



Being part of the club

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It is axiomatic that states join the EU voluntarily and do so because they believe that cost of the autonomy foregone is worth the benefits of being part of the club. A necessary corollary is that no individual Member State is going to like all that the EU does

Damian Chalmers recently published Policy Network paper on Democratic Self-Government in Europe, proposes solutions to the EU legitimacy crisis that could be attained within the existing Treaty rules. There are five strands to the argument: there is to be a new test of relative democratic authority, such that the EU can only act if it enlarges choices/protects values in a way that cannot be done by domestic parliaments, and where the benefits exceed collective domestic democratic costs; the test of relative democratic authority would be policed by national parliaments, and a proposed EU measure would require affirmative support from two thirds of national parliaments; if one third of national parliaments propose that legislation be reviewed, or that new legislation should be proposed, the Commission must make a proposal to this effect; individual national parliaments are to have power to pass laws disapplying EU law where an independent study shows that the law imposes higher costs than benefits for that member state; and in addition citizens should have the right to petition a national Constitutional Court to disapply an EU law if the law violates national values or traditions. There is much that is thought-provoking here, but there is also much that is contentious. Let me chart in outline some of the more contentious issues.

First, there is an alarming paradox running throughout the paper. Chalmers' proposals are designed to increase democratic self-government in the EU. They would if acted on constitute the most significant change in the ordering of the EU since its creation, they would fundamentally change the way in which decisions are made and the way in which they are legitimated. Yet this very imperative to increase democratic self-government is said to be attainable without any proper discursive and democratic process of the kind that attends treaty reform. It is to be achieved through joint declarations, resolutions and the like. If EU history teaches us anything, it is that changes to institutional powers and decision-making rules are contentious. That has been so in relation to changes far-less radical than

those advocated by Chalmers. The idea that we should try to advance such changes without the full machinery of Treaty reform plus constitutional ratification by each Member State does not withstand examination in normative terms.

Secondly, in any event the changes could not in formal terms be achieved within the confines of the Lisbon Treaty. The formal Treaty rules must perforce be interpreted in accord with their wording, underlying purpose and past history. The idea that the package of Damian Chalmers' proposals could be accommodated within the existing Treaty rules is not sustainable when judged by any of these criteria. Thus, to take but two brief examples, there is no basis on which the role to be played by national parliaments in the decision-making process could be accommodated without reform to the primary Treaty rules, and this is equally true in relation to the proposals whereby national parliaments would be accorded the power to disapply EU rules.

Thirdly, the substantive content of Damian Chalmers' proposals is equally contentious. Space precludes detailed consideration, but a brief example will suffice for present purposes. Thus Chalmers argues that a national parliament should be allowed to refuse its assent to a proposed EU measure for any reason, including the fact that it simply dislikes the outcome, which is said to be a feature central to the 'quality of democratic life generated by an EU measure'. If however mere dislike of the outcome of a proposed EU measure suffices as a reason for withholding assent, and if this is to be regarded as a factor that goes to the quality of the democratic life generated by the EU measure, then EU decision-making will be truly precarious. There may well be debate as to the proper interpretation of the identity clause in Article 4(2) TEU, but to interpret it this broadly fits neither with its wording or purpose.

Fourthly, the proposals are predicated on contentious empirical assumptions as to how the EU operates. Thus to take but one example, Damian Chalmers makes broad claims concerning the EU's lack of responsiveness, connoting its relative inability as compared to national systems to respond to undesirable consequences of earlier initiatives. Yet the reality in most areas of EU law is to the contrary, with learning and legislative amendment being the norm no less so than in Member States. The general pattern is for there to be a legislative act, followed by delegated and implementing acts that flesh out its details and fill in problems revealed through operation of the legislative act. This then leads after a number of years to a new legislative act, which embodies the results of the previous experience, and this in turn is supplemented by further measures in order to enhance its efficacy, and so the process continues.

Finally, the package of proposals is in a fundamental sense premised on contentious assumptions as to what it means to be party to a collectivity such as the EU. It is axiomatic

that states join voluntarily and do so because they believe that the autonomy foregone by taking part in such collective action is worth the benefits that are to be gained by being part of the club. A necessary corollary is that no individual Member State is going to like all that the EU does. There are already detailed rules that determine when EU action in the form of legislation and the like can be undertaken. Chalmers wishes to change these radically, so that a national parliament can undertake its own cost/benefit analysis of the proposed measure and determine whether to assent to it, or to disapply it later if independent evaluation reveals that the costs are higher than the benefits for that state. It is not simply that the former proposal would render EU decision-making more complex and precarious than hitherto. It is not simply that the latter would be extremely difficult to do in an objective manner that was not open to abuse. The problem lies deeper than this, since the proposals taken individually and as a whole are premised on the assumption that each and every state can on each and every occasion choose not to accept obligations that it dislikes where it feels that the costs outweigh the benefits for that polity, while remaining part of the club and taking the benefits of membership. This undermines the very idea of collective action in the body that has become the EU¹.

Those euro-sceptics who may be attracted by such proposals should moreover reflect a little further, since it is obviously integral to Chalmers schema that the package is equally applicable to all states. Thus while eurosceptics might relish the ability to use such power to disapply EU social policy in the UK, they might view with considerably less equanimity the fact that EU market liberalization measures that they favour have been disapplied by other states of a more social-democratic disposition. Be careful what you wish for, because it might just come true.

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¹ Chalmers provides for some form of mediation through the European Council, but it does not alter the substance of the point being made here