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FORMAL POWER AND REAL AUTHORITY: THE INVOLVEMENT OF GOVERNANCE NORMS OR PRINCIPLES*

Władza formalna i realny autorytet: urelacjonowanie norm lub zasad panowania

Słowa kluczowe: władza formalna, realny autorytet, normy panowania. Key words: authority, governance, power.

S t r e s z c z e n i e

We współczesnych badaniach – w ramach analizy funkcjonowania instytucji i ich stosunku do reguł, zasad, względnie norm – szczególnie dużo uwagi poświęca się kontrastowi między realnym autorytetem danych instytucji a ich formalną władzą. Ten kontrast wyrasta z potocznych obserwacji: zdolność instytucji do zagwarantowania sobie preferowanych rozwiązań (ich „realny autorytet”), nie jest bezpośrednią konsekwencją całości hierarchicznych prerogatyw (względnie „władzy formalnej”) tych instytucji. W szczególności badania do-

A b s t r a c t

In several avenues of contemporary research, much attention is devoted to the contrast between the real authority of institutions and their formal power, in the analysis of institutional functionings; also, in the study of the relationships between institutions on the one hand, rules, principles or norms on the other hand.

Such a contrast appears to be based on familiar observations: the capacity of institutions to get their preferred outcomes (their so-called “real authority”) is sometimes

* This contribution originates in the Oxford meeting, “Good Governance and Democracy” and in a presentation in Oslo which has been made possible through the Åsgard fellowship granted to the author in 2007. I thank the *Centre culturel français* (especially Xavier Morise, Karine Blandel and Delphine Vallon) in Oslo for the preparation and for welcoming me at the Centre. I also express my gratitude to Peter Burgess and Naima Moulheb for their hospitality at PRIO during my stay in Norway. My conversations with Raino Malnes at the dept. of political science of the University of Oslo have been useful during the last stages of preparation. The presentation reflects work in progress in the DELICOM project (ANR, JC-05 grant); financial support of the *Agence nationale de la recherche* is gratefully acknowledged.

tyczące „migracji autorytetu” uwidaczniają możliwość ewoluowania realnego autorytetu posiadającego formalną strukturę niezmienną władzy.

loosely connected with the hierarchical prerogatives of the considered institutions (their “formal power”). More particularly, current studies of the “migration of authority” bring out possible shifts in real authority while there is no change in the formal structure of power.

This article will partly consist in the explanation of recent results of common research in project “Delicom”, in which a formal treatment of the distinction has been put forward. This approach will be set against the background of recent contributions in political science or economics (in the work of Ph. Aghion and J. Tirole, J. Backhaus, L. Thorlakson). The relevance of the problematic for the study of competence delegation among institutions will be stressed all along.

Introduction

Most philosophers have an interest in *meaning*; some of them are also interested in *power*. I belong to this category and it should come as no surprise that I develop a special interest for the dependence of power on matters of meaning. But meanings in politics are not just a matter of semantics. There is a strategic dimension to them, in connection with both substantive issues in the outside world (the effects of politics) and the internal balance of political power. Presumably, however, the strategic dimension does not nullify the specific operation of norms or principles, and the associated meanings.

I intend to give a firmer grounding to our understanding of the structural constraints imposed by interpretative issues on the evolution of institutional authority relationships.

Real authority is ordinarily defined as an effective control over decisions. This kind of control is precisely what power is about, it would seem. Control of situations is the substance of power, hence the common association of power with a number of guarantees. In the real world, however, it can be noted that power gives guarantees only through certain channels and means: especially legal norms or legal dispositions, the personal use of power, administrative means and also the architecture of the relationships between the various centers of decision.

Then it can be asked if such means have properties which may affect the reality of the control of situations. The channels of power are not necessarily neutral: they could have an influence on the effectiveness of power.

This has long been noted in connection with the personal use of power. Owing to various qualities and backgrounds, individuals and coalitions are more

or less authoritative; hence, they are more or less capable of securing obedience to their prescriptions. One basic fact is that the ability to be obeyed is not exclusively determined by formal norms and formal power relationships (such as those specified in a hierarchical political and administrative structure). Even when legitimacy is fully warranted in a formal sense, the ability to be obeyed is not necessarily warranted. Governance norms play an essential role: this will be illustrated by European examples.

This naturally leads to a conceptual distinction between formal power and real authority. Power has to do with guarantees, but such guarantees might remain notional ones. If this is the case indeed, the guarantees can be derived from formal arrangements, such as legal norms or constitutional power allocation, but they do not give sufficient clues to account for the effective control of situations in the hands of the agents.

1. A real / formal distinction about power

1.1. Rules and authority: a general problematic

Principles are not without influence on the allocation of power. They are not just waiting for implementation: they deal with their own implementation. This gives them an important role in the ongoing transformations of democracy. They are not just democratically produced norms among others, but engines in the evolution of the democratic balance of powers, because they bear on sensitive legitimacy issues. One way to state this is to bring out the reliance of political claims (for example, claims of rights) on existing principles and norms which play an important role as focal points for political actors. Even in a balance-of-power model of rights such as Coleman's (1990), there is room for mutual recognition of legitimate power, based on previously recognized rights-allocating norms. In such a model, however, norms are not usually equipped to survive shifts in the balance of power – with the implication that they are normally short-lived¹. Implementation itself is not just a matter of applying formal legal rules in a predetermined manner; it has to do with strategic opportunities for agents to refer to rules one way or the other.

