

MORALS *for the* MIGHTY

political legitimacy
as impact on
sustainable
development



Jojanneke Vanderveen

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MORALS *for the* MIGHTY

Political legitimacy as impact
on sustainable development

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For mama,
who founded my sense of justice

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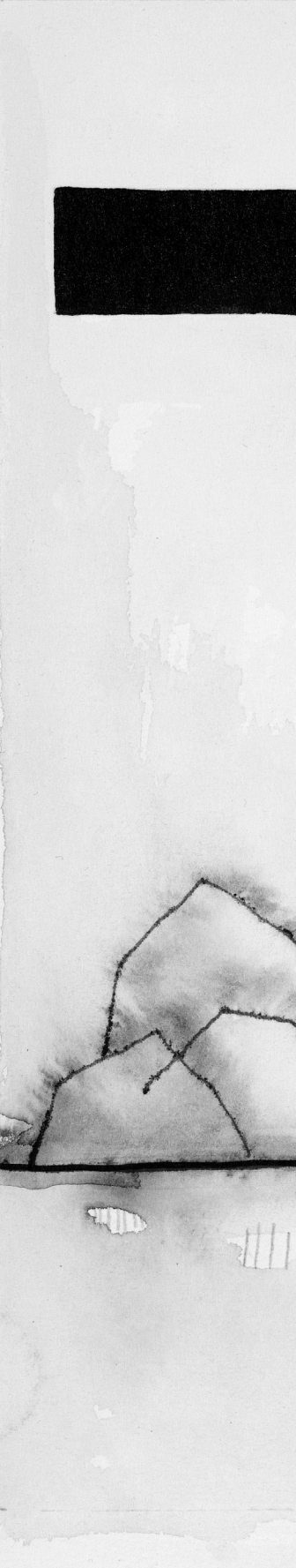
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Introduction

“Universal law is for lackeys. Context is for kings.”

Captain Lorca, *Star Trek Discovery*
Season 1, episode 3

We are governed. Every day. All the time. Our food, our clothes, our transportation, our houses, our families, our jobs ... There is scarcely any aspect of life that modern states do not regulate or influence in one way or another. State power is pervasive. Moreover, it is non-voluntary and expensive.

The big question is: why would we accept this? What justifies all this meddling? And what justifies the fact that we are forced to contribute vast portions of our income to this meddling in the form of taxes? This call for justification is the question of political legitimacy.

The alternative to state meddling is, of course, no state meddling. If states were to stop meddling altogether, the result would be anarchy: the absence of government. Anarchy is the opposite of the state, and every task or activity that a state drops is a step closer to anarchy. When we consider what justifies the activities of states, we do so against the background of the anarchical alternative. We face ‘the anarchist challenge’. The anarchist challenger asks: why the state? Why not anarchy (Nozick 1974, 4)?

The anarchist challenge draws on the presumption against coercion. The presumption against coercion holds that it is morally prohibited to coerce someone unless there is some overriding reason to regard this coercion as permissible. The presumption against coercion

is widely accepted in liberal political theory (e.g. Simmons 2001, 124, Gaus 2003, 139, Valentini 2011, 206). With its taxes and laws, everything a state does is either directly or indirectly coercive. Some laws order you to do something, others forbid. If you do not comply, you will be punished.¹ Some laws and policies do not coerce directly, but can only be devised and implemented with means obtained through taxes. And if you fail to pay your taxes... You will again be punished.²

Because the state is always directly or indirectly coercive, the call for justification is always pertinent. The state can never just act. Ethically, this raises the question under what circumstances the state *is* allowed to act. Throughout the first four chapters of this dissertation, this is the central question. The first starting point in answering it is the anarchist challenge, and the realisation that coercive power is morally so problematic that the reasons relied on in justifying state power had better be good.

As a member of the Dutch society, or another advanced democracy, it is difficult to imagine what anarchy would mean. Our state institutions are so large and regulate our affairs so strongly, that it is well-nigh impossible to think about what our lives would look like without them. This becomes even more difficult if we realise that the big problems of this time – global warming, the depletion of resources, the degradation of land, the loss of biodiversity – call for concerted efforts. If it is already so difficult to get these efforts going when national and supranational institutions exist, how would we fare if we were not united in common structures?

These big problems of our time form the second starting point for my quest throughout this dissertation. I work from a sense of urgency. If we do not act decisively, we may well destroy, or perhaps more aptly: keep on destroying, the conditions in which people can thrive. To just name one indicator of trouble: Earth Overshoot Day has been steadily creeping closer to the beginning of the year. In 2019, the date on which we exhausted the resources the earth could renew in that year fell, for

1 If you get caught, that is.

2 If you get caught, and your tax consultant is not clever enough, that is.

the second time, in July.³ A simply terrifying fact.

Politics must be good for something. That is the core claim of this dissertation. If it is good for nothing, we had better be rid of it. Given the big and small problems that humanity faces, and given that solving problems often calls for collective action, it makes sense to demand that if states act, these actions provide solutions. If states do not solve problems, or are worse at solving problems than we would be outside of their structures, why are these structures with their coercive laws and policies there at all? On the theory of political legitimacy I defend, they ought *not* to be there if they are good for nothing – let alone if they create problems. On the other hand: if they do manage to deliver laws and policies with sufficiently beneficial impact, then we may certainly welcome them.

This is why I call my theory ‘political legitimacy as impact on sustainable development’. If state coercion is to be tolerable, it must be because it has a positive impact, because it contributes enough to something crucially important. This crucially important thing, I argue, is sustainable development. Development consists of two main components: surviving to an old age, and prospering during your life (Sen 1999, 14). To make development sustainable, current generations must make sure that they do not lead their lives at the expense of the conditions in which future generations will be able to also live and prosper (WCED 1987, 41). It is not up to the state to decide what a good life consists in, and how people are to lead their lives. For this reason, the state should be primarily concerned to promote people’s *capabilities* to live and prosper. Capabilities have an external and an internal aspect: having adequate capabilities means that the outside world provides people with enough opportunities, and that they have the abilities within themselves to make use of these opportunities, or even create new ones (Nussbaum 2011, 20).

If state power can be morally justified when it contributes to capabilities for sustainable development then this brings, in principle, all obstacles that people experience in pursuing their idea of the good life within the purview of state action. This is not to say that the state

3 <https://www.overshootday.org/newsroom/past-earth-overshoot-days/>, accessed on 27 September 2020.

should in fact do something about all these obstacles. There can be reasons to refrain from acting, such as when other agents can do so better, or when it is inappropriate to mitigate some obstacle. Sometimes it may be too costly to solve a problem, or removing one obstacle may create new ones. Yet, it is appropriate for the state at least to *consider* whether an issue falls within its responsibility to address if that issue forms an obstacle to people's pursuit of the good life.

So how does the anarchist fare on this approach? Can the anarchist challenge be overcome? It can, if the state makes sure that its laws and policies make an adequate contribution to people's capabilities for sustainable development. On this argument, then, we accept the bite of the anarchist challenge; we do not say that the anarchist is obviously mistaken in their objections against state power. Rather, we accept that, indeed, a convincing case must be made in favour of any coercive activities that the state performs. If this case can be made, because the state's activities make an adequate contribution to sustainable development,⁴ then we have reason to regard the state's coercion as legitimate. When such a justification is not present or forthcoming, the anarchist might still win the day.

Summary of the book

It is important to note at the outset that the arguments I develop do not comprise a full theory of political legitimacy; there are more considerations that bear on the justifiability of state action than the ones I discuss. Yet, the legitimacy criteria I develop are both necessary and weighty ones. If my arguments are correct, then a legitimacy theory that rejects these criteria, or is incompatible with them, will be unsatisfactory. Let me now set out the structure of the book, and introduce my criteria for political legitimacy.

Chapter 1: the concept of political legitimacy

The first chapter sets out the concept of political legitimacy. The aim

⁴ In addition, there should be no other overriding reasons to regard these activities as unjustified.

of the chapter is to provide a definition of political legitimacy that is widely accepted in the literature. More specifically, I situate my discussion in the context of liberal political theory. I engage primarily with the post-Rawlsian strand of political theory, both with the work of those who continue the Rawlsian approach and of those who offer alternatives to political liberalism.

Political legitimacy concerns the question whether a state is morally justified in exercising coercive rule, i.e.: whether it has the right to rule. A state is politically legitimate when it has this right. In setting out what ruling entails, and what it means to have a right to do so, several other concepts must be explained. First of all, political legitimacy is often taken to be tightly related to the concepts of political authority and political obligation (e.g. Pitkin 1966, 39, Raz 1986, 46, Peter 2009, 4, Valentini 2012a, 595). Not all accounts relate these concepts to each other in the same way. I follow Allen Buchanan's structuring, where a state has political authority if it has political legitimacy and citizens have the obligation to obey (Buchanan 2004, 237). This structure might be schematically paraphrased as 'political authority = political legitimacy + political obligation'. I limit my discussion to political legitimacy and set political authority and political obligation aside.

Next, I discuss the concept of 'ruling': what does it mean to rule? Again, I follow Buchanan, who holds that ruling consists in (1) exercising coercive power, and (2) (being reasonably successful at) establishing and maintaining supremacy in doing so (Buchanan 2004, 235). The first component, the component of coercive power, applies to situations in which the state makes laws and policies and enforces them. The second component, the component of supremacy, applies where the state suppresses attempts made by others to compete with it in its exercise of coercive power. Different kinds of rights might be associated with both components of state rule. I limit my discussion to the Hohfeldian privilege. That is: my main question is when it is *permitted* for a state to use coercive power and to establish and maintain supremacy. Given that this permission must be established against the background of the presumption against coercion, the question of political legitimacy can concern any coercive act by the state. It is up to theorists to draw this scope less wide if they deem this appropriate from a normative perspective.

Chapter 2: content-dependence

Chapters 2, 3, and 4 develop three normative criteria. They become more specific as the dissertation proceeds. Each next steps builds on the previous one. Chapter 2 defends the legitimacy criterion of content-dependence. By content-dependence, I mean that the moral justification of state rule depends on the content of that rule, i.e.: the content of a state's laws and policies. If the content of a law or policy is not morally acceptable, it is not morally acceptable that that law or policy is adopted or kept in place.

Content-dependence has a place in many theories of political legitimacy. Rawls's account, for instance, puts content requirements on what he calls 'constitutional essentials and basic matters of justice' (Rawls 1993, 137): these must be defensible by reasons that all might reasonably accept (Rawls 1993, 447). In contrast, laws and policies that are not constitutional essentials or basic matters of justice are justified if they result from previously legitimated *procedures*. Because most laws and policies are not constitutional essentials or matters of basic justice, legitimacy is usually procedural for Rawls (Rawls 1993, 429). He is not alone in this. Laura Valentini and David Estlund defend similar hybrid accounts (Valentini 2012a, 600, Estlund 2008, 110). Others rely even less on content-dependence; Fabienne Peter and Philip Pettit both take a purely procedural approach to political legitimacy (Peter 2009, 124, Pettit 2012, 65).

The reason for (hybrid) proceduralists to reject heavy reliance on content-dependence resides in the fact of pluralism (see section 2.3). Proceduralists worry that putting content requirements on legitimacy implies taking sides in disagreements between citizens with different opinions and views, and that this would constitute a violation of the norm of equal respect (Peter 2008, 36, Pettit 2015, 13, Valentini 2012a, 600) and a circumvention of democracy (Peter 2009, 80, Pettit 2015, 30).

The main goal of chapter 2 is to show that this worry is unfounded in the form in which it is presented by proceduralists, and to defend a criterion of content-dependence that steers clear of the problems they signalise. I argue that content-dependence does not imply that, in our legitimacy criteria, we vindicate one of the views that is part of the plurality. Rather, the criterion of content-dependence should be

formulated in such a way that justifiable laws and policies are laws and policies whose content can be justified *in light of* that plurality. Political decision-makers should take account of the opinions of citizens before they can determine which laws and policies are appropriate. If they do this, they do not have to violate equal respect. Moreover, rather than circumventing democracy, we *aid* political actors who play a role in democratic procedures by developing arguments that they can rely on in order to arrive at morally justified decisions.

Chapter 3: context-dependence

The second legitimacy criterion I propose is context-dependence. After having defended content-dependence in chapter 2, chapter 3 specifies when the content of laws and policies is justified, namely: when that content is appropriate for the *context* in which these laws and policies are in place.

By making political legitimacy context-dependent, my approach adopts a non-ideal character. I argue that the standard for laws and policies should be as normatively demanding for the context in question as is feasible and desirable in that non-ideal context. What is feasible and desirable in a context always differs. Feasibility considerations may rule out certain things we would find desirable. Moreover, measures that we would find desirable in principle may work out very badly in an actual context, making their implementation undesirable under these non-ideal circumstances.

I consider two examples of context-*independent* legitimacy criteria from the literature in order to clarify how feasibility and desirability problems come into play in such cases. One of the examples is democratic procedures. Democratic procedures are regularly presented as a context-independent requirement for legitimacy (e.g. Pettit 2012, 79-80, Peter 2009, 59). Non-democratic state rule is then, by implication, illegitimate state rule. The first problem with such a requirement is a feasibility problem. There may be existing states for which democracy is not feasible in the short term. To meet legitimacy requirements, they would either have to become democratic, or stop ruling. Given that democracy is (as stipulated) not feasible, such states

would have to abolish themselves. If this is sufficiently undesirable to merit opting for non-democratic state rule instead, we should conclude that it is justified to rule, for the time being, in a non-democratic way. We then reject the context-independent requirement. The upshot is that we should not posit anything that is not always feasible as a context-independent requirement for legitimacy.

The second problem is a normative problem. Even if, for a non-democratic state, it is feasible to implement democracy more or less straight away, it is possible that this has such undesirable effects that it *should* not be implemented straight away. If this is true, then better preparing the ground for democracy now, but implementing it later might be the more desirable choice. It might then be justified to not rule democratically right now, and the context-independent requirement would again be rejected. The upshot of reflecting on this problem is that normative legitimacy requirements should always be formulated in such a way that they allow for adaptation to the context.

Chapter 4: political legitimacy as impact on sustainable development

The third legitimacy requirement is impact on sustainable development. Chapters 2 and 3 resulted in the criterion of ‘context-dependent content-dependence’, to put it in a phrase. Chapter 4 continues on this theme and addresses the question when laws and policies have a content that is appropriate for the context. My answer (with applicable caveats, see p. 115) is that they do if they make an adequate contribution to people’s capabilities for sustainable development.

To heed the insights of the criterion of context-dependence, we should adopt concrete criteria that allow adaptation to different contexts. We can be adequately context-sensitive if we adopt a set of values that should be served by state action. By setting out to adopt a set of values by reference to which we can justify state action, my view can be characterised as a public-reason view. As Rawls explains, the idea of public reason does not refer to specific laws and policies, but rather to the reasons used in defending these (Rawls 1993, 476). My contribution to existing public-reason accounts is to point out the relevance that the presence of unreasonableness may have in providing public reasons

(see section 4.1, p. 120).

We should not just adopt a set of values, but a set of values that captures the *rationale* for state action. If there is no rationale for state action – if it is not good for something – why should we tolerate it, given the presumption against coercion? I argue for the value of sustainable development – which is a composite of the values of survival, prosperity, and sustainability – as providing a rationale for state action. Promoting these values comes down to fostering the conditions in which people, now and in the future, can survive and prosper. Particularly, the state should promote people’s *capabilities* to do so. For this reason, justifying state action by reference to its impact on sustainable development amounts to a capability approach to political legitimacy.

The UN Sustainable Development Goals provide a useful framework with which governments can give more content to a capability approach to political legitimacy. There is political momentum for the SDG’s at the moment, and they are explicitly intended to be adapted to local circumstances. For this reason, they satisfy the normative criteria set out in this dissertation.

Chapter 5: political support and political legitimacy

Political legitimacy and citizen support are often taken to be intimately intertwined. Consent approaches to legitimacy are founded on the idea that it matters for the moral justification of state power what citizens are willing to support. Moreover, empirical measurement of political legitimacy generally relies on the variable of political support (Easton 1975, 451, Dalton 2004, 2). After having concluded the development of normative criteria for legitimacy in chapter 4, chapter 5 considers whether and how support still matters for political legitimacy on an impact approach. Its aim is to map the possible relationships, and to set out a number of hypotheses about when these relationships might exist that could be empirically tested.

If political legitimacy is to be measured in terms of a state’s impact on sustainable development, then political support does not conceptually imply political legitimacy. However, there may

be contingent relationships between support and legitimacy. One possibility is that (a lack of) legitimacy leads to (a lack of) support, as when citizens reward governments that make a positive impact on sustainable development by granting their support, or punish governments that make a negative impact by retracting their support. For instance: there is evidence that citizens reward good economic performance (Lewis-Beck and Stegmaier 2013, 368), and punish corruption (e.g. Van der Meer and Hakhverdian 2017, 98, Anderson and Tverdova 2003, 99, Seligson 2002, 424, Chang and Chu 2000, 269).

Another possibility is that support is a condition for legitimacy. A more supportive populace makes the circumstances more amenable for governments to make laws and policies achieve desirable effects. Supportive citizens have, for example, been found to be more cooperative (Levi, Sacks, and Tyler 2009, 355, Hetherington 1998, 803). When laws and policies could, on paper, be expected to have a positive impact on sustainable development, cooperation by citizens may make the difference between whether this impact in fact materialises or not. Where it does, a positive relationship exists between support and political legitimacy. An inverse relationship may also exist. For instance, low support may increase legitimacy when, through electoral volatility, badly performing governments are removed and replaced by new officials motivated or incentivised to do better than their predecessors.

Contribution to the literature

This dissertation is situated in the broadly liberal literature on political legitimacy and theories of justice. Since John Rawls highlighted the distinction between ideal and non-ideal theory (Rawls 1999, 216), it is fair to say that ideal theory has dominated the normative debates within political theory (Robeyns 2012, 162). Non-ideal theorising is an area of research that is still very much developing (Valentini 2012b, 662, Robeyns 2012, 162). It is to this research that I hope to contribute with several of the arguments propounded in this dissertation.

The first argument concerns a new distinction that has clarificatory use in the development of normative principles. A twofold distinction

between social justice and political justice has been defended in the literature (e.g. Pettit 2015, Valentini 2012a). This distinction is made due to the problems that pluralism and disagreement can pose in determining how social justice is to be pursued. If people disagree about how social justice must be pursued, how to determine how this is done? In response to these problems, several theorists offer a theory of political justice to provide procedural ways to adjudicate between people of differing opinions about social justice. However, principles of political justice are not sufficient to solve the practical predicament of determining what to do. There are both reasons of feasibility and of desirability (see sections 3.3 and 3.4, respectively) to think that the question of what to do requires yet another perspective.

I therefore propose to make a *threefold* distinction between social justice, political justice, and political legitimacy. Political justice should not be equated with political legitimacy. Political legitimacy concerns the question of *justification* and justification should be understood as a thoroughly practical, all-things-considered notion. A theory's requirements for political legitimacy should be such that meeting these requirements is feasible, and the uses of coercive power that are sanctioned by the theory are desirable if actually implemented. The kinds of requirements put forward in theories of political justice like those of Pettit and Valentini do not have such an all-things-considered status, nor do they need to. It is entirely appropriate for a theory of political justice to set out what decision-making procedures should (ideally) be like in order to e.g. treat people with equal respect – even if these procedures are not currently feasible, or if their implementation would currently be morally problematic – while reserving the perspective of political legitimacy for the development of requirements for justified decision-making in actual, non-ideal circumstances. Following my argumentation, the perspective of political justice is not sufficiently non-ideal to be suitable for that perspective. A main difference is the role that the presence of *unreasonableness* plays in arriving at justifications. I argue that unreasonableness cannot be dismissed as having no normative weight (see p. 101).

Making this threefold distinction, and creating a conceptual space for political legitimacy that is separate from that of both social and political justice, helps untangle different types of arguments. There

seems to be an often-held belief that there is one purpose that political philosophy should serve (see p. 65 for examples from the literature where such a belief is exhibited), and that we need to find the right configuration of feasibility and desirability to make our normative principles serve that purpose. I strongly disagree. There is great value in accepting that there are multiple questions that political theorists can pertinently take up, and that not all different levels of idealisation need to be addressed in one type of theory (Valentini 2012b, 660). Indeed, this will only make our normative theories more plausible in that we avoid conflation. By continuing on the distinctions proposed by theorists like Pettit and Valentini, this dissertation aims to achieve greater clarity and to show the theoretical progress we can make through non-ideal argumentation.

The second contribution to non-ideal theorising is to press the importance of taking other values than justice into account when we reflect on the moral justification of state power. It has been the contribution of political realists (see William A. Galston (2010) for an overview) to emphasise values like peace and order, and to be critical of political moralism. Political moralism makes “the moral prior to the political” (Williams 2005, 2), in the sense that moral requirements for politics are formulated without taking into account (the details of) any actual political situation. In contrast to political moralism, Bernard Williams defends a more context- and history-sensitive realist approach (Williams 2005, ch. 1).

I take to heart both the realist point that peace and order are crucial values when it comes to political legitimacy, and that the legitimisation of political power should be given by reference to criteria that take the practice of politics into account. Yet, I take these criteria to undeniably be *moral* criteria, and the values they refer to to have *moral* import. If I agree with realists that the norms of justification must arise from the political context, it is not because I think the principles that guide legitimacy assessments are themselves relative to the context. Such relativism could perhaps be attributed to realists (e.g. Williams 2005, 26, Rossi 2012, 157), but my position is different. My strategy is to provide legitimacy criteria that can be adopted independently of the context, but which can be applied to a specific situation in such a way that they provide context-dependent moral guidance. Concretely, I argue

(1) that the justificatory standard for laws and policies should be as normatively demanding for the context in question as is feasible and desirable in that context (p. 62). Next, I argue (2) that the normative demands should be formulated in terms of the contribution of laws and policies to capabilities for sustainable development (section 4.3). Both the former and the latter principle can be defended without reference to the context, even if any moral guidance that they may offer when they are used in a certain situation will be tailored to the context due to the way in which the principles are formulated. In this way, my position can be described as taking a middle ground between political moralism and political realism; it is a theory of political morality for non-ideal circumstances.

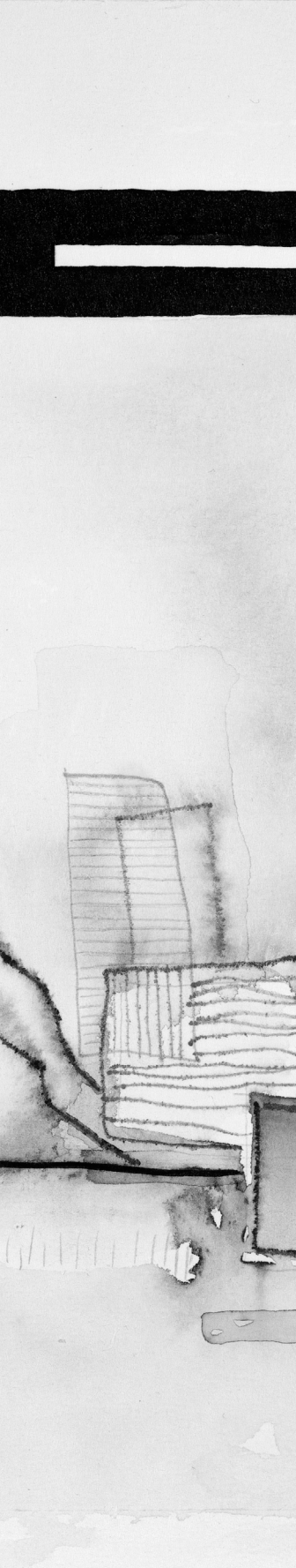
Taking contributions to people's capabilities as the 'umbrella' under which appropriate political values can be placed, it is clear how peace and order can fit in here. A lack of peace and order are prime inhibitors of people's capabilities. They bring the risk of falling victim to violence, which harms many capabilities and certainly that of bodily health or even life. Furthermore, uncertain circumstances make it more difficult to stay in charge of how you shape your life, which also harms your capabilities (as e.g. captured by Martha Nussbaum's capability of practical reason (2011, 34)).

Given the capability umbrella, peace and order can coexist with the value of justice without problem. Pretty much regardless of one's conception of justice, violations of justice will harm one's capabilities. I take this to be an advantage of the approach I develop: it opens up the possibility that proponents of different theories of justice could come to shared conclusions about political legitimacy together. We do not need to settle the question whether justice e.g. only refers to violations of negative rights, or encompasses much more and refers to an overall social ideal. More specifically, although I will not elaborate on this in the dissertation, it could allow libertarians about justice to defend a state that is much more socially active than a minimal state. While libertarians are critical of state interference due to its coercive and hence non-voluntary nature (Nozick 1974), a view of political legitimacy that takes contributions to people's capabilities as its primary focus can be interesting for libertarians about justice. If we judge state activities by their contribution to capabilities, and accept that justice is not

the only value that matters, then state interference may be justified *despite* rights violations.⁵ Suppose that e.g. the coercive collection of people's income in the form of taxes is such a rights violation. Suppose next that a state makes sufficiently valuable contributions to people's capabilities with that tax money. If that latter condition holds, then the rights violation may be justifiable due to the moral importance of furthering capabilities – even if we accept that raising taxes is still a rights violation. I do not develop and defend a libertarian conception of justice in the dissertation, but I do lean that way. For this reason, I find it valuable to point out that my view of political legitimacy makes a socially active state compatible with (a variant of) libertarianism about justice.

A third contribution through non-ideal theorising could be termed a 'warning for idealists'. Those who have big ideals may be exasperated by slow progress, or regress, in politics. When in power, they may want to push through reforms they think are dearly needed. However, even if they are right that the reforms they have in mind are indeed dearly needed, careful attention must be paid to how these ideas will play out in their actual context. Without sufficient societal support, these ideas put to practice may unleash much more than they bargained for, and this may not be to their liking. To put this insight in the words of Gabriel Lorca, captain of the USS Discovery of the United Federation of Planets: "Universal law is for lackeys. Context is for kings."

5 In accepting the non-overridingness of justice, we would of course depart from Robert Nozick's position that rights are so strong and far-reaching that only the minimal state can be justified (Nozick 1974, ix). As pointed out on p. 116, accepting more values than justice does *not* imply that we adopt what Nozick calls a 'utilitarianism of rights'.



The concept of political legitimacy

This chapter introduces the concept of political legitimacy. The chapter has three sections. The first section presents the definition of political legitimacy and a number of concepts that play a role in the definition of political legitimacy. The second section further explains one of these central concepts: the right to rule. Finally, in the third section, I clarify the scope of the concept of political legitimacy.

I.1

The concept of political legitimacy

In this section I introduce definitions of the concepts that play a role in constructing a theory of political legitimacy. Legitimacy is a property, the property of being legitimate, that certain agents and non-agents have under certain circumstances. When we talk about *political* legitimacy, we refer to this property as attached to certain *political* agents or non-agents, e.g.: a legitimate state (an agent), or a legitimate law (a non-agent).

Some authors, notably Joseph Raz, use the property of political legitimacy to qualify the property of political authority. Legitimate authority is then a special type of authority. On Raz's account, the phrase 'legitimate authority' contrasts with '*de facto* authority' (Raz 1986, 46). For Raz, authority is more basic than legitimacy; first there is authority, then we ask whether that authority is legitimate. On other accounts, like that of Allen Buchanan, this relation is reversed, and legitimacy is the more basic concept. On Buchanan's account, an entity

has authority when it is legitimate and moreover has to be obeyed (Buchanan 2004, 237). On this account, authority cannot exist without legitimacy. I will follow Buchanan's arrangement of concepts. The reason for this will, I hope, become clear as the chapter proceeds.

In defining and explaining the concept of political legitimacy, we need to know what the property of legitimacy is, when something counts as political, and which political agents and/or non-agents can have the property of legitimacy. Both agents and non-agents are contenders for having the property of legitimacy. I shall take the word 'legitimate' to mean 'rightful' for agents and 'justified' for non-agents, following Buchanan (2004, ch. 5).⁶ When the property of legitimacy attaches to *agents*, it does so concerning an agent's capacity of occupying a certain role. Certain roles – like that of a spouse, a parent, or a state – invoke a set of rights that belong to the agent that occupies such a role. Depending on the case, these rights can be legal or moral rights. To say that a spouse, a parent or a state is a legitimate one is to acknowledge that they have the rights that belong to being the kind of agent in question. To give two legal examples: spouses may have the legal right not to testify against each other. Parents have the legal right to make certain decisions for their children. The rights of the state will be explored below. In relation to states, I shall understand these terms – 'legitimate', 'rightful', and 'justified' – in a *moral* (rather than legal) sense throughout my discussion. I take moral arguments to have an analogous structure to legal ones; where legal examples refer to rights that are granted by the law, moral examples invoke rights that agents are taken to have based on a moral theory.

6 Another well-known account, that of A. John Simmons, does not use the word 'justified' in relation to political legitimacy. Simmons uses 'justified' to refer to states that are "on balance morally permissible (or ideal)" (Simmons 2001, 126), while legitimacy is "the complex moral right [a state] possesses to be the exclusive imposer of binding duties on its subjects, to have its subjects comply with these duties, and to use coercion to enforce these duties" (Simmons 2001, 130). While Simmons, then, relates legitimacy to rights, he does not relate it to justifiability. I do not follow this usage, mainly in order to be able to deal with the topic of the state use of coercion independently of the topic of the obligations of citizens. This choice is defended later in this chapter. In contrast to Simmons, John Rawls does associate legitimacy with justification. Although Rawls does not give a very explicit definition of the concept of political legitimacy, it is clear that, according to Rawls, for the exercise of coercive power to be legitimate is for it "to be *justifiable* to other citizens" (Rawls 1993, 137, my emphasis).

To acknowledge an agent as being a legitimate one (whether in a legal or a moral sense, as the case may be), is to acknowledge that they are rightful – that they indeed have the rights that belong to the role in question, and that they are justified in doing the things these rights refer to (cf. Buchanan 2004, 235, Durning 2003, 374). On the other hand, an illegitimate agent is one that makes a claim to having the rights in question, but does not in fact have them. An illegitimate state is thus a state that does the things states typically do, but does not have a right to do these things. Depending on one's normative theory and the case at hand, such a state should either stop doing these things, or should stop existing altogether.

The property of legitimacy can also attach to *non-agents*, for example to things like choices, questions or policies. To say that a choice, a question or a policy is legitimate is to say that it is justified, e.g. because there are sufficient reasons for an agent in question to make that choice, to ask that question, or to adopt that policy.

'*Political legitimacy*' refers to the legitimacy of certain *political* agents or non-agents. I follow the literature in taking 'political' to refer, here, to the realm of functioning of states.⁷ For this reason, I shall take political legitimacy to be a property of states. By a state, I will mean "a persisting structure of institutions" for the wielding of coercive power (Buchanan 2004, 237, cf. also Raz 1986, 70, Valentini 2011, 215). This institutional structure specifies certain positions of power (Buchanan 2004, 237). The occupants of these positions (e.g.: members of government) create and control the institutions of the state and they use these institutions to exercise coercive power through laws, their enforcement, and policies. States are generally spoken of as agents. The state as an agent acts through the occupants of its power positions (Raz 1986, 70).⁸ I shall follow this usage and conceive of states as agents

7 In the contemporary literature, political legitimacy is also discussed as a property of international and supranational structures (e.g. Buchanan 2004). My discussion in this dissertation does not explicitly address such structures, but I do not deny that it would be appropriate to extend a theory of political legitimacy to coercive structures in the international and global context.

8 States are generally personified in the literature. For example, they are said to act and to have duties (Collins and Lawford-Smith 2016, 150). States are regarded as 'unitary legal persons' that can be held responsible (Stilz 2011, 190), and ascription of

whose actions are performed by the persons who exercise power in its name. States, as agents, can have rights attributed to them. States persist even if the individuals who exercise state power change.

As set out above, a legitimate agent enjoys the rights that attach to fulfilling the role in question. Legitimate states are states that have the *right to rule* (Simmons 2002, 17, Christiano 2004, 286, Buchanan and Keohane 2006, 405, Applbaum 2010, 221, Valentini 2012, 593). The next section takes a closer look at the idea of a right to rule. Specifically, it sets out what activities ruling consists in, and what kind of right a state has when it has the right to rule – importantly, whether it has a moral claim, a moral liberty, or a moral power. According to many authors, the right to rule relates to the justified or appropriate exercise of coercive political power in making, applying and enforcing law (Nagel 1987, 218, Rawls 1993, 136-7, Buchanan 2002, 689, Williams 2005, 4). We will look into this idea in a more detailed way below.

Given that political legitimacy is a property of states, and given that states are generally understood as agents, are there any non-agents that can be politically legitimate? We shall return to this question in section 3 of this chapter, which deals with the scope of political legitimacy. It is common in the literature to refer to the legitimacy of a state's *decisions* (e.g. Rawls 1993, 446, Peter 2008, 33-4, Estlund 2008, 6). Decisions are generally justified by reference to the procedures through which they were made, or to the content of the decisions themselves. Section 3 considers whether decisions indeed fall within the scope of political legitimacy. I will propose that they do; how the state can be legitimated is up to normative theories, and justifications for the state's decisions are often regarded as part and parcel of such a justification. A normative theory may hold that a state's over-all legitimacy derives from the legitimacy of its decisions. For this reason, we should not conceptually rule out that they can be captured under the concept of political legitimacy.

Before proceeding to the discussion of the right to rule and the scope of legitimacy, it bears mentioning what the concept of political

group agency is taken as warranted (Valentini 2011, 215). They are, in liberal theory, often thought of as “an utterer of coercive proposals and a coercive agent” (Edmundson 1995, 86).

legitimacy is *not*. As pointed out above, I shall follow Buchanan's arrangement of concepts. This means that I distinguish political legitimacy from both political obligation and political authority (Buchanan 2004, 237, cf. also Huemer 2013, 5). On Buchanan's understanding, an entity has political authority if it has the right to rule and the right to be obeyed. Having the right to rule is what it means for a state to be legitimate. If, in addition, a state has the right to be obeyed, and citizens thus have an obligation to obey it, then the state has political authority. Political authority is thus the combination of political legitimacy and political obligation.⁹

Many theorists argue that where political legitimacy exists, political obligation does too (e.g. Pitkin 1966, 39, Peter 2009, 4, Valentini 2012, 595). This implies that the three concepts – legitimacy, obligation, authority – always go hand in hand. This position has been called the 'inseparability thesis' (Durning 2003). I will remain agnostic about whether the inseparability thesis is true. I keep open the possibility that political legitimacy does not imply political obligation, and that the conceptual tie between political legitimacy and political authority can hence be severed.¹⁰ My discussion concerns only the right to rule that states can have, and not the obligations that citizens can have.

9 This arrangement of concepts is not shared by everyone. E.g. according to Fabienne Peter, legitimacy is about the question how the right to rule ought to be exercised (Peter 2009, 58). On her understanding, "the concept of legitimacy qualifies political authority, the right to rule" (Peter 2009, 56). To have authority is to have the right to rule, and to have legitimacy is to exercise that right in a justified way. This suggests that it is possible for a state to have the right to rule even if it exercises this rule in an unjustified way. Moreover, one of the functions of legitimacy, according to Peter, is to determine which obligations are binding (Peter 2009, 58). Peter's account is similar to Raz's. Raz sees legitimacy as a property of authority; a state can have *de facto* authority if its directives are *regarded* as pre-emptive reasons for action by those to whom the directives are directed (Raz 1986, 26). Only a legitimate authority, however, indeed has the moral power to issue pre-emptive reasons for action (Raz 1986, 46).

10 Such a disconnection is proposed by e.g. Arthur Isak Applbaum (2010), Jiafeng Zhu (2015), Patrick Durning (2003). Applbaum, for instance, construes the right to rule as a Hohfeldian power (see table 1 on page 11), and illustrates that such a power does not entail an obligation to obey by giving the example of a motorist turning on a red light. According to Applbaum, "Motorist can consistently hold that the town has the moral power to impose upon her traffic fines – correlatively, that she is morally liable to have traffic fines imposed upon her – but not the moral power to impose upon her a moral duty to obey this traffic regulation" (Applbaum 2010, 231).

Another distinction that we must make is between political legitimacy and justice. These concepts are often normatively connected (Horton 2012, 134-5), but do not need to be, conceptually speaking. While political legitimacy is about the state's right to rule – a right that will be specified below – justice concerns the rights and entitlements of the state's subjects (Valentini 2012, 595). Any plausible account of political legitimacy is likely to argue that the right to rule somehow depends on whether the state respects or promotes the rights and entitlements of its subjects. Commonly, a certain degree of justice is taken as a requirement for legitimacy,¹¹ or political legitimacy is equated with a specific type of justice.¹² However, I take these connections to be *normative* connections; how theorists construe the connection between justice and legitimacy depends on the normative requirements they think an account of justice poses for an adequate moral justification of the state's right to rule. I take it to be possible, conceptually speaking, to argue that the state's right to rule does *not* depend on whether it respects or promotes justice. For the purposes of this exposition of the concept of political legitimacy, we therefore do not yet need to take a stance on the issue of whether and how political legitimacy and justice are connected. This topic will be addressed in the chapters in which I construct a normative account of political legitimacy.

Finally, before proceeding to the next section, it is worth noting that the concept of political legitimacy can be understood in either a normative or a descriptive sense. Thus far, I have been discussing

11 According to Rawls, legitimacy has an “essential connection with justice”; the constitution that specifies decision-making procedures must be “sufficiently just” and the outcomes of procedures can similarly not be “too gravely unjust” (Rawls 1993, 428). On Buchanan's view, political legitimacy concerns the moral justification of political power, which is “subject to the demands of justice” (Buchanan 2004, 233).

12 For Laura Valentini and Philip Pettit political legitimacy is distinct from distributive justice, and instead captures the demands of political justice. Valentini argues that “legitimacy articulates the demands of equal respect under the circumstances of ‘political justice’ (moderate scarcity, limited altruism, and reasonable disagreement about justice)” (Valentini 2012, 598). Legitimacy is thus “a subset of justice” (Valentini 2012, 597). Pettit takes the question of political legitimacy to be “whether the coercive imposition of the order is acceptable or justifiable or desirable” (Pettit 2012, 60). This imposition ought to be carried out through a just process of decision-making, and decision-making processes are covered by theories of political justice (as opposed to social justice) (Pettit 2015, 16).

the normative understanding. On the normative understanding, a theory of political legitimacy gives an account of what gives a state the right to rule; how can state rule be justified? On the other hand, on a sociological or descriptive understanding, political legitimacy concerns the question of whether citizens *believe* the state to be legitimate (Buchanan 2004, 235, Peter 2009, 56). In this dissertation, I shall be concerned with normative political legitimacy. While I shall argue in chapter 5 that citizens' beliefs about the state's legitimacy may causally impact its normative legitimacy, it is not by recording citizens' beliefs as such that a state's normative political legitimacy can be proven.

1.2

The right to rule

A legitimate state is a state that has the moral right to rule. This section further examines this right: what does it mean to rule, and what kind of right does a state have when it has the right to rule?

What is ruling?

Following Allen Buchanan, I take 'ruling' to consist of two components. I call them the components of (1) coercive power and (2) supremacy. First, the state makes laws and enforces them by the use of *coercion* (Buchanan 2004, 235, Simmons 2002, 18, Pettit 2012, 65). In liberal theory, the use of coercion is taken as a defining characteristic of states. According to John Rawls's, political power is always coercive power backed by sanctions (1993, 136). This suggests that any agent that claims to be a state, but does not engage in the use of coercive power backed by sanctions, is by definition not a state.

That the state is inherently coercive is a position that has not gone unchallenged (see Edmundson 1995), but I shall accept it. More specifically, I agree with those who accept the 'libertarian' position which holds that supposedly non-coercive measures like providing education or rewards are also indirectly coercive because they are only

possible due to the prior coercive act of taxation (Gaus 2003, 147, Mang 2013, 301). This renders virtually all, if not all, state activity coercive. Specifically, I take the state to issue threats of the form: “do not break the law, or otherwise I’ll punish you” (Valentini 2011, 209).¹³ Coercion can consist both in issuing this threat and in the infliction of the threatened punishment, should it come to that (Beran 1976).¹⁴

According to Robert Nozick’s path-breaking account of coercion, if I refrain from doing something in order to avoid some consequence you threaten to inflict on me, then, in most cases, you coerce me (Nozick 1997, 44).¹⁵ On this understanding of coercion, citizens who willingly

¹³ In the case of indirect coercion, this threat would be, for example: ‘pay your taxes so that I can provide education programmes, or I’ll punish you.’

¹⁴ References to threats are paradigmatic in definitions of coercion. See e.g. Nozick (1997, 44), Wertheimer (1987, 211), Valentini (2011, 209), Edmundson (1995, 82), Olsaretti (2004, 141). Wertheimer points out that “A’s threat does not *coerce* B to do X if B decides that it is better to suffer the threatened consequence” (Wertheimer 1987, 203). This would suggest that coercion cannot consist in infliction of the threatened punishment. Sometimes, citizens may decide that the threatened punishment is preferable to performing the action the state tries to get them to perform. This may be the case when e.g. a fine is so low that the citizens prefers paying the fine over complying with a law. It is to be expected, however, that citizens usually prefer running the *risk* of suffering the threatened consequence, hoping that they will manage to get away with breaking the law. If citizens were certain that the threatened punishment would be inflicted, one could be reasonably certain that a lot less law-breaking would take place.

¹⁵ Nozick’s full formulation reads as follows. “In the case where Q’s whole reason for not doing A is to avoid or lessen the likelihood of P’s threatened consequence (ignoring his reasons for wanting to avoid this consequence), P coerces Q into not doing A” (Nozick 1997, 44). To determine whether there is a threat, Nozick has an elaborate principle in order to adequately deal with counter-examples: “If the alternatives among which Q must choose are intentionally changed by P, and P made this change in order to get Q to do A, and before the change Q would not have chosen (and would have been unwilling to choose) to have the change made (and after it’s made, Q would prefer that it hadn’t been made), and before the change was made Q wouldn’t have chosen to do A, and after the change is made Q does A, then Q’s choice to do A is not fully his own”, where a choice not being fully your own marks the distinction between an offer and a threat (Nozick 1997, 42). Similar to Nozick, Michael Blake characterises coercion as an intentional action by a coercer to replace the option an agent would choose with the option the coercer wishes the agent to choose (Blake 2001, 272). Alan Wertheimer presents an importantly different account. On his moralised account, “proposals which are not wrong [...] are best understood as offers and therefore do not create coercive situations in the first place” (Wertheimer 1987, 268). This contrasts with Nozick’s account, according to which the preferences of the person to whom the proposal is made determine whether it is a threat or an offer. If we apply Wertheimer’s account to

comply with the state are not coerced; it is not the case that their *whole reason* for complying is to avoid the threatened consequence, which is Nozick's condition for coercion (see footnote 15). We might be inclined to say, then, that the state is not coercive to the extent that it manages to secure citizens' voluntary cooperation. However, there is reason to resist this conclusion. Given that the state requires citizens' compliance regardless of their willing cooperation, and given that the state will stand ready to use force on you in case you cease to cooperate with its decrees, the state remains characterised by a coercive nature, even if it does not coerce all citizens all the time by issuing its commands.¹⁶ The state's threat of punishment is issued to all, also to those for whom the threat is merely a 'stand-by condition for compliance' (Beran 1976, 81). We might thus say that the state is always at least latently coercive and should distinguish between *coercing*, and *being coercive*. While the state does not always coerce, it is always coercive. The first component of ruling, then, refers to the coercive nature of political power. I call this the component of *coercive power*.

I take the exercise of coercive power to be the fundamental aspect of states that calls for a moral justification (Huemer 2013, 77). A presumption against coercion is a widely accepted tenet in liberal theory (e.g. Valentini 2011, 206, Blake 2001, 272, Gaus 2003, 139, Edmundson 1995, 81). The presumption against coercion is usually adopted due to a concern for citizens' status as free and equal vis-à-vis each other (Rawls 1993, 450) and out of respect for every person's freedom (e.g. Buchanan 2004, 87, Pettit 2012, 65). It derives from the presumption in favour of liberty (Simmons 2001, 124, Feinberg 1973, 21).

states, states that only make morally justified proposals are not coercive. I regard this result as impracticable, given that it implies that we could only determine whether a state is coercive *after* we have determined whether its laws are justified. This precludes the possibility that we assess the justifiability of laws *given that* they are, or *despite being* coercive. The presumption against coercion makes such assessments crucially important. If we accepted Wertheimer's account, we would have to resort to phrases like 'presumption against (threats to use) force' instead of 'presumption against coercion'. While this is possible, it is also cumbersome. For this reason, I regard Nozick's account as superior at least for application in political theory.

¹⁶ As Harry Beran points out, "it is possible for something to be a coercive institution, without any of the people to whom it applies acting under coercion" (Beran 1976, 81).

The second component of ruling is (to be reasonably successful at) establishing and maintaining supremacy in the exercise of coercive power (Buchanan 2004, 235). Upholding supremacy involves suppressing others who use coercion, as when non-state actors try to enforce state rules or promulgate and enforce their own rules, without the state's permission (Buchanan 2004, 235, 2002, 689, Nozick 1974, 24). Establishing and maintaining supremacy, then, involves countering competition in the use of coercive power. Establishing and maintaining supremacy is hence also a coercive activity that the state performs, which explains why this, too, stands in need of justification. While it would be too much to ask that the state is able to counter any act of competition, it must at least be reasonably successful at doing so. If it tried to establish supremacy, but did not succeed at all, there would in fact be no supremacy. Given that (being reasonably successful at) establishing and maintaining supremacy is a constitutive part of what it means to rule, an alleged state could not be said to rule if it completely failed at establishing supremacy. I call this second aspect of ruling the *supremacy* component.

