

Special Book Review Symposium

Power and Legitimacy

Stefano Bartolini*

Peter L. Lindseth. *Power and Legitimacy. Reconciling Europe and the Nation-State* (Oxford University Press), 2010, 364 p.

In commenting upon Peter Lindseth's powerful book, I feel handicapped in two ways. Not being a professional legal scholar, I am likely to miss some of the more technically sophisticated contributions the book makes, particularly in the historical reconstruction of administrative delegation. I will not try to overcome these. I will turn this disadvantage around by focusing my comments on the core arguments of the book, which seem notable to me. The second handicap is that I am in agreement with the main thrust of the book, as reflected in these statements:

Focusing on the legitimating structures and normative principles of administrative governance allows us to avoid the temptation, so strong in the legal-theoretical literature on integration, to assume that supranational regulatory powers must somehow demand a new form of 'non-statal constitutionalism' or 'constitutionalism beyond the state' in order to be properly understood and legitimated. (p. 279)

... regulatory powers and democratic and constitutional powers can in fact be separated, at least to a very significant extent. The concept of *delegation* and *mediated legitimacy* have provided the normative-legal framework – the 'logic of appropriateness' – to justify this state of affairs. (p. 279)

On the one hand, significant normative power has migrated to the supranational level; on the other hand there has been little or no corresponding shift in specifically democratic and constitutional legitimacy out of national bodies – executive, legislative, and judicial – despite the creation of roughly corresponding institutions at the supranational level for precisely this purpose. (p. 280)

I agree with the description of the integration process as administrative governance, and the description of the EU as an administrative agent of the member states

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with significant normative powers that are delegated and deprived of democratic and constitutional legitimacy. I also share the view that ‘one needs an administrative, not constitutional interpretation of integration’ (p. 228). I appreciate that the author considers this administrative interpretation of the EU not ‘primarily normative’, but descriptive and analytical, in that it better captures the trajectory of institutional change of European governance.

The thorough analysis of national executive leadership, parliamentary scrutiny, and judicial review that Lindseth undertakes in order to demonstrate the case for supranational delegation leads to a clear-cut opposition between ‘administrative’ and ‘constitutional’ integration. In this way, the author recuperates a strong definition of ‘classic constitutionalism’, which I have also tried to defend.¹ We could read this as a critique of the legal theory that perhaps abuses terms such as ‘constitution’, ‘constitutionalism’, and ‘constitutionalisation’ in reference to the treaties, EU legislation, and ECJ judgments. Similarly, an administrative delegation interpretation of the integration process may help to put into the right perspective the ‘exhausting’ debates in political science about the democratic deficit, legitimacy, politicisation, political mandates, etc. The author sees these as ‘category mistakes’. In my view, they are also policy mistakes and dangerous *fuites en avant*.

There are, however, a few less convincing points in the book that require further elaboration, and a number of questions that the ‘administrative delegation’ reasoning does not answer.

First, the EU’s development as an administrative agent is seen as a further momentous step of a long-term trend moving into the same direction on both sides of the Atlantic. It seems to me that the sequence is different in the USA and in Europe.

Second: according to Lindseth’s interpretation, the EU does not have a problem of ‘limited legitimacy’ (in the sense that this is used for the nation states), but rather the problem is to increase the ‘mediated legitimacy’ typical of all administrative agencies. There must be a point, however, at which extensive and irreversible administrative delegation may run into problems of legitimacy.

Third, the author underlines that the existence of a European Parliament does not change his interpretation because such parliament ‘does not carry true *constitutional* representation on par with a national parliament’ (p. 229). However, if the integration process is essentially one of administrative delegation, why have we witnessed the development of institutions isomorphic to those at the national level?

¹ Stefano Bartolini, ‘Taking Constitutionalism and Legitimacy Seriously’, in Andrew Glencross and Alexander H. Trechsel (eds.), *EU Federalism and Constitutionalism. The Legacy of Altiero Spinelli* (Plymouth, Lexington Books 2010) p. 11-34.

Fourth, what conception of legitimacy underpins the idea that 'mediated legitimacy' sustains the actions of the delegated agent?

Finally, I conclude this note with a reflection about the current core problem of the EU, and argue that the author has not brought his argument to what appears to me as its logical conclusion.

THE HISTORICAL SEQUENCE ARGUMENT

The historical reconstruction of the administrative delegation trend is the most fascinating part of the book. The EU is presented as a 'new stage in the diffusion and fragmentation of regulatory power away from the constitutional bodies of representative government on the national level to an administrative sphere that now operates both within and beyond the state' (p. 251). This is seen as a further development of the pre-war colossal development of executive power delegation and regulation underlined by classic scholars in opposition to the idealised model of legislative power, separation of powers, etc.

