufficient attention to the issue how cooperative social practices can be stable equilibria. Thus, Gauthier does not demonstrate any interest in the crucial issue which is troubling Hobbes, namely securing peace.

164 As G. Vanberg (2018, 636) points out, due to its commitment to unanimity, public choice theory qualifies as "a modern version of contractarianism."

Hobbesian argumentation in identifying the minimal core of natural law based on empirical truisms about human vulnerability and the possibility of cooperation.

John Rawls, however, while also using the thought experiment of the social contract, is not a Hobbesian contractarian. Rawls's account falls in the *contractualist* tradition of social contract theory. Whereas contractarianism relies exclusively on individual interests as a basis of justification, contractualism allows for normative premises. Accordingly, the "original position" from which he derives his principles of justice serves to illustrate certain restrictions which Rawls (1971, 138) believes should obtain in choosing principles to guide the design of formal institutions. This is achieved by means of the *veil of ignorance* which obscures to individuals their personal identity and preferences (see also 4.4.2). Moreover, Rawls (1971, 19–20) also grants an influential role to normative intuitions by employing the method of the *reflective equilibrium*. This tool requires that in identifying the principles of justice, one iteratively adapts both one's intuitive convictions and the design of the original position. Both the veil of ignorance and the reflective equilibrium are clear indicators that Rawls belongs to the contractualist rather than the contractarian tradition.

Apart from his contractualist starting point, moreover, it is to be noted that Rawls does not even address the question whether political regimes can be justified in terms of benefits. Rawls (1971, 4) already starts out with an understanding of society as "a cooperative venture for mutual advantage" in which the division of labour creates a net benefit of material gains. Presupposing that human beings benefit from cooperating in society, Rawls develops a theory of how formal institutions ought to be designed such that cooperative benefits are distributed justly. This is a very different issue than the problem of political authority tackled by Hobbes (see also Kavka 1986, 182). As Moehler (2024, 28) aptly observes, "Hobbes is not in the justice business, but in the peace business, which aims to maintain a mutually beneficial social order."

The question how individuals can overcome strategic obstacles and cooperate with each other, which is at the core of contractarianism, barely plays a role in the contractualism of Rawls and his disciples.[165] The two traditions thus talk mainly across purposes, not least because they address different problems. Whereas Hobbesians consider peace as the *conditio sine*

165 For an attempted synthesis of public reason contractualism and public choice contractarianism, see Vallier (2018b, 120).

qua non for any other state function such as providing justice,[166] Rawls's take on political legitimacy, in contrast, is that a political system with a nearly just constitution may in consequence have legitimate authority (Rawls 1971, 363).[167]

3.4 The Merits of Hypothetical Consent

3.4.1 *Fair Play*

The functional conception of legitimacy is what Simmons (1993, 76) would call a "quality of government theory,"[168] drawing not on people's actions such as giving actual consent but on the merits of the regime (or other institution) in question.[169] Functionality is characterised by individuals realising mutual benefits, which can be illustrated by a unanimous hypothetical contract. Actual consent, in contrast, has the function of granting rights and incurring commitments. The functional conception of legitimacy presupposes that those people who accept their roles as citizens (or permanent residents) already have certain rights and commitments by virtue of their playing by the rules of the game. Hypothetical consent is not a means of entering the game; it ensures that the rules of the game are fair.

166 Hobbes ([1651] 1996, 100–101) even explicitly makes the point that the question of justice only arises when a reliable order is established:

> Therefore before the names of Just, and Unjust can have place, there must be some coërcive Power, to compell men equally to the performance of their Covenants, by the terrour of some punishment, greater than the benefit they expect by the breach of their Covenant […]: and such power there is none before the erection of a Common-wealth.

167 Being nearly just in Rawlsian terms is a highly demanding requirement. Andrew Fiala (2013, 189–190), for instance, advocates anarchism based on the observation that actual states do not live up to the ideal of Rawlsian justice.

168 Stemmer (2013, 12) similarly distinguishes between "Handlungslegitimität" and "Seins-Legitimität," i.e. legitimacy *qua* act and legitimacy *qua* being. The former arises from acts of authorisation or consent, the latter from the inherent qualities of a norm (or law). A hypothetical social contract models legitimacy *qua* being.

169 It ought, however, be distinguished from Raz's (1990, 129–31) *service conception* of political legitimacy which is concerned with the bindingness of political obligations rather than the justification of existing institutional requirements. On Raz's account, the normal and principal way to justify an agent's authority is that submitting to this authority enables the subjects to better act in accordance with reasons they have than if they were to pursue these reasons on their own. Raz refers to this claim as the *normal justification thesis*.

In this respect, functional legitimacy connects closely to accounts of (political) legitimacy which are based on the notion of *fair play*,[170] in contrast to actual consent. These accounts invoke a principle of fair play to argue that social practices and institutions creating mutual benefits give rise to obligations to participate in such practices for all those individuals who benefit. This is irrespective of the fact whether individuals asked for these benefits. In other words, the principle of fair play entails that there is an obligation to contribute to public goods and common-pool resources.

Public goods and common-pool resources are both *non-excludable*, i.e. people can have the benefits of consuming them without the need to contribute. The difference between them is that common-pool resources are *rivalrous* in that consumption is limited because it depletes the good, whereas public goods are not. Examples for common-pool resources are the classical commons, i.e. jointly used pastures, but also clean air or fish stocks. These are typical cases in which the *tragedy of the commons*, a cooperation problem, arises (see 2.4.2).

Classical examples for public goods are national defence or lighthouses. Public goods may not be rivalrous, but they nevertheless pose strategic issues of the same kind as common-pool resources. The issue is not that public goods would be depleted but that it is difficult to provide them in the first place, relying merely on private individual action. This is because for every potential consumer, it is individually rational, i.e. a dominant strategy, to take the benefit without contributing. Thus, the provision of public goods gives rise to a cooperation problem.

Whereas common-pool resources require that users restrain themselves for reasons of sustainability, public goods require them to contribute their share to them. In both cases, non-excludability has the effect that individuals lack incentives to cooperate; cooperation is a dominated strategy. Proponents of fair-play accounts claim that obligations to contribute to public goods and common-pool resources can be justified to individuals insofar as they benefit from the existence of the good, irrespective of their actual consent.

Consider for instance the fair play account developed by George Klosko (1987).[171] He argues that there are political obligations to contribute to the

170 Not to be confused with Rawls's (1971, 11–12) *justice as fairness* which is the name he gives to his theory of justice. Fairness in Rawls's context refers to the idea that the principles of justice are chosen under fair conditions.

171 Hart ([1955] 2006) also formulates a fair play account of political obligation.

provision of public goods if two conditions are met: (1) The goods provided must be worth more than the costs they impose on the individual and (2) they must be "presumptively beneficial," i.e. goods that everyone can make use of. Klosko claims that if enough others comply with a set of rules to supply presumptive goods, an individual in this society has an obligation to comply as well. He also argues that there are obligations to comply with rules providing non-presumptive ("discretionary") goods insofar as these are added to a scheme of provision of presumptive goods: If the overall benefits do not exceed the overall costs, Klosko claims, the individual is still obligated to comply with the scheme. On his account, one might argue for instance that a government that provides an infrastructure which benefits only some citizens still ought to be obeyed because it also provides peace, which tremendously benefits everyone.[172]

In a similar fashion (yet without using the terminology of fair play), Ronald Dworkin (1990) argues that there are *associative obligations*,[173] emerging not from contractual agreements or voluntary choice but from social practice.[174] Associative obligations, Dworkin claims, exist within families, among friends, but also between citizens in the state if civil society meets certain standards.[175] Whereas associative obligations are not deliberatively chosen, they require reciprocity. The theory of associative

172 Schmelzle (2016, 171) criticises that Klosko's approach to justify political authority by reference to security is paternalistic because security is an optional end of individuals: not everyone necessarily aims at being secure, and it can thus not be presupposed. As I will argue in 4.2.1, however, peace is fundamental for almost anything people may aim for. For this reason, it can be assumed to be an end for all those who have any ends at all.

173 Horton (1992) also understands political obligations as a form of associative obligations.

174 For a combination of a natural duties conception of political legitimacy with an associative element, see Schmelzle (2015, 120–21). On his account, insofar as natural duties are not directly operative, political institutions are required for the political process to determine a reasonable interpretation. This interpretation of the natural duty is binding for the members of the political order in question *qua* members.

175 Dworkin (1990, 222–30) himself identifies two serious objections against ascribing associative obligations at the level of the state: For one thing, states comprise large anonymous societies which differ significantly from small communities where members show equal concern for each other. Moreover, thinking of the state in terms of community sounds suspiciously similar to nationalist and racist claims. Dworkin attempts to evade these objections by claiming that (1) it is sufficient if the practices of a society reflect what can be interpreted as equal concern and (2) that the best interpretation of political practice is not nationalist. Yet these replies presuppose Dworkin's idiosyncratic notion of interpretation and need not appeal to anyone who does not share it.

obligations thus bears a certain resemblance to accounts of fair play, insofar as voluntariness is not required and benefits from association are mutual and cooperative gains.

I do not claim that anyone has duties merely due to the principle of fair play. Yet I agree with accounts of fair play and associative obligations that institutions must create mutual benefits for all their participants in order for the obligations arising from them to be justified. The important difference between my functional conception of legitimacy and the principle of fair play or associative obligations is that functionality is not supposed to be what creates binding obligations but presupposes them. Obligations are an institutional phenomenon (see 2.5). Their existence is independent from their moral justification. Functionality only implies that existing institutional burdens are legitimate. Both fair play and actual consent theorists, however, consider their respective criterion as grounding, not only legitimising, political and other obligations.

The distinction between creating and justifying institutions is important because it shields the functional conception of legitimacy against charges that, by forgoing voluntariness, it allows for putting people under obligations from institutions or social practices they do not even participate in. A popular allegation against fair play accounts of political legitimacy is that the receipt of benefits is insufficient to justify any obligations to contribute to the provision of public goods (see for example Larmore 2020, 115–18). The claim is that incurring (justified) obligations requires consent. Authors who consider consent as a necessary condition for political legitimacy are known as *consent theorists* in the tradition of Locke ([1689] 2005, 330–331).

A well-known argument for consent was made by Robert Nozick (1974) in his *Anarchy State Utopia*. He claims that providing people with benefits is no equivalent substitute for obtaining their consent. Nozick (1974, 93–95) gives the example of a public address system in a neighbourhood of 365 people. Like a radio station, but locally restricted to the neighbourhood, the system provides news, music, and entertainment. Each day a year, another neighbour operates the system and provides a programme for the other neighbours. Nozick makes the point that the mere fact that all other 364 neighbours accept to operate the system on one day of the year does not oblige any member of the neighbourhood to participate in it. This is independent of how much he or she benefits from listening to the programme played by the other neighbours. Even if doing one's share is worth the benefits for a person, Nozick argues, it is not possible to create obligations by setting up a cooperative scheme which happens to benefit people, with-

out being asked for. In a nutshell, Nozick (1974, 95) claims, "[o]ne cannot, whatever one's purposes, just act so as to give people benefits and then demand (or seize) payment."

Nozick's example alludes to the intuition that consent creates an institutional relationship which makes the rules inherent to the institution binding. Indeed, this is sometimes the case, e.g. between the buyer and the seller of a good or service, or among spouses when they enter marriage. Only after both parties have given their consent does the buyer need to pay the price and the seller hand out the good. And only after both have consented to being married are spouses legally required to care for each other. Setting up a public address system would also amount to creating a new institution and the obligations it entails in the first place. This does not merely take place by benefitting people against their will. Insofar as people do not have any obligations, the question whether their obligations are justified becomes obsolete.

The relationship between a citizen and her government, in contrast, exists prior to and independent from either party's consent. The regime is there already, and its legal order is already binding for most citizens, with deliberate consent only accounting for a minority of memberships. This binding legal order may or may not be legitimate in terms of fair play, but the obligations exist in either case. It is therefore crucial to distinguish between the *existence* of an institution, and the obligations it entails, and its *justification*.

Another important institutional type which entails obligations without consent is the family. It would arguably be absurd to criticise the family for the fact that children do not choose their parents. There is simply no way to make such a choice. Newly born human beings depend on the care they receive by adults, even though they are not in a position to choose their caregivers and consent to being in their custody. This also means that parents have no choice but to care for the children they brought into the world. The fact that the family cannot be consensual does not preclude, of course, that some institutional token of the family may on good grounds be criticised for being patriarchal or abusive. Yet it does not imply that the institutional type is dysfunctional as such. And whether a particular token of the family is functional or not is best determined by mutual benefits rather than by consent.

One may argue, of course, that both in the case of the state and the family, into which we are born, a lack of consent is only justified when it comes to minors. Interestingly, however, this argument is not raised with re-

spect to the non-consensual institutions of social morality.[176] People do not consider their moral obligations less binding because they never consented, and they would also not accept a lack of consent as a valid excuse on the part of a person shirking her moral duties. If the institution in question was mutually beneficial, evading one's non-consensual duty would not be an act of autonomy but merely a violation of fair play.

3.4.2 *Voluntariness*

If the criterion for political legitimacy is actual rather than hypothetical consent, moreover, it seems that no existing regime would count as legitimate. Since only a tiny fraction of the population ever took an oath of allegiance to their regime, consent theorists are committed to philosophical anarchism. This is a strong conclusion which not every proponent of consent may feel comfortable with. A consent theorist who does not want to endorse philosophical anarchism may claim, however, that although consent must be actual, it need not be explicit. Instead, she may also allow for *tacit consent*.

An account of tacit consent is, for instance, provided by John Locke. Apart from *express* consent which requires a unique action, Locke also recognizes tacit consent which may be given merely by owning property within the state's territory, and even by using the state's infrastructure when passing through it.[177] Locke ([1689] 2005, 347–348) considers both tacit and express consent as equally giving rise to the political obligation of obeying the state's laws.[178] He even holds that historically, governments

176 Ironically, the internalisation of social morality's consent requirement for the permissibility of many actions is arguably the reason why many people would call for consent to the regime as an authorisation of the government.

177 Rousseau ([1762] 2012, 246), too, takes the position that as soon as a state is established by means of a social contract, residence amounts to consent to be subjected to the sovereign. In a footnote, however, he makes the important qualification that this only amounts to "free" states; otherwise, individuals may face high costs and sanctions in the case of exit, so that they may be forced to stay within the territory against their will.

178 Simmons (1993, 202–203) therefore diagnoses Locke with conflating consent and fair play theories of political legitimacy in his account of tacit consent. And Pitkin (1965, 999) interprets Locke as endorsing a hypothetical-contract theory where a government's legitimacy derives from its merits rather than from consent. Locke's notion of tacit consent does not qualify as a fair play account of political legitimacy,

have indeed been established by consent (Locke [1689] 2005, 336).[179] This position is only tenable if one considers any participation in a regime, that is compliance with the de facto constitution, as tacit consent.[180]

Locke's notion of tacit consent has faced a fierce rebuttal by David Hume. It would be absurd, Hume ([1748] 1994, 193) writes, to suggest that people tacitly consented to political authority by remaining in their native country if they lack any realistic alternative. He offers the following analogy:

> Can we seriously say, that a poor peasant or artizan has a free choice to leave his country, when he knows no foreign language or manners, and lives from day to day, by the small wages which he acquires? We may as well assert, that a man, by remaining in a vessel, freely consents to the dominion of the master; though he was carried on board while asleep, and must leap into the ocean, and perish, the moment he leaves her.

Notwithstanding Hume's critique, Harry Beran (1987, 28–29) claims that native citizens assume political obligation via tacit consent. This occurs, he maintains, by conforming to the convention that residence amounts to consent to membership once adulthood is reached. Empirically, however, it is dubious whether there exists a convention of tacit consent in any given state.[181] Yet even for cases "such as voluntary immigration, running for public office, and acceptance of high-level public employment" (Kavka 1986, 408),[182] this is far from certain. Although it is clear that people, by

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however. It is rather a descriptive account of participation from which it cannot be inferred that people benefit.

179 A contrary position is taken by Hume ([1748] 1994, 192–93) who claims that governments never relied on consent but always on force and that consent counts the least when new governments accede to power.

180 According to Hampton ([1997] 2018, 94), participation in a governing convention is a weak form of consent. Such consent may explain the emergence of a state. It is, however, not sufficient to give an account of its legitimacy, she holds.

181 This is also where consent theorist Green (1990, 253–254) takes a wrong turn. He claims that citizenship, like marriage, is socially defined but acceded to by consent. Yet citizenship is not defined in this way. Indeed, Green (1988, 168–169) himself observes that there is no consensus on what counts as consent to the authority of the state, in contrast to many other forms of consent such as in the cases of marriage or organ donation. This is a good indication, I would argue, that consent does not form part of the institutional status of citizenship.

182 Kavka understands these cases as usually being instances of tacit consent. He classifies voting in elections and continued dwelling in a country as unclear marginal cases. At the same time, Kavka (1986, 408) demands that for both explicit and tacit consent, "[…] individuals must have reasonable alternatives, and there must not be

performing these actions, participate in the regime, there is not a general convention that this would amount to tacit consent to the *legitimacy* of the regime.

There are indeed some institutional contexts where a convention of tacit consent exists. For instance, tacit consent may occur at a board meeting, as Simmons (1981a, 77–79) points out. If the board members keep quiet after a proposal is made even though they had the opportunity to raise objections, they tacitly consent to it. Yet residence in a state, Simmons argues, differs dramatically from such a tacitly approved decision in that citizens may not be aware of a choice situation so that they cannot intentionally consent. Moreover, there is no way to object to membership in the state, at least at an acceptable cost.

Beran (1987, 76) also holds that, in addition to their tacit consent to the state, citizens who vote in "free and effective" elections consent to the authority of the particular government elected and are therefore under the political obligation to obey its law.[183] But, as Green (1988, 172) argues, citizens are subject to the outcome of a vote, whether or not they agree to the state's authority. Thus, they may simply decide that it is the lesser evil to vote. Moreover, as Simmons (1983, 799–800) points out, elections are not framed in such a way that citizens would be aware of consenting to anything.[184] Neither has majority rule itself ever been consented to by anybody. All these arguments speak against the idea that citizens consent tacitly to their government. What citizens really do is simply participating in social practices and institutions, such as the de facto constitution. This must not be considered as a justification, however, if we do not want to end up equating de facto with justified political authority (see 3.2.2). In the attempt of compensating for not justifying enough, consent theorists might easily justify too much.