Thus, to rule means (1) exercising *coercive power* by issuing laws and coercively securing compliance with them and (2) (to be reasonably successful at) establishing and maintaining *supremacy* in these activities by preventing others from also exercising coercive power.

Agnosticism about the right to be obeyed

Now we have a definition of 'ruling'. The next question is: what does it mean to say that a state has a *right* to rule? On an often-held view, the right to rule entails the right *to be obeyed* (e.g. Pitkin 1966, 39, Peter 2009, 4, Valentini 2012, 595). For example, according to A. John Simmons's construction of the dominant view on legitimacy in philosophy, "[l]egitimate states have not only the right to command and coerce; they have the right to command and be obeyed" (Simmons 2002, 18). A similar analysis is provided by Arthur Isak Applbaum, who presents the standard view as holding that political legitimacy entails a moral obligation of citizens to obey and a moral immunity of the

state from coercive interference with its rule (Applbaum 2010, 217-8).¹⁷

As I pointed out above, I will remain agnostic about whether citizens' obligation to obey is indeed entailed by the state's right to rule. Since duty is the correlative of a claim-right, on the scheme of Hohfeldian incidents (Hohfeld 1919, 36, see table 1) a duty of citizens to obey the state would entail a right of the state to be obeyed.¹⁸ My commitment to agnosticism about the obligation to obey hence also entails agnosticism about whether the state has a claim-right to be obeyed.

Table 1

Hohfeldian incidents

Claim-right	Privilege	Power	Immunity
Duty	No-right	Liability	Disability

Vertical pairs are correlatives, diagonal pairs are opposites.

Below, I will give a more elaborate analysis of what kind of right the state has when it has a right to rule. For now, let me only say a bit more about whether it is plausible that we can analyse the right to rule – i.e.: the right to exercise coercive power and to establish and maintain supremacy – without simultaneously addressing whether citizens have an obligation to obey the state. Given that the right to be obeyed is often regarded as entailed by the right to rule (e.g. Raz 1985, 3, Simmons 2002, 19), one may think it is problematic to disregard the right to be obeyed in an analysis of the right to rule. I do not think it is, however. In setting out what 'ruling' means, we have singled out two components – the component of coercive power and the component of supremacy – that a state engages in when it rules. If we can examine

¹⁷ Simmons defends this view, Applbaum does not.

¹⁸ My discussion concerns *moral* rights, whereas Hohfeld's scheme was designed to analyse *legal* rights. Several authors point out, however, that Hohfeld's scheme can similarly be used to analyse moral rights without major alterations (Durning 2003, 374f, Applbaum 2010, 221).

under what conditions a state has a *right* to engage in these activities without thereby having to also examine how citizens are or are not obliged to act in response, then we can analyse the right to rule without also looking at the obligation to obey. Based on the above discussion, it is plausible that a state can only be said to rule if it also manages to secure a sufficient degree of obedience and non-competition.¹⁹ However, as I will discuss shortly, a state can have a *right* to rule and to secure *de facto* obedience and non-competition without there being an implication that the obedience and non-competition associated with that rule came about through an *obligation* of the citizens over whom that rule is exercised. Whether or not citizens obey and refrain from competing with the state because they have an obligation to do so is not an issue that we must necessarily settle before we can address the question of whether the state has a right to *secure* obedience and non-competition. If the right to secure obedience and non-competition is a Hohfeldian privilege, we can treat the state's rights independently from the question what obligations citizens have.

Given this possibility (which is discussed below), we can fruitfully analyse the right to rule without appealing to a right to be obeyed. That this possibility exists is sufficient for my purposes: it allows me to remain agnostic about the right to be obeyed. A right to be obeyed may *also* exist, depending on one's normative theory, but to make sense of the right to rule, as understood along the lines set out above, it is not necessary to conceive of this right as a claim-right that includes a right to be obeyed, and correlates with a duty of citizens to obey.

To clarify this point with an example, suppose you think the state has the right to exercise coercive power and establish supremacy if every citizen benefits from its laws and their enforcement, relative to a state of nature. Perhaps the state creates laws to organise traffic, property protection and a compulsory educational system. Now also suppose that every citizen does in fact benefit from every law. The state is hence, according to this example account, legitimate. On this example account, the state's right to exercise coercive power and

¹⁹ This is a conceptual claim: I take the concept of 'ruling' to mean that there is a sufficient degree of obedience and non-competition. If an agent does not secure these things, it cannot be said to rule.

establish supremacy does not depend on whether citizens have a moral obligation to obey the state's laws. Saying that the state is legitimate due to the benefits it delivers is compatible with saying that citizens are morally permitted to break the law. We could e.g. hold that a citizen is morally permitted to break the law if this benefits her even more and the law-breaking is more or less innocuous. She might turn on a red light in the middle of the night, pass over private property if she can see no other route, or skip a day of school if she has something much more important to do. On this example view, then, the right to rule and the obligation to obey come apart. It can analyse the state's right to rule by assessing which benefits its rule delivers without having to say anything about the obligations of citizens.

Assuming that such accounts are not conceptually misguided, we see that the right of a state to rule, i.e.: to engage in the coercive-power and supremacy component, can be considered independently of the right that states might have to be obeyed. Of course, if one proceeds to develop a normative account of political legitimacy that concludes there is a relationship between these different rights, one may have to deal with the right to rule (as conceived of it here) and the right to be obeyed in conjunction. This would have to await normative analysis, however. For now, we will proceed with the question what kinds of rights the right to make laws and enforce them and the right to establish and maintain supremacy are. Let us look at both rights in turn.

What kind of right is the right to rule?

The first component of ruling is to make laws and to enforce them by the use of coercion. Given the presumption against coercion that must be overcome in providing a justification for the use of this coercive power, my main question about legitimacy is whether the state is *permitted* to exercise coercive power over its citizens; a legitimate state is one whose exercises of coercive power are permitted. If exercising coercive power is part of what it means to rule, and if a legitimate state has the right to rule, then a legitimate state has the right to engage in its exercises of coercive power over its citizens. But what kind of right is this? Let us consider the different Hohfeldian incidents.

The Hohfeldian incidents are always relations between two parties (Lindahl 1977, 29) and are hence useful to analyse what rights a state has vis-à-vis its citizens. Given that my main question is how the state can permissibly coerce citizens, it makes sense to start by looking at the Hohfeldian privilege. As Lars Lindahl suggests, the Hohfeldian privilege is plausibly interpreted as a ‘*may* concept’ (Lindahl 1977, 32), i.e.: the privilege refers to what the agent in question may do in relation to the other party. Wesley Newcomb Hohfeld himself says that to have a privilege means to be at liberty to do something (Hohfeld 1919, 42), or not to have a duty not to do that thing (Hohfeld 1919, 39).²⁰ This is indeed the kind of right we need. When the state has the Hohfeldian privilege to coerce citizens, I shall thus understand this privilege as showing that the state may, or is at liberty to, or is permitted to exercise this coercion over its citizens.

If the state has a privilege to exercise coercive power over its citizens, then citizens have a no-right *not* to be subjected to this coercive power. That is: their rights are not violated by being subjected to the state’s coercion (Hohfeld 1919, 41, Lindahl 1977, 30). If the state has a privilege to coerce citizens, however, this does not imply that citizens are under a duty not to *interfere* with the state’s exercise of coercive power over them (Hohfeld 1919, 41, Lindahl 1977, 30). According to Lindahl, this is an important point of Hohfeld’s; it emphasises that the action that forms the content of the privilege is another action than the action of *interfering* with that action, and that nothing about the rights relation concerning the latter action follows from knowing the rights relation concerning the former action (Lindahl 1977, 31). In our case: *exercising* coercion and *interfering* with the exercise of coercion are different actions. If the state has a privilege to exercise coercion over citizens, this does not tell us anything about whether citizens have a privilege to interfere with the exercise of this coercion. This is, for our purposes, also an insight of great value. It supports the idea that the question whether the state has a privilege to coerce citizens can be dealt with independently of the question whether citizens have an

20 Those things that one does not have a duty not to do are the things that, on the traditional scheme of deontic normative statuses, are permissible (McNamara 2006, 202). Lindahl suggests that on a plausible interpretation, Hohfeld’s privilege is a counterpart of the deontic ‘may’ (Lindahl 1977, 33).

obligation to obey the state, or to refrain from interfering with it.

Understanding the right to exercise coercive power as a privilege, then, suits our purposes well. We have not yet established that the other Hohfeldian incidents – claim-rights, powers, and immunities – are not also relevant to the right to exercise coercive power, nor is this a claim I want to endorse and defend. That the state has a privilege to coerce is compatible with it having other rights as well, and in fact, claim-rights, powers, and immunities have been assigned to the state in relation to its right to exercise its power.²¹ *Claim-rights* are especially useful to determine which correlative duties citizens have, e.g. to obey or not to interfere with the state's exercise of its coercive power. Furthermore, if the state has a moral *power*, it can alter the rights and duties of others; others are liable to have their normative situation changed. This might mean, for example, that the state could not just create laws, but laws that are *binding* (Durning 2003, 375). A moral power, too, can thus have implications for citizens' obligations. Finally, having an *immunity* would give the state a right to its status, in the sense that citizens or other states would be morally disabled from taking the state's right to use coercive power away (Durning 2003, 375). All other Hohfeldian incidents, then, are particularly useful in determining how others are to treat the state, given that it has certain rights. It is very plausible that the obligation to obey could not be left undiscussed if one looked at the question whether a state also has these other types of rights.

As Patrick Durning suggests, there is no reason to think only some of these rights matter for legitimacy (Durning 2003, 375), and I hence do not deny that it is quite possible that a legitimate state might have these other rights. A comprehensive theory of political legitimacy and its relationship with political obligation and political authority would have to address the other types of rights as well. In my discussion, however, I will limit myself to the state's privilege to use coercion in exercising its rule. Given the presumption against coercion, we have already achieved a lot if we can show under what circumstances a state is at liberty to exercise coercive power. To limit myself to addressing the state's privileges concerning the exercise of coercive power, then, is far from taking on a trivial task.

²¹ See Durning (2003) for an overview.

Given this demarcation of the task that I set for myself, it is important to note the following: A focus on the state's privilege to coerce might seem too weak. For instance, if the state only has a privilege to coerce me to pay a fine, but not a power to create an obligation for me to pay the fine, then I might still have the privilege not to pay the fine. Should a legitimate state not be one that does more than just coerce me to pay the fine? Should a legitimate state not *oblige* me to pay the fine? In response, I say that this may well be true, and that my preceding discussion has not denied this. I have merely limited myself to one type of question: why would the state be at liberty to coerce citizens (e.g. to make them pay fines under threat of incarcerating them if they fail to comply) if there is a presumption against coercion? The state having a privilege to coerce is compatible with its having a power to create obligations for citizens. However, as just discussed, a state's privilege to rule does not *entail* a citizen's obligation to obey and the question of citizens' obligations is beyond the purview of the current discussion.

Let us now turn to the second component of ruling: (being reasonably successful at) establishing and maintaining supremacy. What kind of right does the state have if it has the right to engage in this activity? Recall that (being reasonably successful at) establishing and maintaining supremacy consists in suppressing attempts of others to also use coercive power and hence to compete with the state.

In relation to the state's supremacy, there are two issues at stake. First, there is the question whether a state has the right to *establish and maintain* supremacy vis-à-vis its citizens. This is the right I have outlined so far. Second, however, there is the question whether the state has the right to *be* supreme. While the former right can, along the same lines as the right to use coercive power, fruitfully be understood as a privilege, this is not so for the right to be supreme. A state is only supreme if others refrain from competing with it. This means that the right to be supreme has direct implications for the permissible behaviour of others; if you (successfully) compete with me, I am automatically not supreme anymore, and if I have a right to be supreme, my right is thus violated. The right to be supreme is, for this reason, best understood as a claim-right: it entails a duty on your part. This is different for the right to establish and maintain supremacy;

this right is more akin to the right to use coercive power in that it is possible to look at it as a privilege. While I can, by definition, only establish and maintain supremacy over you if you do not compete with me, my *privilege* to do so is not dependent on your being *obliged* not to compete.

Both rights are conceptually sound. The right to be supreme can be seen as an extension of the right to establish and maintain supremacy. The right to be supreme then consists in the privilege to establish and maintain supremacy *and* the claim-right that others do not compete (entailing a duty on the part of citizens). The extended right would be an interesting topic of discussion. However, given that the question in this dissertation is how the presumption against coercion can be overcome, and given that it is in establishing and maintaining supremacy that a state's coercive activities take place, I will limit my discussion to that narrower right. Again, we should note that a comprehensive theory of political legitimacy might well have to deal with the possibility of a state's right to *be* supreme as well.

To conclude: in what follows, and for the purpose of my discussion, I shall consider the right to rule to be at least a privilege. I have not claimed that a comprehensive account of political legitimacy should not make reference to other rights as well. The reason I focus on the privilege to rule is that the presumption against coercion calls for an explanation concerning why and when such a privilege could exist. This is the main question I seek to answer in my reflections on political legitimacy.²²

1.3

The scope of political legitimacy

Let me start by summarising the conclusions from the previous paragraphs. I have defined political legitimacy as the property of being legitimate that certain political phenomena can have, where

²² I take a similar approach to legitimacy as David Estlund here. He holds that an account of political legitimacy shows at least "when the state is permitted to enforce (certain of its) commands" (Estlund 2008, 41).

'legitimate' means 'rightful' or 'justified'. 'Political' refers to the realm of functioning of states. States are institutional structures that specify positions of power. These positions of power are occupied by individuals whose actions, together, are the actions of the state. The state is generally personified and taken to act through the government. States persist when governments change. Governments use the institutional structure of the state to rule in the name of the state. Ruling means: to exercise coercive power and (to be reasonably successful at) establishing and maintaining supremacy. Legitimate states are states that have the *right* to rule, a right that I specified as at least a Hohfeldian privilege for the purposes of my discussion in this dissertation.

To provide a normative account of political legitimacy, we must present an account of what makes states legitimate, that is: of what gives them the right to rule, understood as a privilege to rule. This question is pressing due to the liberal presumption against coercion. Given that we specified ruling as a coercive activity, anyone who argues that it is possible for a state to have a right to rule must explain how this presumption against coercion can be overcome. Providing such an explanation is the task that I set for myself in chapters 2, 3, and 4 of this dissertation.

To clarify this task, we must now turn to the question of scope. As I set out above, the aim of a theory of political legitimacy, as I understand it, is to give an account of what gives a state the right to rule. Specifically, I want to answer the question: what makes it permissible for a state to use coercion? Consider the following three answers that all invoke a possible necessary condition for political legitimacy:

1. A state's use of coercion is justified only if the state's rule is exercised by *the right people*.
2. A state's use of coercion is justified only if decisions about how that state will rule are reached through *the right decision-making procedures*.
3. A state's use of coercion is justified only if decisions about how that state will rule are *the right decisions*.

(Note that these conditions do not exclude each other. Moreover, we

do not yet touch on the question which of these conditions, or possible combinations of them, might be sufficient for political legitimacy.)

The first condition concerns *who* has the right to rule on behalf of the state. Determining who the right people are requires a principle of succession, e.g. a democratic election procedure or a hereditary principle, that specifies who is to be the next to wield the power of the state. Rawls refers to this condition when he argues that for a state to be legitimate says something about the *pedigree* of its rulers (Rawls 1993, 427). Emanuela Ceva invokes this condition on legitimacy as well, when she argues that considerations of legitimacy concern the question *who* is entitled to exercise coercive power in society (Ceva 2012, 184). To illustrate this condition at work, suppose we accept that fair democratic election of a state's rulers is necessary for that state's legitimacy. If we apply this principle to Russia, we would have to conclude that the legitimacy of the Russian state was compromised from the moment that Putin got himself elected through a rigged procedure in March 2012 (Snyder 2018, 48). To generalise: if you would accept (1) as a necessary condition for political legitimacy, then you deny that a state whose government did not come to power in the right way is legitimate.

The second possible condition concerns *decision-making procedures* used in the adoption of laws and policies, e.g. a democratic majority-vote procedure or a deliberative-democratic procedure, that determine which coercive decisions a state makes. This second possibility does not concern *who* has the right to rule, but rather *how* a state must rule, regardless of who is in power. Some form of democratic procedure to make decisions about laws and policies is an often-invoked necessary condition for legitimacy (e.g. Rawls 1993, 428, Peter 2009, 59, Valentini 2012, 600, Pettit 2015, 17, Estlund 2008, 8). If you accept (2) as a necessary condition, then any state that does not adopt its laws and policies through the right procedures does not have the right to rule. This means that the right to rule is qualified as the right to rule *through the right decision-making procedures*. That is: no rulers, regardless of their pedigree, can have the right to rule according to whatever decision-making procedure they see fit. Rather, the procedures must meet some normative standard, such as being intrinsically fair or being most likely to deliver the best results.

Democratic procedures have been defended on both these grounds.²³ If legitimacy is dependent on making decisions through the right procedures, it makes sense to see legitimacy as a matter of degree; the more often the right decision-making procedures are used, the more legitimate the state is.

The third possible condition concerns the *content* of the coercive decisions that a state makes. Some form of content requirement is also common in the literature. Rawls, for example, argues that at some point, the injustice of the outcomes of a legitimate democratic procedure corrupts the legitimacy of these outcomes (Rawls 1993, 428); “[l]aws cannot be too unjust if they are to be legitimate” (429). Epistemic accounts of democracy also invoke this condition; on such accounts, the legitimacy of democratic states depends on the ability of democratic decision-making procedures to generate correct outcomes, or track the truth (Peter 2008, 33, List and Goodin 2001, 277).²⁴ Buchanan recognises protection of at least the most basic human rights as a necessary (but not sufficient) condition for state legitimacy (Buchanan 2004, 247). Tim Heyse argues that democratic procedures are not sufficient for political legitimacy, but that an account of legitimacy must also pay attention to the reasons that are used *within* these procedures to arrive at decisions about the use of political power (Heyse 2006, 276). To the extent that legitimacy depends on coercive decisions having the right content, it again makes sense to think of legitimacy as a matter of degree. In what follows, I will assume that legitimacy can be approached in a scalar fashion (cf. e.g. Williams 2005, 10, Greene 2016, 87).

Our question for now is not which of these possible (combinations of) conditions are necessary or sufficient for political legitimacy. As I

²³ Examples of the former can be found in Pettit (2015, 27) and Peter (2009, 134). An example of the latter is presented by Estlund (2008, 8).

²⁴ While Christian List and Robert E. Goodin classify David Estlund as an epistemic democrat, Fabienne Peter analyses Estlund’s account as a hybrid theory drawing on both content and procedural considerations. It is clear that content plays an important role for Estlund. He says that “[d]emocratically produced laws are legitimate and authoritative because they are produced by a procedure with a tendency to make correct decisions” (Estlund 2008, 8). On his account, then, democratic procedures are justified by reference to their ability to produce decisions with the right content.

have indicated above, they all figure in leading theories of political legitimacy. As we shall see in the next chapter, the second and third conditions, which concern decision-making procedures and the content of decisions, are an important point of debate in the legitimacy literature. Here, I have set out these possibilities to make it plausible that an account of political legitimacy could, in principle, contain any of them. When justifying the coercive power of the state is our aim, there is no reason to think that there is anything conceptually inappropriate about formulating one's normative justification by reference to one or more of these conditions. In this light, I shall regard it as desirable to draw the scope of political legitimacy as wide as we can without losing sight of its core question. This prevents that we rule out positions from the start that are in fact worthy of consideration.

Finally, in what follows, I shall agree with Gerald Gaus that legitimacy concerns all coercive acts that a state performs (Gaus 2003, 159). This may seem controversial to those who adhere to legitimacy principles like Rawls's liberal principle of legitimacy. However, I do not think it is. Rawls's principle holds that coercive power must be exercised

in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason. [...] To this it adds that all questions arising in the legislature that concern or border on constitutional essentials, or basic questions of justice, should also be settled, so far as possible, by principles and ideals that can be similarly endorsed. (Rawls 1993, 137)

Does Rawls, here, limit the scope of political legitimacy to constitutional essentials and basic questions of justice? I do not think he does. Rawls's principle only puts *content* requirements on constitutional essentials and basic questions of justice. However, this does not mean that other coercive decisions must not be justified. On Rawls's account, decisions regarding issues that do not relate to constitutional essentials or basic questions of justice still need to be justified, namely: they need to be settled through democratic *procedures* (Peter 2009, 62).²⁵ Rawls's

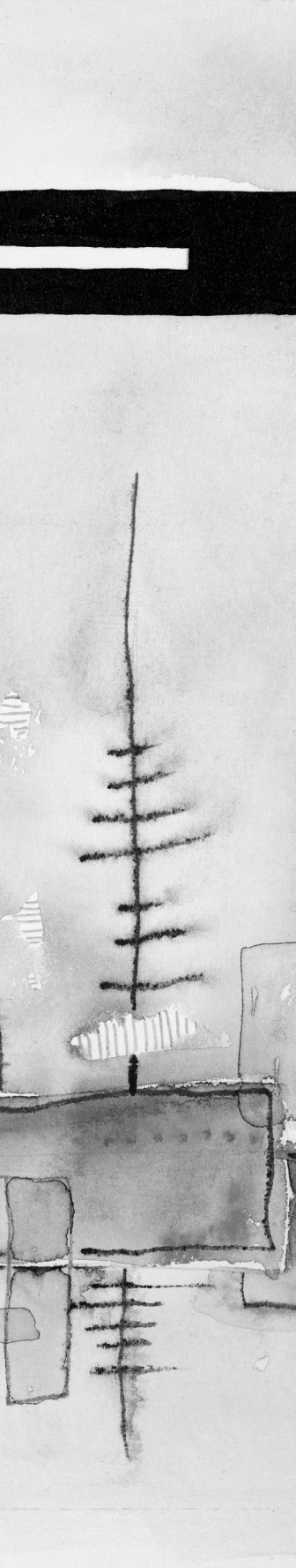
²⁵ This shows that Rawls's view is a non-monistic view (Peter 2009, 65, cf. also Gaus 1999, 273); it poses both content and procedural requirements for legitimacy. The

liberal legitimacy principle, then, is fully compatible with the idea that the scope of political legitimacy extends to every exercise of coercive power, and that every coercive decision needs to be justified.

This leads me to the following conclusion about the scope of political legitimacy. Political legitimacy concerns the question how coercive state rule can be justified: what gives a state the privilege to make and apply laws, and to try to establish and maintain supremacy? This question can be answered by reference to a state's rulers, to its decision-making procedures, or to the content of its coercive decisions. Perhaps there are still other ways to answer the question – ways that I have not identified. In delineating the concept of political legitimacy, we should not rule out possible answers that a normative theory might want to give to the question of political legitimacy. For this reason, the scope of political legitimacy should be drawn wide; anything to which a theorist might want to refer in providing a normative theory of political legitimacy should be available, as long as we note that what stands to be morally justified in such a theory is, in the end, the state as a coercive agent.

Conclusion

In summary: states are coercive agents. Due to the presumption against coercion, states must hence be morally justified. A state that is morally justified is a legitimate state and has the right to rule. Ruling consists in using coercive power and (being reasonably successful at) establishing and maintaining supremacy. A state that has a right to do these things has at least a Hohfeldian privilege to do so. The right to rule could be made conditional on (1) who rules, (2) through which decision-making procedures the state rules, or (3) which content the state's decisions have. All these options fall within the scope of the concept of political legitimacy.



Content-dependence

Chapter 1 provided us with an understanding of the concept of political legitimacy. Now that we have this understanding at hand, we can turn to the *normative* question of the conditions that states must meet in order to be legitimate. Let me note at the outset that this dissertation will not provide a full normative account of political legitimacy; it does not address all considerations that matter for the moral justification of coercive state power. Rather, throughout the next three chapters, I develop three increasingly specific criteria for legitimacy. While a full legitimacy assessment would need to draw on additional criteria, I do regard the ones I defend as central ones. Moreover, in developing them, I hope to contribute a new perspective on political legitimacy to the literature. My approach to political legitimacy will be more non-ideal than political liberalism, and more moralised than political realism, while engaging with both these approaches.

The first and still quite abstract criterion I propose is *content-dependence*. Whether political legitimacy in fact concerns the content of laws and policies is a question that merits careful consideration, because it is far from uncontroversial that political legitimacy is significantly content-dependent. As we will see below, many philosophers prefer to make political legitimacy primarily dependent on *procedures*. Yet, the content of laws and policies clearly has a moral dimension; the question what laws and policies are morally appropriate is certainly intelligible. This does not imply, however, that this moral dimension is also best understood as relevant *within a theory of political legitimacy*. This, then, is the question we need to answer: does it matter for political legitimacy which laws and policies are adopted?

Content-dependence was in chapter 1 suggested as one possible condition for political legitimacy. Now, I will assess the merit of

accepting a content condition on political legitimacy, and argue that political legitimacy should indeed be regarded as content-dependent. By content-dependence I mean that a justification for state coercion is, in a way to be specified, dependent on the content of coercive decisions. Although I will argue that the justifiability of the content of coercive decisions is neither always necessary nor always sufficient for the justifiability of the *enforcement* of laws or the *carrying out* of policies, I regard justifiability of the content of laws and policies as a necessary condition for the permissibility of the *adoption* and *maintenance* of laws and policies. Because of this, political legitimacy will generally be importantly content-dependent. In arguing for this position, I will contrast my view with proceduralist approaches to political legitimacy, e.g. those of John Rawls, Philip Pettit and Fabienne Peter.

In chapter 1, I noted that a content requirement suggests a scalar approach to legitimacy. To ask whether a state is legitimate is to ask whether it is morally justified in exercising coercion in making laws and policies and in establishing and maintaining supremacy. If such justification depends on the content of the coercive measures that make up state rule, then we may say that the state enjoys a higher degree of legitimacy as more of its coercive measures have a justifiable content, and vice versa. In developing the idea of content-dependence and arguing for it as a criterion for state legitimacy, I will assume such a relationship. I will use the term 'legitimate' as a synonym for 'morally justified', and take coercion as the thing to be justified. This means that any coercive state activity (such as making laws and policies and enforcing them) will be called legitimate if and only if it is morally justified.²⁶ Any coercive activity that is morally justified will count towards the legitimacy of the state as a whole, just as any unjustified coercive activity will detract from it. I will not discuss how exactly the degree of a state's legitimacy can be determined; I will set aggregation issues aside.

²⁶ Note that, throughout the chapter, I limit the applicability of the criterion of content-dependence. I argue for its relevance for some coercive decisions, though not necessarily for all.

2.1

An example to set the stage

To make the idea of content-dependence less abstract, let me start by presenting the point that I develop in this chapter in an applied manner, by way of an example. The presentation in this section serves only to speak to the reader's intuitions. The purpose of the example is to make it plausible that the content of coercive decisions should play a central role in their moral justification. The theoretical defence of content-dependence follows in sections 2.2 through 2.4.

The example is the following. In 2015, a number of legal arrangements in the Netherlands relating to work, dismissal and unemployment were changed. The new arrangements were bundled together under the Law on work and security (Wwz).²⁷ An important change that the new law implemented concerned the so-called 'chain provision' ('ketenbepaling'). Before 2015, the chain provision was modelled on a '3/3/3' rule: employees could get a maximum of *three* consecutive temporary contracts in a maximum of *three* years before employers had to give a permanent contract, where breaks of less than *three* months were not considered to break consecutiveness. The Wwz of 2015 included a new chain provision based on a '3/2/6' rule: a maximum of *three* temporary contracts in a maximum of *two* years, where consecutiveness is only broken after *six* months.²⁸

The 3/3/3 rule was replaced by the 3/2/6 rule in order to give workers security earlier on – after two instead of three years – and to prevent employers from simply dismissing their employees for the relatively short period of three months after which they return to work and resume their job on a new temporary contract (colloquially called the 'revolving-door construction'). The intention of the law was to "strengthen the legal position of employees with a fixed-term contract and of those with a contract with flexible hours" and "to improve the flow from flexible to permanent contracts and to limit the long-term

²⁷ See <https://www.rijksoverheid.nl/documenten/brochures/2015/06/04/wwz-ontslag-en-afwijking-cao>, accessed 27 September 2020.

²⁸ Some jobs – like PhD trajectories – are exempt from this rule.

deployment of flexible labour”.²⁹ The government’s expectation was that the new chain provision would further this goal of security for workers, due to employers choosing to give permanent contracts more often, rather than lose their employees after two years (for at least half a year).

This expectation was not generally shared. For example, the Council of State (Raad van State) warned in 2013 that the stricter chain provision might have a counterproductive effect; if permanent contracts are not offered after two years, the polarisation between workers with temporary and permanent contracts might grow, due to temporary contracts being even shorter, namely two instead of three years.³⁰ This effect would be exacerbated if employers would also choose not to invest in educational opportunities for workers on temporary contracts, given that the contract of at most two years would be too short for the employers to benefit from better-educated employees.³¹ A comprehensive evaluation of the law will be conducted in 2020 (Koolmees 2018, 2019). So far, it is not yet entirely clear what the effects of the chain provision have been. Yet, the current (as of March 2020) Dutch government has already partially reinstated the old chain provision before the comprehensive evaluation that will take place in 2020; the chain provision as of 1 January 2020 follows a 3/3/6 rule.³²

29 The original text, which I translated, in the introduction of the Wwz states “dat het wenselijk is de rechtspositie van werknemers met een arbeidsovereenkomst voor bepaalde tijd en met een arbeidsovereenkomst met wisselende uren te versterken, de doorstroom van flexibele naar vaste arbeid te bevorderen en de langdurige inzet van flexibele arbeid te beperken”. See <http://wetten.overheid.nl/BWBR0035254/2016-01-01>, accessed 27 September 2020. All translations of Dutch texts are mine.

30 “Op onderdelen, met name de aanscherping van de ketenbepaling, lijken die aanpassingen zelfs contraproductief te kunnen zijn voor het functioneren van de arbeidsmarkt en de tweedeling op de arbeidsmarkt te kunnen versterken” (Raad van State 2013).

31 “Het is evenmin uitgesloten dat werkgevers overstappen op kortere (ketens van) tijdelijke arbeidsovereenkomsten. In dat geval zal de bereidheid van werkgevers om in scholing van tijdelijke werknemers te willen investeren mogelijk verder afnemen, omdat er te weinig tijd is om deze kosten terug te verdienen. Deze ontwikkelingen dragen niet bij aan een verbetering van de werkzekerheid van flexwerkers” (Raad van State 2013).

32 See <https://www.rijksoverheid.nl/onderwerpen/arbeidsovereenkomst-en-cao/plannen-kabinet-voor-meer-balans-tussen-vast-werk-en-flexwerk>, accessed 27 September 2020.

For the sake of argument, I will assume that the Council of State's reservations are valid and convincing, and that these reservations provided a moral reason for the Dutch parliament not to accept the chain provision in the form in which it was proposed and adopted. Supposing that this moral reason against the chain provision was moreover a *sufficient* reason not to accept the Wwz as it was proposed – that is: a reason which was not outweighed by (a combination of) other valid moral reasons in its favour – adoption of the Wwz including the 3/2/6 chain provision was unjustified.

The example serves to make a distinction that is central to the argument I defend in this chapter. The distinction is between (1) *adopting* a law and *maintaining* (i.e.: *not changing*) it after its adoption, and (2) *enforcing* a law as long as it is in place. If we accept that there were sufficient moral reasons against the chain provision, which ought to have led the parliament to amend the Wwz before adopting it, then we are saying that *adoption* of the Wwz was unjustified. However, the law was in fact adopted, including the new chain provision. Those who execute and apply the law were faced, from then on, with the question whether they should indeed execute and apply the law. They know that if they do, this may lead to employees being fired after two years, instead of three years like before. This would be a bad consequence, leading to a more severe threat to the livelihood of citizens than was the case before. Moreover, one might argue that this bad consequence roots in unjust decisions on the side of employers; they could also offer permanent contracts and perhaps they have a duty to do this, in order to provide employees with security. To the extent that this is true, the chain provision may be said to induce unjust behaviour. Yet, it seems that this would not be sufficient to warrant the conclusion that the law should not be enforced. Not enforcing the law would be a serious breach of the rule of law, and such a breach does not seem to be justified given the general acceptability of the Dutch regime and given the fact that the procedural origin of the law was not problematic. This result tracks the point pressed by a number of theorists, namely that laws may be enforced provided that they came about through the right procedures, and provided that they are not too unjust (e.g. Rawls 1993, 428, Valentini 2012, 600, Estlund 2008, 110).

Here we have a situation, then, in which the adoption of a legal

provision – the chain provision – is presumed unjustified due to the content of the provision in question, while its enforcement is justified due to the importance of the rule of law. The reason that these two judgments come apart is that the decision whether to *adopt* a law (and to *maintain*, i.e.: not change, it) and the decision whether to *enforce* a law are different decisions, made by different persons, to which different moral considerations apply. The question is: do both perspectives matter for political legitimacy, or does political legitimacy only concern enforcement, and not adoption and maintenance? My aim in this chapter is to argue that the content considerations that determine whether a law or policy merits adoption matter greatly for legitimacy, even if they are not the only things that matter.

The reason, in brief, is as follows. As we saw in chapter 1, the call for legitimization of the state use of power stems from the presumption against coercion. As I argue in this chapter, in order to justify coercion, we must not only justify the *enforcement* of existing laws and policies, but also the decision to *adopt and maintain* laws and policies to begin with. While laws and policies must be adopted through procedures, following procedures is not sufficient to justify the adoption and maintenance of laws and policies. Whether there is a justification for adopting and maintaining a law or policy depends importantly on whether it *merits* being adopted and maintained. That is: we should consider whether the content of laws and policies is morally justifiable. I take this perspective to be of crucial importance for political legitimacy; the content of our laws and policies determines whether state coercion is used for better or worse. Given the presumption against coercion, it is vital that it be used for better, or state coercion could not be justified at all. Let me now turn to setting up and defending this argument in detail.

2.2

Content-dependence in theories of political legitimacy

The example that I just discussed provides us with a sense of how content-dependence may matter for assessments of political legitimacy. When the question at stake is which coercive measures merit being *adopted*

or *maintained*, content matters. Now, we must look more carefully into the argument I sketched in the preceding section. Particularly, I want to consider the case – one which I will ultimately not endorse – *against* the position that content-dependence is central to political legitimacy. Understanding this argument is important, given that many political philosophers, as we shall see below, do in fact deny that legitimacy is significantly content-dependent. This section sets up the conceptual space for a number of different types of theories. The next section considers those theories that argue against content-dependence.

Recall the definition of political legitimacy. When a state has the property of political legitimacy, it has the right to rule. As discussed in chapter 1, I understand this right to be at least a Hohfeldian privilege consisting of the privilege to use coercive power in the making, applying and enforcing of laws, and the privilege to establish and maintain supremacy in doing so.

Virtually all theorists³³ recognise that the right to rule is a qualified right; a state never has the right to rule in whichever way it wants.³⁴ Rather, certain restrictions must be respected, or guidelines followed. This means that, even if *who* rules matters for legitimacy, we must still address the question of *how* these rulers may rule; may they use any procedure or make any decision they want? A theory of political legitimacy gives an account of these qualifications of the right to rule, qualifications that specify the conditions under which coercive power is appropriately exercised. As Peter remarks: “it is hard to see how the democratic assembly’s right to rule can be characterized independently of the conditions under which this right is appropriately exercised” (Peter 2009, 58). (This also goes, I would like to add, for the possibility of the right to rule of non-democratic states.) Given the presumption

33 Thomas Hobbes is perhaps the closest it gets to an exception.

34 Some theorists invoke a threshold; laws cannot be too unjust if they are to be legitimate (e.g. Rawls 1993, 428, Valentini 2012, 600, Estlund 2008, 110). Allen Buchanan holds that legitimacy requires protection of basic human rights through means that themselves respect these rights too (Buchanan 2004, 247). Neutralists hold that states are not permitted to enforce ideas of what the good life consists in (Dworkin 1985, 195, Klosko 2003, 169, Quong 2011, 2), or act in ways that cannot be impartially justified (Gaus 2003, 146). Perfectionists hold that states should promote the good (Raz 1986, 133, Sher 1997, 11). Democrats hold that power must be exercised through democratic procedures (Peter 2009, 132, Pettit 2015, 17). Other examples are legion.

against coercion, any use of coercive power by any state must be provided with a justification. The more often such a justification is present, the more legitimate a state is. This makes legitimacy a matter of degree. The legitimacy of the state then depends on the extent to which its use of coercion can be justified.

As set out in the previous chapter, it is for a theory of political legitimacy to specify what such a justification looks like. When we know how the use of coercive power by the state can be justified, we know what it means for the state to have the right to rule: it means that it has (at least) the privilege to engage in these justified exercises of coercive power. The justification provides what we need to overcome the presumption against coercion, and creates the privilege to coerce, while to coerce would have been prohibited without the justification. The right to rule is thus limited, in a way to be specified by a theory of political legitimacy, by principles that determine how the coercive activity of ruling can be justified.

This makes the question pressing what the restrictions on or guidelines for the morally appropriate exercise of state rule are. As we will see below, there are roughly two main strategies in the literature to approach this question: a procedural approach and a content-related approach. While procedural approaches consider the *way in which* coercive decisions are made, content-related approaches ask about the *content* of the coercive decisions directly. These strategies are not incompatible, and hybrid theories are common. This results in three possible kinds of theories: hybrid theories, purely procedural ones, and purely content-dependent ones.

Hybrid theories often employ content-related conditions to set a basic minimum that must be met for the state to have a right to rule. On such accounts, the thought is that legitimate laws are, in principle, laws that are decided on through the right procedures, but that if these procedures yield results that are too morally objectionable, these outcomes must be regarded as illegitimate due to their content. Let us call these views ‘threshold views’. Rawls’s legitimacy theory is a clear example of this strategy, as can be seen from the following passage.

A legitimate procedure gives rise to legitimate laws and policies made in accordance with it [...]. Neither the procedures nor the laws need be

just by a strict standard of justice, even if, what is also true, they cannot be too gravely unjust. At some point, the injustice of the outcomes of a legitimate democratic procedure corrupts its legitimacy, and so will the injustice of the political constitution itself. But before this point is reached, the outcomes of a legitimate procedure are legitimate whatever they are. (Rawls 1993, 428)

Because legitimacy does not require that laws and procedures be strictly just, Rawls argues that “legitimacy is a weaker idea than justice and imposes weaker constraints on what can be done” (Rawls 1993, 428). The requirements for legitimacy, then, are a subset of the requirements for full justice (Valentini 2012, 597). Laura Valentini follows a similar strategy, according to which, under circumstances of reasonable disagreement, the state “should enforce those demands of justice that are a *sine qua non* of equal respect [...], and then let democratic procedures determine what else equal respect requires” (Valentini 2012, 600). According to David Estlund, procedures ought to be accepted that tend to result in substantively correct decisions (Estlund 2008, 108), as determined by a procedure-independent standard of correctness. After the procedure has been selected, substantively unjust laws can be legitimate, due to their procedural pedigree. However, Estlund contends that there must be limits to this; laws can be too unjust to still count as legitimate (Estlund 2008, 110). The structure of threshold views, then, is to make legitimacy content-dependent below the threshold, and procedure-dependent above the threshold.³⁵ Such threshold views are one possible strand of hybrid views.

Others adopt non-hybrid accounts that put yet a stronger focus on procedures in order to determine legitimacy. Peter presents a legitimacy theory she calls ‘pure epistemic proceduralism’. According to Peter, democratic procedures ought to be structured in such a way that they deliver critically examined decisions, without requiring the content of these decisions directly in the legitimacy theory (Peter 2009,

³⁵ I leave aside here whether procedures play a role for the legitimacy of issues below the threshold. It is possible to hold that, while decisions concerning these issues must meet content requirements, they must still be settled through certain procedures. What is relevant here, however, is to show that content-dependence is limited in its application to issues below the threshold.

124). According to Peter, fair procedures will ensure that some types of unfairness, like sexist proposals, will not be adopted as outcomes (Peter 2009, 134). We may say, then, that Peter builds a normative requirement for legitimate outcomes into her criteria for procedure selection. Pettit, too, construes the perspective of legitimacy solely in terms of procedures. According to Pettit, the legitimacy perspective simply is a procedural perspective, and unjust laws can hence be legitimate, provided that they were imposed in the right way (Pettit 2012, 65).

Next to the views just discussed, there is a category of views that is not more procedural than threshold views, but rather more content-dependent. For instance, Gerald Gaus holds that “*everything [public officials] do must be done for good reasons*”. Good reasons are those that “fully rational citizens could recognize as such”, which makes the coercive acts that are justified by these reasons justifiable (Gaus 2003, 148, emphasis original). Any neutrally justifiable coercive decision is one that is drawn from an eligible set, the members of which are regarded by all as better than no coercive choice at all (Gaus 2011b, 322, 502). That is to say: on Gaus’s view, the costs that a coercive decision has for a rational citizen may not exceed the benefits that this citizen derives from the decision, as judged by that citizen (Gaus 2011b, 505). This shows that his view is content-dependent; what the costs and benefits of a decision are for each rational citizen, and hence which decisions are justifiable, depends on the content of those decisions, and not on whether the decision was e.g. adopted in a democratic vote. While Rawls reserves the requirement of neutrality for constitutional essentials and basic matters of justice (Rawls 1993, 137), Gaus argues that it applies “to all coercive acts” (Gaus 2003, 159). This makes Gaus’s view significantly more content-dependent than Rawls’s. Jonathan Quong makes a similar point. He defends what he calls a strictly anti-perfectionist view which holds that the idea of public reasons should govern all exercises of political power, and not just when constitutional essentials and basic matters of justice are at stake (Quong 2011, 43).

Public-reason views like Gaus’s and Quong’s are significantly more content-dependent than the other views just discussed in the sense that they require a justification for the content of *every* coercive decision. This does not imply, however, that they are purely content-dependent.

While, for Gaus, decisions are only legitimate if they are drawn from the eligible set of proposals that can be publicly justified, democratic procedures must determine how selections from the eligible set are made; they are to fulfill an umpiring function (Gaus 1997, 237). Gaus's view is thus also a hybrid view, although one that puts a much stronger emphasis on content-dependence.

The most purely content-dependent views are perhaps libertarian or anarchist views which argue that

the state may coerce individuals only in the minimal way necessary to implement a correct (or at least well-justified) plan for protecting society from the sorts of disasters that allegedly would result from anarchy. The state may not coerce people into cooperating with harmful or useless measures or measures we lack good reasons to consider effective. Nor may the state extend the exercise of coercion to pursue just any goal that seems desirable. (Huemer 2013, 95)

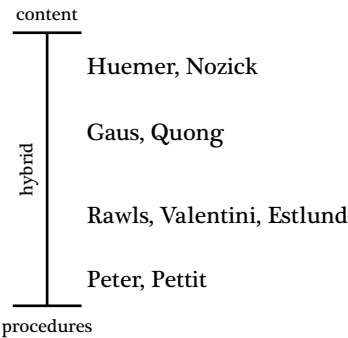
Nozick, in *Anarchy, State, and Utopia* (Nozick 1974), focuses on how a state might arise from anarchy without violating anyone's rights. This leads him, in the end, to defend the permissibility of a minimal state. In setting up his theory, he suggests that "investigating [the nature and defects of the best anarchic situation one could reasonably hope for] is of crucial importance to deciding whether there should be a state rather than anarchy. *If one could show that the state would be superior even to this most favored situation of anarchy, [...] this would provide a rationale for the state's existence; it would justify the state*" (Nozick 1974, 5, my emphasis). Moreover, he says that the legitimacy of the state, as a coercive agent, roots in its function of enforcing the moral prohibitions that it is permissible to enforce (Nozick 1974, 6). Whether laws and policies meet this criterion, i.e.: whether they enforce such (and only such) prohibitions, is a content consideration. For Nozick, the fact that some law or policy was decided on through democratic procedures could never make that law or policy legitimate. Whether laws and policies are justifiable depends wholly on their content: they must be laws and policies that enforce the moral prohibitions that it is permissible to enforce, and they must not do anything else.

This is similar for Michael Huemer. While Huemer defends philosophical anarchism in that he denies the existence of a duty to

obey (Huemer 2013, 137), he does not draw the conclusion that therefore states can never permissibly act. Rather, he concludes that *if* existing states act, what makes the reasons for these actions adequate is their *content*, namely: they must be correct and just and prevent serious harms (Huemer 2013, 100).

This suggests that both Huemer and Nozick limit the set of justifiable state actions to actions whose content can be justified. Moreover, they both point to the possibility that one might try to justify the existence of a state by showing that there is a *rationale* for it, in the sense that it is an improvement over anarchy. This rationale might e.g. be that citizens are protected from the disasters that would result from anarchy (Huemer’s suggestion), or that moral prohibitions are enforced that would not be enforced in an anarchic situation (Nozick’s suggestion). I will not reflect extensively here on the extent to which Huemer and Nozick regard such an argument as likely to succeed. Rather, I want to mention the idea of ‘justification through rationale’ here in order to return to it in chapter 4.

Figure 1



Of all three types of theories – hybrid, procedural, and content-dependent ones – more examples could be given. I hope the above exposition is sufficient to make clear what kind of argumentation they might invoke, however, and that we can proceed to assess their merits. My aim in this chapter is to defend the importance of content-dependence in legitimacy assessments. Hence, my burden of argumentation is vis-à-vis those who deny the importance of

content-dependence: proceduralists. Section 2.3 therefore presents the proceduralist case against content-dependence, as defended by those in the lower half of the chart above, and mainly Peter and Pettit. After having considered the case against content-dependence, I present my rebuttal in section 2.4 in order to salvage the idea of content-dependence. I defend a hybrid view of political legitimacy, but *not* a threshold view like that of the hybrid theorists that I considered above. My theory is hybrid in a different way: rather than proposing a threshold above which content-dependence does not matter anymore, I distinguish between two questions that matter for political legitimacy. The first is: what justifies *adopting* or *maintaining* laws and policies? The second is: what justifies *enforcing* existing laws and policies? I argue that the first question must be answered by providing content considerations, even if procedural correctness is the main consideration in relation to justifying enforcement. By thus reserving an important role for content considerations, my theory lies much closer to those of the theorists in the upper half of the chart.

