

LEGAL MONOCENTRISM AND THE PARADOX OF GOVERNMENT

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ABSTRACT: In this paper I shall argue that, in contrast to its monocentric counterpart, only the institutional framework of legal polycentrism can overcome the problem of the so-called “paradox of government”—that is, establish effective and robust governance structures without simultaneously empowering them to overstep their contractually designated tasks and competences. To accomplish this, I shall critically evaluate the logical consistency of the solutions advanced in this context by the proponents of legal monocentrism, based on the claim that institutional constraints in the form of democratic elections or checks-and-balances can place working constitutional limitations on the power of a coercive monopolist of law and defense.

KEYWORDS: legal polycentrism, institutions, paradox of government, rule-following, rule of law, checks and balances, critical rationalism

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1. INTRODUCTION

By legal monocentrism I mean the view that law and defense are public goods, which have to be supplied by a territorial monopoly of force if they are to be supplied at all (Head and Shoup, 1969, p. 567; Bush and Mayer, 1974, p. 410; Buchanan and Flowers, 1975, p. 27; Hirshleifer, 1975; Samuelson and Temin, 1976, p. 159; Cowen, 1992; Tullock, 2005). By legal polycentrism, on the other hand, I mean the view that law and defense are, in the relevant respect, no different from other goods and services normally supplied by the market, and that, in view of the generally acknowledged superior allocative properties of the market, freely competing protection and arbitration agencies would provide these goods at a much higher level of quality than a monopoly of force does, or—in a stronger version—that only under freely competitive conditions can the provision of protective and legal services be regarded as an unambiguous good in the first place (Tannehill and Tannehill, 1970; Rothbard, 1973; Molinari, 1977; Fielding, 1978; Friedman, 1989; Hoppe, 1999; Murphy, 2002; Stringham, 2007; Hasnas, 2008; Long 2008).

In this paper I shall argue that, in contrast to its monocentric counterpart, only the institutional framework of legal polycentrism can overcome the problem of the so-called “paradox of government”—that is, establish effective and robust governance structures without simultaneously empowering them to overstep their contractually designated tasks and competences.¹ To accomplish this, I shall critically evaluate the logical consistency of the solutions advanced in this context by the proponents of legal monocentrism, based on the claim that institutional constraints in the form of democratic elections or checks-and-balances can place working constitutional limitations on the power of a coercive monopolist of law and defense.²

¹ This is not to say that a monocentric legal system cannot establish regime stability and escape the Hobbesian jungle, but that it fails to secure the rule of law.

² My work in this paper is in certain respects parallel to that of Leeson (2011) and Leeson and Coyne (2012), although these authors focus primarily on analyzing the relative efficiency of various sources of social rules, whereas I concentrate on advancing the claim that there is a more fundamental, logical contradiction embedded in the notion that a monocentric legal system can avoid falling prey to the paradox of government.

2. THE PARADOX OF GOVERNMENT

The paradox of government may be described in the following terms: “The fundamental political dilemma of an economic system is this: A government strong enough to protect property rights and enforce contracts is also strong enough to confiscate the wealth of its citizens” (Weingast, 1995, p. 1).³ On the face of it, this issue might be thought of as raising the plain old incentive problem, associated with Lord Acton’s warning about the relationship between power and corruption. However, I believe that it actually points towards a more fundamental, conceptual difficulty,⁴ which stems from the fact that a monopolistic lawgiver and law interpreter cannot make a logically meaningful distinction between obeying the law (i.e., making verdicts compatible with the binding legal code) and only claiming to obey it, just as the user of a private language cannot make a logically meaningful distinction between obeying the rules of such a language and only claiming to obey them (Wittgenstein, 1953; Kripke, 1982; Nielsen, 2008).

This difficulty, which may be termed the legal rule-following paradox, necessarily follows from the peculiar position of the coercive monopolist of law, which allows its representatives to claim justifiably that any of their interpretations of any rule is consistent with the legal code that they themselves established beforehand, just as the user of a private language can justifiably claim that any use of words on his part is correct from the point of view of the rules governing the communication system that he himself devised in the first place.⁵ Such an observation motivates the conclusion that

³ The paradox of government has also been investigated by Humphrey (2010), who labels it the “credible commitment dilemma.”