In contrast to tacit consent, *explicit consent* as a foundation of political authority is espoused by consent theorists such as Green (1988) and Simmons (1981a; 1983; 1993; 2009). They claim that tacit consent is not binding

so much manipulation of information as to deprive them of the chance to evaluate these alternatives rationally."

183 Irritatingly enough, a few pages before, Beran (1987, 70–74) rejects what he calls the "democracy version" of consent theory, claiming that voting in democratic elections is neither necessary nor sufficient to establish political obligations and political authority.

184 See also Simmons (1981a, 93–93; 1993, 224).

because citizens are not aware of consenting.[185] This criticism, however, seems beside the point. For instance, if the government decided that from next year on, residence amounts to tacit consent, or that citizens have to explicitly consent to its authority to retain their rights of citizenship, individuals would be very much aware of the consent they would give. But their action would not amount to a justification.[186] Citizens already comply with the de facto constitution, so they will also consent explicitly to the state's authority if required.[187] It would be an unwelcome conclusion to consent theorists that any regime can become legitimate merely by labelling actions such as voting or even residence as instances of consent-giving, even if the government acts coercively. As Hanna Pitkin (1966, 43) puts it:

> A government that systematically harms its subjects, whether out of misguided good intentions or simply for the selfish gain of the rulers, is to that extent illegitimate—even if the subjects do not know it, even if they "consent" to being abused.

Thus, even actual consent is not sufficient to guarantee functionality. Indeed, even forced marriage is established by means of exchanging wedding vows. This is notwithstanding the fact that, by construction, marriage without consent could arguably never be justified. Consent theorists do indeed acknowledge that consent may be forced. Since consent may be given under the influence of power, Simmons (1981a, 77) does not only demand that it be intentional, but also voluntary.[188] For instance, he holds that oaths of allegiance in naturalisation procedures can only be understood as voluntary consent if immigrants were not forced to leave their countries of origin and could choose among a set of different countries to go to (Simmons

185 Green (1988, 170–73), Simmons (1981a, 83).

186 Wendt (2018a, 26–27) claims that it would be coercive if the government established a convention stating that non-emigration amounts to tacit consent. Yet the same problem arises if it asks for explicit consent.

187 Binmore (1994, 72) also argues that explicit consent must not be mistaken for a justification for a regime because individuals merely cooperate insofar as this is in their best interest, given power structures as they are.

188 See also Kleinig (2009, 14–20) who lists three conditions for valid consent, namely voluntariness, knowledge and intention. There is also a resemblance to Kavka's (1986, 396) criterion that consent must not be coerced, i.e. that the other party must not be responsible for the consenter's difficult situation (in contrast to forced consent, which is valid, Kavka claims, insofar as dire circumstances result from external causes).

1993, 219). The position that consent must be actual and voluntary to create binding obligations is known as *voluntarism*.[189]

Voluntary consent is an important social practice, both in the formal and the informal sphere. For instance, a requirement of voluntary consent is among the established rules for medical interventions, employment, the purchase of goods, marriage, as well as physical intimacy. If voluntary consent is lacking, attempts to perform or establish these practices and institutions will end up in bodily injury, forced labour, theft, forced marriage, and sexual harassment. And even if consent is given but coerced, it loses any justificatory force. This is notwithstanding the fact that coerced consent may still create a—dysfunctional—institutional relationship, such as a forced marriage.

It is certainly debatable what voluntary consent consists in.[190] Its function, however, is simple: voluntary consent serves as a proxy for the functionality of commitments.[191] In everyday life, voluntary consent is simply the best indicator that individuals will *benefit* from an action.[192] Voluntarily consenting to an action signals that, all things considered, one expects one's situation to be more beneficial if the action is performed than otherwise.[193] For instance, when I consent to undergoing surgery, I express the conviction that I will benefit from it in the long run, such that I am willing to take the cost of being cut open.

Simmons (2009, 306–307) gives two reasons why voluntarist consent theory is attractive as a justification of political obligations: (1) It conforms to the principle *volenti non fit iniuria*, which also comes to bear with promises and contracts, and (2) it expresses the conviction that individual freedom and self-government are morally valuable. Both reasons can be

189 Concerning public goods, Simmons (1993, 255) claims that whereas they cannot be voluntarily *rejected*, *receiving* them may be either voluntary or involuntary. Only in the former case, an obligation can be justified according to voluntarist standards.

190 Wendt (2016, 38–45) names two sorts of conditions to identify what he calls "genuine consent." One is a condition of being able to give voluntary consent on the side of the consenting party. The other condition is not to violate the consenter's basic moral rights. This, however, presupposes an account of moral rights. For more discussions of voluntariness, see e.g. the contributions in Miller and Wertheimer (2009).

191 Greene (2016, 92–93) similarly defines voluntary rule such that the government does not only claim to benefit its subjects by the exercise of powers but that this is in fact the case and that subjects are also aware of it.

192 Vanberg (2004, 156) claims that individuals' voluntary consent is the only available measure of efficiency from a subjectivist and normative-individualist point of view.

193 This is also pointed out by Munger and Vanberg (2023).

understood in terms of benefits. On the one hand, voluntary consent is supposed to protect individuals from avoidable costs. On the other hand, the freedom to choose voluntarily enables them to pursue their own interests, which is a source of benefit for them. As Hobbes already knew, "[…] of the voluntary acts of every man, the object is some *Good to himselfe*" (Hobbes [1651] 1996, 93, emphasis in the original).[194] Mill (1859, 184) makes a similar observation when he notes that a person's "voluntary choice is evidence that what he so chooses is desirable, or at the least endurable, to him, and his good is on the whole best provided for by allowing him to take his own means of pursuing it."

Ensuring that an act of consent is voluntary, however, can be challenging under real-life conditions.[195] Whereas it might be feasible for the institution of marriage with many eligible alternative partners and the viable option of remaining unmarried, it is difficult to see how consent to a political regime could be voluntary beyond doubt.

Simmons (1981b, 28–29, 2016, 122–123) and Beran (1987, 31) imagine that consent to a regime would be more voluntary if there was the possibility to remain an outsider to the legal order without political and legal obligations.[196] Yet remaining outside a political community is not a choice easily made, as Kukathas (2003, 139–140), who also accounts for the possibility of outsiders, points out. Outsiders who reject citizenship will not even obtain a passport to travel elsewhere. People may thus not dare to forego the rights accruing to citizens, even if a regime is not justified to them.

The problem is that the choice to be an outsider is made given the existence of a regime which changes the options available to individuals. This is where *hypothetical contract theories* come into play. Abstracting away from empirical conditions, they take consent under counterfactual circumstances as the criterion of justification, which is voluntary in a way that actual

194 Hobbes ([1651] 1996, 93) also holds that people cannot voluntarily give up their right to self-defence, simply because it is never in their interest not to defend themselves.

195 Pettit (2023, 214) claims that if individuals are sufficiently motivated to comply with the legal order by the benefits it yields to them, rather than by sanctions, their compliance can be considered voluntary. This is questionable for two reasons. For one thing, sanctions are motivationally relevant even for law-abiding citizens because they have an assuring effect (see 2.4.3). Moreover, individuals may have incentives to coordinate even on a dysfunctional regime, not because they receive net benefits but because they incur lower net costs than they currently do (see 3.2.2).

196 Beran (1987, 103–104) also suggests the creation of "dissenters' territories," where those who deny consent to their native states are free to go to.

consent under real-life conditions of institutional power structures cannot be.[197]

Unfortunately, the idea of hypothetical consent has created a good deal of confusion. A frequently voiced worry is that, in contrast to actual consent, hypothetical consent cannot create binding duties or obligations.[198] Moreover, from the perspective of classical liberalism and libertarianism, contractarianism undermines individuals' free choice to assume obligations by consent.[199] The misunderstanding underlying these charges is that a hypothetical contract does not pretend to *create* any obligations, but only endeavours to *evaluate* the legitimacy of institutional arrangements and the burdens they imply.

The argument for hypothetical contractarianism is thus not that hypothetical consent is a substitute for actual consent as a mechanism of institutional authorisation. Rather, a hypothetical social contract is an evaluative tool for social practices and institutions independent of their historical origin.[200] It was never intended to be even "a pale form of an actual contract" (Dworkin 1973, 501). Instead, it is a thought experiment capturing what would be required of institutions such that individuals could voluntarily consent to them.

3.4.3 *Action-Guidingness*

As I argued in the two preceding sections, on the functional account, institutional legitimacy is captured by the notion of hypothetical consent. Actual consent is therefore neither necessary nor sufficient for legitimacy.[201]

197 Thomas Nagel (1995, 36) even frames unanimous hypothetical acceptability as a substitute for voluntariness which is not attainable in the case of subjection to political authority. In fact, however, the notion of hypothetical consent is a detour. Hypothetical contract theory does not care about voluntary consent per se. They merely use it as a proxy for net benefits.

198 See for example Green (1988, 161–162), Simmons (2009, 311), Waldron (1987, 138–139), Wendt (2018a, 30).

199 See for example Holcombe (2018, 97–98) and Levy (2018, 28). For Holcombe (2011), the narrative of the hypothetical social contract empowering governments by unanimous consent is not more than a cynical euphemism serving the propagandistic tool of ascribing legitimacy to the government.

200 See also Buchanan and Tullock ([1962] 1999, 319), Thrasher (2018b, 215).

201 Dworkin ([1988] 2008, 89) also takes this position, arguing that citizens might both consent to authoritarian regimes and deny their consent to governments which actually deserve it (and would therefore obtain citizens' hypothetical consent).

It is not necessary because existing institutions may be fair in the sense that all addressees benefit. Actual consent is not sufficient because consent may be involuntary, tracking only the participation constraint but not functionality. In this section, additionally, I want to argue that hypothetical consent is also superior to actual consent with respect to informing practical decisions, such as which institutions are worthwhile to keep, which ones should be abolished, and also what direction institutional reform should take.

As no existing regime, possibly excluding the Vatican, can claim the voluntary consent of a substantial number of its citizens, actual consent theorists must be anarchists a posteriori if they want to be coherent. This is indeed the conclusion which Green (1988) and Simmons (1981a) draw from the fact that all existing governments lack actual and voluntary consent. That does not, however, commit them to any political position. The lack of consent itself has no practical implications as to whether a regime should be abolished, reformed, or maintained in its current form. Being philosophical rather than political anarchists, neither Simmons nor Green call for the abolition of all political structures. Yet to make the point that the continued existence of some regimes is acceptable, they need to invoke another criterion than consent.

Simmons (1999, 745–48), for instance, grants that some regimes may be justified to exist on the basis of criteria such as providing basic justice, having a lawful regime or being recognised by their citizens and/or the international community. He insists, however, that political authority can only be justified by virtue of consent of the governed. The functional conception of legitimacy, in contrast, takes the converse view to legitimacy. A functional regime may be very imperfect with respect to the functionality of many of its primary laws and lower-level institutions. Its single essential quality is merely that it provides the means for each of its subjects to lead a better life than they could lead in the state of nature. This basic demand helps to distinguish legitimate from illegitimate regimes without invoking other normative standards.

The functional account thus endorses a minimalist conception of legitimacy (see 4.4.3). This makes it well-suited for demarcating among institutional tokens and types which are functional, and those which are not. Functional legitimacy does not commit us to say that all regimes are illegitimate, given the very basic demand that there are regimes which provide all their subjects with net institutional benefits. The latter is arguably the case at least for liberal democracies. On the other hand, it allows us to take a

strong position on dysfunctional institutions which do not even meet this minimal criterion, calling for concrete changes.

Considering how to go about an institutional token, we should first determine whether this token belongs to a functional or a dysfunctional institutional type. Dysfunctional institutional types have functions such that no token would ever be created by a unanimous social contract. Insofar as no token of such an institutional type can be legitimate, we should raise awareness for the illegitimacy of the institution and demand the abolition of this token, as well as of all other tokens of that type. Non-violent practical measures are also commendable. Think for example of the boycott of products from slave labour such as sugar in the late 1800s, or of the South African apartheid regime.

If an institutional token is an instantiation of a functional type, we need to investigate further whether the token itself is functional or not. If it is dysfunctional, e.g. a token of marriage where marital rape is not a crime, we should advocate the reform of the institution such that one day, it becomes functional. The immediate abolition would arguably lead to disruption and deprive all parties of the chance to reap coordinative and cooperative benefits. This is why contractarians often have been sceptical of reforms and taken a more conservative stance on institutional change.[202] Reforms, however, need not be disruptive. They may also take the form of piecemeal social engineering. This is a cautious and negative approach which aims to correct manifest social problems and to eliminate grievances, rather than pursuing a pre-defined vision of society (Popper [1945] 2013, 148–149).[203]

As the example of marriage in Germany shows, an institution may undergo substantial but gradual changes. Whereas it was in 1969 that adultery was abrogated as a criminal offense, the husband's authority to decide about the wife's occupation and the family's place of residence persisted until the 1970s.[204] In 1976, no-fault divorce was made the standard. Marital rape only became a criminal offense in Germany in 1997. And it took another two decades, until 2017, for marriage to be extended to same-sex couples.

202 Contractarians and like-minded theorists tend to argue that the institutional status quo must be taken as the starting point of reforms if these are supposed to be peaceful and mutually beneficial. See for example Binmore (1998, 348), Buchanan ([1975] 2000, 109), Gaus (2011, 460), Moehler (2018, 162), Munger (2018, 59), Vanberg (2004, 158–160).

203 For the advantages of gradual reform, see also Berman and Fox (2023).

204 This was actually in conflict with the constitution, the *Grundgesetz* (GG), article 3, which determined already in 1949 that men and women are equal before the law.

Gradual changes take time, but they may be profound.[205] Gradualism is thus a conservative approach to institutional change, but it is not inimical to change per se.[206] Rather, it is characterised by a certain attitude to *how* change ought to take place, preferring small, slow and continuous steps.

Gradual changes in formal institutions may take place in interaction with the evolutionary development of informal institutions. For instance, in the wake of profound changes in the social perception of gender roles and partnerships, the breadwinner model of marriage went more and more out of fashion in Germany in the second half of the 20th century, while divorce became progressively more accepted. The reform of German alimony law which was adopted in 2007 only became feasible against this background of erosion in the informal norms forming part of the complex institution of marriage. The reform reduced the amount of alimony to be expected in the case of divorce, making it less attractive for wives to withdraw from the labour market upon marriage.[207]

Evolutionary forces, however, may also be employed strategically by activist groups in the deliberate pursuit of their respective agendas, e.g. the suffragettes campaigning for women's' right to vote or the gay rights movement fighting for the introduction of same-sex marriage.[208] Activists may raise awareness for the dysfunctionality of a social practice, and they may also deliberately undermine particular laws by means of civil disobedience.[209]

Even if an institutional token is functional already, we need not stop there. A functional institutional type, such as marriage in Germany after 1997 (i.e. with marital rape being criminalised) may still include dysfunc-

205 As Chirot (2020, 5–6) points out, the long-term effects of piecemeal reform may be as forceful as revolutions.

206 Oakeshott (1991, 431) holds that from a conservative perspective, changes in formal rules must follow changes in beliefs and social practices rather than vice versa. This is what happened in the case of marriage in Germany.

207 Apparently, however, the reform failed to show the intended effect of incentivising married women's participation in the labour market. For empirical evidence, see Bredtmann and Vonnahme (2017).

208 Kitcher (2014, 145–53) describes how outstanding activists contributed to changing norms concerning the social role of women in the West. Kitcher (2014, 162–65) also discusses the process of homosexuality becoming normalised in social morality and law.

209 O'Connor (2019, 202–5) notes that moral education, even if it does not immediately change discriminatory social practices, may have an erosive effect by changing individuals' other-regarding preferences, making illegitimate institutions more susceptible to being overthrown.

tional subordinate institutions or social practices. Even after all the reforms, for instance, marriage in Germany still shows traces of patriarchy, notably in the taxation of married couples. A practice such as income splitting, in contrast to individual taxation, creates incentives for women to work less (Bach et al. 2011), which makes them more dependent upon their husbands. The very function of income splitting is arguably to support marriages that are organised after the breadwinner model. This is not a function which all actual and potential spouses would accept in a counterfactual choice situation. Dysfunctional subordinate institutions such as these should be removed when reforming an institution that is already functional on the whole.

Moreover, subordinate institutions and social practices may also be dysfunctional tokens of functional types. For instance, it may be functional in principle that married couples are required to live in the same place (at least for their first residence), the function being to restrict the benefits of marriage to couples who actually share a household and their personal lives, ruling out sham marriages.[210] Granting husbands the exclusive right to determine the place of residence, however, is not a functional token of this requirement. To become functional, it may be reformed such that both spouses together must agree on one place of residence. So even for institutions which are legitimate, i.e. justified to exist, there is much room for improvement on the functional account of legitimacy.

Deriving recommendations for improving institutions from the principle of actual consent is much more difficult. Simmons (1999, 770) actually holds that while equally lacking legitimacy on his terms, existing regimes may differ in being "more or less fully illegitimate". A criterion for ranking regimes, however, must be different from consent[211] because consent is binary.[212] Functionality is binary, too, so it does not allow for a ranking either. By differentiating between the levels of types, tokens, and subordi-

210 Whether this function is justifiable is of course debatable.

211 Ironically, this criterion seems to be costs and benefits. Elsewhere, Simmons (1981a, 198–199) claims that it is possible to distinguish between better and worse governments insofar as governments do, with varying degree of success, provide benefits by wielding power and coordinating behaviour.

212 Larmore (2020, 118–19) attempts to formulate an alternative conception: Whereas he ascribes full legitimating force only to express consent, he also holds that legitimacy comes in degrees. He gives the example that states differ in the proportion of their population which give express consent. Yet with respect to a subjected individual, consent remains a binary criterion. The same criticism applies in a weaker form to the conception of legitimacy put forward by Greene (2016) who measures the

nate institutions and social practices, however, it can offer a differentiated response to the question how to deal with particular institutions.

