Polecats, Foxes and Lions

Social Choice, Moral Philosophy and the Justification of the European Union as a Restrained yet Capable form of Political Power

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Abstract

John Locke famously argued that the governed are unlikely to consent to a form of political power that unduly exposes them to harm. Nowadays, non-arbitrary political power is often understood as requiring governing institutions to strike a difficult balance between capacity and constraint. Whilst being constrained enough not to be able to get away with the arbitrary treatment of individuals, polities need to be capable enough to protect individuals against non-political sources of arbitrariness. An influential school of thought within the EU literature assumes that the Union is most likely to produce 'restrained yet capable' forms of political power where it is indirectly legitimated by a consensus of Member States. That school of thought basically adopts assumptions of Coasian bargaining theory as introduced to political science by Buchanan and Tullock (1962). Extending a line of argument begun by Fritz Scharpf, this paper shows, however, that, where Coasian bargaining theory breaks down, a consensus of Member States is most unlikely to guarantee non-arbitrary decision-making.

Introduction

In his two Treatises on Government Locke famously criticizes Hobbes for supposing that individuals should willingly give up the inconveniencies of an unruled condition (the state of nature) for the rule of an unconstrained sovereign power.
'This is to think that men are so foolish that they take care to avoid what mischiefs can be done them by polecats and foxes, but are content, nay, think it safety, to be devoured by lions' (1924 [1690], p.163).

Locke's point is, of course, that individuals are unlikely to consent to a form of rule that could unduly expose them to harm. The restraint of power is, therefore, a condition for its legitimacy. At first sight this seems unlikely to help us understand the problem of European Union legitimacy, save, perhaps, to beg the question of why a polity that so often appears constrained to the point of incapacity is seen to pose a problem of legitimacy at all (Barker, 2003). Yet, as Philip Pettit has argued, we seriously under-estimate the challenge of legitimation if we understand it as one of merely restraining power tout court, rather than one of identifying a form of political power that can be justified as 'restrained yet capable' (1997) at the same time.

Now that clearly is a challenge relevant to the Union. An understanding that legitimate power needs to be 'restrained yet capable' is already implicit in the tools that have been developed to study of the Union's own legitimacy (or lack thereof). What else does the widespread practice of analysing the Union's legitimacy into its output and input components (Scharpf, 1999: 2) signify than a recognition that for EU institutions to be legitimate they must be capable enough to produce outputs the governed find useful; and yet constrained enough to satisfy agreed procedural conditions for the rightful exercise of Union powers?

So why does power need to be both restrained and capable if it is to be legitimate? Pettit's own answer begins with the claim that individuals value non-arbitrariness in social systems and that they cannot secure that value by merely restraining institutions of government, since the latter are themselves needed to restrain arbitrariness originating in economic, social and international relations (1997: 287-8). Thus a need to control the arbitrary power of the monopoly producer to extract rents, the arbitrary power of the bad neighbour to impose negative externalities on others, the arbitrary fury of human passions (Hobbes), the arbitrary judgement of the victim who turns out to be a 'poor' and disproportionately vengeful judge in his own case (Locke) or, indeed, the arbitrary power of the bully in international relations, all these

can and have been used to justify the empowerment of strong governing institutions. For Pettit, then, there is an internal relationship between restrained and capable forms of political power. Where either is justified it is in relation to the same value: namely, that of minimising arbitrariness, which he defines as a condition where decisions depend only on the 'arbitrarium' (the pleasure or whim) of those making them, and not on the judgement, let alone the control, of those affected (1996: 55; see also Bellamy, 2007: 80).

However, there is no guarantee that actors will agree on what may be needed if a polity is to be justified as restrained yet capable. Thus alternative understandings of how the EU should be legitimated – from claims it should be indirectly legitimated by its Member States to claims it should generate its own legitimacy in a more direct democratic and/or constitutional relationship with the governed – can be classified, compared, contrasted and critiqued according to the assumptions of fact and value they make about 'restrained yet capable' forms of political power in the European arena. To illustrate how much is to be gained from such an exercise, this paper considers how far arguments for the indirect legitimation of the Union depend on the assumption that it can function as a 'Coasian scheme of co-operation'. Far from being narrowly technical, this is a pivotal question to understanding European integration. Put simply, indirect legitimacy is the belief that the Union is legitimated via its Member States on the principle that a body whose 'authority is recognised and confirmed by the acts of other legitimate authorities' (Beetham and Lord, 1998: 11) is itself legitimate. Whether the Union is best understood as an international organization like any other, a novel kind of international organization (Magnette, 2000), or a new, as yet imperfectly classified, political form, depends on how far it works within the parameters of indirect legitimacy. But what are those parameters? Some are legal to the extent indirect legitimacy presupposes the authorisation of international bodies by their Member States. But not all legal authorisations by states are understood as issuing in indirect legitimacy. They can even be interpreted as alienations rather than delegations of power, as is, arguably, the case in the ECJ's claim to the superiority of Union law: 'By contrast with ordinary international treaties…the Member States have limited their sovereign rights [in favour of]…an independent source of law' (Case 6/64 Flaminio Costa v ENEL [1964] ECR 585).

