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.
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> — 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.