

—————BOOK NOTE—————

Bogdan Iancu, *Legislative Delegation: The Erosion of Normative Limits in Modern Constitutionalism* (Heidelberg: Springer, 2012), pp 289. ISBN 978-3-642-22329-7.

It is rare to come across a work of comparative constitutional scholarship that takes on a foundational concept across multiple boundaries without giving in to any form of reductionism. This is such a work. Even the most knowledgeable student of the history of constitutional ideas and their practical instantiations across influential jurisdictions over time will find much to learn from this erudite and richly layered study. The book aims modestly to provide an account of attempts in several countries to place constitutional limits on legislative delegation, but it does much more. Its careful attention to the changing philosophical, social, political, and economic context of those attempts, as well as its analysis of the concept of legislation, should make it an important work of reference for some time to come.

The text still bears some of the marks of the doctoral thesis that it once was and tends accordingly to be very demanding of the reader. The only way to approach the book, it seemed to me, was to shuffle constantly back and forth between the chapters so as to make sense of where one had come from and where one was going. But the reader is amply rewarded for this effort. In this age of lowered editorial expectations, the copy is good. Typographical errors are few, except for citations in French, which should have been reviewed. Nothing here affects the overall quality of this book, which is undeniable.

Methodology and Argument

The book derives its strength from the author's self-conscious approach to the subject, which rests on the conviction that "normative accounts, historical transformations, and positive law cannot be separated."¹ This stance is ascribed to the school of "integrative jurisprudence", according to which "the virtues of all these dimensions of law (legal philosophy, legal history, legal practice) and of the three major schools of legal

¹ Bogdan Iancu, *Legislative Delegation: The Erosion of Normative Limits in Modern Constitutionalism* (Heidelberg: Springer, 2012) at 14.

thought (natural law theory, positivism, the historical school) can be welded into a more complex, single theory.”² The book thus takes a broad view of constitutional law, treating it as a process in which rules, values, and facts come together and are constantly actualized.

The book’s modest argument is that, since the concept of delegation is a “legal-philosophical corollary” of “substantive, systemic”³ assumptions about law and law-making, legal limits on delegation cease to be workable where these assumptions no longer prevail.

The Issue

Limits on the delegation of legislative power may be explained in at least three ways, which have a measure of overlap. One way appeals to the rule of law: an impermissible delegation is one that negates agency or dignity by making it impossible for one to adjust one’s conduct to the law; because the law’s prescriptions are too vague, an inordinate measure of discretion is created, which results in a government of men and not of laws. Another way of explaining limitations on legislative delegation is to appeal to the separation of powers. One may say that legislative delegation increases the power of one branch of government and creates imbalances that may jeopardize the ability of the system to check power through power. From the perspective of the separation of functions, “the legislature could be said to be divesting itself of its constitutionally assigned function.”⁴ Yet another way of explaining limits placed on the delegation of legislative power is in terms of democratic theory: “[W]e elect representatives (as the Lockean phrase goes) ‘only to make laws, and not to make legislators,’ that is, they are elected to take the actual decisions that govern our lives.”⁵

These concepts and their interplay are all reflected differently in different constitutional orders and may produce different results in different contexts. “It could surely be opined,” the author writes, “that the nondelegation doctrine or constitutional provisions restricting delegation are simply legal devices that functionally serve these various constitutional values (rule of law, separation of powers, and representative democracy-related concerns regarding the legitimacy and accountability of legislative

² *Ibid.* See particularly Harold J Berman, “Towards an Integrative Jurisprudence: Politics, Morality, History” (1988) 76:4 Cal L Rev 779.

³ Iancu, *supra* note 1 at 14.

⁴ *Ibid* at 4.

⁵ *Ibid* at 5, citing John Locke, *Two Treatises of Government* (London, UK: Black Swan, 1690) book II at para 141.

enactments).⁶ But this “would have things in the wrong order,”⁷ or more accurately perhaps, this would ignore the insight that the tentative formulation of those constitutional values over time is also shaped by the practices of limiting or allowing delegation in specific contexts.

Delegation became an issue for the practice and theory of constitutionalism with the transformation of the state beginning in the late nineteenth and early twentieth centuries. The social and economic pressures created by industrialization and advanced capitalism, as well as the emergencies related to war and economic depression, combined to create an unprecedented demand for state intervention. Such demand was met through increased government action, often in previously unregulated fields, based on legislative delegation or *ex post facto* validation of executive action. This elicited a swift reaction in England, where as early as 1915, Dicey worried about the growing discretionary powers of government departments.⁸ The cause was taken up by Lord Hewart, then chief justice of England, who called these arrangements “the new despotism” and made delegation a matter of public debate.⁹ The matter was put to rest, however, by an inquiry committee, which concluded that the practice of delegation was essentially inevitable: “The truth is that if Parliament were not willing to delegate law-making power, Parliament would be unable to pass the kind and quantity of legislation which modern public opinion requires.”¹⁰

Yet events on the continent and elsewhere seemed to “confirm and vindicate” the early English warnings.¹¹ Hitler would ultimately come to full power through executive legislation and broad parliamentary delegations; France was increasingly ruled through *décrets-lois* and ultimately “fell prey, in July 1940, to the legal means of a ‘*décret-constituant*,’ enabling Marshall Pétain to change the constitution at will.”¹² In the United States, the Supreme Court did strike down some elements of Roosevelt’s New Deal in 1935 on nondelegation grounds¹³ but bowed to massive pres-

⁶ *Ibid.*

⁷ *Ibid.*

⁸ AV Dicey, “The Development of Administrative Law in England” (1915) 31:122 *Law Q Rev* 148.

