

# THE PRESUMPTION AGAINST DELEGATION IN PUBLIC LAW. WAS THE IMPORT FROM PRIVATE LAW REALLY JUSTIFIED?<sup>1</sup>

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## Abstract:

*The paper argues that the import of the principle against the delegation from the private law of agency into the public law was inadequate, put aside its subsequent development in the realm of the constitutional law and the other principles with which it allied itself sometimes.*

**Key-words:** delegation, non-delegation doctrine, subdelegation, accountability, representative democracy, parliamentary government, agency.

## I. INTRODUCTION

The discussions about delegation in constitutional and administrative law (generally, in public law) greatly increased in the last two decades due, especially, to the rise and universal spread of the so-called “independent agencies”, both within the national states and supranational organizations. The phenomenon is more than a century old in the United States, and several decades old also throughout the world. Along with the institutional developments came the positions embraced by the national and supranational courts, as well as a great deal of legal, sociological and political writings and comments concerning the topic.

Romania, as a European Union member State, was not left outside the scope of this phenomenon. Even the very recent project of amendment of the Constitution<sup>2</sup> contains two amendment proposals directly concerned with this article’s topic: one is the amended version of Article 117 (2) which is meant to set up an explicit textual framework<sup>3</sup> for the creation of the “independent agencies”; the

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<sup>2</sup> Amendments adopted by the Joint Commission of the Deputies Chamber and Senate for drafting the proposals of amending the Constitution, issued on 19 June 2013, available online at [http://media.hotnews.ro/media\\_server1/document-2013-06-19-15030700-0-noua-constitutie-varianta-finala-amendamentele-adoptate.pdf](http://media.hotnews.ro/media_server1/document-2013-06-19-15030700-0-noua-constitutie-varianta-finala-amendamentele-adoptate.pdf), last visited on 24 June 2013.

<sup>3</sup> Previously, the only proviso in the Constitution dealing with independent agencies was Article 116(2), which, in describing the so-called “Central Administration” stipulated that national administrative institutions could be organized under the authority of the Government or of the Ministries or, “*as autonomous administrative agencies*” [italics added]. The last phrase of the text was used as basis for creating the agencies under the authority of Parliament. The new Article 117(2) provides, instead, that “The specialized organs of central administration – autonomous, under Parliamentary control, under the authority of Ministries or of the Parliament, are created only through an Act of Parliament”. If this amendment will remain final and part of the Constitution, it promises a very interesting institutional discipline of administrative agencies: every agency will be created by the Parliament, which will retain a certain kind of control over it (the means of which are still to

other is the new Article 137<sup>1</sup> concerning the National Romanian Bank (*Banca Națională a României*), which was already organized as a *de facto* independent agency (and recognized as such by major political actors) but lacked a constitutional black letter basis for this status. To be sure, the development of Romanian independent agencies is quite recent (starting from the mid 2000's) and is a visible phenomenon of institutional isomorphism<sup>4</sup>, directly related to Romania's EU accession process and EU membership, or even (as some politicians pretend) of "coercive isomorphism"<sup>5</sup>.

Against this background of global development of independent agencies, theoretical accounts and literature on delegation flourished and revived old issues of constitutional law, as well as revealed new conceptual and institutional challenges emerged from this development. The doctrine of non-delegation<sup>6</sup> is one of such old legal principles brought again forward in the recent discussions and considered, by many, as still very much relevant to it. The doctrine is expressed in the old Latin maxim *Delegata potestas non potest delegari* and is meant to tackle, or however contain, the delegation of powers from legislative elected bodies to persons that are not accountable to the people and, as such, do not enjoy (enough) democratic legitimacy. The source of it is generally acknowledged to have been an import from the private law of agency, expressing a presumption<sup>7</sup> in favour of non delegation by the agent of the powers conferred to him by the principal, unless explicitly authorized by the latter.

The purpose of this article is to question the adequacy of the transplant of the rule from private to public law. It must be confessed from the very beginning that, throughout the centuries of practice in constitutional law, as it will be shown hereinafter, the doctrine was object to many developments and came to acquire many more meanings than the plain prohibition of transfer of power from legislature to executive-like bodies. Today, no one supports such a "strong" meaning<sup>8</sup> of the non-

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be discovered), while the day-to-day (or, in any case, close) supervision of the agency's activity will be responsibility of either the Parliament itself (through some kind of commission, most probably), or of some Ministry appointed by the Parliament to this purpose.

<sup>4</sup> Mark Thatcher, Alec Stone Sweet, *Theory and Practice of Delegation to Non-Majoritarian Institutions*, in Mark Thatcher, Alec Stone Sweet (eds.), *The Politics of Delegation*, Frank Cass, London/Portland, 2003, p. 10.

<sup>5</sup> Ibidem, p. 10: "'Coercive isomorphism' —the diffusion of institutional forms and practices through legal obligation backed up by monitoring and enforcement mechanisms—has also played a role in the spread of delegation to NMs. European integration has favoured isomorphic processes". The concept of 'coercive isomorphism' was labelled by Paul DiMaggio and Walter Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality*, in W. Powell and P. DiMaggio (eds.), *The New Institutionalism in Organizational Analysis*, Chicago, University of Chicago Press, 1991.