⁴ In keeping with the methodology of investigating the institutional robustness of various systems of political economy (Boettke and Leeson, [2004], Leeson and Subrick, [2006]), I may even suppose that the judicial monopoly of force under consideration is composed exclusively of perfectly well-intentioned and absolutely incorruptible individuals.

⁵ Another economically relevant illustration of the original Wittgensteinian rule-following paradox is of course the theorem of the impossibility of economic calculation under socialism (Mises, 1996, ch. 26), which says that in the absence of the intersubjective benchmark of efficiency afforded by the market price structure, which results from the fact that all the factors of production are in the hands of

the fact is that there is no such thing as a government of law and not people. The law is an amalgam of contradictory rules and counter-rules expressed in inherently vague language that can yield a legitimate legal argument for any desired conclusion. For this reason, as long as the law remains a state monopoly, it will always reflect the political ideology of those invested with decisionmaking power. (Hasnas, 1995, p. 233)⁶

Hence, in order to salvage the meaningfulness of the coercive monopolist's legal verdicts, there arises a need to have an external arbiter, who will be able to evaluate impartially whether the institution in question does not renege on the principles that it established and promised to safeguard. In other words, when a legal monopoly of force devises a constitution aimed at constraining its own power (thus attempting to make itself more trustworthy), the crucial problem to address is that of constitutional enforceability.⁷ Unfortunately, all too often this problem is brushed aside, assumed to be self-solving, or taken to be neutralized by the existence of relevant historical evidence. The following remarks can be seen as quite typical in this respect:

We reject the Hobbesian presumption that the sovereign cannot be controlled by constitutional constraints. Historically, governments do

a monopoly of force, no logically meaningful distinction can be made between the said monopoly allocating resources rationally (i.e., efficiently from the point of view of consumer sovereignty) and it only claiming to do so. In this context, "private" prices (i.e., prices set by a single coercive agency) are as praxeologically meaningless as "private" linguistic rules (i.e., linguistic rules set by the only user of a supposed language). Consequently, the rational allocation of resources under socialism turns out to be as logically impossible as the rational use of a private language. Kripke (1982, p. 89) also draws attention to this point.

⁶ One might suggest that I cannot use Hasnas's point to support my claim that a polycentric system is needed for objective legal rules, since Hasnas is not saying that under such a system we would have the rule of law, but that no such thing as the objective rule of law exists (even though a polycentric system is still desirable, since it allows for serving the interests of others besides the group which dominates a centralized system). I do not find such an interpretation of Hasnas's claims problematic. What matters from my point of view is that I can use his contentions to illustrate the essence of what I termed the legal rule-following paradox. Beyond that, I do not need to agree with his views regarding the nature and possibility of the rule of law. Thus, I believe that the potential criticism mentioned above is misplaced.

⁷ See Vanberg (2011) on the importance of constitutional enforcement.

seem to have been held in check by constitutional rules.... Our whole construction is based on the belief, or faith, that constitutions can work.... (Brennan and Buchanan, 2000, pp. 13–14)

Such a statement, it seems to me, is a fatal concession that the issue remains essentially unresolved, not only (or even not mainly) due to ignoring the question of incentive compatibility, but more importantly due to pushing one level up the aforementioned problem of legal politicization without taking the sting out of it.

3. MONOCENTRIC SOLUTIONS

Let us now survey some potential solutions to the above difficulty that might be offered by the supporters of legal monocentrism committed to the viability of the notion of the rule of law. First, they could suggest that democratic elections might serve as an institutional guarantee of constitutional enforceability (Holcombe, 2011, p. 18). In this proposal, the voting public is supposed to be an external arbiter of whether the legal monopoly of force abides by the constitution in making any of its decisions, and whenever it does not, the dissatisfied society can decide not to reelect its failed representatives. Thus, the constitution does not have to be thought of as self-enforcing—instead, it can be seen as proximately enforced by the legal monopolist, but ultimately enforced by the sovereign people, who freely choose and dismiss their administrators and public servants.