These recommendations refer to the very structure of institutions, not to their mere form. This is a remarkable contrast to consent theories of (political) legitimacy. Simmons (1993, 268), for instance, suggests increasing a regime's legitimacy by means of introducing more voluntariness. For one thing, he endorses political activism with the aim of turning existing states into voluntary political societies by offering the possibilities to consent. He also suggests expanding the options open to citizens, for example by offering different levels of citizenship.

The problem with these suggestions is that they do nothing to improve the regime itself which, under given empirical circumstances, might still be the best option to choose for most people. Most importantly, Simmons does not at all suggest any constitutional provisions for how political authority may be exercised. Yet from a functional perspective, constitutional provisions for the exercise of authority are exactly what distinguishes legitimate from illegitimate regimes. They are also the crucial point where legitimate regimes differ from each other. In the remaining chapters, which focus on the legitimacy of political regimes, I will therefore be concerned with matters of constitutional design.

3.5 Summary

In this chapter, I addressed the question what makes institutions legitimate, where legitimacy is understood to mean that an institution is justified to exist. I introduced a functional conception of legitimacy which takes as its starting point that institutions exist to create cooperative and/or coordinative benefits for their participants. Even though institutions all serve such a function, they do not necessarily create benefits for all their (potential) participants. Insofar as those who do not receive any benefits still incur burdens from an institution's existence, they may make the point that an institution is not justified *to them*. Taking a normatively individualistic position, I formulated a principle of legitimacy according to which an institution is legitimate if and only if there is no individual who suffers net costs from its existence. In other words, everyone who incurs institutional

degree of political legitimacy both in terms of the number of citizens who give actual consent and the government's assessed quality.

burdens must at least be compensated by means of coordinative and/or cooperative benefits.

Importantly, people do not automatically signal that an institution is justified to them if they choose to participate in them. This is because, even though they incur uncompensated institutional costs, the very existence of the institution may have made the alternative of not complying even less attractive. On the other hand, people who do not participate in an institution may still benefit from its existence. Even though they do not acknowledge any institutional duties or obligations, these people may legitimately be sanctioned for failing to participate.

Whether an institution is functional or not cannot be precisely measured because individual costs and benefits are subjective values that are inaccessible from an outside perspective. To get a grasp of an institution's legitimacy, however, we can make use of the thought experiment of a social contract. If there is no reason to assume that any individual who incurs institutional burdens would veto the acceptance of a social contract introducing the institutional token in question in a counterfactual situation, known for political regimes as the state of nature, it can be considered functional. Insofar as the state of nature is imagined without any normative presuppositions, the functional conception of legitimacy can be located in the contractarian branch of social contract theory which broadly follows the tradition of Hobbes.

The legitimacy criterion of functional legitimacy is thus consent, but hypothetical rather than actual consent. If an existing institution benefits each of its participants all in all, consent is not necessary to justify it—even though consent may be required to create a new institutional token of a certain type. Actual consent, moreover, may not even be sufficient to capture the requirement of functionality that all participants of an institution realise nonnegative benefits from it. This is not only the case with tacit consent, but also with explicit consent which is given under existing power structures and institutional circumstances, and therefore not necessarily voluntary.

Finally, actual consent fails to be action-guiding with respect to the question whether a particular institutional token should be abolished or reformed. The criterion of functionality, in contrast, which is measured by hypothetical consent, has clear practical implications. Tokens of dysfunctional institutional types such as slavery are beyond repair and should be abolished. Dysfunctional tokens of functional types such as marriage should be reformed. And functional institutional tokens may be improved

by overcoming residual dysfunctionalities at the level of subordinate institutions and social practices.

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.

5 Constitutional Design: Dealing with Dysfunctionality

> If there is a political form that provides the possibility of resolving [class] conflict peacefully and gradually, instead of pushing it to the point of catastrophe by violent revolutionary means, then surely it is the parliamentary-democratic form. The latter's ideology may be a socially unachievable freedom, but its reality is peace.
>
> — Hans Kelsen,
> *The Essence and Value of Democracy* ([1920] 2013, 76)

5.1 Introduction

Although functional legitimacy does not entail a unique ideal of political organisation, it has practical implications for details of constitutional design. Liberal regimes may differ widely at the level of secondary law. Such subordinate institutions may themselves be analysed through the functional lens. In this chapter, I look at three important determinants of constitutional design and their functionality. I argue that majoritarian democracy, in contrast to autocratic forms of rule, is a functional institutional type because it allows for regular and non-violent changes of government. Whether a particular token of majoritarian democracy is functional depends on the situation of minorities. I also make the point that governments may, under certain conditions, legitimately interfere with individuals' property in the form of taxation or redistribution. Existing property rights have no particular claim to legitimacy and may be dysfunctional themselves. Moreover, I analyse the effect of political decentralization on reducing dysfunctionalities in primary law which result from a high level of social diversity.

Let us revisit the case of marriage as an analogy for political regimes. If we compare the marriage-tokens which are in place in the 2020s in Germany and Sweden, both qualify as functional. Both countries have criminalized marital rape and allow for divorce. Unmarried or divorced people do not suffer from a social stigma. Marriage therefore does not impose burdens upon non-participants, while creating net benefits for married couples in the form of establishing a legal kinship relation among the

partners. There are, however, also differences among the formal institutions of marriage in both countries at the level of subordinate social practices.[298] For instance, certain religious communities in Sweden have the permission to perform wedding ceremonies whereas in Germany, legally binding weddings can only be performed by a representative of the government. Moreover, Sweden allows for the possibility to retain one's former surname as a middle name. In Germany, in contrast, there are no middle names. Instead, upon marriage, one may adopt a double surname which is connected by means of a hyphen.

These differences in the subordinate social practices of marriage are culturally relevant. With regard to legitimacy, however, they do not matter. All practices are arguably functional, so it is a matter of tradition and taste which one to adopt. There are, however, further differences. A particularity of German marriage and tax law is the splitting of taxable income among married partners. The function of this income splitting is arguably to subsidize families organized according to the single breadwinner model (see 3.4.3).

Income splitting arguably has the effect that the spouse who earns less, in heterosexual German marriages typically the woman, is disincentivised to work because the joint tax rate will be applied to the first Euro she earns.[299] This may initiate a path-dependent reliance upon her husband. In the long run, the costs she faces from this dependence may easily outweigh the benefits she yields from the tax savings on the family income. After years spent outside the workforce, some women can find it difficult to support themselves in case of a divorce, but also if their husband dies or becomes unable to work. Income splitting is thus a dysfunctional institutional type which cannot be justified to all married people.

The fact that it includes a dysfunctional institutional type at the subordinate level does not make the contemporary marriage-token in Germany dysfunctional. In the dimension of taxation, however, the German token exhibits a dysfunctionality, in contrast to its Swedish counterpart. Since legitimacy is a binary concept, this does not mean that marriage in Sweden would be *more legitimate* than in Germany. Moreover, it might be the

298 For information concerning marriage in Sweden, see Swedish Ministry of Justice (2013).

299 Even the United Nations' Committee on the Elimination of Discrimination against Women, in its report on Germany (2017, paragraph 35), criticises "an income tax system for couples, depending on the combination of the tax collection categories" under the heading of employment.

case that the Swedish token includes a dysfunctional institution or social practice within another dimension. Different subordinate institutions and social practices cannot simply be weighed against each other because the set of individuals who incur net costs from a dysfunctionality may vary. What we can infer from this example, however, is that if the German government wanted to reform the taxation of married couples, it would be well advised to take Sweden or any other country without income splitting as an example.

Marriage itself is a subordinate institution of the legal order. To be precise, marriage is a subordinate institution of that part of the legal order which consists of primary law. The set of secondary law, which can also be understood as the state's constitution, defines the current regime. Any regime comprises many subordinate institutions, for instance the form of governance. A state may be governed democratically or autocratically, and within each category, a wide variety of further specifications is possible. For instance, the Federal Republic of Germany is a parliamentary democracy. Its electoral system is personalized proportional representation. The Federal Republic is a welfare state with a wide range of compulsory social insurance. As its name says, moreover, it is organized federally. The 16 *länder* are represented in the *Bundesrat* which is a second legislative body alongside the *Bundestag*, the federal parliament.

Even though functional legitimacy cannot provide a ranking of regimes, let alone an ideal of political organization, it allows for evaluating the functionality of subordinate constitutional institutions, both at the level of tokens and types. On the one hand, this creates the opportunity to compare regimes within particular dimensions. Assume, for instance, that proportional representation is a functional institutional type and an electoral system which elects winners of a plurality of district votes is not. If this was the case, we could say that in the dimension of the electoral system, Germany does better than the United Kingdom or the United States. Moreover, an analysis of the functionality of a regime's subordinate institutions helps to identify possible targets of constitutional reform. For instance, if it should turn out that a redistribution of income is not justifiable as an institutional type, constitutions should prevent governments from adopting redistributive policies.

To pursue either of these aims, the functional approach may be applied to a variety of institutions that are subordinate to the legal order at large. In this chapter, I am focusing on three very basic determinants of constitutional design, namely majoritarian democracy, the welfare state, and federalism.

Together with the rule of law and its status as a republic,[300] these three institutions form the foundational structural principles of the Federal Republic's legal order (see Art. 20 of the German constitution). For this reason, and because they also play important roles in other regimes, I believe that these institutions deserve particular attention.

Democracy, in its modern, majoritarian form, is a functional institutional type, or so I argue. Majoritarian democracy serves the function to regularly authorize new governments that are backed by majorities of the electorate. It is thus a procedural form of political rule which allows for periodic and non-violent changes in governance. In contrast, autocratic forms of governance authorise rulers based on their social status, without providing a path to decision-making power for other parts of society. This makes them dysfunctional on the level of types. Majoritarian democracy is a functional type in virtue of being a procedural form of government without these flaws.

Not all tokens of majoritarian democracy are necessarily characterized by actual changes in power. A country's society may be so structurally divided that there are persistent minorities who never see their interests implemented as policies. In these cases, similar to an autocracy, it is socially cemented who belongs to the rulers and who to the ruled, albeit only for contingent reasons. One might therefore doubt whether such tokens are functional. The presence of persistent minorities, however, need not undermine the functionality of a democracy-token. If all individuals, including members of persistent minorities and non-citizen residents, enjoy constitutionally guaranteed rights to freedom of speech, assembly, and association, they face a path to shape policies by means of influencing public opinion. This option would not be open to them in autocracies where public opinion does not matter for legislation. Democracies which grant such rights can thus still be considered functional.

A more serious threat to the functionality not only of a democracy-token, but to the regime as a whole, is posed by the presence of intense minorities. I use this term to refer to individuals or groups which incur external costs from democratic decisions that are so massive such that they

300 As I argued in the previous chapter, the rule of law is among the tenets of liberalism which is a necessary condition of political legitimacy. It thus needs no further scrutiny in this context. That a regime is a republic, moreover, is a mostly formal quality which specifies that the head of state is not a monarch. It is, however, neither a requirement for the rule of law nor for democracy, as the countries with crowned heads of state in Northwestern Europe testify. I therefore take it to be of minor importance.

outweigh any potential benefits that the regime's existence may give rise to. If constitutional restrictions on political authority are lacking, democracy may turn into such a "tyranny of the majority." Importantly, it does not suffice that sensitive decisions must be taken with a high quorum of votes. This would still leave small groups or even single individuals vulnerable to devastating collective decisions, and it also leaves non-citizens out of the picture. Rather, the government must grant everyone with whom it deals fundamental rights to protect their basic interests. Whereas most decisions in a democracy may be made by a simple majority of legislators, everyone—including also migrants and would-be migrants—must have a veto when it comes to decisions which threaten their lives, livelihood, or bodily integrity. Even a democratic regime must therefore be liberal to be functional.

Another dimension of constitutional design is to what extent the government is authorized to interfere with the system of property rights that emerges from individuals' private transactions. This may take place by means of taxation or levying mandatory social insurance fees. The legitimacy of such interference is questioned by libertarians who claim that the government must respect individuals' property claims. I make the point that protecting existing property rights may be counterproductive from a functional perspective. Claims to property originate in contingent historical path dependencies and need by no means be justified themselves. They may even perpetuate dysfunctional discriminatory institutions, such as class or caste systems, racism, or patriarchy. Functional regimes must grant individuals a right to own property, but they may define and redefine property rights claims by means of the tax system. This is not only legitimate but even commendable if the rights claims in question cannot be justified themselves.

Libertarians are also sceptical when it comes to the size of the public budget. A public budget can arguably be functional insofar as it provides public goods, the benefits from which people would not be able to attain otherwise. Moreover, redistributive schemes within a public budget can even be beneficial for those people who are at the moment net contributors in financial terms. For one thing, they also profit from social insurance. Moreover, many redistributive policies have positive spill-over effects even for those who are not the direct beneficiaries, e.g. in the domains of public health or education. Of course, it is unlikely that each policy is beneficial for every taxpayer. A particular public budget is still functional, however, as long as they benefit in total. A constitutional demand that public funds

may only be spent on mutually beneficial policies would thus rule out many functional budget-tokens.

That citizens have different policy preferences and cannot all be pleased at the same time has the effect that there are necessarily some dysfunctionalities at the level of primary law. The more diverse the population, the more numerous such dysfunctionalities will be. A possible way to reduce them by means of constitutional design might be to decentralize political authority to lower-level territorial units within the state, i.e. by creating a federal system. Insofar as people have more homogeneous values and preferences within smaller groups, everyone stands to benefit from such decentralisation.

The mechanism is limited, however, insofar as minorities with similar policy preferences live territorially dispersed. Social subgroups such as sexual or religious minorities, for example, may also be scattered across a state's territory. In this case, a decentralisation of political decision-making may even subject minority groups to policies which are more against their interests than centralised legislation. This is because local majorities may be more extreme than the citizenry at large. Federal decentralisation is therefore most likely to reduce dysfunctionalities with respect to cultural and linguistic policies. In this policy dimension, territorial proximity is typically related to a homogeneity of preferences, which cannot be assumed for other dimensions.

Federalism may, however, offer a way for lower-level jurisdictions to *become* more homogeneous. This is because people have the opportunity to leave lower-level jurisdictions where they are in the minority and go to jurisdictions where policies are more to their liking. The problem with this mechanism is that individuals may face substantial costs of moving to another jurisdiction. Incurring these costs will only be worthwhile if moving promises high benefits or a tremendous cut of costs. High benefits, however, are unlikely insofar as lower-level jurisdictions should be restricted in their decision-making capacity, lest they create spillovers to other jurisdictions. Moreover, in a liberal and therefore functional regime, individuals must not face immense costs anyway. Exit is not a substitute for granting individuals fundamental rights. Rather than decentralising political authority to lower-level territorial jurisdictions, I therefore suggest that governments should allow for more parallel legislation at the central level for issues which lack a territorial component. If individuals may choose the regulation which they prefer most, dysfunctionalities can be avoided.

In the remainder of the chapter, I will proceed as follows. In Section 5.2, I will discuss the function and functionality of majoritarian democracy, addressing also the issues of persistent and intense minorities. I will argue that majoritarian democracy is a functional institutional type, but for a democratic regime to be functional, it must grant individuals fundamental rights. In Section 5.3, I turn to the issue of the levying and spending of public budgets, pointing out the potential benefits of tax-funded public good provision and redistribution. I will also make the point that existing property claims, as they are the product of historical contingencies, may be unjustified and should not be exempt from the reach of political authority. In Section 5.4, I look at the potential of federal arrangements to increase citizens' net benefits from political organization. I argue that federalism is limited in reducing dysfunctionalities and suggest that governments should additionally allow for non-territorial parallel law. Section 5.5 provides a short summary.

5.2 The Function of Majoritarian Democracy

5.2.1 *A Procedural Form of Governance*

A major element of constitutional design is the form of governance, i.e. the way in which rulers are selected. I refer to a regime as *autocratic* if it authorises rulers to govern based on the social position they occupy, e.g. in dynastic succession, the military, the clergy, or within a party organisation. Examples for autocracies, accordingly, are monarchies, military dictatorships, theocracies, and one-party dictatorships. All forms of autocracies are dysfunctional institutional types. This is because their function of conferring political authority and power to people based on their social status is not acceptable for the rest of a state's citizens and residents.

Regimes with an autocratic form of governance may theoretically still be legitimate. This would be the case if autocratic rulers respected citizens' fundamental rights, for example in a constitutional monarchy where the monarch plays an active role in the state's governance but is effectively restricted by a liberal constitution.[301] What is dysfunctional in these cases is

301 The term *monarchy* is sometimes also being applied to democracies where the mostly ceremonial head of state is a monarch. I do not classify these regimes as autocracies, however, because they are ruled democratically.

only the form of governance as a subordinate institution, not the regime as such.

Another form of governance is *democracy*. With this term, I refer to forms of governance where rulers are not authorised based on their social position, but rather on procedural grounds. Democracies, according to this general definition, can be lottocratic, i.e. based on sortition, or electoral, i.e. based on voting. Whereas democracy in ancient Greece was lottocratic, modern democracies are electoral.[302] Electoral systems may differ widely in their institutional design. For instance, voting may be either direct, taking the form of referenda, or representative, with a legislative assembly making decisions. Representative democracies, moreover, may be parliamentary, presidential, or semi-presidential, and within these subtypes, many more refined specifications are possible, e.g. with respect to the electoral system in place.

In contrast to autocracy, democracy is arguably a functional institutional type. It is important, however, to know what its function is to understand what democracy can deliver and what it cannot do, and under what conditions a particular democracy-token qualifies as legitimate.

It is a commonplace in democratic theory that (majoritarian) democracy enables the people to rule itself.[303] This thought can already be found in Rousseau ([1762] 2012, 246) who claims that within a state, majority rule is perfectly compatible with citizens' freedom, insofar as it is a tool to identify what he calls the *general will* (see 4.2.2). Whereas the *will of all* merely adds up all private interests or *particular wills*, the general will contains exactly that which is willed by all (Rousseau [1762] 2012, 182).

According to Rousseau, the general will is to be elicited by means of a majority vote, even though he remains vague as to the exact form of the connection. On the one hand, he hypothesises that a vote is the more truthful to the general will, the closer it approximates unanimity (Rousseau [1762] 2012, 245). On the other hand, he apparently identifies the general

302 Sortition-based democracy is not suited for large, modern societies because only a small part of the population would ever be selected to govern, leaving the rest disenfranchised, as Przeworski (2009, 72) points out.