<sup>6</sup> For the doctrine of non-delegation see the exceptionally thorough and vast account made by Bogdan Iancu in *Legislative Delegation. The Erosion of Normative Limits in Modern Constitutionalism*, Springer, Berlin Heidelberg, 2012, pp. 72-99. See also Cass Sunstein, *Is the Clean Air Act Unconstitutional?*, Chicago Public Law and Legal Theory Paper no. 03, [http://papers.ssrn.com/paper.taf?abstract\\_id=177688](http://papers.ssrn.com/paper.taf?abstract_id=177688), pp.30-42, Douglas H. Ginsburg, Steven Menashi, *Nondelegation and the Unitary Executive*, in *Journal of Constitutional Law*, vol. 12 (2), 2010, pp. 251-264, Andrew J. Ziaja, *Hot Oil and Hot Air: The Development of the Nondelegation Doctrine Through the New Deal. A History: 1813-1944*, in *Hastings Constitutional Law Quarterly*, vol. 35 (4), 2008, pp. 921-964.

<sup>7</sup> B. Iancu, p. 77, Marion L. Dixon, *Delegation, Agency and the Alter Ego Rule*, in *Sidney Law Review*, vol. 11, 1987, p. 326 (who calls it a *prima facie* rule).

<sup>8</sup> See Gabriel Clark, *The Weak Nondelegation Doctrine and American Trucking Associations v. EPA*, <http://lawreview.byu.edu/archives/2000/2/cla.pdf>. The author distinguishes between two versions of "strong" non-delegation doctrine (one that asserts that no legislative delegation is allowed and the second which allows some delegations of legislative authority, but only when Congress clearly articulates an "intelligible principle"

delegation doctrine anymore. Moreover, in time, the non-delegation doctrine became the vehicle for expressing values that are not derived from the original meaning of it, but are autonomous from it, such as the requirement of accountability for public officials, the separation of powers, some elements pertaining to the rule of law, etc.

Given this situation, one might legitimately ask what is the use of assessing the reasons of the import of the doctrine from private law many centuries ago if this doctrine, already, came to express today many other meanings and maybe the original meaning has almost completely lost its relevance. To put it more directly, if the non-delegation doctrine has, today, a different basis from the original one, why should one question this original basis? I think the answer to this question, which proves that there is still usefulness in the approach of the present article, comes from reading the decision of the German Constitutional Court concerning the Lisbon Treaty<sup>9</sup>. While accepting the conformity of the Lisbon Treaty (more precisely, of the German Act ratifying it) with the German Fundamental Law, the Court has made several extensive comments which may worry the supporters of further European integration and transmit a general feeling of moderate mistrust towards the European Union<sup>10</sup>. The standard of review chosen by the German Constitutional Court was “the right to vote as a right that is equal to a fundamental right (Article 38.1 first sentence in conjunction with Article 93.1 no. 4a of the Basic Law)”<sup>11</sup>. Such right is qualified by the Court as establishing “a right to democratic self-determination, to free and equal participation in the state authority exercised in Germany and to compliance with the principle of democracy including the respect of the constituent power of the people”<sup>12</sup>. In the light of it, the German Constitutional Court expresses concerns towards a future further European integration and even towards its current structure, from a “democracy” point of view<sup>13</sup>. It is not the first time that the BverfG expresses concerns about the European construction. Throughout the decades, the German Constitutional Court was one of the most demanding “surveyors” of the European supranational legal order, as recalled by the famous *Solange* cases<sup>14</sup>. But, while in the *Solange* cases, the main concern of the German Court was that the European legal order might possibly not meet the material standards of the rule of law and human rights protection (so it was a rule content – based critique), in the *Lisbon Treaty* case, the concerns of the Court are related to the very basis of the European supranational order legitimacy, its “democratic deficit” and the perils of expanding its powers following the *effet utile* doctrine<sup>15</sup>, with the risk of exceeding the

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to guide the agency’s exercise of discretion – the *Chevron* doctrine) and one “weak” version, according to which the agency itself must establish some standards limiting its discretion (the *American Trucking* doctrine).

<sup>9</sup> Decision of the Bundesverfassungsgericht of 30 June 2009, online at [http://www.bverfg.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html).

<sup>10</sup> See, for example, Karl Müller, *The Judgement of the German Constitutional Court on the Treaty of Lisbon*, no. 14, August 2009, <http://www.currentconcerns.ch/index.php?id=826>. See, also, Rike U. Krämer, *Looking through Different Glasses at the Lisbon Treaty: The German Constitutional Court and the Czech Constitutional Court*, Michael Blauberger, *Reinforcing the Asymmetries of European Integration* and Ulrike Liebert, *More Democracy in the European Union?! Mixed Messages from the German Lisbon Ruling*, in Andreas Fischer-Lescano, Christian Joerges and Arndt Wonka (eds.), *The German Constitutional Court’s Lisbon Ruling: Legal and Political-Science Perspectives*, ZERP Discussion Paper 1/2010, pp. 18, 53 and 77, and *passim*.

<sup>11</sup> Paragraph 208 of the Decision.

<sup>12</sup> *Idem*.

<sup>13</sup> See, generally, paragraphs 268 – 296 and *passim*.

