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DELEGATION TO COURTS AND LEGITIMACY

KAROL SOLTAN*

I. INTRODUCTION

Can we understand the recent global popularity of the delegation of decision-making authority and de facto law-making powers to constitutional courts in isolation from all other forms of delegation¹ and other significant changes in the political world? I doubt it. And that puts in question two of the most serious explanations of this recent trend. If Ran Hirschl is right, and elites delegate to courts only to entrench their privileges,² we should observe a parallel growth in popularity of military coups, the traditional way to entrench privileges. There is no such growth. If Alec Stone Sweet is right, and the delegation to courts is a product of an ideological shift toward a “new constitutionalism” and greater rights consciousness,³ we should not observe a parallel shift toward greater independence of central banks.⁴ But we do observe such a shift, and it is clearly not a product of stronger commitments to human rights. It may perhaps be seen as a product of a broader new constitutionalism, but only if we stretch such a notion beyond its ordinary range of meanings and beyond what Stone Sweet appears to have in mind.

In this Essay 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

* Associate Professor of Government & Politics, University of Maryland. Special thanks to Ran Hirschl, who originally provoked me into writing down some thoughts on this issue, and to the participants of the *Maryland/Georgetown Constitutional Law Schmooze* on the theme of his book, who provoked more thoughts and provided many critical comments.

1. See generally *THE POLITICS OF DELEGATION* (Mark Thatcher & Alec Stone Sweet eds., 2003).

2. RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 11 (2004).

3. ALEC STONE SWEET, *GOVERNING WITH JUDGES* 56-60 (2000).

4. See AREND LIJPHART, *PATTERNS OF DEMOCRACY* 232-33 (1999) (hypothesizing a positive relationship between strong constitutionalism and central bank independence). But see SYLVESTER C.W. EIJFFINGER & JAKOB DE HAAN, *THE POLITICAL ECONOMY OF CENTRAL-BANK INDEPENDENCE* 41 (1996) (arguing that central bank independence is determined by unemployment, government debt, political instability, the supervision of financial institutions, opposition to inflation, and other factors); John B. Goodman, *The Politics of Central Bank Independence*, 23 *COMP. POL.* 329, 331-34 (1991) (suggesting that societal coalitions and political expectations determine central bank independence).

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 of decision-making powers has been widespread both in domestic and international politics. It has involved delegation of decision-making powers to courts, central banks, regulatory institutions, international organizations, and most notably the various institutions of the European Union, including its executive, judiciary, parliament, and exceptionally autonomous Central Bank.⁵

The most systematic explanation for this widespread phenomenon is what many have called "rational choice functionalism."⁶ In this Essay I suggest a reinterpretation of this form of functionalism and I incorporate it into a larger picture of the logic of delegation which sees delegation in general as in part a product of strategic politics and in part an instrument of legitimacy enhancement. And so it also sees delegation to courts in particular as driven by a combination of the narrow pursuit of self-interest and efforts to enhance legitimacy.

The story does not end there. Once we see the phenomenon of delegation as driven in large part 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 twentieth 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 and more complex forms of social organization, of which Stone Sweet's new constitutionalism is only one component.⁷

II. COST SAVING AND LEGITIMACY ENHANCEMENT

The best place to begin our understanding of the broad phenomenon of delegation is with rational choice theory.⁸ 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

5. MARK A. POLLACK, *THE ENGINES OF EUROPEAN INTEGRATION: DELEGATION, AGENCY, AND AGENDA SETTING IN THE EU* 77, 157 (2003).

6. *E.g.*, THRÁINN EGGERTSSON, *ECONOMIC BEHAVIOR AND INSTITUTIONS* 7-10 (1990); ROBERT O. KEOHANE, *AFTER HEGEMONY* 80-83 (1984); POLLACK, *supra* note 5, at 20-21.

7. STONE SWEET, *supra* note 3, at 31.

8. *See generally* DENNIS C. MUELLER, *PUBLIC CHOICE III* (2003); *POLITICS FROM ANARCHY TO DEMOCRACY: RATIONAL CHOICE IN POLITICAL SCIENCE* (Irwin L. Morris et al. eds., 2004); KENNETH A. SHEPSLE & MARK S. BONCHEK, *ANALYZING POLITICS: RATIONALITY, BEHAVIOR, AND INSTITUTIONS* (1997).

