

Delegation and Legitimacy

Karol Soltan
University of Maryland
ksoltan@gvpt.umd.edu

Revised 01.03.2005

This is a ticket of admission for the 2005 Maryland/Georgetown Discussion Group on Constitutionalism, aka The Schmooze. Thus, even though it looks like a short paper, it is not. A paper, with footnotes and other paraphernalia of scholarship, will follow.

I. Introduction

Can we understand the widespread delegation of decision-making authority and de facto law-making powers to courts in isolation from all other forms of delegation, and other significant changes in the political world? I doubt it.

In this paper I will try to put the phenomenon of delegation to courts in a larger context. There is the larger historical context of long term political and cultural transformations after the deep crisis of the twentieth century (a crisis that begins in 1914 and ends twice, first in 1945 and then again in 1989). And there is a larger theoretical context of understanding the phenomenon of delegation wherever it occurs.

Delegation has been widespread both in domestic politics and international politics of the last decades. It has involved delegation of decision-making powers to courts, to central banks, to regulatory institutions, to international organizations, and perhaps most notably to the various institutions of European Union including its executive, its judiciary, its parliament, and to its exceptionally autonomous Central Bank.

The most systematic explanation for this widespread phenomenon is what we might call rational choice functionalism (Keohane, Eggertsson, Pollack,). In this paper I would like to incorporate this rational choice functionalism into a larger picture of the logic of delegation which sees delegation in general as an instrument of legitimacy enhancement. And so it also sees delegation to courts in particular as also driven in the first instance by efforts to enhance legitimacy.

The story does not end there. Once we see the phenomenon of delegation as primarily driven by legitimacy enhancement, we can go further in attempting to explain the recent popularity of delegation to courts. We can see it as part of a larger shift in the process of legitimacy enhancement that occurs as the world comes out of the crisis of the 20th century. It is a shift, above all, from legitimacy based on the twin principles of the

sovereignty of the territorial state and the sovereignty of the people, toward more complex forms of legitimacy.

II. Cost Saving and Legitimacy Enhancement

The best place to begin our understanding of the broad phenomenon of delegation is with rational choice theory. The rational choice approach provides us with two angles of vision for our understanding of delegation. We can see delegation, first, as a product of the search by individual agents for the best possible instruments of their independent individual purposes. These individuals and organizations might pursue delegation to courts, for example, in order to protect their interests and entrench their privileges.

But rational choice provides also a different angle for the understanding of delegation. Some have called this alternative rational choice functionalism, others (less friendly) have called this a naïve form of rational choice. On this view the way to understand delegation is to look at the functions it performs. As Pollack has written “institutional choices are explained in terms of the functions that a given institution is expected to perform, and the effects on policy outcomes it is expected to produce” (Pollack, p.20). But a close reading of that (accurate) description of rational choice functionalism makes clear that it is not really very functionalist. The functionalist approach, in its pure form, explains institutional choices in terms of the functions that the institution actually performs. It explains institutions by their effects (). Rational choice functionalism, by contrast, looks at the functions an institution is expected to perform. This is really an effort to see institutions as products of design, not a true functionalism in which effects are causes.

In most contemporary discussions of these issues, especially in political science, the main theoretical battleground in our efforts to understand institutions is a fight between rational choice approach and an alternative which centers on the connection between institutions and legitimacy. The most commonly cited version of this contrast comes from March and Olsen’s work and distinguishes the logic of consequences from the logic of appropriateness. But neither the division between rational choice and legitimacy nor the contrast between the logic of consequences and logic of appropriateness will really help us to understand the phenomenon of delegation.

The fake functionalism of “rational choice functionalism” is the key clue we should follow. The best way to understand the range of phenomena rational choice functionalism describes is to see them as one aspect of the pursuit of legitimacy enhancement. To put the matter crudely, the legitimacy of an institution is a product of both the legitimacy of its ends, and the effectiveness with which it pursues those legitimate ends. And rational choice functionalism allows a detailed analysis of the sources of this effectiveness, by identifying a variety of costs which are impediments to effectiveness, and which appropriate institutional arrangements can help diminish. These are often called “transaction costs.” They include informational costs, which prompt delegation to bodies of experts. They also include costs of negotiation to arrive at agreements, and the costs of

monitoring and enforcing those agreements. Another key impediment to effectiveness is the problem of credible commitment. And here too, delegation to relatively autonomous agencies may be the most effective strategy.