Lindseth takes as a starting point the phase of representative and constitutional government development, located more or less in the golden age up to WW I, and observes the trend toward regulatory and administrative delegation within the United States and the European states. I do not challenge the common trend on both sides of the Atlantic since WW I. I believe there is a fundamental difference between the USA and Europe in the historical sequencing, which is not, perhaps, without consequence for the following developments.

A strong push to regulatory and administrative integration and standardisation always exists in any phase and process of territorial expansion-integration. In the European states, particularly in those early states consolidated between the 16th and the 18th centuries – France, England, Spain on the maritime side, and Prussia, Sweden, and the Habsburg empire on the continental side – this administrative and regulatory integration, consolidation and standardisation took place under the aegis of absolute monarchies much before the 'constitutional moment' arrived. In Europe, the constitutional moment was a moment of constitutionalisation of previously absolute autocracies. The battle between monarchs, their bureaucracies and dynastic circles, on the one hand, and the new 'constitutional' forces and institutions, on the other hand, was often protracted and ferocious.

In the USA, on the contrary, constitutional integration preceded administrative integration by a long margin and the country remained for long in a state of administrative, regulatory and even legislative fragmentation that horrified European observers. In other words, the European ideal-type sequence was the following: territorial control, administrative and regulatory integration, constitutionalism and parliamentarism, and more recently a renewed phase of administra-

tive and regulatory delegation. In the USA, the sequence was perhaps more unidirectional: contrary to Europe, territorial control was a minor problem; first was the constitutional and democratic foundation, and only later came a phase of regulatory and administrative delegation that perhaps continues up to today.

The discussion of this point may seem immaterial if we agree with Lindseth that since WW I, both sides tend to develop in the same direction. However, if we forget that European states, and often European peoples, have been ‘created’ by absolute autocracies that ran their countries predominantly or exclusively via administration, we may miss a crucial point in understanding the European reactions to the current administrative delegation and to the specific pattern of European integration. A full discussion of the legacy of the European tradition of autocratic administration and of its impact on the EU model of integration is fascinating (and it has not been done so far), but would lead us too far in this context. Yet, as I said, to focus only on the common trend since WW I may hide a more remote past that is very different on the two sides of the Atlantic and whose legacies weigh heavily on current forms of administrative delegation both domestically and in the EU.

ARE THERE LIMITS TO ‘ADMINISTRATIVE’ CUM ‘MEDIATED LEGITIMACY’?

Lindseth claims that the EU is based on administrative delegation, and that it therefore does not have a problem of ‘limited legitimacy’ but rather the problem is to increase its ‘mediated legitimacy’, a mediated legitimacy typical of all administrative agencies. The theoretical question remains open of whether there is a limit to what can be done by the administrative agent with ‘mediated legitimacy’, and, similarly, whether the member state principal can indeed delegate everything provided it adds the adequate ‘mediated legitimacy’. If we assume that everything can be delegated with mediated legitimacy, we take a strong position that perhaps overlooks the problem that member state governments are themselves agents of another principal, the national citizens. If we admit that there might be some limit to what can be delegated with ‘mediated legitimacy’, then we reopen the problem we thought to have solved.

Here we are at the core of the issues raised by the German Constitutional Court and by other national courts concerning explicitly which instrument needs to be used to extend the delegation, if one wishes to do so. Lindseth recognises that there are peculiarities to administrative delegation at the supranational level. Multiple principals resort to broad delegation to overcome problems of coordination; principals become agents in implementation; and, more importantly, given the multiple principals and the coordination problems the *reversal* of delegation is far more difficult than at the national level. If these peculiarities are sufficient

to leave open the question of what should or can be done via mediated legitimacy, then the definition of integration as administrative delegation based on mediated legitimacy is an intelligent way to redefine the problem, but does not solve it entirely.

WHY INSTITUTIONAL ISOMORPHISM?

The presence of parliamentary institutions, European parties and direct elections at the top of the EU is certainly a rather important anomaly for any administrative delegation at the supranational level. Lindseth argues that the fact that citizens are represented at the European level in the EP does not change his interpretation because 'this representation should be seen as a highly instrumental form of representation, useful in bringing public opinion and perhaps even various interests to bear on the supranational policy process. This is not however, *constitutional* representation on par with a national parliament' (p. 229). Once again, I share his view. Parliament, parties and elections at the European level have been 'created' by other European institutions; they are normatively and financially 'assisted' by such institutions and they seem to serve such institutions more than any real representative function. The proof of this is simply the fact that nothing of what is done in the European parliament has any bearing on the electoral fate of either national or European parties and leaders.