<sup>14</sup> For *Solange I* and *Solange II* cases, see Paul Craig, Grainne de Burca, *EU Law. Cases and Materials*, 2<sup>nd</sup> ed., Oxford University Press, 1998, pp. 269-271.

<sup>15</sup> See, especially, paragraphs 242 *ssq.* of the Decision.

mandate granted by the German electors<sup>16</sup>. The Court's concerns are, as such, based on a delegation approach in the purest sense – asking whether the trust put by the German electors in their *Bundestag* and *Bundesrat* does not risk to be deceived by the latter through the transfer of too much power from what they lawfully possess towards the European Union.

I wish to conclude these introductory remarks by recalling that my work here is not (and it could not possibly be) one of legal “archaeology”. I do not ask myself why constitutional law (or, generally, public law) imported the non-delegation doctrine from private law, neither what were the precise reasons for such import at the time. I only ask myself whether, given the characteristics of the institutions the rule was supposed to operate within, in the private law and, respectively, in the public law, this transplant is really justified. By justified transplant I mean one that is supposed to enhance or defend the values that are characteristic to the destination system (in the original system, such effect is assumed *a priori*). Or is it that, given the differences in characteristics of the institutions or in prevailing values, the opposite principle (the admissibility of delegation) would be more adequate in public law? Nor do I intend to put in doubt the justifications for the principle autonomously put in place by the constitutional law, *after* the reception from private law and independently of it. That is because these justifications (developed over centuries of constitutional practice, and as such and just for this reason, to be accepted as meaningful) can be reduced to something else that non-delegation (for instance, separation of powers, balance of powers, accountability, transparency, rule of law)<sup>17</sup>. I only ask myself if non-delegation (even merely as a presumption, and not, of course, as an absolute rule) can stand alone, as an autonomous and constitutive (necessary) principle of constitutional law.

Also, I must add that the target of this paper is not the non-delegation doctrine with the meaning that it was developed in American constitutional law, but the general presumption against delegation, which can be found in most modern and contemporary constitutional cultures<sup>18</sup>. Still, since the non-delegation doctrine in U.S. constitutional law is more debated, more elaborated and, as such, more visible, it will be treated, most of the time, as a kind of “representative” of the presumption against delegation.

## II. DELEGATION AND THE NON-DELEGATION PRINCIPLE. THE SOURCE OF THE NON-DELEGATION DOCTRINE.

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<sup>16</sup> My brief account here of the Decision of the German Constitutional Court is necessarily oversimplifying. Since this is not intended to be a critique of the decision, the oversimplification should not be too relevant. For elaborated critiques, see works under fn. 10.

<sup>17</sup> See B. Iancu, pp. 86-99, C. Sunstein, pp. 35-37, D. Ginsburg, S. Menashi, p. 255, John Mark Keyes, *From Delegatus to Duty to Make Law*, McGill Law Journal 33(1987), pp. 52-53.

<sup>18</sup> For constitutional practices in U.K., Germany and France, see B. Iancu, pp. 159-192 and 251-259. See also Peter L. Lindseth, *The Paradox of Parliamentary Supremacy: Delegation, Democracy and Dictatorship in Germany and France, 1920's – 1950's*, <http://ssrn.com/abstract=540462>. For the European Union, see, for example, Giandomenico Majone, *Europe's 'Democratic Deficit': The Question of Standards*, in *European Law Journal*, vol. 4, no. 1, 1998, p. 26, Damien Geradin, *The Development of European Regulatory Agencies*, in *Columbia Journal of European Law*, vol. 11/2004, pp. 9-10, François Lafarge, *Les autorités européennes de surveillance, la régulation financière et l'union bancaire européennes*, <http://ssrn.com/abstract=2261114>, p. 10. For the Romanian setting see, e.g. Mihai Constantinescu, Antonie Iorgovan, Ioan Muraru, Elena Simina Tanasescu, *Constituția României revizuită. Comentarii și explicații*, AllBeck, București, 2004, pp. 221-224 and Ion Deleanu, *Instituții și proceduri constituționale*, C.H. Beck, București, 2006, pp. 58-68.

In its broadest meaning, delegation is “an act where one person or group (principal) relies on another person or group (agent) to act on the principal’s behalf”<sup>19</sup>. In public law, the principal and the agent are, usually, public law bodies (but they can be also individuals performing a public function). Delegation means here the transfer of a power granted (by a Constitution or a statute) to an organ by its holder to another organ or institution. In what the non-delegation doctrine is concerned, the transfer regards the power to legislate that is transmitted from the legislature (Parliament) to some other subject, usually one from the executive branch of the Government. With the rise of the independent agencies (or non-majoritarian institutions), the delegation targeted by legal and political scientists became the “authoritative decision, formalised as a matter of public law, that transfers policy making authority away from established, representative organs (those that are directly elected, or are managed directly by elected politicians), to a non-majoritarian institution, whether public or private”<sup>20</sup>.