2.3

The case against content-dependence

A society consists of different groups of people with different opinions. That is: societies are marked by disagreement and pluralism.³⁶ It is this fact of pluralism that raises the question how political power can be justified; if we view “the diversity of reasonable religious, philosophical, and moral doctrines found in democratic societies as a permanent feature of their public culture” (Rawls 1993, 136), while

36 While Rawls focuses on diversity of views in democratic societies (Rawls 1993, 136), I take it that the assumption that there is such a diversity holds for any society, not just for democratic ones. Even in e.g. North Korea, where the government goes to great lengths to make everyone think the same thing (Terry and Wood 2015), and where no credible dissent movement has emerged (Chen and Lee 2007, 467), we can infer that pluralism still exists. Despite punishments on trying to escape, there are still citizens who attempt and sometimes succeed in doing so (Oh and Hassig 2010, 91). This indicates that they disagree that they ought to live to serve the North Korean ideology of *Juche*, which envisions the people as a family, of which the regime leader is the head (Chen and Lee 2007, 471), and which requires the self-reliance of North Korea.

all are moral equals, then how could it be justified that some get to impose their views on non-consenting others? As Rawls points out, to unite a society in affirming one such comprehensive doctrine would require the oppressive use of state power (Rawls 1993, 37). I take liberals, broadly conceived,³⁷ to be concerned to avoid such oppression³⁸ and to respect citizens as free and equal. This holds for proceduralists, but more strongly content-dependent views often use the same point of departure (cf. e.g. Gaus 2011b, 2, Quong 2011, 2). What is distinctive for proceduralists is how they respond to the challenge of pluralism. Many contemporary defenders of democracy hold that democratic procedures provide the key to explaining how we should deal with disagreement. Valentini puts it as follows.

[Under circumstances of reasonable disagreement about justice], how should we organize our institutions for them to express equal respect to the extent that this is possible given the limits of human nature? The answer is: democratically. [...] If we ask: what should institutions do to show equal respect towards their subjects, when their subjects reasonably disagree about justice? The answer is: they should enforce those demands of justice that are a *sine qua non* of equal respect [...] and then let democratic procedures determine what else equal respect requires. Directly enforcing a partisan conception of justice on society would be inconsistent with equal respect, because it would treat holders of competing reasonable views as inferiors. (Valentini 2012, 600)

As I understand Valentini, what she argues is that no one should be in a position to directly enforce their own partisan doctrine of justice, because people reasonably disagree about which doctrine is correct.³⁹ Rather, democratic procedures must ensure that defenders of

37 I.e.: including republicans and libertarians

38 As Pettit puts it: “[contemporary thinkers] shrink from maintaining that [their view of justice] ought to be imposed by the coercive state without regard to whether or not others endorse it. And as they shrink from investing their own view of social justice with such a special, peremptory status, of course, so they deny that status to the views of others. They agree in each renouncing any form of crusading vanguardism or sectarianism in favor of *an attitude of mutual respect or forbearance*” (Pettit 2015, 13, my emphasis).

39 The acceptance of a reasonability restriction on the extent of disagreement that is regarded as posing a moral problem is widespread among contemporary thinkers. I come back to this issue later in this chapter.

different doctrines have the opportunity to influence which outcomes are accepted and enforced. Where there is disagreement over which decisions are worth making, equal respect requires that all have the opportunity to try and get their (reasonable) view accepted.

Valentini is not alone in defending an argument like this. Peter argues that if respecting pluralism and diversity is an essential reason to favour democratic procedures, then we should not require that the outcomes of these procedures meet a procedure-independent standard of what counts as a correct decision according to a moral theory. This would have “potentially anti-democratic implications” (Peter 2009, 114). The worry is that putting content requirements on the state’s decisions would forestall contestation and exclude those who disagree with the theoretically required outcome. If we accept content requirements on legitimacy, this would imply that “substantive judgments are *exempted from democratic deliberation*”; they would “have to be met *prior to* deliberation” (Peter 2009, 87, my emphasis). This would make the state partial in favour of those who happen to agree with a particular justification, at the expense of those who do not (Peter 2009, 74). It would amount to the rule of those who claim to somehow know the truth about the moral issues that arise in politics. Since they would have to be self-declared knowers, given that there is no acceptable arbiter that can determine who is right and who is wrong in moral matters, this would be despotic.

Such ‘rule by the knowers’ is what Estlund calls ‘epistocracy’ (Estlund 2008, 7). Estlund argues, in a way similar to that of Valentini and Peter, that epistocracy would require comparing people’s moral wisdom in order to determine who is to rule – an exercise that can never be completed in a non-despotic way, given that people disagree about who has such wisdom (Estlund 2008, 36, cf. Valentini 2012, 600, Valentini 2013, 190). Estlund, too, thinks that democratic procedures can circumvent these problems (Estlund 2008).⁴⁰ Pettit likewise advances an argument in favour of proceduralism based on the observation that in a context where rival theories make incompatible recommendations, a society should adopt decision-making procedures that identify and implement suitable compromises (Pettit 2015, 14). Rawls argues that a

40 For a defence rather than a rejection of epistocracy, see Jason Brennan (2016).

reasonable constitutional democracy is the only way to ensure people's status as free and equal citizens and that for this reason, adherents of comprehensive doctrines may also consistently accept this (Rawls 1999, 151).

Democratic proceduralists thus take democratic procedures to be entailed by respect for citizens' equal moral status (Peter 2008, 36, Pettit 2015, 13, Valentini 2012, 600). Democratic procedures treat citizens as equals by granting everyone an equal say in determining collective outcomes (Valentini 2013, 179). In this way, the moral quality of the procedure justifies its outcomes (Peter 2008, 36). Moreover, and importantly for the point that is developed in the next section, this justification does *not* depend on the content of the outcome (Rawls 1993, 427, Estlund 2008, 7, Peter 2009, 128, Valentini 2012, 598, Pettit 2015, 12); outcomes may be unjust or otherwise morally wrong or imperfect and still be legitimate (provided that they are not *too* unjust, on hybrid theories).

We should note that authors usually qualify the range of views that may be entered into democratic procedures; in a Rawlsian spirit (Rawls 1993, 137), many authors adopt some kind of reasonability requirement.⁴¹ This requirement either holds that those positions that can be reasonably rejected *must be excluded* from the options that can be legitimately selected, or that only those views that are reasonable *may be included* in the set of options. Both requirements occur, sometimes in conjunction. (They are not the same; a reasonable proposal may nevertheless be reasonably rejected by someone who supports another

41 To give a few examples: Valentini argues that democratic procedures must be employed to make decisions between proposals of competing reasonable views (Valentini 2012, 595-600); "justice requires that we address reasonable disagreements and come to select particular social outcomes in a way that reflects citizens' status as autonomous agents and practical reasoners" (Valentini 2013, 193). Estlund's alternative to the term 'reasonable' is 'qualified' (Estlund 2008, 34). He holds that no one has "legitimate coercive power over another without a justification that could be accepted by all qualified points of view" (Estlund 2008, 33). According to Gaus, a "publicly justified morality [...] constitutes an equilibrium solution among free and equal moral persons seeking to select from the optimal eligible set revealed by the reasoning of the idealized Members of the Public" (Gaus 2011b, 46), where an idealised Member of the Public is one that "deliberates well and judges only on the relevant and intelligible values, reasons, and concerns of the real agent she represents and always seeks to legislate impartially for all other Members of the Public" (Gaus 2011b, 26).

reasonable but incompatible proposal (cf. Gaus 1999, 270-1).) To the extent that a theorist's reasonability requirement leads to a narrower range of coercive decisions that power holders can legitimately make, a theory becomes more content-dependent. Sometimes, theorists stress that they wish to keep the range of permissible choices wide (e.g. Estlund 2008, 36). This indicates, then, that they wish their theory to remain largely content-*independent*, despite the adopted reasonability restriction on legitimate coercive decision-making.

With this exposition of proceduralist arguments at hand, we are now in a position to understand the proceduralist case against content-dependence. The proceduralist argues that demanding that the state act on one particular controversial view, and disregard all competing views, is oppressive towards the adherents of these competing views, particularly when the view that is enforced is subject to reasonable disagreement. This leads proceduralists to argue that philosophers should not take a stance on what the content of coercive decisions should be, but instead should only prescribe procedures to adjudicate between different positions (except, for proponents of threshold views, where it concerns basic matters). Significant content-dependence is thus rejected because making legitimacy dependent on the content of coercive decisions would, according to proceduralists, inevitably imply that we side with one group and deny others the chance to have their views implemented, or influence the outcomes. Such a denial would violate equal respect. The only perspectives that may be legitimately excluded are unreasonable ones; these views do not carry normative force (Rawls 1993, 64, Valentini 2013, 186).

My aim in the next and final section of this chapter is not to contest that it is often legitimate for the state to *enforce* the outcomes of democratic procedures, even if the content of these decisions is unjust or morally misguided. I concur with proceduralists on this count. There is another issue however: justifying the *adoption* and *maintenance* of laws and policies. This leads me to a point I do want to contest. As we have seen in the above discussion, proceduralists find it inappropriate to provide normative views on what the content of coercive decisions should be. This is where I disagree: the next section argues that legitimacy judgments should take into account whether coercive decisions *merit*, morally speaking, being adopted.

Or, put differently: when are power holders morally at liberty to *make* coercive laws and policies, knowing that these will be enforced and that citizens will be expected to obey any commands these decisions entail? Can they be morally at liberty to make morally wrong laws and policies? This is what I deny. The claim I defend is that the content of coercive decisions – i.e.: of laws and policies – must be morally justified. Power holders are not morally at liberty to adopt and maintain laws and policies for whose content there is no moral justification. Such a justification matters for political legitimacy, given that political legitimacy is the property a state has when its use of coercive power is morally justified. To the extent that a state makes morally unjustified decisions, it undermines its own legitimacy.

If we accept the view that power holders are only at liberty to make coercive decisions whose content can be morally justified, two points come to the fore that challenge or complement proceduralist views. The first point, developed in the remainder of this chapter, undermines the worry that a focus on the moral defensibility of coercive decisions leads to a problematic exclusion of views. In this sense, (largely) procedural theories are too weak; they fail to require moral defensibility where they ought to. The second point, which is the topic of the next chapter, argues that even the unreasonable views must be taken into account in order to arrive at justified coercive decisions. According to this second point, (largely) procedural theories with a reasonability requirement are too strong; they exclude more views than they ought to.

2.4

Salvaging content-dependence

In this section, I argue that proceduralists are too worried that requiring the content of coercive decisions to be morally justified leads to a problematic exclusion of views. Because they are too worried about this, the moral requirements they pose for politicians who wield coercive power are not demanding enough. This is a problem; coercion is a grave moral wrong if it is unjustified. The presumption against coercion makes it imperative that coercion only be used for

good reasons – reasons that show why it is morally preferable that this coercion be exercised, rather than not exercised, or exercised in a different way. For this reason, we cannot do without a justification for the content of laws and policies. Here, I concur with libertarians.

If we accept this argument, we of course need to address the challenge of what count as good reasons. This is the topic of chapters 3 and 4. In these chapters I will defend a partial theory of legitimacy in which the impact of state actions plays a central role in justifying coercive power. I will argue that the state, unlike individuals, has to be valuable in order to have the right to exist and act.⁴² For this reason, constraints on state action are not sufficient to capture the moral demands we should place on the state. Constraints only capture what the state may not do, but do not in themselves provide a rationale for defending the state at all. Without showing what the state is good for – why we would endorse it to begin with – the anarchist challenge looms large and remains unmet. As we saw above, it is libertarians like Nozick and Huemer who point out that, given the morally problematic nature of the state, the state might be justified by explicating its rationale and showing that a specific state meets this rationale. This leads Huemer to say that “[c]onsequentialist and fairness-based arguments come closest to justifying political authority” (Huemer 2013, 100, my emphasis). I agree with this: a justified state is one whose existence has consequences that make its existence morally preferable over anarchy.⁴³ Before I continue to examine what kind of consequences these are, we must assess more closely whether political legitimacy is indeed content-dependent, and how we can adequately deal with

⁴² *Intending* to be valuable is neither necessary nor sufficient for justification. Good intentions can turn out very badly and a lack of good intentions may result in good outcomes. See also p. 143 in chapter 4 for the distinction between expected value and actual value.

⁴³ I also more or less agree with Huemer’s next two sentences: “Nevertheless, [consequentialist and fairness-based arguments] cannot ground content-independent, comprehensive, or supreme authority for the state. The state has the right, at most, to coercively impose correct and just policies to prevent serious harms” (Huemer 2013, 100). I do have quite a different idea of what this implies than Huemer does, however, as will be the topic of chapter 4. Yet, I do agree with Huemer that there is no political authority. There can at most be political legitimacy, in that it can be morally justified for states to act.

proceduralist reservations against such a requirement.

In summary, the proceduralist argument against content-dependence is that, under circumstances of (reasonable) disagreement about which coercive decisions ought to be taken, it would violate equal respect to take sides and proclaim that the views of some may be enforced, while the views of others will be left aside. This section examines this argument, i.e.: the claim that putting requirements on the content of coercive decisions would lead to the exclusion of reasonable views, and that this would be despotic. I argue, against the proceduralist position, that there is a place for content-dependence in a legitimacy theory and that the despotism charge is unwarranted. Demanding, morally speaking, that democratic representatives adopt laws and policies whose content can be morally justified does not circumvent a democratic process in which the choice is up to these representatives. Rather, we can take this process as a given and try to help democratic power holders use this power well.

The proceduralist argument has significant force, and there is a way in which proceduralists are correct. However, they also overlook something. Let me start by emphasising the way in which proceduralists are correct. If a democratic procedure delivers a result, but someone overrules this decision and enforces their own view because they think they know better than the *demos*, this would indeed almost certainly be despotic.⁴⁴ However, we should also ask what happens *during* the procedure that is to deliver a result. This leads us to the mistake that, I

44 Putin can be called a despot for precisely this reason. When the Russian people decided not to grant more than 26% of the 2011 vote to Putin's party in the lower house of the parliament, and not to elect him as president in the first election round in 2012, his response was to fake the elections and take power regardless of the outcome of the democratic procedure: "[b]y the reckonings of independent Russian electoral observers, United Russia won about 26% of the vote in the December 4 elections. The party was nevertheless accorded enough votes to control a majority in the parliament. [...] The fakery was repeated during the March 4, 2012, presidential elections. Putin was accorded the majority that he needed to be named president after one round of balloting. [...] Tens of millions of cybervotes were added, diluting the votes cast by human beings, and giving Putin a fictional majority. [...] He might have understood that many of the protestors [against the election fraud] were concerned about the rule of law and the principle of succession in their country. Instead, he seemed to take personal offense. [...] A claim to power was staked: he who fakes wins. [...] Putin's decision to steal the election under his own spotlight placed Russian statehood in limbo" (Snyder 2018, 49-50).

think, proceduralists often make.

Briefly put, the mistake is that proceduralists blur the distinction between three stages that play a role in the making and executing of decisions. It is this blurring that makes it seem as though putting content requirements on political legitimacy leads to the despotic exclusion of views. Appearances deceive, however. Let me first explain the three stages I have in mind by presenting a metaphor, and then show how proceduralists blur these stages.

This is the metaphor. Suppose we are a group of friends who are away on vacation together.⁴⁵ We are trying to settle on our next destination. Each of us contributes a favourite desired destination. The proposals are different and incompatible: camping near the beach; a cabin in the woods; a hotel in the city. In the end, we find a solution. Those who wanted to go to the beach actually found it more important to camp than to be near the beach. Those who wanted to go to the woods found it most important to spend time in nature. Those who wanted to stay in the city just really wanted to visit a museum. Camping in a green area near a city turns out to be a better and more defensible next destination for our vacation, given the group as a whole, than choosing either of the original proposals.⁴⁶

There are three stages in this example. In the first stage, each puts forward their proposals of what they regard as the best destination. None detract any aspects from what they would prefer to do (camping and beach, cabin and woods, hotel and city). In the second stage, when all proposals are on the table, the question is what the best decision is *given* everyone's preferences. Given that we all wish to show each other equal respect, we look for a solution that tries to incorporate at least everyone's most valued criteria. Camping in the woods near the city turns out to be the best vacation for the group as a whole.

In this example, then, 'best destination' figures twice. First,

⁴⁵ Rest assured that ours is not a socialist vacation.

⁴⁶ The relevance of this metaphor does not rely on there being a perfectly reconciled solution. Rather, the point is, as argued below, that a distinction must be made between what we regard as the best available option given our own preferences or beliefs, and what we regard as the best available option given our own *and others'* preferences and beliefs.

each friend tells the others what they personally regard as the best destination. Second, when all preferences are expressed, we need to find out what the best destination for the group as a whole is. After this decision is made, a third stage follows where each has to decide whether to come along to the next destination, given the decision about the destination that has been made. Not joining could also be an option; some might choose to go home instead, or the whole vacation could be ended.

The stages are the following:

- Stage 1. *Representation of views*. Participants in the decision-making procedure put forward their preferred proposal.
- Stage 2. *Decision-making*. Those in charge of decision-making make a decision for the collective in light of the proposals that were put forward in stage 1.⁴⁷
- Stage 3. *Execution*. Those in charge of executing the decision from stage 2 determine whether they will in fact do so.

These stages translate back to politics. In a democracy, stage 1 might be the debate on a certain issue in society and parliament. Stage 2 could be the moment where the parliament prepares for and takes a vote about the issue. Stage 3 starts after the decision is made and executive branches of government have to execute the decision, e.g. enforce a prohibition.

One might point out that the group of friends is not entirely analogous to a society. While the group of friends has (hopefully) voluntarily agreed to go on a vacation together, the members of a society may not want to be part of a shared political system at all. While this is true, it is also true (at least in modern democracies) that they *are* part of such a system. In this sense, the analogy holds: the friends are on a vacation together, deliberating where to go next, just as citizens are involved in a political system together, also deliberating where to go next. To obliterate the political system, or to reduce its scope (which

⁴⁷ I use 'in light of', and not 'based on' or 'taking into account'. It is possible that, at stage 2, a decision is made that does not adequately take all proposals from stage 1 into account. The separation into stages does not make sure that a *good* decision is made in stage 2. It just untangles different parts of coming to a decision.

would be analogous to ending the vacation), would require decisions made by the power holders of the existing system. That is: at stage 1, a proposal to roll back the state would have to be posited, at stage 2 this proposal would have to be accepted, and at stage 3, state agents would have to stop doing what they did before. Perhaps such a roll-back ought to be decided on, perhaps not. That issue is beyond the scope of this chapter (but see chapter 4). What is relevant for now is that the stages of decision-making can be mapped onto the situation political power holders find themselves in.

How do these stages figure in proceduralist theories of political legitimacy? Proceduralists, as we have seen in the previous section, are critical of content-dependence. The worry is that requiring the state to only make coercive decisions whose content is sanctioned by a certain controversial view of what the state ought to do is oppressive towards adherents of competing views. In response to this worry, they defend (largely) content-independent views of legitimacy, according to which the legitimacy of coercive decisions (often) does not depend on *what* the decision is, but rather on *how* the decision was made, namely: whether it was made through democratic procedures.

Now, I want to argue that this dismissal of content-dependence is too quick. If we duly take into account the distinction between the different stages I just set out, we can both meet the proceduralist worry and defend content-dependence in a circumscribed way. The crux to achieving this result lies in distinguishing between the two types of 'best destination' – the idea of 'best destination' according to each friend at stage 1, and the idea of 'best destination' for the groups as a whole, given all of the friends' proposals, at stage 2. Below, I will give two examples of proceduralist theories – those of Peter and Pettit – that reject content-dependence based on the first idea of best proposals, which figures in stage 1, while not considering the possibility of grounding a defence of content-dependence on the second idea, which figures in stage 2. The difference between these stages is in the perspective from which the reasoning should be performed. At stage 1, individuals are asked to give their personal opinion on a certain matter, regardless of what they expect the others to favour. At stage 2, a decision must be made for the collective, acknowledging a variety of opinions voiced at stage 1. There is no reason to think that the morally most appropriate

decision at stage 2 is necessarily one of the individual opinions from stage 1. It may well be e.g. a compromise between different opinions.⁴⁸

I argue that the type of reasoning employed at stage 2 – where decision-makers reflect on the best decision for a group, given all the different opinions that were voiced at stage 1 – is the right type of reasoning to give body to content-dependence. The proceduralist accounts that I review, however, only look at the type of reasoning employed at stage 1, where each determines for themselves which decision they would favour, regardless of the opinions of others. They argue that justifying enforcement (stage 3) based on such reasoning (from stage 1) is oppressive. They reject this type of radical content-dependence and replace it with a defence of procedures. However, they end up treating procedures like a black box in which anything goes (within the limits that the theory specifies), and politicians seem no longer to be under a moral obligation to act for good moral reasons. I defend another approach. What we should acknowledge is that normative political theory can place moral demands on those who work within (democratic) procedures. This amounts to an acknowledgement of a separate type of reasoning about justifiable decisions at stage 2, and grounding a defence of content-dependence on this type of reasoning. Chapters 3 and 4 given an account of what kind of reasoning this is. If we accept content-dependence in this more targeted sense, we do not run afoul of the despotism objection anymore.

Let me now first consider how proceduralist views run the risk of going straight from stage 1 to stage 3, skipping stage 2. This can be clearly witnessed in the following passages by Fabienne Peter. Peter argues that “[e]ven after deliberation, [...] people will differ in their assessment of what is the most justified way to proceed. If this is the case, *to demand more than that the decision is the outcome of a fair process is to give undue weight to those who happen to be in agreement with a particular justification*, at the expense of those who do not” (Peter 2009, 74, my emphasis). The problem with this argument is that it is not made

⁴⁸ Accepting this distinction does not presuppose a rejection of ethical individualism, understood as the position that it is ultimately only individuals that matter morally, not groups. Compromises or other deviations from one individual's preferred decision do not have to be made for the sake of group welfare. They may well be made *because* of a recognition of other individuals' moral importance.

clear what kind of demands Peter is talking about, and who is issuing these demands to whom. There can be moral demands and non-moral demands; demands backed by force, and demands not backed by force; demands issued to decision-makers, and demands issued to executive agents. It matters what kinds of demands we take Peter's text to refer to, and it is not evident that demanding something always results in giving undue weight to someone. A demand on executive agents to only carry out the wishes of another agent, who is able and willing to back its demand by force is a completely different demand than a non-coercive moral demand on decision-makers to take all relevant moral considerations into account. In other words: if I put a knife to your throat and order you to do as I say, then my demand is very different in nature than when I argue that morality demands certain decisions and put my opinion online.

Peter does not make the distinction between these different kinds of demands and as a result, she blurs stages 2 and 3 – the stages of decision-making and of execution. Law-enforcers who execute the law should generally execute it, even if they or we do not agree with it. When it comes to execution, then, we should not demand that law-enforcers only enforce laws whose content we judge to be morally justified. This would indeed give undue weight to the views of those who have different ideas about when laws are justified. Usually, law-enforcers should enforce laws that have come about through standing procedures, even if the law-enforcers regard the content of these laws as unjustified. They should not assume the task of decision-making by disregarding the outcomes of procedures, thereby turning themselves into unaccountable kings. Nor should others demand of law-enforcers that they only enforce laws that can be morally justified in their eyes. In brief: law enforcers should enforce the law, not decide what the law is or only enforce those laws they agree with. Call this the argument *against zealous enforcers*.

However, while the argument against zealous enforcers holds that executive agents should not side-line decision-makers in order to enforce their own views, this does not at all show that moral judgments about when the content of laws and policies is morally justified have no place in legitimacy assessments. When we make the moral demand that legislators only vote for laws that can be morally justified, nothing

strange is going on. We can very well ‘demand’, morally speaking, that legislators vote for morally justifiable proposals. This does not imply that a “great range of potentially contested issues will be exempt from deliberation and will have been decided by other means than by democratic process”, as Peter suggests (Peter 2009, 80). Peter here confuses moral judgment about what should be *decided* (stage 2) with moral judgment about what should be *enforced* (stage 3). If someone argues that it is morally incumbent upon decision-makers to decide on the basis of sound moral reasons, they are not suggesting that a decision should be made by something other than the democratic process. Rather, they take it as given that the democratic process will deliver results, and address those who are the decision-makers within this process. They say: ‘decision-makers, if you want to make morally justified decisions, you should take the following moral considerations to heart.’ They provide a judgment, not a decree or veto. By providing such moral advice, they aim to aid the democratic process, rather than to hamper it.

The problem that Peter points to – that contested issues are exempted from deliberation – would only occur if we also addressed law-enforcers at stage 3 and said: ‘law-enforcers, if you want to be justified in enforcing the law, you should enforce my moral ideas about what good laws are.’ This, indeed, would leave a great range of potentially contested issues exempt from deliberation and democratic decision-making. However, giving moral advice to decision-makers at stage 2 does not at all amount to moreover placing such demands on law-enforcers. Decision-makers at stage 2 are exactly engaged *in* deliberation, and by giving them moral advice, we thus do not exempt anything *from* deliberation. Of course, we may be better or worse at giving moral advice. We will address the standards that apply to good moral advice for stage 2 in chapters 3 and 4.

The blurring of stages 2 and 3 is the result from a prior blurring of stages 1 and 2. Peter contrasts her own theory with theories that rely on the “premise that there is an *ideal outcome* that can be identified independently of the democratic process” (Peter 2009, 62, my emphasis). As we saw in the metaphor, the friends all propose their idea of the best destination at stage 1. The best solution at stage 2, however, was not anyone’s idea of the best destination in the sense of stage 1; it is

no one's ideal outcome. In practice, available solutions at stage 2 will often not be as reconciled as in the metaphor either, leaving the best decision even farther from ideal.

If we do not make it explicit that the best solution at stage 2 may be different from what anyone regarded as the best solution at stage 1, then it is easy to see how we may come to think that requiring decisions to meet certain content requirements may run counter to an adequate response to pluralism.⁴⁹ This holds especially if stages 2 and 3 are blurred as well, by not distinguishing between different kinds of demands (e.g. demands backed by force placed on executive agents vs. moral demands placed on decision-makers). I thus agree with Peter that it would be morally problematic to require for legitimacy that some ideal voiced at stage 1 also form the content of the decision at stage 2 and of enforcement at stage 3. As we considered, the best decision at stage 2 may be a compromise, and not anyone's ideal. As I will argue in chapter 3, different moral considerations are relevant to the different stages, and we cannot simply copy the content of moral advice for one stage to another stage.

Peter is not the only proceduralist to reject 'radical' content-dependence without considering a more circumscribed version of the idea. Philip Pettit, like Peter, seems especially worried that someone's opinion at stage 1 might be used to justify oppression at stage 3. For instance, he argues that "whether our [philosophical] proposals [about social justice] are to be accepted is up for general determination, not something on which we in particular can issue dictates"; a proposal about social justice should "be implemented only under the proviso that it is selected by a just, democratically approved, and democratically structured process of decision-making (Pettit 2015, 30). Like Peter, Pettit is here presenting a variant of the argument against zealous enforcers; "[w]e do not claim any privileged, philosophical place in debating with our fellow citizens" (Pettit 2015, 30).

While the argument against zealous enforcers is convincing at stage

⁴⁹ Anarchists may agree that the best solution at stage 2 can differ from the best solution in the sense of stage 1, even if the anarchist will deny that any acceptable solution at stage 2 may be a *coercive* decision. Anarchists will deny that coercion can become justified at stage 2 or 3, and thus deny state legitimacy.

3, Pettit, like Peter, is here blurring the lines between stages 2 and 3. It is plausible to hold that any proposal should only be *implemented*, i.e.: enforced or executed, under the proviso that it is decided on through a certain procedure. However, Pettit also says that whether philosophical proposals ‘are to be accepted is up for general determination’. This phrase is ambiguous; it can be interpreted in two ways. First, it can be a repetition of the point about implementation. It then says that at stage 2, a certain procedure should be used to structure decision-making, and whether something is to be implemented at stage 3 depends on whether the proper procedure was used at stage 2. This leaves open that we have additional moral principles for sound reasoning at stage 2, and it is mainly a point about when it is proper to enforce or execute decisions at stage 3. I agree with this.

There is a second interpretation, however, that is more problematic. The problem surfaces in how he distinguishes between social justice and political justice. Concerning social justice, Pettit sees political philosophers as advisors to decision-makers (Pettit 2015, 30). The advisory role takes place at stage 2: we support a theory of social justice and “argue *inter cives*, among citizens, that we the people as a whole, or the government that acts in our name, ought to do this or that” (Pettit 2015, 30). We simply argue; we cannot issue dictates concerning what the government ought to decide.

Concerning political justice, Pettit sees a different role for the philosopher:

But whereas we put forward proposals in social justice [...] under a democratic proviso of the kind described, we assume rather a different position in relation to other citizens when we pronounce as philosophers or theorists on matters of basic political justice: in effect, on matters of democratic process. [...] Do we make [a proposal for democratic procedures] under the proviso that it is itself democratically endorsed? I argue not. [...] Here, there is solid ground on which political philosophy can build without deference to democratic will. (Pettit 2015, 31)

Something elusive is going on here. While the philosopher is an advisor in relation to social justice, she is not in relation to political justice. In relation to political justice, she ‘pronounces’. But what does that mean? How is pronouncing which procedures you deem correct any different

from giving advice? Pronouncing and advising would be different if by making a pronouncement, the philosopher could establish democratic procedures, but this can surely not be what Pettit has in mind. Rather, it seems that Pettit thinks we should defend our proposals for democratic procedures unwaveringly, while proposals concerning social justice can be cast aside if they are not democratically approved. But this again raises the question on the basis of what we would be giving advice concerning social justice, if there is really no ‘solid ground on which political philosophy can build’.

How to solve this situation? Pettit’s concern, which is a valid one, is to argue that those who defend a theory of social justice should “shrink from maintaining that it ought to be imposed by the coercive state without regard to whether or not others endorse it”; we should adopt an “attitude of mutual respect or forbearance” (Pettit 2015, 13). To phrase this in terms of the vacation metaphor: we should acknowledge that our preferred destination (at stage 1) should not be selected (at stage 2) for implementation (stage 3) regardless of whether our friends like this idea. Like Peter, however, Pettit jumps from this point to adopt a proceduralist position that does not refer to *any* content considerations at stage 2, but that instead allows a general, democratic determination to define the demands of social justice, which should subsequently be enforced at stage 3. Any reference to the importance of making decisions with justifiable content is omitted. This turns procedures into a black box, which is undesirable, as I argue below. Moreover, it is not the only way to solve the threat of oppressive zealous enforcers.

The take-away from this discussion of Peter’s and Pettit’s views is this: we should indeed be against zealous enforcers. We should not command the imposition (at stage 3) of our own preferred moral views (from stage 1), if this would be oppressive. Rather, we should acknowledge that there is a stage in between (stage 2) where decisions are made *in light of* the variety of views that have been put forward (at stage 1). This may require e.g. a compromise. The question is: what moral considerations apply at stage 2? According to proceduralists, a central part of what mediates between stages 1 and 3 are democratic procedures.⁵⁰ As I have tried to show, however, the reasons that

50 I say ‘a central part’, because most theorists, as we saw, also include content

proceduralists cite to omit content considerations at stage 2 are not convincing. They are rooted in confusions due to the blurring of the different stages.

The main problem is that, in response to a valid concern to avoid oppressive zealous enforcers, the procedures that are taken to provide the solution are treated as a black box. Peter and Pettit are not alone in doing this. Valentini does it when she says that we should “let democratic procedures determine what else equal respect requires” (Valentini 2012, 600). Rawls’s threshold approach, too, is rooted in the idea that “the outcomes of a legitimate procedure are legitimate whatever they are” (Rawls 1993, 428). While he holds that the “assurance of legitimacy would gradually weaken to the extent that the society ceased to be well ordered”, this refers only to the justice of the constitution; provided the constitution is sufficiently just, legitimacy is purely procedural (Rawls 1993, 429). Estlund similarly argues that the “legitimacy of the decisions [is] not owed to the correctness of the decisions, but to the kind of procedure that produced them” (Estlund 2008, 8).

On all these accounts, procedures are presented as though they were some kind of machine that is used to process a fixed input – a set of incompatible proposals. If the machine is of a good enough quality, it will automatically yield justified output. Such an understanding of what procedures are fails to acknowledge, however, that it is *people* who act within the procedures. Without their considerations and decisions, procedures do not do anything. What procedures yield depends on the choices – choices with moral import – that people make when they function within these procedures. It is wholly appropriate to address these people, who have moral choices to make, and to morally demand that they only make morally permissible choices. Chapter 4 reflects on what moral considerations characterise morally permissible choices.

The important distinction is between moral demands that we place on *legislators* and those that we place on *executive agents*. From legislators and policymakers, we should morally demand that they adopt only morally justified laws and policies, i.e.: laws and policies that *merit* adoption. From executive agents, we morally demand that

constraints like a set of rights that may not be violated.

they guard the rule of law, at least as long as the moral value of the rule of law outweighs any moral disvalue that the content of laws and policies may have. So when legislators and policymakers meet these moral demands, what follows is not that they enforce a controversial view and flout democratic procedures. Rather, and very simply, what follows is that the democratic procedures deliver morally justified, i.e.: legitimate results.

Of course, this may make us worry that the oppressive zealous enforcer simply enters again. Whose views are going to count as morally justified? However, we should be careful to distinguish between stages 1 and 2. There is no reason to think that the only way to make sense of ‘morally permissible choices’ (stage 2) is to maintain that power holders have to select the morally best proposal that was put forward (at stage 1) – whatever ‘morally best’ may mean. Specifically, we should consider the possibility that avoiding oppression is part and parcel of what it means to make a morally permissible choice (at stage 2). This, I take to be the concern of public-reason views that apply to all coercive acts, like that of Gaus and Quong. I endorse such a type of position, which I further develop in the following chapters.

Conclusion

This chapter has argued that political legitimacy is significantly content-dependent.⁵¹ The main upshot of the chapter is that every coercive decision concerning the adoption and maintenance of laws and policies must be justified by reference to its content, and that this requirement, *pace* (pure) proceduralists, does not circumvent democracy. Requiring content justifications for such decisions means that content considerations are not confined to basic matters below a threshold, but rather permeate the whole practice of justified law- and policy-making. The more, or the more severely unjustified decisions a

⁵¹ My view is *significantly*, and not *fully* content-dependent, because the justification for coercive decisions is not all that matters for legitimacy. The *execution* of coercive decisions (stage 3) also matters for legitimacy, and I agree with proceduralists that the execution of coercive decisions (i.e.: the actual use of coercion) may sometimes be justified despite the initial coercive decision (at stage 2) having been unjustified.

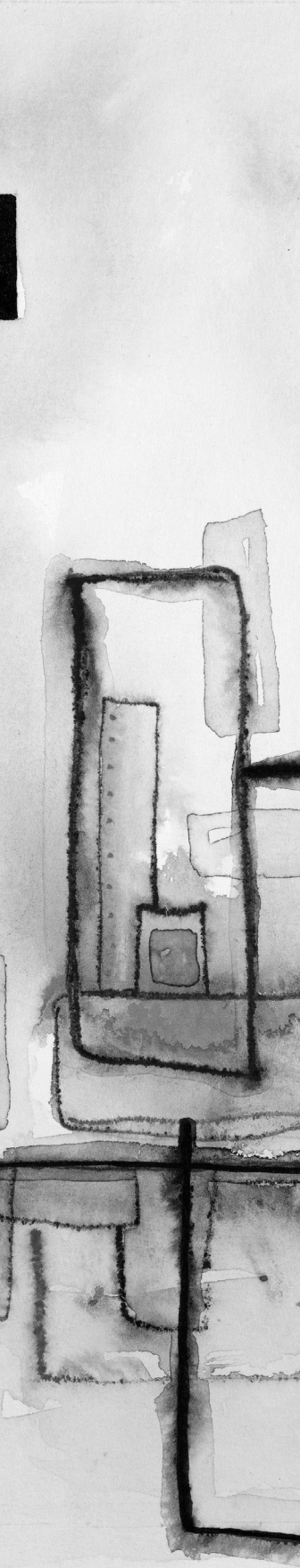
state makes, the less it rules rightfully. Each new law or policy must merit being adopted, and each existing law or policy must merit being maintained. The adoption and continued existence of laws and policies are only justified if their content is. In this chapter, I have tried to show that we can accept this conclusion while steering clear of the despotism worries that motivate proceduralist positions that reject significant dependence on content.

Before moving on to the next chapter, which further fleshes out in what way legitimacy is content-dependent, let me come back to the example that this chapter started with. While the Wwz law was adopted in a procedurally unproblematic way, we assumed the considerations the Dutch Council of State expressed against the chain provision that is part of it to be a sufficient reason to deny that the law merited adoption in its actual form. If the arguments of this chapter have been correct, then we should conclude that the fact that the Dutch parliament adopted the law despite its remediable shortcomings diminished the state's legitimacy, i.e.: the extent to which it rules rightfully. The unjustifiable step was made at stage 2: making a decision about how coercion will be used. The fact that the law was enforced since its adoption – stage 3 – we can still very well call justified.

Note that, in the previous chapter, we have set the issue of political obligation aside. My arguments, then, should not be taken to imply anything about whether *citizens* ought to *accept* morally unjustified laws or the state that makes them. I have only argued that the right to rule should be specified in such a way that no state can have the right to rule by adopting and maintaining laws and policies whose content cannot be morally justified. When a state adopts or decides not to change laws or policies whose content cannot be morally justified, it goes beyond what it has the moral privilege to do, and its legitimacy is diminished.

In the following chapters, I will further develop the idea of content-dependence, and develop a normative view of the requirements that the content of laws and policies must meet. This leads me to a hybrid view – it acknowledges that both content and procedures matter for legitimacy – but unlike the hybrid views we have considered in this chapter, my view is not a threshold view. That

is: I do not adopt a threshold below which content matters, and above which procedures determine legitimacy. Rather, I see content and procedural considerations as different considerations that must be taken into account in judging the legitimacy of coercive measures, whether constitutional essentials or not.



Context-dependence

In chapter 2, I argued that political legitimacy is content-dependent, in the sense that a justification for the content of laws and policies is a necessary condition for justifying the *adoption* and *maintenance* of laws and policies, even if it is not a necessary condition for justifying the *enforcement* of laws and policies after they have been adopted. Due to the presumption against coercion, laws and policies may only be adopted or maintained if there are moral reasons sufficiently strong to *merit* their adoption or maintenance.

I take the overall legitimacy of the state to depend on⁵² the extent to which its laws and policies have such merit, and are morally justified. A fully legitimate state has only morally justified laws and policies. A fully illegitimate state has only morally unjustified laws and policies. One might ask whether there is a degree of legitimacy that a state must have, at least. My simple answer is that a state must be fully legitimate. It would be inconsistent and defeat the purpose of a theory of political morality to say that it can be permitted for states to do impermissible things. One might insist on the question and ask whether there is a threshold such that when a regime falls below it, it must abdicate. My brief answer to this question is: whether a regime should abdicate not only depends on the extent to which its laws and policies are justified, but also on the alternatives to the current regime. If all alternatives are even worse, then I do not think the regime is morally required to abdicate. Rather, it is morally required to improve. I will not elaborate on this issue, although I recognise that it would be interesting to do so, and appropriate within the confines of a theory of political legitimacy.

⁵² Though not exclusively; there are considerations that matter for legitimacy that I do not discuss.

After having argued for content-dependence in chapter 2, the next question is: *what kind of justification* do we need for the content of laws and policies? Chapters 3 and 4 address this question. In this chapter, I argue that the justification for the content of laws and policies must be *context-dependent*: coercive measures must be morally suitable for the context in which they are adopted or maintained. On the view I develop, to be suitable for a certain context means that a certain law or policy in fact serves (and is not just intended to serve) certain relevant moral values in that context. As we will see below, an important implication of accepting context-dependence so conceived is that unreasonable views can impact the justification of laws and policies. Unreasonable opposition may block the benefits of laws and policies that would exist under more congenial circumstances.⁵³ This may make it undesirable, all things considered, to adopt or maintain a law or policy in a certain context, making a moral justification for the adoption or maintenance of this law or policy unavailable in that context. In chapter 4 I further specify which moral values apply to determining whether coercive measures are suitable in their context, and what this implies concerning the compatibility of my view with different kinds of moral theories.

The first section of this chapter specifies the idea of context-dependence and shows how a context-dependent theory amounts to a non-ideal theory. The second section discusses two examples of context-*independent* requirements from the literature, in order to get into a clear view what context-dependence is an alternative to. The third section presents a first argument in favour of context-dependence by showing that rejecting it would lead to a violation of 'ought implies can'. This is the feasibility problem for legitimacy criteria that are not context-dependent. The fourth section gives a second – and more practically relevant – argument for context-dependence. Allowing justifications for the content of coercive laws and policies to

53 Joseph Carens, for example, refers to the 'risk of backlash' that more ideal laws may have in relation to citizens who oppose immigration; moderately restrictive policies may be defended on the grounds that they are "needed to prevent even harsher ones that will be demanded if citizens feel that the borders are out of control or that the arrival of so many immigrants and refugees is creating too much economic and social dislocation." Whether such backlash exists, "can only be assessed in particular contexts" (Carens 1996, 160).

be insensitive to the context creates the possibility that measures are seen as justified, while it would be morally undesirable to adopt them under the circumstances. This is the normative problem for context-independence. Together, these arguments support the case in favour of context-dependence.

3.1

Ideal vs. non-ideal

What does it mean for a moral justification to be context-dependent, and how can context-dependence be squared with content-dependence? One might think that if the justification for the adoption of laws and policies depends on their content, then we need a normative standard, something like a set of ideal laws and policies, to which we can compare actual laws and policies to see if they meet this context-*independent* standard to a sufficient extent. This seems to be the kind of view that proceduralists have in mind when they discuss (and reject) content-dependence. For instance, Fabienne Peter suggests that non-proceduralists about legitimacy “take it as a premise that there is an *ideal outcome* that can be identified independently of the democratic process”, such as an egalitarian distribution or another idea of “which social state is best” (Peter 2009, 62-3).

In the previous chapter, we saw that proceduralists regard it as despotic to associate political legitimacy with one view of ideal outcomes, given the widespread disagreement concerning what outcomes are in fact ideal. On this, I agree with proceduralists. However, this does not provide a decisive reason against seeing political legitimacy as content-dependent: there is at least one other and better way to determine whether the content of laws and policies is morally justified. On this alternative understanding of content-dependence, the content of laws and policies is morally justified if they are morally appropriate *in the non-ideal context* in which they are in force. This makes for a context-dependent understanding of the moral standards on which the justifiability of the content of laws and policies depends.

In this section, I first look into the non-ideal character that I

suggest a theory of political legitimacy has, at least insofar as content justifications are concerned. Second, I consider whether there are reasons that objectors might pose against such a non-ideal understanding and in favour of a more ideal theory. Specifically, I consider whether we need to reject the usefulness of ideal theory if we embrace non-ideal standards for justifying the adoption and maintenance of laws and policies. I argue that we do not; non-ideal standards for the adoption and maintenance of laws and policies are compatible with ideal standards informing us what we should *strive for* in the future. What we should do now and what our ambitions for the future should be, are two questions that should be clearly distinguished.

The non-ideal character of content justifications

Setting moral standards that justifications for the content of laws and policies must meet does not imply that we must take a stance on what ideal outcomes of law- and policy-making processes would be. By ideal outcomes, we may imagine e.g. those outcomes that would obtain in a society characterised by perfect justice (cf. Rawls 1999b, 216). Moral standards do not need to be ideal standards. We can – and should – adopt non-ideal standards instead. By non-ideal standards, I mean standards that result in recommendations that are both feasible and desirable for the context at hand (Stemplowska 2008, 339). Specifically, I argue that the standard for laws and policies should be *as normatively demanding⁵⁴ for the context in question as is feasible and desirable⁵⁵ in that context*. The requirements for legitimacy should be *as normatively demanding* as is feasible and desirable due to the

54 My position is that the context-dependent standard should always be as normatively demanding as is compatible with feasibility and desirability considerations. This is a maximising position, but not a consequentialist one. It does not state that e.g. happiness or utility must be maximised. Rather, it means that as much as possible of what would ideally be the case must be required, provided that it is not overridden by countervailing moral considerations. In a phrase, the requirement can be formulated as: ‘maximise moral justification’. This justification could be consequentialist, but it could also be deontological.

55 By ‘desirable’ I mean: sanctioned by one’s moral theory. I will rely on the assumption that whatever a moral theory prescribes will be regarded by those who subscribe to that theory as desirable. I do not take the word ‘desirable’ to be exclusively relevant for consequentialists.

presumption against coercion: to coerce people in a certain way, while there is an alternative that is better from a moral perspective, would trivialise the ills of coercion and undermine a moral justification. Given the context-dependence of this non-ideal standard, the bar that the standard sets will differ per context. This is as it should be, as I argue in this chapter.