Given that mere legality may, in any case, be considered a insufficient justification for the exercise of political power (See esp. Beetham, 1991), a fuller theory is needed of how indirect legitimacy can motivate compliance and justify political obligation. With varying degrees of explicitness several leading scholars of European integration (Moravcsik, 1993; Majone 2005; Scharpf, 2006) have attempted to fill the gap with assumptions from what Fritz Scharpf

terms 'Coasian bargaining theory'. Contra that literature this paper questions how far Coasian theory can satisfy some basic conditions for non-arbitrariness needed to justify the Union as a restrained yet capable form of political power.

Whilst the Coase theorem is of course a public choice concept, the paper is a work of political philosophy, it aims to follow Amartya Sen's advice that 'ways out' of problems identified by public choice should be regarded as 'ways into' moral philosophical issues (2002: 328). Thus four difficulties with applying the Coase theorem to the European Union are used to question how far attempts to legitimate it indirectly can meet two conditions political philosophers have required for the non-arbitrary exercise of political power. The first is John Rawls' requirement that a fair scheme of co-operation should be neutral between equally reasonable yet conflicting conceptions of the 'good'. The second is the requirement variously articulated by Kant, Rousseau and Habermas that citizens acting as equals should be able to control those who make the laws by which they are bound. Since, however, a great deal has already been said about the problem of democratic control in the literature on the European Union, I will give much more attention to problems of justifying it as a fair scheme of co-operation. Indeed I will argue that the latter problem presents a whole new set of reasons for worrying about the former. Crucial to my argument is an assumption I will justify as I go along that indirect legitimation does not strictly require that the Union meets standards of non-arbitrariness but that Member States should do so on account of their participation in the Union. The paper proceeds as follows. Section 2 discusses indirect legitimacy and its link to Coasian bargaining theory. Section 3 develops the public choice 'puzzles'. Sections 4 and 5 introduce the political philosophy standards. Section 6 concludes.

The EU as a 'Coasian scheme of Co-operation'.

Consider the following answer Giandomenico Majone gives to the question 'which policies could be legitimately included in the agenda of a European federal state?'

'Aside from foreign and security, the public agenda would mostly include efficiency-enhancing, market preserving policies… Unlike redistribution – zero-sum game – efficiency issues may be thought of as positive sum games where everyone can gain. Hence, efficiency-enhancing policies do not need a strong normative foundation: output legitimacy (accountability by results) is generally sufficient' (2005: 191)

Here we have as clear a statement as any of the claim which runs through so much of Majone's work on the EU that a pattern of collective action which is pareto-improving between Member States would need little further justification. All would benefit and all consent. A glance at his references shows that Majone traces this understanding of how institutions can be made to work – and what justifies them – back to Buchanan and Tullock's Calculus of Consent (1962) (See Majone 2005, pp. 55-6), which has, in turn, been described as a 'political Coase theorem' (Parisi, 2003). Ronald Coase (1960) demonstrated that, as long as there were efficiency gains to be had from eliminating externalities, actors would, under conditions set out in section 3 below, search out those gains and realise them, no matter how property rights were legally defined between themselves. Buchanan and Tullock argued that, under like conditions, something similar could be said of political institutions. Institutions could employ any decision rule from dictatorship (one person decides) through simple majority voting to unanimous consent and still be capable of realising all possible efficiency gains Whilst, though, any decision-rule could, in principle, secure pareto optimal outcomes, only consensus would have the normative quality of assuredly doing so with the agreement of all actors.

Some of the most important contributions to the literature on European integration make a number of Coasian assumptions. First that Member States will have an 'incentive to co-operate' wherever they can achieve pareto improvement by eliminating 'negative international policy externalities' (Moravcsik, 1993: 485). Second that a drive to lower transaction costs involved in co-ordinating Member States preferences, and thus to secure a further round of pareto-improvement, is a sufficient explanation for important features of the Union's institutional design and legal order (Moravcsik, 1993: 508; Pollack, 2003: 377). Third that bargaining between the pareto-improvers themselves (the Member States) is usually sufficient to identify sources of mutual gain. Union institutions are thus 'passive' in the sense that their main purpose is to serve as a 'contractual environment' for bargaining between Member States (Moravcsik 1993: 508), notably by securing credible commitments (Moravcsik, 1998: 73; Majone 2001), pooling access to sources of information and expertise (Majone, 2001) and dealing with problems of incomplete contracting (Garrett, 1995: 172).

Such an account plainly does go beyond legal authorisation to show how integration can be motivated and justified by the continuing co-operative needs of Member States. Even the obvious objection – that several Union policies reallocate values between states and some of its decision-rules allow majorities to impose unwanted obligations on them – might be answered in ways that arguably only clarify that the EU is at base a Coasian scheme of co-

operation to which all its Members consent and from which they all benefit. In answer to the point about re-allocative policies, 'Coasians' might reply that truly efficient 'efficiency-seekers' do not seek anything as crude as pareto-improvement in relation to single policies. Rather, they trade their vetoes, even if that means losing out here and there. As for majority voting, that can be seen, from a Coasian perspective, as little more than a closure device for the efficient and timely pursuit of objectives that are themselves supported by a consensus of Member States (Moravcsik, 1993: 510). Not only, as Rousseau might have put it, does majority voting 'presuppose unanimity, on one occasion at least' (1973: 173), but it is in practice only used sparsely (Mattila and Lane, 2001; Heisenberg, 2005) and, it would seem, with regret in so far as the search for consensus often continues after Member States have been out-voted. Comitology committees - which play the key executive function in the Union of agreeing implementing instructions - are often used to achieve real-time adjustments between common obligations and the preferences of individual Governments (Sabel and Zeitlin, 2007).

