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**Independence vs. Accountability?
Non-Majoritarian Institutions and
Democratic Government in Europe**

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Independence vs. Accountability? Non-Majoritarian
Institutions and Democratic Government in Europe

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1. Introduction

The European Central Bank (ECB), if and when it will be established, will have sweeping statutory powers. According to the Treaty of Maastricht, the ECB can make regulations that are binding in their entirety and become European and member states' law, without the involvement of the EC Council or of national parliaments. It can impose penalties on credit institutions for failure to comply with its regulations and decisions. The Bank has a single objective, monetary stability, and the freedom to pursue this objective in complete independence of the other European institutions and of the national governments.

Moreover, since the governors of the central banks of the member states are members of the ECB Council, they too must be insulated from domestic political influences in the performance of their task: they can no longer be players in the old game of pumping up the economy just before an election. In short, in the monetary union, issues of macroeconomic management that have been the lifeblood of Western politics, determined the rise and fall of governments, and affected the fate of national economies, are to be decided by politically independent experts (Nicoll 1993: 28).

Why did the same politicians who always preferred to have a hand on the monetary lever, suddenly opt to delegate such far-reaching powers to an independent technocratic institution? A popular explanation invokes the power of Germany in the EC and the attraction of the German model of central banking. After all, political independence and single-minded commitment to price stability are much advertised features of the Bundesbank.

However, the available evidence indicates that Germany did not have to pressure its partners into accepting an independent ECB exclusively committed to price stability. Most EC governments had converted to disinflation before the project for economic and

monetary union began in 1988 (Sandholtz 1993). On the other hand, the case of Japan, where the national bank enjoys limited autonomy, provides a telling counterexample to the generalization that monetary stability requires a politically independent central bank. In short, the explanation of the consensus in favour of central bank independence has to be sought at a deeper level.

Paradoxically, the commitment to political independence is particularly strong in countries such as France, Italy and Spain with a long tradition of state intervention in the economy. It seems to be more hesitant in Britain where privatization and deregulation have made the greatest progress, but where the traditional principle of parliamentary sovereignty remains largely unchallenged. This principle, as we shall see, has profoundly influenced the formal as well as the substantive understanding of the notion of democratic accountability.

Thus, the political independence of central banks, far from being an issue specific to monetary policy, raises the general problem of how received theories of democratic government may be extended to encompass the new structures of governance that are emerging at the national and European levels. In fact, the advantages and risks of politically independent institutions are currently debated not only in the field of monetary policy but also of competition policy, of economic and social regulation, and even with reference to judicial review and judicial policy making.

Independent central banks and regulatory agencies, independent courts and administrative tribunals, share one important characteristic: they are all non-majoritarian institutions in the sense of not being directly accountable either to voters or to elected politicians. How to reconcile independence with accountability is the central political problem of such institutions. Here attention is focused on the regulatory agencies, but it is hoped that our conclusions will be of more general significance.

The main thesis of this paper is that agency independence and public accountability can be complementary and mutually reinforcing rather than antithetical values. What is required to reconcile independence and accountability are richer and more flexible forms of control than the traditional methods of political and administrative oversight. Statutory objectives, procedural requirements, judicial review, budgetary discipline, professionalism, expertise, monitoring by interest groups, even inter-agency rivalry, can all be elements of a pervasive system of control which only needs to be activated. When the system works

properly no one controls an independent agency, yet the agency is "under control" (Moe 1987).

An improved understanding of the relationship between independence and accountability is also important for a correct evaluation of European policy making. Contrary to widespread opinion, the problem of the so-called "democratic deficit" is not unique to institutions such as the EC Commission or the future ECB. If the problem is more visible at the European level this is only because regulation is relatively more important there than at the national level (Majone 1993a). Regulation is not achieved simply by passing a law, but requires detailed knowledge of, and intimate involvement with, the regulated activity. This requirement necessitates, sooner or later, the creation of specialized and more or less independent agencies entrusted with fact-finding, rule-making and enforcement. Hence, as the member states establish their own regulatory institutions, often in response to European legislation, they face the same issue of political legitimacy that confronts EC regulators.

2. Why Independent Agencies?

Administrative regulation -- economic and social regulation by means of agencies operating outside the line of hierarchical control or oversight by the central administration -- is becoming the new frontier of public policy and public administration in Europe. The development has been particularly intense during the past two decades. In France, for example, the expression "autorité administrative indépendante" was used for the first time by the law of 6 January, 1978 creating the Commission Nationale de l'Informatique et des Libertés. Today there are some 17 independent agencies, including such bodies as the Commission des Opérations de Bourse, the Commission Bancaire, the Commission de la Sécurité des Consommateurs and the Commission de Contrôle des Assurances.