There are several problems with this solution that have to be mentioned here. First, the familiar considerations of rational ignorance (Downs, 1957; Matsusaka, 1995) make it unlikely that an average member of the voting public will have a sufficient incentive to familiarize himself with the details of the binding constitutional principles and their relationship with the decisions actually made by the functionaries of the existing judicial system. This is because the likelihood of his particular vote having a decisive influence on the outcome of any given election is infinitesimally small, hence making the potential benefits of contributing successfully to the election of a constitution-abiding representation far outweighed by the costs associated with acquiring relevant information.

Second, since political democracies⁸ allow for externalizing the costs of one's individual actions onto others via redistributive means, as well as make each individual vote very unlikely to exert a determining influence on the outcome of any given election, the majority of voters can be expected to be not only rationally ignorant, but also rationally irrational (Caplan, 2000, 2007; Caplan and Stringham, 2005)—that is, willing to indulge in making choices based on even the most wildly implausible beliefs rather than simply vote at random. This conclusion is based on a commonsensical assumption that irrationality can be treated as a consumption good like any other, similarly subject to the law of demand—thus, the smaller its opportunity costs, the more widespread its presence. In view of this, a plausible case can be made for the claim that political democracies are bound to be plagued by a particularly high level of irrationality in the sphere of public policy-making, since they make electoral irrationality very cheap. This, in turn, makes it difficult to have much faith in the arbitral skills and constitutional expertise of the voting public.

Third, since, *ceteris paribus*, it is always easier for a minority to overcome the collective action problem (Olson, 1971; Ostrom, 1990), as within small groups benefits are more highly concentrated, interests are more uniform, and effective monitoring of free-riders is more feasible, it is likely that as long as a given democratic system enjoys general legitimacy, it will more often cater to the preferences of powerful, well-organized interest groups than to those of the disorganized, fragmented general public. Thus, the supervisory powers of the supposed external constitutional arbiter are vastly diminished or transferred into the hands of a small fraction of those interested in quality legal services.

Fourth, while it can be argued that democratic elections infuse any given legal system with an element of diachronic competition, it has to be acknowledged that they still leave it devoid of any trace of synchronic competition. This is noteworthy insofar as it can be contended that diachronic competition is the less significant of

⁸ I use the term “political democracy” in order to make a clear distinction between the majoritarian system of institutionalized coercion and the Misesian “market democracy” (Mises, 1978, p. 178), as well as voluntary, club-like entities operating according to majoritarian principles.

the two—after all, a coercive monopoly whose managers are periodically replaced does not thereby cease to be a coercive monopoly, together with all of its undesirable characteristics.

Since the market data are in constant flux (Shackle, 1958, 1968; Mises, 1996; O'Driscoll and Rizzo, 1996; Klein, 2008, pp. 172–175), especially with respect to consumer valuations, it is relatively unimportant to compare the performance of a number of service-providing agencies over time if at any given moment only one of them exists in operation. Can it be said, for instance, that if an administration X was voted out of office in favor of an administration Y and the latter managed to survive two terms, it indicates that the latter turned out to be unambiguously more successful in satisfying the wants of the voters than the former did? Insofar as the voters of yesterday need not be the same as the voters of today, the same being the case for the values endorsed and needs felt by those respective groups, we have to remain agnostic with regard to the answer to the above question. Strictly speaking, it cannot even be said that the latter administration turned out to be more adaptable to the changing social sentiments, because it might have just so happened that its terms in power overlapped with a period of unusual psychological stability among the public, triggered by factors completely independent of its choice of policies (such as, say, the emergence of a great entrepreneurial talent, capable of delivering cheap and high-quality goods to the masses, therefore greatly increasing their personal well-being).

The crucial point here is that, due to the absence of synchronic competition, at no point of time can it be said that a given democratically elected administration does its job better than its actual or potential competitors, since by definition there are none such, and thus the supposed external arbiter in the collective person of the voting public is at no point of time in a position to evaluate the performance of its representatives against a meaningful benchmark of efficiency (Mises, 1962; Tullock, 1965; Rothbard, 2004, pp. 1070–1074). In fact, to be more specific, the “voting public,” treated as a monolithic social bloc, is, logically speaking, never in a position to engage in this kind of evaluation, since such an entity—due to its all-encompassing nature—necessarily locks itself in a world bereft of synchronic competition. It is only after it decomposes itself into individual customers capable of patronizing individual providers

of legal services that this all-important element is brought into the picture, and with it the prudential yardstick of profit and loss.