Doubtless a brute functional dependence on the resources and enforcement structures of Member States constrains how far the Union (Dann, 2006) can deviate from a condition in which all its Members consent and all benefit. Yet my concern is with another source of dependence: namely, with how far the Union may need to operate as a Coasian scheme of co-operation if it is to be justified as a restrained yet capable form of power in a manner that is consistent with the assumptions of indirect legitimacy, and the structure of political obligation they imply.

Legitimacy, as Jurgen Habermas argues, is best understood as those 'political obligations' actors 'put themselves under' through the propositional logic of their own 'moral claims' (Habermas, 1996: 67)'. Although this sounds forbidding, it is quite straightforward. Only by showing how participants in a polity can accumulate obligations through moral claims they themselves make upon it of their own free will can we a) avoid the circularity of assuming the justifiability of those very distributions of power or interest that are in need of justification and b) make sense of the notion that actors 'consent' even to decisions they oppose (Rousseau 1973: 250) through their prior obligation to the procedures by which those decisions are made.

But who are the morally obliged in the case of the EU? With whom does it need to be legitimate? Fritz Scharpf observes that 'if the function of legitimacy is to motivate compliance with undesirable obligations (his emphasis), what matters for the EU is the compliance of governments, parliaments, administrative agencies and courts within Member States...Empirically, therefore, the EU is best understood as a government of governments, rather

than a government of citizens' (2007: 5). Thus, he argues, enquiry into the legitimacy of the Union should focus 'primarily' on 'normative arguments that could oblige governments to comply with undesired rules'. Rodney Barker likewise questions how far it is meaningful to ask whether the Union is legitimate in relation to individuals as opposed to its Member States: 'legitimacy is a concept which can usefully be applied to rule or challenges to rule. It cannot usefully be applied where rule is absent, hypothetical or so indirect as to be invisible to the ruled'. He then puts his finger on what, in his opinion, it is about the EU which only requires it to have indirect legitimacy. As he puts it, the 'the EU may govern' but 'it does not follow that it has subjects in the same way a state has' (2003: 159-60). In other words, the Union does not, for the most part, require the obedience of individuals, since its laws are only enforced on the latter through the medium of national law. Thus understood, indirect legitimacy allows the Union to seek solutions to collective action problems which elude single states whilst relying on those same Member States for the most state-like of their characteristics: namely their pre-acknowledged monopoly of legitimate coercive power.

However it would be a mistake to regard indirect legitimacy as a 'soft option'. Consider the structure of political obligation it implies. Governments can presumably be said to enter into moral obligations to comply through the promises they make to one another. Yet indirect legitimacy hardly removes the need for EU law to be legitimate with the individuals and groups to whom it is eventually applied. It merely holds out the possibility that it can be legitimate via the moral obligations those individuals and groups have to their own Member States. Given a free and critical media, and temptations on Governments to pose as the reluctant enforcers of law made elsewhere, it can no longer be assumed that the origins of Union laws in Union institutions are undiscoverable. Rather, attempts to secure legitimacy indirectly have to be justifiable for what they really are: namely, as a lending out of national enforcement structures to laws made according to the procedures of the Union. Whilst, then, indirect legitimately is self-evidently an attempt to derive the legitimacy of the Union from that of its Member States, it has also to be capable of justifying a form of authority exercised by those states that is itself profoundly changed by their membership of the Union (Eriksen and Fossum, 2007: 14). The object of legitimation is, as it were, 'the state within the Union': the Member State, rather than the nation state; the state that obliges itself through its commitments to the Union to act as the enforcer for Union law in exchange for decision rights in the making of that law.

It will be important to bear in mind as the article proceeds that the challenge of indirect legitimacy is indeed one of justifying the state within the Union. Not the least reason for this is that, thus understood, indirect legitimacy is a

precarious structure of political obligation. Although Member States can be fined for non-compliance, held liable by private actors for the consequences of not meeting obligations established under Union law (Tallberg, 2003), or simply reminded of instances of their own non-compliance when they request new obligations of others, indirect legitimacy necessarily implies limits to the Union's powers to sanction those very states it understands as being its own principals. Given the monopoly of legitimate violence remains with Member States, there are obvious constraints on how far the Union can escalate sanctions on non-compliant states, hence Weiler's observation that, at the end of the day, the Union 'invites' its Member States to obey (2002). In so far as indirect legitimacy is usually justified on the grounds that the ingredients of democracy and political community remain at the national level (Scharpf, 1999) there are arguably even limits to how an indirectly legitimated Union should even attempt to overcome tensions between the accumulation of obligations beyond the state and the dependence of Member State Governments on their domestic arenas for electoral survival. Where there is conflict between the two levels it by no means self-evident that it is the domestic demoi that should give way.