Also in Britain the 1970s have been a period of significant institutional innovation, particularly in the area of social regulation: Independent Broadcasting Authority, Civil Aviation Authority, Health and Safety Commission, Equal Opportunities Commission, and the Commission for Racial Equality, among other agencies. Despite the hostility of Conservative governments toward any kind of "quangos", a number of independent agencies were set up also in the 1980s and early 1990s, partly because it was realized that

in many cases privatization would only mean the replacement of public by private monopolies unless the newly privatized companies were subjected to public regulation. Thus, the privatization process has been paralleled by the development of a whole new regulatory structure, including a new breed of regulatory agencies, the regulatory offices: Office of Telecommunications, Office of Gas Supply, Office of Water Services, Office of Electricity Regulation.

Similar, if slower, institutional developments are taking place everywhere in Europe, so it is natural to ask what are the reasons for both the sudden growth of administrative regulation and the lateness of its arrival on the European political stage (Majone 1994). The growing realization that the interventionist and welfare policies of the past either had failed or could not be afforded any more, did not lead to demands for a return to laissez-faire, as the more radical advocates of privatization and deregulation seemed to expect. Instead, there was a demand for better focused and more flexible forms of public intervention, and for more attention to those areas of social regulation (environment, consumer protection, equal opportunities, freedom of information) which were often neglected by the welfare policies of the past. Thus, paradoxically, the debate on privatization and deregulation contributed to directing the attention of European public opinion to regulation as a distinct mode of policy making aimed at correcting specific types of market failure.

Unlike older forms of state intervention, regulation is primarily concerned with increasing microeconomic efficiency. This is true of social as well as of economic regulation. Thus, the purpose of environmental regulation is to reduce negative externalities caused by pollution; microeconomic efficiency is increased by reducing the difference between the private and the social cost of pollution.

The adoption of microeconomic efficiency as the main normative criterion has several important consequences. It implies, for example, that regulatory instruments should not be used to achieve redistributive or other social policy goals (Majone 1993a). The institutional implications are particularly relevant to our discussion. The use of specialized, single-purpose agencies is a direct consequence of the focused approach characteristic of regulation. Also in this respect, there is a striking difference between administrative regulation and traditional modes of public intervention. In Europe, even when techniques of administrative regulation were used, such as entry and price regulation, standard setting,

or licensing, there was a general reluctance to rely on independent agencies. Instead, important regulatory functions were assigned to some obscure office buried deep inside some large ministry, or to an inter-ministerial committee effectively protected from any kind of judicial review or independent scrutiny.

The reasons for the reluctance to set up independent agencies varied according to different constitutional, political and administrative traditions, but the net result was everywhere the same: a serious mismatch between the increasingly specialized functions of government and the administrative instruments at its disposal. Only after the mismatch became too obvious to be overlooked did European scholars begin to produce functional justifications for the rise of independent regulatory agencies. It has been argued that agencies are justified by the need of expertise in highly complex or technical matters, combined with a rule making or adjudicative function that is inappropriate for a government department or a court; that an agency structure may favour public participation, while the opportunity for consultations by means of public hearings is often denied to government departments because of the conventions under which they operate; that agencies' separateness from government is useful whenever it is hoped to free government administration from partisan politics and party political influence. Agencies are also said to provide greater continuity and stability than cabinets because they are one step removed from election returns; and the exercise of a policy making function by an administrative agency should provide flexibility not only in policy formulation but also in the application of policy to particular circumstances. Finally, independent agencies can protect citizens from bureaucratic arrogance and reticence, and are able to focus public attention on controversial issues, thus enriching public debate (Baldwin and McCrudden 1987: 4-9; Guédon 1991).

3. New Wine into Old Bottles?

The rise of administrative regulation in Europe owes much to these newly articulated perceptions of a serious mismatch between existing institutional capacities and traditional styles of administration, on the one hand, and the new demands of public participation and growing complexity of policy problems, on the other. Old habits of secretiveness and ministerial interference continue to persist, however. Even in Britain, after more than a decade of privatizations and deregulation, government departments still preserve important

regulatory powers, so that the operations of agencies often are dependent on prior decisions of the minister laying down the principles to be applied. The danger is that these powers of direction "could be abused to exert behind-the-scenes pressure on the regulator in much the same way as pressure was put on the nationalized industries by government, precisely the situation which the privatization programme is supposed to render impossible" (Prosser 1989:147).

In France, the Minister of the Economy maintains important powers to regulate economic competition despite the creation in 1986 of the supposedly independent Conseil de la Concurrence. The Minister remains the final decision maker in matters relating to mergers and acquisitions, and the power of investigating anti-competitive practices is still in the hands of the administration. Obviously, the government has kept for itself these important prerogatives in order to be able to deploy the "competition weapon", and especially the power to launch an investigation, in its dealing with economic interests. Also the German Bundeskartellamt, despite its considerable powers, must occasionally yield to ministerial decisions. This was clearly demonstrated when, in 1989, the agency opposed the merger of Daimler Benz with the Messerschmidt-Bölkow-Blohm Company on the ground that the new group would have a dominant position in several industries ranging from defense electronics to aerospace and transportation. Despite the clear danger of a distortion of competition in important markets, the Minister of the Economy overrode the Bundeskartellamt allowing the merger to take place, subject to some conditions, in the name of industrial policy.