303 See for example Beran (1987, 77), Christiano (2015, 475), Lafont (2019, 3), Landemore (2021, 19), Przeworski (2009, 72), Urbinati (2014, 24). A different case for the legitimacy of democracy is made by Christiano (2004) who claims that the authority of democratic legislation is legitimate because only by obeying democratic laws can citizens act justly, treating others publicly as equals in light of a pluralism of values and opinions, as well as biased and fallible judgement.

will directly with the outcome of majority voting,[304] claiming that those who are in the minority for any given vote are mistaken about the general will and therefore also about their own interest (Rousseau [1762] 2012, 246).

The concept of the general will is problematic in that it presupposes that there is a common good which all citizens want, even though they need not be aware of it. Only under this assumption can Rousseau claim that "whoever refuses to obey the general will be constrained to do so by the whole body, which means nothing else but that *he will be forced to be free*" (Rousseau [1762] 2012, 175, emphasis added).[305]

Whereas the idea of a common good was popular in the enlightenment era, political theorists more recently acknowledged that competing interests and political parties are an irreducible part of politics (Przeworski 2010, 26–27). Not least, moreover, social choice theory has shown that voting as an aggregation mechanism is both incapable of consistently reflecting voters' preferences and susceptible to manipulation, dispelling the notion that democratic rule is the instantiation of the people's will, obedience to which makes citizens free (see Riker 1982, 238). Insofar as there is no detectable common good willed by all, it appears highly dubious how being subjected to the outcome of a majority vote can count as a form of autonomy.

Leaving the naïve idea of the general will behind, contemporary democratic theory still follows in Rousseau's footsteps insofar as it attempts to fathom how autonomy, or "self-rule," as a legitimacy requirement for political authority can be realised in democratic regimes, although the ambition has been lowered. One strand in democratic theory modestly considers citizens' power to elect and oust their leaders in representative democracy as a tool of self-rule.

William Riker (1982, 242–246), for instance, acknowledges that Rousseau's "populist" version of democracy fails due to the lack of a coherent popular will. Nevertheless, he argues that the democratic promise of freedom, both as non-interference and as self-determination, can be salvaged by a less demanding liberal version of democracy. Liberal democracy, on his definition, only sets the negative standard of voting unpopular

304 This is analogous to the argument put forward by Sieyès ([1789] 2014, 95–96) that, since the common will is made up of individual wills, the common will is identical to the position taken by the majority.

305 Rousseau's formulation finds a contemporary reflection in Lovett's (2018, 121) assertion that a justly imprisoned person in a democratic society is free "in the politically relevant sense," even though she is certainly not free to walk out of the prison.

leaders out of office, giving citizens a "democratic veto" against "official tyranny." Likewise, Adam Przeworski (2010, 166–168) holds that the possibility of governmental change by elections lends credibility to the notion of popular sovereignty even in modern democracies. Insofar as they are held accountable by the instrument of competitive elections, he argues, politicians can be said to rule on behalf of the rest of the people.[306]

A change in leadership by means of competitive elections is an essential benefit for citizens of a democracy, compared to autocratic forms of government. Nevertheless, framing this feature of democracy as an instantiation of individual autonomy is to misrepresent it. Voting is not equivalent to making use of a veto. Under majority voting, individuals lack an equal chance of their opinion becoming law insofar as members of the minority have no impact on legislation. That a government rules by the mercy of a popular majority does not even mean that the members of the majority rule themselves; they simply happen to be in the majority.

Another attempt in democratic theory to address the impossibility of identifying a common good by means of voting is *deliberative democracy* (Mackie 2018, 219). Deliberative democracy, according to the definition by Amy Gutmann and Dennis Thompson (2004, 7), is

> […] a form of government in which free and equal citizens and their representatives justify decisions in a process in which they give one another reasons that are mutually acceptable and generally accessible, with the aim of reaching decisions that are binding on all at present but open to challenge in the future.

There is no space to discuss the whole family of theories of deliberative democracy in detail here. In particular, I will not touch upon the epistemic case for deliberation,[307] as it is circumstantial from the cost-benefit perspective of functional legitimacy.[308] The important point for the purposes of the chapter is deliberative democrats' idea that, even though there is no pre-existing general will, the practice of open and uncoerced deliberation

306 Przeworski (2010, 38) even claims that autonomy is numerically maximised in a democracy where power alternates between parties as citizens' preferences change.

307 The argument that deliberation is conducive to finding truth and making good decisions is, among others, made by Landemore (2013) and Estlund (2008).

308 As Mackie (2018, 231), notes, epistemic accounts of democracy do not invoke a reflection of individual preferences in collective decisions as an argument to justify democracy. Insofar as they do not consider costs and benefits, these accounts are not relevant for my argument.

among equals prior to democratic voting creates a public forum of joint political will formation. For this reason, deliberation is supposed to be a mechanism enabling all citizens to perceive themselves as the authors, rather than mere recipients, of law.[309]

According to democratic theorist Bernard Manin (1987, 359), for instance, the majority rule is justified insofar as it closes a deliberative process in which all positions could be presented and heard. Deliberation therefore succeeds and supersedes the general will as a guarantor of autonomous legislation and, accordingly, legitimacy (Manin 1987, 352).

For Jürgen Habermas (1997, 152–62), too, *public autonomy*, as the legitimacy criterion for laws, is reconciled with *private autonomy* in the form of individual rights by means of a discursive formation of opinion and will.[310] Private autonomy, for Habermas, is a negative freedom which relieves legal subjects of the burden to act according to publicly acceptable reasons, thus allowing them to pursue their self-interest. The apparent tension between public and private autonomy can be solved, Habermas claims, by realising that a system of individual rights granting private autonomy is a necessary condition for institutionalising the forms of communication which enable politically autonomous legislation.[311]

Deliberative democracy constitutes a valuable advancement in democratic theory beyond the simple majoritarianism of Rousseau, going a long way in the direction of making the process of democratic decision-making more consensual. Public discourse can indeed make democratic legislation more tolerable and transparent to minorities. Moreover, Habermas's emphasis on private autonomy contributes an awareness for the importance of liberal rights to the debate.

Deliberation, however, cannot turn majoritarian democracy into a form of self-rule. Even deliberation must ultimately lead to a vote. And since deliberation cannot create a harmony of interests out of deep disagreement,[312] a collective democratic choice might diverge significantly from what any

309 Note that Rousseau ([1762] 2012, 182–185) himself is averse to communication, fearing that it will divide the people into factions which have only private and particular wills, but no general will any more.

310 As Habermas (1997, 133–34) puts it, in this discourse the *unforced force* ("zwangloser Zwang") of the better argument prevails.

311 Similar to Habermas's argument, Kelsen ([1934] 2008, 123–124) observes that so-called private rights are political as well, insofar as they also enable citizens to participate in political will-formation, and therefore in political governance.

312 See also Przeworski (2010, 26–27), Vallier (2018a, 1123).

individual would have chosen, even after undergoing public deliberation.[313] Communication may create acceptance for majority decisions, but it cannot overcome the deep cleavages that characterise many modern democracies, for instance between rural and urban areas or between owners and renters. As long as decisions are made by majority rule, members of the minority still surrender their autonomy.[314]

Yet this does not imply that majoritarian democracy is not a functional institutional type. It is just not the function of majoritarian democracy to enable citizens to rule themselves. Rather, the function of majoritarian democracy is to authorise governments to rule which are backed by shifting majorities of voters. Those citizens who are currently in the minority are not supposed to rule. This is not a construction error, but part of the definition of majoritarian democracy.[315]

Even though it is the function of majoritarian democracy to authorise a small set of rulers who are backed only by a part of the population (albeit the larger part of the citizenry), it is a functional institutional type. This is because majoritarian democracy is a procedural form of governance which does not privilege a group of people based on their social status.[316] Instead, it authorises those who meet certain procedural requirements.[317] Importantly, authority is transferred to another set of people if these now happen to meet the procedural requirement, and those transfers take place

313 Gaus (2011, 387–388) criticizes that deliberative democracy cannot account for deep disagreement; it must assume that consensus is achievable. Insofar as this is not the case, deliberations must end with a vote. According to him, this amounts to a majority dictating its evaluative standards upon a minority.

314 As Wolff (1998, 39) puts it, "[a] member of the minority […] appears to be in the position of a man who, deliberating on a moral question, rejects an alternative only to find it forced upon him by a superior power."

315 Tullock (1994, 40), too, misrepresents the function of democracy when he writes that "[t]he basic objective in democratic government is to have the government behave as much as possible in accordance with the wishes of its citizens. Unfortunately this frequently means only with the wishes of a majority."

316 This advantage also accrues to sortition-based forms of democracy. Since modern democracies are election-based, however, I focus on majoritarian democracy here.

317 Peter (2023, 200–206) also ascribes legitimacy to majoritarian democratic decisions on procedural grounds. Since her account of political legitimacy is primarily an epistemic one, however, she only understands democratic decision-making as legitimating in those situations where disagreement among citizens needs to be resolved but nobody has epistemic authority to which others ought to defer in making their political judgments. Moreover, she does not invoke the benefits of proceduralism but rather puts forward democracy on the grounds of citizens' equal moral permission to be decisive in such situations.

non-violently. This is an enormous benefit for all those living within the borders of the state which can hardly be overstated.[318]

In contrast, the narrative that democratic regimes are legitimate insofar as and to the extent that they enable "the People" to rule itself is an elusive myth which risks doing more harm than good. Although governmental authority is not a direct function of citizens' beliefs (see 2.3.3), a widespread perception that rulers lack political legitimacy may over time lead to an erosion of the rule of recognition. A belief in the myth therefore poses a risk to the stability even of legitimate regimes such as representative democracies.

Measured by the standard of self-rule, our democratic reality is only too likely to appear disappointing and corrupted. What Christopher Achen and Larry Bartels (2017) refer to as the *folk-theory of democracy* as "government of the people, by the people, for the people" (in reference to Lincoln 1863) is an illusion. The non-realisation of this ideal may fuel discontent with reality and the belief to be run by a self-serving elite (Achen and Bartels 2017, 8). Such anti-elitism is one of the two constitutive features of populism (the other being anti-pluralism) as defined by Jan-Werner Müller (2016, 19–20).[319] Müller (2016, 76) also directly relates the appeal of populism to the "broken" democratic promise of popular self-rule.

The narrative of self-rule may therefore even obscure the real and tangible merits of democratic regimes. An intellectually more honest—and no less worthy—reason to support democracy as a regime type is that it is a functional form of governance where power changes take place regularly and without violence. Democratic theory should thus be careful not to inadvertently underrate the legitimacy of existing democratic regimes (or

318 A similar observation has been made by other authors. Already Hume ([1748] 1994, 194–195) notes that a state's population does not so much wish to choose their leaders but to have an orderly succession of power without violence. Kelsen ([1920] 2013, 76), moreover, identifies democracy as the most promising consensual alternative to violent conflict. Similarly, Popper ([1945] 2013, 118–119), refusing to equate democracy with any essentialist notion such as "the rule of the people," emphasizes instead that elections offer a non-violent route to changes in governmental power and that democracy as a fallibilistic regime type protects individuals from tyranny. And Hayek ([1979] 1998, 5), while noticing that democracy does not embody individual freedom, values the non-violent changes of government as a necessary precondition for freedom.

319 Landemore (2021, 17) actually recognizes that her account of "Open Democracy" may be considered populist but is not to be bothered by this fact.

however one may want to call them)[320] by sticking to the myth of self-rule, without taking notice of the more fundamental credentials democracy has to offer in the form of individual benefits from non-violent changes of political authority and power.

5.2.2 *The Case of Persistent Minorities*

For citizens eligible to vote, majoritarian democracy holds the promise that their own preferences may one day become policy in their state. Even though there is no guarantee that this will happen, there is at least a chance because the electoral mechanism does not confer political authority based on pre-determined social characteristics but follows an open-ended procedure. It may turn out, however, that some people never see their preferences and values become policy because they belong to *persistent minorities* who systematically find themselves outvoted.[321] This may happen because policy preferences are not distributed randomly but tend to be correlated with social parameters.[322] Insofar as these correlations are stable, members of minority social groups find themselves excluded from any path to control a democratic government.[323]

The situation of persistent minorities can be described using the selectorate theory developed by Bueno des Mesquita et al. (2003). In their terminology, the *selectorate* comprises all those people who are eligible to vote or otherwise determine the ruler(s), whereas the *winning coalition* is the subset of the selectorate which is actually required for gaining and retaining authority. In a majoritarian democracy, the winning coalition

320 Robert Dahl (1956, 37) diagnoses that no existing regime lives up to the ideal of "populistic democracy" defined by the two requirements of popular sovereignty and political equality which are supposed to be jointly satisfied by majority rule. For this reason, Dahl (1956, 75–83) suggests that political science rather occupy itself with the more modest and better measurable concept of "polyarchy."

321 Simmons (1993, 94) therefore warns that majoritarian democracy entails the "problem of tyranny by permanent majorities."

322 Lipset and Rokkan (1990) provide evidence the party systems of several consolidated democracies are structured by deep social-structural *cleavages*, i.e. dividing lines along social and cultural differences. Examples of salient electoral cleavages are geographical location, ethnicity, language, religious denomination, and class.

323 As Przeworski (2009, 79–82) points out, the mere possibility of alternation in modern majoritarian democracies does not guarantee that different parties rule in turn. Only insofar as preferences change and/or parties are deficient in representing them can office alternate between parties.

constitutes a majority of the selectorate. This sets it apart from autocracies, where winning coalitions are much smaller. Insofar as there are entrenched social cleavages, however, citizens have different chances of ending up in the winning coalition, although they all have an equal vote as members of the selectorate. The structural impermeability of the winning coalition has the effect that the right to vote is more of a formality than a means to initiate a change of government.

A lack of political equality is a serious issue from the perspective of democratic theory. Democratic theorists consider equality to be a core value which democracy is supposed to serve.[324] This value is jeopardised if some citizens are de facto excluded from the polity's governance. Chiara Cordelli (2022, 70) therefore even claims that for political authority to be justified, there must be no persistent minorities. She holds that members of such minorities will perceive themselves as passive subjects, not as citizens who participate in a common political will. Arash Abizadeh (2021, 753) also fears that political equality would be undermined by entrenched social structures in a purely majoritarian system. This is why he argues that counter-majoritarian institutions such as representation and federalism are required to offset the numerical power of members of the majority and to restore equality.[325]

From a functional point of view, the case is somewhat different. An institution may be functional even if individuals are not treated equally. This may be the case, for example, for conventions solving games of the battle of the sexes type. What matters is not so much that citizens interact with each other as equals, but rather that all of them at least gain nonnegative benefits from an arrangement.

The problem with entrenched cleavage structures, however, is that it may undermine the procedural character of majoritarian democracy. This proceduralism is the very reason why democracy creates benefits. In a completely rigid society, rulers are effectively authorised based on social characteristics, not unlike in an autocracy. Of course, even in the limiting case, the effect of empowering rulers based on their membership in a certain social group would only happen accidentally in a majoritarian democracy. It would still not be part of the function of majoritarian democ-

324 See for example Abizadeh (2021, 743), Buchanan (2002, 710), Christiano (2004, 276), Dahl (1956, 37), Przeworski (2010, 32), Riker (1982, 5), Urbinati (2014, 19).

325 Note that Abizadeh (2021, 748) is not concerned with the outcome of a vote failing to equally align with the *preferences* of members of a minority. His argument addresses a lack of equal *agential power* he identifies with persistent minorities.

racy. Thus, majoritarian democracy is still a functional type. It might be the case, however, that tokens with deep and stable cleavages must count as dysfunctional.

As an example, consider a society which is deeply divided among its rural and urban population on all issues that people care about. If the rural folk is in the majority and both groups remain unchanged in size, urbanites will never see their policy preferences implemented on anything that matters to them. From their perspective, it might seem, living in a democracy is essentially not different to living in an autocracy where rulers are selected exclusively from the rural population. They apparently have no de facto chance of non-violently influencing policy.

This is certainly a marginal case. Real societies can be assumed to be much more dynamic due to changing birth rates and migration. Different cleavages may also cut across each other, making room for shifting coalitions. In the example, both urbanites and rural folk may additionally be divided among religious people and agnostics, which may impact their positions on certain policies. In this way, urban dwellers who adhere to the majority worldview may still have some of their preferred policies implemented. Although the same is not true for adherents of the minority position, the example is still highly oversimplified. In complex and pluralistic societies, each individual's identity is composed of a different set of manifold and overlapping group memberships (see also Young 2011, 48).[326] And the assumption that an individual's preferences are wholly determined by her identity is also too crude to be realistic.

Crucially, moreover, the functionality of a democracy-token is not so much a question of the social structure of the citizenry and its cleavages. Even in states where majorities alternate, governments exert authority over people who are not only excluded from the winning coalition, but even from the selectorate. Most prominently among those are minors and non-citizen residents. Although these people usually have the prospect of gaining (full) citizenship rights in a couple of years, some never will, and they all lack them in this moment. Thus, in contrast to members of persistent minorities, they do not even have a procedural *ex ante* chance

326 Group memberships which are relevant for an individual's identity may be either self-chosen, as in the case of religion, or externally imposed by means of social categories such as race or gender. This is why Pierik (2004, 535) distinguishes between *social groups*, which are categorised mainly by processes of external ascription, and *cultural communities* which self-categorise by means of what he calls inscription and community-building. Whereas social groups aim for recognition as members of the broader society, cultural communities have a distinct conception of the good life.

of non-violently determining who will be the state's rulers by means of a vote. A token of majoritarian democracy where these people are completely deprived of any influence on the policies they live under would arguably always be dysfunctional, whether or not there are persistent minorities in the citizenry.