As it can easily be seen, the discourse against delegation shifted in time from delegation to the executive (which is, nowadays, generally, if not universally, accepted) to the delegation to the non-majoritarian institutions (or independent agencies). The first type of delegation (from legislature to regular executive institutions) is generally accepted in Parliamentary systems (the same is not precisely true in United States, for example), because it is believed that both members of legislature and chief of executive have a legitimacy issued by elections. The second one is more problematic, because non-majoritarian institutions enjoy certain guarantees of autonomy (such as duration of tenure, limited mechanisms of control, limited reasons for removal of the heads, etc.) which render them (in part) independent from the elected bodies (and do not have, as such, the same legitimacy like the ministries in a Parliamentary democracy)<sup>21</sup>.

In short, the non-delegation doctrine prohibits the legislature to delegate its legislative powers to other branches of government or to other persons. The commentators concede that the source of the principle is to be found in private law<sup>22</sup> (the common law of agency or the continental law of “*mandatum*”). The principle has been synthesised in the Latin maxim *delegate potestas non potest delegari* and its application dates back (in public law) to the Roman times, as proved by the Digests<sup>23</sup>. In common law, its first incorporation has been made by Roger de Bracton<sup>24</sup> and reaffirmed by the most important English and American legal writers<sup>25</sup>. In the sphere of public law, apparently the greatest influence has been exercised by a passage in John Locke’s *The Second Treatise of Government*, according to which “[T]he legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others. . . . The power of the legislative, being derived from the people by a positive voluntary

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<sup>19</sup> Arthur Lupia, *Delegation and Its Perils*, in Kaare Strom, Wolfgang C. Müller, Tornbjörn Bergman (eds.), *Delegation and Accountability in Parliamentary Democracies*, Oxford University Press, 2006, p. 33.

<sup>20</sup> M. Thatcher, A. Stone Sweet, p. 2.

<sup>21</sup> Frank Vibert, *the Rise of the Unelected. Democracy and the New Separation of Powers*, Cambridge University Press, 2007, pp. 55-68, Gúl Sosay, *Consequences of legitimizing independent regulatory agencies in contemporary democracies*, in Dietmar Braun, Fabrizio Gilardi (eds.), *Delegation in Contemporary Democracies*, Routledge, London/New York, 2006, pp. 171 ssq.

<sup>22</sup> B. Iancu, p. 77, J. M. Keyes, p. 50, Evan J. Criddle, *When Delegation Begets Domination. Due Process of Administrative Lawmaking*, in *Georgia Law Review*, 46, 2011, p. 125.

<sup>23</sup> Dig. I. 21, 1 quoted in B. Iancu, p. 80.

<sup>24</sup> B. Iancu, p. 81, J. M. Keyes, pp. 50-51.

<sup>25</sup> B. Iancu, 81.

grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws and place it in other hands”<sup>26</sup>.

The principle has been then recognized successively in the case-law of the United States Supreme Court several times<sup>27</sup>. The principle was inferred from the Vesting Clause of Art. I of the U.S. Constitution, according to which “All legislative powers herein granted shall be vested in the Congress of the United States, which shall consist of a Senate and House of representatives”<sup>28</sup>.

It must be noted, though, that in the more recent developments of the doctrine, the non-delegation principle does not stand alone anymore, but it is backed by (or it backs) different important principles of public law, such as the principle of accountability of public officials, the separation of powers, the rule of law, the principle of transparency of legislation, etc.<sup>29</sup>. It does so to the point that one might say that it becomes difficult to understand whether there is something left from the original non-delegation or whether it has just become an empty glass to be filled with the content of other principles or, even, whether it has transformed itself into a *passepartout* or an “umbrella” theory covering every issue pertaining to the consequences of delegation.

### III. THE SOURCE OF THE PRESUMPTION AGAINST DELEGATION IN PRIVATE LAW.

As public law commentators have shown, the maxim *Delegata potesta non potest delegari* was a rebuttable presumption in private law<sup>30</sup>, which implies that an exception could be made if the principal allowed the delegation from the agent to a third-party (the sub-delegation). The agent cannot re-delegate the power it received from the principal, unless this power is expressly conferred to him or can be fairly implied from the terms of the agreement or other circumstances. The explanation for the rule, according to Joseph Story, is the confidence reposed by the principal in the agent<sup>31</sup>. Also, it seems that in common law, there were several exceptions to the rule and, according to Eric Posner and Adrian Vermeule, “as far as the constitutional question is concerned, those exceptions give away the game”<sup>32</sup>. We are not in the presence, then, of an absolute rule of non-delegation in the common law of agency and the presumption, even as a rebuttable one, is not always functioning in favour of non-delegation.

On the other hand, the rule equally exists in the Continental private law of the mandate, drawn equally from its Roman origins. Here, too, the presumption was not always operating against non-delegation. According to Pothier, one of the most authoritative voices of the French civil law before the codification, the presumption against non-delegation only operated when the mandate was

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<sup>26</sup> John Locke, *Second Treatise of Government*, edited by C.B. McPherson, Hackett Publishing, Indianapolis, 1980, chapter XI, par. 141, p. 75. See also the comments in E. J. Criddle, p. 125, D. Ginsburg, S. Menashi, p. 254.

<sup>27</sup> B. Iancu pp. 76 *ssq.*, A. Ziaja, *passim*.

<sup>28</sup> The Romanian Constitution contains quite a similar clause at Article 115, according to which the Parliament is “the only legislative authority”.