In so far, though, as it lacks means of justifying why the Union should have ultimate sanctioning powers of its own, or even a democratic authority of its own capable of trumping that of the very actors whose compliance it seeks, indirect legitimacy rules out two possible solutions to the problem that compliance depends on stabilising expectations of compliance. The importance of this difficulty should not be underestimated. To the extent political obligations are fashioned for living and solving collective action problems together it would be eccentric indeed if they were not seen as losing their binding force once the prospects of others complying falls beneath the threshold needed to secure their purposes. Indeed there is no contradiction between understanding political obligations as both morally binding and yet to some degree contingent on the compliance of others (Føllesdal, 2004: 15-7. See also, of course, Weber, 2: 1378). Even Rousseau - who of all people believed that legitimacy was a matter of moral obligation – seems to hint at the need to anchor expectations of the compliance of all in order to secure the obligation of each when he remarks in the preface to the Social Contract on the importance of 'uniting what right sanctions with what is prescribed by interest, in order that justice and utility may in no case be divided' (p. 165, 1973[1762]).

So what would stabilise expectations of compliance in a manner consistent with the assumptions of indirect legitimacy? Consider how a well-functioning Coasian scheme of co-operation might be defended as non-arbitrary, just and useful, restrained and capable, to the satisfaction of Member States

themselves. It hardly needs repeating Member States should be capable of realising all potential for pareto-improvement under such a scheme. Yet 'political Coasians' in the tradition of Buchanan and Tullock also see themselves as having a great deal to say about restrained collective choice. The restriction of collective choice to pareto-improving solutions is, in their view, a kind of pure non-arbitrariness. It ensures all collective choices are necessarily also choices all individuals could agree. It thus satisfies conditions for 'non-dictatorship'. It avoids inter-personal comparisons that assume anyone's preferences are better than anyone else's. It is, in sum, ethically preferable precisely because it is ethically neutral.

If credible such a scheme of co-operation would stabilise the structure of political obligation implied by indirect legitimacy twice over. First, pareto improvement implies Member Governments will have no obvious incentive to defect from their obligations, at least not for long or wholesale. Second, the notion that the pareto criterion is ethically neutral between all points of view limits the risk of co-operation at the European level becoming domestically contentious in ways that need drive a wedge between obligations to comply with Union law and the brute fact that Governments are dependent on their domestic politics for electoral survival. This fits with Moravcsik's view that:

There is an undeniable normative attraction to a system that preserves national democratic politics for those issues most salient in the minds of citizens, but delegates to more indirect democratic forms those issues that are of less concern, or on which there is an administrative or legal consensus (Moravcsik, 2005: 6).

In sum, then, Coasian negotiating theory identifies conditions under it should be possible to meet the co-operative needs of Member States whilst confining ethical choices, and any solidarism needed to sustain them, to domestic arenas. In Brian Barry's terms it identifies conditions where it should be sufficient for the Union to practice 'justice as mutual advantage' (1995). We will pick this up below.

Public choice critique

The last section showed that indirect legitimation implies a structure of political obligation which is likely to work a good deal better where it can be assumed that the Union can operate as a Coasian scheme of co-operation. Yet there are well known problems both with the pareto criterion and with the Coasian pathway to it. This section presents some of those difficulties as four puzzles. Their depiction as puzzles is deliberate, since, as we will see, the question of how far they are challenges to be overcome, or insuperable

difficulties, is itself dependent on further factors. Whilst I will try to keep the discussion as non-technical as possible it needs to be prefaced by a more formal specification than hitherto of the conditions under which Coasian theory would predict that a consensus between states would be sufficient for pareto-improvement. Robert Inman and Daniel Rubinfeld (1997:76-80) suggest the following conditions: a) low transaction costs in concluding or enforcing agreements; b) widespread knowledge of the preferences of all states and thus of the 'full range of possible trades' between them; c) states operate as good 'agents' of their 'publics' d) gains can be divided, if necessary through trades across issues (log-rolling) or compensations to losers on any one issue (side payments) (1997:76-80). Following Sen's suggestion (see above p.) that more use be made of public choice puzzles in the analysis of question of political philosophy I begin by suggesting at least four technical limitations to benefits that might be expected from running the Union as a Coasian scheme of co-operation, or, indeed, to the possibility that it can function in such a way at all.

Difficulty 1: The 'non-arbitrary' starting point.

A much-discussed problem is that only a process of pareto-improvement – and not the point from which that process starts out - can ever be considered to be both chosen and fair from all points of view. To use Amartya Sen's distinction, the pareto criterion can only ever satisfy a 'process', and not an 'opportunity', standard of freedom: at best, it sets out standards for an undominated process or direction of choice, not for removing all possible forms of arbitrariness in starting points and in distributions of 'opportunities' to choose (2002:505-6). Indeed, Sen remarks that, from many points of view, a 'society can be Pareto-optimal and still be perfectly disgusting' as for example where 'the starvers cannot be made better off without cutting into the pleasures of the rich' (1970: 22). In the case of the EU, the fairness of 'starting points' arises in relation to the rule that all new Member States should accept the acquis communautaire in its entirety. We will come back to this point in the next section.