Moreover, the statements by institutions might influence both the success of the cause they embrace and their own authority position. In the special case of the courts of justice and constitutional matters, this had been accurately noted by

¹ This can be a disadvantage for descriptive purposes, since a number of central social or political norms appear to be quite long-lived once they are established. See Demeulenaere (2003, p. 119–123).

legal theorist H.L.A. Hart: “The truth may be that, when courts settle previously unenvisioned questions concerning the most fundamental constitutional rules, they *get* their authority to decide them accepted after the questions have arisen and the decision has been given. Here all that succeeds is success [...]. The manipulation by English courts of the rules concerning the binding force of precedent is perhaps most honestly described in this last way as a successful bid to take powers and use them. Here power acquires authority *ex post facto* from success. Thus before the decision of the Court of Criminal Appeal in *Rex v. Taylor* the question whether the court had authority to rule that it was not bound by its own precedents on matters concerning the liberty of the subject might have appeared entirely open. But the ruling was made and is now followed as law. The statement that the court always had an inherent power to rule in this way would surely only be a way of making the situation more tidy than it really is” (*The Concept of Law*, 2d ed. p. 153–54).

The impact of general governance norms on the allocation of power might thus be indirect and flexible, through the channel of the capacity of institutional agents to rely on such norms to make the best of their own interaction with other institutional agents. Ultimately, this flexibility appears to be based on the widespread influence of *interpretations* of given principles or rules². Institutional agents normally have their say in the process through which definite interpretations are socially chosen – indeed, sociologists have long noted that the ambiguity of norms is correlated with the importance of influence activities (Bourricaud 1961, 2d ed., p. 320–21).

1.2. Basic notions for the analysis of authority

As Herbert Simon (1951) suggested, authority might be defined as the right to select actions affecting part or the whole of an organisation. Starting from this provisional definition, it is of course obvious that acceptance of authority is essential to the ability of “selectors” to influence outcomes in a real sense. Selecting actions is one thing, getting the proper results through these actions is another matter. This holds even if we start from the standard decision-theoretic view according to which alternative courses of action are really alternative

² This was implicit in Demsetz’s observation that normative beliefs are sometimes subject to normative ambiguity. Demsetz noted this on the basis of antitrust examples, in a discussion of “essential ambiguity” (about which behaviour “should be tolerated, encouraged, or discouraged”) in the context of monopoly and externalities. In particular, what counts as unacceptable oligopolistic distortion of competition is subject to many possible interpretations. See Demsetz (1981), sec.VII: “Normative Ambiguities”. The concept of antitrust policy, Demsetz notes, has two polar meanings: it can be defined as directed against price-setting capabilities, or else, toward the protection of consumers.

ways to connect possible states of the world and possible outcomes. Admittedly, in this approach, actions are strongly connected with outcomes; but when several outcomes are possible, that is to say when there is some amount of risk or uncertainty, the selection of actions is not the same thing as the selection of outcomes.

Acceptance of authority proves crucial to getting the right results through the exercise of authority. Acceptance has to do with the willingness to have one's own behaviour determined by the choice of actions by other people. Of course, anything will not do. This provides for an important link between real authority and formal power. More precisely, this takes the form of a necessary condition: the exercise of authority will be accepted, and hence it will be effective, only if the chosen actions belong to a set of "legitimate" actions. This is usually warranted by formal norms or principles, or other institutional arrangements. In an important sense, then, recognized and well-accepted formal power is a necessary condition for real authority. Hence we must refer to some sort of "formal" allocation of power if we are to understand a crucial aspect of obedience to authority. In some sense, there must be somewhere a "formal" allocation which must be recognized as legitimate if authority is to be used in a smooth way, with predictable success in the attainment of the desired results.

This is at the root of an approach I shall discuss in the following section, in the field of the theory of organisations: formal authority results from an explicit or implicit contract allocating the right to decide on specified matters to a member or group of members of the organisation. In this approach, acceptance of authority has to do with belief, or perhaps only with acceptations in some cases. In order to accept authority, people should have beliefs or acceptations about the kind of rights-allocation they have agreed upon or about the kind of rights-allocation they could have agreed upon if they had had a choice. They should be able to portray the orders issued to them as compatible with their own beliefs about the correct allocation of power – either in an absolute sense, as in classical contractarian theory or other moral approaches, or in the sense of an appropriate interpretation of positive agreements or contracts. In either case, it might happen that they can't manage to back their own acceptance of authority by beliefs in the strict sense. Then they can choose to "accept" certain arrangements as correct for the sake of common work, or for the sake of institutional order, or for any other political or institutional reason. This can happen even if their true beliefs are at discrepancy with such "acceptations". And in the special case of inter-institutional relationships, it might happen that some *acceptations* are effective in determining the common attitudes about legitimate and illegitimate actions, even though nobody in the institutions holds corresponding *beliefs*.