It might appear, now, that no token of democracy can be legitimate because there are always people living under the government's authority who lack the right to vote. However, subjects of political authority who are excluded from the selectorate, just as members of persistent minorities, may still have a way to non-violently exert an impact on elections and policies. This is possible via the detour of public opinion. Deliberation, in the form of public discourse, is therefore indeed important for the function of democracy,[327] even if this function is taken to be non-violent changes of authority and policy, rather than popular self-rule (see 5.2.1).[328]

To guarantee an open public discourse, it must be institutionalised by constitutional provisions. In a functional democracy, every individual, not only citizens, must therefore enjoy the right to free speech, as well as the freedoms of assembly and association.[329] This gives them the opportunity to draw attention to their values and needs and to exert pressure on the

327 Gaus (2011, 387–388) criticises that in deeply divided societies, deliberation does not lead to consensus and must still end with a vote. This, he claims, amounts to a majority dictating its evaluative standards to a minority. It would, however, ask too much of deliberation to expect that it may overcome the power of majorities over minorities in majoritarian democracy. Rather, as Manin (1987, 359–60) argues, exactly because the majority decision goes against the interest of minorities, such minorities should have the chance to continually voice their position.

328 In democratic theory, in contrast, public opinion formation is considered to be a means to citizens' self-rule. For instance, Urbinati (2014, 24) argues that freedom of speech does not only protect citizens against political power but also maintains their own power. In the terms of Lafont (2019, 8–10), pure majoritarian proceduralism is a "democratic shortcut" around deliberation which requires the minority to blindly defer to majority judgements and therefore does not qualify as a form of self-governance. And according to Habermas (1997, 160), there must be a fundamental right of participation in processes of opinion and will formation to legally guarantee that the conditions are given for citizens to judge whether the law they legislate is legitimate according to his discourse principle.

329 Freedom of association may also have epistemic benefits for the political process. Sunstein (2005, 157), for instance, praises it as a tool to create many different perspectives and arguments. Even though groups might internally tend towards polarisation and conformity, the fact that there are many different groups should prove beneficial for society as a whole, he argues.

government without resorting to violence.[330] Insofar as regular elections take place, rulers are alert to public opinion, even if they hail from a social-structural majority group.[331] In this way, the regular and procedural determination of leaders still has a beneficial effect for all individuals, even though there are groups which lack a path to leadership, and some individuals are even (temporarily) excluded from the selectorate. It is therefore crucial for the functionality of majoritarian democracy that individuals enjoy the rights to make their opinions known and to protest such that a tyranny of the majority can be averted.

5.2.3 *Protecting Intense Minorities*

For the functionality of majoritarian democracies, not only the fate of persistent minorities matters. Democracies must protect the interests of minorities and disenfranchised groups, whether they are permanently in conflict with the majority position or only exceptionally. In particular, the treatment of what I call *intense minorities* is important not only for the functionality of a token of democratic governance but even for the legitimacy of the regime as a whole. This is because, insofar as majority decisions may threaten individuals' most fundamental interests, minorities need not be persistent to suffer net costs from the existence of a regime.[332]

330 Hampton ([1997] 2018, 111) also emphasizes that even though the procedure of voting does not lead to a decision which pleases everybody, it is possible for all sides to make their views heard while decisions are reversible at a later point in time. In this way, she argues, democracy makes disagreement productive and forestalls violent revolution by allowing for a peaceful change of government.

331 This is what distinguishes liberal democracies from constitutional monarchies which grant fundamental rights but are governed by a monarch. Although the latter can be justified as regimes, their form of governance is dysfunctional because individuals lack any leverage to non-violently shape policy.

332 The cases of persistent and intense minorities tend to get mixed up, however. For instance, Pettit (2012, 304) suggests addressing the issue of persistent minorities by excluding certain issues from political choice. Yet this solution is appropriate to tackle the problem of intense minorities instead. As I argued in the preceding section, the issue of persistent minorities is best addressed by granting free speech and freedom of association. Moreover, Pitkin (1966, 44) draws attention to the fact that members of a persistent minority group who are being abused and exploited by the majority lack a procedural means to challenge the majority's authority. Yet the fact that the majority is in the position to inflict severe harm on the minority is even problematic if the minority is only temporary.

Consider, for example, the case of a country where the legislature decides with a large majority to build a dam holding back a river in order to create a reservoir lake for the production of electric power. In the area to be flooded, however, there lies a small town which is surrounded by agricultural land. The bill does not provide for any form of compensation. Thus, once the river is dammed, the denizens of the town will lose their homes without replacement. Entrepreneurs will be deprived of their commercial premises and farmers will be dispossessed of their agricultural land. If the decision is in line with constitutional rules, there are no legal means by which the townspeople can fight the authoritative decision and even physical resistance against the overpowering executive will not stop its coercive implementation. Thus, the people from the town are worse off than they would be in the state of nature where they would be on an equal footing with encroaching neighbours.

Majoritarian democracy as a form of governance does not automatically protect individuals against unbearable externalities from political action. Yet it is a necessary condition for the functional legitimacy of a regime that individuals' basic interests are protected against a government yielding political authority and a monopoly of power, even if it is a democratic government. In other words, the fact that political authority is wielded democratically is not sufficient for the regime to be legitimate. To guarantee that a majoritarian democratic regime is even functional, it must be a *liberal democracy*[333] where individuals enjoy fundamental rights.[334] This requirement is straightforward insofar as *any* regime must be liberal in order to qualify as functional (see 4.3.2).

It is important, however, to emphasize that for protecting intense minorities, it does not suffice to merely require that decisions be made with a supermajority. This is because the minority affected may be infinitesimally small. In the case of the dam, imagine that decisions are made by direct democracy and that the society has one million inhabitants, 9,999 of whom live in the small town. Then the law might still pass even if the supermajority quorum was 99 percent. This would be the case if all 990,001 individuals who do not live in the town but stand to benefit from the dam would vote

333 The case for democratic regimes (like all other regimes) to be liberal is different from the so-called liberal view of democracy. According to Riker (1982, 9–14), the latter conceptualises the control exercised through elections as sufficient for liberty—in contrast to Rousseauvian populism, which identifies popular rule with liberty itself.

334 As Stemmer (2013, 188) notes, majority rule would hardly be bearable without fundamental rights which restrict the majority's power.

in favour of it. Supermajority rules thus cannot securely guarantee that all individuals yield nonnegative benefits.

Notably, this problem is insufficiently accounted for in Buchanan and Tullock's constitutional model which aims to strike a balance in the supposed trade-off between individual protection and facilitated decision-making. Buchanan and Tullock ([1962] 1999, 130–31) even suggest that constitutions provide special rules for issues which are particularly likely to intensely affect minorities. Yet their approach is unsatisfactory for two reasons. For one thing, Buchanan and Tullock ([1962] 1999, 47) already presuppose individual and property rights, as well as sanctions in case of their violation, to exist at the constitutional stage, omitting their definition from the analysis.[335] What is more, however, the protection suggested by Buchanan and Tullock for such "rights" consists merely in raising the internal costs for changing them. This takes place by adding further veto players,[336] i.e. by requiring the assent of more individuals by means of supermajority rules, or another institutional agent such as a second chamber.

On the one hand, Buchanan and Tullock ([1962] 1999, 73–75, 82) envision higher majority thresholds for issues which affect changes in individual and property rights where externalities from collective action may be particularly high. This would have the effect that changes in such rights become more difficult because more people need to agree. Moreover, Buchanan and Tullock ([1962] 1999, 241) point out that bicameral legislatures have higher thresholds for issues about which a minority cares more strongly than the majority, compared to an equal or random distribution of preference intensities. Yet increasing the internal costs of collective decision-making by adding more veto players is insufficient to guard individuals against intensive externalities. As Buchanan and Tullock ([1962] 1999, 72) themselves underscore, any decision rule short of unanimity exposes the individual to the risk of external costs.[337] Supermajority decisions do

335 In *The Limits of Liberty*, Buchanan ([1975] 2000, 11–12) himself notes that this question was left out in *The Calculus of Consent*.

336 Tsebelis (2002, 19) defines veto players as agents whose consent is required for changing an existing policy. Institutional veto players may be defined by the constitution, such as the president, the House of Representatives, and the Senate in the US. There may also be veto players without an institutional role, such as political parties.

337 Elsewhere, Buchanan ([1986] 2001, 170) even claims that having a say in delineating the private from the public sphere is more valuable to the individual than being entitled to vote.

not provide sufficient protection to intense minorities in the democratic process of legislation.

In the limit, an intense minority might consist of one single individual who could only be protected by a rule of unanimity. In other words, every individual would need to be a veto player on her own to fend off collective action exposing them to excessive harm. For sensitive issues which threaten an individual's freedom, bodily integrity or livelihood, unanimity is the only decision rule which guarantees functionality, provided no other institutional mechanisms are in place. Any less restrictive rule allows for the adoption of laws which put some individual(s) in a situation which for them is worse than the state of nature.[338]

Since the individuals affected will never consent to a policy depriving them of what they care for most, unanimity in sensitive decisions effectively means to ban these issues from collective choice. Indeed, effectively protecting what individuals feel most strongly about can be achieved at minimal internal costs by completely excluding those and only those issues from the sphere of political authority where individuals and minorities are intensely vulnerable to majority decisions (see 4.2.2). A legitimate regime must therefore exclude the mere possibility of passing intensely harmful laws such as laws mandating that mentally ill people are to be sterilised, that adherents of a particular religion may be killed and used as organ donors, or that the unemployed may be utilised as compulsory labourers by the government.

Insofar as individual rights are protected by the constitution and exempted from the range of political authority altogether, they become *inalienable*. This sets them apart from rights in Buchanan and Tullock's sense which merely require broad coalitions to be changed. Although Buchanan and Tullock ([1962] 1999, 250) note that "the doctrine of inalienable rights—institutionally embodied in constitutional provisions limiting the authority of legislative majorities" is compatible with their approach, they only consider it as tangential to their project.

From the perspective of functional legitimacy, however, inalienable rights are a requirement of political legitimacy, even in a majoritarian or supermajoritarian democracy which provides some precautions against in-

338 Elsewhere, Buchanan ([1993] 2001, 259) fittingly warns that "[t]he tyranny of the majority is no less real than any other, and, indeed, it may be more dangerous because it feeds on the idealistic illusion that participation is all that matters."

fringements of minority interests.[339] Their existence is what makes political authority legitimate, not the fact that it is based on the support of a majority of citizens.[340] Majorities may also adopt dysfunctional policies.[341] Yet this does not threaten the functionality of the regime as long as individuals' inalienable rights are being respected and the costs from particular policies do not outweigh the general benefits of peaceful coexistence. To this end, certain issues must be exempt from majority decisions.[342]

Inalienable rights need not only be enshrined in a constitutional document; they must also be respected. This is why in all functional regimes, including democracies, government officials must adhere to the rule of law. Moreover, inalienable rights must be legally recoverable to effectively protect individuals and minorities. Thus, regimes must provide individuals with the option to take legal action if they see their fundamental rights threatened or violated, either in a constitutional court or within the regular judicial system.

5.3 The Legitimacy of Public Funds

5.3.1 *The Arbitrariness of the Status Quo*

A functional regime must grant individuals inalienable rights but beyond that, the government enjoys much leeway. In particular, it may interfere with the structure of existing property rights by raising public funds such

339 This is in notable difference to Rawls (1971, 224) who makes the case for majority rule which is not restricted by constitutional provisions such as supermajority requirements, a bill of rights, or a bicameral legislature. His argument is that the simple majority rule maximises the equal political liberty of individuals whereas constitutional restrictions limit participation, although they may be compatible with political equality.

340 In contrast, Przeworski (2009, 86–88) claims that democratic self-government can only take the form of "counting heads," even though a numerical minority may feel much more intensely about an issue than the rather unaffected majority. He holds that countermajoritarian devices such as constitutions or veto players only protect the interests of the wealthy against the majority of the not-so well off. Yet this argument is flawed insofar as fundamental rights protect *everyone* against unacceptable collective decisions, including the poor.

341 Similarly, Rawls (1971, 356) holds that although the majority has the right to make laws given that the background structure is just, this is no guarantee that the laws enacted by the majority will be just as well.

342 See also Nagel (1987, 239) who describes majority decisions in democracies as instances where it is justified to let a majority decide at all.

as taxes or compulsory social security contributions. Governments may use these funds to provide public goods and to redistribute income and wealth for social purposes. Such fiscal manoeuvres are compatible with the functionality of the regime at large insofar as the rule of law prevails and the government respects individuals' fundamental rights. Nevertheless, it is an open question whether public spending is functional in its own right as a subordinate institution.

The idea that the government, unsolicitedly providing public goods and acting as a "welfare state," is entitled to interfere with the property rights claims of individuals is met with particular resistance on the part of libertarians. This is because libertarianism considers the only justifiable *raison d'être* of government to consist in the protection of pre-political property rights claims (see 4.2.3). Such existing rights claims, however, are heavily influenced by contingent path dependencies. From a functional perspective, it may therefore be the case that a particular system of property rights is itself illegitimate, in the sense that its existence entails net costs for some individuals who incur the burden of having to respect rights claims.

Libertarians consider a structure of property claims legitimate if and only if it has historically come about voluntarily, without a violation of pre-existing property rights.[343] At the outset, rights are supposed to originate in initial acquisition, as held in the Lockean tradition, or negotiated at the constitutional stage, as argued for by Buchanan ([1975] 2000, 37). These rights are to some degree arbitrary, reflecting differences in strength and opportunity.

According to Locke ([1689] 2005, 286), the things created "by the spontaneous hand of Nature" belong to all humankind together. Yet since people possess their bodies, they also possess their labour and whatever they take from nature and thereby mix it with their labour. In this way, it is possible to appropriate goods, under the only restriction that "there is enough, and as good left in common for others" (Locke [1689] 2005, 287–288).[344] Libertarian Lockeans such as Narveson and Nozick adopt this assumption.[345] Moreover, they hold that property rights can only be transferred voluntarily

343 See for example Buchanan ([1975] 2000, 27–28), Narveson (1988, 151), Nozick (1974, 153–55).

344 This condition has been popularised by Robert Nozick as the "Lockean proviso." Nozick (1974, 178) subscribes to the proviso in the weak form which requires that enough must be left for others to use, claiming that the proviso may only be violated if the others affected are being compensated otherwise.

345 Narveson (1988, 85), Nozick (1974, 151).

after the initial acquisition, in exchange against other property rights or as gifts.[346]

Buchanan, in contrast to Locke, does not assume natural rights in a strict sense. In his theory, property rights which individuals exchange at the post-constitutional stage during the trade of goods are initially defined in negotiations at the constitutional stage, which is akin to a Hobbesian state of nature (Buchanan [1975] 2000, 40).[347] Concluding the constitutional contract, however, presupposes a "natural equilibrium" of predation, production and defence, he claims (Buchanan [1975] 2000, 76).[348] The proto-property rights which are defined by this equilibrium and serve as the basis for the constitutional contract are completely contingent upon individuals' personal circumstances and skills. A one-time initial redistribution of these natural claims may be required to reach consent to the constitutional contract (Buchanan [1975] 2000, 83). Once the constitutional contract is in place, however, transfers in property must be consensual, he claims (Buchanan [1975] 2000, 50).

Both the Lockean strand of libertarianism and Buchanan's idiosyncratic version have in common that they enshrine claims which are the product of historical contingencies and withdraw them from the government's authority. Yet the fact that people *have* certain rights, even if they acquired them before the current regime, or even before the state came into existence, does not mean that they are *justified* to have them according to the functional account. Existing property rights regimes may well be dysfunctional, e.g. if they cement privileges for members of a certain gender, class, caste, or ethnicity. Rather than taking it as given, the status quo is itself to be evaluated against to the contractarian measure of unanimous and voluntary consent (see also Vanberg 2004, 162–63).

In the counterfactual choice situation, which abstracts away from all existing property rights, the condition of unanimity is crucial to determine whether a system of property rights is functional. Insofar as a regime meets this test, the government is justified to define and re-define property rights claims. Libertarians' insistence that legislative decisions concerning property rights must be unanimous entails a conservatism with respect to

346 Narveson (1988, 94), Nozick (1974, 160).

347 Buchanan ([1975] 2000, 38, footnote) is aware that rights have historically developed in an evolutionary way, not being the result of an actual contract. Yet he assumes otherwise for analytical reasons.

348 Here, Buchanan diverges from Hobbes for whom no equilibrium is possible in the state of nature because individuals are equally vulnerable to each other.

property rights which is not always warranted from a functional perspective.[349] This is because, within an existing society, unanimity protects the institutional status quo.[350] Elinor Ostrom (1986, 13) sums it up as follows: "There is nothing inherently conservative about a unanimity rule unless the default condition is the status quo."[351]

This is exactly where libertarianism differs from the functional conception of legitimacy. Functional legitimacy employs the state of nature as a baseline and uses the criterion of unanimous consent under these counterfactual circumstances as the measure to determine that the *existence* of an institution is legitimate. Libertarianism, in contrast, evaluates a *change* in an institution in terms of unanimous consent in the status quo. This is a very different approach from functional legitimacy.[352]

In particular, a concern for protecting existing and pre-political property rights against changes does not follow from the fundamental liberal right to property which a functional regime must grant. Functional legitimacy only demands that the government must respect those rights which it defined and that expropriations, if they take place at all, must be compensated. The government may, however, create new property claims and redefine property rights by changing the tax code or other regulations without committing expropriation.

Nevertheless, a pragmatic reason for governments not to interfere with existing property rights might be that these rights impose constraints on what is implementable. On Buchanan's ([1975] 2000, 107–10) account, people will not accept governmental interference with their rights as binding

349 In contrast, Meadowcroft (2014, 97) argues that Buchanan's contractarianism is not a conservative defence of the status quo, pointing out that Buchanan charges current institutions to lack legitimacy and calls for a constitutional revolution. Indeed, Buchanan ([1975] 2000, 213) envisions a constitutional revolution. The reason, however, is that he believes the government to have overstepped its bounds and violated citizens' pre-existent rights claims.

350 Munger and Vanberg (2023) also hold that Buchanan's theory is biased in favour of the status quo insofar as it privileges those individuals who do well in the status quo, which is a consequence of his employment of unanimity as a criterion for evaluating the legitimacy of institutional changes.

351 Munger and Vanberg (2023) note that even under simple majority rule, normatively problematic structures may be perpetuated if at least half of the population benefits. Here again, the conservatism lies not in the decision rule but in the status quo which is chosen as the baseline.

352 As Munger and Vanberg (2023) point out, Buchanan does not even give a criterion for judging the legitimacy or illegitimacy of existing regimes. He is only concerned with determining whether a suggested change to an existing constitution counts as legitimate.

because it violates the constitutional contract. Thus, they will only comply with the law if the prospect of being sanctioned is sufficiently threatening. In the long run, he warns, even the stability of the legal order is threatened when the protective state enforces rights which do not square with individuals' bargaining power and the government thus loses its authority.

