THE EMERGENCE OF A PROTECTIVE AGENCY
AND THE CONSTITUTIONAL DILEMMA

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In the last decades' revival of contractarianism a constitutional contract is interpreted as a device to overcome the hypothetical state of anarchy. It is not entirely clear, however, how, in a pre-constitutional setting that lacks any institutional forms, an unanimous agreement on the rules and the agency enforcing the rules can be imagined to emerge. This paper conceptualizes the problem in game-theoretic terms. A solution is discussed together with an old dilemma that turns up in this context. The dilemma results from the fact that the protective agency has to be endowed with sufficiently powerful coercive means to prevent anyone breaking the social contract. However, this concentration of power itself may induce a violation by making the protective agency usurp its power. The logical basis of the dilemma is explored together with the conditions under which it may challenge the contractarian approach.

Introduction

The legitimacy of the state is a central theme in moral and social philosophy. It has been given a new lease of life by the work of Buchanan (1975), Nozick (1974), and Rawls (1971), the "new contractarians" (Scott 1976). In their work, which revives a tradition reaching back to Locke, Rousseau, and even Hobbes, the basic idea is to postulate a hypothetical unanimous consent which legitimizes the 'protective state', i.e. the authority enforcing and protecting individual rights in social interactions. In an imagined state of anarchy ('Hobbesian jungle', 'state of nature') all members of society are supposed to decide on a suggested constitutional contract. The contract would determine the rules of orderly interaction within society after unanimous consent has been given and would establish an agency to enforce those rules. It is argued that, given certain preferences of the members of society, such a contract, and the agency enforcing it, would be approved as they would enable society to escape permanent anarchy and the Pareto inferior outcomes associated with it.

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In a large body of literature many facets of this basic idea have been elaborated in detail. Yet one problem, hidden behind the catchword of the “invisible hand explanation” of the emergence of a protective agency (Nozick 1974: chap.2), has found comparatively little attention: the question of how precisely, in a pre-constitutional setting that lacks any institutional forms, an agreement on rules and a rule enforcing institution, the protective state, is achieved simultaneously. Building on the notion of an agent of collective action in the role of the state founder or founding agency a possible answer to the question is outlined in section I. However, the suggested solution poses an old problem anew and perhaps more explicitly than usually in the literature.

On the one hand, for the constitutional contract to be agreeable, it would certainly have to constrain the power of the agency. If it did not, everyone, except the members of the agency, would run the risk of being deprived of all benefits from avoiding anarchy or of suffering an even worse fate. On the other hand, if the constitutional rules and rights are not to be violated, the agency must be able to police them and to threaten violators with effective sanctions. It must therefore have coercive powers greater than those available to other members of society. How can constraints on the agency’s power then be made credible? Rules intended to constrain the agency may be written into the constitution, but who is in the position to enforce them except the agency itself? How can the members of society at the constitutional stage be convinced that the agency will not, once it is established, use its power to further private interests? This old dilemma, often alluded to (most recently, e.g., in North 1990: 59f.) but apparently not considered becoming relevant, is investigated together with its implications for the contractarian approach in section II. The final section offers some tentative conclusions.

I. The Emergence of a Protective Agency

In his reconsideration of Locke’s state of nature scenario Nozick (1974: chap.2) argues that individual vulnerability to deceptive activities of others and the inherent instability of mutual-protection associations are likely to result in the formation of protective agencies, one in each geographically distinct area. Such an agency takes over, he submits, the functions of detection, apprehension, judicial determination of guilt, punishment, and exaction of compensation (a similar assessment is