<sup>29</sup> See B. Iancu, pp. 86-99, J. M. Keyes, pp. 52-53.

<sup>30</sup> B. Iancu, p. 77.

<sup>31</sup> *Idem*. B. Iancu quotes from Joseph Story, *Commentaries on the Law of Agency as a Branch of Commercial and Maritime Jurisprudence, with Occasional Illustrations from the Civil and Foreign Law*, Little, Brown, Boston, 1839, § 13. See also J. M. Keyes, p. 51, M. L. Dixon, p. 326.

<sup>32</sup> Eric A. Posner, Adrian Vermeule, *Interring the Nondelegation Doctrine*, in *University of Chicago Law Review* 69, 2002, p. 1733.

conferred for an activity that required specific abilities from the part of the agent (the example given by Pothier is that of a lawyer whose task was to make a settlement)<sup>33</sup>. Otherwise, he says, the agent is free to find a substitute for him in order to perform the job delegated. As such, under the pre-codification French civil law, the rebuttable presumption against non-delegation was also a relative, and not a general one, operating only in certain circumstances.

The Code Napoleon transformed the presumption into a general one, through art. 1994, extending it to all the situations where an authorization to re-delegate was not issued by the principal. It still remained, though, a rebuttable presumption. If found applicable, it entailed the liability of the agent for the acts of the substitute. The explanation for the rule was the same as in common law, i.e. the confidence of the principal put in the ability, the zeal, the loyalty and the credibility of the agent<sup>34</sup>. An influential French commentator from the 19<sup>th</sup> Century, Raymond Troplong, acknowledges the rule, but expresses concerns with respect to the opinions of another learned civil law author, C. S. Zacchariae, from the same age. According to the latter, as a matter of principle, the agent would still be free to choose substitutes to do for him the task required by the principal<sup>35</sup>. Also, Troplong cites a learned Italian civil lawyer from the early 18<sup>th</sup> Century, Giuseppe Casaregis who testified that Italian civil law experts always considered re-delegation as a “very difficult subject” (*“Omnes doctores hoc disputant”*), over which unanimity could not be reached<sup>36</sup>. While non-delegation was the rule for the field of the civil law, the opposite was the valid rule in commercial law that is, re-delegation was forbidden only when expressly provided for by the principal<sup>37</sup>. How else would it have been possible to create the French legal construction of *“rapport de préposition”*,<sup>38</sup> which was the common legal framework for big sales business not incorporated? The *“préposé”* was a kind of agent with full discretion in choosing the ways to act, including finding substitutes for himself (*“voilà tel entreprise, conduisez-la a ma place, en home intelligent”*)<sup>39</sup>. Still under the discipline of the Code Napoleon, there were authors that were less convinced by the presumption in favour of non-delegation. Although the Code required explicitly that the agent should have received the power to substitute someone, it was argued that such explicit permission from the part of the principal was not needed in cases when the job conferred to the agent was one that he was obviously not able to perform himself or to perform it without help<sup>40</sup>.

I have made here a sketch of the image of the non-delegation rule in private law. A more accurate account would have implied a lot more details and nuances. But, as it is, this sketch can show that the non-delegation rule is not an undisputed and swift one even in the realm of private law. And we must not forget that private law is concerned typically with simple legal relations, one-to-one legal relations and, most of the time, discrete (i.e. spot) legal relations. What were the chances for such a

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<sup>33</sup> Robert Joseph Pothier, *Oeuvres complètes de Pothier, Tome 9, Traités. Du contrat du mandat. Du contrat de nantissement. Du contrat d'assurance. Du contrat de prêt a la grosse aventure. Du contrat du jeu*, Thome et Fortic, Paris, 1821, par.99, p. 90.

<sup>34</sup> Raymond Theodore Troplong, *Le droit civil expliqué suivant l'ordre des articles du code, depuis et y compris le titre de la vente. Du mandate. Commentaire du Titre XIII, du Livre III du code*, Tome 16, Charles Hingray, Paris, 1846, p. 426.

<sup>35</sup> R. Troplong, p. 427.

<sup>36</sup> Idem.

<sup>37</sup> R. Troplong, p. 426.

<sup>38</sup> Ibidem, pp. 66-69.

<sup>39</sup> Ibidem, p. 68.

<sup>40</sup> Edouard Parenteau Dubeugnon, *Du mandat en droit romain et en droit français. Thèse*, Dupré, Poitiers, 1863, p. 98.

rule to perform well in the complex field of public law? That is why I asked myself the question whether the transplant of the rule from the private to the constitutional law was an adequate one.

In what follows, I will advance three arguments against this transplant, in the first place.

