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Conduct and Contract

Abstract:

Political philosophy relies on three alternative types of theory to explain social order. The first, is order anarchy, built on the system of spontaneous Humean conventions. They are equilibria, self-enforcing or enforced by the participants' own contingent strategies and involve no central, specialised enforcer. The second type is contractarianism. This paper contends that its name is a misnomer hiding a redundancy. The third type is social contract theory, where there is unanimous commitment to submit to non-unanimous collective choices of certain kinds or reached by certain rules. The paper suggests that social contract theories serve mainly to render acquiescence in political obedience more palatable.

1. Introduction

Though even large agglomerations of people manage to live together in some semblance of mostly peaceful order, it is not really evident why they succeed to do so. Hobbes held that the obvious presumption was that of “warre” and that some artefact, typically a Leviathan (Hobbes 1968[1651]), needed to be grafted on to formless agglomerations of men to overcome the presumed condition of “warre” and create a society out of the state of nature. Prior to Hobbes, no such presumption was generally accepted, while post-Hobbes, explaining the near-miracle of an orderly society has been and might well remain a central preoccupation of social philosophy.

Two theories with a claim to being sufficient explanations are the front runners. In one, the work of establishing and maintaining a viable order is done by spontaneously arising conventions, in the other by consciously agreed obligations that have the appearance of a social contract. It is not really asserted that a social contract has in fact been concluded in times past (though an apocryphal history of Venice does assert it), but only that the result is one that we would expect a social contract to produce if it had been concluded. Adding a belt to the braces, it is also pointed out that though no contract may have been actually concluded, their need for one would have induced a people in the state of nature to enter into one. Both the first or ‘as if’ and the second or hypothetical version could be admitted in place of the historically real one provided the idea of a social contract was agreed as compatible with plausible notions of rationality.

Thanks to the increasing interest in Hume in the last few decades, the nature and role of conventions is now widely understood. They are forms of conduct that, if adopted by a significant number of people, yield enhanced benefits to each; hence, if a critical threshold number adheres to a convention, non-adherents are induced to adhere. Doing so is not the result of agreement, but is a unilateral choice. All conventions are (Nash) equilibria (see Lewis 1969), i.e. self-enforcing, but only a few are self-enforcing in the simple sense that deviation from them is *ipso facto* bad for the deviant; language, paper money and the rule of the road are well-known examples of the simple ones. Most conventions, however, are self-enforcing only in a composite sense: they leave a free rider option open to the deviant, but trigger off a punishment strategy if he attempts to take advantage of it by actually deviating. A wide range of punishments is available to deter free riding. Refusal to interact with the deviant in a significant number of future rounds of the ‘game’ is perhaps the most obvious one, but of course there are others. It must be assumed that the cost of punishment is no greater than the advantage of suppressing free riding and thus protecting the convention from unravelling and favouring its longevity. Some such assumption does not look unreasonable, for it explains the timeless survival of conventions that seem to invite free riding. Let us note that no central, specialised enforcer seems necessary or even economical, especially as the employment of one (e.g. Nozick’s “protective agency” that ultimately leads to the formation of the state, see Nozick 1974) creates principal-agent problems that are liable to occasion very high costs indeed in exploitation and loss of freedoms.

A Humean system of conventions may consist of three tiers. The most important works against torts; it protects life and limb, the free pursuit of peaceful purposes, in Hume’s words “the stability of possession” (Hume 1978, Book III, Part II, Sect. 3) and their “transference by consent” (Sect. 4) as well as the keeping of promises (Sect. 5). In the second tier there are conventions against nuisances and negative externalities. In our day, some new conventions against environmental degradation may come to be added to the other externalities of this second tier, though it is too early to be sure. The third tier of only loosely enforced conventions work against incivilities and defend some amenities of civilisation.

The set of these conventions, tolerably well adhered to but not necessarily seamless, look comfortably sufficient to create and uphold a social order that can tellingly be called ordered anarchy. On thorough consideration, the set is adequate to induce what should be called just conduct on the part of enough members of society for there to be a high degree of justice and freedom. On the other hand, ordered anarchy offers no mechanism enabling non-unanimous collective choices to be made and for politics to take hold—a systemic shortcoming that some of us may regard as a safeguard and a benefaction.