The relative ease with which agency autonomy can be disregarded in the name of political considerations extraneous to the logic that led to the creation of independent bodies in the first place, shows how precarious the position of national regulators still is. Considerations of political expediency are often disguised as constitutional concerns. It is said that independent agencies are constitutional anomalies which violate basic principles of democratic government. But as was suggested in the introduction, independence and accountability should be seen as complementary and mutually reinforcing rather than mutually exclusive. If regulation in Europe suffers from the defects noted by its critics, the cause is not an excess of independence but, on the contrary, the constant threat of political interference. With greater independence would go greater accountability. The experience of the nationalized industries is quite instructive in this respect.

Detailed ministerial intervention in the decision of public managers, particularly on pricing and personnel decisions, produced perverse effects. Because such interventions were usually exercised through informal and even secret processes, accountability was reduced to a vanishing point. Indeed, who could be held accountable if it was unclear whether responsibility for decisions rested with the public managers or with the government? Parliaments, on the other hand, have neither the time nor the expertise and information necessary to supervise great industrial enterprises. In addition, the very multiplicity of objectives assigned to nationalized companies made impossible to define clear criteria of evaluation. Public managers could always argue that the poor performance of their companies was due, not to poor management but to the political and social constraints imposed on their personnel, investment and pricing decisions.

The general lesson is that clear and limited objectives, and the decisional autonomy necessary to achieve those objectives in the most efficient way, are necessary conditions for public accountability. Notice, too, that political interference can compromise not only the coherence and transparency of regulatory policy making, but the very credibility of national regulators in the eyes of regulated firms and of other governments. As I show in the next section, the issue of credibility is important for understanding the rationale of regulation at the European level.

4. Demand and Supply of European Regulation

The continuous growth of European regulation, and the lack of significant progress (even after the Treaty on Political Union) in other fields such as foreign, security, and social policy, are developments which neither intergovernmentalist nor neofunctionalist theories can adequately explain. Yet, for our argument it is quite important to understand why the most significant developments of European policy making have taken place in the areas of economic and social regulation.

Aside from competition policy and from measures necessary to the free movement of goods, persons, services and capital, and to the operation of the Common Agricultural Policy, few regulatory policies are specifically mentioned in the Treaty of Rome. Nonetheless, EC regulation has grown continuously since the first directive "on the approximation of the rules of the Member States concerning the colouring matters authorized for use in foodstuffs intended for human consumption" was adopted by the

Council on October 23, 1962. Often, regulation was introduced even in the absence of an explicit legal mandate, as in the case of environmental protection prior to the Single European Act. Thus, the almost 300 measures proposed by the 1985 White Paper on the internal market (COM(85), 310 final) only represented the acceleration of a trend set in motion two decades before.

An adequate explanation of these developments must consider both the supply and the demand of Community regulation (Majone 1991, 1994). On the supply side, it is sufficient to assume that the Commission's objective is to maximize its influence or power, subject to severe budget constraints. In general, the size of non-regulatory, direct-expenditure programmes is limited by the level of budgetary appropriations, while the costs of regulation are borne directly by the firms and individuals who have to comply with them. Compared with these costs, the resources needed to produce the regulations are negligible. This structural distinction between regulatory policies and policies involving the direct expenditure of public funds is particularly important in the case of the Community since not only the economic but also the political and administrative costs of enforcing EC directives are borne by the member states.

Note, too, that the budget of the Community is small (less than 1.3 per cent of the combined GDP, and barely 4 per cent of the central government spending, of the member states) and rigid: about 70 per cent of the budget is allocated to the Common Agricultural Policy and to a handful of redistributive programmes. In practice, regulation offers the only solution to the problem of maximizing the influence of EC policy makers consistent with such severe budget constraints. Thus, while the power of the member states remains the traditional power of taxing and spending, that of the Community is, primarily, the power of rule making.

This concludes our discussion of the supply side of regulatory policy making in the EC. We turn now to the demand side. A detailed analysis should consider various non-governmental actors such as environmental groups, consumer advocates, trade unions and economic interests, all attempting to influence or promote Community regulation. For example, multi-national, export-oriented industries want to avoid inconsistent and progressively more stringent national regulations. Community regulation can eliminate or at least reduce this risk. A similar phenomenon has been observed in the United States,

where certain industries, faced with a significant loss of markets through state and local legislation, have strongly supported federal regulation (Majone 1991).

