Ekonomia — Wroclaw Economic Review 23/2 (2017)
Acta Universitatis Wratislaviensis
No 3770

DOI: 10.19195/2084-4093.23.2.5

Jakub Bożydar Wiśniewski
King's College London
jakub@cantab.net

Legal Polycentrism and Contractarianism

Date of submission: 11th of October 2016; **date of acceptance:** 25th of January 2017

JEL Classification: H41, P16, P48

Keywords: Legal polycentrism, contractarianism, public goods, public choice, conceptual unanimity, institutional entrepreneurship

Abstract

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According to the contractarian perspective, a public good can be thought of as not so much a good that meets the technical neoclassical criteria of non-rivalness and non-excludability, but as one that is produced on a purely contractual basis, thus necessarily increasing the utility of all the involved parties. In this paper, by critically examining Nozick's "emergent" contractarianism and Buchanan's teleological contractarianism, I shall argue that no such contractual origin can be plausibly attributed to territorial monopolies of force, and that therefore legal monocentrism — the view that the public goods of law and defense can be provided exclusively by territorial monopolies of force — fails the relevant efficiency test as conceived on a contractarian basis. This, in turn, implies that legal polycentrism, one of whose constitutive features is precisely its unambiguously voluntary and contractual character, should be considered as a superior system in this context.

1. Introduction

Legal polycentrism is the term I use to designate the view that law and defense are not qualitatively different from other goods and services normally supplied on the free market, and that, given the generally accepted superior allocative features of the free market system, freely competing protection and arbitration companies would provide these goods more effectively than territorial monopolies of force do (Rothbard 1973, Friedman 1989, Stringham 2007, Hasnas 2008, Long 2008, Wisniewski 2014). On the other hand, legal monocentrism is the term I use for the

mainstream position according to which law and defense are paradigmatic public goods, which have to be provided by a territorial monopoly of force (i.e., the state) if they are to be provided at all (Bush and Mayer 1974, p. 410; Buchanan and Flowers 1975, p. 27; Samuelson and Temin 1976, p. 159; Cowen 1992; Hirshleifer 1995; Tullock 2005).

In this paper, however, I shall not adopt the more popular neoclassical perspective on public goods, but the contractarian one. This decision is motivated by two main factors. First, as indicated above, there already exists a substantial literature that explores the relationship between legal polycentrism and the neoclassical framework, while its counterpart focusing on the contractarian framework is much more difficult to come by. And second, if one is to treat the critical arguments against legal monocentrism raised in the abovementioned literature as valid (as I believe they are), then, as will be further explained, contractarianism appears to be the natural candidate for a position capable of defending the viability of legal monocentrism while avoiding the methodological and substantive weaknesses of the neoclassical view.

According to the contractarian perspective, a public good can be thought of as not so much a good that meets the technical neoclassical criteria of non-rivalness and non-excludability, but as one that is produced on a purely contractual basis, thus necessarily increasing the utility of all the involved parties (Buchanan and Tullock 1962, Buchanan 1975). In other words, the perspective in question explains collective order in terms of the process whereby "individuals will be led, by their own evaluation of alternative prospects, to establish by unanimous agreement a collectivity, or polity, charged with the performance of specific functions, including, first, the provision of the services of the protective or minimal state and, second, the possible provision of genuinely collective consumption services" (Brennan and Buchanan 1985, pp. 21–22). Thus, if it can be shown that a monopoly of force tasked with the provision of law and order can emerge on a purely contractual basis, it can be argued that it can produce the supposedly public good of law and order at least as effectively as any of its polycentric counterparts.

A thorough investigation of this line of thinking should be of particular interest to the adherents of the causal-realist tradition of economic reasoning (Salerno 2010), since it suggests that it is possible to reconcile the monopolistic production of putative public goods with the strict requirements of methodological individualism and methodological subjectivism. This would imply that the existence of a "natural monopoly" of law and order is compatible not only with neoclassical welfare economics, but also with its "Austrian" counterpart (Rothbard 1956). In what follows, however, by critically examining Nozick's "emergent" contractarianism in Section 2 and Buchanan's teleological contractarianism in Section 3, I shall argue that, in fact, no genuinely contractual origin can be plausibly attributed to territorial monopolies of force, and that therefore legal monocentrism fails the relevant efficiency test as conceived on a contractarian basis. This, in turn,

implies that legal polycentrism, one of whose constitutive features is precisely its unambiguously voluntary and contractual character, should be considered as a superior system in this context.