This accounts for the necessity to bring normative issues of legitimacy and rational acceptance into the picture, when we focus on the more positive issues of effective capacities for action. Indeed, many researchers acknowledge that normative studies and positive studies of power are interlocked to a degree which is quite rare in social or political studies.

1.3. The role of information and other contingent characteristics

Aghion and Tirole (1997) have put forward a theory of formal and real authority which may also be viewed as a theory of delegation. Although they have derived much of the impetus for their work from the employment relationship, they consistently suggest that their model is applicable to other kinds of delegation of authority, especially from national political authorities to international agencies or institutions.

Formal power is part of the rule-of-law ideal. The notion that power is not used in a discretionary manner is essential to it. But it might well turn out that, in some circumstances, the real control over the relevant issues is in the hands of a hierarchically subordinate centre of decision. This has been nicely brought out by the Aghion-Tirole study of authority in the framework of a principal-agent model with asymmetric information. For example, the principal might be a supranational authority, and the agent might be a given country.

In their model, P (the principal) proposes a contract that allocates formal authority (to P and to the agent, A) over the future choice of projects. Then P and A privately gather information over the projects's payoffs (they do more or less effort in this respect). Next, the party without formal authority communicates to the controlling party a subset (of his choice) of the relevant projects's payoffs he has learned. The controlling party finally picks a project or none, on the basis of his/her information and the information handed over to him or her by the other party.

Their model explains how a poorly informed (or overloaded) principal might *optimally* (not just routinely) rubber-stamp the agent's proposals by fear of picking a worse alternative, even though the proposals do not qualify as optimal in the principal's eyes.

Several formal relationships are investigated: in the case of "integration", P can always overrule the agent. Typically, if he is relatively well informed, he will reject the proposals from A when they are not congruent enough with his own preferences: in such a case, P is not dependent upon the efforts and proposals of A; it can safely be said that he has real as well as formal authority. But this is not always the case.

The lack of time to gather or use information might result in the subordinate's having real, although not formal, authority. Such a mechanism may be vie-

wed as an example of a larger family of problems, in which we investigate the reasons why an individual chooses not to act upon his/her own best judgement. Prominent in existing explanations are limited-rationality problems such as the lack of time and work overload, as well as the superior information of other agents, or the lack of confidence of the individual in his/her own judgement. Such empirical features of the social world can result in the prevalence of routines (as in the conclusions of Heiner's model) or in the delegation of concrete authority to other individuals.

Another formal structure of power is *delegation*: A picks his preferred project and cannot be overruled by P. Whereas delegation involves a loss in control, it yields benefits which are quite well explained by a strategic model like Aghion and Tirole's. In particular, delegation raises the agent's incentives to acquire information, provided he has a share in the benefits of the decision. It therefore facilitates both the achievement of good results and the agent's participation in contractual relationship (which secures cooperation). There can also exist intermediary patterns of formal authority, such as *contingent delegation* (or *ex post validation*): P delegates authority but retains the faculty of re-establishing authority at the expense of a high cost of intervention, on the basis of ex post evaluation (when the cost of letting A have his way would be greater than the incurred cost of intervention).

On the whole, the Aghion-Tirole theory explains in strategic terms how real authority and formal authority can not only diverge, but also be complementary features of social reality. Their comparative analyses are about the specific impact of various types of formal authority. Real authority is another matter, but it can be influenced both by the formal structure of authority and by contingent empirical factors such as the cost of acquiring information of the proximity of preferences.

The model also delivers clear analytical cases in which abstaining from acquiring information is a strategic choice for some individuals or institutions. As a result, it can be stressed that agents or institutions are not just "naturally" ill-equipped for decision-making because they lack information: this might result from specific choices on their part in a given strategic relationship with other centres of decision.

A further theoretical implication of the model is that in cases where objectives are strongly divergent, the existence of a formal authority relationship can hinder the transmission of information from the agent to the principal, whereas the same has a facilitating role in the case of convergent objectives.

In our empirical investigations about the French-Government Commission relationship, there is no clear evidence (in questionnaire results) that information transmission is hindered by divergent objectives even though there are formal authority relationships which give the Commission the role of a "principal" vis-à-vis

the Government (the Commission can control and sanction the policies pursued by the Government and it can let it develop its own preferred policies in many cases).

On the other hand, the evidence shows that *expertise efforts* are sometimes perceived by French civil servants as correlated with the existence of *legitimacy problems*. The willingness to engage in expertise activities might well be rooted in the usefulness of arguing in favour of one's own actions, even though they are not initially legitimate in the eyes of powerful actors. This kind of mechanism is aptly captured by the next model we shall consider (Backhaus's model).

1.4. Legitimacy and authority

Formal legitimacy is not sufficient to warrant real authority in the sense of an effective control of situations. But formal legitimacy does play a role in effective control or the lack of it. This is because formal legitimacy is not always defined in a clear-cut manner: sometimes legitimacy depends on formal norms which stand in need of interpretation.