It is important to use non-ideal standards for the justification of laws and policies. What we should want to justify within a theory of political legitimacy is that certain laws and policies are in place, and are used by the state to exercise coercive power. If we look at the laws and policies of an actual state, to ask whether they are legitimate is to ask whether it is morally permissible that these laws and policies exist and are enforced. This is a different question than asking whether they would be part of a set of laws and policies meant for ideal circumstances. Laws and policies for ideal circumstances can both be (1) unfeasible and (2) undesirable in actual circumstances. If some law or policy that we think should be part of an ideal set of laws and policies is *unfeasible*, it cannot currently be achieved by the relevant political actors. (Section 3.3 deals more extensively with feasibility.) If a law or policy is *undesirable*, it would be morally objectionable to implement it in actual circumstances, even if it would be part of a set of laws and policies meant for ideal(ised) circumstances. (Section 3.4 expands on this normative point.) Because laws and policies that are intended for ideal circumstances may be both unfeasible and undesirable under actual, non-ideal circumstances (cf. Robeyns 2008, 350), justification of laws and policies for non-ideal circumstances should proceed by using non-ideal standards. Only non-ideal standards for the justification of adopting and maintaining laws and policies can ensure that only laws and policies that are both feasible and desirable will count as morally justified in real situations.

Using context-dependent non-ideal standards to justify the content of laws and policies has great advantages. It allows political theory to engage closely with the practice of politics without, as we will see below, having to abandon reflections on ideal standards, or to compromise these standards for the sake of action-guidance. Using non-ideal standards within a theory of political legitimacy does not preclude using ideal standards when engaging in different theoretical

endeavors, like formulating a theory of justice. The questions these theories deal with may simply be different (cf. Valentini 2012b, 660). For a theory of political legitimacy, it is crucial that it can closely engage with the practice of politics. Political legitimacy is about the moral justification of coercive power. The use of coercive power is a practical matter (Pettit 2015, 16, Valentini 2009, 334), and it cannot be justified in the abstract. If we say that coercive power may be used in a certain way, then we are saying that an actual state may actually use coercive power in that way. For this reason, legitimacy assessments must be formulated as all-things-considered assessments; the normative judgments that follow from a theory of political legitimacy must be such that they express how power may be exercised after all is said and done.

Considering reasons against non-ideal standards

The main possible objection against using a non-ideal standard for justifying the content of laws and policies is that it would make us complacent about the ways in which the status quo falls short of ideal standards. If we limit ourselves to making normative proposals that we can achieve right now, do we not surrender to the non-ideal status quo? This is the tension between feasibility and desirability.

A tension between feasibility and desirability is widely taken to exist; if the feasible falls short of the desirable, then what must give way? A recurring dilemma in the literature on ideal and non-ideal theory is how to settle this tension (Räikkä 1998, 28, Buchanan 2004, 268, Miller 2007, 18-9, Gheaus 2013, Larmore 2013, 277, Wiens 2015b, Herzog 2015, 959). A focus on feasibility enhances action-guiding potential, but a focus on desirability increases transformative potential.⁵⁶ It seems we somehow need both; what we want is to guide action in such a way that it can have a transformative effect for the better. The risk of taking too many feasibility constraints into account in desirability principles is that we “become blind to the extent of injustice characterizing the

⁵⁶ Or, in other words: “the more factual constraints are introduced in the elaboration of normative political principles, the more these will appear to offer an uncritical defence of the *status quo*” (Valentini 2012b, 659).

world in which we live” (Valentini 2012b, 659). In response, a possible solution is to strike a balance between feasibility and desirability. John Rawls’s term ‘realistic utopia’ exemplifies this strategy; what a theory proposes must be utopian so as to provide “a long-term goal of political endeavor” which serves as an aspirational ideal. This ideal must be realistic, however, because we must be able to show “how the social world may realize [its] features” (Rawls 1999a, 128).⁵⁷ This strategy, then, takes a little bit of both. It rejects all-too-utopian views due to their lack of sensitivity to feasibility concerns, but does not want to sacrifice its ambitions to feasibility entirely because that would make us blind to injustice. Instead, it tries to find a middle ground.

While the dual concern for feasibility and desirability is justified, this does not imply that a uniquely best balance between them needs to be found. Many theorists seem to conceive of it as their task to choose one possible trade-off between feasibility and desirability,⁵⁸ and to argue that this is the point at which political theory is rightly conducted, thus seemingly rejecting the possibility that there might be different kinds of exercises in political theory for which different calibrations are required. I prefer to take a different approach, in the following way.

There are multiple tasks that political theorists can fruitfully take up, and different tasks may require different levels of ambition *qua* targets and constraint *qua* feasibility. Nor is it the case that these different questions are on a direct continuum from fully ideal to fully non-ideal (Valentini 2009, 335); different questions raise their own

⁵⁷ The debate between realists and idealists – with Rawls being in the crossfire – to a certain extent exemplifies that many are concerned to find an adequate balance between feasibility and desirability. (See Valentini (2012b, 656–60) for an overview.) While realists put the focus on feasibility and are less concerned to pronounce verdicts on what would be desirable, idealists focus on desirability and are less concerned that the ideal is also feasible.

⁵⁸ In more or less explicit terms, many theorists indicate adherence to the ‘one purpose of political theory’ thesis. They speak of the requirements that “normative political theories” in general (Wiens 2015b, 468) face, of how “political philosophy should approach the idea of justice” (Larmore 2013, 296), of “the ultimate aim of political philosophy” (Räikkä 1998, 36), and argue that “the question for political philosophy is not what we should do but what we should think” (Cohen 2003, 243). The thought, then, seems to be that all political theory is somehow of the same sort.

concerns that may be different in (their normative) nature. For instance: while good prescriptions for difficult circumstances may fall short of the demands of an ideal standard, they may be more demanding than the ideal standard given the practical obstacles that they must take into account, but which can be ignored in an ideal theory. We can do justice to both desirability and feasibility by assessing the different roles they play in different theoretical endeavors – endeavors that may well complement each other (Mason 2016, 53, Stemplowska 2008, 334).

As I argued above, the legitimacy perspective is a practical perspective dealing with the justification of the use of coercive power. This calls for action-guiding normative prescriptions, because the actual exercise of power can only be justified by reference to the actual context in which it is used. When we think about how to formulate such action-guiding prescriptions, a realistic long-term goal of political endeavor that strikes a balance between feasibility and desirability does not yet give us all the tools to determine what the state ought to do at present (Valentini 2009, 341). Indeed, it has been wondered whether this long-term goal is even necessary for the state to determine what it should do now (Sen 2009, 15). If our concern is to have a normative standard that guides action concerning the use of coercive power in the best possible way, we had best let go of the idea that there is one uniquely best balance between feasibility and desirability in political theory. Instead of trying to find a uniquely best balance, we should determine what feasibility and desirability criteria are *relevant* to the question at hand (cf. Carens 1996, 169, Valentini 2012b, 660), while acknowledging that other criteria may be relevant when a different question is asked.

My main purpose in this chapter is to clearly demarcate the question of political legitimacy, and the non-ideal normative concerns it raises, from other questions that are appropriately asked in political theory, like what political ideals we should adopt. By doing so, I hope to provide theoretical clarity that helps improve our ability to use normative political concepts – particularly that of political legitimacy – in practice.

The remainder of this chapter points out difficulties specifically with theories of political legitimacy that have the ambition of being

both action-guiding and ideal. The point I develop is that if we take the proposals these theories make as all-things-considered judgments, meant for implementation, then they may cause both feasibility and normative problems. Especially the normative problems may be quite severe, depending on the context in which a proposal is to be implemented. Given these difficulties, it seems more appropriate not to understand these theories to be action-guiding in the all-things-considered sense. If this is true, however, then these theories fail to give us something that a legitimacy theory should provide. If legitimacy is about the question how the actual use of power can be justified, then we need a theory that leads to all-things-considered judgments. If this is not what these theories give us, then we are still in need of an additional theory.

Before we proceed, let me briefly expand on the idea of action-guidance. ‘Action-guidance’ can be interpreted in two ways. The most ambitious level of action-guidance for a theory would be if it gave political actors a tool they could use to arrive at decisions. The theory would then be a moral decision-making tool, in the sense that it helps politicians reach conclusions about what they ought, morally, to do. It would specify considerations that must be taken into account, and say something as to how these considerations can be brought to bear on actual cases.

To contrast this decision-level action-guidance with another form of action-guidance, we can take a cue from Anca Gheaus. Gheaus argues that dropping the feasibility constraint on the concept of justice “is going to *enhance* the action-guiding potential of a conception of justice, by providing an aspirational ideal” (Gheaus 2013, 448). On this understanding of action-guidance, an ideal theory can be action-guiding by inspiring us “to try to make it possible that others (or our future selves) bring justice about” (Gheaus 2013, 459). The theory is action-guiding, then, not in the sense that it can be directly used to arrive at decisions by bringing it to bear on actual problems, but rather in the sense that it can be used as a heuristic (cf. Stemplowska 2008, 338, Uberti 2014, 209) to imagine in what direction it would be morally desirable to proceed. This may – in jargon – imply ‘dynamic duties’ (Gilbert 2009, 677) to expand the ‘feasibility frontier’ (Wiens 2015b), but only through a significant reasoning process that also draws on

other normative theoretical tools than just the evaluative standard of the ideal theory.

If we see a theory of political legitimacy as one that should result in all-things-considered judgments about the permissible use of coercive power, then we need the former, rather than the latter type of action-guidance. The question at stake is always: in these circumstances, is it justified to adopt or maintain these laws and policies, and to enforce them? This conforms to the decision-level action-guidance that I just set out. This fits more naturally with a non-ideal theory, given that actual decisions are made under non-ideal circumstances.

Ideal theory and action-guidance can more readily be reconciled on the second understanding of action-guidance, where an ideal theory inspires action by being an aspirational ideal. An ideal theory adopts a critical distance to assess the status quo (Valentini 2009, 339). However, the larger this critical distance becomes, the less likely it is that its recommendations are *sufficient* to guide action in a real-world context.⁵⁹ For this reason, while it may reconcile ideal theory and action-guidance, the ideal understanding of action-guidance is less suitable for a theory of political legitimacy, understanding political legitimacy as I do. If the question is how the laws and policies of actual states can be morally justified, the answer should take note of the non-ideal circumstances in which laws and policies exist. Formulating an aspirational ideal is not sufficient to arrive at judgments on the permissibility of adopting and maintaining laws and policies and of enforcing them.

In the next sections of this chapter, I consider a number of theories that associate political legitimacy in different ways with an ideal, or an idealised state of affairs. My aim is to argue that this approach has its dangers. First, there is a feasibility problem: in practice, the ideal the theory prescribes may not be feasible. This leaves actual laws unjustified without offering a feasible alternative, which violates ought implies can: the state is required to realise the ideal, but given

59 Or to formulate it the other way around: “[u]topian thought is not necessarily frivolous, but the nearer political thought gets to action, as in the concrete affirmation of human rights, the more likely it is to be frivolous if it is utopian” (Williams 2005, 25).

that this ideal is unfeasible, the state cannot do what it ought to do. Second, there is a normative problem: in practice, the ideal the theory prescribes may not be desirable. This is more severe than the first problem, since it is then the case that the normative prescriptions ought *not* to be followed. This would undermine the purpose of the theory and make the normative theory a threat to improvements of the status quo, rather than an aid.

A theory that does quite well at avoiding these problems is the legitimacy theory of Allen Buchanan. Buchanan accommodates most, but not all, of the concerns I set out in this chapter. Importantly, Buchanan argues that legitimacy depends chiefly upon the feasible and morally accessible alternatives to a system and on the system's capacities for improvement (Buchanan 2004, 301).⁶⁰ He acknowledges that it is not sufficient to endorse ideal moral principles for institutions, but that the consequences of institutionalising these principles should also be taken into account (Buchanan 2004, 22). Consequences, of course, are specific to a context, which shows that Buchanan's view is context-dependent to a certain extent. Yet, Buchanan proposes that legitimacy requires a "threshold approximation of justice" (Buchanan 2004, 268), where this threshold itself seems to be more or less fixed and one-size-fits-all. On this issue, my proposal follows a different strategy.

3.2

Context-independence in theories of political legitimacy

Many theories of legitimacy are context-independent in important ways. In this section, I introduce two examples of context-independence. The main purpose of considering these examples is to see how context-independence plays a role in existing theories of political legitimacy. In the next two sections, I will illustrate by reference to these (and other) examples what is problematic about context-independence. The examples are the following. First, a number of theorists require laws that specify democratic procedures as necessary for political

⁶⁰ Buchanan asks this question in the context of the international legal system. The same question can however also be asked for legitimacy within states.

legitimacy, regardless of the context. Second, threshold theorists set a threshold of sufficient justice as a necessary requirement for political legitimacy, where this threshold itself is context-independent. The example discusses one requirement of justice: means of subsistence for all.

What is important to note at the outset is that, if I have interpreted the theorists discussed below correctly, the context-independent requirements they pose are *binary*. That is to say: if the context-independent requirement is e.g. to be democratic, and this requirement is binary, a state is either democratic in the required way, or it is not. According to the requirements discussed in this section, it is moreover the case that if a state does *not* meet this context-independent binary requirement, the whole state is illegitimate. This is hence incompatible with a scalar approach.

To avoid this, one might pose democracy as a context-independent requirement, but allow that the *degree* of democracy that is required for full legitimacy depends on the context. Every state would then be required to be democratic, but a state might still be fully legitimate if it embodies only an easily achievable variant of democracy, e.g. if circumstances make a more ambitious form of democracy infeasible. Such a gradual approach might be able to circumvent some of the problems I raise. However, I do not think this gradual form of legitimacy requirement is intended by the theorists in the examples, as I hope my discussion will make clear.

Example 1: democratic procedures

Let me start with the first example: the context-independent requirement for political legitimacy of democratic institutions. As we saw in the previous chapter, democratic proceduralists require democratic institutions for political legitimacy. Philip Pettit requires democratic control for political legitimacy and specifies three conditions that must be met for this democratic control to be adequate: the system must give each citizen an equal share in control, the control must not depend on the cooperative attitude of the state, and control must be significant enough to avoid domination (Pettit 2012, 79-80).

Peter, too, argues that “democratic decision-making procedures are necessary for political legitimacy” (Peter 2009, 59). Similarly, Laura Valentini argues that in order for the state to express equal respect for persons in circumstances of reasonable disagreement, it ought to have democratic procedures (Valentini 2012a, 600). This is a requirement of legitimacy (Valentini 2012a, 596).

The following stands out. These theorists all conceive of legitimacy as concerning the justified use of coercion (Pettit 2012, 60, Peter 2009, 59, Valentini 2012a, 593). In answering the question how coercion may be justified, they all refer to democratic procedures. They do not add significant qualifications to the democracy requirement. For instance, while Valentini argues that democratic procedures are necessary for legitimacy *under circumstances of reasonable disagreement*, this hardly limits their range of application, for any society is likely to contain such disagreement. This implies that democratic procedures are in fact always necessary for legitimacy, regardless of the more specific context of a certain state.

What I will argue below is that we need, instead, a sensitivity to the context in which procedures are to be defended as institutional proposals and choices. A context-dependent approach is able to deal with feasibility problems and normative problems that arise for theories that defend context-independent requirements like democratic institutions.⁶¹

Example 2: resources for subsistence

The second example I would like to offer is the context-independent requirement for political legitimacy of means of subsistence for all. Multiple theorists, among whom Rawls, defend this requirement for legitimacy. As we saw, Rawls’s theory of legitimacy is an example of a threshold theory. He argues that legitimacy in principle depends on

⁶¹ Cf. Buchanan for a suggestion in the direction I have in mind: he points out that democratic authorisation of the exercise of political power is only required for legitimacy if it is feasible and likely to be achieved without excessive risks to persons’ basic rights (Buchanan 2004, 258). This is an important qualification, because it acknowledges that democratic procedures may *not* be feasible, or may *not* be accessible without incurring unacceptable moral risks.

the outcome of democratic procedures, but that these outcomes can be too unjust to be legitimate (Rawls 1993, 428). Rawls's liberal principle of legitimacy states what kind of constitution a society must have for its exercise of political power to be fully proper. This ideal is worked out by giving an account of what all citizens might be reasonably expected to endorse (Rawls 1993, 137). For Rawls, only a conception of justice that all can be reasonably expected to endorse can serve as a basis of public reason and justification (Rawls 1993, 137).

A legitimate state is one that approximates a political conception of justice *to a sufficient extent*. A constitution cannot be expected to be "perfectly just, as no human institution can be that" (Rawls 1993, 428). The relevant question for now is: what is a sufficient extent? A context-dependent account would let its criteria for sufficient justice depend on the context a state is functioning in, while a context-independent account would adopt a threshold that is equal for all states.

Rawls's legitimacy approach, focusing on constitutional essentials and matters of basic justice, is best understood as a context-independent approach. The thresholds he introduces are equal for all states and are thus context-independent. They are intended to avoid the result that states can be called legitimate due to the procedural origin of their laws and policies despite the gross injustice of these laws and policies. Rawls argues that there are "fixed points – such as slavery and serfdom, religious persecution, the subjection of the working classes, the oppression of women, and the unlimited accumulation of vast fortunes, together with the hideousness of cruelty and torture" that show "the illusory character of any allegedly purely procedural ideas of legitimacy and political justice" (Rawls 1993, 431). In other words: there is a basic threshold, consisting of points that are fixed independently of the context, which rules out that states whose laws allow e.g. slavery are counted as legitimate. After this threshold is reached, democratic procedures determine legitimacy (Rawls 1993, 428). The same concern – ruling out that excesses on the grossly unjust side of the spectrum are compatible with legitimacy – seems to motivate other threshold theorists (Estlund 2008, 110, Valentini 2012a, 600).

One tenet of 'sufficient justice' that is regularly cited in the literature is the provision of means for subsistence to all, which serves

as my second example. For Rawls, such a social minimum that provides the basic needs of all citizens is a constitutional essential (Rawls 1993, 228). For this reason, we can assume that he takes it to be a necessary requirement for legitimacy; his liberal principle of legitimacy requires that a number of constitutional essentials be adequately addressed in any acceptable political conception (Rawls 1993, 227). The social minimum is one of these aspects, and is thus part of the threshold below which no legitimate regime can fall.

Another threshold theory that adopts a context-independent requirement of resources for subsistence among its legitimacy requirements is Buchanan's theory. Buchanan argues that, while legitimacy requirements should become more stringent as states become capable of more progress, they should in any case be held to a "minimalist requirement" (Buchanan 2004, 269). Buchanan's minimalist requirement refers to protection of basic human rights, which are the core of justice. Buchanan takes the pursuit of justice to be the chief moral purpose of states (Buchanan 2004, 247). Among these basic rights is the right to resources for subsistence (Buchanan 2004, 129).⁶² Buchanan's minimalist requirement is not unambitious. He argues that an "approximation of justice" must be achieved (Buchanan 2004, 247, 268). For Buchanan there is thus a lower threshold such that no state that falls below it can be counted legitimate. However, which actual threshold a state must meet depends on its capabilities for progress. This suggests that Buchanan's theory is context-dependent above the threshold, but the lower threshold posed by the minimalist requirement is context-independent.⁶³

By being context-dependent to some extent, I regard Buchanan's theory as a step in the right direction compared to threshold theories

⁶² David Reidy similarly argues that "[n]o body politic can possess the capacity legitimately to coerce its members, then, if it fails to secure for them all basic subsistence, security and certain core liberty rights" (Reidy 2007, 275).

⁶³ One might wonder whether Rawls could not also defend a context-dependent threshold above the lower threshold. As I interpret Rawls, this is not compatible with his theory. Because his theory is purely procedural under "normal and decent circumstances" (Rawls 1993, 429) (while there is no legitimacy at all under non-decent circumstances) his theory does not allow content requirements to be put on the legitimacy of laws and policies – not context-dependent ones either.

that follow Rawls's structure. By invoking a context-independent lower threshold, however, his theory can still run into the problems that I discuss below. If my arguments are correct, then we should not adopt any threshold. I hope my proposed alternative (further developed in chapter 4) will make it clear that a context-dependent account without a threshold does not amount to condoning the atrocities that threshold theories hope to avoid. A defensible theory of legitimacy must recognise states' responsibility to adequately respect citizens' rights and to guard their interests. We should be careful, however, about how we incorporate these responsibilities into our legitimacy theory if we are to avoid feasibility and normative problems. It is here that I hope my theory provides improvements over existing theories.

Having introduced these two examples, I will continue to discuss two problems that context-independent approaches can run into, using the examples to illustrate the problems. These problems pave the way for a defence of an approach that assesses legitimacy in a way that is sensitive to the context of a particular state.

3.3

The feasibility problem

In the previous section, I discussed two examples of context-independence that occur in theories of political legitimacy: (1) the context-independent requirement of laws that specify democratic procedures, and (2) the context-independent requirement of means of subsistence for all, which can be found in a number of threshold theories. Why would it be problematic to adopt these context-independent criteria for legitimacy? A first argument against context-independence is that it may lead to feasibility problems. I now discuss both examples of context-independent requirements in turn, with the aim of substantiating this feasibility problem.

Example 1: democratic procedures

First consider the example of democratic procedures. The theories we

considered require for political legitimacy that democratic procedures exist in order to settle disagreements between citizens deserving of equal respect. Now, let us imagine a newly appointed political leader in a currently authoritarian regime. This leader is committed to using the coercive power of the state only in justified ways, and has therefore concluded that continuing the authoritarian tradition does not grant the respect to citizens that they are owed. The leader hence intends to change the political system. In this imagined society, however, citizens are on average not well-educated. A significant proportion of citizens are illiterate. There is no developed civic political culture; citizens are not used to having opinions about politics or discussing these with each other. There are no political parties. The rule of law is, as of yet, very minimal.

Given these circumstances, we can well imagine it is impossible for the state to implement democracy, understood as a political system in which all citizens have “(approximately) equal political decision-making power” (Valentini 2012a, 600). A successful and stable transition to democracy might well take years, if not decades. Let us suppose this is true in this case, and immediate implementation of democracy is thus impossible. The newly appointed leader can, ought to, and (let us suppose) does take steps to achieve such a transition, but this does not alter the fact that under current circumstances, implementing democracy is, as of yet, impossible. Given the conduct of the leader, and supposing that others who hold power within this state cooperate with their leader, the current leaders of the state are not at fault for there being no democratic procedures. This society is, in Rawlsian terms, a burdened society. It faces unfavourable conditions; there are “historical, social, and economic circumstances” (Rawls 1999a, 90) that make it impossible, for the time being, to be democratic.

If proceduralists are correct that state power can only be justified if it is exercised through democratic procedures, then this state’s use of power is morally unjustified as long as it does not have such procedures. In chapter 1, I concluded that the justification of coercive power must, at least, deal with the question of what gives a state the *privilege* to engage in such power. What makes it permitted for the state to coerce its citizens? If the state cannot have a privilege to coerce unless its coercive actions are decided on through democratic means,

then any coercive state action will be impermissible until the state has become democratic. In other words: a non-democratic state does not have the privilege to coerce, and hence has a duty not to coerce.⁶⁴

As chapter 1 also showed, a defining characteristic of what it is to be a state is its coercive nature. If a state's being non-democratic entails that it has a duty not to coerce, then any non-democratic state that meets this duty would stop being coercive, and would hence cease to be a state at all, given the definition of a state. As a paradoxical implication of this conclusion, this means that, insofar as a non-democratic state relies on coercive taxes for its activities, it could also not engage in democracy-enhancing activities as long as these activities are not themselves adopted through democratic means.

In the case of our example state, democratic institutions are infeasible. This means that even given that this state wants to use democratic procedures to make coercive decisions, it is currently unable to do so. If democratic procedures are indeed required for legitimacy – i.e.: the privilege to coerce – regardless of the context, then our non-democratic example state is not allowed to raise taxes, not allowed to make laws and policies, and not allowed to develop any activities or provisions for which it has to rely on taxes. If this state decides not to do anything that it is not allowed to do, it does not do any of the things states generally do. If it does not do any of these things, it cannot be called a state, so in effect this state is not allowed to exist. What the state ought to do – make decisions about coercion through democratic procedures – it cannot do. All currently feasible ways to make decisions are non-democratic, and are hence prohibited, if democratic procedures are indeed a necessary requirement for legitimacy.

Requiring democratic procedures where these are not feasible, then, leads to a violation of the principle of 'ought implies can': it is to require that a state do something that it cannot do. Violations of 'ought implies can' are problematic – something which many of the

64 Given that a privilege to coerce is the negation of a duty not to coerce (Hohfeld 1919, 39), the negation of a privilege to coerce is a double negation of a duty not to coerce, which amounts to a duty not to coerce.

legitimacy theorists we discussed explicitly acknowledge.⁶⁵ Valentini, for example, says: “[i]f *ought implies can*, justice cannot require of institutions any more than what they can do to realize it” (Valentini 2012a, 600, emphasis original). She assumes that the ‘can’ in that statement “corresponds to respect for basic rights plus democratic entitlements” (Valentini 2012a, 600): states can provide democratic entitlements. As we just considered, however, democratic procedures themselves may be currently impossible to implement in any effective way. While Valentini notes that reasonable disagreement may make it impossible to always fully realise justice, she does not acknowledge that there may be other circumstances – such as illiteracy or the absence of a civic culture – that, in turn, can stand in the way of democracy. Thus, while her aim of avoiding violations of ‘ought implies can’ is on the right track, her solution does not yet hit the mark.

Pettit makes a similar move. He notes that without a theory of political justice, which should prescribe democratic procedures, theories of social justice would be “irrelevant to public life”, would not have “any practical point”, nor “any application” (Pettit 2015, 15). The point of democratic procedures, according to Pettit, is to make political theory practically relevant; just, democratic processes of decision-making should determine what ought to be practically implemented (16). This is something that, according to Pettit, theories of social justice cannot do. However, Pettit does not consider that his solution for the problem of making a theory of social justice practicable, may itself be infeasible, i.e.: impracticable. It may sometimes be impossible to solve the practical predicament that Pettit argues theories of social justice

65 Pettit, for example, says that “I may recommend that you should do X, where I can and do assume [...] that X is within your deliberative control: something that you can do or not do [...]. But I cannot recommend responses that do not fit this constraint” (Pettit 2015, 18). Buchanan says that “where democracy is *possible* it is required for legitimacy” (Buchanan 2004, 235, my emphasis). He thereby acknowledges some role for feasibility constraints in legitimacy assessments, even if later on he does say that there can be no full legitimacy without democratic processes (259), indicating that, for full legitimacy, it is not necessary that what is required is actually possible. Rawls also seems to tap into the intuition that what is impossible cannot be required when he says that the legitimacy of institutions cannot depend on them being fully just, as “no human institution can be that” (Rawls 1993, 428).

face by way of democratic procedures.

Now return to our example state: its leaders are committed to only using coercion in morally justified ways. They recognise that, ideally, they would do so through democratic procedures, but as we stipulated, it is currently impossible to do so. Should the state stop coercing, and hence cease to be a state? Or should the state adopt less ideal procedures to arrive at decisions concerning laws and policies, provided that they are feasible and as desirable as possible?⁶⁶ If we opt for the latter, should we not say that, given the situation, it is *justified* to act in these non-ideal ways, even if in a more *ideal* situation, other decision-making procedures would be used? And if political legitimacy is about the moral justification of coercive power, should we then not say that this state is therefore (*ceteris paribus*) politically legitimate? I think the answer to these questions should be 'yes'. Where ideal procedures are unavailable, a state can be legitimate if its uses of coercive power are justified by context-dependent standards that meet the principle I specified above: the procedures (which, of course, are themselves laid down in laws or policies) should be as normatively demanding for the context in question as is feasible and desirable in that context. In this case, this means the example state is *not democratic, but still legitimate*. This, then, calls into question the proceduralist take on legitimacy. On a democratic proceduralist view, our example state should be classified as illegitimate if it adopts alternative decision-making procedures. To be legitimate in the face of democracy being impossible, it should stop using coercive power if it insists on being legitimate, and a democratic proceduralist theory would seem to prescribe anarchy.

While this conclusion could certainly be a consistent one to adopt, I do not think this is what the theorists in question would espouse. Nor does drawing out this implication adequately represent what their theories are intended to convey. Defences of democracy are best

66 I am here assuming that there are actions the state can perform that are feasible and maximally desirable, which are not omissions. If for all possible choices, the best course of 'action' for the state is not to act, then indeed the state should cease to exist. In that case, the former and latter option amount to the same. In practice, however, most societies will likely be much better served by an existing state stepping up its game than by throwing in the towel and delivering the society to anarchy.

seen as positing a target to strive for, something that political leaders should work to bring about, and that they ought to implement if they can. This becomes clear, for example, from references to democratic institutions as an ideal (Pettit 2015, 12) or a system that is as just as it can be (Valentini 2012a, 601). Nevertheless, the question I mean to pose is: when this goal cannot currently be reached, how can the use of power be justified in the meantime? On the basis of what kinds of considerations should a non-democratic state determine which laws and policies to adopt instead? Note that it will not do, here, to merely say that such a state should strive to become democratic. If this really does take decades, there are many other tasks that the state will have to tend to besides the creation of democratic institutions, and it will need tools to help it make morally appropriate decisions about these. Of course, the anarchical alternative is still an option; a state does not *have* to adopt laws and policies and take on tasks. It can also abolish itself. This is an option that must always be kept in mind, and judged in comparison with the available alternatives. However, I will assume for now that in the case of most societies, opting for anarchy *now*, i.e.: immediately abolishing all existing laws and policies, will lead to effects that are so disastrous that it is without doubt an unjustifiable alternative.

The point of considering the situation of non-democratic states where democracy is currently infeasible is not to study the predicament of such states. Democratic institutions, here, merely serve as an example of the problematic implications of making political legitimacy dependent on context-independent requirements, if there are circumstances in which these requirements cannot be met. The case of requiring democratic procedures exemplifies this point, and helps argue for the following general upshot: if there are circumstances in which using such procedures is infeasible, then this leaves the question open how the use of state power can be justified in these circumstances.

Buchanan's defence of democracy is better able to cope with these troubles. He only requires of states that they be democratic if it is feasible (Buchanan 2004, 258). In this way, he avoids the implication that states should stop using power if they cannot yet do so democratically. Yet, he still argues that states can be only *minimally*, and not *fully* legitimate if they are not democratic (Buchanan 2004, 259). This suggests that,

in the end, democracy is still a context-independent requirement for legitimacy; non-democratic states will be counted as less legitimate for not being democratic, even if, due to the circumstances, implementing democracy is not among the options. Buchanan thus adopts a second, maximalist threshold – the threshold a state must meet to qualify for full legitimacy – which includes the context-independent criterion of democracy.

What leads theorists to withhold judgments of (full) legitimacy for non-democratic regimes is the fact that there is something inadequate about a situation in which not all citizens share in the state's power. If a regime is not democratic, it should not stay the way it is, but its leaders must work to change it in order to become more democratic. As Buchanan phrases it:

[W]e may distinguish between what might be called minimal and full political legitimacy. Where institutional resources for democratic authorization are lacking, an entity can be politically legitimate – can be morally justified in exercising political power – if it satisfies minimal standards for protecting individuals' rights by processes and policies that are themselves minimally just. However, this legitimacy is deficient or at least less than optimal: It fails to reconcile the exercise of political power with the fundamental equality of persons. (Buchanan 2004, 259)

While I agree that a situation in which the exercise of political power cannot be reconciled with the equality of persons is less than optimal, it is important to distinguish between two different issues, and to reject the distinction between minimal and full legitimacy as made by Buchanan. First, there is the question whether it is justified that power *is currently exercised* in a certain way. If we want to know whether a state is legitimate *now*, then this is the question that we need to answer. This concerns the first issue that Buchanan mentions: is the state morally justified in exercising political power? If a country benefits (in the way that one regards as morally relevant) from having a non-democratic state, relative to not having a state at all, and if democracy is currently infeasible, then we may have a convincing case for arguing that that state is currently justified in exercising power non-democratically.

Second, there is the question whether it is justified that the state *continues* to exercise power in that way, viz. whether the state

should take measures to enable itself to *change* the way in which it exercises power. For any non-democratic regime, the answer to this second question should be that measures should be taken (if these are themselves feasible and without excessive moral costs) to improve the prospects for power being exercised in a more democratic way in the future. These measures should be taken because non-democratic exercises of political power fail to reconcile the exercise of political power with the fundamental equality of persons, which explains what is deficient about them. However, these transformative measures may not lead to the immediate achievement of democracy; despite a state doing all it can, democracy may not (yet) be achieved.

In sum, two things may be true at the same time: (1) due to the infeasibility of democracy in a certain situation, a non-democratic state can be justified in exercising political power, and (2) compared to an ideal standard, this exercise of power is morally deficient, because it fails to reconcile the exercise of political power with the fundamental equality of persons. As we can see, while the second point refers to a moral deficiency, it does not refer to a lack of moral justification. Given that political legitimacy is about moral justification, we should conclude that the first statement is about political legitimacy, while the second statement is about something else – something that does not concern all-things-considered permissibility. This is indeed what I defend: the first statement concerns political legitimacy, the second statement concerns political justice. These concepts are not synonyms.⁶⁷

It is puzzling that Buchanan insists on including both the moral justification for the exercise of political power (political legitimacy) and the optimality, measured by a context-independent ideal standard, of this exercise of power (political justice) under the heading of political legitimacy. Earlier in the same chapter, he defines political legitimacy by saying that “[a]n entity has political legitimacy if and only if it is morally justified in exercising political power” (Buchanan 2004, 233). By distinguishing between minimal and full legitimacy, however, he now suggests that moral justification is not sufficient for full legitimacy. Full legitimacy requires not merely that the exercise of power is

⁶⁷ Chapter 4 comes back to the distinction between political legitimacy and justice.

morally justified, but moreover that it be exercised in an *optimal* way, which may be infeasible, as Buchanan acknowledges. This conflation of political legitimacy and political justice is confusing, and I prefer a theory in which these issues are kept apart and considered separately. The reason to keep them apart is that, if we do not, we will ultimately stumble on the question whether the infeasible can be required for the moral justification of the exercise of coercive political power. I argue that it cannot. Political legitimacy is about moral justification, and moral justification must be understood in a context-dependent, non-ideal way, if it is to make sense. For this purpose, all legitimacy requirements should be feasible. This position is defended in the remainder of this section.

Elaboration: the concept of feasibility

Before we turn to the second example in which we consider that the provision of resources for subsistence for all may also be infeasible, it is helpful to elaborate on the concept of feasibility. I adapt my understanding of feasibility from Pablo Gilabert and Holly Lawford-Smith (2012, 812) and Lawford-Smith (2013, 250). I say that to determine whether a certain outcome *O* is feasible, we must determine for which *agent* *X* at which *time* *T* it is to be possible to achieve this outcome, and by which *time* *T'* this agent must have achieved that outcome. This also means there must be some *action* ϕ that the agent can perform to bring that outcome about. The 'formula' of feasibility whose variables must be filled out in order to make a feasibility assessment is hence:

O is feasible for *X* at *T* iff it is possible for *X* to have have ϕ 'd by *T'*, where ϕ 'ing is sufficient to bring about *O*.

Feasibility, then, does not refer to anything that is possible, but rather to outcomes that a specific *agent* can achieve within certain *time* constraints (Lawford-Smith 2013, 244, Wiens 2015b, 459, Gilabert 2009, 675). Thus, to know whether, in our previous example case, democracy is feasible, we must specify *who* is to bring about democracy, and by *when* they need to be able to do so. In the example, I suggested that, for this state, it is currently impossible to implement democracy. In other words: *X* is the state, and *T'* is set to 'now' or 'very soon'. Because the

state cannot implement democracy *now* (or very soon), its legitimacy should not depend on its being democratic now, as this would violate ‘ought implies can’.⁶⁸

We may wonder, however, whether it is justifiable to set the timeframe *T* to ‘now’ or ‘very soon’. Why not set it to ‘in twenty years’? It may well be feasible for the state in our example case to implement democracy within twenty years, and then we might say it is legitimate as long as it stays on course to do so. While this is a sensible approach, we should note that this line of reasoning entails that the presence of democratic institutions is *not itself a criterion for legitimacy*. Rather, legitimacy then depends on the efforts that a state makes to improve itself and to open up possibilities that were not directly available before.⁶⁹ This would suggest, however, that legitimacy depends on which available actions a state performs *now* – namely: it should perform those actions that are part of a path towards democracy. With this, we are back at making feasibility assessments with a close timeframe in order to determine legitimacy, rather than timeframes like ‘in twenty years’. As I suggested above, this is as it should be

A second issue to point out is that, as can be seen clearly from the example, choosing a very restricted timeframe does not provide an excuse to hang on to bad institutions indefinitely. That we can only require for legitimacy what is feasible is something very different than saying we should have weak requirements. That a state can be legitimate without being democratic at a certain moment in time does not imply that a state can be legitimate *without taking actions that can make the implementation of democracy possible in the future*. A state may be dependent on others, such as citizens making use of newly created

68 That is: assuming that we regard it as unjustifiable that the state abolish itself. If anarchy were a justifiable option, then an infeasible legitimacy requirement would not violate ‘ought implies can’, because the state could simply opt for anarchy and hence remove the call for legitimacy. There would be nothing to legitimate anymore.

69 This ties in with a number of distinctions that are made in the feasibility literature. In this example, the state does not have a *synchronic* ability to implement democracy, while it does have an *indirect diachronic* ability to do so within twenty years (Gilabert and Lawford-Smith 2012, 811). This ability requires that it create new possibilities, which were not available in the previous situation. This entails a modification of what David Wiens calls the feasibility frontier (Wiens 2015b, 456–7), which can be done by e.g. changing the total amount of available resources.

rights to create a civic political culture or at least not impeding others to do so, which means that it cannot create democracy alone.⁷⁰ This does not undermine the possibility, however, that the state may have obligations. It may have an obligation to promote citizens' initiatives that, on the best possible judgment, can be expected to contribute to the creation of fertile ground for the development of democracy, or to take other actions that are currently available to it and foster democratic development. We might then argue – as I will do in the next chapter – that a state's right to rule depends on whether its use of coercive power serves certain values in the best possible way, such as the values that underlie a commitment to democracy, rather than on how closely it already approximates certain desirable states of affairs. While this certainly disqualifies complacency or resignation on the part of states, it keeps intact the argument that non-ideal institutions can be legitimate as long as no better alternative is in fact available at acceptable moral costs.

But what if a state does *not* take the required actions for improvement in the future? It is tempting to say that institutions can become illegitimate if too little is done to create circumstances in which they can be improved, if they cannot currently be improved. We should resist this response however, and provide a more careful one. In modern states, any law or policy is part of a complex body of power exercises that together form the state. All these laws and policies, and all opportunities for the creation and abolishment of laws and policies, provide levers that the state can use to alter the stage and make new reforms possible. If preparatory actions are required to change some existing institution, and improving the existing institution is not currently feasible, those preparatory actions will relate to laws and policies that *can* currently be improved. If rulers fail to make feasible improvements in these laws and policies, *this* is what will undermine legitimacy. This is what I argued above: while the example state may be legitimate while undemocratic, it becomes illegitimate if it fails to e.g. improve the availability of education and encourage or require school attendance; acknowledge civil rights of free speech,

⁷⁰ Cf. Lawford-Smith (2012, 458) for discussion of a case in which, similarly, one agent cannot reach a desirable outcome alone, and therefore has an obligation to convince others to do their part, instead of an obligation to create the desirable outcome.

assembly, and fair trial; improve the training and integrity of judges; gather support among influential figures (intellectuals, religious and cultural leaders) for drafting a constitution that can found democratic institutions (provided that these measures are feasible, of course). If these things need to be done before democracy can be implemented, then not taking these measures would undermine the legitimacy of the example state. As long as these preparatory actions have not been performed and sufficiently concluded, however, not implementing democracy itself does not undermine the legitimacy of the state.

If we look at legitimacy in this way, we can let a theory of legitimacy have a function that is importantly distinct from the function of theories of justice. We can use our theories of social and political *justice* to determine what rights political leaders should aim to establish for citizens, also if this is only in the long run, such as the implementation of laws that specify democratic procedures and concomitant political rights. We can then avoid burdening our theory of legitimacy with this same task, and only address the justification of coercive power within the context of legitimacy theories.⁷¹ From the fact that certain goals of justice have not yet been reached, we do not need to conclude that power is being used *illegitimately*; power may be used with justification, even if certain goals of justice may be out of reach at the moment. In summary: while a theory of justice specifies the (long-term) aims of state action relating to citizens' rights, a theory of legitimacy specifies how states can act with justification, even if the aims set in a theory of justice are still out of reach.

I regard this as a plausible way of looking at political legitimacy. Whether the state is politically legitimate – whether it is justified in using coercive power – should depend on whether it is using its power *in a justified way*. It is unlikely that we will find state action morally defensible if it consistently leads to morally unacceptable outcomes, or fails to bring about movement in a morally required direction.

⁷¹ To say that a theory of political legitimacy focuses on the justification of coercion is not to say that such a justification has nothing to do with reaching goals of justice, or reaching other goals. As I will argue in chapter 4, the primary way to justify the use of coercive power is that it promotes certain values. My point here, however, is to clearly get into view which type of question belongs to which type of theory. This does not preclude that they draw on each other's insights.

My point here, however, is that morally defensible conduct does not *guarantee* a morally desired outcome, one that a more ideal theory would propound. In particular, movement towards such outcomes may be slower than we wish. For this reason, a theory of justice cannot be a sufficient measure of legitimacy. Instead, we need additional guidelines to determine what it is that justifies state action under non-ideal circumstances in which justice is either out of reach (the feasibility problem), or cannot be brought about in a morally acceptable way (the normative problem, see section 3.4).

If we accept this non-ideal perspective for a theory of legitimacy, then a split between political legitimacy and political justice occurs. While understanding legitimacy in terms of political justice instead of social justice was intended to solve problems relating to disagreement about social justice, we have now seen that there is at least one way – the infeasibility of arrangements of political justice – in which a theory of political justice may not be an adequate measure when it comes to justifying the use of coercive power by the state. What I propose, then, is to divorce the perspective of political legitimacy from the perspective of political justice, in order to deal with both these issues adequately. In this, my position diverges from those of Pettit and Valentini, who both use ‘political legitimacy’ and ‘political justice’ as synonyms (Pettit 2012, 60, 2015, 11, Valentini 2012a, 598, 600).⁷² In contrast, I suggest that a theory of political legitimacy is best used to arrive at action-guiding prescriptions concerning how political power may be used in non-ideal circumstances, while a theory of political justice addresses more ideal standards that can be used to evaluate in which direction actual regimes ought to strive to change qua political rights.⁷³ The feasibility problem just described provides one explanation for why a state may fall short of the ideal(ised) standard while still having a justification for exercising power in the way it does. The normative problem that I discuss in the next section provides another such reason.

⁷² Philip Pettit confirmed in personal communication (17 June 2016) that the terms ‘political justice’ and ‘political legitimacy’ can be used interchangeably on his view.

⁷³ Cf. Gilibert (2011, 56), Wiens (2015a, 440) for the distinction between prescriptive and evaluative roles. Wiens uses the terms ‘directive’, ‘prescriptive’ and ‘practical’ as synonyms, emphasising the action-guiding character of prescriptions.

Example 2: resources for subsistence

Before proceeding to discuss the normative problem, let us look at the second example of a context-independent requirement that I introduced in section 3.2: resources for subsistence. The argument I developed in relation to democratic institutions can be repeated here in a similar form. As we saw, Rawls and Buchanan both require for political legitimacy that a level of material resources be secured for all. This is a context-independent requirement. Could there be contexts in which securing sufficient material resources for all is infeasible? Let us imagine a society with a government that is committed to ruling in a morally justified way. Furthermore, the society has a strongly libertarian culture that opposes high taxes, and especially strongly redistributive taxes. There is a standing habit among big companies and educated individuals to try and avoid or evade taxes. There is a significant group of poor and homeless people who rely on charity and who have trouble securing food and housing for themselves. It is often hard to reach these people and they frequently lack knowledge and skills to find and use government programmes aimed at poverty reduction.⁷⁴

I surmise that under these circumstances, it is difficult and costly to take “measures ensuring for all citizens adequate all-purpose means to make effective use of their freedoms” (Rawls 1993, 450). Given the public culture and the habits of tax avoidance and evasion, effectively implementing a tax law that collects the means to provide subsistence for all may be quite a challenge. This challenge may be exacerbated due to the high costs that must be made to communicate to persons in the target group that social-security schemes exist, that they are eligible for these programs, and how they can apply for them. It is at least imaginable that, despite serious attempts, a government may fall way short of the ‘adequate means for all’ requirement if circumstances are dire enough, and that “a reasonable approximation” (Buchanan 2004, 247) of it is not achieved. Given the serious attempts of the

⁷⁴ I avoid giving a real-life example, because in practice, whether a government is committed to ruling in a justified way will generally be ambiguous, questionable, or simply very hard to determine. For the sake of the argument, however, it needs to be beyond doubt that the state is not at fault for not meeting the alleged legitimacy requirement.

government to implement measures to ensure adequate means for all, the state cannot be said to be at fault here.

If the use of coercive power by the state can only be justified if it succeeds in the provision of adequate all-purpose means or resources for subsistence, then it is prohibited for the state to use coercive power if it does not succeed in such provision. In our example, however, it is also currently impossible for the state to provide such resources to all, despite serious attempts. The state, then, finds itself in a situation in which it cannot do what it ought to do, and again, we face the question whether this means that the state ought to abolish itself in favour of anarchy, or whether it ought to keep on doing its job in the best way it can. Further, if – as I think we should – we opt for the latter, then we need to ask ourselves how the state can perform the job that is required of it in a justified way, where this job involves the use of coercive power.

In conclusion: if we are concerned not to violate ‘ought implies can’, and if theory is supposed to be helpful in determining how coercive power ought to be used in actual situations, then we should not posit anything that is not always feasible as a context-independent requirement for legitimacy. This goes both for requirements of political justice like democratic decision-making procedures and for requirements of social justice like the provision of resources for subsistence.