2. Nozick's "emergent" contractarianism

Let me begin my analysis by focusing on one of the most popular and ingenious versions of the argument that attempts to reconcile legal monocentrism with contractarianism, formulated by Nozick (1974, ch. 2). It is important to note at the outset, however, that Nozick's story is contractarian only in an indirect sense — he does not claim that the only contractually legitimate form of a monopoly of force, i.e., the minimal state, could arise through any sort of collective agreement, but that it could arise through an "invisible hand process", i.e. through a series of decentralized, voluntary transactions whose outcomes do not violate anyone's individual rights. In other words, he provides a contractarian story of the "emergent" rather than the "teleological" variety (Schmidtz 1990). But the most controversial part of it consists in the way Nozick tries to justify banning all competing protection agencies by the dominant one as consistent with respecting individual rights. Nozick claims that until the dominant protection agency bans the activities of all of its actual and potential competitors, its clients will be exposed to "risky procedures" engaged in by the competitors in question (Nozick 1974, pp. 55–56). This, in turn, will presumably (though it is not stated directly) expose the clients of all protection agencies to the risk of living in the notorious Hobbesian jungle, thus violating their individual rights to life, liberty, and property. In sum, Nozick's justification of the minimal state is based on the claim that by banning the activities of competing protection agencies, the dominant protection agency-turned minimal state simultaneously insulates all of its inhabitants from "risky procedures" and compensates those among them who were clients of the alternative agencies in question.

Unsurprisingly, the notion of risk employed in the abovementioned train of thought turned out to be one of the most vigorously contested elements in the intellectual edifice of Nozick's minimal statism (Childs 1977, Rothbard 1977). It has been suggested that Nozick confuses quantifiable risk with unquantifiable uncertainty, thus rendering his notion of compensation logically meaningless and incompatible with the goal of individual rights preservation. It has been suggested that there are no reasonable grounds for believing that the activities of non-dominant protection agencies are inherently more risky than those of the dominant one, especially since the former are inherently leaner, more nimble, and more responsive to specific, local circumstances of time and place[1]. And finally, it has been

[1] Since such agencies do not strive for the position of a monopoly within a given territory, they can retain a comparatively smaller size and thus make their information channels more effective in

suggested that, far from shielding its inhabitants from the influence of risky activities, the dominant protection agency-turned minimal state is uniquely capable of subjecting them to the risk of gradually transforming itself into a maximal state and unleashing the horrors of totalitarian tyranny.[2]

In addition to the above more general arguments, there exist more specific arguments drawn from the causal-realist and new institutionalist traditions that provide further and even more serious doubts regarding the viability of Nozick's indirect contractarianism. First, they suggest that, regardless of what other kinds of uncertainties[3] it is able to eliminate, a monopoly of force tasked with the provision of law and order is uniquely capable of subjecting its "clients" to regime uncertainty, thus rendering inoperative the legal framework that was supposed to ensure the protection of their life, liberty, and property, especially in the context of specifically entrepreneurial activities (Wisniewski 2012). And second, they suggest that, even when it does not generate regime uncertainty, the monopoly of force under discussion still necessarily generates what has been called "the paradox of government" (Weingast 1995), or what in this context may be more precisely called "the legal rule-following paradox" (Wisniewski 2013a), i.e., the situation in which the meaning and thus also the efficiency of binding legal rules cannot be intersubjectively evaluated, again rendering them inoperative.

If the above arguments are correct, then, in accordance with Nozick's own philosophical assumptions, the dominant protection agency-turned minimal state necessarily violates individual rights, and does so on many fronts, which controverts the notion that it might come into existence in an "emergently contractarian", invisible hand-driven manner. On the other hand, the correctness of the above arguments would also imply that an entrepreneurial, polycentric legal order

processing relevant, context-specific data. Furthermore, their non-monopolistic character prevents them from falling prey to the Misesian calculation problem, which prevents the affected entity from being able to assess the opportunity costs of any given action due to the non-availability of competitively established factor prices (Klein 1996). Needless to say, the existence of such problems significantly raises the risk that the affected protection agency will not be able to supply its services with the requisite degree of efficiency.

[2] As a particularly telling illustration of this point, it is worthwhile to imagine how self-described individualist anarchists would react to hearing that they will be compensated for being deprived of the services of competing protection agencies by being offered the services of a monopolistic, coercive state, and how convinced they would be that none of their individual rights have been violated in the process (Rothbard 1977, p. 51). It would be difficult to dismiss such negative reactions as knee-jerk expressions of ideological prejudice, given the fact that states are responsible for some 170 million civilian deaths in the 20th century alone, while even the most well-organized of rogue non-dominant "protection agencies", such as those united in international mafia networks, never managed to take even a small fraction of such a death toll (Rummel 1994).

[3] From now on, I shall call "uncertainty" what Nozick calls "risk", since I agree that he confuses these two concepts, while only the former is generally applicable to theorizing about the realm of human action (Knight 1985, Hoppe 2007), the latter being relevant exclusively to its relatively narrow aspects, such as those pertaining to participation in games of chance.

might arise in precisely such a manner, thus turning out to be far more compatible with Nozick's invisible-hand contractarianism than his preferred variety of the minimal state.