This is why some authors have singled out the connection between a possible "legitimacy deficit" of authorities and their inability to get what they want in political matters. According to the penetrating approach taken by Jürgen Backhaus, such problems may arise from difficulties with *meaning*. Quite often, the spectrum of legitimate government action is dependent upon a favoured interpretation of constitutional norms and principles. Moreover, as sociologists have long noted, the ambiguity of norms is correlated with the importance of influence activities (Bourricaud 1961, 2d ed., p. 320-21). Such activities might in turn affect the comparative legitimacy positions of various actors.

Hence matters of meaning might influence the legitimacy of institutional action. This opens up opportunities for deliberate action: when there is a margin for interpretation concerning constitutional rules, institutions can have clear incentives to try and establish those interpretations which are more congenial to their own view of the power they have. This important theoretical insight calls for clarification of the legitimacy-authority connection.

In Backhaus's theory, democracies are not just governed by elected officials; they are also heavily dependent upon the choices of judges and civil servants. New elected political staff is sometimes hindered in political action by the behaviour of the judicial and the bureaucracy. Hence the importance of a non-electoral process Backhaus calls the "process of interpreting the Constitution", or PIC. What people can't achieve in the normal course of political competition, they can hope to achieve through expertise and ideological influence, in a process which results in new meanings being attached to old rules.

Backhaus is particularly concerned with the case of newly elected “radical” governments, whose preferred interpretation of the basic rules of the country sharply differs from the predominant one; his favoured example is the regime of property. How can such a government succeed in exercising its “formal power” (given by rules and elections) with the desired results? To answer this question, Backhaus has stressed the specific relevance of the expertise work through which political leaders can influence the conditions for the success of their action beforehand. I will not be concerned here with the details of his model; rather, I shall examine its implications for the mutual connections of such ideas as legitimacy, formal power and real authority.

Generally speaking, (*real*) *authority* is the capacity to let outcomes emerge, in a reasonably stable manner (that is, with some guarantees that they are not turned upside down through subsequent actions taken by others). Quite clearly, then, *legitimacy* is a factor of authority in that sense. Other factors, of course, have an influence: the threat potential of actors, patterns of preferences (see the works by Kolmar, Moser, Steunenberg), and indeed formal rules that allocate power.

Legitimacy itself has to do with some notion of the correct allocation of roles or action domains. Such a notion can be an object of belief, but also an object of mere acceptations in social life. Quite clearly, different groups in society can have divergent beliefs or acceptations concerning such a “correct” allocation of power, even in the comparatively simple case where “correctness” only refers to the proper interpretation of positive rules.

This complex of notions can be thought of as ruled by straightforward methodological constraints. One such constraint (which has emerged in the collective work in DELICOM³) is to give a single name (for example, “authority”), to:

- what is constant when institutional power is “stable” in the sense of the analysis of the migration of powers (in such contributions as those of J. Weiler, L. Thorlakson).

- the kind of power which is to be distinguished from the purely “formal” power (this distinction being made in such contributions as those of Aghion and Tirole, Backhaus, Kolmar).

This equation seems appropriate because in the literature on the migration of authority or power, explicit changes in rules are set aside and the theory focuses on evolving real capacities for decision.

A second methodological constraint is that *legitimacy*, whatever the precise definition, should enable one to give some reasons for or against the transfer of a capacity for decision from one institutional actor to another one. In the real

³ The study of such constraints has been carried out in DELICOM by Guillaume Dupont, Marc-Antoine Dilhac and myself.

world, this normally involves the reference to a certain pattern of power which is used as a correct benchmark model.

If we accept these constraints, we cannot be fully content with Backhaus's use of the phrase "legitimacy deficit" to refer to the gap between real and formal power. Such a gap should rather be portrayed as an *authority deficit*.

This conceptual rearrangement is necessary if we do not restrict the distinction between real and formal power to the specific set of problems addressed by Backhaus's theory, that is, problems in which the single cause of a lack of real authority is a lack of legitimacy. In problems of this sort, authority is restored if legitimacy is restored. But this is not necessarily the case in other problems, in which a discrepancy between real authority and formal power also has an impact.

1.5. Migrations of real authority

In this rapid survey of existing contributions, I would also like to point out that the literature about the migration of authority (see for example Thorlakson 2006) is basically concerned with shifts in the comparative real authority of institutions. Very often, shifts in real authority are being operated in the shadow of an unchanged structure of formal power (in Thorlakson's paper, this is illustrated by the historical experience of federal unions). Of course, this raises serious normative issues, because such phenomena may convey a sense of illegitimacy, with all the correlated risks of political apathy and cynicism, or revolt.

My purpose here is conceptual rather than normative, and I will set aside the normative questions. On the conceptual side, the analysis of the migration of authority yields insights about the close relationship between the use of general principles in the coordination of institutions, and shifts in real authority. As ample evidence shows in administrative science (see Matland 1995), the use of general principles can hardly be equated with a transient imperfection. Generality has structural properties when it comes to institutional coordination.