To visualise the idea, take an example from the sphere of traffic. The city council wants to strengthen the rights of cyclists and decides to phase traffic lights such that the optimal speed for catching a "green wave" is 18 kilometres per hour. Yet car drivers, used to an uninterrupted traffic flow, may prefer not to comply and simply drive through the red traffic lights rather than slow down. In this way, the coordinative function of traffic lights is undermined and traffic rules in general forfeit their usefulness as heuristics for how other road users will behave. To keep up the order and maintain its own authority, the council would probably need to install more radar traps, which massively increases enforcement costs.

In the same vein as Buchanan, Michael Munger (2018) argues that the status quo is relevant because existing power structures impose a limit on what is feasible. Likewise, John Meadowcroft (2014, 96–99) holds that redistributive policies which are not in everyone's interest lack a realistic account of power.[353] And Binmore (1998, 348), too, shares Buchanan's position that the status quo must be the starting point of social contract negotiations because this is a requirement for its acceptability.[354]

These arguments make it seem as if a government's authority was very fragile and easily undermined by non-consensual legislation. That impression, however, is not warranted in a stable regime. If the government effectively wields political authority, it is authorised to change existing rights by virtue of its very authority. Citizens and residents will recognize any alterations in their property rights insofar as they recognize the bindingness of the legal order, on which they are dependent, and the authority of the government. The government, moreover, is empowered to enforce the legal order by means of its executive branch which deters resistance.

353 Meadowcroft (2014, 96–99) even claims that, by setting a precedent of non-consensual legislation, social democratic policies will eventually erode the constitutional contract such that nobody can count on having any rights against predation anymore.

354 Moreover, Binmore (1998, 348) interprets Buchanan's reference to an underlying equilibrium in the state of nature as an expression of the fact that any social contract must be feasible, i.e. an equilibrium in the "game of life."

In certain passages, even Buchanan, ([1975] 2000, 54-8, 61-63, 94, 111-112, 227) allows for political changes in property rights made by a majority, insofar as this is specified by the constitutional contract.[355] The idea is that individuals at the constitutional stage unanimously agree on non-unanimous decision-rules for the post-constitutional provision of public goods.[356] This premise implies that individuals' rights are inextricably linked to accepting membership in a polity with defined collective decision rules. Thus, rights are not conceived as pre-political but as a consequence of the legal order and subject to legislation. Such an understanding of property rights is much more compatible with the functional conception of legitimacy.

Property, on the functional account, is not an end in itself but contributes to the function of a legal order of providing security and peace for the citizens and residents of a state. If it is clearly defined what belongs to whom, individuals need not be afraid that they wake up one day with nothing to support themselves. This is what they would need to fear in the state of nature where there are no positive claims to property.[357] A peaceful political order and security of one's possessions are also necessary for individuals to find it worthwhile to be productive and to engage in mutually beneficial exchange (Olson 1993, 567–72). Since a functioning economy with production and trade is the basis of all individuals' livelihood, a system of clearly defined property rights is crucial for any functional regime (see 4.2.3).[358]

That property rights claims must be defined, however, does not preclude that the government may define them in a way that displeases those individuals who amassed or inherited riches which have their origin in brute force or in dysfunctional social practices such as slavery, coerced labour, or racism. Neither does it rule out that governments may levy taxes or social security contributions, as long as they adhere to constitutional rules.

355 G. Vanberg (2020, 664) also holds that the tension between democratic decision-making and constitutionalism can be solved at the constitutional level, where individuals unanimously select regimes with both majoritarian governance and constitutional restrictions on political authority.

356 There is a close affinity between this suggestion and the model used by Buchanan and Tullock ([1962] 1999).

357 See Hobbes ([1651] 1996, 90), Locke ([1689] 2005, 350), Rousseau ([1762] 2012, 176).

358 See also Mises ([1929] 2011, 14) who denies that private property is an institution which only serves the propertied classes at the expense of everyone else. If the latter was the case, he claims, private property ought indeed to be abolished. Functional legitimacy would have the same implication.

A certain amount of redistribution may even be required in a functional regime. The social contract rationale provides a strong case to guarantee a social minimum to individuals who cannot support themselves (see also Kavka 1986, 211–212).[359] This follows from the fact that individuals mainly enter the social contract in order to obtain security.[360] If the poor have nothing left to lose, they are not only as miserable as they would be in the state of nature. In fact, they are even worse off because they are additionally subjected to a property rights regime which bans them from taking goods from others, which would be possible in the state of nature.[361] A regime with such a system of property rights would accordingly be dysfunctional. Thus, functional legitimacy demands that everyone within the state is guaranteed a social minimum which ensures that they are materially not worse off than in the state of nature.

5.3.2 *The Justifiable Size of the Public Budget*

A public budget can be considered a functional institutional type insofar as controlling its own funds enables the government to create security and peace. Raising money provides the government with the resources to maintain internal and external order, as well as to ensure that all people in the state achieve the social minimum of material security. Beyond these existential functions, however, governments tend to use their funds to provide a wide range of other goods and services. Yet it may be doubted whether extensive public-sector tokens qualify as legitimate according to the functional account. The reason is that people incur high costs from paying for many public goods and services, few of which actually benefit them. Many "public goods," in fact, are not public in the sense that everybody wants them equally, or even at all (see also Gaus 2011, 534).[362] Examples are subsi-

359 Kavka (1986, 223) claims that Hobbes himself envisions a guaranteed economic minimum for those who cannot work.

360 Note that even Hayek ([1979] 1998, 55), who is generally sceptical of government interventions, considers the provision of a minimum income or social security net as an essential part of the anonymous "Great Society" where poor relief is no longer organised by personal networks.

361 This is why Buchanan ([1975] 2000, 83) envisions that before a constitutional contract can even be concluded, some initial transfer of resources must take place.

362 Treisman (2007, 177) argues that even the medical specialisation of a local hospital benefits some groups more than others, e.g. families with young children or senior citizens.

dies for cultural establishments, public childcare funding, or the provision of free highways (since not everyone has a car).

This may be seen as a reason to call for a *small state* where the public sector is subject to strict limitations. For instance, Buchanan ([1975] 2000, 130–131) cautions that if the government becomes larger, i.e. provides more goods and services, the probability rises that the individual loses out on total. He considers this threat to be particularly intensified by majority voting.[363] Buchanan ([1975] 2000, 204–205) even voices the apprehension that a democratic government may turn into a Leviathan with an inflated budget, arguing that constitutional restrictions on spending are necessary to avert this threat. And Nozick (1974, 149) leaves no room for doubt when he claims that "[t]he minimal state is the most extensive state that can be justified."

Apparently, taxation for purely redistributive purposes is a zero-sum matter (see for example Mueller 1998, 182), taking resources from some to give them to others. It must be noted, however, that even goods and services that governments provide to directly benefit some individuals, e.g. by means of transfers or by providing an infrastructure for them, may be considered public. This is the case insofar as these policies cause positive externalities for all members of society (see also Tiebout 1956, 416–417).[364] If these benefits are sufficiently high, they may outweigh not only the costs borne by those who make use of the good or service themselves, but even the costs for all other contributors. Under this condition, such goods and services are functional.

Subsidised childcare is arguably a public service which falls in this category. Although only parents of young children benefit in monetary terms, there are indirect (potentially net) benefits for all members of society

363 Accordingly, Buchanan ([1975] 2000, 195–196) claims that majority voting can lead to a level of public expenditure at which everybody pays more than they obtain. Insofar as taxes are taken from all individuals but need not benefit everybody equally, he fears, the public sector will be inefficiently large. In a footnote, however, Buchanan ([1975] 2000, 196) points out that the bias towards a larger state is a historical fact, but not a theoretical necessity. If benefits of public spending, rather than the costs of taxation, would have to be distributed equally, the public sector would be systematically too small.

364 Cordelli (2022, 26–27) argues that if the public sphere was defined based on calculations of externalities, there would be an underproduction of education and an overproduction of public fireworks. This argument, however, overlooks that there arise not only positive externalities but also costs from the collective provision of fireworks. Conversely, not only costs but also external benefits are entailed by public education.

insofar as parents can work more hours, increasing the economy's productivity. Moreover, subsidies for childcare might slow down falling birth rates, which in the long run stabilises labour supply and the pension system.

The externalities argument also extends to forms of poor relief that go beyond the social minimum. Accordingly, the rich may actually benefit from supporting the poor. Murphy and Nagel (2002, 86), for instance, make the point that the public provision of certain social and cultural goods to the lower classes may have positive spill-over effects for wealthy people. The examples they give are economic benefits from public education and the value of living in cities where people with a variety of backgrounds and occupations find a home. One might also add certain health care services here: Even though the rich can buy private health insurance, they have an interest in public hygiene and in preventing the spread of communicable diseases.

Kavka (1986, 441), moreover, lists three concrete benefits of a social insurance scheme which also accrue to the rich: (1) their future selves or their children may themselves fall upon hard times and benefit from assistance to the poor, (2) redistributive schemes can contribute to equality of opportunity, which in turn is conducive to economic productivity, and (3) if the poor have a stake in the existing social order, they pose a much lesser threat to the stability of the regime.[365]

There are, however, also public expenses which do not qualify as public goods at all. In other words, they do not even indirectly benefit all contributors through net positive externalities. For instance, public broadcasters, financed by mandatory fees, may purchase the expensive television rights for sports events which only a subset of citizens and residents is interested in watching. This spending decision, seen in isolation, cannot be considered functional.[366] Sports-averse individuals would be better off if overall fees were lower and everyone could privately spend their money on programmes they actually enjoy watching.

365 In a similar vein as the last point, Buchanan ([1975] 2000, 94–95) notes that it may be worthwhile for the better-off to accept a one-off redistribution of goods in exchange for their remaining property rights to be honoured.

366 Similarly, Gaus (2011, 534–535) emphasizes that to be publicly justified, a policy providing a public good at a certain cost must be worthwhile for all individuals to whom it is to be justified.

Should such dysfunctional public spending policies be constitutionally banned? This is what libertarian-leaning authors tend to argue.[367] The result of constitutional restrictions on adopting spending policies which impose net costs on any individual would be a fairly small state, allowing only for such expenses which entail net positive externalities for all contributors.[368] Governments of states with large and heterogeneous societies in particular will find it difficult to come up with concrete spending policies which do not impose net costs on anyone.

A large public budget, however, need not be dysfunctional on the whole, even if it comprises subordinate policies which are. Keeping the government's fund small may thus turn out to be overcautious, depriving individuals of the possibility to gain net benefits from a more generous public spending scheme. Constitutions, however, should not only restrict rulers from pursuing policies which impose net costs on the ruled. At the same time, they should also enable them to create cooperative benefits (see also Vanberg 2008, 115–16). Adopting dysfunctional policies can be understood as a false positive error and not passing functional law as a false negative. A constitutional design which prevents the adoption of any dysfunctional redistributive scheme aims exclusively at minimising false positives while tolerating false negatives. It is thus short-sighted since both types of errors entail costs.[369]

The costs of false negatives may not be as apparent as the costs of false positives. This is because they are *opportunity costs*, i.e. foregone benefits. For instance, Buchanan and Tullock ([1962] 1999, 258) claim that there is a fundamental difference between adopting and blocking public policy, as the former entails external costs whereas the latter prevents them.[370] Yet this

367 Muldoon (2016, 103–5), for example, demands that the distribution of benefits from social cooperation must be according to the Pareto principle. Narveson (1988, 232) rejects taxation and the provision of goods and services for which the individual has no demand. And according to Vanberg (2006, 93), redistribution must at least *ex ante* benefit everybody who is to contribute to it, functioning as an insurance scheme.

368 Other goods, as long as their usage is excludable, might be provided according to the "benefit approach" suggested by Mueller (1998). This would mean that those and only those individuals ought to contribute to public infrastructure such as roads, bridges, or parks, who actually use them, provided that their use is excludable. For instance, if technologically possible, highway tolls ought to be introduced, ensuring that only those pay for the infrastructure who actually benefit from it.

369 See also Vallier (2018b, 125), Vanberg (2000, 20).

370 This is surprising insofar as, in the appendix of *The Calculus of Consent*, Buchanan ([1962] 1999, 323) actually notes that both types of error may entail costs.

view ignores the opportunity costs of unrealised benefits from collective action, that is, the costs of false negatives. If blocking public spending is systematically easier than granting it, people would be deprived of net benefits they could otherwise realise.[371]

A constitution which enshrines a small public budget where all subordinate spending policies must be functional on their own thus potentially obstructs the creation of a functional, i.e. mutually beneficial, public spending scheme. On the functional account, in contrast, relatively large budget tokens may be legitimate, as long as all individuals benefit from their existence in total.[372] In a nutshell, functional legitimacy requires the limited government of liberalism, but not the libertarian minimal state.

5.4 Diversity and Decentralisation

5.4.1 *The Costs of Diversity*

Modern states are characterised by large populations.[373] Particularly in rich democracies, moreover, people tend to exhibit a wide variety of identities, assumptions about the world, preferences for public goods, and value systems, which translate into very different ideas concerning which policy choices are the right ones. For such large and heterogeneous societies, it becomes increasingly difficult to pass policies that please everybody. Insofar as people disagree about the goals of political decision-making, political disagreement is irresolvable by argumentation. In such a situation, many citizens and residents will merely feel subjugated to authority and the existing legal order.[374]

371 Gaus (2011, 458–60) accordingly notes that Buchanan and Tullock's ideal decision rule, which he conceptualises as a supermajority rule, outperforms the majority rule in reducing false positives while doing worse when it comes to false negatives.

372 Invoking the principle of fair play, Klosko (1987, 255–256), too, argues that the individual is obligated to comply with a scheme of public goods beyond the minimal state as long as the overall benefits do not exceed the overall costs. Even Hayek ([1979] 1998, 45) argues that a system of public spending can be justified as an exchange: Whereas most individuals will need to contribute to goods and services they do not care about, they will be in favour of a system of taxation as long as they expect to benefit as least as much as they pay in total.

373 Every member state of the United Nations has more than 10,000 inhabitants, and in four fifths of member states, the count exceeds one million.

374 See also Moehler (2018, 1–2), Müller (2019, 159).

This is no surprise because diversity has the consequence that the legal order is characterised by a high amount of dysfunctional primary law. Although the regime in itself is legitimate, such deep diversity makes it simply impossible to have laws that provide net benefits for all individuals, particularly in certain domains. Examples for policies with irresolvable disagreement are the legalisation or prohibition, respectively, of assisted suicide, drugs, prostitution, fire weapons, or abortion. Such policies are purely zero-sum, i.e. they entail costs for some individuals if they are passed and opportunity costs for others if they are not passed. Either way, the costs are high for some part of the population.

The issue with such contested policies is the fact that they are adopted by a part of the state's large and diverse population but become binding for everyone within its borders. Whereas both more lenient and more strict constitutional rules for legislation would simply favour one substantial position,[375] it appears that political authority concerning contested issues should rather be divided analogously to the divided population.[376] Thus, it seems, such a state should be organised in smaller and more homogeneous jurisdictions below the central government. If the constitution is designed such that political authority is located at more than one level, the regime is a *federal* one.[377] William Riker (1964, 11) classically defines federalism as follows:

> A constitution is federal if (1) two levels of government rule the same land and people, (2) each level has at least one area of action in which

375 Since both regulation and deregulation can be dysfunctional, it is no help to resort to more laissez-faire in these situations. Realising that the costs of political organisation increase with the size and diversity of a society, Buchanan and Tullock ([1962] 1999, 115–16) prescribe a higher degree of private organisation of activities for those societies with deep disagreement on values. Yet laissez-faire is not a neutral option. The individuals benefitting from less regulation are those with libertarian views, but those with more demand for more public guidelines incur substantial costs. The problem in such societies is precisely that it is both costly to adopt certain policies and not to adopt them.

376 As Buchanan (1986, 252–253) observes, in a situation of political decision-making between two alternatives, it would be better for everyone to get what they want, rather than centrally choosing one option for the whole population. This would constitute a Pareto-improvement since external costs would be eradicated for individuals who are otherwise being outvoted, without imposing new externalities on anybody else.

377 Treisman (2007, 23–26) distinguishes political from administrative decentralisation. Only political decentralisation, where lower tiers have some political authority, qualifies as federalism.

> it is autonomous, and (3) there is some guarantee (even though merely a statement in the constitution) of the autonomy of each government in its own sphere.[378]

From a functional perspective, the appeal of a federal system where political authority is decentralised to lower levels is that it may mitigate the costs arising from diversity by allowing for different legal regulations of the same issue within the same state. In other words, the decentralisation of political authority makes it possible to have a horizontal variety of parallel jurisdictions with different sets of regulation, taking the geographical distribution of political positions and cultural preferences into account. Individuals benefit from decentralisation insofar as policies which are adopted at the lower level are matched closer to their respective preferences (see also Ederveen, Gelauff, and Pelkmans 2008, 23).

As Nozick (1974, 312) aptly points out, people are so different that there is not one single Utopia for all of them. Utopia can therefore only be understood as a "meta-utopia," a framework which includes a plurality of utopias. Whereas for Nozick (1974, 333–334) himself, the framework for Utopia is embodied by the minimal state, functional legitimacy allows for an extensive public sector, under the premise that it creates net benefits for all individuals (see 5.3.2). Federalism may help ensure that this is indeed the case, by tailoring policies to the set of people who actually benefit from them.[379] In this way, it may be possible to reduce the number of dysfunctional policies without sacrificing functional ones in exchange. In other words, federalism offers the chance of creating institutional benefits without any costs. It may thus be the framework for Utopia of functional legitimacy.

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378 Another definition is given by Bednar (2009, 18–22) who lists three criteria for federalism: geopolitical division, independent bases of authority and direct governance.

379 A very different case for decentralising political authority is made by Thunder (2024). Based on an Aristotelian account of human flourishing, he argues that individuals can only experience essential human capacities within communities and that a good life is constituted by membership in communities. A single and overarching legal order, Thunder claims, does not allow for membership within several communities, which is constitutive of a good life. Instead, there should be voluntary and bottom-up communities where rulers are epistemically, culturally, and spatially close to the ruled.