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, to protect their interests and entrench their privileges. Thus for those who elaborate the principal-agent approach in the study of delegation,⁹ the delegation of power to any decision-maker (including courts, central banks, or regulatory agencies) is driven and constrained by the strategic interests of the principals. In his book *Towards Juristocracy*, Hirschl constructs a version of this story, attempting to show that at least in the case of Canada, New Zealand, Israel, and South Africa, the principals were the political and economic elites, and the goal was to entrench their threatened privileges.¹⁰

But rational choice theory provides also a different angle for the understanding of delegation. Some have called this alternative "rational choice functionalism,"¹¹ others (less friendly) have called this a naïve form of rational choice.¹² According to this view the way to understand delegation is to look at the functions it performs. As Mark Pollack has written: "[I]nstitutional 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."¹³ But a close reading of rational choice functionalism makes clear that it need not be, and most often really is not, very functionalist. The functionalist approach, in its pure form, explains institutional choices in terms of the functions that an institution *actually* performs. It explains institutions by their effects.¹⁴ Rational choice functionalism, by contrast, typically looks at the functions an institution is *expected* to perform. This is really an effort to see institutions as products of tacit or explicit *design*, governed by a calculus of costs and benefits, not a true functionalism in which effects are causes.¹⁵ Delegation, according to this

9. See WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971) for an early contribution, and for a later, important series of papers see Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987) and Mathew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989). See also DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* (1999); POLLACK, *supra* note 5; SHEPSLE & BONCHEK, *supra* note 8.

10. HIRSCHL, *supra* note 2, at 213-14.

11. KEOHANE, *supra* note 6, at 70-73; POLLACK, *supra* note 5, at 20.

12. EGGERTSSON, *supra* note 6, at 8.

13. POLLACK, *supra* note 5, at 20.

14. ARTHUR L. STINCHCOMBE, *CONSTRUCTING SOCIAL THEORIES* 181-84 (1968).

15. Karol Soltan, *Institutions as Products of Politics*, in *INSTITUTIONS AND SOCIAL ORDER* 45, 51-53 (Karol Soltan et al. eds., 1998).

view, occurs when those who delegate expect it to produce efficiency gains by solving commitment problems, lowering decision-making costs, or improving the quality of information on which the decision is based. It is better to call this an efficient design explanation for delegation.

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 the 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 James March and Johan Olsen's work and distinguishes the logic of consequences from the logic of appropriateness.¹⁶ But both a strict division between rational choice and legitimacy and the contrast between the logic of consequences and logic of appropriateness are problematic when we attempt to understand the phenomenon of delegation. Neither leaves any room for efficient design explanations or for legitimacy based on efficient design considerations. In fact, however, 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 it 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, or efficient design explanation, 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, or efficient design theory, can be seen as a set of hypotheses about the sources of the legitimacy of means. So we observe the logic of consequences at work contributing to legitimacy, in a way March and Olsen's contrast between the logic of consequences and the logic of appropriateness would not allow. The logic of consequences appears in the efforts by individual agents to obtain as much as possible in light of their purposes. But it also

16. JAMES G. MARCH & JOHAN P. OLSEN, *REDISCOVERING INSTITUTIONS* 8-16 (1989).

appears as a source of legitimacy or appropriateness: a legitimacy of means to complement the legitimacy of ends. It is governed by instrumental reason, as distinct from the processes that develop more legitimate ends, prominent among them the sort of historically constrained (precedent bound) impartial deliberation we commonly find in the courts of law.

The problem of legitimacy can be divided in a variety of ways. We need to distinguish the notion of legitimacy that can be the goal of institutional design, which is a normative notion perhaps best understood as the right to loyalty,¹⁷ from another notion we often call Weberian, which refers to *beliefs* about appropriateness or legitimacy.¹⁸ According to the first a system is legitimate if it has the right to the loyalty of the relevant parties. According to the second it is legitimate when the relevant parties *believe* that the system has the right to their loyalty. When we claim that institutions are products of tacit or explicit design in pursuit of legitimacy enhancement, we understand that it is *perceived* costs and benefits and *perceived* legitimacy that will be the direct drivers of institutional change. But certain aspects of *real* legitimacy (e.g., the legitimacy due to cost effectiveness) may be perceived with sufficient accuracy so that real costs and benefits may be seen as the drivers of change. Efficient design principles can have an effect to the extent they are tacitly or explicitly understood. They operate through human beliefs.

A second 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 a court engages in purposive statutory interpretation, it is enhancing the legitimacy of the statute it is interpreting. It reads the statute as a reasonable effort in pursuit of a legitimate purpose. Legitimacy enhancement is here part of the central task of a court, and it has two aspects, attributing a legitimate purpose to the statute 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 as well as

17. A more common view identifies political legitimacy with the right to govern. See, e.g., JEAN-MARC COICAUD, *LEGITIMACY AND POLITICS* 10-25 (David Ames Curtis ed. & trans., 2002). The idea of legitimacy as the right to loyalty is broader, being limited neither to political institutions nor to governance.

18. See generally I MAX WEBER, *ECONOMY AND SOCIETY* 33-38 (Ephraim Fischoff et al. trans., Guenther Roth & Claus Wittich eds., Univ. of Cal. Press 1978) (1968) (discussing legitimacy as a function of beliefs). See also J.G. MERQUIOR, *ROUSSEAU AND WEBER: TWO STUDIES IN THE THEORY OF LEGITIMACY* (1980).

the 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 perceived imperatives of efficient design drive institutional change. 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 (in international law) a supreme *ius cogens*, that is not a product of any treaties, but binds them all. Hence efficient design explanations are less likely to be satisfactory for the delegation to courts than for delegation to central banks. When we consider the new powers of courts, we need to broaden our perspectives, and I suggest we turn to the more inclusive idea of legitimacy-enhancing design (with efficient design as only one of its aspects).