In particular, the generality of principles (or ends, or means) gives an important role to experiments and emerging authoritative interpretations. This gives new power to "leading" agents and institutional entrepreneurs who are able to demonstrate their ability to give a substantial and adequate content to general principles. At the hermeneutic level, their successful use of power has an impact on the typical beliefs or acceptations concerning the meaning of the principles. More generally, some institutions can try to establish a special connection between the possibility that such principles be turned into reality, and extended prerogatives for themselves. Even more important perhaps, coordination through general principles gives a central role to inter-institutional argument and interpretative settlements.

It should be stressed, in this respect, that actions and interpretations are intermingled. As J. Backhaus argued in a 1979 paper in *Public Choice*, audacious actions which are not met by adverse reactions acquire some sort of legitimacy, even though they could be portrayed as problematic beforehand. Then a major theme to investigate is the nature of the factors which give attractiveness to such audacious actions, through which the balance of real authority might be upset. Apart from electoral considerations in the head of political leaders and the mutual threats institutions can use, the following factors turn out to be important:

- 1) the knowledge of the real issues
- 2) the knowledge of other institutions (their history, traditions, functionings...)
- 3) the knowledge of medias and public opinion
- 4) the support of other institutions
- 5) a specific connection between the considered actions, the agency of the considered institution, and a set of principles; in particular, a special mission with respect to the implementation of a specific principle.

These factors can influence legitimacy, and they can thereby affect the attractiveness of unexpected, problematic actions.

Such factors may also be viewed as crucial to the reliability of institutional decision-making; hence it can be asked if they have a specific impact on legitimacy perceptions, or only an impact through perceptions of reliability (given that reliability can influence perceptions of legitimacy in its own right).

2. Argument and principles in reallocations of real authority: examples

By referring to two examples, a quick example and a more developed one, I will try to defend and further illustrate the specific role that can be played by argument and principles in reallocations of real authority, with unchanged formal power, as well as the role played by governance norms (or general principles of “good governance”). This will point out the lack of plausibility of a description in which “real authority” would be the mechanical result of coercion, balance-of-force considerations or even unlawful conquest of power. There is also a place for argument in the real-world processes of authority reallocation.

2.1. The “Car gas emission” case

To illustrate the possible linkage between interpretation and the margins for effective action, let us consider the “car gas emission standard” example, as analyzed by Hubschmid and Moser (1996) and Moser (1997). This is an exam-

ple where, during the successive rounds of a cooperation procedure, the European Parliament is able to uphold its preferred proposition, while the European Commission is obliged to accept this proposition, although it disagrees with it, in spite of the apparent weakness of the European Parliament in terms of formal power.

A key factor in the proposed explanations of what happened is that in the meanwhile an ECJ decision has had the result of shifting the reversion point to a point in the issue space which is even worse, from the Commission's point of view, than the Parliament's proposition. The location of the reversion point has changed because the default no-stricter-regulation status quo is now equated with a (frightening) situation where each member State could take restrictive measures on a unilateral basis for ecological reasons.

In this example, it is apparent that there has been a change in the meaning of the rules; consecutive to an ECJ decision, the free-trade rules are now interpreted as compatible with ecology-based unilateral restrictions. In the process, the Parliament's authority has become greater: it has been able to reach a concrete result even though this was implausible at the start. Correlatively, the Commission's authority has been challenged.

The Commission has been led to accept a deteriorating arrangement for fear of an even worse outcome. It can be said that its margins for action have become smaller: the institution cannot use the procedure to vindicate its preferred views; neither can it influence the predominant view about exceptions and the interpretation of existing rules (Picavet 2006).

2.2. Principles of economic liberalism and the French Government / Commission interactions

Let us consider the interaction between the French Government and the European Commission in the last decades, against a background of widely diverging views in these institutions about the extent to which a national government is allowed to help national industries.

In the case study which lies at the heart of this study, the focus is on interactions structured by Arts. 92-4 of the Rome Treaty, which stipulate that State aids which create competition distortions or undermine fair competition aren't compatible with the making and completion of the single market in Europe. Notwithstanding the massive ambiguities associated with such a statement⁴, such

⁴ See for example the detailed analyses of the relevant semantic indeterminacies in Louri (2002), Isla (2002). It must be stressed that ambiguities and / or indeterminacies, here, have a structuring role in formal processes of institutional interaction. On the communicative side, see especially Lefèvre (2004). This seems roughly in accordance with theoretical contributions which emphasize the structuring role of interpretative interaction for political processes in

a political norm has had a general de-legitimizing effect on State aids to industry and other kinds of State-driven economic intervention, regional policy or industrial policy. Secondly, it has also had a de-legitimizing effect on the initial interpretations of the exceptions (leaving room for State intervention)⁵. After the norm is promulgated, it becomes *prima facie* plausible that State authority has no legitimacy at all in market-based regions of social life – even though it has taken several decades, in the case at hand, for the normative change to bring about clear-cut effects in political reality.

This is a partly strategic, partly argumentative sort of political interaction. Discussion is crucial, especially as it helps political actors describe problems and relate them to existing norms (especially norms of the Rome Treaty and subsequent Community and EU Treaties). Such a role in defining the subject matter of political interaction is hardly reducible to underlying interests: argument as it is expressed through communication appears to have an important and independent role. This kind of discursive argument, moreover, is institutionalized in specific communication stages and procedures.