Such detailed analysis is not needed, however. We are primarily interested in the relationship between independence and accountability, and in the related issue of credibility. To discuss these problems it is sufficient to examine the position of the national governments as the most important actors on the demand side of the equation. Why, then, are the member states willing to delegate regulatory powers extending well beyond the minimal level required by an integrated market? The most convincing answer to this question is: international regulatory failure; that is, the difficulty of managing international externalities by means of voluntary co-operative agreements among sovereign states.

The main causes of international regulatory failure are the strategic use of regulation, lack of information, and credibility problems. Domestic regulation can be used strategically in order to gain advantages with respect to other countries or jurisdictions. For example, local authorities have sometimes controlled air pollution by requiring extremely tall smokestacks on industrial facilities. With tall stacks, by the time the emissions descend to ground level they are usually in the next city, province, or country, and so of no concern to the jurisdiction where they were emitted. Within a federation or a supranational system like the European Union, centralization of regulatory authority to a higher level of government can limit such strategic use of regulation. Similarly, EC-wide harmonization of essential health and safety requirements and European standards serve to limit the strategic use of technical specifications and standards by national regulators.

Lack of information makes it difficult to determine whether international agreements are kept or not. Because regulators lack information that only regulated firms have, and because governments are reluctant, for political reasons, to impose excessive costs on industry, regulators and regulated firms constantly bargain over the precise obligations of the latter. Bargaining being such a pervasive feature of regulatory enforcement, it is usually quite difficult for an outside observer to determine whether the spirit of an international agreement has been violated. Although the monitoring capacity of European institutions is still underdeveloped in most areas of regulation, it is considerably greater than that of purely intergovernmental institutions.

When it is difficult to observe whether member states are making an honest effort to enforce a co-operative agreement, the agreement is not credible. The issue of credibility is central to international regulatory failure and, more generally, to the failure of international policy coordination. Member states have problems of credibility in the eyes of each other because of the problems noted above -- inadequate information and the strategic use of regulation. They may also have credibility problems in the eyes of third parties, such as regulated firms or governments outside the Union. For example, where pollution has international effects and fines impose significant competitive disadvantages on firms that compete internationally, firms are likely to believe that national regulators will be unwilling to prosecute them as rigorously if they determine the level of enforcement unilaterally rather than under supranational supervision. Hence the transfer of regulatory powers to a supranational authority like the Commission, by making more stringent regulation credible, may improve the behaviour of regulated firms (Gatsios and Seabright 1989:49).

The issue of the credibility of national regulators is closely linked to the problem of "regulatory capture", that is, the possibility that regulatory agencies become captured by the very interests they are supposed to regulate. This possibility exists also at European level, but European authorities are less vulnerable to lobbying by firms and trade unions. This is a considerable advantage in cases involving state aids to industry, merger authorizations, and competition policy. In fact, the Commission has consistently taken a stricter pro-competition stance than national authorities such as the British Monopolies and Mergers Commission and the German Bundeskartellamt.

One reason why the Commission is less vulnerable to lobbying by interest groups is that it is involved in the regulation of a large number of firms throughout the Union. Hence it has much more to gain by being tough in any individual case than a national regulator: weak enforcement would destroy its credibility in the eyes of more firms (ib.: 50). Perhaps even more significant is the fact that supranational authorities are not as vulnerable as national regulators to political pressures. As we saw above, ministerial interference in the decisions of regulators is still fairly common in the member states. On the other hand, Article 157(2)EEC states: "The members of the Commission shall ... be completely independent in the performance of their duties ... they shall neither seek nor take instructions from any Government or from any other body ... Each Member State

undertakes to respect this principle and not to seek to influence the members of the Commission in the performance of their tasks". With some notable exceptions, member states seem to understand that these prescriptions are essential for the credibility of European regulations.

To conclude, I have tried to show that supply and demand meet to produce a supranational regulatory regime which not only complements, but is in many respects more credible than, the national systems. Indeed, in an increasingly integrated market the credibility of national regulation will depend more and more on the effectiveness of an independent supranational "fourth branch of government". Mutual recognition and subsidiarity notwithstanding, European regulation will remain necessary to curb excessive or counter-productive regulation by national authorities.

5. Regulation by Publication: The New European Agencies

It has already been suggested that the focused approach characteristic of the regulatory style of policy making entails, sooner or later, the creation of specialized, single-purpose agencies. This institutional development is already well advanced in the member states (see section 2), but at the European level it is becoming noticeable only now. Proposals advanced by the Commission and by independent scholars in the 1960s and early 1970s for setting up specialized agencies in areas such as cartel policy, agriculture, customs, and research and development, were regularly turned down by the Council (Hilf 1982).