It is perhaps worth adding that all well-established conventions qualify to be treated as rules made by use without being derived from any higher, rule-making rule. The essential ones may also be regarded as moral rules in that

they act to defeat indisputable wrongs. It may even be tenable to hold that such conventions alone qualify as moral rules.

2. Moral Contractarianism

Showing that individual maximisation of potentially available advantages entails a social order we might call ordered anarchy made up of spontaneously emerging conventions of just conduct, leaves us free to propose that some of these conventions rise to the rank of moral rules that function as such, in that they constrain choices because they are taboo and not because they maximise the exploitation of available advantages, though they continue to do that, too. This would amount to saying that honesty is the best policy, but the rules of just conduct induce individuals to act honestly regardless of the advantage they derive from doing so. If this proposition has merit, it is that it is harmless and undemanding, leaving little or no work left for Occam's razor to do.

One major alternative to ordered anarchy is contractarianism that, unlike anarchy, is said to depend on agreement. In its most prominent versions, a basic assumption (the veil of uncertainty in Buchanan 1975, the veil of ignorance in Rawls 1971) moulds preferences in such a way that all wish to live in a society of qualified egalitarianism. However, they need no agreement, let alone a contract, in order to do so. Any binding commitment is redundant and the term 'contractarian' looks a misnomer.

A less easily comprehended theory, labelled as moral contractarianism, is one mainly associated with the name of David Gauthier (1986). Stripped to its essentials, it seems to be saying that in some initial status quo, individuals follow practices that constrain 'direct' maximisation for the very good reason that if they did not respect certain constraints, the reactions of counterparties to the attempted unconstrained maximisation would result in a worse outcome than constrained maximisation. It turns out, however, that potentially there exists a different set of practices that is superior to the one actually in use. While the actual constrained practice is a Pareto-improvement over 'direct' maximisation, the potentially superior practice is actually Pareto-optimal. Though it is not easy to feel confident when trying to fathom Gauthier's meaning, it would seem that it is their Pareto-optimality that leads him to accord moral character to these superior practices, and it is mutual agreement that enables them to be attained and maintained.

The well-known Folk Theorem (Fudenberg and Maskin 1986) makes an incontrovertible case for holding that interactions of the prisoners' dilemma type, not adopting the dominant (direct-maximising) strategy can yield any number of superior payoffs if the players expect the interaction to be repeated, there is no telling which of these potentially superior equilibrium strategies will in fact be adopted. Over a much broader range of types of interactions, the Humean theory of conventions is telling us the same thing. The equilibria in these conventions are Pareto-improving, but may or may not be Pareto-optimal. Nor do

we have any supplementary theory of a mechanism that would lead to Panglossian Pareto-optimality. Neither the Folk Theorem nor the broader set of Humean conventions depends on agreement of any sort. They obviously depend on expectations of the responses of others to our own strategies, but this is not agreement, nor even a tacit one, about the strategies the parties would commit themselves to in order to reach the putative optimum. Neither such negotiation nor the commitment to it is easy to imagine in real life. The least demanding theory would assume that Pareto-optimum is possible and if reached, it could have been reached by negotiated agreement and commitment. Perhaps this is how we should treat Gauthier's theory, though he seems to demand far more for 'deliberative rationality' to accomplish.

If the claim that optimality can be reliably reached is abandoned,—a claim I think is particular to Gauthier,—we are left with a general contractarian claim that agreement leads to mutual advantage. It is easy enough to sustain that agreement, a quasi-contract (hence the name 'contractarianism', presumably as distinct from 'social contract theory') is a sufficient condition for generating improved outcomes. It seems to me more difficult to sustain that it is a necessary condition. The supposition that people need to agree to do what they wish to do is redundant. Note in this context that insofar as Buchanan's and Rawls's version of contractarianism involves redistribution of society's goods, they represent this as the unanimous wish of the citizenry. For agreeing to do what one wishes to do, without stating the redundant, a stress must be laid on the meaning and nature of cooperation that I think it should not be asked to bear.

Consider the case of two men Will and John who both want to cross a river. Will has a boat and John has a pair of oars. I believe they would without further ado get into the boat and row across without previous agreement about taking turns at rowing and the fee John would pay Will for using the boat and Will would pay John for using the oars. As to agreement about sharing the fruit of their cooperation, Nature has already allotted the shares: Will has his 'utility' gained by reaching the shore and John will have his. No residue is left to share.