⁹ The Right Honourable Lord Hewart of Bury, *The New Despotism* (London, UK: Ernest Benn, 1929) at 17.

¹⁰ UK, HC, “Committee on Ministers’ Powers Report”, Cmd 4060 in *Sessional Papers*, vol 12 (1931-32) 341 at 23.

¹¹ Iancu, *supra* note 1 at 8.

¹² *Ibid.*

¹³ See *Panama Refining Co v Ryan*, 293 US 388, 55 S Ct 241 (1935); *ALA Schechter Poultry Corp v United States*, 295 US 495, 55 S Ct 837 (1935).

tures and effectively retreated two years later;¹⁴ the power of the executive branch then reached an extent that had never been witnessed before.

Treatment

These developments had a different impact on the post-war evolution of constitutionalism in each of the jurisdictions under study. While in the United Kingdom, the legal principle of parliamentary sovereignty kept changes within the realm of pragmatic accommodations and judicial elaborations of judicial review concepts, antidelegation measures were constitutionalized in both France and Germany.¹⁵ In the United States, debates over nondelegation have remained surprisingly vigorous even if the doctrine has not resulted in a single law being struck down since the New Deal era.

The groundwork leading to the core of the book is laid down in chapter 2, entitled “The Genealogy of the Concept of Delegation: Constitutional Presuppositions”. This dense but captivating chapter traces the evolution of the concept of legislation from antiquity to our era, with a view to teasing out the theoretical assumptions that have informed the notion of delegation. This is an interrogation of legislation as a means of law-making, decanted through representation in legislative bodies, separation of powers, and rule of law, the three possible justifications for limiting delegation. This section relies heavily on Locke’s *Second Treatise*,¹⁶ and there are two features of Locke’s framework that are crucial to the book’s argument. The first is that the purpose of government is limited to securing the natural right of life, liberty, and property. The second is that, although power must always be exercised for the common good, there are issues that cannot be subject to legal rules: “[D]iscretionary exercises of state authority are explicitly outside the range of the Lockean legal rationality.”¹⁷ These points are taken as “exemplary of the philosophical presuppositions of classical constitutionalism.”¹⁸

The core of the book, chapter 3, is a “constitutional history of delegation”. This is a study of the attempts to operationalize constitutional limitations on legislative delegation as workable legal criteria. The study focuses on the US experience, which gets twice as much attention (some

¹⁴ See *National Labor Relations Board v Jones & Laughlin Steel Corp*, 301 US 1, 57 S Ct 615 (1937).

¹⁵ See Iancu, *supra* note 1 at 9.

¹⁶ *Supra* note 5, book II.

¹⁷ Iancu, *supra* note 1 at 67.

¹⁸ *Ibid* at 69.

eighty pages) as the other jurisdictions taken—and indeed here treated—together (some forty pages). In both cases, the description is attentive to the relevant historical, political, and sociological factors, tracking the developments of constitutional law with an eye on the broadest possible array of sources. The general conclusion is that all of these attempts have ultimately failed.

Why have these attempts failed? This is the question that chapter 4 attempts to answer under the title “Delegation and Contemporary Implications: The Erosion of Normative Limits”. The starting point for the answer is that “[c]lassical liberal constitutionalism has straddled from the onset the pre-modern belief and systemic presupposition in ‘natural’ or unquestionable boundaries to the operation of rationality and the newly emerging faith in the power of human reason, now liberated from past hindrances, to master and reshape the world.”¹⁹ The “natural boundaries” presupposed by classical constitutionalism—between state and individual; between the legal and the political—have now all but vanished and have been replaced by an appreciation of the required “degree” of rationality. The book uses the Canadian case of *Baker v. Canada (Minister of Citizenship and Immigration)*²⁰ as an exemplar of this: a vain denial of the distinction between discretion and law, and the false promise of the elimination of political space beyond the reach of legal rationality.²¹

Conclusion

This book will remain relevant for many decades. The only blind spot in the argument, looking forward, is the current convergence of much constitutional rationality on proportionality analysis.²² It is arguable that this is today the most glaring and significant manifestation of the erosion of normative limits to which the book refers. The connections between the constitutional evolution so carefully traced here and the rise of proportionality as a dominant feature of constitutionalism today are certainly worth exploring. More generally, the book, though it refrains from offering solutions,²³ does make an implicit but powerful case for virtue ethics, and

¹⁹ *Ibid* at 200-201.

²⁰ [1999] 2 SCR 817, 174 DLR (4th) 193.

²¹ Iancu, *supra* note 1 at 270-72.

²² See generally Vlad Perju, “Proportionality and Freedom: An Essay on Method in Constitutional Law” (2012) 1:2 Global Constitutionalism 334.

²³ See Iancu, *supra* note 1 at 272.

against the current tendency to place undue reliance on rules-based rationality in the governance of human affairs.

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