The coordinating attempts by the Government and the Commission heavily rely on the peculiarities of the situation at each stage of interaction. This is illustrated by the importance of expertise to establish the details of controversial situations and to assess the results of past or ongoing policies. The general principles and rules which are referred to by both institutional actors are quite indeterminate, unless they receive a more precise interpretation. Each new situation creates a new interpretation problem, when it comes to determining whether such or such rule or principle applies. In addition, the outcome of such collective problem-solving activity heavily influences, at least for some time, the *received (predominant) interpretation* of principles, rules and their exceptions.

A notable feature of the process is that formal communication between institutions is cast into the mould of rule and exception, rather than the balancing of interests or values. This, in itself, prepares the ground for a substantive role of argument. The problem is not just to strike a balance between rival views; in a way, each institution stands for the validity of its own pretensions, and mutually accepted norms are often put forward, so that negotiation typically assumes the

the shadow of general norms or principles ; notable contributions to this emerging theoretical body are Backhaus (1979, 2001), Matland (1995), Jones and Clark (2001) and Reynaud (2003). An interesting tentative general account of the insertion of such processes in ordinary legal-political transactions can be found in Moor (2005), esp. p. 70–76. Hart's casual descriptions of the "open texture of law" as well as Perelman's analyses of argumentation in legal transactions are rather obvious antecedent landmark contributions (Hart, 1961, Perelman, 1976).

⁵ This process has been described by Isla (2002) and, from a legal perspective, by Louri (2002).

form of a discussion of legitimate exceptions, given the room left for exceptions (in vague terms) in the initial statement of the norms, and given well-publicized antecedent cases. In such a setting, argument gradually defines the precise scope of principles and their legitimate exceptions. We have an opportunity to observe the joint social construction of principles and domains of real authority.

The need for coordination is very important in such a process. Government and Commission can suffer from each other's initiatives because the frontiers of their respective domains of authority are not so clearly defined from the start, so that their real authority (their concrete power to change things in the world by political means) is partly endangered through potential criticisms or lack of support from the other institution. This is so because, in the case of a large European State like France (a founding member of European communities), support from democratically appointed State authorities is an important part of the overall legitimacy of the Commission, which is often criticized – especially in France – on account of its lack of popular legitimacy.

Reciprocally, the French government, even when its involvement in the European integration process is rather weak, stands to lose from a lack of coordination with the Commission. One important mechanism is that the French government is usually in need of the Commission's support about a variety of economic affairs and sensitive social issues, giving the Commission a real threat potential in its negotiations over other issues.

Lack of coordination, then, can be characterized as a situation such that

a) the French government demonstrates little respect for community rules and the Commission's authority (for example, through the omitting of compulsory notification or the non-fulfilment of policy assessment obligations), or such that

b) the Commission acts in ways that negatively affect the success of governmental policy (for example by attacking the French government before the European Court of Justice with reasonable expectations of success, or by administratively interfering with ongoing processes of economic policy).

Quite simply, both institutions can lose part of their real authority because of their interaction. They are at risk of being obliged to comply with additional requirements when they choose to act in a certain way; some of their policies or regulations might lose any substance because of the opposition met; criticism from top leaders of the "civil society" may be formulated in terms of State's inability to comply with good governance rules (which is easily interpreted as bad behaviour). Moreover, the institutions might become incapable of exerting any real influence on the accepted interpretation of the underlying rules or principles – a phenomenon I propose to describe in terms of *lost margins for action concerning interpretation*.

3. Attempts at systematizing the distinction

3.1. A formal approach to real authority and formal power

In a joint work with D. Razafimahatolotra, I have chosen the formal system of “effectivity functions” to capture real authority as a kind of effective power. In such a system, the basic notion is the effectivity function that allocates to each coalition a number of more or less fine-grained subsets of outcomes; each subset can be reached in a secure way through one course of action or the other. Of course, if a subset belongs to the effectivity domain of a coalition, any super-subset of option will also belong to it.

One of the upshots of the discussion of existing contributions is that the diagnosis of a shift in real authority with unchanged formal rules presupposes some notion of a previously recognized or accepted allocation of concrete power. But, as the discussion of previous contributions also shows, a plurality of interpretations is not just an anomaly – it is rather a constitutive feature of the fact of being governed by rules. Thus we have to work with several interpretations at the same time.

Several groups will have separate views about their respective action domains. This means that legitimacy problems are inescapable and do not belong exclusively to crisis periods. Some agents will consider that some of their actions are legitimate, even though they aren’t in the eyes of other actors. But this is not to say that all actions are compatible with any rule, provided you choose the right interpretation. A major property of norms, rules or principles is that, notwithstanding the problems with interpretation, they do rule out certain actions. Thus, in a general approach of the real/formal dichotomy, we should not try to capture those phenomena which rather concern the abuse of power, or usurpation quite simply.

Following these guidelines, we could take as a model of “formal” power a set of effectivity functions which epitomize a subset of the alternative, legitimate interpretations of the meaning of rules or principles. This set reflects the dominant view of the legitimate interpretations of the “rules of the game” (which can be identified with the “game form” or “constitution” as game theorists think of it).