The great bulk of cooperative acts do not result from agreement unless the word 'agreement' is stretched to breaking point. When I buy a teapot at the price marked on its ticket, it is a bit absurd to declare that this act of social cooperation was the result of a previous agreement between the shopkeeper and all potential aspirants to new teapots. Opportunities for cooperation are mostly generated by the spontaneous competition of market participants and are not the result of negotiated agreement. The participants must adhere to the conventions of just conduct which do not involve agreement between them or anybody else, and that is all.

To be sure, there is a great variety of cooperative acts and relations that are one-off, unique and not impersonal. Their terms do not emerge from market competition and must be negotiated. If agreement is needed to generate morals, and morals constrain the terms agreements can justifiably have, it is to such negotiated agreements that the argument may possibly be relevant. However, even here fundamental objections stand in the way.

A crucial point in Gauthier's scheme of the agreed moral order is that negotiations must result in the equal sharing of the cooperative gain (presumably, the excess of the Pareto-optimal gain over the gain yielded by a preceding practice). No argument is advanced why we should believe in this far from self-evident requirement. However, the real obstacle is not that this is not self-evident, but that it lacks any ascertainable or even just definable meaning. Gauthier uses 'utility' as the entity that, if it existed, would be maximised by a rational individual's revealed and logically well-ordered preferences. How, for pity's sake, can he tell that Will's gain of Will-utility was greater, equal or smaller than John's gain of John-utility from their cooperative enterprise of crossing the river? As we had learnt, to the great dam of classical welfare theory, neither Will, nor John, nor the Impartial Observer can answer such questions without protesting that of course he is merely expressing his strictly personal view of social welfare function or his value judgement (of which there may be as many different versions as there are persons). Any sharing of the utility gain, assuming there is any technology telling us how the shares can be varied, from Will getting what may seem to you most of the gain to John getting most of it, could be argued to be equal sharing. Any sharing could be said to conform to morals by agreement, or none could. The best escape from this impasse without getting into further and ever more complicated problems would seem to me to abandon the idea of morals originating in agreements or contracts. Doing that would, in addition, also help to dissipate the risk of confusion between contract and contractarianism in the latter of which the contract is redundant.

3. Contracts of Exchange and the Social Contract

Some voluntary, self-imposed constraints upon choice are unilateral. The vow or unrequited promise is the most stringent. Hume recognizes "the performance of promises" as one of the key conventions of the social order. Arguably, it is self-referential: compliance with this convention ensures the performance of promises, and promising to comply with any convention transforms that convention into a binding commitment. The possibility of cooperative strategies becoming binding commitments might open a new perspective to social theory, albeit a hypothetical one.

Beyond unilateral agreement lies the contract. It is a pair of voluntarily assumed obligations, each to be discharged by one party in favour of the other. The contract is thus designed to bring about an exchange of performances. Each party would most prefer to receive the performance of the other while escaping his own obligations to perform. However, he would rather perform his obligation than not receive the other party's performance. The contract may provide for simultaneous performance of the obligations of the two parties (such as a 'spot' transaction of cash against delivery) or a continuous flow of performances by both parties (such as employment of labour against pay). Such contracts are self-enforcing and in strict logic redundant, except perhaps for the need to define

side conditions. The contract comes into its own when the performances to which the parties obliged themselves are to be non-simultaneous (such as all credit transactions). The enforcement dependence of such contracts may be resolved in a variety of ways. One is the 'shadow of the future'; like any iterated prisoners' dilemma, the pay off of each round of a repeated 'game' is skewed in favour of due performance because of the forgone gain from future rounds of the game in case default would cause counterparties to cancel future rounds. Performance may additionally be ensured by the force of the convention of promise-keeping. Finally, performance may be entrusted to a specialised agency such as the state. Instead of being entrusted to, it could be appropriated by such an agency which would ordinarily seek to assure for itself the monopoly of exercising this function.

It must not be forgotten that contrary to the underlying postulate of contractarianism, in reality no state has ever been formed at the unanimous wish of its prospective subjects. The origin of states has always been the assumption of power over the prospective governed by the prospective governors, usually by foreign conquerors, with support by a part of the governed purchased with the resources transferred to them from the rest of the governed. It is this standard mechanism that social contract theory seeks to represent in the metaphor of a voluntary contract of exchange between governors and governed.