The agency model does raise serious issues for European law since nothing in the founding treaties provides for the creation of such administrative bodies. Article 4 of the Rome Treaty lists the various institutions operating at Community level and specifies that each of them must act "within the limits of the powers conferred upon them by the Treaty". This has generally been read as a prohibition on the establishment of additional organs, short of a treaty revision (Lenaerts 1992). As early as 1958 the European Court of Justice also indicated that the delegation of powers by Community institutions to ad hoc bodies not envisaged by the Treaty on the European Coal and Steel Community, was possible only subject to strict conditions; in any event, the delegation of broad discretionary powers was not permitted. This "Meroni doctrine" (Case 1056, Meroni, [1957-58] ECR 157) is generally held to be applicable, mutatis mutandis, also in the broader

context of the Rome Treaty (Dehousse et al. 1992).

The question naturally arises: why did the drafters of the treaties choose to impose such constraints on the Community? Two factors may explain this choice (ib.: 48-49). The first is the emphasis that was laid from the very beginning on an essentially legislative approach to integration through a cumbersome harmonization process. The Community adopts a legislative act, which is subsequently transposed by the member states into their own legal order, and applied by their own administration. If one overlooks the important powers enjoyed by the Commission in the competition, anti-dumping, and agricultural policies, the Community has never significantly departed from its traditional mode of decentralized administration. Hence, the delegation to autonomous bodies of wide-ranging law-making and enforcement powers was always resented by the member states as too intrusive since it would alter the delicate balance of power which has presided over the growth of Community competences.

Secondly, the lack of a significant European tradition of regulation by means of independent agencies certainly contributed to the reluctance of national governments to accept the establishment of such agencies at the Community level. As already noted above, specialized bodies endowed with broad powers and independent of central government are not part of European administrative culture. Hence the reluctance of national governments to concede to Community bodies powers that they were not prepared to delegate to domestic bodies.

However, things are changing at the European level as they have been changing at the national level. In a common agreement between the representatives of the governments of the member states signed in Brussels on 28-29 October 1993, decisions were taken concerning the establishment and location of ten new administrative bodies (Agence Europe, No.6098, 31 October, 1993). These include, in addition to the forerunner of the European Central Bank, the European Monetary Institute located in Frankfurt, the European Environmental Agency; the Office of Veterinary and Phytosanitary Inspection and Control; the European Centre for the Control of Drugs and Drug Addiction; the European Agency for the Evaluation of Medicinal Products; and the Agency for Health and Safety at Work.

It would be misleading as well as unfair to compare these new bodies with fully-fledged regulatory agencies such as the American independent commissions. Whereas the

typical American agency has powers of rule making, adjudication of individual cases, and enforcement, the functions assigned to the new European agencies are essentially the collection, processing and dissemination of information, and networking with national and international institutions. For example, Council Regulation No.1210/90 of 7 May 1990 (OJ No.L120, 11 May 1990, pp.1-6, Art.2) lists the following tasks for the European Environmental Agency:

- to provide the member states and the Community with information;
- to record, assess, collect data on the state of the environment;
- to encourage harmonization of methods of measurement;
- to promote the incorporation of European environmental information into international environmental monitoring programmes;
- to ensure data dissemination;
- to cooperate with other Community bodies and international institutions.

Similarly, the Agency for the Evaluation of Medicinal Products has been given such task as the co-ordination of scientific evaluations of the quality, safety, and efficacy of medicinal products; the dissemination of assessment reports summaries of product characteristics; the provision of technical assistance for the maintenance of a database on medicinal products, to be made available to the public; and advising companies on the conduct of various tests necessary to demonstrate the quality, safety and efficacy of new medical drugs (Council Regulation No.2309/93 of 22 July 1993, in OJ No.214, 24 August 1993, Title IV, Art.51, pp.15-16).

But if it is misleading to think of these new agencies as fully developed regulatory bodies, it would be equally wrong to overlook their potentialities. Even in American administrative history one finds a weaker version of the independent regulatory commission, termed the "sunshine commission" because of its reliance on "regulation by publication", that is, on disclosure and public information (McCraw 1984). The outstanding historical example is the Massachusetts Board of Railroad Commissioners created in 1869. This commission issued no order that the regulated industry was legally bound to obey, except for orders to produce information. Sometimes the Board also specified the form the information had to take. For example, the agency often required railroads to submit data in standard accounting forms that would facilitate a comparative statistical analysis of different companies.

The informal approach to regulation followed by the Massachusetts Board amounted to a reversal of the state's traditional railroad policy, which had produced a number of stringent laws that everyone then ignored. The Board, by foregoing the role of adversary, avoided the embarrassing impotence of the early railroad statutes. Like the new European agencies, it also avoided the troublesome question of constitutionality in the delegation of legislative power to agency discretion. It is interesting to note that even now the most successful agencies are precisely those which rely, to some extent, on the model of "regulation by publication". The best illustration is provided by the Securities and Exchange Commission. Nearly all American business executives are familiar with the agency because of the reporting requirements it enforces. These include the public disclosure of detailed information about their companies and even disclosure of their own salaries, and perquisites. Recently, American firms have also been required to inform the Commission about prospective environmental liabilities, for example for cleaning up contaminated land.