There is something empirical to this restricted subset of privileged interpretations. These are the interpretations which are “predominant” in the sense that it is widely expected, in educated opinion, that the real interplay of powers conform itself at least to one such interpretation of the other (within the restricted set). But other interpretations remain possible and plausible. They can be held in earnest by some institutions which simply do not subscribe to the dominant views, but who do not want to violate the rules either. Being indifferent to a dominant interpreta-

tion is one thing, and engaging oneself in the conquest of illegitimate power is another thing.

In such a general framework, the real/formal distinction would boil down to the following. There is a discrepancy between “formal” power and real authority when the observed effectivity of social groups is impossible to rationalize by means of any one of the “privileged” interpretations. The privileged interpretations are constitutive, in an hermeneutically pluralistic world, of what can be called “formal power” (the structure of power that can be derived from rules, following the insights given by educated opinion).

3.2. Distinct types of effective control

From the point of view of theoretical analysis, the notion of the ability to have it one’s way is ambiguous. It may be explained in terms of several concepts of real or effective power. The relationships between such concepts may deliver some insights into the real process of rule-learning among cooperating and yet competing institutions.

In some episodes in our second example an institution such as the French government comes to realise that it can no longer guarantee for itself certain results through a specific course of action (say, a preferred multi-stage policy) while paying no attention to the demands of other institutions. That is to say: it is no longer possible to make sure, thanks to a given course of action, that the outcomes will be in a subset of the possible outcomes. In the vocabulary of the theory of game forms (Abdou and Keiding 1991) this can be expressed by saying that there is a loss in the “alpha effectivity” of the institution.

Then it may be rational for institutions to opt for a governance regime in the “beta effectivity” format, with the relevant reciprocal guarantees consisting in making sure that, given some actions on the part of the others, it will always be possible to choose one’s own strategy in such a way that possible outcomes are in some target subset. This is at root an adaptative concept, which seems well fitted when it comes to describing the mutual adjustment of behavioural standards in agreements which include procedural and assessment requirements (typically, things “to comply with”, which are announced in advance and which form a predictable component of the strategy of the other institutions).

One interesting conclusion from mathematical studies in the field is that beta-effectivity yields a finer-grained control of the situation. Thus there is at least an understandable, rational component in rule-learning (irrespective of ideological attitudes or changes of mood or political atmosphere). By switching to a conventional interpretation of principles in which their implementation involves procedural and assessment requirements, each institution is able to warrant for itself a more predictable political world. Each subset it could guarantee for itself in

the alpha sense is included in the set of subsets it can guarantee for itself in the beta sense. Although it must comply with specific process-based requirements, it loses no ground in terms of control over the consequences, and it may even gain some additional control⁶.

This is what happened in the regional aids story, for example, when members of the French government came to understand that reaching an agreement with the Commission, involving compliance with procedural and assessment requirements, was preferable after all (after attempts at “alpha” type controls after the pattern of controversial initiatives with no previous notification nor any preliminary agreement). There was a switch from “alpha” controls (of the “forcing” type) to “beta” controls. For a while, it made possible a fine mutual adjustment of behavioural standards, giving each institution a fine-grained effective control of the situation. But then it became possible for one institution to make its fundamental aspirations effective in a more radical way, relying on constraint or threat. Negotiation then developed over other issues (such as the precise agenda for the reimbursement of State aids).

Another well-known mathematical conclusion is that larger coalitions have more power (either in the alpha or in the beta sense) than smaller ones – which may account for the importance of mutual support among institutions.

The above remarks on interwoven principles and capacities for action should guide us if we are to set our sights beyond formal, merely legal, authority relationships. Formal (legal) power is not the same thing as the real authority to bring about changes in the world. The selective use of possible procedures can precipitate shifts in the balance of effective power; and institutional agents do not always have an interest in making full use of their formal power in the service of their preferences. Such theses are fairly recent, and their integration into a renewed view of political authority is yet to be done⁷.

In our European example, the interpretation of rules is a determinant of economic life, but at root there are basic disagreements about the extent of State power – a truly political question about legitimate authority (figs. 1, 2).

⁶ This corroborates a conclusion arrived at by E. Steclebout (2004) by other methods: sharing power in Europe can restore controls for States, through power shifts in States-Commission-regions interaction.

⁷ These theses has been convincingly brought forth and advocated in various ways by Aghion and Tirole (1997), Backhaus (1979), Calvert and Johnson (1997), Kolmar (2002) and Steunenber and Schmidtchen (2000).