Rational choice functionalism is essentially a study of the sources of legitimacy of means. So we observe the logic of consequences at work contributing to legitimacy, in a way that is quite distinct from the other use of rational choice, in which we look at the world as a series of efforts by individual agents to obtain as much as possible in light of their purposes. And it is also distinct from the processes that develop more legitimate ends, prominent among them the sort of historically constrained (“precedent bound,” in various ways) impartial deliberation we find so prominent in the courts of law.

The problem of legitimacy can be divided in a variety of ways. One important division is between the establishment of legitimate purpose or principle, and the effective pursuit of that legitimate purpose or the articulate expression of that principle. So, for example, when the court engages in purposive statutory interpretation it is enhancing the legitimacy of the statute it is interpreting. It aims to show the statute to be a reasonable effort, an effective pursuit of legitimate purpose. Legitimacy enhancement is here part of the central task of a court, and it has two aspects, showing the statute to have a legitimate purpose, and showing it to be an effective instrument in the pursuit of that purpose.

Delegation to courts is in some ways quite distinctive. Delegation to both courts and central banks, for example, can achieve credible commitment, prompting analogies to Ulysses and the sirens, and repetition of well worn phrases about “the people sober binding the people drunk.” But the nature of the commitment required, and of the expertise, are quite different. For central banks the commitment tends to be relatively focused and the expertise based on knowledge of causal connections relevant to effective policy. The commitments of courts are more normatively complex, and the expertise less instrumental in its function. Courts increasingly are called upon to articulate fundamental principles of a law beyond the reach of law making powers of any kind: an unamendable constitutional commitment to equal human dignity, or a supreme *ius cogens*, that is a product of no treaty, but binds them all.

Beyond a few short steps the further path in this direction seems blocked by the unwillingness of democratic majorities or territorial states to be constrained. If territorial states are unwilling to enforce a law or principle, the new power and autonomy of courts must depend on the development of alternative enforcement procedures and incentive systems, independent of the state and the market. The most important of these in the period since the end of the great crisis of the 20th century have been self-limiting principled social movements inspired largely by the example of Gandhi. So on top of the now quite ancient alliance between courts and states, we have a new alliance emerging between courts and self-limiting movements. This alliance was already visible in the immediate postwar period [get reference]. It has recently been prominently on display in the Orange Revolution in the Ukraine. States, to be sure, will continue to provide systems of incentives crucial to establish and maintain the highest principles of law. But it is now difficult to ignore the additional role of these “Gandhian” movements. And this provides

another wedge between law and the state, and another reason to rethink the nature of law and its relationship to the state. Delegation of power from states to courts is one symptom of this change.

III. From Easy to Difficult Legitimacy

The evidence from Lijphart's () systematic comparison of different democratic systems suggests two patterns directly relevant to the understanding of delegation of power to courts, or the larger trend of which this delegation is both an important element and a visible symptom. First, countries with rigid constitutions and strong forms of constitutional review are also likely to have more independent central banks. And, second, countries with stronger forms of federalism are more likely to delegate power to both courts and banks in this way. Why should that be? The simple answer, I suggest, is that both federalism and these forms of delegation are products of a moderate style of politics, which I discuss more fully below. By contrast, systems in which the state is unitary, and in which delegation from democratically elected bodies is rare, are products of a more radical democratic tradition.

These “more radical” alternatives are more likely to survive in settings where problems of institutional design and legitimacy enhancement are relatively easy: in smaller and more homogeneous societies. As we shift from small to large, as we increase both heterogeneity and the difficulty of problems to be solved, institutional design solutions that include federalism and delegation to courts, banks and independent agencies become more attractive. [discuss Toward Juristocracy here] Legitimacy is easy in small homogeneous settings, when we have to perform relatively easy tasks. As we move to larger settings, and more heterogeneous populations, faced with more difficult tasks, legitimacy becomes more difficult and more complex forms of legitimacy are required. Delegation is part of an effort to achieve these more complex forms.

The task of constructing a polity based more on legitimacy than on force began where it was relatively easy, in the small homogeneous state of the ancient Greek polis, small in size, and made more homogeneous through restricted citizenship. The task then shifted to more difficult settings, from the city state to the larger territorial state and beyond that to multinational heterogeneous states and supranational institutions.