#### **IV. THE PERSONAL CONFIDENCE PRINCIPLE IS NOT TO BE FOUND IN PUBLIC LAW DELEGATION.**

The explanation given by all the private law authors for the rule of non-delegation in the field of agency is the need to protect the confidence put by the principal in the agent. It is also the explanation put forward by Locke himself in his often quoted passage from *The Second Treatise on Government*. But it is not difficult to see how improper it is to believe that the voters in Parliamentary elections put in the delegates they chose (by majority) a confidence of the same kind a principal puts in an agent in a private law agency contract. As one author said, “modern writers attach little importance to the maxim’s root in the law of agency”<sup>41</sup>. Of course, as mentioned before and generally accepted, the doctrine cannot be reduced to a mechanical application of the private law rule in the constitutional realm. Rather, as its evolution showed, its force seems to lie in its power to attract other fundamental principles of public law of a liberal democratic State and to ally with them<sup>42</sup>. Still, how can a principle survive in the absence of its most compelling “*raison d’être*”? Can’t we even try to approximate the kind of trust people put in their representatives in the legislature with the kind of confidence put by the principal in his agent in an agency relationship? Unfortunately, any such approximation is, I think, bound to fail.

Think, for instance, at the process of appointing an agent. First of all, it’s the principal’s choice, in the first place, to appoint an agent. He can always choose between doing the activity himself and delegating it to an agent. After choosing to appoint an agent, the principal tailors the agent’s tasks and the ways in which these are to be performed. He can give him strict instructions or he can let him free to choose the means of accomplishing the delegated outcome. As such, the principal decides whether to appoint or not an agent and what the content of the agency should be. And it is plausible to suppose that, in doing so, he kept in mind the specific qualities or vices of the agent. That is why the principle of confidence weighs so much in the legal discipline of the agency.

When we look at Parliamentary representation, we see almost nothing of the kind<sup>43</sup>. First, appointing a representative is not left at the choice of the supposed principals. A representative of a group of electors is appointed<sup>44</sup> anyway, even if only a minority of those with voting rights took part in the election process. The choice of appointing (or electing) a representative is thus not the voter’s choice (the presumable principals), but is an outcome imposed by the institutional mechanism put in place by the State. Moreover, the content of the “agency” is not really established by the presumable principals, but by the system itself. As such, while the private mandate is “essentially optional”

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<sup>41</sup> J. M. Keyes, p. 52.

<sup>42</sup> B. Iancu, p. 82: “the maxim’s capacity to condense a simple kernel of truth, which is of the highest relevance to any regime of law-bound exercise of public power”.

<sup>43</sup> Hans Kelsen said that parliamentary government is characterized by “a fiction of representation” – H. Kelsen, *Das Problem der Parlamentarismus*, Braumuller, Vienna, 1926, p. 10 *apud*. Wolfgang C. Müller, Tornbjörn Bergman, Kaare Strom, *Parliamentary Democracy: Promise and Problems*, in K. Strom, W. C. Müller, T. Bergman (eds.), p. 26

<sup>44</sup> I use here “appointed” instead of “elected” on purpose, for obvious reasons.

("purement facultatif"), the public law one is "obligatoire"<sup>45</sup>. And, on the other hand, while the content of the mandate is "mandatory" (*impératif*) in private law for the agent, it is not such in the public law (or, at least, its mandatory content is not the one established by the principal).

This is not to say that the "mandate metaphor" for the representation in public law is not a well found one. I would say that the main input of the principal in the mandate is the confidence, while the main input of the agent (as response to that of the principal) is the accountability. The "mandate metaphor" is most valuable in that it emphasises and preserves the accountability feature, which is very important in constitutional democracy. But it does not (and it cannot possibly) capture the confidence element of the private agency.

In what precedes I tried to show that the main reason of the non-delegation rule in private law (i.e. the personal confidence of the principal towards the agent) is not to be found in the realm of the constitutional law. If there is any confidence at all from the part of the principal, then it should be the confidence in the institutional mechanism put in place by the Constitution. But if there is no personal confidence, then there should be no reason for the non-delegation principle. Because the confidence in institutions does not, by itself, exclude further delegation, on the contrary, it could presuppose it, as I will argue in the following.

## V. THE SIZE ARGUMENT. THE FALLACY OF MICROMANAGEMENT.

Most of the American commentators of the non-delegation doctrine quote a famous line in the *Mistretta* Case at the U.S. Supreme Court: "Congress simply cannot do its job absent an ability to delegate power under broad general directives"<sup>46</sup>. It has also been said that "given the complexity of modern government, Congress cannot address all issues demanding resolution and that, even if Congress could do so, its decisions often would reflect deficient knowledge and experience"<sup>47</sup>. The first quotation concerns precisely the delegation from Congress to agencies (with its specificities, such as the limits of discretion of the agency), while the second regards more in general the problem of delegation. What I argue, instead, is that not only modern government, but any kind of government is complex enough and needs to employ delegation. Of course, there is no novelty in this, but I feel it is important to recall that, since government is, in a broader sense and ultimately, the management of the public affairs, it cannot possibly avoid delegation. If this is the case, a presumption against delegation would be unfitted. Rather the opposite presumption should function<sup>48</sup>, while, simultaneously, assessing the possible dangers that too much delegation or delegation in certain spheres or to certain agents could present for the rule of law or for the Constitutional democracy.

As it had been said, delegation is necessary for the organization of work and is a consequence of the division of labour<sup>49</sup>. As such, organization of government cannot escape the basic needs of

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<sup>45</sup> Edmond Defossées, *Du mandat politique étudié dans ses rapports avec le mandat civil*, Librairie Universelle, Paris, 1875, p. 14: "Mais le mandat qui est purement facultatif, en matière privée, devient obligatoire, en matière politique" (italics not added).