Thus, one should not underestimate the practical significance of fact-finding, of the standardization of information, and of publicity. In some cases, "regulation by publication" may be a sufficient form of control; in others, it may be preferable to badly designed or poorly implemented statutory regulation, or to forms of self-regulation not sufficiently open to public scrutiny. In all cases, a solid factual and analytic basis is an essential prerequisite for credible regulation. The development of common methodologies of data collection and analysis, and of laboratory practices, is particularly important at the European level because of the very different approaches followed by the member states.

The future activities of the new European institutions need not stop here, however. First, the need to develop uniform assessment criteria for monitoring the implementation of Community regulations is at least as urgent as the development of common methodologies of data collection and analysis. Such matters can be only partially addressed in the formal texts of European legislation. Here, then, is another function which only the new agencies can perform adequately. Second, the same agencies cannot be passive and uncritical receivers of data supplied by the national administrations: sooner or later their officers will have to be given powers to visit member states to verify the accuracy and consistency of the methods followed by national and subnational governments.

Finally, as the House of Lords' Select Committee on the European Communities has argued in its recent report on Implementation and Enforcement of Environmental Legislation (House of Lords 1992: 40-41), there is a strong case for some form of Community oversight of the measures taken by the member states to monitor and enforce compliance. This is because common regulations lose credibility if they are not consistently implemented throughout the European Union. Hence the proposal to create an "audit" inspectorate to examine the policies and performance of national regulatory authorities, rather than seek to supplant them, and publicly report its findings to member states, the Commission and the European Parliament. The inspectorate would also report on shortcomings in administrative arrangements, such as inadequacies of training or resourcing, leading to insufficient regulatory activity.

The House of Lords report rightly insists that these functions and powers should be formally distinguished from the Commission's own duty to enforce Community policies in the event of failure to do so by the member states. In the case of environmental policy, for example, the inspectorate should not be part of DG XI. Rather, "the logical home for an environmental inspectorate on the lines indicated is the European Environmental Agency, with whose functions the inspectorate would neatly dovetail..." (ib.: 41). Institutional separation from the Commission would enable the inspectorate to scrutinize the Commission's own role, notably in providing assistance to the member states through the Structural Funds or the Cohesion Fund. It is known that the use of such funds in the countries of Southern Europe has often produced environmentally unacceptable consequences.

For analogous reasons, European inspectorates in such fields as the regulation of medical drugs or health and safety at work should be organized within the corresponding agencies rather than as offices of the Commission. It is interesting to note that existing Community inspectorates in the areas of competition, agriculture, and fisheries are housed in DG IV, DG VI and DG XIV, respectively. However, the same logic that underlies the independence of the Commission from the member states also suggests that inspectorates and even entire directorates, such as DG IV responsible for competition, cartels, mergers and state aids, should be insulated from the Commission.

This discussion of European agencies and inspectorates, and of the reasons for making them independent from the member states and from the Commission itself, brings

us back to the central issue of this paper: the tension between independence and accountability which pervades the political discourse about the regulatory state. The nature of the tension has been analyzed most carefully by American scholars in the course of a long debate about the "fourth branch of government".

6. The American Debate on the "Independent Fourth Branch of Government"

With the expression "fourth branch of government" American scholars denote the regulatory branch which combines legislative, executive and judicial functions. Initially the expression was used to emphasize what already in the 1930s were considered major defects of the independent regulatory commissions (IRCs): violation of the principle of separation of powers, lack of political accountability, and poor coordination. According to the Committee on Administrative Management (Brownlow Committee) established by President Franklin Roosevelt in 1936, the independent commissions

are in reality miniature independent governments set up to deal with the railroad problem, the banking problem, or the radio problem. They constitute a headless "fourth branch" of the government, a haphazard deposit of irresponsible agencies and uncoordinated powers. They do violence to the basic theory of the American Constitution that there should be three branches of government and only three (cited by Litan and Nordhaus 1983: 50).

Writing almost a generation later, a political scientist expressed similar concerns in equally strong language:

The theory upon which the independence of the commission is based represents a serious danger to the growth of political democracy in the United States. The dogma of independence encourages support of the naive notion of escape from politics and substitution of the voice of the expert for the voice of the people ... The commission has significant anti-democratic implications. (Bernstein 1955: 293).

In fact, an independent regulatory branch appears problematic in view of the traditional separation-of-powers theory and of the constitutional position of the U.S. president as head of the executive branch and its agencies. The crucial political issue is, of course, accountability. Regulators are appointed, not elected, officials, yet they yield

enormous power. How is their exercise of that power to be controlled? The traditional answer of liberal scholars has been that stronger presidential oversight is needed.