Difficulty 2: Changing Preferences and Technologies

Other commentators point out that in a world of constantly changing preferences and technologies a policy agreed by a consensus of states would be unlikely to remain pareto optimal over time (Shapiro, 1996). Random shocks, technological change, the partial endogeneity of preferences, or, to put the point less technically, the very autonomy of what it is to be human and change one's mind, will cause preferences in most polities to drift away from previously-agreed pareto points. As Douglas Rae puts it, this is almost certain to occur 'unless the citizenry is dull as dirt' or the public authority is 'utterly clairvoyant' (See Rae, 1975: 1292). In a multi-state setting, and especially one

that rests on indirect legitimation, there is the further challenge that Governments, and even the institutional design of domestic polities, may change with consequences for who can claim the authority within Member States to aggregate individual preferences into legitimately-formed social preferences. All these factors and more may mean that a policy endorsed by particular Member States in the past may become unwelcome to them, raising, as we will see, the crucial question of how easy it is to restore them to their pareto frontier.

Difficulty 3: Indivisibilities

The closer values are to being 'continuous' – such that they can be divided into ever smaller amounts - the easier it will be to 'trade' them in ways that allow actors to realise all possible pareto-improvements between themselves (See Inman and Rubinfeld above p.). Yet, many values are anything but continuous. They can only be enjoyed if 'all or nothing' choices are made to provide them in similar ways for large numbers of people. Kenneth Arrow puts the point thus: [Some] 'actions being collective or interpersonal in nature, so must the choice amongst them…The individuals in a country cannot have separate foreign policies or legal systems' (1973 [1967]: 123). He might have added that there are also limits to how far they can have separate market structures, separate institutions of macro-economic management, separate opportunities to breathe clean air, or separate welfare states. Not only are such choices affected by European integration, but, we will see, the indivisibilities in question often seem to involve equally reasonable, yet conflicting values.

Difficulty 4: Multiple equilibria

The search for pareto improvement may produce multiple equilibria which leave all participants better off, whilst distributing the gain in different ways. The pareto criterion will therefore be an insufficient condition for non-arbitrariness without some agreed means of choosing between the several solutions it may offer. Indeed, Rawls deftly links this to the first puzzle. If we have to choose between multiple ways of leaving everyone better off, we may want to take the initial distribution – including its perceived fairness - into account in allocating the increment (1973:334-5). The (at least) two dimensional structure of preferences on EU questions (Hix, 1999), means that the Union is just the kind of arena where multiple equilibria are likely; and, in so far as pareto improvement is itself thought to require some elements of majority decision in order to raise decision speeds and lower transaction costs, there is a risk that collective decisions will 'cycle' between an infinite number of possible equilibria in the EU's two-dimensional policy space (McKelvey, 1976). Discretionary and even manipulative choices of procedure (Riker, 1982) will then be decisive in selecting outcomes, unless, of course, procedures are

comprehensively specifying procedure in advance. The latter solution, however, departs from the hope expressed by Majone above (p.) that - in a pareto improving world - the main weight of legitimation in the European arena can be put on the intrinsic qualities of policy outputs, so lightening the need for procedural consensus. Moreover, indeterminacies associated with multiple equilibria may result not just from the dimensionality of single decisions but also from the sequencing of several. Again, we will return to this below.

Indirect Legitimacy as a Fair Scheme of Co-operation

I now take up Sen's suggestion that greater use be made of public choice puzzles in considering problems of moral and political philosophy (See above). Since I am primarily concerned with the conditions a polity has to satisfy if its powers are to be justified as non-arbitrary I begin by considering issues of impartiality or equal treatment. John Rawls presents the link between justice and legitimacy as categorical: in other words, we have to be able to classify a polity as just if we are to categorise it as legitimate.
'Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant or economical must be rejected or revised if untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust' (1971: 3-4).

For those, however, who find this move just a little too categorical, there is at least empirical plausibility to the claim that legitimacy and justice are linked. If we assume that feelings of obligations to a polity are often the by-product of obligations its members feel to one another, a perception that a polity favours some of its members, and some of their views, at the expense of others is likely to be corrosive of its legitimacy (Rothstein, 1998). Far from ducking this question, Coasians, as we have seen, believe they have a clear answer to it: namely, a pareto-improving polity would in and of itself ensure 'justice as mutual advantage', which, in their view, is the standard of justice best suited to a polity that needs to be able to solve co-ordination problems whilst avoiding choices between the normative positions of different Member States (See above). To test whether that answer is adequate, I return to the puzzles set out in the last section. This will necessarily involve introducing further concepts of justice as we proceed. However, I hope to be able to show a) that the conditions under which the Union can deliver the Coasians own preferred standard of 'justice as mutual advantage' are non-robust, b) even a well-functioning Coasian scheme of co-operation would leave much to chance, rather than choice and c) that there is in any case an understanding of justice which is prior to the previous two – impartiality between competing

conceptions of the right and the good – which a Coasian scheme of co-operation is most unlikely to satisfy at the level that matters most if indirect legitimacy is to work: namely, that of the internal politics of Member States.