Finally, there is the problem of delayed feedback (North, 1993, p. 16; Sutter, 2002) —under political democracy, the element of diachronic competition can be normally utilized only once every few years; to do it more often would, as both its proponents and critics agree, make the system too volatile to be practicable (Williamson, 1976, p. 81). “Market democracy” (Mises, 1978, p. 178), on the other hand, utilizes both diachronic and synchronic competition practically permanently, as a result of which some parts of the social system it creates are highly volatile, while some are consistently stable, neither being seen as its vice any more than volatility and stability can be seen as vices of individual characters. In other words, since entrepreneurs on the free market can survive only by adjusting their offers to the expectations and preferences of the consuming public, market democracy is bound to exhibit a tendency towards combining fixity and flexibility of its various dimensions in the proportion consistent with the prevailing social time and risk preference (Kirzner, 1973, 1997; Huerta de Soto, 2010).

Thus, I have to conclude that the procedure of democratic elections fails to serve as an effective institutional guarantee of constitutional enforceability and fails to elevate the general public to the position of an efficient constitutional arbiter.

The second solution offered in this context by the supporters of legal monocentrism is to create an institutional structure based on the principle of checks and balances. As described by Barnett (1998, p. 253), “the essence of this strategy is to create an oligopoly or a ‘shared’ monopoly of power. This scheme preserves a monopoly of power but purports to divide this power among a number of groups.” In other words, in connection with the issue of constitutional enforceability, the idea here is to make certain branches of a coercive legal monopoly the arbiters of the actions of its other branches.

The problem with this proposal is that, since any given monopoly of force aims at making its ability to deploy discretionary power maximally effective (even if, for the sake of the argument, we were to assume that this power were to be used for what the representatives of the said monopoly regard as “the common good”), its

separate branches have a natural incentive to cooperate with each other so as to form a close-knit cartel with uniform interests. As Barnett (*ibid.*, p. 254) puts it:

Eventually, entrepreneurs of power—master politicians, judges, executives, or outsiders called “special interest groups”—figure out ways to teach those who share the monopoly that each has an interest in cooperating with the others in using force against those who are outside the monopoly. This process may take some time, but gradually what is originally conceived of as “checks and balances” eventually becomes a scheme more aptly described as “you don’t step on my toes and I won’t step on yours” or “you scratch my back, I’ll scratch yours.”

Citing Buchanan (1968, p. 87), one might question the above worry by saying that

it may prove almost impossible... to secure agreement among a large number of persons, and to enforce such agreements as are made. The reason for this lies in the “free rider” [problem].... Even if an individual should enter into... [an] agreement, he will have a strong incentive to break his own contract, to chisel on the agreed terms.

However, the appeal to “chiseling” is inadmissible here. It could be made as an argument against the claim that free market cartels are sustainable arrangements, but it cannot be applied to a monopoly of force, since any attempt on the part of a segment of such a monopoly to become an independent provider of relevant services would be declared illegal by the institution in question. In other words, while it could be plausibly suggested that free riding has a beneficial effect on the consuming public insofar as it makes business cartels inherently unstable and operationally self-destructive (Block, 1977, 2008; Armentano, 1978; Pasour, 1981; Hoppe, 1989, ch. 9; DiLorenzo, 1996),⁹ the same phenomenon

⁹ Cowen and Sutter (1999) raise the point that there might be a tension between saying that, on the one hand, cartels are unstable because they face a collective action problem, and yet, on the other hand, that collective action problems can be solved to privately produce public goods. I believe that Caplan and Stringham (2003) successfully answer their worry by pointing out the fact that, in the context under discussion, Cowen and Sutter seem to mistake (self-enforcing) coordination game scenarios with (non-self-enforcing) prisoner’s dilemma scenarios.

cannot be said to occur within bureaucratically rigidified structures of coercive monopolies.¹⁰

Furthermore, even if we decide to analogize any given monopoly of force to a firm and its branch responsible for constitutional oversight to the said firm's supervisory department, we need to bear in mind that this analogy still leaves us with only one firm in the sector of lawmaking and law execution, and thus the efficiency with which the abovementioned supervisory department performs its role still cannot be assessed against any intersubjective benchmark of entrepreneurial competence.