3. Buchanan's teleological contractarianism

Let us now discuss another well-known contractarian proposal — that of Buchanan (1987), who, in contrast to Nozick, the proponent of the most well-known version of "emergent contractarianism", puts forward the most well-known contemporary version of teleological contractarianism. Buchanan argues that "there are two levels of analysis in political economy – the pre-constitutional level of analysis and the post-constitutional level of analysis, [where] the pre-constitutional level […] is focused on the choice over the rules of the game and the organizational arrangement that will enforce those rules, [while] the post-constitutional level […] is focused on the choices made *within* a given set of rules" (Boettke 2014). In other words, he argues that the purpose of arriving at a constitutional contract is to create a legal framework for orderly interpersonal interactions — his version of contractarianism is teleological rather than emergent insofar as what chiefly matters to him is not whether the contract in question is arrived at by an invisible hand process, but whether it facilitates rule-based exchange relationships. And since Buchanan clearly adheres to the principles of methodological individualism and methodological subjectivism (Buchanan 1969), and thus to the principle that unanimity is a necessary condition of Pareto-superiority, his vision of an ideal constitutional contract is one that protects life, liberty, and property so that the members of society may enhance their well-being by entering into voluntary, mutually beneficial arrangements.[4]

However, Buchanan also claims that adhering to the strict rule of unanimity in the context of ratifying constitutional contracts is bound to generate prohibitive bargaining costs, and that is why reaching efficient outcomes on the pre-constitutional level may require a monopoly of force to impose the requisite framework of legal rules on any potential holdouts (Buchanan 1975). But since the existence of such a framework is a necessary prerequisite of engaging in mutually beneficial exchange relations on a regular basis, it can be assumed, the argument goes, that every member of society regards the establishment of such a framework as a positive development, and, were it not for the holdout problem, every member of society would freely con-

[4] It is also the case that Buchanan considered himself a "philosophical anarchist" and supported secession as a means of curtailing governmental predation and inefficiency (Buchanan and Faith 1987). The endorsement of legal polycentrism, as described in the present paper, can be regarded as taking the next step and bringing the secession-based argument in question to its ultimate logical conclusion. What prevented Buchanan from taking this step is likely to have been his support for the neoclassical public goods framework, which can be criticized on independent grounds (see, for instance, Wisniewski 2013b and 2013c).

sent to its creation. Thus, actual unanimity gives way to "conceptual unanimity". In other words, Buchanan's story assumes the form of a Hobbesian hypothetical contract, with the crucial caveat that the prerogatives of the sovereign are to be limited to protecting the life, liberty, and property of the members of society.

Unsurprisingly, the above train of thought has been seen to involve a fatal departure from methodological subjectivism and praxeologically sound welfare economics, and a rather conspicuous attempt at eating one's cake and having it (Block and DiLorenzo 2000, 2001) — after all, a top-down imposition by a monopoly of force is the very opposite of a unanimous agreement, and any attempts to cloak it in the language of "hypothetical agreement" can be thought of as resorting to the kind of psychologizing that is completely at odds with the principles of methodological individualism.

However, even if we were to put this particular worry aside, it would still remain the case that, just as Nozick's minimal state, Buchanan's purely protective state based on a clearly specified constitutional contract would remain susceptible both to regime uncertainty and to the legal rule-following paradox. After all, the monopolistic, coercive entity in question would be uniquely capable of refusing to abide by the constitutional rules (and backing its refusal with the threat of monopolized violence) (Higgs 1997) or reinterpreting them in a manner that would suit its exclusive interests to the detriment of society at large (Hasnas 1995). And while admittedly the principle of checks and balances could be said to make the organizational structure of such entities less monolithic and their verdicts less arbitrary, it nonetheless remains the case that, since any given monopoly of force aims at making its ability to deploy discretionary power maximally effective, its separate branches have a natural incentive to cooperate with each other so as to form a close-knit cartel with uniform interests insulated from genuine social control (Barnett 1998, p. 254). In other words, it seems reasonable to conclude that the alleged benefit of substituting conceptual unanimity for actual unanimity in the context of creating an effective, constitutionally constrained framework of legal and protective institutions does not exceed the associated costs.

This is not to say, however, that the benefits of contractually agreed constitutional limitations on the power of the institutions under consideration have to be abandoned. On the contrary, it seems plausible to suggest that within an entrepreneurial, polycentric legal order they could not only be maintained, but also reconciled with the principle of actual unanimity. Since, in order to generate value for their customers, competing private protection and arbitration agencies would have to present clearly specified sets of rules that they would be willing to uphold and enforce, and since, as free market institutions, they would have to be patronized on a purely voluntary basis, they would provide an example of what might be regarded as genuinely contractual governments. As Boudreaux and Holcombe put it:

Competition among various contractual governments […] provides a market mechanism that leads [them], as if by an invisible hand, toward the production of optimal rules. The contractual government is an institution that produces unanimous agreement in the real world that parallels the conceptual agreement postulated in the recent contractarian models (Boudreaux and Holcombe 1989, p. 276).

4. Conclusion

In sum, insofar as we understand public goods as those that are produced on a purely contractual basis, it is plausible to argue that the free market (together with the institutional framework that sustains it) is the only real public good, since, as the sum total of voluntary interactions between people, it is the only good whose creation and perpetuation meets the criterion of strictly unanimous, and thus genuinely public acceptance (Wisniewski 2013b, 2013c). And insofar as we understand the entrepreneurial, polycentric system of law and order as the best institutional framework for sustaining the free market, it is plausible to conclude that such a system is the paradigmatic example of a public good according to any form of contractarianism worthy of its name.

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