Where better to start than with the problem of the starting point? From a point of view of Coasian negotiation theory, it would only be in the unlikely event that all existing Members would be better off constructing an enlarged Union on the basis of some alternative to the acquis communautaire (after taking account of the costs of negotiating and implementing that alternative) that the Union would be likely to depart from its present practice of restricting new applicants to a 'take it or leave it choice' over existing policy obligations. Of course, new Members will themselves only join if they are likely to be better off than remaining on the outside. But, note, this says nothing about the distribution of the relative gain between new and existing Member States. On top of that, the cost of non-membership - against which new Members will have to decide whether they will be better off by joining - may itself be affected by the previous history of European integration. The very fact that outsiders have not previously participated as full Members creates a risk that some Union decisions will have been made at their expense. Any tendency for members of an existing club to facilitate agreement between themselves by externalising costs of their own collective actions may even be aggravated where those governments happen to be democracies accountable to their own national publics, and not to all those affected by their decisions. (Grant and Keohane, 2005: 34).

Of course, defenders of a Coasian scheme of co-operation might well respond that it is precisely a focus on forward-looking and absolute gains that avoids burdening the legitimacy of the Union with any need to agree standards of relative gain or of historical responsibility (Miller, 2004). Indeed, they would probably claim that a forward looking focus on pareto-improvement can also solve the second puzzle: if preferences or circumstances change such that policies becomes sub-optimal for some Member States it should be possible to get the others to lift their vetoes on change by offering them a 'compensation' or 'side-payment' out of the gain to be had from returning the unhappy state to its pareto frontier. One possible difficulty, though, with this response is that just as there may be some historical arbitrariness in where a state finds itself in the sequence of new entrants - and in the consequences to it of swallowing the acquis whole – so chance factors may influence whether they later need to supplicate change, or whether they, conversely, find themselves in the fortunate position of being able to extract a side-payment in exchange for agreeing changes to policies which have become unwelcome to others. If, indeed, we assume – in Coasian fashion - that institutions must sometime in the past have been 'in equilibrium' such that all actors have made best use of

all information available to discover what is best for themselves, then unforeseen shocks are likely to be amongst the main reasons for departures from the pareto frontier (Greif and Laitin, 2004; Streek and Thelen, 2005).

That arbitrariness – both in starting points for Member States joining the club and in subsequent arrangements for dealing with unforeseen contingencies – would seem to be possible even under a well-functioning Coasian scheme of co-operation might be considered a weakness by 'luck egalitarians' (Dworkin, 1981). In their view institutions are just in proportion to how far they link outcomes to 'choice' rather than 'chance' (Lehning, 2009: 63)

A further difficulty is that it may not always be technically possible to compensate veto holders in ways that keep the acquis optimal (or even satisfactory) for all Members. Scharpf has built an entire critique of the Union's legitimacy on this very problem. From empirical studies of several Union policies he concludes 'transaction costs are high… side payments and log-rolling are not always possible…and information on preferences is far from perfect' (C.f. the conditions for the application of Coase theorem to multi-state settings proposed by Inman and Rubinfeld above). The result is that consensus decision-rules can only be relied upon to align EU policies with the preferences of all Member States 'first time round'. Once policies are in place 'those same' consensus 'decision-rules' may create 'joint decision-traps' in which it is hard to change arrangements which may have become deeply undesirable to some Member States (2007: 6).

The significance of the observation that conditions for the application of Coasian bargaining theory are non-robust cannot be underestimated, since it implies that a consensus of states may not even satisfy the one standard of fairness which Coasians themselves defend: namely, 'justice as mutual advantage'. Moreover, in so far as Member States cannot be quickly restored to their pareto-frontiers in the event of perturbations, shared policies will cease to be value neutral in the sense of being obligations to which they would all willingly consent in view of their own values and their own internal arrangements for the legitimate allocation of values. Indeed, in Scharpf's view, in areas of policy that are central to the relationship between Member States and their citizens, attempts to run the Union with rules that demand high levels of consensus result in precisely the opposite outcome to that predicted by Coasians: the external constraint of 'change-resistant' Union policies dominates domestic value allocation, rather than vice versa. Here it is important to consider three of his claims in combination: a) the Union entraps Members in change resistant policies; b) the Union has pronounced ideological biases, notably towards negative rather than positive integration: to policies that put restraints on how Member States should act, notably by loosening

their control of markets, rather than policies that require them to act together to provide collective goods such as social protection; and c) the Union operates as a 'compulsory negotiating order' in which Member States are legally and economically limited in how far they can pursue key objectives by other means if they feel constrained or disadvantaged by a Union policy.

Scharpf's analysis is, however, open to a counter-argument as follows. It is an empirical question how large or small the problem he identifies turns out to be. Even if Member States sometimes become entrapped in particular change resistant policies their overall Membership may, as we put it earlier, remain pareto improving in the round. If, on top of that, there are reasons to believe that compensation will work a good deal better within states than between them – because single states are solidaristic communities that can support redistribution to a degree the Union cannot – then each Member State may be able to use its overall surplus from co-operation at the Union level to compensate those who lose out from any joint-decision traps or ideological biases in the European arena. Each participating society could decide to spend its co-operate 'surplus' in different ways. This might amongst other things include more spending on social and environmental policies. Only, once account is taken of this secondary effect, would it really be possible to conclude that even a European Union that did negative integration and nothing but negative integration would be 'ideological biased'. European integration could – in other words be ideologically extremely narrow – and yet still expand the overall choice set of those with a wide range of different ideological preferences. In sum, then, Member States may be able to absorb and neutralise any ideological biases that follow from their participation in the Union.

