

## 1 Opening Remarks: The Need to Justify Political Rule

Because no man has any natural authority over his fellow human, and because force produces no right, conventions remain as the only basis of all legitimate authority among men.

— Jean-Jacques Rousseau, *On the Social Contract* ([1762] 2012, 167)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