Let me stress that I do not argue against taking democratic procedures or state provision of resources for subsistence as goals, nor against a state responsibility to try to provide these things. My argument here is only that if there are influences beyond the sphere of control of the state that can inhibit meeting these requirements, then this provides a reason not to include such requirements in a theory of political *legitimacy* (but rather to include them in a theory of social justice or political justice).

One may be reluctant to let go of these requirements as requirements for political legitimacy. The worry may be that states can get away with moral abominations if we do not require of them that they secure such fundamental things as resources for subsistence and

democratic procedures. I fully agree that a theory with this implication would be incorrect. The theory that I develop in chapter 4 therefore avoids this implication. To anticipate: I will argue that the *values* that underlie defences of e.g. democratic procedures and resources for subsistence should guide the choices of rulers. Which laws and policies best serve these values in practice will differ per context, and full success cannot be guaranteed.

A context can be tragic, in the sense that states may want and attempt to reach certain moral standards, but be unable to, and regret this. If what we think ought to be done cannot be done, there may be no ‘resolution without residue’ (Marcus 1980, 131); it may be that there is reason for the chooser to feel bad about having to maintain an objectionable situation for the time being, even if they have no better alternatives.⁷⁵ Such situations exist – in fact: they are omnipresent – and a theory of legitimacy should thus be able to guide choices for such circumstances. Specifically, then, I suggest that there must, in every decision situation, be at least one feasible alternative that it is permissible for the state to choose. The set of feasible alternatives should always include at least the status quo and a null value (anarchy, no law, or no policy).

When what we are concerned to do is to assess the legitimacy of the status quo (i.e.: of *this* state, with *these* laws and policies), the status quo should figure as one option among feasible alternatives. When the status quo is maintained, this, too, is a decision; the status quo could also be changed. Whether the exercise of coercive power through existing laws and policies is legitimate depends on the merits of those laws and policies and on the merits of feasible alternatives to the status quo. What the merits of laws and policies should be will be the topic of chapter 4.

⁷⁵ Cf. Bernard Williams (1965, 107), who speaks of “regret for what was missed”.

3.4

The normative problem: the moral costs of changeover

The previous section considered a problem that may arise when states are held to context-independent legitimacy requirements: meeting these requirements may currently be impossible. States may not be able to do what they ought to do. Now, I consider a second problem that may arise when requirements are context-independent, namely that it may be *undesirable* for states to meet context-independent requirements. Briefly put, taking the necessary means to meeting context-independent requirements may lead to morally unacceptable outcomes.⁷⁶ Even if a requirement may be desirable as a target, it may be undesirable to implement the institutional structure of the target *now*.⁷⁷

Suppose that a theory proposes an ideal and argues that this ideal is feasible in the long run. Suppose further that there are no short-term feasibility problems either; structuring any society according to this ideal is also feasible *now*. That is: it can be done. However, implementation may come at considerable cost. It is these costs that I want to focus on now, and that are the main driver for the normative problem for context-independent requirements of legitimacy.

⁷⁶ Cf. Valentini, who presents one type of ‘guidance critique’ which argues that “if we apply principles developed under ideal conditions to real-world circumstances [...] we are bound to obtain morally counterintuitive results” (Valentini 2009, 341) – the risk being that these results will be counterproductive.

⁷⁷ This distinction between something being desirable as a goal and being desirable as the object of enforcement is familiar in the literature. Disagreement is an important reason that the two perspectives may come apart. The distinction is referred to in different terminologies. Fabian Wendt contrasts first-level and second-level moral considerations in evaluating political arrangements (Wendt 2016, 23-4). Similarly, Charles Larmore distinguishes between first-order theories of justice and second-order principles of justice that govern the choice from competing first-order theories when it comes to enjoying the force of law (Larmore 2013, 295). Gerald A. Cohen contrasts the content of justice with “[w]hat we should do, all things considered” (Cohen 2008, 305). Likewise, Pablo Gilabert contrasts *pro tanto* judgments with all-things-considered judgments that include “an appraisal of feasibility and of the relative weight of different moral considerations in certain circumstances” (Gilabert 2011, 57). Valentini contrasts theoretical principles with all-things-considered judgments that need to take the social context into account (Valentini 2009, 344). Not all these theorists necessarily use these distinctions in the context of political legitimacy.

Democratic institutions again provide a good example. Let us accept that it is valuable for a country to be a democracy and that institutionalising democratic principles is therefore a good target to work towards. This does not imply that it is desirable to implement democratic institutions *now*. If, for example, a society is not prepared to collectively work within democratic institutions, then the implementation of, say, a parliament and parliamentary elections might lead to consequences that are morally problematic. Even if the state itself were to perfectly comply with democratic procedures and the spirit of these procedures, citizens might create parties that intend to use democratic institutions for purposes that violate the values that underlie democracy (such as equal respect), they might try to coerce each other to vote for certain parties, or they might violently target people who associate with rival parties (cf. Mihai 2010, 193-4). It may be justifiable for the state to risk inciting these injustices due to the importance of democratic rights. It is also conceivable, however, that the state may have to tread carefully and wait with the implementation of democratic institutions, while preparing the ground for them.⁷⁸ This may especially be the case if there is a non-democratic alternative that is currently stable and (relatively) peaceful. When a situation is not peaceful, the conclusion may well be that transitioning towards democracy is less urgent than stopping bloodshed (cf. Mihai 2010, 184).⁷⁹ If the implementation of democracy risks the consequence of bloodshed, then there is something to say for the state not doing justice ‘though the heavens fall’ (Geuss 2008, 83, Nielsen 2007, 22).⁸⁰

⁷⁸ This is an important addition; dictators may not use the risks of implementing democracy as an excuse to maintain their totalitarian position.

⁷⁹ Cf. also John Gray: “It cannot be denied that the regime that has emerged in Iraq since the American-led invasion is more democratic than the one that preceded it: the government of the day is chosen by a process that includes elections, the results of which may be unpredictable. But it is also undeniable that many minorities – religious minorities such as Christians and lifestyle minorities such as gays – are less free than they were under Saddam’s despotic rule, while the freedom of the half of the population that is made up of women has been much diminished” (Gray 1996, 7).

⁸⁰ As Michael Walzer says: “we would not want to be governed by men who consistently adopt that [‘absolutist’, non-rights-violating] position” (Walzer 1973, 162). Or in the words of G.A. Cohen: “I don’t see how anyone, whatever she thinks justice is, can deny the possibility that certain facts, or other values, might make it inappropriate, or too difficult, or too costly, to produce justice” (Cohen 2008, 302); “[j]ust as truth is not a

A theory of political legitimacy should be sensitive to the possibility that a target that is inspired by a theory of justice may not directly supply the answer concerning which arrangement should be implemented (Valentini 2009, 333). Even if this is not necessarily a problem for theories of justice, where these are intended to guide our *thinking* about the direction in which society should be changed (Räikkä 1998, 30), it is a problem for theories of political legitimacy. If the question is how the state can use its coercive power in a justified way, then political theories that aim to answer this question should not just propose an enticing plan that serves as a long-term or even medium-term goal. Importantly, theories of political legitimacy should give power holders moral tools to determine which laws and policies best or sufficiently serve the relevant moral concerns *under the actual circumstances*. The state is legitimate if it can be shown that the way it uses its coercive power can be justified *at present, under actual circumstances*.

Before we turn (in chapter 4) to the question of how the use of coercive power can be justified, it is useful to get a firmer grasp on the ways in which otherwise morally desirable plans may lead to morally unacceptable outcomes, and what this entails for the kind of legitimacy theory that we need. What might explain this gap between morally desirable targets and morally desirable choices that political leaders can actually make? First, there is the fact that translation to practice itself may be a challenging activity, one that requires political sensitivity, good judgment, and a high degree of knowledge about the relevant facts (Valentini 2009, 344). However, this is not all there is to it. If, for example, there is not sufficient support for democratic institutions in a society, political sensitivity and good judgment may actually tell rulers *not to implement these institutions now*, instead of telling them *how to implement them now*. Good moral judgment may tell a ruler that the moral costs attached to changeover in the laws and policies of a state may be too great to incur. In this section, I take

necessary condition of all justifiable utterance, so it is sometimes justifiable, all things considered, to deviate from justice in the formation of social institutions" (304). Or as Sen says: "Ferdinand I, the Holy Roman Emperor, famously claimed in the sixteenth century: 'Fiat justitia, et pereat mundus' [...] [...] If indeed the world does perish, there would be nothing much to celebrate in that accomplishment [...]" (Sen 2009, 21).

a more systematic look at what the moral costs of changeover are and how their existence can be explained.

Let us start by distinguishing between an ideal on the one hand, and the road towards it on the other. As Juha Räikkä points out, “the ethical evaluation of social ideals⁸¹ does *not* include ethical evaluation of the *necessary moral costs of the changeover* to the new system. It is one thing to evaluate the ideal, and another thing to evaluate the costs necessary for achieving (and maintaining) the ideal. [...] One should distinguish the value of the ideal from the combined value of the ideal and the means necessary for achieving it” (Räikkä 1998, 33, emphasis original). While it may be useful to establish the value of an ideal in itself, e.g. in the context of an ideal theory of justice, when it comes to political legitimacy we must assess the combined value of a (more or less ideal) proposal and what it takes to achieve it. In other words: what would happen if a state decided to adopt a proposed law or policy?

This is a question that matters for both consequentialist and non-consequentialist theories, taking consequentialist theories as ones that argue for the promotion of values, while non-consequentialist theories hold that at least some values should be honoured, whether or not they are also promoted in doing so (Pettit 1993, 19). When it comes to the implementation of institutions recommended by ideal(ised) theories, it may both be true that doing so fails to promote certain values that ought to be promoted and that doing so fails to honour certain values that ought to be honoured. To illustrate both by reference to our two examples: (1) if implementing democracy incites bloodshed, and life is a central value to promote, then consequentialists may oppose implementing democracy because promotion of the value of life is too severely hampered if democracy is implemented. (2) If resources for subsistence can only be effectively provided to all by incarcerating anyone who is found living on the streets, non-consequentialists may oppose the provision of resources for subsistence due to the rights violation the needed measures would entail.⁸²

81 I would add that this also holds for *political* ideals like democratic institutions.

82 Not taking the needed measures into account in determining whether you support the implementation of a plan would lead to means-end incoherence (Bratman 1992, 3).

These examples show that implementation of something whose realisation is in itself desirable when regarded independently of an actual context, may nevertheless be morally undesirable when implemented in practice. To elaborate, implementation may run into two related but separate moral problems. First, the implementation process should not make *moral costs of transition* that are too high to incur. Second, given limited resources, the implementation of one proposal should not inhibit the implementation of other, morally more urgent or important proposals – that is: the *moral opportunity costs* of implementation should not be too high (Erez 2015, 50-52).⁸³ Normative problems that arise on the level of implementation, then, relate to value conflict. In the case of transition costs, moral costs arise that make the value of the desired goal clash with values that must be acknowledged (i.e.: promoted or honoured) in the present, sometimes to the detriment of the goal we are trying to obtain. In the case of opportunity costs, different values pull in different directions, and the adequate response to one value (i.e.: to promote or to honour it) clashes with the adequate response to another.⁸⁴

Both with transition costs and opportunity costs, there are two or more goals or values⁸⁵ that are irreconcilable; they cannot be promoted or honoured (in the way that we would want to) at the same time. This irreconcilability can be either practical or theoretical.⁸⁶

83 Räikkä and Erez both refer to this as normative feasibility (Räikkä 1998, 37, Erez 2015). I will refrain from doing so, and reserve the term ‘feasibility’ for the question whether an agent is able to achieve a certain outcome, as set out in the previous section.

84 Note that if, in the case of transitioning costs, values only clash practically, but not theoretically (see footnote 86 for this distinction), then transitioning costs can sometimes be reformulated as opportunity costs; having more resources (money, time, people, support) could make it possible to pursue the goal without incurring the moral transitioning costs.

85 Two different goals may both contribute to the same value, so value conflict can also occur when only one value is at stake.

86 If goals are practically irreconcilable, then the fact that they cannot all be realised in a specific state of affairs is a contingent fact (cf. Williams (1965, 104), Vallentyne (1989, 311)). This means that they could in principle be realised together, i.e.: they are compossible (cf. Williams 1965, 104, Larmore 1996, 139). The fact that we are not in a position to bring about this state of affairs is due to some contingent reason. Theoretical irreconcilability is what John Kekes refers to when he says: “[t]he incompatibility of values is due to qualities intrinsic to the conflicting values. Because of these qualities, the

Usually, political problems of the irreconcilability of values will be practical rather than theoretical. To take the example of democracy: there is no in-principle conflict between democratic institutions and a stable and peaceful society (quite the contrary, as democratic practice shows in quite a number of countries). However, in some specific situation, there may be facts that cause democracy and peace to be at odds, as may be the case in situations of violent civil conflict. When rulers are faced with the question what they should do in light of this irreconcilability, something has to give. It is not at all clear that pushing through with the implementation of institutions that an ideal theory requires is always the right response. Too much may be lost. This is the normative problem for context-independent requirements. What causes this problem? I consider a few options.

Disagreement and non-compliance

Here, I want to address an important issue that receives much attention in the literature: disagreement (see List and Valentini 2016, §7). When the normative problem arises, disagreement among citizens about what the state ought to do may be an important cause of this. An important normative constraint on what rulers can bring about in a morally acceptable way is what citizens are willing to cooperate with. The most crucial thing to note here is that this goes for both reasonable and unreasonable disagreement. Citizens may refuse to cooperate for sound or unsound reasons. If the state acts to realise something it regards as morally very desirable, but this is regarded as a hostile provocation by citizens, things may well turn out ugly – whether or not citizens’ resistance is reasonable. This holds especially if people *act* on their disagreement and choose not to comply or cooperate.⁸⁷ ‘Ugly’ may

realization of some values entirely or partly excludes the realization of the other” (Kekes 1993, 21). Bernard Williams uses the adjectives “[l]ogically incompatible” (1965, 105) (for desires) and “intrinsically inconsistent” (108) (for moral views); Charles Larmore uses “logically inconsistent” (1996, 139). Peter Vallentyne speaks of action types that are “conceptually incompatible” (Vallentyne 1989, 310), Richard Bellamy of “inherent incompatibilities of a logical nature” (Bellamy 1999, 8). I take all these phrases to refer to goals that are theoretically irreconcilable.

⁸⁷ Note that non-compliance does not necessarily root in disagreement. People may also agree and yet fail to comply. I shall take the problems that non-compliance

mean that people are injured or die, or that any perceived legitimacy that the state may have had in the eyes of its citizens is eroded, risking an ineffective state and deteriorating future prospects for peace. This chapter focuses on the theoretical implications of heeding this insight. Chapter 5 addresses empirical evidence that supports the expectation.

We may distinguish between two types of disagreement, which I will call pre-decision and post-decision disagreement. Pre-decision disagreement concerns disagreement about which decision ought to be made. Where there is a lively public culture, citizens debate and deliberate with each other what laws and policies ought to be implemented. Different (groups of) citizens will adopt different positions on a certain issue. These positions will often be phrased as recommendations to politicians. Politicians and their parties, too, will have opinions about the issue at hand. The different opinions that exist in society may be incompatible, and it may be impossible to heed them all. At some point a decision will be made in light of the different positions that have been voiced. Politicians have to take citizens' opinions into account as a mere fact (Williams 2005, 13). It is useful to note that (1) it is not up to politicians to determine what opinions citizens have, and (2) it is not up to citizens to make the final political decision (except when a democratic state holds a binding referendum, or has other tools of direct democracy). If no consensus emerges from the public debate – this is the usual case – decision-makers will cut discussion short and make a decision (cf. Heyse 2006, 279-81).

At this point, decision-makers have taken into account the different opinions from society – in whichever way, to whatever extent – and have concluded that a certain decision ought to be made. There will be an outcome. This is where the second type of disagreement enters the picture: there will be disagreement concerning the outcome. This disagreement is not the same as the disagreement before the decision. Before the decision, citizens provided input for the decision. After the decision, citizens evaluate whether they think all input was incorporated in the right way, and they need not think that it is only their own input that should have been heeded. They may agree that, given the circumstances, the outcome is as it should be, even if they

poses for legitimacy to also exist in these cases.

wish that their own position had gained more traction. This may be the case if a good compromise has been struck. For instance: workers may want all contracts to be permanent contracts, while employers want to have the opportunity to freely terminate contracts whenever they want. There is pre-decision disagreement. A compromise is reached allowing for fixed-term temporary contracts. Workers and employers may both insist that their initial proposal was superior, but acknowledge that, given the others' opinions and interests, the compromise is acceptable in the circumstances. For this reason, they agree that the decision to adopt the compromise was a good one. Of course, they may also disagree that the compromise forms an acceptable decision. In that case, there still is disagreement post-decision.

There is thus (1) disagreement that forms the context in which a decision has to be made (pre-decision disagreement), and (2) disagreement about the decision that has been made (post-decision disagreement). Pre-decision disagreement plays an important role in political philosophy.⁸⁸ Post-decision disagreement, however, is more sparsely dealt with. Perhaps this is due to theorists' hope that,

88 For example, the following authors acknowledge disagreement in society, and point out the task of political theory to find a solution concerning what to do in light of this disagreement. Simon Caney contends that “[m]uch contemporary political philosophy focuses on the question of how the state should negotiate and accommodate the differing moral perspectives and outlooks that exist within modern liberal political systems. What political principles are appropriate in pluralistic, heterogeneous societies in which there is little agreement between citizens on important moral issues” (Caney 1998, 19)? His own proposal is to “devise political procedures to accommodate the political conflict” (Caney 1998, 30). Gerald Gaus asks whether “the authority of social morality [can] be reconciled with our status as free and equal moral persons in a world characterized by deep and pervasive yet reasonable disagreements” (Gaus 2011, xv). He proposes a publicly justified morality in which the ruler’s “demand is rooted in your reasons as a free and equal person”, implying that “the normative authority to which I appeal, even when you disagree, is rooted in your own evaluative point of view” (Gaus 2011, 30). Laura Valentini distinguishes four types of disagreement, where all types are about disagreements between citizens (Valentini 2013, 182-5). As a solution to the problems that disagreement poses, she proposes that democratic procedures “are as close as we can get, from a practical, real-world, point of view, to the ideal of mutual justification” (Valentini 2013, 192). Other examples are legion. The thread that runs through them is that (1) it is acknowledged that disagreement poses the question why it would be justified to enforce one person’s position against others. (2) The theorist proposes a solution, hoping that with this solution, the normative problem of disagreement disappears when this solution is adopted.

when the recommendations issued by the theorists are followed, the problem of disagreement is already stripped of its normative bite. Theorists acknowledge disagreement and propose that a certain type of procedure (e.g. democratic ones) or argument (e.g. public reasons) will suffice to take the normative sting out of it. The avoidance approach provides a clear example of this hope (but see note 88 for more examples). When answering the question what to do in light of disagreement, avoidance theorists propose to avoid those values and principles that are contentious – the method of avoidance (endorsed by e.g. Rawls (1985, 231) and other neutralists like Larmore (1996) and Gaus (2003)⁸⁹, discussed by e.g. Young (2006, 163), Caney (1998, 20), Hampton (1989, 799)). For Rawls, what is left after disputed philosophical, moral, and religious questions have been avoided (Rawls 1985, 230) is “the kernel of an overlapping consensus, that is, the shared intuitive ideas which when worked up into a political conception of justice turn out to be sufficient to underwrite a just constitutional regime. This is the most we can expect, nor do we need more” (Rawls 1985, 247).

It makes sense to assume that if there is an overlapping consensus, the problem of disagreement has been solved insofar as it poses a normative challenge. Rawls’s starting question is: “how is it possible that there can be a stable and just society whose free and equal citizens are *deeply divided by conflicting and even incommensurable religious, philosophical, and moral doctrines*” (Rawls 1993, 133, my emphasis)? His political conception of justice which forms the content of the overlapping consensus is formulated as an answer to this question (Rawls 1993, 134), and forms the normative basis under his principle of liberal legitimacy (Rawls 1993, 137). Rawls’s project is premised on the conviction that reasonable pluralism is a fact, and its absence is excluded by the nature and culture of free institutions (Rawls 1999a, 12). The disagreement that exists between citizens given this reasonable pluralism is what we reconcile ourselves to by adopting a Rawlsian political conception of justice; we do not need to regret reasonable pluralism, for its existence “allows a society of greater political justice and liberty” (Rawls 1999a, 12).

89 Larmore speaks of “prescinding from controversial views of the good” (Larmore 1996, 126), Gaus of a ‘minimal principle of neutrality’ which holds that the government ought not to act unless it has an impartial justification (Gaus 2003, 148).

This suggests that if a state heeds the liberal principle of legitimacy and rules in line with a political conception of justice, the normative problem of disagreement is solved. We achieve greater justice *and* have no need to try to mitigate disagreement. After all, this disagreement is reasonable, and if the liberal principle of legitimacy is indeed followed, all reasonable citizens will be able to endorse the political conception of justice that the state uses. Rawls's liberal principle of legitimacy thus deals with pre-decision disagreement: it proposes a way a state can respond to reasonable disagreement that generally exists within society, and expectably leads to differing opinions about what should be decided on a whole range of topics. The avoidance approach suggests setting such controversial issues aside and instead prescribes that the state limit itself to those questions that can be answered within a reasonable overlapping consensus informing a just constitutional regime. If this truly works, then we would expect that there is no normatively problematic disagreement about the decisions that such a regime ends up making; everyone should reasonably be committed to the regime functioning as it does, given that anything outside of the overlapping consensus was set aside from the beginning.

Rawls is not the only legitimacy theorist to present a theory that follows an argument along these lines. Many other liberal theorists (see footnote 88 for examples) also attempt to reconcile the legitimacy of state power with a normatively appropriate response to disagreement. In all these cases, however, the response is to general disagreement in society, stemming from the different doctrines that citizens support, and not to disagreement that results from any specific decisions a state actually makes. (Where post-decision disagreement *is* examined, such as in the literature on civil disobedience, the focus has been on whether *citizens* have the right to disobey. The discussion is not extended to the question whether this disobedience has implications for what the *state* can permissibly do.⁹⁰)

90 In fact, in his theory of civil disobedience, Rawls limits himself to “the special case of a nearly just society, one that is well-ordered for the most part”, thus assuming that the state already enjoys “legitimately established democratic authority” (Rawls 1999b, 319), rather than examining how civil disobedience might *influence* legitimacy criteria. The literature on civil disobedience is shaped against the background assumption that there is a *difficulty* in justifying such dissent, given an obligation to obey that citizens are assumed to have (e.g. Rawls 1999b, 319, Simmons 2003, Lefkowitz 2007).

In the context of these liberal legitimacy theories, this makes sense. They are all concerned with how states ought, *in principle*, to deal with the circumstance of pluralism, and hence with the disagreement that exists before they make decisions. Taking reasonable disagreement as a fact of at least contemporary political life, rather than as a contingent aspect of the context of a specific state (Valentini 2012a, 598, Caney 1998, 22, Gaus 2011, xv, see also e.g. Rawls 1993, xvii, Christiano 2004, 280, Buchanan and Keohane 2006, 418, Reidy 2007, 247, Applbaum 2010, 236-7 for reliance on this premise), they reason about a normatively appropriate response to reasonable disagreement in a context-independent way. For this reason, the question how states ought to deal with citizens disagreeing with and opposing state decisions that are actually made does not naturally arise within the confines of such theories.

In reality, however, post-decision disagreement is clearly widespread. Whenever citizens disagree with, are resentful about, or protest existing laws or policies, their disagreement is post-decision; these laws or policies would not exist if no decision had been made to adopt or maintain them. And it is post-decision disagreement that is the most important explanation for the normative problem for context-independent requirements that I discuss in this section. Whenever there is post-decision disagreement, the conclusion must be drawn that actual consensus or reconciliation has apparently *not* been reached. This can be true, quite apart from the question whether, according to a theory of political legitimacy, there was a *reasonable* consensus. Even if a theorist suggests certain measures should be able to attract an overlapping consensus of reasonable doctrines, these measures may be ineffective in practice, or even have adverse effects, if citizens disapprove of the decisions their leaders make. If I am correct, this shows that developing a theory about how states should, in general, respond to pre-decision reasonable disagreement is not sufficient to deal with the issue of the justification of *actual* laws and policies. To justify actual laws and policies, we need to take into account what would happen *after* a decision is actually made: will it command sufficient assent to function in the way it is supposed to function?

One possible response is to argue that laws and policies that would

attract a reasonable consensus will only be opposed by *unreasonable* citizens, and that this opposition is therefore not normatively relevant. For those who argue that justified decisions are those that will be supported by reasonable doctrines, this may seem like an apt response. After all, if laws are chosen in accordance with a conception of justice that forms the content of an overlapping consensus of reasonable doctrines, then the argument suggests itself that it is unreasonable to reject these laws. Several theorists argue that unreasonable disagreement does not carry any normative force (Valentini 2013, 186, Estlund 2008, 4) or has to be contained, like war and disease (Rawls 1993, 64). If unreasonable disagreement indeed does not carry normative force, then there is no normative problem to solve when there is unreasonable disagreement.

There are three things to say in response, however. First of all, post-decision disagreement need not be unreasonable. Just like there are reasonable disagreements over principles of justice, there is also reasonable disagreement over how the reasonable should be demarcated from the unreasonable (Besch 2013, 63, Reidy 2007, 256). If the state has one view of reasonableness, while a group of citizens has another, this may lead to disagreement that these citizens regard as reasonable, even if the state does not. Second, even if all post-decision disagreement were unreasonable, we have reason to believe that this still amounts to disagreeing stances by a significant amount of people (Klosko 2004, 140), who cannot easily be ignored; it may simply be difficult to proceed with a plan when confronted with opposition. Third – and this is the point I want to press – regardless of whether disagreement with state decisions is reasonable or not, it is often doubtful that the state can dismiss the opposition or resentment that is likely to result from disagreement *with moral impunity*. Attempts to dismiss opposition can easily have morally undesirable consequences, as I will illustrate with an example below. These consequences may be such that it is not permissible for the state to bring them about.

In espousing this position, I am drawing on a central theme developed in the political-realism literature, even if I do consider my view to be a moralised account of political legitimacy. (See also the conclusion of chapter 4, where I address how my view takes a middle ground between political liberalism and political realism, in being more non-ideal than the former and being more moralised than the

latter.) The realist insight I draw on is that political theory should acknowledge the practice of *politics*, that is: the fact that any state decision has to be made in a context where conflict and instability are always a possibility (Galston 2010, 387), just as regress instead of progress is (394). For this reason, the values of “order, protection, safety, trust, and the conditions of cooperation” (Williams 2005, 3) should not be underestimated.⁹¹ Bernard Williams even calls their securement the first political question (3).⁹² We do not need to go as far as Williams does to still concede that he is right to point out the importance of these values – an importance, I maintain, that is clearly of a moral nature. Even if they would not be the most important political considerations, power holders must always pay close attention to these values if they are to use their power responsibly (cf. Galston 2010, 392).

Because of the importance of values like the ones Williams puts centre-stage, it is in a way quite irrelevant whether disagreement, and the opposition and non-compliance that will often accompany it, are reasonable or unreasonable. Let me explain why. Suppose the state has a reasonable proposal – reasonable in the Rawlsian sense of the word: the state proposes the plan after having listened to the proposals of different groups of citizens. The state indicates that it, too, will abide by the terms of the proposal (Rawls 1993, 49). Moreover, the state has assumed the burdens of judgment (54); it has observed evidence, made its best attempt at weighing values and giving a plausible interpretation to them, and drawn on its past experiences. The result is the proposal at issue. Nevertheless, there are citizens who disagree with the proposal. They may do so on reasonable grounds. They may, for example, be convinced by different information than the state (they are in a different epistemic situation, and hence arrive at a different judgment). How might these citizens respond? First, they may acquiesce in the state’s decision, because they recognise it

91 Like Williams, other realists emphasise the importance of peace- and safety-related values like physical well-being (Shklar 1989, 32), the avoidance of war (Mouffe 2005, 31) and stabilisation in the context of ongoing contestation (Honig 1993, 15).

92 In doing so, he contrasts his position with Rawls’s, who reserves this role for justice (Rawls 1999b, 3). While Rawls is concerned with stability in *Political Liberalism*, his concern with stability has a markedly less practical orientation than the concern with stability in realist accounts since Rawls aims to solve the problem of stability with a theoretical solution referring to a reasonable overlapping consensus (Rawls 1993, 39–40).

as reasonable. Second, they may oppose the state's decision and try to work around or against it because they insist their own proposal, too, is reasonable and should not be tossed aside. (Would this insistence be reasonable? Maybe, maybe not.) In the first case, the state's carrying out its plan will not be obstructed by these citizens. In the second case, it will be.

Now consider unreasonable citizens. Like the reasonable citizens, they disagree with the state's proposal. However, let us say they have not assumed the burdens of judgment and have thus not tried to arrive at the best possible judgment. They insist they disagree, however. Again, they can acquiesce in the state's decision, or they can try to oppose it. And again, in the former case, these citizens will not obstruct the state's carrying out its plan. In the latter case, they will.

If this is correct, then whether the position that people have on a certain issue is reasonable or not does not make a decisive difference in whether the state can proceed with the implementation of its proposal unhindered. What matters here is not whether the opposition the state encounters is *reasonable*. What matters is that it is *opposition*. If disagreement is accompanied by opposition and non-compliance, and the state cannot proceed unhindered, the question is how it responds to these hindrances. This question – how does the state respond if it is hindered? – is the one I want to focus on. If the state exploits its coercive nature in responding to hindrances in a far-reaching way, it is possible that the ills of coercion start to outweigh the moral benefits of having certain laws, especially if opposition and non-compliance are widespread and the state's reaction is aggressive. (See chapter 5 for an empirically-focused discussion of this point.)

A vivid real-life example to illustrate this point is the 'War on Drugs' that particularly the United States of America have vehemently pursued over the last decades. In the US, selling, possessing and using drugs are prohibited, some state-level exceptions excluded. 'Drug Prohibition' was effectively inaugurated in 1914, when the distribution of opium, cocaine and its derivatives became subject to cumbersome bureaucratic procedures (Gray 2012, 22). Subsequently, various acts increased the stringency of anti-drug laws, implementing schemes of illicit drugs and increasing penalties (Gray 2012, 27). These laws and the

penalties attached to them have, however, not been able to abate the availability and use of drugs, which led to greatly increasing numbers of incarcerations. In 2009, the incarceration rate in the US was 756 per 100,000 residents – the highest rate in the world (Gray 2012, 29). Today, 46.2% of federal inmates in the US serve for drug offenses⁹³, a number that used to be higher still (Gray 2012, 31, Bewley-Taylor, Trace, and Stevens 2005, 2).

The best available rationale for these strict, prohibitive laws is probably to avoid the harm that drugs can do; drugs can harm the user, users are more likely to harm others, and they may lead impoverished lives (e.g. Sher 2003, 30-1, De Marneffe 2003, 34). A defence of drug prohibition based on a wish to avoid these consequences, then, relies on the empirical expectation that such laws in fact deter people from using (certain) drugs (Sher 2003, 30-1, De Marneffe 2003, 34). Let us, thus, charitably assume that drug prohibition laws are intended to serve the values of health and well-being, by protecting people against the harms of drug use. Let us also accept that it would be legitimate for a state to concern itself with these values through its laws. Further, let us assume that citizens, by and large, indeed have good reason not to use drugs given the adverse effects drugs can have on their health and well-being and thus, in practice, have good reasons to comply with prohibition laws.⁹⁴ This would supply a charitable interpretation of the justification for drug prohibition – one that does not sound extremely implausible.

It is very questionable, however, that US drug laws actually achieve such desired results. Non-compliance with these laws is widespread. Nevertheless, the US state has continued to enforce them with increasing vigour, relying more on incarceration throughout time (Bewley-Taylor, Trace, and Stevens 2005, 2). On a large scale, the law declared and still declares citizens to be criminals. The incarceration they suffer upon conviction itself forms a considerable cost affecting

⁹³ https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp, accessed on 27 September 2020, numbers last updated on 19 September 2020.

⁹⁴ We can ignore the question of whether citizens refrain from using drugs *because* it is the law. If they have good reason not to use drugs, they would automatically comply with the law if they act in line with what they have good reason to do.

the lives and perspectives of convicts and their communities (Bewley-Taylor, Trace, and Stevens 2005, 4). Moreover, the prohibition of drugs despite the demand for it, creates a huge, profitable, and uncontrolled black market, which incentivises the sale of stronger and more dangerous drugs (Gray 2012, xii). The high price of drugs leads addicts to perform actual crimes like theft to obtain the money to buy their stuff, thus increasing crime (Gray 2012, 12). The courts are clogged due to the high number of drug cases (Gray 2012, 5), threatening the rule of law (Gray 2012, 41). Funding the courts, the police and the prisons is extremely expensive, to the detriment of other public facilities like universities (Bewley-Taylor, Trace, and Stevens 2005, 4). Does it have the desired result – less drug use? No. American judge James P. Gray sets out:

Today more drugs are available in [US] communities, and at a lower price, than ever before. We have greatly expanded the number of prisons in the United States, but all of them are overflowing. As a direct result of the enormous amount of money available from illicit drug sales, the corruption of public officials and private individuals in our society has increased substantially. We have a much higher incidence of diseases, such as hepatitis and AIDS, caused by the use of dirty needles, than most industrialized countries in the world. The War on Drugs has resulted in the loss of more civil liberties protections than has any other phenomenon in our history, including the results from the attack on New York's World Trade Center on September 11, 2001. Instead of being shielded, our children are being recruited into a lifestyle of drug selling and drug usage by the current system. And revolutionaries and insurgents abroad are using money procured from the illegal sale of drugs to undermine legitimate governments all over the world. We could not have achieved worse results if we had tried. (Gray 2012, 3-4)

My point here is that laws that have such consequences are unjustified and undermine the legitimacy of the state. That they do so, does not depend on what the law was *intended* to achieve. Neither does it depend on whether the government has the right status to make laws. Nor does it depend on the reasonableness of the law itself, or on the unreasonableness of citizens who fail to comply. *The fact that, in practice, these laws have such morally objectionable consequences provides a sufficient reason to deny their legitimacy.* Their moral costs

are extremely high, in this case due to non-compliance. The state of the US does *not* have the right to maintain these laws, quite independently of whether under different (more ideal?) circumstances drugs ought to be prohibited. When these are the results, it is *irrelevant* whether these laws would be accepted by reasonable persons (in e.g. the original position). They are not abided by – they are actively and steadfastly flouted – and the results of their enforcement have been so dire that the state should give up the laws, instead of keeping on trying to use its muscle to force people into line.

A further analysis shows, of course, that the farther the state goes in enforcing a law – the US drug laws, in this case – the more likely it is that it will create tensions with other values it has to promote. The state may have the responsibility to promote health (which, we assumed, was the purpose of the US drug laws – although the laws miserably fail at this task, due to non-compliance), but it also has the responsibility to protect people from theft, and to provide services that require the resources that are now spent on the War on Drugs. Note, however, that these tensions only materialise *because* there is widespread non-compliance with the drug laws. Clearly, if everyone abided by the drug laws, no money would have to be spent on arresting, convicting and incarcerating drug users, and universities could be financed with the money that was saved.

As practice has shown, however, not even \$26 billion (in 2012) (Gray 2012, 42) is enough to make sure that people abide by these drug laws. Thus, the US state should take the presence of drug users as a mere feasibility constraint on what it can achieve. It is *impossible for the US state* to achieve the outcome that no one uses drugs. These circumstances impact which laws are desirable – and drug prohibition with vehement enforcement is clearly undesirable in light of what it effects.

The important thing to note, now, is that this can only be concluded when we look at the actual world – it cannot be determined in theory. Given a degree of knowledge about the actual world, one might *predict* that drug prohibition will not work out well, but which laws do or do not serve the purpose – public health and well-being, in this case – must be determined by finding out which laws and

policies have which actual effects. The value conflicts that arise only arise contingently, and may be different in different circumstances. This is why theory cannot simply *change* its context-independent recommendations. Usually, there will not be a one-size-fits-all answer concerning how coercive power is best exercised. There may be good practices that have worked for other contexts, and these good practices can inform law- and policymakers. They continually have to check, however, whether these practices will also work in the context at hand. It is vital to know, then, what it means for laws and policies to *work*. In the next chapter I argue that for laws and policies to work means that they serve the right values.

Coordination and information problems

Disagreement and non-compliance are probably the most challenging countervailing forces when it comes to changing the status quo. When citizens object, reaching a target that is deemed morally desirable may become impossible without incurring moral costs that are too high. There are other problems, however. Here, I want to briefly mention coordination and information problems – not to conclude an exhaustive list of all causes of the moral costs of changeover, but to show that disagreement is not the only cause. Both coordination and information problems may lead to chaos. Chaos may disrupt people's lives, thus incurring moral costs.

When the status quo is changed, existing responsibilities disappear or change, and new ones arise. When e.g. the responsibility to organise child-protection services is moved from the national to the municipal level,⁹⁵ it may temporarily be unclear who is responsible for what. The bigger the change and the larger the scale of a transition, the more likely it is that coordination problems will occur, be significant and last a while. If, like in the case of child-protection services, significant harm can be the result of temporary responsibility unclarities, then an otherwise desirable plan may be disqualified.

The same holds for information problems. After a transition like the move of child-protection services from the national to the local

⁹⁵ This decentralisation was performed in the Netherlands in 2015.

level, government services are probably to be found in other buildings, staffed by different people, who use new phone numbers that are listed on new web sites and portals. If people lack information about how to get in touch with and use the services during and after a transition, this, too, may result in harmful situations. These potential consequences have to be taken into account when a decision in favour of or against changes in the status quo is made.

These kinds of problems may have significant impact on moral judgments concerning the justifiability of maintaining laws and policies. Many laws and policies hang together with other ones and with non-state actions. They form an important part of the structures within which people shape their lives. Even if some laws and policies ought not to exist, if they do exist, people will have to deal with the situation as it is. Once they build their lives in such a way that they rely on existing laws and policies, the moral costs of changing these laws and policies increase markedly. For instance: a subsidy that no one uses can be abolished easily, but once someone's livelihood depends on the availability of a subsidy, its cancellation will incur moral costs in terms of that person's means for subsistence if no immediate and equivalent alternative is provided. The importance of the subsidy for people's livelihoods can then become an argument against the (immediate) cancellation of this subsidy, even if the subsidy ought never to have existed to begin with. The same may go for e.g. paternalistic measures. If the state enforces laws relating to cleanliness in restaurants, and as a result, there are no private initiatives to secure restaurant hygiene, a society's reliance on the state fulfilling this task may count against it dropping this task (immediately), quite independently of whether one thinks it belongs to the proper domain of state action.

In summary, then, the normative problem for context-independent requirements for political legitimacy is that it is always possible that such requirements do not, in practice, have the impact they are or can be desired to have. When they do not, their implementation and enforcement may be highly morally objectionable. Sometimes, the costs of transition may form a step back that in time enables multiple steps forward. However, whether these costs are acceptable, and what

the risks are that the steps forward will not in fact materialise, may be very hard to determine. Moreover, especially the more idealistic power holders should keep in mind the Berlinian worry that “to sacrifice the present to some vague and unpredictable future is a form of delusion which leads to the destruction of all that alone is valuable in men and societies – to the gratuitous sacrifice of the flesh and blood of live human beings upon the altar of abstractions” (cited in Gray 1996, 30-1). Some things cannot be (easily) forced onto an unwilling citizenry, no matter how desirable it would be for some goal to be achieved.⁹⁶

I do not mean to suggest that liberal theorists intend for their proposals to have oppressive or otherwise morally undesirable effects. They may duly acknowledge that their proposals ought not to be taken as proposals for implementation here and now. I hope my discussion has shed a clearer light on which dangers may arise if states are too insistent on making citizens comply with possibly reasonable laws that citizens simply do not wish to abide by – whether reasonably or unreasonably. This shows why, when it comes to the design of laws and policies, we must turn to the actual circumstances of a society to determine what can be justified and what cannot. These actual circumstances may include unreasonable citizens, too. Unreasonable non-compliance may be an even bigger threat to the successful enforcement of otherwise reasonable laws than reasonable non-compliance. Hence, unreasonable citizens cannot simply be ignored when it comes to the justification of laws and policies. Arguably, their opinions provide an important normative constraint on how coercive power can be used in a justified way, due to how they may influence the likelihood of success of proposed laws and policies. To the extent that the available legitimacy theories fail to take these difficulties of the practical circumstances into account, or are incompatible with them, I hope my theory provides improvements.

96 Cf. also Raymond Geuss (2008, 10): “[t]hat the prophet claims and genuinely believes that his table of values will bring peace and prosperity to this followers, and even that the followers genuinely believe this and act according to the table of values to the best of their ability, does not ensure that peace and prosperity will in fact follow.” He urges us to keep the purpose of politics in mind, and to look at “what *actually happens*”.

Conclusion

This chapter has picked up a number of issues concerning the impact of the feasibility and desirability of arrangements on assessments of political legitimacy. Now, I want to turn to the question of how these issues can be accommodated to arrive at a theory of political legitimacy that takes them into account. This conclusion summarises the pieces of the puzzle so far. The next chapter makes an attempt to put the pieces together for the start of a revised theory of political legitimacy.

This chapter argued that a theory of political legitimacy, understood as an answer to the question how the use of coercive power by the state can be justified, should be a *non-ideal theory*. That is: the theory must be a tool that rulers can use to arrive, in their respective circumstances, at conclusions about how they may permissibly use the coercive power they wield on behalf of the state.

This suggests that the audience of a theory of political legitimacy consists in *rulers*: those who wield the coercive power of the state. This means that the theory is not addressed at citizens at large. The question a theory of political legitimacy stands to answer is not (although this would certainly also be an interesting question) what citizens can do to improve the institutions of the state. Nor is it likely to be a question for ‘founding fathers (and mothers)’; the issue at stake is usually not which constitution should be chosen if a new state is founded.⁹⁷ Of course, if a new state *is* founded (such as when a secession happens), its prospective rulers may wish to know how they should assume the power they are about to assume. A theory of political legitimacy might be of help here, but it is not its typical case. The typical case for a theory of legitimacy is an existing state, where rulers or those concerned to give advice to rulers want to determine how the coercive power of the state may and ought to be used.

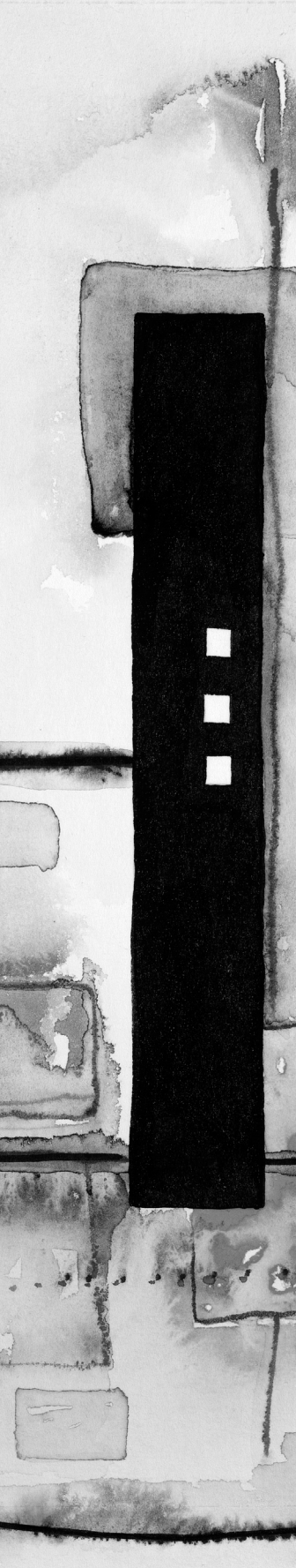
My discussion in the preceding chapters has intended to show that, to determine the legitimacy of laws and policies – the instruments through which coercive power is used – we should be sensitive to the question whether their *content* is morally appropriate for the *context*

97 Bernard Williams (2005, 56-7) distinguishes these types of “listener to works of political philosophy”: a prince, a concerned citizenry, and founding fathers.

in which they exist. In the next chapter I turn to the development of a theory of political legitimacy that is sensitive both to the content of laws and policies and to the context in which these laws and policies must function. My suggestion will be that laws and policies have the right content if they serve the right *values*. Which laws and policies serve the right values depends importantly on the context, insofar as the moral costs of changeover are different in different circumstances. Thus, an important task for a theory of political legitimacy is to illuminate which values the state ought to promote, and, ideally, also to give guidelines concerning how to deal with conflicting values.

Disagreement plays an important role in this exercise. When citizens disagree with the state and are non-compliant, this may create value conflict, such as the case of the US drug laws showed. Opportunity costs of a law may be higher, making it the case that the enforcement of one law precludes the pursuit of laws that embody other values. Moreover, forcing people to comply with laws they do not want to comply with is a moral cost in itself, due to the presumption against coercion.

Pre-decision disagreement, too, plays an important role, as has been pointed out by many liberal theorists. Given that citizens support different doctrines, the state should avoid being partial in problematic ways. This raises the question whether my suggestion – the state should serve the right values – is perfectionist and should be rejected because of its non-neutrality. This question is also addressed in the next chapter.