Fig. 1

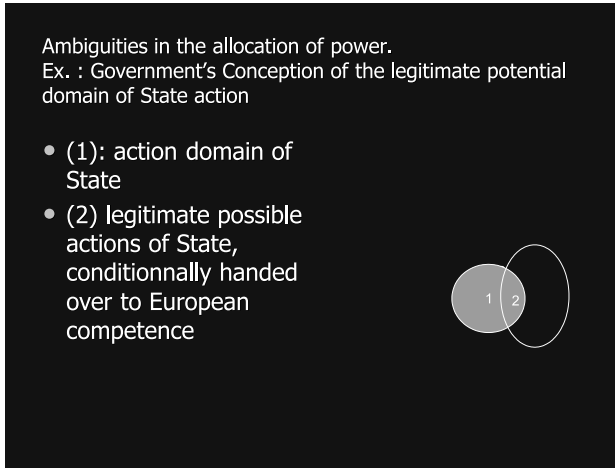
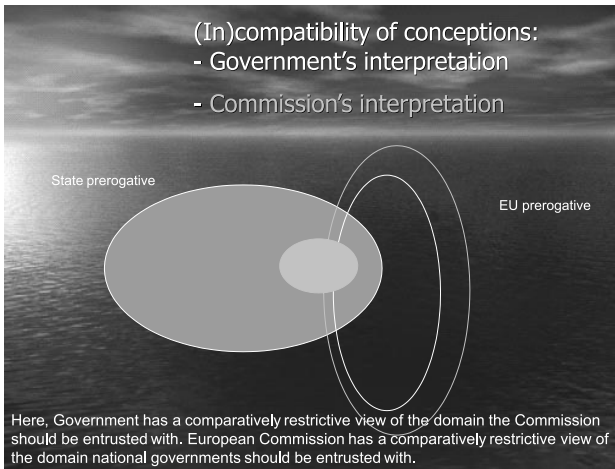


Fig. 2



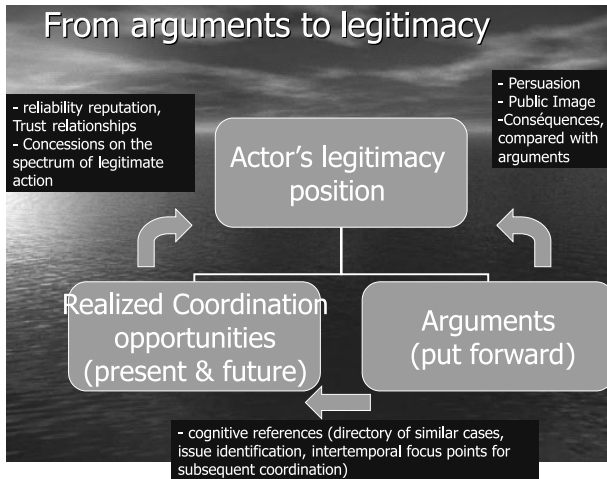
This is a partly strategic, partly argumentative sort of political interaction. Discussion is crucial, especially as it helps political actors describe problems and relate them to existing norms (especially norms of the Rome Treaty and subsequent Community and EU Treaties). Such a role in defining the subject matter of political interaction is hardly reducible to underlying interests: argument as it is expressed through communication appears to have an important and independent role. This kind of discursive argument, moreover, is institutionalized in specific communication stages and procedures (Lefevre 2004).

The general principles and rules which are referred to by both institutional actors are quite indeterminate, unless they receive a more precise interpretation. Each

new situation creates a new interpretation problem, when it is to be decided whether such or such rule (or principle) applies. In addition, the outcome of such collective problem-solving activity heavily influences, at least for some time, the received interpretation of principles, rules and their exceptions.

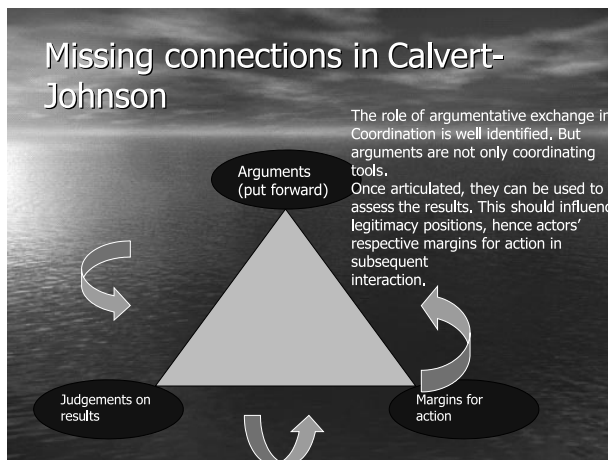
In the case of a smooth process of continuing political argument, institutional actors can establish the divergence and the partial overlapping of their respective rival views of each other's domain of competence (fig. 3). On this basis, they can argue over, and negotiate, the frontier of their respective policy domains.

Fig. 3



But other scenarios are to be considered and the main conclusions of our analysis give reasons to try and supplement the Calvert-Johnson intertemporal coordination scenario (fig. 4).

Fig. 4



Conclusion

From the point of view of political philosophy, a present-day motivation is to make some progress in understanding how the concrete powers of the State are gradually being redefined when the State is part of a supranational or international governance system. My guess is that moral and political principles play a crucial part in the process. If we accept the notion that the delineation of the State's power is the expression of evolving compromises between mutually supporting centers of power, there remains to investigate the kind of compromises that are operative. In particular, starting from existing theories of deliberative democracy, it is *a priori* interesting to evaluate the role of argument (in some cases philosophical argument concerning the State and the limits of its power) in political life. In democracy as it is, the formal dialogue between institutions is an essential component of argumentative deliberation.

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