Whether this counter-argument really works requires us to turn to the third puzzle: namely, that of indivisibilities. Now it seems to me that there are sizeable indivisibilities in at least six choices affected by European integration: choices of a) market structure, b) environmental protection c) welfare states d) security provision e) collective definitions of political community and f) democratic institutions of rule (Bartolini, 2005; Offe, 1998; Scharpf, 1999; Schmidt, 2006). All are 'gross choices' (Dunn, 2001: 203) where it is hard to avoid at least some solutions that must apply more or less uniformly to many of those who are affected by them.

Now, each indivisibility is affected by integration in very different ways: a) and b) by the Union's legal competence; c) by the external effects of Union policies on market integration and the free movement of persons and capitals; d) by Union-level co-ordination of policies that largely remain national competences: and e) and f) by Europeanisations of domestic arenas (Olsen,

2007: 227). Yet one thing is for certain: all six affect value allocations within Member States via their participation in the obligations and decision rules of Union Membership. Thus the fairness of arrangements for dealing with the indivisibilities test precisely that relationship which any theory of indirect legitimacy identifies as in need of justification: namely, whether the consent, control, and compensatory mechanisms available to Member States can be sufficient to justify those acts of coercion within their own arenas which are required by the obligations of Union membership. Unusually, though, that challenge arises twice over in the case of indivisibilities. Decisions involving indivisibilities may not just need to be enforced but they are also coercive in the further sense that they involve a high level of pre-emption. Choices made about them in one way drastically limits other ways of making choices about in others.

In answer, then, to the counter-argument to Scharpf, each additional indivisibility puts one more constraint on how far the overall package of outcomes in the domestic arena can be adjusted to offset any tendency for Union policies to privilege particular ideological positions or the status quo. Even that difficulty, though, is minor in comparison to another. All six indivisibilities are saturated with contrasting conceptions of what is right and good: of what rights are owed to others and of what are desirable ways of co-operating with them under shared mechanisms social choice. It is thus unclear that it even makes sense to think of choices involved in a)-f) as tradable or compensable.

Now all polities, and especially liberal ones, face a challenge of how to make fair choices in the face of indivisibilities. That, it seems to me, is precisely the problem addressed by Rawls. What he identifies as the basic structure of society – rights and liberties, arrangements governing access to opportunities and life chances – is plainly an indivisibility. Indeed at various points Rawls identifies each of the further indivisibilities in a)-f) above as components of the basic structure (1993: 257-88). Precisely because it is an indivisibility – that must in its essentials be the same for all members of society – Rawls points out that the basic structure can only amount to a fair scheme of co-operation if it can be endorsed from the point of view of opposing yet equally reasonable conceptions of the good.

This is not the place to discuss whether such an 'overlapping consensus' is fated to be an empty set or, contrariwise, over-determined (Sen, 2009). Rather it is sufficient for our purposes to emphasise Rawls' negative conclusion that one thing liberal polities cannot do is to privilege particular ideological positions or the status quo where a) that has consequences for the basic structure of society and where b) that amounts to an arbitrary selection

between opposing but equally reasonable conceptions of the right and the good (Rawls, 1993; See also Barry (1995: 82-5). I will expand this crucial argument when I consider the problem of democratic self-legislation below. Remaining, though, for the moment, with the problem of establishing a fair scheme of co-operation, it is important to note Rawls' view that political partiality between a plurality of equally reasonable values involves a more fundamental failure of impartiality than distributive concepts of injustice. Whereas the latter are understandings of injustice from particular views of the good. The former is a failure to achieve impartiality between possible views of the good. The problem will, moreover, be aggravated by the last of the public choice puzzles set out above. Procedural biases for or against opposing yet equally reasonable views of the good will be even less defensible if multiple equilibria over time mean that favoured positions benefit from from increasing returns whilst disadvanged ones face costs of switching between alternatives (Pierson, 2000).

Indirect Legitimacy and Democratic Self-Legislation

Impartiality is, however, only one test of non-arbitrariness. Recalling Pettit's definition of arbitrariness as decisions that depend only on the arbitrarium of the decider without reference to the affected (above p.) there is a long tradition in political thought that holds the problem can only be fully removed where laws are 'framed by every private man unto no other end than to protect the liberty of every man' (Harrington 1992: 20 quoted in Bellamy, 2007: 80). In their somewhat different ways, Rousseau, Kant and Habermas later developed this into the principle of democratic self-legislation: that citizens, acting as equals, should be able to control the laws by which they are themselves bound.

Beginning from an ideal of democratic self-legislation, the standard critique of attempts to legitimate the Union indirectly is that Member State Governments may not always act as adequately controlled agents of their publics when they legislate in European arena. Worse, they may even practise what James Bohman terms a 'reverse agency' (Bohman, 2007: 70) in which, instead of controlling Union institutions on behalf of their publics, they use Union institutions to gain some unwarranted controls over their own publics. Thus Peter Mair has argued that the Union 'has been constructed by national political leaders as a safeguarded sphere in which policy making can evade the constraints imposed by representative democracy' (Mair, 2005: 4) on the basis of claims that national governments have used integration to practice an arbitrary form of agenda- restriction: to restrict the choices that can be influenced by 'political competition' (ibid: 12).