5.4.2 *The Problem of Local Minorities*

The way in which federalism may reduce the number of dysfunctional policies in a legal order is that diversity within sub-jurisdictions might be lower. If people living close to each other have the same policy values, the same decision can create net benefits for all of them. This is intuitively plausible. Take the case of a multi-lingual federation such as Belgium, Canada, or Switzerland.[380] People within different geographic sub-units speak different languages and follow different customs.[381] If linguistic and cultural policies were made at the central level, as a one-size-fits-all solution, many individuals would be unhappy and feel alienation towards their rulers.[382] This would be the case even if the central government was elected by a majority of citizens of the whole state.[383]

To be sure, a parallel variety of law could also be decided by the legislative at the central level and merely be administered by local executive officials, as suggested by Daniel Treisman (2007, 58).[384] Lower-level governments, however, seem to have a twofold advantage. First, officials have direct access to local knowledge.[385] And second, they are also electorally accountable to lower-level jurisdictional constituencies. This gives them an incentive to cater to the interests of their respective constituents—or at least to a majority of them.

380 If the European Union should one day become a federation, its internal heterogeneity of cultures and languages would be even higher.

381 Weinstock (2001, 79) makes the point that in multi-ethnic societies, federalism is conducive to political equity, insofar as it confers the clout to be decisive in certain decisions of central importance to cultural minorities.

382 According to Hayek ([1979] 1998, 146), the "widely felt inhumanity of the modern society" is due to political centralisation which deprives individuals of the right to co-determine local issues. Allard-Tremblay (2017, 702), moreover, argues that decentralised decision-making can create epistemic acceptance for the exercise of political power which would not be possible for centralised decisions.

383 Kelsen ([1920] 2013, 75) even argues that majority decisions only make sense within culturally and linguistically uniform polities. These may be located at a lower level than the central state.

384 Treisman (2007, 60–61) notes that combining political centralisation with administrative decentralisation may even internalise positive spill-over effects if several lower-tier jurisdictions have the same preferences, e.g. if there are dispersed communities of the same linguistic minority.

385 See also Allard-Tremblay (2017, 701), Oates (2004, 315).

This caveat, however, must be taken seriously in a regime with democratic governance.[386] Territorial sub-jurisdictions in a federal state may be homogeneous in terms of language, culture, or religion, but they may exhibit a high level of diversity in other dimensions where those in the minority are still being outvoted. There is no reason to suppose that many substantial policy preferences are correlated with geographical location. Moreover, even ethnic and religious minorities do not benefit from decentralisation if they are dispersed through the whole territory of the state and live in different lower-level jurisdictions (see also Treisman 2007, 239).[387] The same applies to sexual minorities who are particularly prone to being scattered across federal sub-jurisdictions, finding themselves in the minority everywhere. The only way for such minorities to influence sub-jurisdictional policies is by means of public opinion.

Local majorities need, however, not be open to the arguments from minorities. They may even be more extreme in their position towards minorities than the majority at the central level. Consider the case of gay marriage which is actually discussed by Richard Schragger (2005) as well as Erin O'Hara and Larry Ribstein (2009, 161–71) as an example for the benefits of federalism.[388] If a conservative majority in a lower-level jurisdiction bans same-sex marriage, it thereby withholds the benefits of marriage from homosexual couples within the jurisdiction. This might not have happened if the decision would have been taken at the central level, given that the nationwide majority is more tolerant. Under such circumstances, granting authority to local majorities entails that homosexual couples who are denied the benefits of marriage incur net opportunity costs from federalism.

386 In non-democratic regimes, rulers are not accountable to any constituency, so this argument for decentralisation becomes obsolete.

387 Treisman (2007, 241–43), moreover, cautions that decentralisation along ethnic lines might induce radicalisation and weaken identification with the centre. As an alternative, he suggests veto and representation rights at the central level. As the example of the European Union shows, however, decentralisation and representation may also be combined.

388 According to Schragger (2005, 154–56), the authority to issue marriage certificates should rest with cities since marriage is the sanctioning of a union by a local community. He envisions marriage status to depend on residency within a city which acknowledges the union. Making marriage status dependent on residency, however, creates problems if one or both partners move away. O'Hara and Ribstein (2009, 165–66), who focus on the level of US states, therefore suggest that states should recognise marriages celebrated in other states, but should not grant the benefits to them which they confer in order to incentivise marrying, e.g. tax benefits.

Thus, the dysfunctionality remains, and additionally, those incurring the net costs are members of a vulnerable minority.

William Riker (1964) even argues that federalism favours the values of a "privileged minority," i.e. of a group which is nationally in the minority but constitutes the majority at a lower level. In the case of the US at his time of writing, the beneficiaries of federalism are "Southern white racists," as Riker (1964, 155) bluntly states.[389] Their ideal of racial segregation translates into policies that impose net costs on members of racially stigmatised minorities and are therefore dysfunctional. Insofar as the majority at the central level is less racist, taking authority away from sub-jurisdictions would thus reduce the number of dysfunctional policies. Such a measure might even be required to render the whole regime functional, by ensuring that racially discriminated people enjoy net benefits of peaceful coexistence in the state.

The case discussed by Riker is certainly an extreme example. Moreover, if the state's constitution is thoroughly liberal, local officials must also abide by the rule of law and respect all individuals' fundamental rights, just as the government at the central level. Nevertheless, locating political authority with smaller geographical units is simply no guarantee for achieving higher levels of homogeneity in many particularly contested policy dimensions. Therefore, it is also not a panacea for dealing with dysfunctionalities in primary law. The appeal which federalism has from the perspective of functional legitimacy wanes quite a bit upon loosening the assumption that smaller jurisdictions are internally more homogeneous than the central level (see also Oates 2004, 317). This seems to speak against decentralising much authority beyond questions concerning local and regional customs.

5.4.3 *The Potential of Exit for Homogeneity*

Although homogeneity cannot be presupposed in a federal regime, federalism may itself have the effect that jurisdictions become more homogeneous. This is because it offers people who are in the minority within their current local community an alternative to go somewhere else where they might be in the majority, or where at least public opinion is more in favour of their case. In fact, the opportunity to choose among different sub-jurisdictions with their own policies may be the main advantage of federally organised

389 See also Gerken (2010, 46), Latimer (2018, 300–301).

democratic systems for addressing the costs which arise from diversity.[390] Individuals may not be able to influence policies in their own jurisdiction because they are in the minority. Yet this matters less to them insofar as they can choose to be subjected to a different policy by relocating to another jurisdiction with a majority which is closer to their preferences.

The idea that individuals can impact the set of rules they are subject to not only by means of participation, but also through withdrawal, was formulated by Albert O. Hirschman (1970) who distinguishes between *exit* and *voice*. Hirschman conceptualises exit and voice as two alternative responses to a decline in the quality of a good or service provided by a firm or other organisation. Dissatisfied customers, members, or citizens may either quit without an explanation or stay on and complain. Within a federal system, exit takes the form of physical relocation to another lower-level jurisdiction. Exit in the political sphere has been credited not only with increasing efficiency in the provision of local public goods,[391] as well as with providing epistemic benefits,[392] but also with beneficial effects on legitimacy.

For instance, exit may be attractive for consent theorists, insofar as it offers a way to approximate unanimity,[393] and arguably the only one for large populations. Whereas no existing political institution can meet the ideal of actual consent, exit at least affords individuals with the opportunity to *withdraw* their consent to their subjection to a government's authority (see also Lemke 2020, 269–271). Insofar as the exit mechanism increases homogeneity and thus provides a path towards unanimity, moreover, it also

390 See also Müller (2019, 170) who suggests extending the scope of individual choice to genuinely public issues in order to overcome the problem of insurmountable value pluralism.

391 See for example Aligica (2018, 28–29), Boettke, Lemke, and Palagashvili (2015), Buchanan (1995/96), Hayek ([1979] 1998, 146), Oates and Schwab (2004), Ostrom, Tiebout, and Warren (1961), Vanberg (2006), Vanberg (2008).

392 Müller (2019, 138) argues that a political order where people have a choice among different sub-jurisdictions exhibits three epistemic advantages: (1) it enables people to find new and better ways to organise society, (2) it is a way to test hypotheses and establish new facts, thus reducing disagreement concerning the empirical realm, and (3) it offers a way to mitigate the difficulties which arise in highly diverse societies by allowing for self-selection into polities. Moreover, Friedman (2020, Chapter 7) argues for an "exitocracy," in contrast to technocracy, on epistemic grounds. And Somin (2016, 136–38) claims that "foot voting" (in contrast to "ballot box voting") avoids the problem of voter ignorance because individuals have an incentive to get informed about their options, since the choices they make will necessarily have an impact upon their lives.

393 See also Mueller (1998, 177), Somin (2016, 139).

constitutes an alternative to reaching consensus by means of deliberation, i.e. voice.[394]

Exit has even been ascribed the effect of liberating individuals from domination, i.e. arbitrary power. As Mark Warren (2011, 690) argues, exit may for instance be a means for individuals to free themselves from domination in a marriage, by means of divorce. Analogously, he notes, individuals may free themselves from the authority of a lower-level government by means of exit from lower-level jurisdictions within a federal system.

Within classical liberalism, moreover, the possibility to escape a government's authority is valued as a remedy against governmental overreach. For instance, Peter Kurrild-Klitgaard (2010, 350) suggests that providing institutions with an exit option constitutes an alternative to both anarchy and the coercive threat of a Leviathan. And Buchanan (1995/96) even argues that it is simply incoherent of libertarians, conservatives and classical liberals to oppose federalisation because federal structures limit state coercion. He envisions a federal system where the central level plays the role of the protective state whereas lower levels serve as productive states (for the distinction between productive and protective state, see 4.2.3).[395] In this way, the individual is protected both from the central government, due to the absence of legislative competences, and from the lower level, thanks to the possibility of exit.

Providing individuals with an exit option is also attractive from the viewpoint of functional legitimacy. This is because citizens and non-citizen residents can evade policies from which they incur net costs.[396] If individuals would generally choose to exit when a policy entails net costs for

394 See for example Taylor (2017, 67), Vallier (2018a).

395 For similar suggestions, see also Hayek ([1979] 1998, 63), Müller (2019, 170–171), Nozick (1974, 329–330).

396 Buchanan and Tullock ([1962] 1999, 114–15) also argue that the opportunity to leave in a decentralised system can reduce the individual's costs of social interdependence. They make the point that if individuals have alternative jurisdictions to choose from, they may decide to live where they face fewer external costs from being outvoted and where they will also see less need to incur the internal costs of bargaining. Thus, Buchanan and Tullock claim, exit-induced homogeneity reduces both types of costs from social interdependence. Internal costs, however, may be far more effectively reduced by political representation (see 4.4.1) than by decentralisation. A community of such a size that all citizens can personally participate in decision-making must be extremely small. Dahl (1967, 963), for example, calculates that if each member is supposed to meaningfully participate, a community must not have more than around 40 members. At such a low level, there are barely any relevant decisions to be made, he points out. This would be different for a

them, the legal order might include fewer dysfunctional primary laws. Importantly, this can be achieved without imposing restrictions upon political authority that would make it difficult to adopt net beneficial policies. For instance, imagine a local jurisdiction where the majority decides to invest a high amount of public funds into creating a new bike infrastructure. This decision may impose net costs upon those residents who do not use bikes. Yet if all individuals for whom the costs would outweigh the benefits decided to leave, the policy would be functional, yielding net benefits to all the remaining inhabitants.

Insofar as individuals can influence their subjection to policies not only by participating in collective decisions, but also through private choice, a decentralised system of jurisdictions introduces the market forces of supply and demand into the realm of politics, as Buchanan and Tullock ([1962] 1999, 114–15) observe. Notably, the effect of exit does not only pertain to the demand side. That citizens and residents can shop for the policies most beneficial for them may also give rise to competition among sub-jurisdictions as suppliers of primary law.[397] Local governments may compete with each other with regard to the public goods they provide, such as infrastructure, and also in terms of regulation, adjudication, and enforcement (see also Vanberg 2006, 82). Insofar as jurisdictions compete for residents, they have an incentive to provide benefits and abolish dysfunctionalities.[398]

Competition among jurisdictions may thus reduce the extent to which individuals are subject to political authority and power against their will. Accordingly, Richard Epstein (1992, 149) argues that horizontal competition in federal systems can serve as a means to protect the individual against an abuse of power on part of the state. And Robert Taylor (2017, 70) even

representative committee of the same size. Thus, exit is far more pertinent for reducing external than internal costs.

397 For a historical overview of theories of institutional competition, see Vaubel (2008).

398 Vanberg (2000, 24), for instance, understands jurisdictional competition as an element of constitutional design by which individuals may avoid legislation which privileges special interests. A case study to this effect is provided by Lemke (2016). Drawing on the case of the Married Women's Rights Acts in 19th century America, she argues that jurisdictional competition for female residents along the frontier incentivised policymakers to abandon the institution of coverture, which stripped married women of legal agency, and to extend rights of property-ownership to them.

claims that a perfectly competitive market for local jurisdictions could eliminate political domination at the local level.[399]

A decentralised and competitive political system may even be conducive to approaching an ideal of justice. Brian Kogelmann (2017), for instance, claims that if citizens adhere to different conceptions of justice, a polycentric system,[400] where political units compete with each other both horizontally, via exit, and vertically, via voice, is the best embodiment of Rawls's "well-ordered society." This is because it achieves the three desiderata posited by Rawls: laws and institutions are subject to public scrutiny, a shared notion of justice creates social unity, and people are able to reach full autonomy as self-legislators.[401] Alexander Schaefer (2021) also claims that polycentricity is more likely to offer individuals the opportunity to be subject to a conception of justice they at least approve of, although he cautions that even in a polycentric system, it cannot be guaranteed that all individuals live under their most preferred conception of justice.

Competition among local jurisdictions can be formalised in a model such as the one formulated by Charles Tiebout (1956). In his model, "consumer-voters" choose from a wide variety of local communities which do not create externalities for each other.[402] City managers offer different amounts of public goods within their respective communities. Consumer-voters then pick a community according to their preferences. Tiebout claims that the local level is better placed to cater to the preferences of

399 Taylor (2019, 217) argues that to effectively restrict domination, the jurisdictional market must be characterised both by competition and by "resourced exit," i.e. support for leaving.

400 According to Ostrom, Tiebout, and Warren (1961, 831), polycentric systems are characterised by a plurality of decision centres which consistently interact with each other by means of competition, cooperation, or shared mechanisms of conflict resolution. Aligica and Tarko (2012, 252), moreover, identify three attributes of polycentricity, namely a plurality of decision centres, an encompassing system of rules and a spontaneous order resulting from competition.

401 Although he takes a Rawlsian position on justice, Kogelmann (2017, 780) holds that Nozick's framework for Utopia comes close to a polycentric political order.

402 Levy (2007, 461) claims that this model is not realistic, arguing that most federal states in the world have too few and too large sub-units, which enjoy a monopoly on most policy issues, to allow for meaningful jurisdictional competition and citizen self-selection. Moreover, if jurisdictions are created along identity lines such as ethnicity or language, competition and sorting are effectively blocked. The latter point is why Bednar (2009, 48–49) recommends deliberately not drawing state frontiers along agglomerations or territories of ethnic minorities in order to enable residents to leave the state while staying within the same region.

individuals concerning public goods than the federal level.[403] His model, however, relies on highly idealising assumptions. Not only is there a wide variety of communities which do not create externalities for each other. Importantly, he also assumes that consumer-voters live from dividend income, have complete information, and are perfectly mobile. Yet, as Tiebout himself notes, moving to another community constitutes a cost,[404] namely a cost of transaction.

The fact that moving is costly may be understood as an argument in favour of consequent decentralisation down to the very level of local jurisdictions. Leaving one's town or city may be easier than moving out of a state or province.[405] Within a territorially extensive federation, however, one's preferred jurisdiction may in fact be very far away, potentially on the other side of the continent. The costs of moving may thus involve leaving behind friends, family, and fond memories.[406] They might also include higher housing prices, and potentially a lower income or even unemployment if an individual's preferred local community is so remote she has to find a new position.[407]

Moreover, what individuals gain in terms of benefits for incurring the costs of moving may turn out to be meagre. This is because the political authority of lower-level governments in a federation must be limited by spill-over effects to other jurisdictions.[408] If spillovers entail net benefits, i.e. positive externalities to members of other jurisdictions, the amount provided locally is inefficiently low. For instance, if a local jurisdiction reduces emissions from industry production, neighbouring jurisdictions will

403 Treisman (2007, 83–87), however, argues that a central government could also use the Tiebout mechanism of local competition for public goods, without decentralising political authority.

404 Tiebout (1956, 422) does not give much weight to this restriction. He compares the costs of moving to another city to the costs of transportation which are readily incurred in private markets. Yet in the private market, too, some transportation costs are prohibitive for exchange to take place. For instance, it is often not worthwhile for small sellers to ship articles very far.

405 This point is for example made by Bednar (2009, 35–36), Buchanan ([1975] 2000, 131) and Schragger (2005, 179).

406 Tucker (2024, 168) also notes that the costs of moving are often prohibitive.

407 Tiebout (1956, 419) does not bother about individuals losing their job when relocating, as he assumes that consumer-voters live from dividend income.

408 Buchanan and Tullock ([1962] 1999, 113), for example, argue that political decisions should be decentralised up to the point where spill-over costs to other jurisdictions get higher than the benefits from saving decision-making costs within the jurisdiction itself.

benefit from higher investment levels.[409] In this case, the benefits created by this public good or service would be higher if the decision was made at a higher level.[410] Negative spillovers in contrast, impose net costs on other jurisdictions. They may occur for instance in a "race to the bottom" where, after one jurisdiction lowers its regulatory or social standards, others have to follow suit in order to remain competitive.[411] To avoid net costs for other jurisdictions, such decisions also should be made at a higher political tier.

On the other hand, if moving is costly, leaving one's jurisdiction of origin behind may only be worthwhile if an individual's fundamental interests are at stake. In a functional legal order, however, individuals must not find themselves in such a situation in the first place. This is because individuals' fundamental interests are to be protected by fundamental constitutional rights.[412] For instance, it cannot be expected from individuals belonging to a religious minority in a functional state that they leave their home jurisdiction for not being subject to expropriation and physical assaults. Rather, all sub-jurisdictions must guarantee that citizens and residents can reap the benefits of peaceful coexistence without the need to leave. In this respect, functional legitimacy differs from more libertarian accounts of federalism which consider exit as a substitute for substantive individual rights.[413]

409 In the case of a public good such as fighting climate change, the spillover even requires decisions to be made beyond the level of states, which is arguably why it proves so challenging to provide.