Political legitimacy as impact on sustainable development

Throughout the first three chapters of this dissertation, I have gradually made more commitments that lead to the development, in this chapter, of a normative position on political legitimacy. First, in chapter 1, I gave a definition of political legitimacy and excluded a number of issues – particularly: political obligation – from my focus. Then, in chapter 2, I argued for the not uncontroversial view that in justifying coercive power, we should pay significant attention to the *content* of decisions about coercive laws and policies. This implies that, even if (democratic) procedures are important for political legitimacy, legitimacy cannot rest solely on the procedural origin of state coercion. In chapter 3, I refined this commitment about the content-dependence of political legitimacy by arguing that, in judging the content of coercive measures, we should be sensitive to the *context* in which these measures apply. What can be justified in one context, may not be justifiable in another. This suggests a non-ideal perspective for a defensible theory of political legitimacy; when we judge whether the content of a certain law or policy is justified, we should pay attention to how it functions in its actual, non-ideal context.

With these preparatory commitments in place, I will now explore the question: what normative criteria apply to determining whether the content of state coercion is morally justifiable in its context? By addressing this question, I do not provide a full theory of political legitimacy; I have not argued and do not think that sensitivity to content and context is sufficient to determine state legitimacy. Procedures do play an important role as well, certainly in determining whether laws and policies that have been adopted, should be enforced. However, the considerations I have discussed in chapters 2 and 3 form

a crucial dimension for a defensible theory of political legitimacy, especially when it comes to the moral acceptability of decisions to *adopt and maintain laws and policies*. Now it is time to reflect on what this dimension might come down to when we want to arrive at actual judgments of political legitimacy.

In this chapter, I proceed as follows. First, in section 4.1, I embrace the structure of public-reason views as suitable for the kind of theory I develop. Section 4.2 continues on this theme and argues that, if power holders are to justify the use of coercion by public reasoning, they need to be able to refer to a *rationale* for the state. In other words: what is the state for? I propose that the point and purpose of the state is to mitigate obstacles that stand in the way of people's pursuit of their idea of a good life. Finally, section 4.3 draws on the capability approach and the UN Sustainable Development Goals to specify what kinds of obstacles we should think of. I propose three values – survival, prosperity, and sustainability – the pursuit of which can justify state coercion. Together, these values form the composite value of sustainable development. For this reason, I call my approach 'political legitimacy as impact on sustainable development', or 'impact legitimacy' for short.

4.1

Pursuing values and public reason

This section argues that to determine whether the content of laws and policies is appropriate for their context, we need a set of values that capture the purposes that laws and policies should serve. This section does not yet address the question of *which* values these should be. I merely want to argue, here, that we are in need of a set of values as normative starting points that can be used to arrive at context-dependent prescriptions. The view I defend is that an account of political legitimacy should start from the purposes of state coercion, and determine whether laws and policies serve these purposes in order to provide *pro tanto* justifications for state coercion. If laws and policies serve no defensible purpose, the coercion that they rely on is unacceptable.

This does not mean that there are no constraints on the way in which these values may be served. To argue for a set of values that laws and policies must serve is compatible with agreeing that there are constraints on how these values may be pursued (cf. Nozick 1974, 29). Even if protecting rights (i.e.: preventing rights violations and punishing offenders) is a goal of the state, this does not mean that the state may commit any rights violations necessary to minimise the violation of rights overall. While I think there are constraints on state action, they are not the topic of my discussion. My claim in this section is more limited: being useful for furthering certain goals is a necessary and central legitimating condition for any use of coercion by the state. Given the presumption against coercion, the continued existence of a law or policy is not acceptable if it does *not* serve defensible political values. That said, usefulness is still only a *pro tanto* justification for a coercive state activity, not an all-things-considered one. That something is or would be useful does not imply that it should be done.

With these caveats in place, let me now turn to the argument in favour of adopting a set of values to be used in determining context-dependent legitimacy requirements. This section argues for such a view as a public-reason view. I start by a discussion of the idea of public reason, how it fits my legitimacy approach, and how my use of public reason differs from other public-reason accounts. The section ends with a reflection on the relationship between my legitimacy approach and theories of justice.

A context-dependent view of public reason

The idea that legitimacy depends on pursuing certain values is an important part of public-reason views of legitimacy – even if not all such views rely on the idea in the same way. While earlier chapters have discussed some ways in which my position deviates from Rawls's, a number of passages from “The Idea of Public Reason Revisited” capture the idea of pursuing values in a clear and appealing way. Let me cite the following passage.

[T]he idea of public reason is not a view about specific political institutions

or policies. Rather, it is a view about the kind of reasons on which citizens⁹⁸ are to rest their political cases in making their political justifications to one another when they support laws and policies that invoke the coercive powers of government [...]. (Rawls 1993, 476)

These reasons can be “expressed in terms of *the political values of public reason*” (Rawls 1993, 476, my emphasis). Rawls adds, at the end of the cited passage, that the idea of public reason only applies to “fundamental political questions” (Rawls 1993, 476), confirming that his view is a threshold view as discussed in chapter 2. As I argued there, I follow Gaus and hold that content considerations matter for all coercive acts (Gaus 2003, 159). Here, however, I want to follow Rawls in arguing that political justification should be based on reasons that can be publicly defended, i.e.: reasons that are neutral between comprehensive doctrines (see section 4.2). I also follow Rawls’s suggestion that these reasons should be rooted in certain political values. This chapter addresses the question of what these values are. Such values can serve as a tool for power holders to construct moral arguments about the decisions they consider making. Note that these values themselves will be context-*independent*. What exactly these values require politicians to do will be context-*dependent*. The values should thus be formulated in a general enough way to allow application in highly divergent political contexts. This section argues for the adoption of a set of values. The question of *which* values we should adopt is addressed in section 4.3.

Promote, not embody

In Rawls’s public-reason account of legitimacy, the focus lies on the criterion of reciprocity, which requires that we must be able to “reasonably think that other citizens might also reasonably accept” the

⁹⁸ Throughout, I have been focused on power holders, rather than citizens at large. I will continue to do so for reasons discussed in previous chapters. This means that the values of public reason that are defended in this chapter are particularly presented as a tool for office-holders, rather than for citizens at large (cf. Badano and Nuti 2018, 147). This aligns with what Rawls says earlier in the same essay, arguing that public reasons are those we would offer for political actions “were we to state them as government officials” (Rawls 1993, 447).

reasons we would offer for our political actions (Rawls 1993, 446-7, cf. also Gaus 2011, xv, Larmore 1999, 608). Public reasons are those reasons that are acceptable in this way. If we translate this to the perspective of decision-makers, it means that they should base their decisions on reasons that they think all citizens that are affected might reasonably accept.

Without the reasonability requirement, it would be an empirical question what people would find acceptable. On the Rawlsian approach, however, the reasonability requirement makes it possible to determine the kinds of values decisions should be rooted in. For Rawls, reasonably acceptable reasons refer to political values, such as “those mentioned in the preamble to the United States Constitution: a more perfect union, justice, domestic tranquility, the common defense, the general welfare and the blessings of liberty for ourselves and our posterity” (Rawls 1993, 453). Following this line of thought, a reason founded on such values might e.g. take the form: ‘we adopt institution X because it promotes domestic tranquility,’ or: ‘we implement law Y because it promotes the general welfare’. Values like domestic tranquility and the general welfare are then taken to be values whose pursuit everyone can reasonably accept, and X and Y can be publicly defended because they promote these values.

The idea of *promoting* values is then an important one. But we should pause on this point. Do public reasons require the promotion of values, or can a public reason also be based on the argument that some law *embodies* a certain value? For instance: laws can both *promote* justice and *be* just, but a law that does the one does not necessarily do the other. Could a public reason also take the following shape? ‘We adopt law Z because it is just.’ While this does look quite plausible at first sight, I want to reject this kind of argument. Of course, *if* we have law Z, there is great value in that law being just. However, to find it important that Z is just *if* we have Z, does not provide an argument *for* having Z. To argue for Z, we should know what it is good for; we should know whether it promotes anything valuable.⁹⁹ If it does not, not

⁹⁹ Jeremy Waldron makes the same distinction between being just and pursuing justice. He makes a related argument and says that “Rawls seems to be saying [...] that *if* we have social and political institutions, it is important that they be just. In fact, the

having Z is the morally superior option given that having a law is not a morally neutral situation. Due to their coerciveness, laws are morally objectionable unless they have been justified. My contention is that to overcome this morally objectionable nature, it should be shown that a law serves some relevant value in a sufficient way to justify having that coercive measure in place. This suggests that for public reasons to be rooted in e.g. the values of justice or liberty, such reasons should argue that a state measure can e.g. *protect* people against rights violations inflicted by other citizens, or *create* a wider sphere of free action.¹⁰⁰

In brief, then, to specify the purpose of state action by reference to values, we should adopt values that a state can *promote*. On the partial view of political legitimacy that I develop in this chapter, a state can only be justified if it serves as a tool for promoting values. This does not imply that serving as a tool is a sufficient condition for legitimacy. I shall only regard it as a necessary condition. As pointed out above, I will not discuss, in any extensive manner, the constraints on state action. I do think there are such constraints, however, and for this reason, my partial view should not be taken to imply what Nozick calls a ‘utilitarianism of rights’ (Nozick 1974, 28).

The structure of a public-reason view, focusing on the reasons we give to justify the use of state coercion, is very well suited to capture my partial view of political legitimacy. I will therefore continue, in this chapter, to develop my view as a public-reason view. In light of this approach, it is useful to say more about existing public-reason accounts, and what innovations my view offers over these accounts.

importance of justice goes beyond this. It is morally imperative that the demands of justice be pursued *period*. If institutions are necessary for their pursuit, then it is morally imperative that such institutions be established. Our duty of justice is not satisfied by ensuring that whatever institutions we happen to have are just” (Waldron 1993, 28-9). While Waldron emphasises that justice must be pursued, I emphasise that *if* we have laws, it is imperative that they promote a relevant value, e.g. justice.

¹⁰⁰ It may be that justice and liberty are best promoted by non-interference. When this is true, pursuing these values would require the state not to interfere.

How context-dependent public reason differs from existing accounts

The key difference between familiar public-reason accounts and the approach I favour lies in the argument developed in the previous chapter. In that chapter, I argued that a theory of political legitimacy must be context-dependent. That is: when arguing that some state decision is justified, we should be sensitive to the moral costs of changeover that accompany this decision. It is possible that a decision would be justified in one context, but not in another, if the moral costs that attach to this decision are different in these contexts. For instance: if a local government decides to let groundwater levels fluctuate naturally, this may be completely uncontroversial and only beneficial in a nature reserve. In (Dutch) farmland, however, it sometimes threatens the livelihood of farmers, leading to moral costs that must be taken into account and weighed against the importance of the benefits, like improved water quality, that natural fluctuations have (see e.g. Borren et al. 2012). Thus, the values of safe-guarding a healthy ecology and of maintaining opportunities to create a livelihood may be in tension in one context, but not in another. As a consequence, the costs of implementing flexible groundwater levels in agricultural areas may be bigger than in natural areas. If the question is what is justified *now*, then flexible groundwater levels may be justified in natural areas, while preparatory actions may have to be undertaken, or compromises struck, before it becomes justified in agricultural areas.¹⁰¹

¹⁰¹ See e.g. the following compromise that was struck between ‘nature’ and ‘farmers’, as reported in the Dutch newspaper *Trouw*, 9 January 2020, “Soms gaan boeren en natuur wél samen” (“Sometimes farmers and nature do go hand in hand”), my translation. “This move [of the family Luttikhuis] meant that the land of Luttikhuis’s enterprise became available. This offered chances for environmentalists. They wanted to make the Snoeyinksbek [a creek, JV], which is crucial for the nature reserve, less deep, which is good for biodiversity. But wet pastures, that is not something the surrounding farmers favoured. Because you cannot put your cows in a wet pasture. The province then decided, after a long period of puzzling and intensive consultation with all stakeholders, to make a complicated triangular swap that addressed everybody’s interest. To compensate the farmers for the higher water level, Luttikhuis’s land was partially split up. Luttikhuis’s former neighbors, Herman and Marian Hulst, were offered dry plots of land that previously belonged to Luttikhuis in compensation. And the farm [of the Luttikhuis couple] has been taken over by new farmers, the Lentfert couple. They have less livestock, so the impact of their enterprise on the environment is more limited.” This

This is what I mean by context-dependence.

Context-dependence is what sets my view apart from other public-reason views. As we saw, in Rawls's view, a reason is public if others can also accept it. He qualifies this acceptability requirement with a reasonability requirement, thus taking a step away from actual full acceptability. The presence of a reasonability requirement is characteristic for public-reason accounts; in general, public-reason accounts require that coercive actions and institutions can be justified to everyone who is subject to them (Quong 2018, §1). Thus, for instance, Gaus requires that legislation be supported by reasons that people would accept if they reasoned impartially by reference to relevant and intelligible arguments, based on the values, reasons and concerns that they in fact have (Gaus 2011, 26). For Charles Larmore, reasonableness requires that people exercise the basic capacities of reason and that they argue with others in good faith (Larmore 1999, 624). In this way, public-reason accounts are an attempt to find a middle ground between citizens' actual consent on the one hand, and the truth of the political rules that are followed, which may be subject to reasonable disagreement, on the other hand (Quong 2018, §1, cf. Larmore 1999, 610). However, on such a view, it is not regarded as relevant for legitimacy what people *unreasonably* might not find acceptable. Rawls assumes that the reasonable citizens are "dominant and controlling", and that political legitimacy can be understood by reflecting on the actions permitted by principles that reasonable citizens would accept (Rawls 1993, 441n).

I disagree. As I have argued in chapter 3, the moral costs of changeover may also exist due to *unreasonableness*. It is in the way it deals with the issue of unreasonableness that my account differs from other accounts of public reason. For instance: it may be untenable to indefinitely keep lowering groundwater levels for the purpose of agriculture. Even if a local government proposes reasonable transition measures, however, farmers may be unwilling to cooperate and find

is a good example of a justified decision that a government (the province of Overijssel in this case) could make, as I have it in mind. As the *Trouw* article further elaborates, not everybody is over the moon with the solution, but it does address everybody's interests, and the new situation manages to further ecological values without harming the livelihood of the farmers.

an alternative location or occupation. Still, even if we see this as an unreasonable attitude, the loss they suffer if they would have to quit their activities is still real. Moreover, their uncooperative attitude may antagonise them and lead to further obstacles in the process towards groundwater levels that serve ecological values. For these reasons, political decision-makers have to take unreasonable attitudes into account as well, to mitigate losses where it is in their power, and to make sure important values can be served as well as possible. In other words: the moral costs are still real when citizens take unreasonable positions, and these costs provide reasons for political decision-makers to adapt their actions and make them suitable for non-ideal circumstances. Amartya Sen argues for a similar point when he says that we should give room to “the possibility that some people may not always behave ‘reasonably’ despite [a] hypothetical social contract, and this could affect the appropriateness of all social arrangements” that are proposed in normative theories (Sen 2009, 90).

I thus take public reasons to be reasons in support of laws and policies that *in fact* serve political values in non-ideal circumstances, which, importantly, include the presence of unreasonable citizens. As the previous chapter argued, by way of example, this may e.g. mean that a state must wait with the implementation of democratic institutions until it can be expected that these could function in a stable way, and would not lead to (the continuation of) bloodshed. Similarly, a local government may have to keep lowering groundwater levels at least somewhat until a proper solution has been found for the farmers that rely on groundwater levels being low enough for farming activities.

Taking the presence of unreasonable citizens into account is not the same as surrendering to their unreasonable views. Rather, it is an acknowledgement that states have a responsibility to deal with their power carefully, and that they may not simply put the life, health or livelihood of citizens at stake in pursuing morally desirable goals. So while the pursuit of democratic institutions may be morally desirable, and morally mandatory due to the way in which they grant citizens their political rights, this does not mean that creating a situation in which these political rights are granted is the only thing a state has to care about. If, unreasonably, enough citizens oppose institutions in which everybody's rights are granted, and are willing to put the

lives or well-being of fellow citizens at risk in opposition to democratic institutions, then a state has to take this into account in deciding which actions it undertakes, in which way, and when.

Often, responding responsibly to the presence of unreasonable citizens may not alter the values that must guide a state's decisions, like the value of equal respect which underlies the defence of democratic institutions, or the value of a healthy ecology which underlies the position that groundwater levels should not be lowered indefinitely. It may, however, alter *how*, and how *quickly*, the state ought to bring a certain goal about. In general, I want to defend a mild conservatism that does not apply to ideals or goals, but rather to transitional processes. Transitional processes should be shaped in such a way that they take account of the ways in which people rely on and are attached to the status quo. When politicians initiate transitions, they should do so by taking steps that make it possible for people to adapt to the new situation, and that have as much support as is compatible with staying on track towards the goal for whose attainment the transition was intended. Of course, this is not the only consideration that matters; it will often be the case that postponing transitions increases the likelihood or severity of problems further down the line, as with the transition to sustainable societies or with the debate, which has been ongoing for years now, regarding the Dutch pension system. But my reason to support a mild conservatism is exactly that if change is brought about in too radical a fashion, the transition is less likely to be successful and to avoid the problems it was intended to avoid.

I take this mild conservatism of transitional processes to be entirely compatible with a progressivism of goals, as well as with the defensibility of progressive movements that demand radical or significant change. To comment on the latter: it is politicians who wield the coercive power of the state who should be careful not to cause harmfully disruptive effects. Those who do not wield power, but are advocates for change, however, do not necessarily need to worry about this. They may propose their desired changes, and just see to what extent they turn out to be politically feasible and desirable. It is defensible – indeed necessary – for advocates, but not for politicians when they implement laws and policies, to shoot for the stars in order to have a chance to reach the moon. To put it in the terminology introduced

in chapter 2: while advocates operate at stage 1, the representation of views, and have the liberty to propose their favoured laws and policies without compromise, power-wielding politicians operate at stage 2, decision-making. At this stage, a multiplicity of views voiced at stage 1 has to be taken into account, which may call for compromises and careful maneuvering. In other words: to make a value-pursuing decision work well, political leaders may have to conduct transitions *gently*. If changes are too fast, citizens may get frustrated or alienated, threatening the stability of the society, or impeding stabilisation if there was no stability before. This may hamper further improvements in the long run. (Of course, if changes are too slow, progressive citizens may be alienated. This, too, has to be taken into account, turning politics into a balancing act, which, indeed, it is.)

Thus, while my account bears important resemblances to public-reason views qua structure – the use of coercive power by the state is legitimate only if it can be defended by reference to appropriate political values – it differs from such accounts in being more context-dependent and relying less on the implications of applying an idea of reasonableness. As we will see below, the increased focus on context-dependence suggests a number of values to be considered weighty for political legitimacy that do not play a dominant role in more context-independent accounts of public reason.

Context-dependence and the role of theories of justice

I thus put emphasis on my view being context-dependent. Consider the following line of thought, however, that may mitigate the difference between context-dependent and context-independent approaches to public reason. I have argued in favour of context-dependence primarily because moral costs of changeover only start entering the picture when we consider cases in which the pursuit of desirable goals has undesirable side effects. Sensitivity to such effects in different kinds of cases suggests a context-dependent approach. The project of this chapter, however, is to find values that should be served *in any context*. While the question *how* these values should be served is a context-dependent question, the values themselves are in fact context-independent. If this is true, does it still matter whether the approach

to public reason is context-dependent or context-independent when it comes to the pursuit of these values in practice? Might the dispute between context-independent and context-dependent views as it was discussed in chapter 3 not disappear once we climb up to the level of overarching values? Might we not agree on a set of political values, regardless of whether the more specific requirements for legitimacy are context-dependent or context-independent?

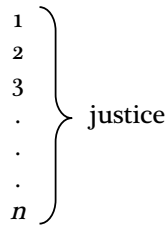
To quite an extent, this is certainly possible. For instance, if freedom is a value that matters in the formulation of a realistic utopia, we will likely agree that it also matters in constructing recommendations for the here and now. The same goes for most other values. However, I do think that there are values that only really surface once we become sensitive to the context. I return to this group of values below.

If it is true that ideal and non-ideal perspectives draw, at least in part, on the same values, then it is further worth asking how the kind of non-ideal legitimacy theory I propose relates to (ideal) theories of justice. Specifically, if state coercion must be justified by showing that it is useful for the pursuit of political values, then could it not be the case that justice is the value, or one of the values, that a state should pursue? If that is so, does giving normative content to a theory of political legitimacy not require adopting a theory of justice? In other words: I have been trying to divorce the perspective of political legitimacy from the perspective of (social and political) justice, but can these perspectives really be divorced if giving normative content to a theory of political legitimacy would simply lead us back to the topic of justice?

In addressing these questions, Sen's reflections on different approaches to theories of justice are helpful. Sen makes a distinction between, on the one hand, transcendental institutionalist theories of justice, and, on the other hand, comparative ones (Sen 2009, ch. 4). Sen's main point is that in order to compare different feasible alternatives on the dimension of justice, we do not need to know which (infeasible) alternative would be fully just. This leads Sen to reject the project of trying to formulate the fully just alternative as merely an "engaging intellectual exercise" (Sen 2009, 101), which does not have much to do with making actual societies more just.

It might seem as though my distinction between the perspective of justice on the one hand and legitimacy on the other tracks Sen's distinction between transcendental institutionalism and comparative justice. However, this is not true. Consider the following figure to interpret the distinction between transcendental institutionalism and Sen's comparative approach. Take the numbers in the figure to represent all possible societies, ranked on the basis of their justice. Justice, in this

Figure 2



case, is what Ruth Chang calls a 'covering value' (Chang 1997, 5): it is the value with respect to which the items are ranked.¹⁰² As I understand Sen, he takes transcendental institutionalists to be involved in trying to identify the society that is perfectly just, and would thus rank as number 1 on the ranking of societies qua their justice. Sen, on the other hand, sees more use in comparing different feasible alternatives qua their justice, e.g. the options 2 and 3 (or $n-10$ and $n-9$, or whichever subset of options). What both these exercises have in common is that they concern *the covering value of justice*. As I see it, both transcendental institutionalists and those who take a comparative approach like Sen's need to give content to the covering value of justice in order to be able to identify either the perfect alternative, or the comparatively better alternative qua justice. It is to this content of the covering value that I will, in what follows, refer as 'a theory of justice'.¹⁰³

¹⁰² Cited from Chang: "[a] 'value' is any consideration with respect to which a meaningful evaluative comparison can be made. Call such a consideration a *covering value* of that comparison. [...] How well an item does with respect to a value is its *merit*" (Chang 1997, 5, emphasis in original).

¹⁰³ Sen calls this content 'the materials of justice', which are given by his capability approach (Sen 2009, pt. 3).

The question I posed for myself above is: does giving normative content to a theory of political legitimacy lead us back to the topic of justice? That question can now be specified as follows. Is justice a value that is relevant for political legitimacy, and if so, is it necessary to adopt a theory of justice in order to be able to arrive at a normative theory of political legitimacy? Formulating a complete theory of legitimacy indeed does require this. Insofar as it is the responsibility of the state to make a society just, we need to subscribe to a specific theory of justice in order to assess whether the coercive power a state uses helps realise justice. We cannot judge how well a state uses its power to serve justice without committing to a view on justice. It is not surprising, then, that theorising about justice and legitimacy are intimately intertwined. Especially if justice is the first virtue of institutions, as Rawls holds, we can only expect a theory of legitimacy to reference a theory of justice. However, in line with the arguments from the previous chapter, we should realise that it is not always feasible to fully realise justice, and even if it is feasible, there are costs of changeover. States should be attentive to what their just and justice-promoting activities effect for other important values. It is only if we include all that is valuable into our conception of justice that justice does not compete with other values, but only with itself. However, that would broaden the concept of justice too far. Justice is about the entitlements that people have.¹⁰⁴ We should at least be alert to the possibility that there may be things that it is morally desirable for people to have, and which a state might help them obtain, but that they are not necessarily entitled to have. If this is true, then other values beside justice are relevant to political legitimacy, and we should not restrict a discussion of political legitimacy to the covering value of justice. By adopting this broader perspective, we hence also go beyond the scope of Sen's comparative approach, given that this approach concerns only justice. I will get back to the question which other values matter below.

There is a second (related) reason, besides the possibility that not all morally valuable things are matters of justice, to not ask too much of a theory of justice. One might try to incorporate all morally

¹⁰⁴ See e.g. Rawls (1999b, 276), Nozick (1974, 151), Olsaretti (2004, 34), Valentini (2012a, 593), Claassen (2018, 2).

valuable things into one's conception of justice in order to make the value of justice an all-things-considered value, or something close to it. However, this would lead to essentially the same problem as the strategy of striking a balance between feasibility and desirability, which was discussed in section 3.1. In the practice of politics, compromises may have to be struck to avoid harmful consequences, even if no one finds these compromises fully satisfying. By trying to incorporate all the normative material that governs decision-making in non-ideal circumstances into one's theory of justice, that view of justice would be diluted and fail to recognise all injustices as such (Valentini 2012b, 659). It should be possible to both assess a situation as unjust, and hold that this injustice can unfortunately not be solved by the state in a justifiable way at a certain moment in time. Jane Mansbridge makes essentially the same point. She puts it beautifully when she says:

We go forward, but instead of putting our compromises with justice behind us, we keep them with us, in nagging tension, not disabling us but reminding us that all is not as it should be. Because it would disable us to accomplish this task alone, maintaining the reminder of injustice needs to be a collective act.

So it is with democracy as well. The injustices we commit as we act collectively – for not to act would be a greater injustice than to act and coerce some unjustly – should not be forgotten and put behind us. Our collective deliberations should recognize, store, rethink our understandings of these injustices, so that someday we may make, perhaps, some reparations, or someday understand how to make the coercion we must use a shade more just. (Mansbridge 1994, 55)

In order to be able to both say that the best available alternative needs to be chosen in decision-making, and that this alternative contains injustice, we should not equate the best available alternative with the just alternative. The best alternative may not be so just.

Moreover, the *most* just available alternative is not necessarily the most choiceworthy one, given that justice is not the only value to consider. In my view a theory of justice must indeed have something to say about the choices that are actually on offer, as Sen holds (Sen 2009, 106). It should be able to say how just these choices would be. However, the perspective of justice does not exhaust everything that

should be taken into account in political decision-making. Justice does not equal choiceworthiness. I have argued in chapter 3 that a theory of political legitimacy, as opposed to a theory of justice, should occupy the non-ideal perspective of all-things-considered prescriptions. Even if we approach justice from the comparative perspective, the issue of the moral costs of changeover remains. It would be counter-productive to try and incorporate the moral costs of changeover into the assessment of how desirable a goal is in itself. It should be possible to say that we want to get to Mount Everest, but that the road is so treacherous that we will stay on Kilimanjaro for now. To use yet another metaphor: a theory of justice is a compass, not a GPS.¹⁰⁵ The GPS function should be reserved for the theory of political legitimacy. When the GPS tries to select the best route, it should take numerous values into account, and justice is not the only one. Values like stability, peace, conflict management are of central importance when we determine which route to travel, and we should not try to capture all of these under the heading of ‘justice’. They matter greatly in themselves.

As pointed out above, justice is about the entitlements that people have. Justice is violated if not everybody gets what they are entitled to. But political legitimacy is not necessarily violated when justice is. This is not because political legitimacy is somehow less demanding than justice, as has been suggested (Rawls 1993, 428, Valentini 2012a, 597, Vallier 2019, 216). It is because political legitimacy is about something else. A theory of political legitimacy, rather than illuminating what entitlements citizens have, specifies the criteria that justify the use of coercion by the state. While justice no doubt plays an important role in providing such a justification, it is not only justice that does. More normative concerns matter, and in this sense, political legitimacy can

105 It is probably for this reason that Pettit, who uses the metaphor of a compass, says that the moral compass his theory provides is *not* suited for “specific guidance on the institutions that figure in our different social and democratic societies, and our shared international world”, but is intended to provide “a means by which to steer in *thinking* about the right and wrong of those institutions” if you are “appalled by how things are developing in the political world” (Pettit 2014, xxiii, my emphasis). It is puzzling, however, that he immediately continues to say that nevertheless, this compass should be useful in deciding “how best to adjust policy”, should you happen to be in government (Pettit 2014, xxiii). This seems to me to be a mistaken continuation of the first contention.

turn out to be *more* demanding than justice. Thus, while the topic of justice cannot be omitted from a full discussion of political legitimacy – and we are thus indeed led back to the topic of justice in a way – we can certainly reflect on the topic of legitimacy in a worthwhile way without first having to settle on a theory of justice. It will be my main purpose in the remainder of this chapter to do just that.

To recapitulate: I regard a public-reason approach to legitimacy as a fruitful approach. My approach, however, differs from existing public-reason approaches due to its emphasis on context-dependence. Context-dependence brings non-ideal considerations to the fore, considerations that relate to ‘feet-in-the-dirt’-type of values like peace, conflict management, and dealing with unreasonable attitudes. These considerations are likely to surface in relation to the moral costs of changeover. The upshot of this section is that a theory of political legitimacy should propose a set of values, and that to determine what the content of laws and policies should be in diverging contexts, we should draw on these values. These values provide the basis on which we can construct public reasons to morally justify laws and policies. The set of values should include those values that come to the fore in the non-ideal context.

4.2

What the state is for: justification through rationale

In chapter 2, I mentioned the libertarian views of Nozick and Huemer, who both suggest that one possible way to justify state action is through identifying a rationale for it, and showing that actual state action serves this rationale. I now want to look further into this idea of ‘justification through rationale’, and use it to develop my view of how public reasons should be incorporated in legitimacy assessments. The first and very minimal thing we can say about the rationale for the state is that it should be formulated in response to the anarchist challenge: why support state coercion, instead of no state coercion? The structure of the answer should then be: because the absence of state coercion will leave certain ills in existence that can be remedied by state coercion, and remedying these ills is morally more important

than the absence of state coercion. This is the structure that I will follow. What it boils down to is that a theory of political legitimacy should answer the question: what is the state for?

The great and chief end

Hobbes and Locke

The strategy of justifying the state by pointing to the ills it can remedy is familiar from classical social-contract theories, like Hobbes's and Locke's, that start from a state of nature. According to Hobbes, the state is intended for people's "*Peace and Common Defence*" (Hobbes 1985, 228 [88]) and is hence in the self-interest of those subject to state authority. Hobbes expects that people would be a continual threat to each other in the state of nature, and that the state of nature would be a state of war (Hobbes 1985, 185 [62]). The purpose of the state is the prevention of such a war; it is "to keep them in awe", and "to defend them from the invasion of Forraigners, and the injuries of one another" in order that they may "nourish themselves and live contentedly" (Hobbes 1985, 227 [87]). In this way, the state serves the desire that all people have in common: the desire to preserve their lives (Hobbes 1985, 223 [85], Moehler 2009, 300). To this end, the state has to lay down rules to tell people what is and is not allowed in how they deal with each other, and to enforce these rules through the (threat of) coercion (Hampton 1986, 101). The idea is that the institution of state power will give those inclined to peacefulness the security that others will also be peaceful; it solves the problem of assurance (Hampton 1986, 67, Moehler 2009, 298, cf. Anomaly 2015, 119). Non-cooperation will be punished, which should prevent citizens from free riding (Moehler 2009, 299, cf. Anomaly 2015, 119). The rationale for having a state would then be that a state can secure peace (the stable absence of violence (Wendt 2016, 71)) by solving the assurance problem. As such, the state constitutes a strategic relationship between its citizens (Christman 2005, 341).

Locke does not sketch anything so dire as Hobbes in formulating the state of nature. As A. John Simmons points out, there is not one

particular social characterisation of the state of nature for Locke; life in a state of nature can be quite dire, or quite civilised. Yet, whenever people are in the state of nature with respect to each other, there will be the problem that they are judges in their own cases (Simmons 1989, 458). The insecurity this causes is, according to Locke, “the primary reason for seeking the protection of a (properly limited) civil government” (Simmons 1989, 458). In Locke’s own words, it is this uncertainty that makes a person

willing to quit a condition, which, however free, is full of fears and continual dangers: and it is not without reason, that he seeks out [...] others [...] for the mutual preservation of their lives, liberties and estates, which I call by the general name, property. The great and *chief end*, therefore, of men’s uniting into common-wealths, and putting themselves under government, *is the preservation of their property*. (Locke 1980 [1690], §123-4)

What unites Hobbes and Locke, then, is that

anarchy loses out for both Hobbes and Locke. Both use the idea of the state of nature to formulate general conditions for governmental legitimacy, the rule being (roughly) that a government is legitimate if it fosters conditions preferable to those in the state of nature. (Simmons 1989, 463)

So, while Hobbes and Locke have very different views about individuals’ rights outside of the state, and therefore draw very different conclusions about the rights the state has vis-à-vis its citizens, both see improvements over anarchy as forming the rationale for the state. These improvements are to be sought in the certainty that a state is able to provide relative to the state of nature. Hobbes focuses on peace and common defence, Locke on preservation of life, liberty and estate. Both can be captured under the term ‘self-preservation’.

My earlier conclusions about the importance of context-dependence suggest a slightly different approach, one that does not start from a state of nature. Instead of asking why one would want a state when there is none, I ask why we would want a particular existing state rather than not.¹⁰⁶ Whether there is a rationale for an actual

¹⁰⁶ That this is not the question that primarily concerns Hobbes and Locke is

state depends on the available alternatives to it: is there an available alternative – whether anarchy or some other version of the current state – that would be morally superior? (For the extended version of the argument supporting this context-dependent type of reasoning, see section 3 of chapter 3.) The difference is that starting from a state of nature allows for the formulation of a more ideal solution to the ‘inconveniences’ of the state of nature than starting from an actual context does. When we reason from an imaginary context like the state of nature, we can argue for the best kind of state we can imagine, given certain constraints concerning e.g. human psychology that we adopt. The non-ideal theorising that I have in mind limits the exercise to alternatives that are available to power-holders starting from the status quo. Like for Hobbes and Locke, my concern is to answer the question why we would want a state rather than anarchy, but the anarchy it takes as its counterfactual is not an imaginary pre-state anarchy, but the anarchy we would have if we had it now, after abolishing state institutions that actually exist – a post-state anarchy.¹⁰⁷ This means, for instance, that anarchy may be a much worse alternative for people who are currently heavily reliant on the interference of a state, than for those who live more self-reliant lives. Moreover, continuing the approach I have used so far, we can also ask for *specific laws and policies* whether no state action on that issue would be preferable to the current state action, or another directly feasible alternative. The important point to note, here, is that if we consider no-state-action alternatives, we should take into account what consequences would materialise if the actual state stopped acting as it currently does. We do not imagine ‘the best anarchic situation one could reasonably hope for’, but rather the actual anarchic situation that would occur in our actual context.

confirmed by Simmons: “[t]he contrast Locke draws bears not so much on the choice each must make between joining an already existing commonwealth or not doing so, but rather on the choice between having governments at all or not having them (and, in this sense, the point is reasonably close to Hobbes)” (Simmons 1989, 463).

¹⁰⁷ There are good indications, in fact, that Hobbes’s actual concern was also with the ills a post-state anarchy would bring. He worried about the dangers that arise when the state collapses and disintegrates into civil war, which he had seen to be accompanied by “miseries, and horrible calamities” (Hobbes 1985, 238 [94], cf. Lloyd and Sreedhar 2018, §2). Against this background, Hobbes expects that almost any form of government will be preferable (Hobbes 1985, 238 [94]).

A (mostly) neutral rationale: pursuing one's idea of the good life

From the examples of Hobbes and Locke we can see that references to the rationale of the state have always – or at least long since – played an important role in legitimacy theories. What has happened to the idea of a rationale for state action since then? What role does it play in more recent theories of legitimacy? Reference to a rationale for the state is bound up with content-dependence. If the justification for coercive state action roots in the improvements it provides over a situation without state action, then the legitimacy of actual state coercion should be judged on whether it does in fact provide such improvements.¹⁰⁸ This judgment is a content-dependent judgment.¹⁰⁹ For this reason, it is to be expected that, to the extent that legitimacy theories are content-*independent*, they do not seek to justify state coercion by asking whether that coercion serves a justifiable purpose. We would rather expect references to the rationale for the state in the discussion of the content-dependent parts of legitimacy theories. As was discussed in chapter 2, Rawls's view is content-dependent when it concerns constitutional essentials, which he specifies in the political conception of justice which is the focus of an overlapping consensus. And indeed, in his discussion of the overlapping consensus we find Rawls formulating an aim of state action. He says that the state is to secure equal opportunity to advance any permissible conception of the good (Rawls 1993, 193).¹¹⁰

108 The idea on which it builds is that “[i]f an institution [or any instantiation of state coercion, JV] cannot effectively perform the functions invoked to justify its existence, then this insufficiency undermines its claim to the right to rule” (Buchanan and Keohane 2006, 422).

109 This even still holds in Hobbes's case. Hobbes famously argues for an absolute sovereign, which fits with his expectation that almost any form of government is preferable to the horrible calamities of the state of nature (see footnote 107). However, citizens retain a right to self-defence; when self-preservation is at odds with state action, citizens' political obligation is suspended. The state thus does not have the power to bind citizens to stop preserving their lives. As Susanne Sreedhar puts it: “since the purpose of [Hobbes's] social contract is the preservation of life, a covenant within it not to do what one can to preserve one's life is invalidated” (Sreedhar 2008, 795).

110 Note that, on my approach, the state does not need to be fully successful in securing equal opportunity. Rather, it should use its coercive power in such a way that

This rationale – the chief end of the state is to create opportunities for the pursuit of one’s conception of the good – can be found in many contemporary liberal theories in one way or another. Rawls takes this aim of basic institutions and public policies to be an appropriate one for a *neutral* state (Rawls 1993, 192). Some argue that neutralism is a central tenet of liberalism (Wall and Klosko 2003, 1). For Rawls, neutrality means that the state abstracts from what he calls comprehensive religious, philosophical, and moral doctrines (Rawls 1993, 192). Similarly, according to Ronald Dworkin, neutrality means that political decisions must, where possible, be independent of particular conceptions of the good life (Dworkin 1985, 191). The meaning of neutrality clearly influences the kind of rationale for state action that neutralists adopt; like Rawls, other neutralists refer to promoting opportunities to pursue a good life, while not being partial to any particular conception in specifying a rationale for state action. According to Jonathan Quong, the state’s purpose is to ensure that people get a fair chance to develop and pursue their conception of the good life (Quong 2011, 1). Larmore argues that political institutions should aim to achieve a common good, which he takes to consist in a way of life that makes it possible for people to pursue their conception of human flourishing (Larmore 2008, 142).¹¹¹

I will follow neutralists in the kind of rationale that can be found in their theories: ‘the great and chief end’ of the state is not to further a particular perfectionist doctrine,¹¹² but rather to foster people’s opportunities to pursue their own conception of the good. Or, phrased negatively: it is to *mitigate obstacles that stand in the way of people*

it promotes opportunities to pursue a good life. It may not be within the state’s power to secure full equality of opportunity and it is therefore not necessarily required for legitimacy.

¹¹¹ The opposite of neutralism is perfectionism. Perfectionism is the idea that the state should promote a conception of the good (Wall and Klosko 2003, 1). Thus, Steven Wall argues that the state should “aim to favour the good and the worthwhile over the bad and the pointless” (Wall 2010, 255-6). George Sher argues that “when a government can elevate its citizens’ tastes, characters, aspirations, and modes of interaction, these [...] fall within its legitimate aims” (Sher 1997, 246). References to a rationale for state action come perhaps even more naturally for perfectionists than for neutralists.

¹¹² For instance a religion, see e.g. Dworkin (1985, 181), Rawls (1993, 476), Larmore (1999, 600).

making a good life for themselves. I will take such obstacles to be the ills that are to be remedied by state action. Particularly, I accept Rutger Claassen's approach to neutrality, which is part of what he calls 'moderate perfectionism' (Claassen 2018, ch. 1). A moderately perfectionist state endorses the value of autonomy and hence aims to provide people with the capabilities to freely choose their own conception of the good life. In this first-order sense, the state is perfectionist. Yet, when it comes to determining which conceptions people pursue, the state is abstinent and does not meddle. In this second-order sense, the state is neutral (Claassen 2018, 21). This suggests a second part to the rationale: the purpose of the state is not only to mitigate obstacles that stand in the way of people's pursuit of their current idea of the good life, but also to mitigate obstacles *that prevent them from freely choosing their own conception of the good life.* I accept neutralism for the same kinds of reasons that other neutralists do: the state should recognise people's equal moral worth, and respect the decisions they make about the kind of life they want to lead.¹¹³

Throughout this chapter, I develop and defend this rationale. In specifying it, I model it as a capability approach to political legitimacy. In doing so, I therefore also draw on the rationale for the state referenced in the capabilities literature. For instance, Amartya Sen's central concept of development concerns removing obstacles to what a person can do in life, obstacles such as illiteracy, ill health, or lack of civil and political freedoms (Fukuda-Parr 2003, 303) and enhancing people's real opportunities to pursue their objectives (Sen 1999, 74).

My acceptance of neutrality is not founded on the idea that everyone should be able to agree with state policies. My position is *not* a variant of a consensus view. For this reason, I do not run into a particular problem that some other neutralist views do. Some views that defend neutrality of justification hold that states should not adopt and maintain laws and policies that can only be justified by appeal to *controversial* conceptions of the good (Arneson 2003, 195).

¹¹³ For instance, Rawls espouses neutrality of aim in light of citizens' status as free and equal (Rawls 1993, 190-5). Larmore argues in favour of neutrality due to the requirement of showing equal respect to everyone (Larmore 2003, 56). Claassen argues for second-order neutrality out of respect for the autonomy of persons (Claassen 2018, 21).

Such views, as Richard Arneson points out, run into the problem of having to explain their scope; if the state should refrain from invoking controversial conceptions of the *good*, should it not also refrain from invoking controversial conceptions of the *right* (Arneson 2003, 195)? This problem roots in the fact that these approaches to neutrality rely on *non-controversiality*.

While I do support the idea of neutrality of justification, I do not think that such neutrality is best explained as non-controversiality. If we let go of non-controversiality, we can support neutrality of justification without running into the problem Arneson mentions. On my view, neutrality does not require universal (actual or reasonable) agreement. What matters is that we find a plausible set of values that does not rely on comprehensive doctrines, not that we find a set that everyone agrees with.¹¹⁴ For instance, some people may not find it important to make use of the earth's resources in a sustainable way. Yet, this does not make it unjustified for the state to adopt measures to make society function more sustainably. The value of sustainability is an *enabling condition* for future generations to be able to pursue a good life, it is not a value that can only be understood if one *adopts* one particular idea of what it is to live a good life. So the question should be whether we need to refer to a specific idea of what a good life is to justify state measures, not whether everyone agrees with them, or would agree with them under some special conditions.¹¹⁵ The neutral state is a state that does not use its coercive power to get people to live a certain kind of life. It is not a state whose every action can be justified by uncontentious reasons. In brief, then, the state should enable people to pursue their own vision of a good life, and mitigate obstacles that prevent people from doing so. Here, the question arises of whether

114 It follows from the arguments presented in chapter 3 that a plausible account of how the state should mitigate obstacles for the pursuit of a good life takes note of the impact that disagreement has on the effectiveness of laws and policies. This does not imply, however, that (actual or reasonable) consensus is required for legitimacy.

115 We might say my account is compatible with defending the requirement of *reasonable* agreement. We would then say that all reasonable persons would agree with the plausible account. On such a line of argument, however, the normative work would simply be done in the construction of the idea of reasonableness (cf. Besch 2013, 67, Manin 1987, 348-9), and there is no separate need for the idea of reasonableness itself. I do not think, then, adding the idea of reasonable agreement is useful.

there is not a limit on the kinds of good life that a state can enable people to pursue. I come to this question below.

Obstacles to a good life can consist in many different kinds of things. Other people can hamper your prospects through e.g. aggression or exploitation.¹¹⁶ Natural disasters or insufficient adaption to the threat of such disasters can too, as can (unintended) effects of how social connections are ordered at a certain moment in time.¹¹⁷ I hold that whenever something forms an obstacle for some people in making a good life for themselves, it is proper for the state to consider whether there is some justifiable course of action it could take to mitigate that obstacle. Of course, mitigating one obstacle could create new obstacles. For instance, mitigating obstacles requires collecting taxes in order to have the means to develop any state activity. Collecting taxes alters or diminishes the options taxpayers have to spend these resources on realising the life they want. It must be considered whether the gains of mitigating one obstacle are justified given the obstacles they may create. I should not be understood to argue, then, that states are simply justified in mitigating all obstacles. Here, another question arises, namely how trade-offs between different interests should be made. This question is also addressed below.

It is important to point out that this approach is not as dependent on a theory of justice as many other theories of political legitimacy are. Rights violations form an important category of obstacles to the good life. If someone harms me physically, steals my property, or wrongly exploits me, these violations of justice clearly hamper my capabilities to pursue a good life. However, such rights violations are but one way in which I can experience obstacles. On my approach to political legitimacy, it can be justified for the state e.g. to assist people who suffer

116 See e.g. Ben Ferguson and Hillel Steiner (2018) for an overview of accounts of exploitation, which consists in “taking *unfair* advantage” (2018, 533).

117 Cf. e.g. Iris Marion Young, who argues that “some harms come to people as a result of structural social injustice” (Young 2006, 102), where structures are taken to “denote the confluence of institutional rules and interactive routines, mobilization of resources, as well as physical structures such as buildings and roads. These constitute the historical givens in relation to which individuals act, and which are relatively stable over time” (111-2). We need not necessarily agree that structural obstacles are injustices to still see them as morally problematic.

from brute bad luck, without having to claim that people are *morally entitled* to this assistance. In other words: we do not have to claim that providing such assistance is a matter of justice, and consequently, we do not necessarily have to decide which theory of justice we support before we can start to think about the question whether it can be justified for a state to provide such assistance. It would, I contend, be a mistake to think that state activity can only be justified if it gives people what they are entitled to. We should be aware of the possibility that the justification of state coercion can depend on more than justice, provided that justice is not taken as an absolute constraint, one that cannot be overridden by any other values.¹¹⁸ If there are indeed other values besides justice that can play a role in justifying state action, then a situation can be morally bad and deserving of mitigation without people being *entitled* to this mitigation. One can hold that something *should* be changed, even if no one has a moral *right* that it be changed. A situation can be morally bad without there being a moral wrong. (And the existence of moral wrongs can certainly also be morally bad.)