Yet can we get rid of this non-trivial anomaly in this simple way? Though an extensive literature on European parties and electioneering shows that forms of true electoral competition and representation are absent or ineffective, the parliamentary institution is a powerful actor in the inter-institutional competition and inserts itself between the Council and the Commission with increasing powers and competences. The European Parliament is bound to boast of its 'democratic' and 'representative' legitimacy in its dealings with the Commission and Council. Parliamentary elites are likely to exchange their support whenever required with increasing powers and with further symbolic recognition of their democratic sources. Actually, there is some room to argue that the growing role of the EP has come at the expense of the powers of the Commission, the key administrative delegate. Therefore, even if we agree that the EP is not providing the sort of 'constitutional representation on par with a national parliament,' it nevertheless introduces an actor and a dynamic within the top institutional architecture that the thesis of the regulative-administrative delegation via mediated legitimacy does not explain. In addition, the potential developments of this institutional graft are difficult to foresee and potentially in conflict with a mere further development of administrative delegation.

A similar reasoning applies to the role of the European Court of Justice and this raises a more general question. Why is the process of supranational delegation of regulatory powers progressively enshrined in an institutional architecture so isomorphic with national ones? Sociological institutionalism has much to say in this respect.² Some of its insights into institutional developments could be used to reconcile the substance of administrative delegation with the inconsistency of a non-constitutional design that is, nevertheless, isomorphic with the national one. This isomorphism, in fact, generates many hopes among the supporters of further federal integration and many fears among its opponents and it requires explanation.

MEDIATED LEGITIMACY

The clever use Lindseth makes of the idea of 'mediated legitimacy' prompts me to advance a few thoughts on this dimension and a brief discussion on the ambiguity and vagueness of this term in general and in connection with the EU.

The term is so ambiguous and vague that almost everything can be argued about it following different definitions and schools. Legitimacy is instable, usually assumed *ex ante* and ascertained only *ex post*, often merely a theoretical argument. Different principles ground legitimacy: expertise and asymmetric knowledge, tradition and ritualism, legality, administrative correctness, etc. Therefore, there is always some room to argue that some sort of legitimacy exists. In fact, in most cases we substitute the crucial theoretical meaning of legitimacy as 'likelihood to be obeyed' with our own intellectual discussions about the good reasons and the intellectual arguments by which it can be rationally argued that certain decisions should be obeyed by those who are subject to them. This is an exciting debate; it may have some bearing on what the elites believe and it can be a source of inspiration for their actions and symbolic speeches.

Combining the term legitimacy and political in the expression 'political legitimacy', we identify a specific source of legitimacy. Legitimacy that is not technical, procedural, legal, etc., but based on the ultimate capacity to take decisions that are autonomous and independent from all other sources and references and in this sense are 'exceptional' decisions. When we combine 'legitimacy' and democracy in the expression 'democratic legitimacy', we define a special kind of 'political legitimacy' that is grounded in a mechanism of selection of those who are authorised to take those exceptional decisions, via participation rights, elections and elite

² John W. Meyer and Brian Rowen, 'Institutionalized Organizations: Formal Structures as Myth and Ceremony', in Paul J. DiMaggio and Walter W. Powell (eds.), *The New Institutionalism in Organizational Analysis* (Chicago, University of Chicago Press 1991) p. 41-62.

circulation mechanisms. Yet we know next to nothing about the likelihood of political obligation until extreme and exceptional circumstances put it to the test. In almost all cases, it is not legitimacy that is measured, but the rational arguments about it.

Based on this concise recasting of the problem, there is no room to disagree with Lindseth's point that political and democratic legitimacy, as outlined above, does not apply to the EU. The author clearly expresses the idea that political, in case, democratic, 'legitimacy' remains at the national level and it is not transferred to the new level of administrative delegation. The latter, therefore, rests on legitimacy that is only indirectly transferred from the holder of national political and democratic legitimacy; that is 'mediated legitimacy'.

In this vision – which is not exclusively Lindseth's vision – 'legitimacy' is a property that can be generated and kept in a single locum (i.e., the nation state) or transferred in quantum-like modality to other loci as, for instance, supra-national institutions. In other words, legitimacy, and namely political democratic legitimacy, can be transferred and this transfer takes place at no costs of dissipation. As I said, we know so little about legitimacy in a proper sense that I have no solid argument to deny this principle of the conservation of legitimacy. However, there is room to raise a crucial doubt. What if legitimacy dissipates in transfers, particularly if significant and repeated? Is legitimacy a fixed amount that can be conserved in different distributive proportions? What if the administrative delegation actually reduces the legitimacy at the national level?

Decisions of the delegated agencies can diminish and confine the responsiveness of the national legitimacy holders to the extent that they impose new rights, titles and capacity, prevents the distribution of certain rights, titles and capacities. If the 'mediated legitimacy' restricts the scope of political action of national authorities, it can affect their legitimacy. Could it be that the EU is transmitting its disease (lack of political democratic legitimacy) to the nation state more than the nation state transmit its capital (political democratic legitimacy) to the Union?