<sup>46</sup> *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

<sup>47</sup> See David J. Barron, Elena Kagan, *Chevron's Nondelegation Doctrine*, in *The Supreme Court Review*, 4/2001, p. 246. See also, C. Sunstein, pp. 37-39, D. Geradin, p. 14, A. Lupia, p. 33.

<sup>48</sup> See E. A. Posner, A. Vermeule, pp. 1745 and 1762.

<sup>49</sup> *Ibidem*, p. 1744. See also W. Müller, T. Bergman, K. Strom, p. 25

organization<sup>50</sup>. What could be seen as adequate for a bilateral relation between one principal and one agent cannot be equally adequate for a structure with many actors and different intermediate levels. What could have been appropriate in the plain geometry of the private law might not be as appropriate in the space geometry of the public law.

Of course, delegation does not come without costs, those that are called in economic theory “agency costs”<sup>51</sup>. For controlling and containing them, mechanisms of accountability are put in place<sup>52</sup>. And indeed, one of the values covered by the non-delegation doctrine as an “umbrella” doctrine is accountability<sup>53</sup>. But, in such an approach, the functioning presumption is not the one in favour of non-delegation, but the contrary one. And, from this perspective, the non-delegation rule will apply only when the accountability costs entailed by the delegation process are higher than the costs of non-delegation. And, again, in such a case, I believe the accent should fall on identifying appropriate mechanisms of delegation and accountability (if available), rather than stressing the importance of non-delegation and sticking to it.

To be precise, the doctrine of non-delegation does not prohibit any kind of delegation in the realm of public government and never pretended to do so. It only prohibits the delegation of legislative powers from the legislature to other bodies (initially, to an executive-like body, and then, to the so-called non-majoritarian institutions). But what “legislative powers” mean triggers a controversy that could not be possibly accounted here. I will simply quote Cass Sunstein on this subject and this will be enough to capture the inconclusiveness of the controversy in the American academic *milieu*<sup>54</sup> (and, as such, I would say, its inconclusiveness for our topic):

“The difference between a permissible and impermissible delegation—between “legislative” and “executive” conduct—is one of degree, not one of kind. From what has been said thus far, it should be clear that the line involves not anything qualitative but the precise amount of delegated discretion, and there is no simple metric to tell when how much discretion is too much. It is for this reason that Justice Scalia, among others, has urged that the nondelegation is largely unenforceable by the federal judiciary, simply because it is not subject to principled judicial application”<sup>55</sup>.

One of the most common errors in the management of an organization is the one called “micromanagement”, meaning the inability of the manager to delegate tasks and its inclination to

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<sup>50</sup> From this perspective, and returning for one moment to the first argument, one can also notice that, in some businesses, the confidence of the principal in the agent was, actually, a confidence in agent’s capacity to choose good substitutes, his capacity to further delegate. See *supra* fn. 42. See also the rule in Roman law, according to which the captain of a ship (*magister navis*) could substitute any person, even against the will of the ship-owner (*exercitor*) – Constantin G. Jonnesco, *Essai sur le mandat en droit romain et en droit français*, Blanpain, Paris, 1878, p. 166.

<sup>51</sup> See Mark Pollack, *Principal-Agent Analysis and International Delegation. Red Herrings, Theoretical Clarifications and Empirical Disputes*, in Bruges Political Research Papers/ Cahiers de recherche politique de Bruges, no. 2, February 2007, pp. 3, 15, A. Lupia, p. 35, W. Müller, T. Bergman, K. Strom, p. 23.

<sup>52</sup> The costs of maintaining such mechanisms (and of their shortcomings) are, too, part of the agency costs.

<sup>53</sup> B. Iancu, p. 86, C. Sunstein, p. 35.

<sup>54</sup> To these arguments, others should be added from different constitutional cultures where the same controversy has taken place.

<sup>55</sup> C. Sunstein, p. 37.

involve personally and directly in dealing with every detail of the organization<sup>56</sup>. To plead for a presumption of non-delegation in public law might seem as pleading for some sort of micromanagement.

## VI. NON-DELEGATION AS NON-SUBDELEGATION. THE “ORIGINAL SIN”.

The act of re-delegating a power granted by someone is sometimes called subdelegation. The U.K. and Commonwealth countries writers use it predominantly<sup>57</sup>. I will take this semantic point to stress that if we conceive that something is lost in the process of delegation, than how much more can be lost by further delegating (by subdelegation). If, by delegation, control is lost over the object of delegation, then how much worse can subdelegation do to this control? The legislature is no original holder of the right to legislate, but only a derivative one<sup>58</sup>. Why should we then stick to just one step delegation as a standard formula, instead of, say, two or three steps delegation<sup>59</sup>? Bogdan Iancu plastically put it: “The people as such, as a subject of public law, were in a way ‘relocated’ by the Constitution outside government, thus making it impossible for any branch to ‘speak’ for them and claim a representative monopoly”<sup>60</sup>. So, if on one side we have the people, which would be the original holder of the power to make rules, and on the other side we have an entire apparatus to make, interpret and apply rules within which delegation functions “in chain”<sup>61</sup>, if something is to have been lost on the way, isn’t it more likely to have been lost during the first delegation, the one from the people?