III. FROM EASY TO DIFFICULT LEGITIMACY

Comparative research relevant to the question of delegation consists usually of in-depth studies of a few countries, say four or five, and focuses typically on one type of institution as the target of delegation (e.g., courts or central banks). The books by Hirschl¹⁹ and Stone Sweet²⁰ on delegation to constitutional courts fit this pattern well. Such studies help us develop a detailed understanding of the processes of delegation. But what we conclude from them should not be inconsistent with the results of larger scale comparisons. What we may conclude from comparisons of the delegation of power to constitutional courts in four or five countries must be integrated into a larger story, if we know something about the larger story. In this case we do.

The most inclusive relevant study I know is Arend Lijphart's *Patterns of Democracy*.²¹ The evidence from Lijphart's systematic comparison of institutional arrangements in thirty-six stable democracies 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

19. HIRSCHL, *supra* note 2.

20. STONE SWEET, *supra* note 3.

21. LIJPHART, *supra* note 4.

also likely to have more independent central banks. Lijphart found here a correlation of 0.39.²² And, second, countries with stronger forms of federalism are more likely to delegate power to both courts (correlation of 0.48) and banks (correlation of 0.57) in this way.²³ Why should that be?

It cannot be because federalism requires independent arbiters in the form of constitutional courts (that wouldn't explain why central banks tend to be more independent in federal countries). And rights consciousness cannot be the whole story (again, central banks don't help with human rights). Finally, I have trouble constructing an account in which this pattern would be a product of the efforts by elites to entrench their privileges. A better answer, I suggest, is that both federalism and these forms of delegation are products of a moderate style of politics, committed to balancing principles and ideals (a political style with special affinity to legal reasoning). By contrast, systems in which the state is unitary, and in which delegation from democratically elected bodies is rare, are products of a more uncompromising democratic tradition with strong roots in radical politics. Hirschl argues that a shift of power to constitutional courts undermines "progressive" politics and supports pro-market neoliberalism. If my hypothesis is correct, this shift is rather a victory for a principled moderate politics, a form of politics courts promote and support. Radical politics loses to be sure, and some pro-market neoliberal principles gain. But other principles gain as well.

The contrast between these two styles of politics, and the corresponding efforts to enhance legitimacy, is not simply a political contrast between the center and the left. These "more radical" alternatives are more likely to be found 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. 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. This is what is happening, for example, in the

22. *Id.* at 244 tbl.14.1.

23. *Id.*

four countries Hirsch studies. In all of them either the population is becoming more heterogeneous, or the politically relevant population is becoming so, because previously suppressed groups are gaining in power. Quebec is becoming more powerful in Canada; South Africa shifts from apartheid toward racial equality; and previously neglected groups gain in New Zealand and Israel. In each new political situation more is demanded of legitimacy, and the older, simpler, and more targeted systems of legitimacy prove inadequate.

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 also appears to decline 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 eighteenth-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 Third 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 institu-

tions 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 or an equally mysterious shift of power from the left to the center, 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, or different social groups (the nobility and the Third Estate, say), 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 nonstate institutions. And that is in fact what we find in the contemporary fashion for delegation.

The phenomenon of delegation fits well within the larger pattern some have come to call "a new medievalism."²⁴ 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

24. E.g., HEDLEY BULL, *THE ANARCHICAL SOCIETY* 254-55, 264-76 (1977); Stephen J. Kobrin, *Back to the Future: Neomedievalism and the Postmodern Digital World Economy*, *J. INT'L AFFS.*, Spring 1998, at 361, 362-66 (1998).

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. And contemporary moderate politics has its antecedents among the classics: Aristotle, Confucius, and Buddha were all advocates of some form of the middle way. 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, appropriate for a heterogeneous global society facing difficult problems.

This more complex system features delegated power in the hands of such domestic institutions as constitutional courts, central banks, and regulatory agencies. It also features power delegated to various international institutions. But we also see new instruments, which reinforce the power of principle. In the emerging new system when territorial states are unwilling to enforce a law or principle, the new power and autonomy of courts can be reinforced by alternative methods of pressure, independent of the state and of the market. The most important of these in the period since the end of the great crisis of the twentieth century have been self-limiting principled social movements inspired largely by the example of Gandhi. So on top of the ancient alliance between courts and states, we have a new alliance emerging between courts and self-limiting social movements. This alliance was already visible in the immediate postwar period, when the politics of the civil rights movement in the United States supported the Warren Court's rights revolution. 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 in this task of these Gandhian movements. And this provides another wedge between courts of law and the other state institutions. The growing autonomy and power of courts, especially constitutional courts, is one symptom of this change. The new complexity of legitimacy is thus also backed up by more complex systems of pressure: enforcement from above by states now combined with pressure from below by these social movements.