Finally, the inadequacy of the solution of checks and balances can be illustrated by appealing to the private language analogy mentioned earlier. This analogy suggested that one is capable of saying meaningfully that one follows a certain set of linguistic rules only if there is at least one external arbiter who can verify that person's claims. Now, let us assume that there exists a coercive monopoly that creates and enforces the binding linguistic rules within a given territory, organized according to the principle of check and balances—in other words, one of its branches creates the rules, while another verifies whether they are consistent with the body of the already existing ones. The crucial point here is that even if, on the most charitable interpretation, we were to accept that such an arrangement could be said to ensure that the language in question is used correctly from the point of view of the monopolistic institution under discussion, it cannot be cogently maintained that this assurance extends to any of this institution's "subjects." And this is a serious problem insofar as we agree that any given language is supposed to serve the purpose of effective communication among the whole population, not only among its rulers.

Likewise, the legal system is supposed to serve the purpose of peaceful conflict resolution among the whole society, not only among its lawmakers, law interpreters and law enforcers. Hence, one might plausibly argue that while under a monopoly of force the relevant kind of freedom of association and choice of legal rules is granted only to its political and bureaucratic management,

¹⁰ It is possible that the different branches of government might still free ride by seeking the dominant position in their relationship with each other, e.g., through marginal power struggles. This does not, however, change the conclusion above.

under a competitive, contractual, polycentric legal order the same freedom is extended to all members of society.

It might be suggested at this point that the above arguments simply reiterate standard points about the difficulty, if not impossibility, of limiting power in a centralized regime, and that they do not raise any special Wittgensteinian problem about meaning. In order to illustrate this contention, the following example might be used: the commerce clause of the US Constitution has been interpreted to give Congress very wide control over all economic activity. Efforts to limit the scope of the clause have not been very successful. This does not show, though, the argument might go, that the question of whether the Supreme Court has correctly interpreted the commerce clause has no objectively correct answer. The clause's meaning can be debated in public language, and the fact that the power of the central government to act as it wishes cannot be blocked does not gainsay this. Hence, one might conclude, I have confused meaning and enforceability.

In response, I have to say that I find no disagreement with the content of the above example, but I do not agree that the critical conclusion derived from it applies to the arguments advanced in the present chapter. I never suggested that government-made law cannot be publicly debated or that it cannot thereby acquire intersubjective meaning. What I did argue is that under coercive legal monocentrism the meaning thus established is irrelevant from the point of view of law enforcement, since territorial monopolies of force set themselves up as exclusive lawgivers and law interpreters within the areas they control, and, as demonstrated in the preceding paragraphs, it is implausible to assume that the procedure of democratic elections can provide an effective external check on their actions. In other words, with regard to the actual operation of the legal system, as opposed to its public perception, the difficulty or impossibility of limiting power in a centralized regime does imply that its legal verdicts are objectively meaningless or effectively reduced to expressions of subjective whims of the regime's officials. To sum up, under coercive legal monocentrism, intersubjective legal meaning can still exist, but it cannot be translated into objective enforceability.

4. POLYCENTRIC SOLUTIONS

Thus, I have to conclude that both of the “monocentric” solutions analyzed above fail to resolve what was termed the “paradox of government.” In distinct contrast, the voluntary, entrepreneurial alternative mentioned in the introductory section of this paper offers hope to address it successfully. As Long (2008), who describes the competitive order in question as “market anarchism,” puts it:

Market anarchists reject the concept of monopoly government, insisting that every legal institution must be subject to correction from without. It follows, of course, that any agency doing the correcting must also be subject to correction, and so on. This doesn’t lead to an infinite regress, however, because while any legal institution is subject to correction from other legal institutions, those in turn are subject to correction from the first one; legal institutions check and balance each other. (*ibid.*, p. 137)