More modern simplifying devices for the task of legitimacy building include a culturally homogeneous state, more commonly known as the nation state, and the two great ideas of popular sovereignty and sovereign territorial states. The chief characteristic of the more recent period, with its widespread practice of delegation, is a transition beyond these simplifying devices, abandoning neither popular sovereignty nor the sovereign territorial state, but making these two legitimacy producing principles part of a larger and more complex system of legitimacy.

In more specific historical terms the fashion for delegation can be seen as part of the

definitive ending of the French Revolution. The antidemocratic legacy of the French Revolution ends with the collapse of communism. Its distinctive democratic legacy ends with a shift away from a certain conception of democracy which was also the brainchild of the radical politics of the Enlightenment. We find it already in the English Civil War, but we find it in a more elaborate form among some radicals in 18th century North America, and even more among the powerful currents of radicalism in the French revolution. It is characterized in its extreme form by pure separation of powers, or by “government by convention,” in which the legislature takes over executive tasks. It is characterized more generally by a preference for political systems dominated by democratically elected legislatures, and an overriding concern with limiting judicial power. The French 3rd Republic during most of its years was the best example of this tendency. It is a style of politics which recognizes only one source of legitimacy: democratic voting.

An alternative style of politics, with an ancient pedigree, favors a set of constitutional arrangements that are more mixed and balanced, relying on complex forms of power separation and power sharing, and on complex systems of legitimacy enhancement, proposing arrangements of checks and balances, and mixed régimes. When we shift away from the radical legacy of the French Revolution toward this alternative more moderate legacy, we predictably see everywhere the phenomenon of delegation from democratically elected law making bodies to various agencies, courts prominent among them, combining to create more complex forms of legitimacy.

The whole trend, then, can be seen as part of a project of moderate politics. Among the main characteristics of this moderate project is a distinctive form of realism, whose loyalty to reality is expressed not in the conviction that improving the world is impossible (this is largely the spirit of realism in international relations, for example), but that it is difficult, and becomes possible only when that difficulty is fully recognized. And this requires both complex ideas and complex institutions, because difficult problems require complex solutions. So if we see in the world of ideas and institutions a shift toward greater complexity, we need to understand it as a requirement of design for difficult circumstances (and not as an otherwise inexplicable evolutionary trend, for example).

We see here emerging, it seems to me, a new form of the balanced constitution, in which the crucial balance is not between different branches of government, but between different legitimacy producing systems. And delegation is an excellent instrument for the production of such mixed legitimacy régimes. When a democratically elected body delegates some of its powers, it does not entirely give them up. So the resulting decisions are still in part legitimated by their partially democratic origin, but they are also legitimated by the process to which the decision-making has been delegated, whether it is the expertise of the regulatory body, the expertise and distinctive credible commitments of an effective central bank, or the distinctive procedures and forms of reasoning of a court.

The shift from simpler to more complex forms of legitimacy goes beyond domestic

politics. In the rhetoric we have inherited from the Enlightenment it is appropriate to attribute sovereignty to two entities. As democrats, we are committed to the sovereignty of the people, but we also recognize the sovereignty of the territorial state. Sovereignty of the people rules domestic politics; sovereignty of territorial states rules the international sphere. Legitimacy is derived from the people on the one hand, and from the state on the other. As we move toward more complex forms of legitimacy, we can expect delegation from democratically elected bodies to other bodies. And we can also expect delegation from the state to non-state institutions. And that is in fact what we find in the contemporary fashion for delegation.

The phenomenon of delegation fits well the larger pattern some have come to call “a new medievalism.” The new system we see being born has some key features in common with pre-modern Europe. A world that used to be dominated by sovereign territorial states is replaced by a more complex structure in which sovereign territorial states are less sovereign and other political entities take over some of their functions. For some this brings to mind a world in which the Holy Roman Empire competed with the papacy for both authority and power. There are to be sure some interesting analogies between the political arrangements of pre-modern Europe and the world we see emerging today. But if we understand this new world as more nearly a second stage of modernity we are more likely to understand better the trends we see before us, including the shift of power to courts. And we are less likely to miss the current immense potential of the project of moderate politics, to build a global political structure centered on a complex system of legitimacy, whose starting point may be the sovereign state and the sovereign people, but which takes advantage of a variety of processes of delegation to build a more complex system more appropriate for a heterogeneous global society facing difficult problems.