Now, my central contention in this section is that there is a rationale for the state if it is the case that it can mitigate morally bad situations (including moral wrongs), where I take the relevant morally bad situations to be those that form obstacles for people in making a good life for themselves (or in freely choosing their idea of the good life – I shall omit this extension from now on, and understand it to

118 See e.g. the following theorists who deny that justice has an absolute status. G.A. Cohen argues: “I don’t see how anyone, whatever she thinks justice is, can deny the possibility that certain facts, or other values, might make it inappropriate, or too difficult, or too costly, to produce justice” (Cohen 2008, 302); “[j]ust as truth is not a necessary condition of all justifiable utterance, so it is sometimes justifiable, all things considered, to deviate from justice in the formation of social institutions” (304). Michael Walzer similarly argues that “we would not want to be governed by men who consistently adopt that [‘absolutist’, non-rights-violating] position” (Walzer 1973, 162). Amartya Sen also provides examples of the type of reasoning where other considerations may restrict the pursuit of justice: “[i]f it so happens that the effects of such [free market] transactions are so bad for others that the *prima facie* presumption in favor of allowing people to transact as they like may sensibly be restricted, there is still something directly lost in imposing this restriction” (Sen 1999, 26-7). We can only hope that justice and other important moral values do not stand in tension too often, or that more of one value also increases the chances that other values will be served. Indeed, there does seem to be evidence that e.g. more extensive political rights correlate with higher material living standards (World Bank 2000).

be included in references to the creation of a good life). If a state is able (and better able than an available alternative) to mitigate such obstacles, then there is a *pro tanto* case in favour of it and the coercion it entails. If it is not able to do so, or mostly creates obstacles,¹¹⁹ then there is no case in its favour and the presumption against coercion calls for its rejection. The same goes for the individual coercive measures it carries out. Again, I should point out that there will be constraints on state action that are not directly related to the consequences of such action, and not every measure that mitigates obstacles is justified simply because it does; that some state action mitigates obstacles for creating a good life is only a *pro tanto* – if weighty – argument in its favour, not yet an all-things-considered one. There may be reasons besides the mitigation of obstacles that make a certain course of action unjustifiable. Moreover, as pointed out above, removing one obstacle may create others. The normative principle I propose, then, far from eliminates the need for decision-makers to engage in careful judgment of what is at stake in a certain context, and of how these stakes must be weighed against each other. Yet, I believe that recognising the plurality of *pro tanto* arguments that feed into an all-things-considered justification of state action is useful. It allows us to put arguments derived from what we think is desirable on the table, without thereby jumping to the conclusion that all of them must be acted on.¹²⁰ It allows decision-makers to see what is still deficient about our world, without becoming paralysed if they cannot solve it all.

Leaving open the possibility that it may be justified for the state

119 I will not, here, try to address the question of when a state is, in the final judgment, unjustified if it is sometimes a force for the better, and other times for worse.

120 I take this distinction between *pro tanto* and all-things-considered justifications for a certain course of action to track W.D. Ross's distinction in individual ethics. Ross distinguishes between *pro tanto* duties on the one hand, and actual duties (or 'duty proper') on the other (Ross 1930, 19-20). *Pro tanto* duties are not things that we ought in fact to do, but rather a kind of responsibilities, of which we can have multiple. On the other hand, as Philip Stratton-Lake interprets Ross, "what we should do (our duty proper) is determined by the balance of these responsibilities" (Ross 1930, xxxiv). All *pro tanto* duties are real responsibilities, but when we cannot meet all of them, deciding what to do comes down to determining "which morally relevant consideration gives us the weightier reason" (xxxvii). This determination must be made in the specific context one is in, because it is only in this context that one's responsibilities come to compete with one another in a certain way.

to do something unjust, or to leave injustices unremedied, because of the importance of also serving other moral values besides justice, my position bears similarity to the ‘dirty hands thesis’. In his seminal article “Political Action: The Problem of Dirty Hands” (Walzer 1973), Michael Walzer contends that it is “easy to get one’s hands dirty in politics and it is often right to do so” (Walzer 1973, 174). Dirty hands, according to Walzer, are the hands of a politician who has violated morality to reach results that are worth the crime. He gives the example of using torture to obtain information to prevent bombs from going off. While the use of torture renders the politician morally guilty, the prevention of many deaths makes it right for the politician to incur this guilt. Walzer thus sees the politician with dirty hands as guilty; by giving the order to torture, the politician committed a moral crime and accepted a moral burden of guilt (167).

Despite the similarities, I disagree with Walzer in the estimate of how common it will be for politicians to be justified in dirtying their hands, and in the assessment of guilt. Originally, Walzer suggested dirty hands situations occur systematically and frequently (Walzer 1973, 162), and dirtying one’s hands could be right even to win an election (166). Later on, he held that dirty hands are only permissible when the ongoingness of the community is at stake (Walzer 2004, 46, Tillyris 2019, 7), that is: in cases of supreme emergency. On one commentator’s analysis, the dirty hands thesis regards the justifiability of dirty hands as a sporadic situation; it presumes that “public integrity should *not* be that dissimilar to, or incompatible with, moral integrity, or the innocence, and consistency of the saint” (Tillyris 2019, 1587), except in rare, tragic cases. As political realists point out, however, if this is indeed the purview of the dirty hands thesis, it seems oblivious to the real context of politics, where dirty hands may often be required in order to be able to cooperate and coexist in a peaceful manner (Tillyris 2019, 1589).

In short: acting in politics unavoidably entails dirtying one’s hands, more or less dramatically, all the time. Yet, on my view, these hands will be only ‘*pro tanto* dirty’, if politicians succeed in making decisions that are all-things-considered justified. Rather than being fishy deals with malevolent manipulators or criminals, justified ‘dirty’ decisions will more commonly take the shape of compromises

– e.g.: the politician who sees that animal factory farming is wrong, but cannot do more than take steps in the right direction, rather than eliminating it altogether straight away. Compromises might be perceived as hypocritical, as not being true to political ideals or agendas. However, such compromises can serve an important *moral* purpose in the justified use of state coercion; if that state coercion is to actually serve the rationale for the state, then small steps may be necessary in order to avoid undesirable side effects, or the erosion of support for further steps in the right direction (see also chapter 3). For this reason, it would be a mistake to see politicians who fail to achieve all relevant moral goals as guilty.

Before setting out in more detail how I propose to specify the rationale for the state in terms of capabilities (section 4.3), let me first address three open questions about the argument so far. To recapitulate: section 4.1 argued that a theory of political legitimacy should adopt a set of political values, and that moral justifications for state coercion should show how these values are served by the coercive activities that are being justified. Section 4.2, so far, has argued that the values that a theory of political legitimacy adopts should be values the pursuit of which captures the rationale for the state: it is for their pursuit that we want state action, instead of no state action. As an overarching rationale for the state, I have argued that state action can be valuable if it mitigates obstacles that stand in the way of people making a good life for themselves. In the remainder of this section, I discuss two questions that were raised above. First: does the state have to mitigate obstacles for the pursuit of *any* idea of the good life, or can it refrain from doing so in the case of unacceptable views? Second: when not all obstacles can be mitigated simultaneously, or when action to mitigate one obstacle creates another, how are trade-offs to be made? A third point to discuss before proceeding concerns the distinction between the *expected* value of a state measure, and the *actual* value it ends up having. Does the justifiability of state measures hinge on the former or the latter?

Open questions

Unacceptable views

Above, I adopted the position that it is appropriate for the state to consider, whenever there exists an obstacle for someone's pursuit of the good life as they conceive of it, whether it can justifiably mitigate that obstacle. The first question to reflect on now is: is this position not too strong? Does this really hold for *any* obstacle? Take e.g. someone whose idea of the good life consists in wasting large amounts of resources, e.g. by having a lifestyle with an excessively high ecological footprint (eating lots of meat, flying a lot and driving a 'dirty' car, and perhaps even urging others to do the same). Should the state consider fostering the conditions in which this person can live as they please?

My answer to this question is: yes, the state should consider it. However, when the state considers it, the ensuing deliberation will show that the interests this person has in leading their excessive lifestyle are easily outweighed by the interests that others have in seeing the conditions for their pursuit of a good life fostered. To stick with this example: the prospects that future generations have of being able to create a good life for themselves are dangerously on the line. It is exactly for this reason that it can become justified for states to limit the kinds of actions involved in excessive ecological footprints. There is no need to argue that a person should not be allowed to live such a life directly. All we need to do is point to obstacles that such lifestyles create for others, and argue that these obstacles are more severe and justify putting limits on wasteful activities. Of course, as I have emphasised throughout, the state should also consider which limits will be *effective*. If e.g. banning carbon-emitting cars next year has a counterproductive effect and erodes support for climate policies, then this may well count against such a measure.

Trade-offs

The second open question concerns trade-offs. I do not think it is possible to give a principle for dealing with trade-offs that is both illuminating in theory and always appropriate in practice. The best

we can do is to say that this principle should be a function of moral urgency and practical possibility. Working with such a principle could proceed roughly as follows. First, an assessment is made of which parts of the status quo need to be addressed by the state, and of how urgent action is. This delivers a prioritisation of things for the state to do based on desirability considerations. Then, an assessment is made of which courses of action are feasible to address the issues on the list, and of what the moral costs of changeover and opportunity costs would be. These are weighed against the moral urgency of the goal and the competing goals. This delivers a weighed prioritisation, but not yet an all-things-considered one. To arrive at all-things-considered judgments about what the state ought to do, it must be assessed whether the proposed courses of action violate side constraints that outweigh the moral urgency of the goal state action is supposed to contribute to. As mentioned above, however, I will not go into the side constraints on state action to any significant extent.¹²¹

Expected vs. actual impact

A final issue to address before proceeding concerns the distinction between the expected impact of state measures and their actual impact. On the rationale I have proposed, state measures are *pro tanto* justified if they mitigate obstacles for the pursuit of people's idea of the good life. This seems to suggest that what justifies these measures is their *actual* impact. After all, you cannot better pursue your idea of the good life if measures are merely aimed at enabling you to do so, but fail. However, it is impossible for states to make decisions on the basis of what the actual impact of laws and policies will be; the best a state can do is to make a realistic assessment of what can be *expected*

¹²¹ Adopting such a principle means that e.g. the lexicographic priority of liberty is rejected. As Sen asks: "[w]hy must any violation of liberty, significant as it is, invariably be judged to be more crucial for a person – or for a society – than suffering from intense hunger, starvation, epidemics, and other calamities? [...] We have to distinguish between giving some priority to liberty [...] and the 'extremist' demand of placing a *lexicographic* priority on liberty, treating the slightest gain of liberty – no matter how small – as enough reason to make huge sacrifices in other amenities of a good life – no matter how large. Rawls argues persuasively for the former, and yet chooses, in the formulation of the difference principle, the latter" (Sen 2009, 300).

to mitigate obstacles, and to act on the basis of its best judgment. Does this imply that what justifies state action is *expected* impact, rather than actual impact? If so, this would raise the question of what a realistic assessment looks like, and when a 'best judgment' is good enough to serve as the basis for the justification of state measures. Importantly, it would seem to make justifiability dependent on the capacities of the state itself; if a state is bad at estimating the results of its actions, then its best judgment may not be a very good one at all, and yet be the basis on which its actions are to be justified. A naïve state might think it can only do good, and wreak havoc while intending to make things better. In sum: the down side of relying on actual impact is that the actual impact is only known after the fact and thus cannot serve as the basis on which to decide what measures to adopt. The down side of relying on expected impact is that it makes justification dependent on the predictive capacities of the state.

There is no straightforward way to solve this dilemma. The most promising strategy seems to be to look at it from the practical perspective of decision-makers. In every decision situation, they ultimately face a 'yes or no' question: do we adopt this law or not? Do we maintain this policy or not? Especially in the case of the adoption of new laws and policies there may be considerable uncertainty concerning the effects that can be expected. Where this is so, it will be wise to consider different scenarios and to take into account that the worst scenario may materialise. After considering different scenarios, the only option is to choose on the basis of expected impact. When decisions concerning whether or not to maintain existing laws and policies are at stake, there is more information about the effects these laws and policies have had, so in these cases, decisions can be based on the actual impact that has come about.

4.3

Political legitimacy as impact on sustainable development: a capability approach

Accepting that the rationale for the state is the mitigation of obstacles

to people's pursuit of a good life is still very abstract. In this section, I draw on the capability approach to propose three values – survival, prosperity, and sustainability – that give more body to the function of the state. My suggestion is that obstacles for the pursuit of a good life are obstacles that inhibit survival or prosperity, for current or future generations. When people have the capabilities to survive and prosper, they have what they need to pursue their idea of a good life. It is the function of the state to assist people in achieving those capabilities. My approach can therefore be seen as a capability approach to legitimacy, and hence as a 'sister' to capability theories of justice. To support the case for the values of survival, prosperity, and sustainability, it is pertinent to note that they underlie the Sustainable Development Goals, which have been adopted by, and (should) serve as a guideline for the activities of governments around the world. I will now spell out this approach in some more detail.

The capability approach has influentially been applied to the topic of social and political justice (e.g. Sen 2009, Nussbaum 2003, Robeyns 2017, Claassen 2018). As a theory of justice, the capability approach spells out "capabilities which are held to be fundamental entitlements of all citizens" (Nussbaum 2003, 40), whether as a list in Nussbaum's approach, or in a more piecemeal fashion as in Sen's approach.¹²² Besides being used in theories of justice, the capability approach is used in e.g. economics, to provide measures of economic welfare that are an alternative to income-based metrics (Robeyns 2017, 11).

To apply the capability approach to the topic of legitimacy, and hence get a capability theory of political legitimacy (cf. Robeyns 2017, 29), we should go about it slightly differently than when it is applied to justice. Above, I argued that the legitimacy question is not about citizens' fundamental entitlements, but about the justification of state coercion. Next, I argued that the use of state power should be justified by reference to the rationale for the state, and that the rationale for the state is to mitigate obstacles for the pursuit of people's idea of the good life. The capability approach provides a useful and plausible

¹²² Cf. Nussbaum (2003, 43), who notes that, while Sen does not present a definitive list, he does speak "as if certain specific capabilities are absolutely central and nonnegotiable".

framework to elucidate what kinds of obstacles people may experience in pursuing their idea of the good life. For this reason, the capability approach can be used in identifying obstacles and in this way inform a theory of political legitimacy. An assessment of state legitimacy on a capability approach then primarily specifies to what extent a state's laws and policies make an effective contribution to citizens' capabilities to pursue their idea of the good life. The theory of legitimacy set out in this dissertation can appropriately be called a capability theory of legitimacy in that it explicitly addresses or is compatible with all the core elements of a capability theory ('the A-modules') as set out by Robeyns (2017, 38-59).¹²³

In line with the remarks made in the previous section, I will take the perspective of political legitimacy to be broader than justice. This means that when the state mitigates obstacles to people's capabilities, it can do so both for obstacles that result from injustices inflicted on people, and for obstacles that do not result from injustices. In the remainder of this chapter, I focus on obstacles to capabilities for the pursuit of one's idea of the good life in general, and do not further discuss the distinction between obstacles that result from injustice and those that do not. Moreover, I will not address the question which capabilities (and what levels of them) are matters of justice. Rather, I will assume that all capabilities that people would need to pursue their idea of the good matter morally, whether or not they are entitlements of justice.

If a state's available resources (e.g.: money, support, personnel) are fully employed to make the most effective contribution, it has maximum legitimacy (provided that it did not violate constraints it ought not to have violated – I have set this topic aside). We thus do not

123 To wit: functionings and capabilities are core concepts; they are value-neutral categories in that there can be positive and negative functionings and capabilities; it is acknowledged that people can have differing abilities to convert resources into capabilities; ultimately it is the ends (capabilities) that matter, not the means to achieve these, but the necessity of the means is acknowledged; functionings and capabilities serve as the evaluative space; procedures have been granted importance in determining legitimacy next to the content-dependent considerations of which capabilities form the core; the account endorses value pluralism; the account endorses ethical individualism. Concerning many, though not all, of the B-modules (Robeyns 2017, 60) explicit choices have also been defended.

focus on the *level* of capabilities that citizens have and the prospects that future citizens have, as we would for justice assessments, but on the *influence* on capabilities that the state is exerting. The more positive its influence, the more legitimate the state, and vice versa. We should thus take a step back from capability theories of justice, and reconfigure the argument for it to be suitable for a theory of political legitimacy, given that legitimacy is the topic at hand, and not justice. This means that Nussbaum's approach, focused on meeting certain thresholds of capability for everyone (Nussbaum 2011, 24), is not what we need for the current endeavour. Nussbaum's purpose is to specify what everyone is entitled to as a matter of *justice*. This is something else than providing a theory of *political legitimacy*, when we understand political legitimacy along the lines defended in this dissertation. On my view, a state that exerts a negative influence on people's capabilities undermines its own legitimacy, even if everybody is above the threshold. On the other hand, a state that exerts the best influence that lies within its power, even if many people are still below the threshold, counts as more legitimate than the former state. Legitimacy, then, is about *impact* – the impact a state has on the values that justify its existence.

Sustainable development

What capabilities should a state have a positive impact on to earn legitimacy? The debate concerning capability theories of justice deals with its own variant of this question. Notably, Nussbaum defends a list of ten fundamental capabilities (Nussbaum 2011, 33-4). Sen emphasises that different capabilities matter in different contexts, and that philosophers should not try to settle, once and for all, the question of which capabilities matter (Sen 2004, 2009, 242). While there may be a real dispute between Nussbaum and Sen (Claassen 2011, 493), Nussbaum does also stress that her list is open-ended and subject to ongoing revision and rethinking (Nussbaum 2003, 42). Hence, Sen and Nussbaum seem to agree that, whatever the use of list-making, it should not be done dogmatically.

Sen's reason to insist that no attempts should be made to offer definitive lists of capabilities is that the list of capabilities that are

pursued and how they are prioritised should be sensitive to public discussion (Sen 2004). New experiences or insights can make other capabilities relevant and the prioritising of one capability may be more urgent in one context than in another. Even if one were not convinced that the capabilities to be pursued should vary per context, there are epistemic reasons to make sure that the list has been subject to public reasoning; it is simply more likely that no important capabilities have been forgotten if many people have contributed their thoughts about it. It is for this reason that the UN Sustainable Development Goals are a highly relevant list of goals with which to give content to a capability approach to legitimacy. In 2015, the UN member states adopted the Sustainable Development Goals (SDGs), with the aim of achieving them by 2030. We have now, writing March 2020, just entered the so-called ‘decade of delivery’.

Figure 3
UN Sustainable Development Goals²⁴



The SDGs were formulated through “a process of intense diplomatic negotiations and open multi-stakeholder debates” (Fukuda-Parr 2016, 47). “As a process for elaborating international development priorities, it involved an unprecedented level of participation by governments, civil society groups, academics, business groups, and UN agencies, in intense debates in meetings around the world and over the internet” (Fukuda-Parr 2016, 47, cf. Norton and Stuart 2014). In this, they

²⁴ <https://sdgs.un.org/goals>, accessed 27 September 2020

are a major improvement over the Millennium Development Goals, which resulted from a much more technocratic process with far fewer consultations, which meant that their formulation was not linked to ongoing debates about development priorities (Fukuda-Parr 2016, 45).

The overarching goal of the SDGs is to end all forms of poverty and promote prosperity while protecting the planet. Governments of all countries, whether poor or rich, are expected to “take ownership and establish national frameworks for the achievement of the 17 Goals”.¹²⁵ This overarching goal is specified in the 17 SDGs (see Figure 3). All SDGs are again specified in concrete targets associated to the goals, to be reached by 2030. For example, the first target of goal number 1, ‘No poverty’, is to “eradicate extreme poverty for all people everywhere, currently measured as people living on less than \$1.25 a day.”¹²⁶ The SDGs are formulated as global goals, but make room for national adaptation (Fukuda-Parr 2016, 50). In doing so, the SDGs fit within the kind of context-dependent approach that I support (cf. Alkire 2007, 103).

The SDGs are not themselves capabilities. They are goals to be pursued by law- and policymakers. If they are achieved, they will have been converted into capabilities and functionings. Capabilities are a person’s real freedoms to achieve functionings, where functionings are those things a person can do and be (Nussbaum 2011, 25, Robeyns 2017, 39). That someone functions in a certain way proves that they are able to do so, but it does not prove that they *freely* chose to do so. Sen mentions the functioning of ‘not eating’. For someone who fasts, this functioning was chosen freely.¹²⁷ For someone who is starving, on the other hand, it was not, and the capability of ‘eating’ was not available. Thus, a person’s functionings reflect their actual *achievements*, while their capability set reflects the *freedom* they have to achieve functionings (Sen 1999, 75). Applying these concepts to the SDGs, we see that reaching the goals usually means that certain functionings have been achieved, e.g.: being well-nourished, being healthy, having clean water. While they thus provide a slightly narrower picture

¹²⁵ <https://www.un.org/sustainabledevelopment/development-agenda-retired/>, accessed 27 September 2020.

¹²⁶ <https://www.un.org/sustainabledevelopment/poverty/>, accessed 27 September 2020.

¹²⁷ With the caveat that one may be forced to fast.

than if they had been formulated in terms of capabilities, achieved functionings are generally taken as key indicators of progress (Fukuda-Parr 2003, 303). Given how essential many of the SDGs are, it is quite safe to assume that in the usual case, people will in fact choose the functionings associated with them if they have the capability to do so.

While acknowledging Ingrid Robeyns's argument that a capability approach should not simply be equated with a development paradigm (Robeyns 2017, 199-200), there is a close fit between the SDGs and the capabilities and associated functionings deemed important in the capability literature. For instance, life and bodily health – the first two items on Nussbaum's list (Nussbaum 2011, 33) – are served by goals like 'no poverty' (SDG #1), 'zero hunger' (#2), 'good health and well-being' (#3) and 'clean water and sanitation' (#6). Gender equality (#5) has been a primary concern within the capability approach right from its inception, and in part aligns with Nussbaum's 'bodily integrity'. Many of the SDGs relate to sustainability and environmental protection. These values, too, have entered the scope of the capability approach over the years (Nussbaum 2011, 163-6, Robeyns 2017, 9). Many other items on Nussbaum's list, such as 'senses, imagination, and thought', 'emotions', 'practical reason', 'affiliation', and 'play' overlap with quality-of-life SDGs like 'good health and well-being' (#3), 'quality education' (#4), 'decent work and economic growth' (#8), 'industry, innovation and infrastructure' (#9), 'reduced inequalities' (#10), and 'sustainable cities and communities' (#11). For instance, Nussbaum refers to adequate education in specifying 'senses, imagination, and thought'. In specifying 'emotions', she refers to attachments to others, which is likely served by things like education, decent work, and infrastructure. Many other connections can be mentioned.

As the overarching goal of the SDGs suggests, three values capture the normative core that underlies them: ending poverty, promoting prosperity, and protecting the planet. They can be expressed concisely through the following three terms: subsistence, prosperity, and sustainability. I will replace 'subsistence' by 'survival', taking this value more broadly than only the ending of poverty. People's lives are not just threatened by poverty, but also by war and violent conflict. This first value – survival – thus captures everything that relates to a bare minimum: staying alive and making ends meet. The second value –

prosperity – relates to the things people need in addition to survival in order to be able to pursue their idea of a good life – things like education and infrastructure. These two values come down to what Amartya Sen calls ‘development’. Development consists in “the capability *to live really long* (without being cut off in one’s prime) and to *have a good life* while alive (rather than a life of misery and unfreedom) – things that would be strongly valued and desired by nearly all of us” (Sen 1999, 14, my emphases). This emphasises the tight fit between the SDGs and the capability approach. Finally, the third value – sustainability – relates to everything that is needed to secure the conditions for survival and prosperity for future generations as well. The three values of survival, prosperity, and sustainability, then, are the parts of an idea of sustainable development. An influential definition of sustainable development, given in the report *Our Common Future* by the World Commission on Environment and Development, defines sustainable development as “development that meets the needs of the present, without compromising the ability of future generations to meet their own needs” (WCED 1987, 41).^{128, 129} The report thus relates development to meeting needs, and sustainability to maintaining this possibility for future generations. While ‘needs’ in the WCED definition of sustainable development could be interpreted as referring narrowly to command over economic resources (Robeyns and Van der Veen 2007, 15), I will instead adopt a broader understanding of ‘needs’ as those things that provide one with the capabilities to live a good life, in line with Sen’s remarks (Sen 2013). Robeyns and Robert-Jan van der Veen (2007, 16) also opt for a broader understanding, and furthermore

¹²⁸ The report continues with remarks that “overriding priority should be given” to the “essential needs of the world’s poor” (WCED 1987, 41). I shall take this remark to espouse a view of justice and will not assess its merits in the context of my current discussion of legitimacy.

¹²⁹ Kate Raworth provides a similar slogan to formulate the goal economic policy should aim to pursue: “let’s evict the cuckoo [of GDP growth] and replace it with a clear goal for twenty-first-century economics, one that ensures prosperity for all within the means of our planet” (Raworth 2017, 32). In its 2009 report, the French Commission on the Measurement of Economic Performance and Social Progress advocates a shift to a system of economic measurement “focused on the well-being of current and future generations, i.e. toward broader measures of social progress” (Stiglitz, Sen, and Fitoussi 2009, 10), hence also taking the dual perspective of the quality of life of present generations, and the prospects for this for future generations.

specify the WCED definition of sustainable development to make it suitable for use in a national context, which has been the focus of the present discussion as well.

The fact that the SDGs have gained widespread political traction *and* are firmly rooted in normative theory makes them quite unique. Moreover, given that they are explicitly intended to be translated to the context of the different countries around the world (Fukuda-Parr 2016, 50), they are especially satisfactory from the perspective of the context-dependent theory I have proposed. They allow accounting for feasibility concerns and moral costs of changeover. Given a context-dependent approach, when it comes to analysing legitimacy in practice, the focus should be on the *improvements* in sustainable development that a state manages to bring about, rather than on the *level* of sustainable development at which we find the society that it governs. When it comes to measurement, this suggests a focus on the rate of progress, rather than on the level of achievement (Fukuda-Parr 2014, 124). Justifiable exercises of coercive power contribute to sustainable development, but this does not mean that the level of sustainable development will immediately be high. Reversely, bad governments may issue laws and policies that detract from sustainable development, even if a society currently still scores high on indicators of sustainable development. This undermines the legitimacy of these states. Legitimacy thus depends on a state's *impact on sustainable development*.

While it probably does not need a lot of discussion to argue that survival is necessary for anyone to create a good life, regardless of what kind of life that is, prosperity is bound to generate more discussion. How much prosperity should a state aim to create, and for whom? If the state has to take on distributive tasks in order to create prosperity, what should it distribute, and should a distribution be egalitarian? These questions put us squarely in the realm of theories of distributive justice. Developing a position in relation to that debate is not the aim of this dissertation. However, that does not put the topic of state action for prosperity beyond the scope of the current discussion. The arguments about political legitimacy developed in the previous chapters allow us to say something about how such action might be justified, even if we have not taken a position about distributive justice.

If we accept that a theory of political legitimacy must be context-dependent, then how egalitarian a state should be to be *legitimate* will depend (among other things) on the context, even if a view of how egalitarian a state must be to be *just* would be context-independent. If a society is currently stable, the government is in the business of addressing obstacles to sustainable development, and is not creating new future problems, then these facts about the circumstances of this society count towards a justification for the current state of affairs (cf. Kekes 2006, 97), regardless of whether this state is currently quite egalitarian or inegalitarian.¹³⁰ A theory of distributive justice thus cannot be translated directly into an assessment of political legitimacy. If the current distributive role of the government makes a positive contribution to people's capabilities to create good lives for themselves, then this counts towards its legitimacy, even if a theory of justice still requires changes.

Note, too, that it is not necessary for a justification that *everyone* benefits from e.g. education for the pursuit of a good life. It may be impossible for a state to take measures that help every single citizen in creating a good life. Society may simply be too large or diverse for there to be laws and policies that mitigate obstacles for everyone. Legitimacy would be under pressure if a specific group were structurally favoured by state measures, while other groups never see their obstacles mitigated by the state.¹³¹ This would violate impartiality, and hence neutrality; it would make the state partial to a specific group of people. If measures effect a relevant gain for some people while not for others, however, this in itself does not make that measure non-neutral. What

¹³⁰ The research presented by Richard Wilkinson and Kate Pickett in *The Spirit Level* (Wilkinson and Pickett 2010) suggests that a relatively high degree of income equality helps in achieving relatively good scores on indexes of health and social problems like mental illness, infant mortality, obesity, teenage births, homicides and imprisonment (Wilkinson and Pickett 2010, 18-9). If mitigating these social problems is what counts for state legitimacy, due to the obstacles these problems form for the pursuit of good lives, then this research suggests that, *ceteris paribus*, striving for more equality is likely to enhance legitimacy. This connection is empirical, not conceptual.

¹³¹ This does not preclude the possibility of determining the legitimacy of single measures. Measures are decided upon throughout time. Every new measure is taken against the background of already existing measures, so which groups have already been favoured by existing measures forms part of the context in which new measures are adopted.

is important is that state action contributes to people's prospects of pursuing their idea of a good life by enhancing their capabilities.¹³² As pointed out above, my approach to neutrality does not equate it with non-controversiality. Indeed, the requirement of neutrality will itself be controversial.

My account, then, puts forward a number of values – survival, prosperity, sustainability – the pursuit of which provides a rationale for having a state. I point to the SDGs as a useful set of more concrete values that specify what pursuing these general values requires in the current world. I have presented this account as an application of the capability approach, because the reason to pursue these values is to mitigate obstacles that limit people's capabilities to create good lives for themselves. I have not attempted to suggest which values or SDGs carry more weight or urgency. I accept Sen's point that public discussion is a good means to make comparisons and that pre-determined weights are not necessary (Sen 2009, 242-3).

Conclusion

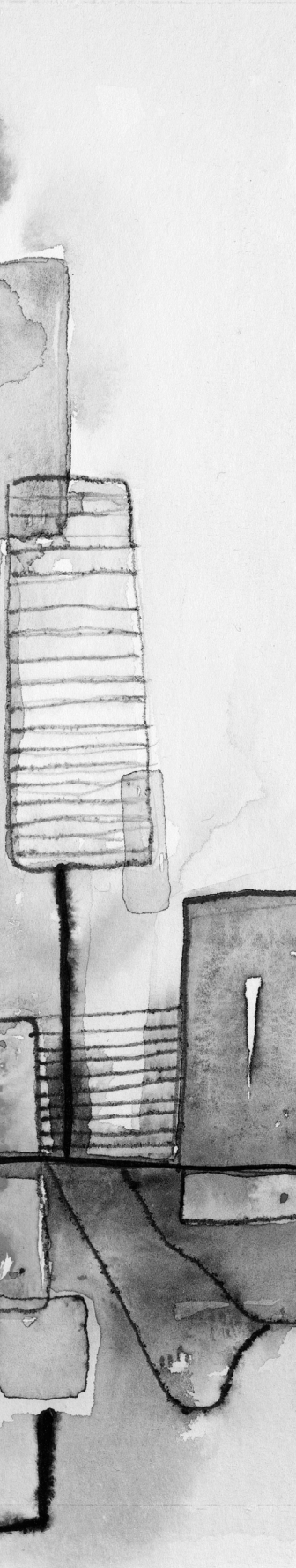
In closing, it is perhaps interesting to note that my approach to political legitimacy takes a middle ground between realist and moralist approaches to political legitimacy. I have explicitly drawn on realist insights, and my approach shares central characteristics with realists; I have pointed out that we must “never lose sight of the possibility for regress as well as progress”, I “begin from where a given political community is”, I adopt value pluralism, and I have argued against the possibility that “a course of action [can be justified] that might bring disaster to the community on the grounds that it comports with some abstract moral norm” (Galston 2010, 394-400). Moreover, the typical realist concern with peace and stability is a central part of the values I have adopted. Yet, the whole purpose of my discussion has been to reflect on the content of political morality, and definitely not to

¹³² Nussbaum makes a similar point when she says that “endorsing the capabilities list does not require [citizens] to endorse the associated functioning as a good in their own lives” (Nussbaum 2003, 49). A measure that is primarily of use to others does not need to stand in the way of our own freedom to live as we choose.

deny that there is such a thing. This means that to the extent that realists hold that “we need politics just because we disagree on ethics, so applied ethics-based political theory will not do” (Rossi 2012, 150), I am not on board. Rather than using realist insights as alternatives to ethics, my purpose has been to provide a specifically political morality by drawing on realism.¹³³

This concludes my discussion of normative criteria for political legitimacy. I have proposed three criteria of increasing specificity. The first criterion (chapter 2) is *content-dependence*: it can only be morally justified to adopt and maintain laws and policies if the content of these laws and policies merits it. The second criterion (chapter 3) is *context-dependence*: the content of laws and policies can only be morally justified if that content is appropriate for the context in which these laws and policies are in place. The third criterion (this chapter) is *impact on capabilities for sustainable development*: the content of laws and policies is appropriate for the context if, in that context, these laws and policies have a sufficient, positive impact on capabilities for sustainable development. Now I turn to the last chapter, which considers whether there is still a relationship between political legitimacy and support if we adopt this approach to political legitimacy, and what this relationship can look like.

¹³³ Enzo Rossi argues that legitimacy “concerns the *purpose* of the exercise of political power in a given polity” (Rossi 2012, 157). However, it is not clear whether Rossi refers to the purpose to which power *is* used in a given polity, or to the purpose for which it *should be* used. His reference to “an *empirically informed* account of what politics is for in a given context” (Rossi 2012, 157) suggests a descriptive approach. It seems that I argue against Rossi in saying that prescriptions for politics should follow from the values we think should inform political practice, rather than taking the practice of politics as a given.



Political support and political legitimacy

The approach to political legitimacy developed in the previous chapters deviates from theories that derive political legitimacy from the consent or support of citizens. Instead of being founded on the consent or support of the governed, political legitimacy is here founded on the *impact* that the use of state power has on people's capabilities for sustainable development.

This raises the question whether support still plays a role in legitimacy assessments and if so, what kind of role. This question is pertinent to address given the central role that support plays in various normative theories of legitimacy, such as those founded on (hypothetical) consent or democratic (deliberative) procedures, as well as in descriptive understandings of legitimacy that equate legitimacy with popular support directly.

For instance, Rawls's theory of legitimacy founds the legitimacy of constitutional essentials and basic questions of justice on an overlapping reasonable consensus (Rawls 1993, 137), and the legitimacy of other matters on support obtained in democratic procedures (Rawls 1993, 428). Peter's democratic legitimacy view founds legitimacy on the exchange of reasons in deliberation, which is to generate acceptance (Peter 2009, 89).

While in philosophy, normative conceptions of legitimacy are usual, in empirical political science both descriptive and normative understandings are invoked. On both normative and descriptive empirical approaches, political support is usually taken as the measure of political legitimacy. Easton propounds a descriptive notion. On his framework, political legitimacy consists in citizens' *conviction* that the

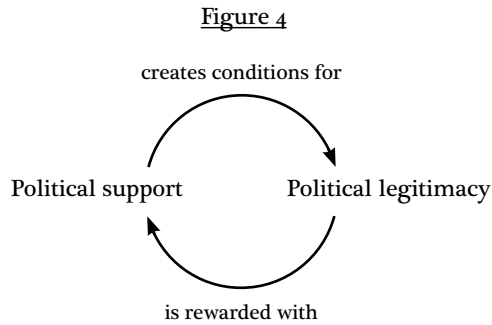
state has a moral right to rule (Easton 1975, 451, cf. Lipset 1959, 86), and it is thus understood as a ‘supportive sentiment’ (Easton 1975, 451). On such an understanding, to observe that political support is decreasing is, at least for democratic societies, the same as observing that the state is “losing legitimacy among its citizens, who are the foundation of the democratic system” (Dalton 2004, 2). On such a descriptive notion, political legitimacy depends on the political support of citizens, not on whether that support is merited.

Normative conceptions are also used in empirical science, based on the argument that political support should be distinguished from the things that lead people to grant such support (Thomassen and Van Ham 2017, 8). The presence of normative political legitimacy may lead citizens to grant support, making legitimacy a possible cause of support. Despite their conceptual distinction between support and legitimacy, Thomassen and Van Ham still argue that *measuring citizens’ political support* forms the best strategy to assess legitimacy (Thomassen and Van Ham 2017, 8). They take support as a proxy for legitimacy, on the assumption that what really matters are legitimacy *judgments* made by citizens, as opposed to legitimacy itself. They take this to be the common approach (Thomassen and Van Ham 2017, 6). In empirical political science, then, political legitimacy is measured in terms of support, regardless of whether the concept of political legitimacy is understood as a descriptive or a normative notion.

Given the prevalence of the notion of support in the analysis of legitimacy, it would be a very radical departure from established convention to deny that support plays any role for legitimacy. Does the normative approach to political legitimacy presented in this dissertation suggest such a radical departure? I argue that it does not. This chapter considers how political legitimacy and support are related if we adopt the kind of account I have proposed. The analysis is tentative: it maps possibilities and considers some evidence that may make these possibilities more or less plausible.

The chapter proceeds as follows. The first section discusses the concept of support in some more detail. The second and third sections, respectively, discuss two possible relationships between support and political legitimacy given the kind of legitimacy account that

I have proposed. The two possible relationships are schematically represented in the figure below. Both relationships are contingent, not logical, relationships. The developed approach to political legitimacy precludes a logical relationship; the mere presence of high levels of support need not imply high political legitimacy. However, there may well be important relationships between support and legitimacy, understood as impact on capabilities for sustainable development.



One possible relationship is that political legitimacy leads to support, if citizens reward a state's morally justified performance with a supportive attitude (the lower arrow in the figure). In that case, support supervenes on legitimacy. The other possibility is that support leads to political legitimacy, if by their attribution of support, citizens create favourable or improved circumstances for the state to make effective contributions to people's capabilities for sustainable development (the upper arrow). (The level of) support is then a condition for legitimacy. I will call the first relationship (the lower arrow) 'legitimacy leads to support', and the second (the upper arrow) 'support leads to legitimacy'. These terms suggest a causal relationship. While it will in both cases be difficult to prove causality, it is interesting from the perspective of a normative theory of political legitimacy to pose the existence of these relationships as hypotheses, and to examine under which conditions they can be sustained empirically. This final chapter sets out and reflects on these hypotheses.

5.1

The concept of political support

Political support is a central concept in discussions of political legitimacy, both in philosophy and in empirical political science, as pointed out above. The importance that is attached to political support is tightly connected to ideals of consent and democracy, which in turn are valued due to the equal moral standing of all persons (e.g. Rawls 1993, 3).

In political philosophy, political legitimacy is often based on consent – e.g. actual or hypothetical consent. Actual consent can be seen as a strong type of support. The idea of actual consent has played a role in theories of political legitimacy at least since John Locke's *Second Treatise of Government* (1980 [1690]). At the heart of Locke's theory lies the idea that no government can be legitimate without the consent of the governed (Simmons 1976, 274). No actual states, however, are based on consent, and not many philosophers today think that actual consent is required for legitimacy.¹³⁴ A possible alternative is to rely instead on hypothetical consent, and in that way to preserve the search for principles that bring us “as close as a society can to being a voluntary scheme” (Rawls 1999, 12). Rawls searches for principles “which free and equal persons *would assent to* under circumstances that are fair” (Rawls 1999, 12, my emphasis, cf. Nagel 1991, 33, Waldron 1993, 53). Hypothetical consent, because it relies on idealised circumstances or citizens, is a theoretical construction that

¹³⁴ Philosophical anarchists might be seen as exceptions. They draw from the absence of actual consent the conclusion that “all existing states are illegitimate” (Simmons 2001, 103). As Simmons presents the anarchist's case, this does not necessarily mean that they oppose or want to eliminate states. Rather, the illegitimacy of states is taken to count against “any strong moral presumption in favour of obedience to [...] existing states” (Simmons 2001, 104). Even on this view of philosophical anarchism, then, the absence of consent only significantly impacts the obligation to *obey*, and not the privilege of states to *coerce*. Simmons says that a state is *justified* in doing what it does if there are moral reasons to refrain from undermining it and to positively support it. This may be the case, for instance, if the state promotes people's happiness (Simmons 2001, 137). *Legitimacy*, which Simmons distinguishes from justification, is the state's right to impose duties of obedience on citizens. This right can only be obtained by consent (Simmons 2001, 137).

is conceptually detached from what people actually support (Horton 2012, 133). For this reason, it is doubtful that hypothetical consent can still meaningfully be understood as a variation of support, if support relates to the attitudes and behaviour of actual citizens.

It is the attitudes and behaviour of actual citizens that will be the focus of this chapter. Does it matter for political legitimacy what actual citizens think about their state and its government, and how they behave in response to it? To address this question, I will draw on the concept of political support as it is used in empirical political science. In the empirical literature on political support, David Easton's discussion of the concept of political support (1975) is usually taken as the starting point. Central to the concept of support, according to Easton, is "an attitude by which a person orients himself to an object either favorably or unfavorably, positively or negatively" (Easton 1975, 436), where this attitude, when positive, can also result in behaviour intended to uphold, promote or defend the object. While Easton defines support as a positive *or negative* attitude, I will instead use 'support' to refer to the positive attitude, while keeping in mind that when we ask whether a person supports an object, the answer may of course also be that they do not, and that their attitude is negative. An attitude may also be neutral, as a possibility within the extremes of positive and negative attitudes. Both in the negative and the neutral case, there is a lack of support. In relation to a people or an electorate at large, we can ask about the *level* of support, which will then express the aggregation of positive and negative attitudes, leading to a higher or lower level of support. Support is generally understood as a relational concept; there is an agent A (e.g.: a citizen) that supports some object or agent B (e.g.: the government) to perform a certain task or role X (e.g.: make law) (Hardin 1999, 28).

It is in this attitudinal and behavioural way that political support serves as a measure of legitimacy in empirical science. To further specify support, Easton's distinction between specific and diffuse support is usually invoked. As Easton set out the distinction, specific support is support for current political office-holders, while diffuse support is support for the regime, 'the underlying order of political life', more abstractly speaking (Easton 1975, 436). Empirical research confirms that citizens indeed distinguish between specific and diffuse

support, although these two terms are nowadays seen as the two ends of a continuum, rather than as a dichotomy (Voogd 2019, 36). In the practice of measurement, a division into four or five different objects of support, ranging from most specific to most diffuse, is often made (e.g. Dalton 2004, 59-60, Norris 2011, 24, Voogd 2019, 39). Convention has not settled on one set. To measure support in the context of political legitimacy, empirical scientists draw on data concerning both more specific and more diffuse objects of support.¹³⁵

Before proceeding, consider the question whether my account of political legitimacy suggests a relationship with a more diffuse or specific type of support. This will be relevant to the discussion in the next two sections. I have emphasised that the content of any instantiation of the use of coercive power, i.e.: every law and policy, or other decision that relies on coercive state power, must be justified. This suggests a specific, rather than diffuse, take on political legitimacy. If we look at the figure above, both relationships might then be examined with specific support in mind. That is: (1) how do citizens change their attitudes and behaviour in response to specific state performance? Does the moral quality of the state's performance determine citizens' specific support (legitimacy leads to support)? And (2), how does citizens' specific support for (proposed) state measures affect the moral quality of the decisions that state officials make (support leads to legitimacy)?

Diffuse support may also well be relevant to political legitimacy. Especially concerning the 'support leads to legitimacy' relationship, citizens' more diffuse attitude towards the system as a whole might be expected to affect the extent to which governments can count on citizens' cooperation. As discussed more elaborately below, a state is likely to need citizens' cooperation in order to be able to make effective contributions to capabilities for sustainable development. In sum, then, both more specific and more diffuse measures of support could be relevant, and neither should be set aside out of hand.

¹³⁵ For instance, Berggren, Bjørnskov and Lipka (2015, 309) use 'satisfaction with democracy' (quite diffuse) and 'confidence in parliament and political parties' (quite specific). Van Ham and Thomassen (2017) consider measures of support across the spectrum of diffuse to specific in the analysis of an alleged legitimacy decline. Andeweg and Farrell (2017, 83) rely on measures of the 'degree of satisfaction with the way national democracy works' (mid-spectrum) and 'trust in parliament' (quite specific).

5.2

Legitimacy leads to support: citizens reward legitimacy

Taking political legitimacy as a normative notion, an account of legitimacy provides criteria that the state must meet in order to be legitimate. I have proposed a number of criteria in the previous chapters. It is not necessarily the case, but certainly possible, that citizens positively evaluate the state when it meets these criteria and give their support to the state in response, for instance by voting for incumbent parties in elections when these parties have performed well. Legitimacy would then lead to support due to citizens rewarding the state for its morally justified performance.¹³⁶ This relationship is represented by the lower arrow in the figure above, and I refer to it as ‘legitimacy leads to support’. Insofar as this relationship between good performance and political support exists, (specific) support is a better or worse measure of legitimacy.

This relationship between legitimacy and support can also be called ‘support as evaluation’, where evaluations can, following the literature, be based on mainly two aspects of state functioning: policy performance and process performance (Van der Meer and Hakhverdian 2017, 82). This section is structured on this distinction. I first discuss policy performance, and consider empirical evidence that confirms or rejects the idea that political support is a consequence of a government’s policy performance. Second, I discuss process performance, and look at empirical evidence that suggests that political support correlates with such performance.