ADMINISTRATIVE DELEGATION AND THE CORE PROBLEM OF THE INTEGRATION PROCESS

I close these comments with a reflection that concerns the nature of the problem posed by the EU's development and the nature of the solution posed by the theses of the book. We conclude with the author that the integration process is in fact an administrative and regulative delegation process; that this process is a further momentous step in a long-term transformation process of the advanced polities; and, finally, that an indirect transfer of legitimacy from the member states sustains it. This is a step forward in our intellectual debates. It can probably save intel-

lectual energies and clarify terminological quarrels. It can help national principals adapt their language to the reality of what they are doing, and perhaps this would contribute to dissipate fears and to curb expectations. Yet, I am not sure that we have faced the crucial problem in this way.

We should not overlook that a new centre of normative production exists at the supranational level that claims generalised behavioural conformity to its decisions. Therefore, there now exist two sources of political production and two centres that ask for behavioural conformity. Regulation and administration is a way to define and distribute rights, titles, capacities, etc. towards which generalised and stabilised behavioural conformity is established. In this sense, regulation and administration are intrinsically political as Lindseth rightly underlines. The process of national implementation of EU legislation, judicial review, etc. normally solves this double source of behavioural conformity search. It brings again in line the two sources of rights, titles, etc. but the harmonisation of the two is neither immediate nor necessarily guaranteed. The duality exists until it is reconciled and so far the reconciliation has predominantly taken the form of national authorities abiding to the decision of the supranational regulator.

The EU's 'political output' (law and administrative regulation) generates tensions in its relation to the national one as it affects individual, corporate and territorial actors. Irrespective of how we label the existing configuration of the EU, the existence of a centre of production of rights, titles and capacities and of claim of behavioural conformity outside the nation state generates expectations, actions, conflict and interest definition and redefinition among real actors. Rights, titles and capacities distributed at the national level can be challenged or jeopardized by decisions at the supranational level and in fact, they have been. The fact is that political output defines and redefines 'interests'. It affects the systems of political structuring at the national level. The essence is that there are two sources of norms and legal adjudication; there are two seats for distributing and adjudicating 'rights', 'titles', and 'capacities'; there are two claimants to generalised (in space) and stabilised (over time) behavioural conformity. This tension is bound to generate unintended effects.

We should not overlook that the debates about constitutions, competences, parliaments and elections, legitimacy and power may be regarded as misleading in the perspective of administrative and regulatory delegation, but they are not only definitional academic games. Real forces, interests, actors, groups lie behind them and use them for their purposes. We cannot exclude that the outcomes of these silent fights may lead the European Union towards unexpected shores.

The Parliament claims the representation of the 'ordinary people' of Europe; the Council claims to represent the 'local rulers', the only and true principals; the Commission as a techno-bureaucracy sees itself as the new 'centre-builder'

representing the general interests. The specific configuration of boundaries of the EU makes it impossible to establish links between ordinary people and the new centre-builders passing over local rulers; something that the Commission would probably aspire to. The alliance between centre-builders and ordinary people is made impossible by the complex cultural infrastructure, the absence of shared identity, and the weaknesses of political participation and social sharing rights. The alliance between the local rulers and the ordinary people against the centre-builders is always possible, but it is made difficult by the functional requirements of the integration *acquis* and by the coordination problems of the national rulers.

Therefore, it is correct to say that today, the EU can only rest on an 'elite consolidation',³ an alliance between the local rulers and centre-builders. This alliance indeed takes the form of the 'administrative delegation' and 'mediated legitimacy'. But it is an unstable alliance that needs to leave out the ordinary citizens while it generates increasing tensions, considerable processes of interest redefinition, and growing 'nativist' ideological reactions at home. Clearly administrative and regulatory delegation does not foresee and require sophisticated conflict resolution mechanisms, while its political output seems to increasingly generate conflicts to be solved.

This seems to me the core issue of the current and persisting stalemate in the integration process. Lindseth, however, does not take a stand on these issues. His convincing reconstruction of the system of administrative and regulatory delegation could have led to conclusions of this type. He could have focused more on the profound inconsistencies between administrative delegation, on the one hand, and institutional design and vast political output, on the other hand. He could perhaps have made more explicit what I find a compelling conclusion of his work: if the process continues to rest on administrative regulatory delegation, then it cannot sustain a continuous expansion of tasks and competences. A considerable reduction of its political output is necessary to keep it in line with the boundaries of regulatory delegation. Otherwise, the local rulers have to be willing to change the frame of reference. To discuss these implications is a step that Lindseth was not willing to make, at least in this book.



³W. te Brake, *Making History: Ordinary People in European Politics, 1500-1700* (Berkeley CA, University of California Press 1997).