Marver Bernstein, for example, maintained that isolation from the presidency results in a lack of political support, and this political vacuum leads to capture of the regulators by the supposedly regulated industries. It has also been argued that presidential control allows the government to respond to shifts in public opinion, reducing the likelihood that politics will become routinized and heavily bureaucratized (Sunstein 1987).

But what if shifts in public opinion lead to the election of a president with strong deregulatory views, like President Reagan? An important idea behind the creation of the IRCs was to ensure consistency in regulatory policy making by insulating the regulators from the potentially destabilizing effects of the electoral cycle. However, because of the liberal critique of the IRCs, most of the regulatory bodies created in the 1970s -- agencies like the Environmental Protection Agency, the Occupational Safety and Health Administration or the National Highway Traffic Administration -- were organized as single-headed executive agencies, either reporting directly to the president (the case of the EPA) or in the line of command from the president down through the executive-branch hierarchy.

Once elected, President Reagan tried to use his control of the budgetary process to reduce the activity of the EPA and the other social regulatory agencies, and to slow down enforcement of antitrust legislation. At the same time Congress, concerned about the mounting cost of social regulation and the consequent threats to employment and to the international competitiveness of American industry, was not pushing the agencies very hard to implement the statutes of the 1970s.

Faced by a reluctant Congress and by a president opposed to any form of regulation, some liberal scholars and representatives of public-interest groups began arguing that not only the IRCs but also the social regulatory agencies should be viewed as an independent branch of government not answerable to either Congress or president, but closely monitored by the courts. As Martin Shapiro writes:

If you don't trust Congress and know that the president is the enemy, who is left to love and nurture the health, safety and environmental legislation of the sixties and seventies? All that is left is the bureaucracy of the new federal agencies who were recruited only recently and retain their enthusiasm for doing what they were hired to do. They want to regulate

in behalf of the great public values of health, safety, and environmental purity. So it becomes attractive to those favoring regulation to turn the federal bureaucracy into an independent branch of government. Such a branch would be free of the president, even free of the Congress of the eighties, but loyal to the sweeping statutory language of the sixties and seventies (Shapiro 1988: 108).

As shown in the next section, the political and legal arguments used by the latter-day advocates of an independent fourth branch are quite relevant to the European debate on accountability at the national and supranational levels. In terms of political philosophy the arguments draw on strands of the American tradition that emphasize the value of independent, non-majoritarian institutions, such as the courts, for democratic government. There is, first, the Madisonian tradition that views insulation of government as a possible safeguard against "factionalism" -- the usurpation of government by powerful and self-interested groups -- and the threats which factionalism poses to the republican belief in deliberative democracy. Also the tradition of the Progressive movement, represented by such political leaders as Theodore Roosevelt and Woodrow Wilson, attached great importance to the insulation of government from short-term party politics and electoral interests as a way of ensuring both efficiency and honesty in public affairs (Hofstadter 1955). Finally, the ideology of the New Deal defended the independence of the regulatory commissions as necessary to the acquisition and use of that expertise which was their *raison d'être*. Such commissions emerged and became important instruments of governance for industry precisely because Congress and the courts proved unable to satisfy the "great functional imperative" of specialization. In the words of Merle Fainsod, regulatory agencies "commended themselves because they offered the possibility of achieving expertness in the treatment of special problems, relative freedom from the exigencies of party politics in their consideration and expeditiousness in their disposition" (Fainsod 1940: 313).

One must remember that the independence of the regulators is relative. Even the IRCs are independent only in the sense that they operate outside the presidential hierarchy and that commissioners cannot be removed from office for disagreement with presidential policy. All regulatory agencies are created by congressionally enacted statutes. The programmes they operate are defined and limited by such statutes; their legal authority,

their objectives and sometimes even the means to achieve those objectives are to be found in the enabling laws.

Regulatory discretion is also severely constrained by procedural requirements. Since passage of the Federal Administrative Procedures Act (APA) in 1946, followed in 1976 by the Freedom of Information and by the Government in the Sunshine Acts, regulatory decision making has undergone a far-reaching process of judicialization. Under APA, agency adjudication was made to look like court adjudication, including the adversarial process for obtaining evidence through presentations of the contending parties, and the requirement of a written record as the basis of agency decision. Clearly, these and similar procedural requirements greatly simplify judicial review of administrative adjudication.