As a matter of practical experience, it is quite obvious that the original principal (the people) has much less means of control, supervision and intervention in the activity of its “primary” agent, the legislature, than the latter, in its turn, has over its presumable “derivative” agents or than those have between them.

The real problem is not as much the “chain of delegations” (which starts with the “original sin” – the Constitution of the state), as it is, indeed, the “accountability in chain”. But “cutting the chain” by a non-delegation principle does not solve the problem of accountability, it only removes it, without knowing if what is left instead is better or worse than the possible alternative. The problem of accountability is the problem of every representative democracy, because of the “original sin”.

## VII. CONCLUSION.

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<sup>56</sup> Harry E. Chambers, *My Way or the Highway. The Micromanagement Survival Guide*, Berrett-Koehler, San Francisco, 2004, Peter F. Drucker, Joseph A. Maciarello, *Management*, Revised Edition, Harper Collins, 2008, p. 2.

<sup>57</sup> M. L. Dixon, p. 326.

<sup>58</sup> Carol Harlow, *The Concepts and Methods of Reasoning of the New Public Law: Legitimacy*, LSE Law, Society and Economy Working Papers 19/2010, available at <http://ssrn.com/abstract=1713633>, p. 21. She uses the collocation „Representative democracy as delegation”.

<sup>59</sup> For a four-step-delegation government and, respectively a five-step-delegation government, see W. Müller, T. Bergman, K. Strom, p. 20 and A. Lupia, p. 34.

<sup>60</sup> B. Iancu, p. 87.

<sup>61</sup> On the “chain of delegation” see B. Iancu, p. 199, W. Müller, T. Bergman, K. Strom, p. 19, Deirdre Curtin, *Delegation to EU Non-Majoritarian Agencies and Emerging Practices of Public Accountability*, in Damien Geradin, Rodolphe Munoz, Nicolas Petit (eds.), *Regulation through Agencies: A New Paradigm of European Governance*, Edward Elgar, 2006, available at <http://ssrn.com/abstract=1349771>, p. 89, Dietmar Braun, Fabrizio Gilardi, *Introduction*, in D. Braun, F. Gilardi (eds.), p. 4.

Writing about the conceptual framework of accountability, Mark Bovens<sup>62</sup> distinguished between two perspectives on accountability. One is the “democratic perspective”, based on the idea of popular sovereignty, according to which accountability must ensure the proper information of the voters (primary principal) with regard to the activity of their (primary and derivative) agents. The other is the “constitutional perspective”, concerned with the idea of preventing the abuse of power on the part of the Government. Under this perspective, the role of accountability is not so much that of transmitting information to the people, than that of effectively protecting it from the possible abuses. If one is to adopt successively those two perspectives, it becomes clear that the former might uphold, to a certain point, the doctrine of non-delegation, while for the latter what counts more are the outcomes of the system in protecting the rights and freedoms of the citizens and their effectiveness. The effectiveness of this protection is not dependent upon one rule of non-delegation (or the opposite one), but is rather a quality of the entire system. In the institutional architecture of a constitutional system the traditions, cultures and the path dependence play an important role, as well as abstract principles that are part of the Democratic and Liberal conception of politics. But its measure is given by its efficacy in guaranteeing the protection of human rights and liberties, and not by some institutional standard.

In his article *Democracy Schmemocracy*<sup>63</sup>, Dan M. Kahan argued that “democracy” cannot be a standard for assessing the desirability or constitutionality of “delegation schemes”, because democracy is essentially a contested concept, meaning that there is a “plurality of competing conceptions of democracy, each of which emphasises a different good commonly associated with democratic political regimes”. Being an essentially contested concept, democracy cannot “uniquely determine institutional structure”. In light of this, he advocates a bottom up approach, according to which the best decision on whether to delegate or not is to be taken “locally”, that is on a case-by-case basis, depending on the particular setting involved. Besides a kind of “relativism” that I am not certain I can share, Kahan’s position has an undeniable virtue: that of detaching the issue of delegation from the superior values one might retain as essential to democracy.

Just an ending note: the purpose of this article was by no means that of challenging the usefulness or the meaning of the non-delegation doctrine, in the shapes taken by it during centuries of constitutional practice and with the merit of pointing out important values for a democratic society, be it even in a pluralistic way, as Kahan suggested. I only questioned a kind of presumption in favour of non-delegation that is sometimes almost instinctively embraced when some new institutional construction (national or supranational) is under attack. Complex problems might need complex solutions, which might not be able to avoid delegation. My suggestion is that, in such cases, the focus should be less on the delegation issue, and more on the other side of the coin, on the accountability.

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<sup>62</sup> Mark Bovens, *Analysing and Assessing Public Accountability. A Conceptual Framework*, European Governance Papers (EUROGOV), no. C-06-01, <http://www.connex-network.org/eurogov/pdf/egp-connex-C-06-01.pdf>, pp. 25-26.

<sup>63</sup> Dan M. Kahan, *Democracy Schmemocracy*, 1999, *Faculty Scholarship Series*, Paper 110, [http://digitalcommons.law.yale.edu/fss\\_papers/110](http://digitalcommons.law.yale.edu/fss_papers/110).