However, this paper identifies a further reason why attempts to legitimate the Union indirectly may fail to satisfy conditions for democratic self-legislation. Here it is essential to note that Rawls regards his definition of a fair scheme of co-operation – i.e. one that can be endorsed by opposing yet equally reasonable views of the good – as entailed by liberal democratic follows. argues: a) that liberal democracy commits us to the view that individuals should be regarded as autonomous and equally-entitled choosers of what is 'good' and what is 'right'; b) that the' burdens' of making those judgements are such as to make it almost certain that however hard individuals try to make those judgements reasonably – i.e. so that they are accepted by others – they are likely to end up with some incommensurable views of what is 'good'. And c) it is therefore only possible to insist that the basic structure of society should reflect particular opposing views of the good by acting coercively, so negating the initial premise that all individuals in a liberal democratic order should be autonomous and equal choosers of what is a valuable way of living. In sum, then, democratic self-legislators cannot

Conclusion: Whither indirect legitimacy?

This paper has shown how arguments for indirect legitimation work a great deal better where they can assume a Coasian scheme of co-operation. There are, however, difficulties, even from a perspective of public choice theory, in applying Coasian bargaining theory to the EU. These include arbitrariness in starting points, preference drift, indivisibilities and multiple equilibria. Taken together those four difficulties call into question how far attempts to run the Union as a Coasian bargain between its Member States can deliver two conditions political philosophers require if a polity is to be justified as a non-arbitrary form of political power: namely, that a scheme of co-operation should be neutral between conflicting yet equally reasonable values and it should allow addressees of law to see themselves as autonomous authors of the obligations by which they are themselves bound. Notice, though, that the polity whose capacity to deliver those standards of non-arbitrariness is called into doubt is the Member State itself; or, as I have repeatedly characterised it here, the state as it is constrained by the political obligations and decision-rules of Union membership. That would, however, imply that, if Coasian assumptions break down in the ways suggested here, they cannot ground a plausible theory of indirect legitimacy, which must, of its nature, be able to show how the state can retain enough of its legitimacy within a setting of European integration for it also to be able to do the work of legitimating the Union itself.

This is a significant conclusion in so far as influential arguments for the continued indirect legitimation of the Union do indeed make Coasian assumptions. But if those assumptions fail, where does that leave indirect legitimacy? Can it be rescued or must it be abandoned? Can it be defended notwithstanding the difficulties identified in this paper, perhaps on the grounds that publics would seem to prefer the disease to the cure. To paraphrase the above quotation from Locke, European publics might quite plausibly prefer to live with the 'mischiefs' of imperfect forms of indirect legitimation – the constraints these might put on ideals of democratic self-legislation and impartiality between alternative conceptions of the right and good to be found in the domestic arena – to all that would follow from switching over to more direct forms of legitimation. Majone himself hints at this possibility when he cautions that some of the most familiar laments about European integration - the 'democratic deficit' and the absence of a solidarism which would permit agreement on standards of a just distribution at the European level – may themselves be the social preferences of publics who do not want to associate at the European level as a single European people (2005: 23).

Note, though, that this is itself an empirical claim: and not just one about the values publics hold in fact (Gaus, 2009) but also one about the ways in which they in fact establish rankings between their values. No one can say a priori that all publics will always prefer not to agree standards of fairness at the European level; nor that they will always prefer to give a strict priority to political community at the national level rather than weight that value in a more continuous trade off relationship with other values that might be better secured by agreeing ethical standards in the European arena (Sen, 2009). Indeed, it is essential at this point to recall the reasons why Coasian accounts assume that such a trade-off will not be needed. They do not dispute that engagement with others under shared institutions implies shared ethical responsibilities for the consequences of those institutions. They only question whether that also implies a need to agree ethical standards at the European level. In their view it is possible to affirm the first proposition but doubt the second, since Member States can meet their ethical responsibilities to one another precisely by crafting European integration so that its institutions and policies align automatically with their individual ethical preferences. But, if for the reasons set out here, there are reasons to doubt that convenient alignment, and to doubt it in relation to such core values of non-arbitrariness within Member States themselves as fairness and democratic self-rule, then tradeoffs between continuing with the benefits of collective action and agreeing ethical standards at the European level may be inescapable if the Union is to function as a restrained yet capable form of political power to the satisfaction of its Member States and publics.

Yet the Coasians may be correct to seek to minimise trade-offs, even if their solution is implausible. In that case, we should look elsewhere. The application to the EU of at least two other possibilities – the transcontextualism proposed by Thomas Pogge (2002) and the non-transcendental views of justice favoured by Sen (2009) – merit further research. This is not the place to explain those positions in full. But the first implies that views of fairness developed within contexts of social solidarity – such as Member States – can to some degree be taken as committing actors to standards in their behaviour towards others outside those contexts. The second holds that reluctance to agree ideals of moral perfectionism needs be no bar to agreeing rankings between immediately feasible solutions (Sen, 2009). Either of those solutions would soften trade-offs between those who value political community at the national level and those who acknowledge a need to agree ethical standards for non-arbitrary collective action at the European level; and, as I hope to show in further work, they would do so on a more plausible and defensible basis than Coasian bargaining theory.

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