There is one caveat to mention in relation to this distinction. The distinction between policy and process is based on the idea that policy is the outcome of a process, and that those two can be conceptually

¹³⁶ While support, in this case, is granted based on the output that a state delivers, my conceptualisation of legitimacy is different from what has been called ‘output legitimacy’ (e.g. Scharpf 2003). Output legitimacy relies on “*trust in institutional arrangements* that are thought to ensure [...] that the policies adopted will generally represent effective solutions to common problems of the governed” (Scharpf 2003, emphasis original). As such, legitimacy is conceptualised in terms of *trust*, and not in terms of the quality of the policies directly. Output legitimacy, so conceived, is a descriptive notion, while I have developed a normative conceptualisation of legitimacy.

kept apart. We should note, however, that the formal procedures that a state uses to arrive at output are themselves enshrined in laws, and that how processes are shaped within existing procedures is likewise a topic for policy decisions. When laws and policies concerning procedures and processes are adopted, maintained, or changed, procedures and processes are thus outputs from previous procedures and processes, such as when a parliament decides on new voting procedures. The distinction between process and outcome is hence not as strict as it seems. For this reason, I will only discuss *social* output under the heading of ‘policy performance’, and discuss *political* output concerning procedures and processes under the heading of ‘process performance’. This mirrors the distinction between social capabilities and political capabilities that I will draw on below.

Policy performance

A state’s social-policy performance – understood as pertaining to both the *laws* it adopts and maintains, and the *policies* that it carries out within its legal framework¹³⁷ – is of central relevance to political legitimacy on the account I have presented. Chapter 4 proposed three broad values – survival, prosperity, and sustainability – the pursuit of which forms the rationale for having a state. A state’s social-performance record, then, forms a central part of a legitimacy assessment, given that this performance determines to a great extent how the state contributes to the adopted values.¹³⁸ If it would be the case that citizens grant support on the basis of how well a state performs qua social laws and policies, this would mean that support is a useful measure of a state’s legitimacy on the account I have developed, even if support is not constitutive of

¹³⁷ Usually, a policy is not a single action, but a repeated action that is performed in similar cases, e.g. to execute traffic controls at busy intersections during peak hours. A policy, thus, can be phrased as a principle of regulation, i.e.: a principle that we decide to adopt within a background framework of more fundamental principles (laws, in this case) and which regulates our affairs (Cohen 2003).

¹³⁸ Note that a state’s *lack of interference* could also be conducive to capabilities, if non-state actors are better at contributing to capabilities than state actors are. In this case, a state’s non-performance has to be included in an assessment of its social-policy performance. After all: a decision *not* to make laws or policies is then the justified decision, and hence contributes to that state’s legitimacy.

legitimacy.

Throughout the political-science literature, research on citizen support has usually focused on one specific policy area: macro-economic performance (Van der Meer and Hakhverdian 2017, 83). This is, for instance, the case in the literature on ‘vote and popularity (VP) functions’, which measures support for the government as a function of economic outcomes (Nannestad and Paldam 1994, 213). The general idea throughout this literature is that voters hold the government responsible for developments in the economy (Nannestad and Paldam 1994, 215, Lewis-Beck and Stegmaier 2013, 368), either through how they vote (the vote function) or through their assignment of approval (the popularity function). Of the economic variables tested,¹³⁹ voters have been found to react mainly to unemployment and inflation (Paldam 2008, 536). The gist of the research on VP functions is that the voter rewards the government for good economic performance and punishes it for bad performance (Lewis-Beck and Stegmaier 2013, 368). The relationship between the state of the economy and citizens’ assignment of support relates primarily to the capability categories of survival and prosperity.

To get a full picture of how citizen support varies with the legitimacy of the state, the other areas of a state’s policy performance must also be taken into account. Macro-economic data are neither exhaustive of the categories of survival and prosperity, nor adequate measures to infer which capabilities future generations can hope to enjoy (the sustainability perspective). Moreover, even insofar as macro-economic data tell us something about the prosperity of a society on the aggregate level, they do not tell us how capabilities are distributed over society, and whether all citizens have adequate capabilities to prosper.

Measures exist that have been devised to allow for such a broader perspective. Of the measures in use, the Human Development Index (HDI) is probably the most influential one around (Yang 2018, 457). The

¹³⁹ These include macro-economic variables such as employment, per capita real income, per capita money income, and inflation (e.g. Kramer 1971, Bengtsson 2004), as well as micro-economic data concerning people’s individual financial situation and perceptions of how the general economy is doing (e.g. Fiorina 1978, Borre 1997).

HDI was developed by Amartya Sen and Mahbub ul Haq and is based on proxies for three important capabilities: health, education, and goods (Stanton 2007, 1). The HDI has evolved over time, in response to critiques directed at it (Stanton 2007, 16-22).¹⁴⁰ With changes included, it is still used in Human Development Reports. An inequality-adjusted HDI (IHDI), which lowers HDI scores as countries become more unequal on the measured capabilities (see Yang 2018, 458), is also in use in these reports.

The HDI could be used in legitimacy assessments by taking a country's HDI (or IHDI) scores over multiple years, and analysing how the scores change over time. Improvements would suggest (though not imply) a positive impact of state performance on people's capabilities, and thus count towards legitimacy. *Ceteris paribus*, the bigger the improvements, the higher a state's legitimacy would be. It is important to look at the development of a country's score over time, rather than at the level of the score itself. To apply the legitimacy theory developed here, *improving* scores could be taken as a proxy for legitimacy, not *high* scores. A state may have low, but improving scores, or high, but deteriorating scores. In line with the arguments developed in previous chapters, the direction of this development is more important for legitimacy than the score itself. As argued in chapter 4, what matters for political legitimacy is that a state use its power to have a positive *impact* on people's capabilities. A state's impact may be positive, even if HDI scores are as of yet not very high. Reversely, a state's impact may be negative, even if HDI scores are currently still high. To test the relationship 'legitimacy leads to support', it should hence be examined how support varies with changes in one country's HDI scores. Note that improving scores do not *prove* good state performance; scores might also improve *despite* state performance, instead of *thanks to* it. Moreover, the HDI is but one possible proxy. These caveats should be kept in mind.

¹⁴⁰ While the HDI is broader than just macro-economic variables, it has been critiqued for still containing only a limited number of dimensions. The trade-off between usability in measurement and adequacy from a normative perspective is no doubt very complicated. The HDI opts for the usability side of this dilemma, and is "a pragmatic compromise that puts all priority to the possibility of computing the measure for all countries, at the cost of being unable to track many dimensions and their correlations" (Fleurbaey 2015, 205, cf. Alkire 2007, 98).

A related index that incorporates more dimensions than the HDI is the Economic and Social Rights Fulfillment Index (ESRF Index). Sakiko Fukuda-Parr positions the ESRF Index as sharing “the same key objectives of expanding human freedoms and dignity” as the human-development and capabilities approach and as drawing on the methods and concepts used in the latter (Fukuda-Parr 2011, 86). The ESRF Index incorporates six rights – rights to health, education, food, housing, social security, and decent work – and relies on socio-economic survey data (Fukuda-Parr 2011, 83). Its aim is to determine a standard of rights fulfilment that is feasible for a specific country, and to extend a lower score on the index the farther away that country is from achieving its custom-tailored standard.¹⁴¹

The aim of the ESRF Index is to set benchmarks that “can realistically be achieved” by countries given a specific level of resources (Fukuda-Parr 2011, 83), thus incorporating at least one type of feasibility constraint. This is an especially interesting feature for our current purposes, given the emphasis I have put on the relevance of feasibility constraints for legitimacy assessments (see chapter 3). It would thus be interesting to see how political support varies with changes in a country’s ESRF-Index score.¹⁴² Again, the same caveats as for the HDI should be taken into account; the index is merely a proxy and does not prove morally justified state performance, and there may be other empirical measures that can be used in testing the relationship between legitimacy and support.

I am not aware of empirical research on political support that links support to measures like the HDI or the ESRF Index. My conclusions

¹⁴¹ To calculate the index for a country, benchmarks on the included dimensions are set for this country, after which it is determined to what extent the country meets these benchmarks. Benchmarks are based on a ‘frontier’ that shows the highest levels of rights fulfilment that have been achieved on a certain indicator by any country given the same level of resources available (measured in GDP per capita) over the last 25 years. The idea is that “states should be obligated to achieve the highest level [of rights fulfilment] historically recorded for countries with the same level of resources that they currently have” (Fukuda-Parr 2011, 84).

¹⁴² That said, the claim that all countries could, and should, meet their GDP-adjusted benchmark “if they were making the best effort to achieve rights fulfilment” (Fukuda-Parr 2011, 84) seems an overstatement. After all, there may well be feasibility constraints other than too little money that inhibit the realisation of rights.

about political legitimacy make clear that such measures are relevant and should be taken into account, in addition to the macro-economic variables commonly relied on in empirical research.

An important disadvantage of all these measures is that they do not incorporate sustainability indicators. This leaves the very serious risk that present-day improvements are obtained at the cost of the opportunities for future generations, while this remains invisible in how states score on the measures used (Togtokh 2011). This is very undesirable, given the huge implications that the lifestyles of prosperous people have and are expected to keep having for the habitability and productivity of the earth. In this respect, the Happy Planet Index (HPI) and the Human Sustainable Development Index (HSDI) bear mentioning. The Happy Planet Index “compares how efficiently residents of different countries are using natural resources to achieve long, high wellbeing lives” (The New Economics Foundation 2016, 1). It is based on measures of life expectancy, experienced well-being, inequality and ecological footprint. Countries such as Costa Rica, which combine low ecological footprints with high well-being, come out on top of this index, while prosperous western countries fare worse due to their high environmental impact.¹⁴³ Another index that includes a sustainability dimension is the Human Sustainable Development Index. The HSDI was proposed as a revision of the HDI: it adds the sustainability-related variable of a nation’s per capita carbon emissions to the index (Togtokh 2011). On the HSDI, various European countries obtain high scores, while e.g. Australia and the USA tumble (Bravo 2014, 146). Unfortunately, neither the HPI nor the HSDI seems so far to have attracted a lot of academic attention.¹⁴⁴ For this reason, they are underdeveloped.

In sum, then, one way in which legitimacy and support might be related, is that support is granted on the basis of a state’s (social-)policy performance. The literature on VP functions provides reason to think that such a connection indeed exists in relation to macro-economic variables. This connection between legitimacy and support would

¹⁴³ See <https://happyplanetindex.org/>, accessed 27 September 2020.

¹⁴⁴ See Tausch (2011) for an – unpublished – exception concerning the HPI, and Bravo (2014) for a reflection on and application of the HSDI.

be still closer if it would also be the case that support is conditional on richer measures like the HDI or the ESRF Index, given that they capture more capabilities. Measures should be devised or further developed that also adequately address the sustainability perspective.

Process performance

Next to policy performance, we can also look at a state's process performance. I will understand a political process to refer mainly to two things: (1) the formal procedures that state officials must follow, such as voting rules, and (2) the more informal way in which decisions are prepared before the formal moment of decision-making arrives, which may include e.g. citizen consultation. A decision that has been made according to formal procedures may in this respect be flawless, but the process might still be very suboptimal if for instance relevant perspectives have been ignored. The possibility examined in this subsection is that support might be related to legitimacy through a state's process performance: citizens might grant their support based on how they evaluate how a state performs in this respect. I will discuss the formal and the informal aspect of processes in turn.

Formal procedures

State decision-making is generally bound by many formal procedural rules: voting rules in e.g. parliament, rules relating to integrity to prevent power abuse, hierarchical structures determining which kind of decision belongs to which level or body of government, et cetera. If these rules are violated, the origin of state decisions is problematised, and in a very direct way, their legitimacy may be denied.

It is worth reflecting on the relationship between the procedural origin of decisions and political legitimacy on the kind of account that has been developed in this dissertation. Decisions might have a positive impact on people's capabilities, even if their procedural origin is problematic. Does that mean violations of procedure are acceptable as long as the resulting decisions are beneficial? There are several reasons to deny this.

First of all, formal procedures play an important role in securing people's political capabilities. Political capabilities comprise people's opportunities to participate in and influence collective decision-making through e.g. voting and speaking freely about their views in public discussion and to decision-makers (Claassen 2018, 192). Formal procedures fix who is responsible for which decisions, and hence which rights citizens have – e.g. the right to elect their representatives – and who they must approach if they want to make their views concerning a certain issue known to decision-makers. As Sen points out, political capabilities are valuable in themselves; they form a part of development directly, quite apart from the instrumental value they may have in delivering other benefits (Sen 1999, 5). Because people have reason to value their political capabilities, they should be taken into account in legitimacy assessments, understanding legitimacy as impact on capabilities. Following procedures is hence not only important for legitimacy for instrumental reasons: it is intrinsically valuable for people's political capabilities.

There are many ways in which political capabilities can be undermined. One clear way in which political capabilities can be harmed via the violation of formal procedures is through corruption. Departing from formal procedural rules is called corruption when these departures are made for the private gain of the transgressing official (Warren 2004, 329, Chang and Chu 2000, 259, Anderson and Tverdova 2003, 92, Kunicová and Rose-Ackerman 2005, 577). Corruption “breaks the link between collective decision making and people's powers to influence collective decisions through speaking and voting” (Warren 2004, 328). By undermining people's power, and making their influence on political decisions dependent on the interests of the official in question, corruption harms people's political capabilities.¹⁴⁵

Second, corrupt departures from formal procedure also harm other capabilities. There is an often-confirmed relationship between a country's levels of corruption and poverty (Blackburn 2012, 403).

¹⁴⁵ Note that political capabilities are still undermined if departures are made for non-corrupt reasons. Departures introduce arbitrariness, and arbitrariness creates uncertainty for citizens concerning the circumstances in which they can create their lives (cf. Warren 2004, 335).

Evidence suggests that the causal relationship between corruption and poverty runs both ways. Importantly for our purposes, many studies report that corruption is a cause of low economic development; it has been found to negatively impact investment and to increase the costs of doing business (see Keith Blackburn (2012, 403) for an overview). By corruptly violating formal procedures, then, state officials will likely also fail to use state power for the promotion of social capabilities. This further undermines the legitimacy of the way in which this power is used.¹⁴⁶

The impact of corruption on legitimacy goes even further. Laws and policies that are non-corruptly enacted for in principle good reasons can become ineffective if citizens lose confidence that political decisions are in fact taken for justifiable reasons (Warren 2004, 328). This decreased confidence may in turn make the state less effective in applying laws and policies that are sound and non-corruptly enacted, which undermines the state's contribution to people's capabilities. I will come back to this effect in the next section.

This discussion of corruption shows that violations of formal procedures – at least when these violations are corrupt – are harmful for political legitimacy in several ways. Corruption is an especially relevant category of procedural violations to consider, given the fact that there is a strong and often replicated empirical relationship between corruption and a negative evaluation of the performance of the political system (e.g. Van der Meer and Hakhverdian 2017, 98, Anderson and Tverdova 2003, 99, Seligson 2002, 424, Chang and Chu 2000, 269). The possibility that legitimacy and support are connected due to support being conditional on procedural performance is thus plausible.

Informal processes

An important part of decision-making processes is difficult to capture in formal procedures. For instance: the attitudes with which political-

¹⁴⁶ Note that the connection is empirical; there might be situations in which corrupt choices happen to conform to justified choices. It is hard to imagine what such a context would look like, however.

power holders approach citizens cannot be regulated, but forms an important part of the quality of a decision-making process. Are state officials open to what citizens have to say, and genuinely intent on taking their perspectives into account? Or do they merely talk to citizens to sell their own point of view? I now consider this side of processes: the way in which citizens are included in decision-making processes in more informal ways. First I consider why and how citizens should be offered opportunities to participate, in order to determine whether such opportunities are relevant for political legitimacy. Then I look into the empirical relationship with political support: is support granted conditional on adequate opportunities to participate?

Like for formal procedures, it is pertinent to consider how citizens' opportunities to participate in state decision-making, and hence the state's openness to citizens, relate to political legitimacy. It is not obvious that openness is necessary for legitimacy; decisions may contribute to sustainable development without citizens having participated in the making of these decisions. Why would citizen participation nevertheless be valuable?

Again, we can note that the opportunity to participate increases people's political capabilities and hence bears a direct connection to legitimacy understood as impact on capabilities. However, given that informal processes, of which participatory activities are usually a part, can be shaped in many different ways and are often not specified in laws, it is less clear what citizens can justifiably expect qua opportunities. For this reason, the question what opportunities should be offered merits examination. How is political legitimacy served by the creation of opportunities for citizen participation?

A first reason for involving citizens in decision-making that readily presents itself is an epistemic reason: given that state agents do not have privileged insight into how to promote people's (social) capabilities, and given that there are many experts and stakeholders to be found who are not state agents, there are strong reasons for the state to take people's opinions and preferences into account and to be responsive to them. By being open to citizens, the state can collect expertise and relevant perspectives, making it more likely that ignorance, bias or narrow-mindedness are the basis for state decisions. This is a variant of

an ‘epistemic democracy’ argument (Peter 2016, 137, List and Goodin 2001, 277); there are reasons to provide avenues for citizens to address the state agents that make decisions in their name, and to be taken seriously. As Robert Goodin and Kai Spiekermann concisely put it: the best thing for decision-makers is to just “ask around” (Goodin and Spiekermann 2018, 3), given that many errors root in sheer ignorance.

Asking around may well not result in a clear suggested course of action. Nor does it mean that, once having asked around, the state must do what citizens want *per se*.¹⁴⁷ Yet, the state, acting through its officials, must take very seriously the possibility that it does not have the capacity to determine which laws and policies best contribute to capabilities for sustainable development and that knowledge and opinions therefore must be gathered sufficiently widely. It is to be hoped that laws and policies that are chosen on the basis of the knowledge and opinions collected in this way will have a stronger and more positive impact on capabilities for sustainable development than laws and policies for which the epistemic capacities of the society have not been consulted, and will subsequently attract more support.

It is useful to pause on this point, and to consider whether the epistemic argument still holds if there is considerable voter irrationality, as some claim there is. Bryan Caplan, for instance, argues that “voters are worse than ignorant; they are, in a word *irrational* – and vote accordingly”. As a consequence, “democracy persistently delivers bad policies” (Caplan 2006, 2). Research also shows that voters tend to be myopic: they make voting decisions based on government performance during the few months before the elections, and not on an over-all assessment of how it performed during its term (Achen and Bartels 2016, 153). Moreover, they have been found to hold politicians responsible for things that were outside their control, such as droughts, floods and shark attacks (Achen and Bartels 2016, ch. 5), although this result is not uniform and subject to further specification.¹⁴⁸ If voters are

¹⁴⁷ Given that not all citizens want the same, this would not be possible in a straightforward sense anyway. Opinions need to be aggregated and turned into a coherent decision first. Decision-making procedures are required for this (Peter 2016, 136).

¹⁴⁸ While it would indeed be irrational to hold the government accountable for the occurrence of e.g. a drought, it may not be irrational to hold it accountable for the

thus not the best epistemic judges, what good is to be expected from consulting with them?

In response, the following can be said. Gathering knowledge and opinions widely does not mean that the state should set out a poll, let everyone vote and act according to the result. The value of ‘asking around’ is to get a clear view of the landscape of knowledge and opinions concerning a certain issue. Without such a clear view, the state is likely to miss relevant knowledge, which may result in less justifiable decisions. For this reason, it is useful to both consult experts¹⁴⁹ and lay stakeholders. Because experts can be mistaken and can overestimate their own contribution, state officials should consult a wide array of experts, make sure that their opinions are not all dependent on each other, but have, where possible, been reached independently (Holst and Molander 2017), and engage in their own reflection on what the experts say.¹⁵⁰ Consulting experts should not be expected to lead to a conclusion directly; it is not a sufficient strategy for the selection of a choiceworthy course of action, but it may well be a necessary one. After having considered the available expertise, decision-makers still have to use their own judgment to determine what to do. Lay knowledge is also relevant to take into account (Holst and Molander 2017, 246), especially where it concerns the perspectives of laypeople who are directly affected by the laws or policies in question. Without an adequate grasp of the problems that people face, and how a law or policy under consideration would affect people’s lives, it is very difficult to adopt appropriate laws and policies (Chambers 2017, 270). To get a

event becoming a disaster; “[n]atural disasters are not events that are simply caused by nature [...]. Disaster preparedness, response, and recovery are human and specifically, political tasks. Hence, governments are accountable for the impact of these events” (Albrecht 2017, 384). And indeed, there is no uniform trend in how citizens respond to disasters in terms of political support (Albrecht 2017, 385). While effects on political support are more often negative than positive, positive effects do occur (Carlin, Love, and Zechmeister 2014, 4-5). Moreover, voters have been found to respond more to the political reaction to a disaster, than to the disaster itself (Healy and Malhotra 2010).

149 Experts have significant knowledge about a topic at hand, and exceed the average person to a considerable extent in this respect. They are aware of the opinions and arguments concerning the topic at hand that are voiced by others, and are able to apply their knowledge and arguments to new questions (Christiano 2012, 36-7).

150 The consultation of experts aligns with what Mansbridge et al. call the epistemic function of a deliberative democratic system (Mansbridge et al. 2012, 11).

feel for what state measures must accomplish, law- and policymakers should be confronted with people's lived reality, and hence should gather these perspectives sufficiently widely. When doing so, state officials should be aware of the risk of power imbalances; these may "derail the discussion so that the views of the elite dominate" (Alkire 2007, 106). Active efforts are required to make sure that those who do not easily get or make their voice heard are involved, and sufficient diversity is achieved.¹⁵¹ In sum: there are epistemic reasons for states to be open to citizens in arriving at decisions. There is reason to believe that openness is called for in creating a sufficient knowledge base to arrive at morally justified decisions.¹⁵²

These caveats point to the conditional value of citizen participation; even if citizen participation is intrinsically valuable because of its contribution to political capabilities, this value must be weighed against the value of contributions to other capabilities, and these are not necessarily served by citizen participation in decision-making. While departure from formal procedures in the form of corruption is widely acknowledged to also result in negative effects on social capabilities (which was discussed above), this is less clear in the case of citizen participation. As listed by Renée A. Irvin and John Stansbury (2004), there are various disadvantages to citizen participation that may come into play depending on the situation. Irvin and Stansbury mention the risk of elite domination in participatory processes, the risk of breeding resentment if citizens' expectations are too high, and possible selfish motivations on the part of citizen participants leading to decisions made in only their own interest (Irvin and Stansbury 2004, 59-60). Moreover, citizen participation may be ineffective and a waste of resources, depending on the circumstances (Irvin and Stansbury

¹⁵¹ Including lay perspectives concurs with the democratic function of deliberative democracy (Mansbridge et al. 2012, 12). Here, however, I consider the epistemic function of including lay perspectives more relevant. When law- and policymakers deliberate about which measures to adopt, the inclusion of lay perspectives improves the knowledge base on which decisions are made.

¹⁵² Note that this approach differs from Fabienne Peter's take on the epistemic argument. While she adopts democracy as a context-independent, necessary requirement for political legitimacy, I argue that the state should create those avenues for the consultation of experts and stakeholders that will lead, in the actual context, to decision-making that best serves the political values.

2004, 62).

Taking these considerations into account, we can conclude that shaping informal processes well does not imply that citizens should necessarily be given as many opportunities as possible to participate in decision-making. Rather, political leaders should be aware that there are many epistemic resources present in society, and use these resources in a way that makes state decisions most conducive to capabilities.

The next question is: how do citizens respond to opportunities for citizen participation? As pointed out by Irvin and Stansbury, participatory trajectories may breed resentment and backfire if the expectations that citizens have of the trajectory do not match the authority that it actually grants them (Irvin and Stansbury 2004, 59). On the other hand, if citizens believe they have been treated fairly and have a positive view of the process, this can also positively affect their assessment of the decisions that are the outcomes of that process and of the government that made them (Kweit and Kweit 2007, 413). On the basis of their own fieldwork, Mary Grisez Kweit and Robert W. Kweit found that what citizens value most is not necessarily participation itself, but rather the feeling that there are avenues to voice their opinions *if* they want to (Kweit and Kweit 2007, 420, cf. Newton 2006, 847). This suggests that people indeed value their political *capabilities*, even if they do not choose to *function* in ways that make use of these capabilities, and may well make their support conditional on them.

In conclusion: citizens can make their political support conditional on how the state performs qua policy and process. This possibility is represented by the lower arrow in the figure: 'legitimacy leads to support'. This section has surveyed several ways in which this connection could take shape, and considered evidence that looks into these connections. There are quite some indications that support is indeed conditional on state performance, with punishments on corruption being the most convincing connection. This, then, establishes a first way in which legitimacy could be related to support. It suggests that, along the lines discussed in the section, support could serve as an indicator of legitimacy, keeping in mind that the connection is contingent.

5.3

Support leads to legitimacy: conditions for legitimacy

The second possible relationship does not examine how citizens respond to state performance. Rather, in this relationship, citizen support is the independent variable and the question is how the attitudes of citizens shape the conditions under which states have to function and make contributions to capabilities for sustainable development. This relationship – ‘support leads to legitimacy’ – is represented by the upper arrow in the figure above. The relationship may be of two different kinds. On the first kind, which I will call ‘positive relationship’, high levels of support increase political legitimacy, while low levels decrease legitimacy. Support and legitimacy then move in the same direction. On the second kind, labeled ‘inverse relationship’, low support increases legitimacy, while high support decreases legitimacy. Support and legitimacy then run in opposite directions. I discuss both possibilities in turn.

Positive relationship

The first possible relationship in which the degree of legitimacy is affected by the level of support is a relationship in which the variables of support and legitimacy move in the same direction; high support leads to high(er) legitimacy, and low support leads to low(er) legitimacy. The thought is as follows. If a state is to make effective contributions to capabilities for sustainable development, it should not only consider the defensibility of proposals for laws and policies in isolation from society, or on paper. It should also consider how proposed laws or policies will be *received* by the people. If people do not support the laws and policies that a government issues, they may oppose them, whether for good or bad reasons. As a result, their effectiveness may be reduced. To ensure the effectiveness, i.e.: actual contribution to capabilities for sustainable development, of laws and policies, governments should be sensitive to what people are willing to support. This subsection works out this line of thought.

Each decision-making situation that a state faces is part of a

long string, and cannot be seen in isolation. What a state does today, will alter the way citizens orient themselves towards it in the future. As pointed out by Easton, specific support for measures at a certain moment may, over time, and in conjunction with citizens' evaluation of other measures, impact their diffuse support (Easton 1975, 445). Diffuse support is basic in a sense that specific support is not: it "underlies the regime as a whole" (Easton 1975, 445).

If diffuse support is low, the circumstances that governments face and in which they have to function are more challenging. While commentators point to the usefulness of critical citizens in keeping officials accountable, widespread distrust and cynicism are seen as putting a democratic system at risk (Van der Meer and Zmerli 2017, 1). As we saw above, perception of corruption is robustly correlated with dissatisfaction with the performance of the political system (Anderson and Tverdova 2003, 99) and corroded trust (Chang and Chu 2000, 269, Torcal 2014, 1559). Where levels of trust are low, people may not be willing to comply with or accept state decisions. Where this happens, "[p]ossible effects [of low institutional trust in contexts of high corruption] include increasing levels of protest, [...] diminishing support for redistributive government action aimed at tackling socioeconomic inequalities, and higher levels of noncompliance with government regulations" (Hakhverdian and Mayne 2012, 748, cf. Blackburn 2012, 401). Given a generalised attitude of non-compliance and non-acceptance, even laws and policies for which there are otherwise good reasons may not reach desirable effects, or have outright negative effects. This undermines their legitimacy, seeing as they cease to have a desirable impact as a consequence of citizens failing to cooperate with them. This holds true for low diffuse support in general (Hetherington 1998, 792), also if it does not stem from corruption.

Low diffuse support thus makes legitimacy more difficult to obtain, in that it heightens the challenge for states to create a positive impact on capabilities for sustainable development. This effect is exacerbated by the fact that states that face a non-cooperative populace may feel the need to escalate the use of coercion to compensate where support is lacking (Zhu 2011, 124-5, Berggren, Bjørnskov, and Lipka 2015, 311). This would make the presumption against coercion all the more difficult to overcome. It also makes it more costly to apply laws

and policies, thus diverting resources away from other goals that could also be pursued.

On the other hand, when diffuse support is high, citizens are likely to be more cooperative and compliant without the need for direct coercion (Levi, Sacks, and Tyler 2009, 355, Hetherington 1998, 803). Specific support may have a similar positive effect. As pointed out in the previous section, sufficient state openness may lead to specific support for the state's process performance. In turn, this may make citizens more supportive of the outcomes, which may increase the effectiveness of these measures in terms of their contribution to people's capabilities, and hence their legitimacy. For instance, as one commentator argues in a discussion of peace negotiations, when civil-society groups are included in peace processes, this may ensure their sense of inclusion and ownership, and prevent opposition to concessions made on their behalf or violent attempts to gain access to the table (Paffenholz 2014, 73). Citizen participation may better ground policies in citizen preferences, and as a result the public may evaluate a government's decisions more sympathetically. This may create less antagonistic circumstances and a more cooperative populace to govern (Irvin and Stansbury 2004, 55). Thus, even if power holders do not establish openness out of a "sincere desire" to improve policy outcomes by using a society's epistemic resources, but rather because of the prospect of "a more cooperative public" (Irvin and Stansbury 2004, 56), acting on this strategic reason may still enhance legitimacy if its effect is that government decisions are more effective in their contributions to capabilities.

Inverse relationship

As just discussed, there are reasons to expect that high levels of support make the circumstances in which states have to achieve contributions to capabilities for sustainable development more amenable, while low levels of support deteriorate these circumstances. In mapping the possible relationships between support and legitimacy, there is one more possibility that bears mentioning. In discussing the relationship 'legitimacy leads to support', we considered how citizens may punish bad performance, or reward good performance. Dealing punishment

or reward based on past performance is a backward-looking act. This backward-looking act, however, can have forward-looking *effects*. If a state performed badly (compromised its legitimacy), and citizens punish it for this bad performance by voting against the incumbent parties, this may incentivise the next government to perform better in the hope of retaining popular support. This mechanism can be called ‘anticipatory representation’ (Mansbridge 2003, 517). In this way, low support as expressed through electoral punishment might lead, in time, to improved performance and hence legitimacy. This is an inverse relationship between support and legitimacy: *low* support leads to *higher* legitimacy.

To be complete in mapping the possible relationships, we should note that there is also the option that *high* support leads to *lower* legitimacy. This effect might occur if voters create (clearly undesirable) incentives for politicians to adopt measures that decrease capabilities, or support political platforms that propose such measures. Undesirable incentives may exist where there is a discrepancy between actions that best promote voters’ interests on the one hand, and actions that attract most votes on the other (Ashworth 2012, 188). Due to such a discrepancy, electoral considerations may come to trump content-based considerations (Healy and Malhotra 2009, 388). Where this happens, anticipatory representation has undesirable effects. For instance, unpopular climate policies may attract punishment at the polls, incentivising inadequate climate policies. This may make accountability counter-productive when policy-making needs to be focused on the long term (Gagliarducci, Paserman, and Patacchini 2019, 33). Moreover, citizens may directly support bad or suboptimal policies, and reelect politicians that do not use their power to adequately further capabilities. In such cases, high support may lead to decreased legitimacy.

In the remainder of this section, I will focus on the ‘low support, increased legitimacy’ possibility, and set the ‘high support, decreased legitimacy’ option aside. I discuss two scenarios in which low support as expressed through significant *electoral volatility* might lead to increases in political legitimacy.

Electoral volatility refers to the voting behaviour of voters away

from previously endorsed political parties and towards other parties. It is generally measured on the aggregate level and expressed as a net percentage change – the Pedersen index (Pedersen 1979), which is widely used (Mainwaring and Zoco 2007, 158, Bischoff 2013, 543, Anderson 1998, 578, Mair 2008, 238n, Tavits 2005, 289n). Empirical research shows that citizens' changing voting behaviour can at least partly be explained by their dissatisfaction with (1) the performance of the party they previously endorsed (Söderlund 2008, 230), (2) distrust in political parties generally (Dalton and Weldon 2005, 945), and (3) dissatisfaction with democracy generally (Anderson 1998, 586, Dassonneville and Dejaeghere 2014, 596). This suggests that electoral volatility can be an indicator of citizen distrust in or dissatisfaction with some political object.

While electoral volatility is thus mainly an expression of a lack of support on the part of voters in response to a negative evaluation, it is not said that electoral volatility cannot have positive consequences for political legitimacy. One possibility is that electoral volatility creates an accountability mechanism: if rulers know they will be punished for bad governance, this may make them govern better through anticipatory representation.

One reason to doubt that the occurrence of such a scenario is common is that the average government in a developed democracy is punished at the polls regardless of how it performed (e.g. Nannestad and Paldam 1994, 235, Ravishankar 2009, 98). This phenomenon is called 'the cost of ruling'.¹⁵³ If governments are punished regardless of how they performed, then an accountability mechanism may not work. There is no electoral incentive for rulers to choose morally good over morally bad behaviour if they know they will be punished for good behaviour just as they will be punished for bad behaviour. This may make it more attractive for politicians to serve their own or party interests, instead of the interests of all citizens.

¹⁵³ One possible explanation for the cost of ruling is that a 'grievance asymmetry' (Nannestad and Paldam 1997, 92) is at play, entailing that voters tend to punish economic downturn more strongly than they reward economic upturn. However, evidence for the existence of a grievance asymmetry in voting has been found to be inconsistent and, according to recent research, insufficient (Park 2019, cf. Nannestad and Paldam 1994, 216).

However, while the cost of ruling is robust, it is not always equally high. An accountability mechanism may still work if the punishment is sufficiently more severe for bad performance than for good performance. The previous section discussed the literature on ‘vote and popularity (VP) functions’. The general observation throughout this literature is that the voter rewards a state’s good economic performance and punishes bad performance (Lewis-Beck and Stegmaier 2013, 368, cf. Healy and Malhotra 2009, 388). This then, does support the view of elections as an accountability mechanism by providing a forward-looking incentive to deliver good economic performance, which is relevant for (though not by far exhaustive of) political legitimacy.¹⁵⁴

A second scenario in which volatility might contribute to legitimacy does not depend on an accountability mechanism providing desirable incentives. Rather, it considers elections as a way to channel citizens’ feelings about the government, and volatile voting outcomes as a way to channel discontent. Even if voters are whimsical, myopic, or otherwise fail to link their vote to objective performance results of the state, low support expressed in volatile voting outcomes might still contribute to state legitimacy if by being able to vote out ruling parties that they are dissatisfied with, citizens remain willing to accept the system and the government in office. Determining or influencing who remains in office and who is set aside can make people feel that they are in charge of controlling their office-holders (Voogd 2019, 115), which boosts political support after elections. As Remko Voogd suggests, high levels of electoral volatility can be seen as a signal that disliked representatives have been successfully replaced through the election. This success restores political support by nurturing the sentiment that elites have been realigned with mass preferences (Voogd 2019, 111). Voogd finds substantial evidence for this mechanism. Restored support in turn may form the support basis that any government needs to make effective laws and policies, as was discussed earlier in this section. In this case, low support as expressed through volatility may ‘relieve’ the electorate and increase legitimacy due to improved circumstances for effective government.

¹⁵⁴ However, not everyone agrees these effects are strong. See e.g. Bengtsson (2004).

It should be pointed out that volatility away from governing parties is only likely to channel the discontent of those volatile voters who voted for governing parties before. Those voters are not necessarily the most dissatisfied ones. In the Netherlands, for instance, non-voters and populist-party voters have been found to be most discontent (Schumacher and Rooduijn 2013, 132, Kemmers 2017, 384).¹⁵⁵ Especially those who do not feel that institutional politics are the locus of the exercise of power – those with an ‘opaque power orientation’ (Kemmers 2017, 399) – may not change their attitude in response to a change in government. These voters do not see any party as efficacious, and their support may hence not increase after a volatile voting outcome. This limits the expectations we could have that legitimacy will improve through electoral volatility along the lines of the ‘channelling discontent’ scenario.

To conclude: the level of support may affect political legitimacy in two types of ways: in a positive way, and in an inverse way. On the positive relationship, levels of support and legitimacy run in the same direction: high support leads to high(er) legitimacy and low support leads to low(er) legitimacy. This may be the case when high support creates favourable circumstances for effective government, while low support makes it more difficult for states to be effective. On the inverse relationship, levels of support and legitimacy run in the opposite direction: low support leads to high(er) legitimacy and high support leads to low(er) legitimacy. This relationship may come about through the incentivising effects of elections on politicians. Whether these incentives increase or decrease legitimacy depends on the kinds of policies that voters reward.

Conclusion

The approach to political legitimacy developed throughout this dissertation and the analysis of the relationship between support and

¹⁵⁵ Causal relations have been found to run both ways; discontented citizens channel their discontent by voting for populist parties, and populist parties fuel the discontent of their followers (Rooduijn, Van der Brug, and De Lange 2016).

political legitimacy conducted in this chapter show how empirical political science and political philosophy can work together. For a non-ideal normative theory, sensitivity to the context is crucial. This brings feasibility concerns and moral costs of changeover to the fore. The practical constraints that result from assessments of feasibility and costs of changeover can only be determined by having an adequate grasp of a society's empirical circumstances.

Especially given the role that citizens' support plays in creating the conditions in which political legitimacy can be obtained, as set out in section 5.3, it is very relevant for power holders concerned to use their power legitimately to know what leads citizens to be supportive of their government. This chapter has surveyed a range of empirical findings that provide insight into what fosters or undermines citizens' tendency to view their government in a positive light. Power holders should heed these insights, in order to make sure that the laws and policies they make will actually effect a positive impact. As such, knowledge of the response to laws and policies that they can expect from their citizenry is vital to furthering a state's legitimacy. Here, empirical political science can be of help in fostering the conditions for normative improvements.



In closing

It's been quite a ride. I started my research on the 1st of November, 2014. Beginning feels so luxurious. You get paid for continuing what you did as a student, but with more time, more depth, more freedom, more privileges, more opportunities. I loved it.

The position was for a three-year trajectory. After that, the funding would stop and the idea was that the dissertation would be finished by then. It didn't scare me. I felt confident I would be able to meet that deadline of 31 October 2017.

My reading and writing got underway. My thoughts developed. I went back and forth between the project description, papers, books, and my own paragraphs. I was looking for a good theoretical 'hook' to build my reflections on, and after a while I found it: political legitimacy. There was the incidental hiccup, but on the whole, everything progressed rather smoothly. Yet, time seemed to pass with similar ease.

Five months before the end of my contract, in May 2017, I went on maternity leave. Tordis was born in June 2017. I was going to finish the contract in part-time, which left ten months of writing time after my leave. It was in those ten months that stress started to mount. I realised that three years of research time wasn't going to be enough. Feelings of failure and anxiety about my prospects took quite a toll.

It was around the time that my contract ended, in the summer of 2018, that I had to make up my mind about whether I wanted to stay in academia or not. I considered looking for a postdoc, but was advised not to do so; my dissertation still needed quite some work. I was able to stay at the VU in an administrative position for a while, but given that I now only had half a day a week to write, it might still be quite a while before I would finish. In this time, I wanted to work somewhere where I could develop myself in a direction that fitted my interests

and ambitions. With academic positions still out of reach, and with a growing desire to work closer to politics again, my die was cast (at least for now): I was leaving.

I started looking for opportunities to work in a more political environment, on topics related to sustainability. I found such an opportunity with AVV, the democratic labour union for which I had already been a board member for some years. In 2019, I carried out a research project on involving sustainability in work and terms of employment. Alongside this project, I worked on my dissertation and went on maternity leave a second time. Hedwig was born in June 2019.

The PhD project started, increasingly, to feel like a ball and chain. I never intended to carry it along with me for so long and with no paid time to work on it anymore, none of my spare time was really free. A voice in my head was always saying: 'you could also write right now.' Over time, I became better at replying: 'shut up. Evenings are mine' (provided that the kids would sleep).

In January and February of 2020, I took unpaid leave to finish my dissertation. The luxurious feeling I remembered from the start in 2014 was there again. It was lovely to be able to speed up my writing after one and a half years of using only scraps of time. By coincidence, it was in this period that I was hired at the Ministry of Agriculture, Nature and Food Quality. I was able to put my starting date on 15 March, which left me two more weeks to work on my PhD. It was exactly what I needed: on Sunday 15 March, I handed in my dissertation. The next day, I started my new job.

So it was quite the ride, but now it's done. I feel happy, relieved, proud. I have had my moments of ambivalence, and occasionally I wondered why I even started. But I am glad that I did and I feel privileged to have had the opportunity to develop my thinking.

Luckily, the collective labour agreement of the Dutch universities now states that PhD contracts should, in principle, be for 4 years.¹ I hope future PhDs will benefit from this, and universities will take their responsibility in this respect.

¹ CAO Nederlandse Universiteiten, 1 januari 2020 t/m 31 december 2020, p. 22, <https://www.vsnul.nl/cao-universiteiten.html>, accessed on 6 September 2020

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Also many thanks to all the fellow philosophers from other universities, in the Netherlands and abroad, who have read and commented on drafts (of drafts of drafts) of chapters from my dissertation on many different kinds of occasions, such as participants of e.g. the following events: ASPP conference 2015, OZSW conference 2015, MANCEPT workshops 2015, DemocracyNet.EU workshop 2016, OZSW spring school on ethical theory and moral practice 2017, WINIR conference 2017, OZSW conference 2017, VURANT workshop 2018, Oxford Studies in Political Philosophy 2018, ASPP conference 2018. In particular, I would like to mention Huub Brouwer and Willem van der Deijl and the other attendants of the peer-review circle we hosted as

part of the OZSW for years. Huub and Willem, I have greatly enjoyed cooperating with you and benefiting from our conversations, both in and outside of meetings. We haven't seen each other as much recently due to our PhDs ending, but I have valued your friendship and hope to keep it warm in the future.

Another group of valued colleagues to mention are the organising committees of the Conference by Women in Philosophy. After having founded this conference with two fellow students in 2014, I am excited that it has been organised annually ever since, and has grown considerably throughout that time. I would like to extend my gratitude to all the passionate women I have worked with in the five years I was on the committee myself, as well as to those who picked up the baton afterwards. (The current website of the conference is <https://womeninphilosophyc.wixsite.com/home>.)

I would like to address Peter Timmerman and Regine Dugardyn as well. Peter, you inspired me to pursue a PhD. I am grateful for the chats we have had in the years since we met. We talked about political philosophy, the experience of writing a PhD, and about things personal. This was very valuable to me. While Peter inspired me to begin, Regine, you perhaps inspired me about how to end. I am thankful for the opportunity you created for me and fellow philosophers to present our work to a wider audience. The *Trouw* article that resulted from this project was very timely, and I would not even be surprised if it landed me my new job.

I am also grateful to my political environment in general. I have always felt that the kind of political theory I do should exhibit a close understanding of how the political process works, and make itself relevant for that practice. To achieve such relevance, I wanted to avoid arguing only with philosophers. Instead, my concern has been to develop principles and arguments that can be of value to those who engage in political decision-making. In doing so, I sometimes feared I was replicating an experience that Bernard Williams attests to having had:

After one glass of bourbon, [Michael Stocker and I] agreed that our work consisted largely of reminding moral philosophers of truths about human life which are very well known to virtually all adult human beings except moral philosophers. After further glasses of bourbon, we

agreed that it was less than clear that this was the most useful way in which to spend one's life, as a kind of flying mission to a small group isolated from humanity in the intellectual Himalaya. (Williams 2005, 52)

Now that my career has moved to more political waters again, I am happy to notice that all the thinking that has gone into writing this dissertation feels useful in my current work. I thank all those in my political environment with whom I have conversed in the last decade, for teaching me about the way the world works.

Also many thanks to the reading committee, for taking the time to read my work. I look forward to the questions that you will ask me about the dissertation at my defence.

Finally, I would like to extend my gratitude to my parents and to my love, Lucas. Mama and papa, thank you for nurturing my critical thinking, for founding my sense of justice, and for helping me build the determination to contribute something of value to the world. Lucas, thank you for your cynicism about philosophy. It challenged me to prove its worth. Thank you for your patience. After the money was up and the kids were born, time to write became exceedingly scarce. You always encouraged me to take the time I needed, despite the extra burden this placed on you. You are a rock.



Curriculum vitae

Work experience

Policy officer sustainable animal husbandry <i>Ministry of Agriculture, Nature and Food Quality (LNV)</i>	March 2020 - present
PhD candidate in political theory <i>Vrije Universiteit Amsterdam</i>	Nov 2014 - Nov 2020
Project leader sustainability <i>AVV: De Democratische Vakbond</i>	March 2019 - Dec 2019

Societal functions

Board member <i>AVV: De Democratische Vakbond</i>	May 2015 - present
Committee work <i>GroenLinks</i>	March 2019 - Dec 2019
<ul style="list-style-type: none"> • Permanent programme committee • Candidacy committee Tweede Kamer (parliament) • Programme committee Tweede Kamer 	<ul style="list-style-type: none"> Jul 2013 - May 2019 Dec 2014 - Nov 2016 Apr - Jun 2012
Co-founder and organiser <i>Conference by Women in Philosophy</i>	2014 - 2018
Board member <i>DWARS, GroenLinks youth organisation</i>	Dec 2010 - Oct 2012
<ul style="list-style-type: none"> • President • Treasurer 	<ul style="list-style-type: none"> Oct 2011 - Oct 2012 Dec 2010 - Oct 2011

Music

Voice and piano teacher <i>Private practice</i>	Nov 2007 - Jul 2015
Singer in various bands and productions	Jun 2004 - Dec 2013

Education

RMA Philosophy, University of Amsterdam	Sept 2012 - Aug 2014
BA Philosophy, University of Groningen	Sept 2008 - Aug 2011
BA Jazz Voice, Prince Claus Conservatoire, <i>cum laude</i>	Sept 2007 - Aug 2011

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