410 See also Ederveen, Gelauff, and Pelkmans (2008, 23), Treisman (2007, 83).

411 This is why Oates and Schwab (2004, 177) argue that in a federal system, redistribution must be organised centrally.

412 As Latimer (2018, 297) notes, leaving such things as rights up to experimentation and the spontaneous forces of evolution could turn out to be extremely harmful. Notably, those individuals who are not able to move at all would be subjected to dysfunctional and therefore illegitimate political authority.

413 Buchanan ([1995] 2001, 72), for instance, holds that in an ideal federal system, subunit policies are not restricted by the constitution or the federal level. Their room for manoeuvre depends solely on what their citizens are willing to go along with. Similarly, in the "free society" envisioned by Kukathas (2003, 96–97), individuals merely have the fundamental right to leave the associations they belong to. As long as they do not exercise this right, the association's authority over them is to be considered legitimate. For Kukathas (2003, 137), "the decentralization of tyranny is to be preferred" to uninhibited central authority. And Somin (2016, 148–54) even cites the case of African Americans from the South who migrated to the North and the West of the United States in large numbers during the Jim Crow era as an example for the benefits of exit. In light of Riker's fierce criticism of federalism as racist (see 5.4.2), this example is rather striking. The Jim Crow laws, after all, were upheld by local governments.

Thus, the overall benefits which individuals can expect from choosing local public goods or regulations by moving may often not offset the costs. To this must be added that even at the local level, consumer-voters cannot pick their favourite policies one by one. Rather, they need to choose among large bundles of public services.[414] These, moreover, are also subject to collective decisions in the future which may turn out to be adverse for the individual. It can therefore be expected that people put up with a good deal of local legislation they do not particularly like before they consider moving. This makes jurisdictional competition by means of geographical exit a blunt tool for reducing dysfunctionalities which result from diversity at the level of primary law.

5.4.4 *The Possibility of Non-Territorial Parallel Law*

The appeal of exit for addressing the effects of diversity could be considerably enhanced if it did not entail geographical relocation. Without the costs of moving, exit would be worthwhile in more cases. It would thus be attractive to have a legal system that includes parallel institutions which individuals could choose from, irrespective of their territory of residence.[415] Such a non-territorial concurrency of legislation would be particularly valuable for all social-cultural groupings which lack a clear territorial base. Among these are, for instance, territorially scattered ethnic or religious communities, sexual minorities, but also individuals who share the same political-ideological convictions. Moreover, if parallel primary law existed beyond territorial jurisdictions, individuals would not need to choose or reject the whole bundle of public goods offered by a particular local community (see also Aligica and Tarko 2013, 734). Rather, they would be in the position to withdraw only from those policies which impose net costs on them.

The idea of non-territorial authority is not as new as it might seem.[416] Before the Westphalian Peace, which gave rise to the modern territorial state, Europe exhibited a legal pluralism where laws and institutions applied

414 See also Aligica and Tarko (2013, 734), O'Hara and Ribstein (2009, 14).

415 See also Aligica and Tarko (2013, 734), O'Hara and Ribstein (2009, 28), Somin (2016, 158), Tullock (1994, 47–48), G. Vanberg (2020, 666–667).

416 See for example Jellinek ([1900] 1959, 395) who notes that it is a modern phenomenon that political rule is territorially bound. According to Thunder (2024, 19–20), it was Hobbes's Leviathan that shifted the focus of political philosophy

to individuals in a personal way, rather than on the basis of territory (Salat 2023, 5). Another historical example for non-territorial decentralisation would be the *millet* system in the Ottoman empire.[417] Several non-Muslim minorities were given the autonomy to adjudicate internal matters according to their own law in exchange for a special tax payment. Remnants of the system remain even today in the Middle East. Alas, these have the tendency to counteract equal citizenship rights and to subject individuals from minority groups to religious authorities and patronage while not being an effective remedy for a weak central state (Barkey and Gavrilis 2016). It may thus be questioned to what extent non-territorial decentralisation of political authority is possible in a modern nation state.[418]

A noteworthy suggestion for non-territorial jurisdictional choice in the particular context of US federalism is offered by O'Hara and Ribstein (2009, 213). They propose a federal choice of law statute which allows parties to choose their preferred state's regulation when they enter into a contractual agreement with each other. The statute drafted by O'Hara and Ribstein does not require parties to have a connection with the state whose law they are choosing. States may, however, pass "super-mandatory" laws for their own residents which must be respected by courts in other states and at the federal level in order to ensure that states are indeed in a position to make their own regulations (O'Hara and Ribstein 2009, 208–9).

Apart from the extant market for the regulation of business transactions,[419] O'Hara and Ribstein (2009, 165–175) also envision a market for both marriage and divorce law in the US. For instance, they suggest that couples who want to commit more to their marriage could get married in states which do not allow for divorce and that other states ought to accept this rule and not divorce the couple either. Moreover, O'Hara and Ribstein (2009, 175–181) discuss potential law markets for surrogacy and

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to a unified social structure capable of providing peace, rather than networks of overlapping and diverse groups.

417 Tucker (2024, 174–75) gives more examples of non-territorial political organisation before and parallel to the Westphalian system of territorial states.

418 Levy (2007, 473), for instance, is sceptical of non-territorial federalism, claiming that most legislative and executive issues in modern states are territorially bound. He fears that non-territorial minority governments would degenerate into mere arenas for rent-seeking without political discourse and decision-making power.

419 O'Hara and Ribstein (2009, 3) claim that a "law market" already exists, allowing individuals and firms, by means of relocating, to choose the regulations most profitable for them from the highly diverse supply of states and federal states.

living wills as opportunities to experiment with legal regulation at the state level in response to technological innovation.

The proposal by O'Hara and Ribstein is intriguing in that it allows parties of a contract or similar agreement to choose the law of a state with which they are not affiliated in any way, merely because it best matches their demand. Individuals are given more choice concerning what legislation they are subjected to, while at the same time it is always clear what law applies in the case of a conflict. Their suggestion appears somewhat incomplete, however, in that states as territorial entities still play a central role: State legislatures enjoy legislative authority for contract regulation, and state courts share judicial authority with federal courts. Moreover, the notion of super-mandatory law still subjects citizens to an authority which they may only escape by physically moving.

A more radical scheme, devised for the European context, is provided by Bruno Frey and Reiner Eichenberger (2004) with their notion of functional,[420] overlapping, competing jurisdictions (FOCJ). FOCJ are single-issue jurisdictions providing public goods and regulation. They compete on overlapping territories in the case of territorially bound goods and otherwise non-territorially.[421] In contrast to the Tiebout model, thus, exit is possible without physically moving. Another difference to Tiebout is that FOCJ must be democratically constituted—exit and voice must complement each other (Frey and Eichenberger 2004, 38). Moreover, the FOCJ scheme goes farther than the choice of law statute by O'Hara and Ribstein in that it dispenses with the somewhat arbitrary allocation of bundles of authority to federal states as territorial entities and gives individuals more exit options without moving.

On the downside, decentralising political authority to numerous small and functional jurisdictions raises issues of practicability. It is certainly overly demanding to expect citizens to participate in all the democratic settings of the wide variety of single-purpose jurisdictions of which they are members. After all, in existing federations, even lower-level elections for jurisdictional "bundles" are usually considered to be "second-order elections" where turnout is low since citizens care more about national than local issues (see Treisman 2007, 158). Creating many new democratic decision-making bodies would give rise to internal costs of decision-making,

420 The term „functional" is used here in opposition to "territorial," not in the sense in which it was defined in the context of functional legitimacy in Chapter 3.

421 Similarly, Binmore (1998, 503) envisions an ideal "whiggish" state as a decentralised polity with overlapping geographical and non-geographical units.

in the sense that elections would have to be organised and representatives would need to invest time into finding a decision. If jurisdictions are too numerous and their authority is too curtailed, citizens might not find it worthwhile to incur these costs.

Another serious issue is constituted by the fact that the implementation of chosen law must be ensured for the whole territory of the state. Imagine that a homosexual couple celebrates a wedding according to one FOCJ's marriage law, but officials from another jurisdiction refuse to accept their marriage. To ensure the implementation of chosen law everywhere within the state's territory, it is arguably advisable to authorise the central government to apply and enforce functionally decentralised law throughout the country.

A workable alternative to FOCJ might thus be "sociological federalism" as advanced by Gordon Tullock (1994). The term describes a political setting where different lower-level governments make their own laws whereas sovereignty remains with the central government.[422] Parallel associations without a territorial monopoly, e.g. ethnic or religious communities, would then raise their own taxes and provide public goods and services such as schooling or marriage parallel to the state. Their "governments" would have the authority to make laws for members, as long as these laws would not be in conflict with the state's legal order. Parallel governments would also be entitled to adjudicate conflicts, but they would rely on the state for enforcement.

For non-territorial jurisdictions below the level of federal states, however, the question is not only how law is implemented, but also how it is to be adjudicated. Theoretically, it is of course possible for each community to maintain its own court system. Yet in reality, the costs would be substantial, disincentivising the creation of new jurisdictions and making it difficult for established ones to survive. Since a judicial system comes with economies of scale, it would be inefficient to create one for each non-territorial jurisdiction. Jurisdictions might also find it difficult to hire judges, since they would need to be trained in their particular law.

It is therefore plausible to allocate judicial authority for non-territorially decentralised law with the central government. This is not as far-fetched as it seems. For example, in US business law, for contracts regulated by state law, disputing parties from different states may choose between state and federal courts if at least $75,000 in value is at stake, as O'Hara and

422 Gerken (2010, 9), too, argues for granting minorities the right to make decisions without sovereignty, albeit on a territorial basis.

Ribstein (2009, 69) point out. And in Germany, not only does the executive branch of government collect taxes for the main Christian churches. The judiciary also adjudicates labour law particular to churches as employers. In most well-functioning modern states, the judiciary at the central level would probably be capable to adjudicate parallel legislation.

In fact, allowing for non-territorial choice of law does not require the decentralisation of political authority at all, not even of the legislative branch. The central legislature could simply adopt a default regulation for contract-like arrangements such as marriages but also e.g. living wills. Taking into account potential spill-over effects, it could additionally define a range of permissible deviation for alternatives among which parties would be free to choose. For instance, spouses might be able choose among marriage options with different levels of commitment.[423] Another case of application could be work contracts, with employers and employees agreeing on a set of e.g. Muslim, Christian, or secular holidays to be exempt from work duties.

Insofar as these alternative sets of regulation are not imposed on anyone against their will, they need not originate in the authority of a democratic government.[424] Instead, their emergence may be left to evolutionary forces. Small groups of legislators, but also civil society organisations or political entrepreneurs, may draft their own proposals within the scope defined by the legislature.[425] These proposals could then become valid upon a court ruling that confirms that the alternative is within legal bounds. It should also be possible to challenge the legally admissible range of regulation by means of constitutional complaint at a court. For instance, judges could be asked to decide whether the legislative was entitled by the constitution to define marriage as a relationship among exactly two persons by polyamorous interest groups. By decentralising the drafting of parallel law but maintaining legislative, executive and judicial authority at the central level, constitutional design may avoid an inflation of lower-level

423 O'Hara and Ribstein (2009, 171), too, suggest that governments could offer a variety of marriage tokens or grant certain private alternatives to marriage.

424 But of course, the legislative could also adopt a variety of options. In the case of marriage in Germany, for instance, the existing law allows couples to choose their family name, the matrimonial property regime, and whether they want to file a joint tax return.

425 O'Hara and Ribstein (2009, 223–24), in contrast, argue that insofar as law-making is a public good, there is also a reason why it should be undertaken by public agents. Since it is costly for private individuals and groups to draft their own legislation, the central legislature needs to adopt a default option.

jurisdictions as in the FOCJ scenario, while still granting individuals some choice of law on a non-territorial basis.

If governments provide non-territorial parallel law, individuals gain an opportunity to opt out of policies where the costs they face outweigh the benefits. Such an innovation would therefore indeed have the potential to reduce dysfunctionalities in primary law. It must be noted, however, that its scope of applicability is narrowly limited. Only policies which are not territorially bound and belong to the sphere of private law, e.g. labour or family law, are eligible because externalities for other citizens and residents are low.[426]

In other cases, it is hardly possible to free individuals from costs without creating new costs for others. The legal orders of diverse and complex societies are thus prone to include much dysfunctional primary law. This is not necessarily an impediment to their legitimacy.[427] As long as the secondary laws of the de facto constitution guarantee the regime's functionality, it can be assumed that this is a price individuals would be willing to pay for the peace and security they enjoy as a consequence of living in a liberal regime.

5.5 Summary

Functional legitimacy is only a minimal standard, not an ideal. It merely demands that a regime must be liberal, providing the rule of law and fundamental individual rights. Nevertheless, the functional account has substantial implications for constitutional design. This is because the criterion of

426 In contrast, Tucker (2024) envisions that there could even be non-territorial states which delegate governmental tasks either to computers or to local contractors. The idea of non-territorial states, however, is in conflict of the very function of legal orders to ensure peaceful coexistence within a territory by means of shared rules. Individuals within the same territory often find themselves in situations where they would benefit from rules that enable them to coordinate or cooperate with each other. Yet insofar as they are members of different non-territorial states, they may fail to reap these benefits or even incur substantial costs, just as they would in the state of nature, because it is unclear which rules apply. From a functional perspective, this means that only that part of political authority may be open for non-territorial choice which regulates individuals' private lives, i.e. their voluntary interactions.

427 Vallier (2018b, 120–21) claims that the justification of constitutional rules is a function of whether they entail justified or unjustified legislation. Yet a legal order does not become illegitimate merely because it includes a dysfunctional token of marriage or other forms of dysfunctional primary law which are compatible with peaceful coexistence.

functionality cannot only be applied to the institution of the regime as such but also to subordinate institutions of primary and secondary law. In this chapter, I analysed three subordinate institutions at the constitutional level, namely majoritarian democracy, public budgets, and federalism.

On the functional account, majoritarian democracy as a form of governance is neither necessary nor sufficient for the legitimacy of a regime-token. It is not necessary because other forms of governance, such as constitutional monarchy, may also be liberal. It is not sufficient, moreover, because majorities may decide to impose intense costs on minorities if their authority is not restricted. As a subordinate institution, however, majoritarian democracy is a functional institutional type. Notably, its function is not to enable individuals to rule themselves, as assumed in democratic theory, but rather to provide regular and non-violent changes of government on a procedural basis. Autocratic forms of governance, in contrast, are dysfunctional. Their only function is to authorise individuals or groups to rule based on their social status.

At the token-level, majoritarian democracy must respect the rights of minorities to qualify as functional. On the one hand, there may be persistent minorities. Although authority is allocated procedurally, members of persistent minorities do not face a realistic chance of ever bringing about a change in government merely by their impact in elections. To be justified both to persistent minorities and to residents who lack the franchise, a democracy must therefore grant everyone rights to free speech and freedom of assembly as an indirect way to non-violently influence policy.

Moreover, minorities may be intense, i.e. feel strongly about a decision. In a functional regime, people must be securely protected against decisions, including democratic decisions, that negatively affect their most basic interests. This cannot be achieved by requiring supermajorities for sensitive decisions because intense minorities may comprise very few individuals. Rather, an effective protection requires fundamental and inalienable rights.

Another dimension of constitutional design is the extent to which the government is authorised to raise a public budget to fund public goods and the welfare state. A libertarian argument against public spending is that the government lacks the right to interfere with individuals' property claims. This argument is not convincing from a functional perspective, however. Existing property regimes are the product of contingent historical processes and interactions. There is no reason to assume that they are functional. Insofar as governmental intervention may correct unjustified distributions,

a presumption against the raising of public funds is not warranted on the functional approach.

Although it is justifiable that governments raise funds, however, there may be restrictions on how these may be spent. Insofar as the function of political authority is peaceful coexistence, governments arguably need to provide the public goods of internal and external security, as well as a social minimum. Other spending policies, e.g. on infrastructure or extensive social security, however, might be dysfunctional in the sense that they impose net costs on some contributors. I argued that for one thing, positive externalities from public spending must not be underestimated. Moreover, I made the point that even a public budget that includes some dysfunctional spending policies may be functional in total. A constitutional ban on passing spending decisions that impose net costs on any individual would thus rule out many potentially functional budgets, denying all individuals benefits they could otherwise have achieved. This would be too high a price to pay for avoiding all dysfunctionalities at the policy level.

In large and complex societies, dysfunctional policies are not rare. Individuals have incompatible preferences and values, so net benefits for some translate into net costs for others. One apparent way to address this phenomenon is by means of federalism. A decentralisation of political authority to lower jurisdictional levels can reduce the amount of dysfunctional primary law insofar as the population within sub-jurisdictions is more homogeneous. This is often the case with respect to language and customs. In many other dimensions, however, sub-jurisdictions need not be particularly homogeneous since many minorities live territorially dispersed. Such minorities may even face higher costs and more dysfunctional policies if they live in a sub-jurisdiction where the majority is more extreme than the majority at the central level.

Federalism itself may, however, contribute to the internal homogeneity of sub-jurisdictions. This is because individuals have the option to leave jurisdictions where they do not agree with the majority. Jurisdictions might even adapt their primary law to compete for residents. Yet for the individual, the benefits from moving to another jurisdiction with better policies are outweighed in many cases by disproportionate costs of leaving behind loved ones and also possibly their homes and jobs. Incurring these costs is rarely worthwhile insofar as only few benefits are to be gained at the local level.

Offering individuals a choice among parallel legal regulations of the same issue is much less costly if it does not require geographical relocation.

As I argued, governments might provide a default option and define a scope for civil society actors to draft alternatives which would also be enforced and adjudicated by the central government. This would be most feasible for legal institutions regulating private contracts, such as marriage or employment. In many other domains, individuals arguably need to put up with some dysfunctional policies in return for the benefits of peaceful coexistence which they gain within a functional regime.

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.

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