Thus,

far from eschewing checks and balances, market anarchists take market competition, with its associated incentives, to instantiate a checks-and-balances system, and to do so far more reliably than could a governmental system. (*ibid.*, p. 141)

In other words, even though in the system under consideration there is no uniform, written constitution, there is a powerful mechanism of “constitutional” constraint, whereby the clients of any given arbitration agency can objectively evaluate to what extent it fulfills its contractual duty of resolving conflicts vis-à-vis its competitors in the same business (Stringham and Zywicki, 2011). This kind of evaluation, it has to be noted, would appeal not to any rigid set of codified legal principles, but to a more amorphous criterion, composed of a number of elements: logical justifiability and commonsense character of the passed verdicts, their adequate grounding in the particular conditions of time and place of any given case, and, perhaps most importantly, their consistency with the customs, beliefs, conceptions of justice, and other aspects of the “soft” institutional framework of any given locality (or localities in cases of interlocal disputes) (Stringham, 1999; Boettke, Coyne, and Leeson, 2008).

The above approach captures the essence of what I would describe as the soft variety of the critical rationalist conception of law interpretation and enforcement. The critical rationalist conception, as opposed to its constructivist counterpart (Hayek, 1967, pp. 82–95; Miller, 1976, p. 384), conceives of the legal system of any given community not as created by the monopoly of force that imposes itself on the community in question, but as contained in the customs, conventions and traditions stemming from free, gradually evolving and solidifying interactions and associations among its members (Hume, 1740, Book III, p. 541; Leoni, 1972). As indicated earlier, I would like to argue that this particular conception can be further subdivided into hard and soft varieties. According to the hard one, the legitimate function of territorial monopolies of force is not to design bodies of rules specifying the norms of social cooperation and requiring the inhabitants of specific geographic areas to conform to them in their everyday behavior, but to discover such rules that preexist in the organically, evolutionarily grown social tissue and pass judicial verdicts based on them (Hayek, 1979, p. 33).

What I regard as the chief weakness of the hard variety is that I consider it highly unlikely that any given community would voluntarily decide to patronize a single provider of arbitration services, which is a contention consistent with the view that coercive territorial monopolies of law and defense have always been established by conquest (Gumpłowicz, 1899; Oppenheimer, 1922; Nock, 1935; de Jouvenel 1949; Tilly, 1985). The logical justification of this contention is quite simple—just as people all over the world are very diverse with respect to, e.g., their culinary, sartorial and artistic preferences, and thus prone to patronizing different food, clothing and art providers, they are also diverse with regard to their unwritten legal and moral customs, their beliefs concerning justice and fairness, etc., which, in the absence of coercive legal monocentrism, should result in them using the services of different specialized arbitration agencies or various informal means of dispute resolution.¹¹

¹¹ And this is in fact what a substantial number of historical and contemporary empirical case studies illustrate (Benson, 1988, 1990; Ellickson, 1991; Friedman, 1979; Anderson and Hill, 2004; Leeson, 2006, 2007a, 2007b, 2007c; 2008; Powell, Ford, and Nowrasteh 2008; Powell and Stringham, 2009; Adolphson and Ramseyer, 2009).

In other words, a voluntarily patronized “quasi-monopolist” could appear and function only in a society thoroughly uniform in its adherence to a given set of moral and legal conventions, which seems to me to be an entity as unlikely to exist as a society all of whose members were to dine in a single restaurant. The vision of freely competing arbitrators aiming at discovering and applying the social conventions concerning law and justice is the alternative offered in this context by the proponents of what I described earlier as the soft variety of the critical rationalist approach.

5. CONCLUSION

Since, in virtue of its essential nature, the critical rationalist approach in its soft variety can be practiced only within the framework of contractual legal polycentrism, such a framework, insofar as it establishes a genuine, competitive market for legal and protective services and subjects it to an intersubjective benchmark of efficiency, as judged from the point of view of consumer sovereignty, is the only institutional setting capable of dealing adequately with the paradox of government (or, to use a somewhat more precise term in this context, the paradox of governance), as well as its logically necessary corollary, the legal rule-following paradox.

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