What non-simultaneity is to the general contract of exchange, non-unanimity is to the special one of the social contract. Collective choices binding everyone may well not be Pareto-improvements, better for some and worse for none. The most vital ones, dealing with the distribution of goods and bads, are typically conflictual, Pareto-noncomparable. The prospective losers would oppose them, and lest they should veto the choice, the state might coerce them by the threat of violence or other means of pressure, and secure their acquiescence. Social contract theory would typically represent this as a metaphorical contract of exchange where the governed assume obligation of submission or political obedience to collective choices made in defined form or rules, while the governors accept the obligation to make collective choices by these rules and not to resort to violence as long as the rules are obeyed. The collective choice rule which in modern states tends to be a rule of rule-making, may be quite elementary, e.g. 'the king (or dictator) has discretion to make all the rules' or highly complex e.g. voluminous constitutions drafted by committees. Most of these rules restrict, in a great variety of ways, the freedom of collective choices to range over the entire feasible choice set, reserving certain alternatives for individuals to select for themselves. For instance, so-called civil liberties are often held immune from encroachment. Significantly, however, no constitution, past or present, known to me limits the extent to which collective choice may pre-empt the national product and devote it to public expenditure. Thus, collective choice is tacitly given first call by taxation on society's current product, with the residue left over for individuals to dispose of. The share absorbed by public consumption and public investment is not limited by the choice rule, but by such extra-constitutional contingencies as the resistance of society to taxation and the ability of govern-

ment to pre-empt resources from future generations of individuals by increased borrowing.

Social contract theories may imply, if not argue explicitly, that individuals in fact prefer resources to be used for collectively decided purposes which give them greater 'utility' than individually acquired goods and services could procure. Collective choice and the public use of resources, then, is a more efficient producer of 'utility' than individually chosen use of the same resources would be. As there is no independent way of comparing the marginal utility of public expenditure with the marginal utility his own expenditure procures for each individual (nor with that of the randomly selected representative individual), we must take it that public expenditure produces more because it is chosen. This, of course, justifies the primacy of collective over individual command of resources by a tautology; public is superior to private, for otherwise it would not be chosen. However, if this were true for every comparison between the utility of each and every individual from individual and from collective use of resources, collective choice would be unanimously preferred. It would be Pareto-better; as in contractarianism, all individuals would choose to do what they wished to do, all would opt for the Pareto-superior state over the stateless anarchy that has no collective choice mechanism. There would be no need for a social contract.

Putting this the other way round, social contract theory is saved from redundancy because collective choice is typically Pareto-noncomparable. Some people feel better if there are more public goods, but other people would rather pay less tax or have a smaller national debt weigh upon the future of their children. The social contract, if it existed, would uniformly oblige everybody to submit to the collective choice rule because the rule applies uniformly if it applies at all; no one can choose to exempt himself from it. Everybody accepts the principle of submission. The contract commits all to obey choices made by way of the choice rule whether they like the chosen alternative or not. There is unanimity that non-unanimous collective choices made in previously agreed ways bind everybody.

This is not nice and tender like contractarianism, but closer to resembling actual societies.

Needless to say, nobody is seriously suggesting that a social contract has really been entered into by our forefathers or that if it has would bind our own generation. The suggestion instead is that starting from a state of nature, rational individuals would willingly enter into such a contract. Moreover, the present state of affairs is one that would have been produced by such a contract. The upshot of the two theses is that the hypothetical social contract lends the state the same legitimacy as a real one would have done.

Hume taught that man does not create and approve of the authority of the state, but acquiesces in it. However, acquiescence comes in many moods: it may be serene or bored, but also bitter and despairing. Social contract theory, if it has any use or effect at all, may have some impact on the mood of acquiescence. The stripped-down hearsay version of it that trickles down from the academic journals to the media and the schoolroom tells the ordinary man that the political

and social state of affairs under the authority of government that he passively accepts and often resents, is one that he and his fellows would rationally have chosen. Religion, it has been asserted, is the opium of the people. Should not someone announce now that social contract theory is its Valium?

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