On the other hand, APA requirements for rule making are less demanding: before promulgating a rule, the agency must provide public notice and opportunity for comments; when it promulgates the rule, it must supply a concise general statement of the rule's "basis and purpose"; the rule can be set aside by a court only if it is "arbitrary, capricious, or abuse of discretion" -- the "lunacy test", as this lax standard of judicial review has been called. Such difference in requirements for adjudication and rule making did not matter much as long as most regulation was of the rate-setting and permit-allocation types and hence relied largely on adjudication. However, with the growth of social regulation in the 1960s and 1970s, rule making (e.g., standard setting) became much more important. Thus, the courts began to develop a large body of new procedural rules and strict standards of judicial review for rule making proceedings. Finally, in the 1980s there were serious attempts to make the exercise of regulatory discretion -- the residual category of what agencies do, which is neither adjudication nor rule making -- court-like as well (Shapiro 1988: 111). For example, agencies were required to justify their regulatory priorities or risk assessments through the use of cost-benefit or risk analysis. In turn, such requirements strengthened the role of professionalism as a foundation of agency independence. Professionals are oriented by goals, standards of conduct, and career opportunities that derive from their professional community, giving them strong reasons for resisting interference and direction by political outsiders (Moe 1987: 291).

The progressive judicialization of regulatory proceedings makes the arguments in favor of an independent regulatory branch more plausible by making the agencies more

and more court-like. After all, one of the most important characteristics of courts is their independence. If it is improper for a president or member of Congress to interfere with a judicial decision, the same ought to be true with respect to the decisions of a court-like agency. This does not mean, of course, that regulatory decisions should be taken in a political and institutional vacuum. The authority of Congress to define broad policy objectives and the responsibility of the president to coordinate the entire regulatory process to ensure internal coherence, are not questioned. Rather, the advocates of an independent fourth branch, but also some supporters of stronger presidential control like Cass Sunstein, favour a bigger role for the courts in controlling agency discretion through procedural and substantive review of rule making (Ackerman and Hassler 1981; Shapiro 1988; Edley 1990; Sunstein 1990; Rose-Ackerman 1992).

If a pro-deregulation president can mount a frontal assault on social regulation, and if members of Congress are too concerned with their own re-election to worry about the coherence of statutory programmes, only the courts can provide the necessary continuity of the regulatory process. They, more than any other branch of government, are committed to preserving continuity of meaning in statutory law. What is suggested here is a partnership between regulatory agencies and courts. By both procedural and substantive means, but especially by statutory interpretation, the courts should insist that regulators continue to pursue with vigour the objectives set by Congress in the 1960s and 1970s, even when other political forces try to use recently elected members of Congress and presidents to cut back on regulation in the name of economic development (Shapiro 1988: 127). In return, judges should protect the independence of the regulators.

But what about political accountability? Is government by judges and technocratic experts compatible with democratic principles? The writers considered here are quite aware of the importance of these questions, but they point out that government by elected politicians, too, suffers from a number of defects that have been extensively discussed by public-choice theorists (Mueller 1989). For example, in seeking re-election, legislators engage in advertising and position taking rather than in serious policy making, or they design laws with numerous opportunities to aid particular constituencies. In either case, re-election pressures have serious consequences for the quality of legislation. On the other hand, proregulatory scholars ask rhetorically, if the courts require the regulatory process to be open to public input and scrutiny and to act on the basis of competent analyses, are the

regulators necessarily less accountable than elected politicians? (Rose-Ackerman 1992: 34).

At any rate, the value of agency responsiveness to political principals begins to appear questionable once it is realized that new political forces can put pressure on Congress and the president to cut back on social regulation. Under such circumstances continuity with the policies of the past could be preserved only by reasserting the faith of the New Deal in the independence of the regulatory branch. However, while New Dealers viewed the courts with suspicion, the new advocates of an independent fourth branch see judicial review as the most effective means to ensure the public accountability of the regulators. It is no coincidence that America has developed both the most probing methods of judicial review and the most extensive network of regulatory institutions.

7. Efficiency, Redistribution and Accountability

Not surprisingly, many of the traditional criticisms of American-style regulation -- independent commissions violate the principle of separation of powers, they lack political legitimacy, are un-co-ordinated, and have a tendency to be captured by private interests -- are heard now in Europe. On this side of the Atlantic, agencies are still seen as "constitutional anomalies which do not fit well into the traditional framework of controls, checks and balances" (Veljanovski 1991:16), even as challenges to basic principles of democracy and of the Rechtsstaat (Teitgen-Colly 1988:49). Even to sympathetic observers, regulation in Europe appears to be highly discretionary, suffering from weak accountability to parliaments, weak judicial review, absence of procedural safeguards, and insufficient public participation (Baldwin and McCrudden 1987; Prosser 1989; Veljanovski 1991).

To be sure, the new regulatory institutions do not fit easily into the constitutional framework of countries where the diffraction of state power is regarded as a serious threat to the rule of law, to parliamentary sovereignty, and to the hallowed principle that governmental policy ought to be subject to control only by persons accountable to the electorate. It is certainly not a coincidence that similar concerns are expressed in the ongoing debate about the proper scope of judicial review and judicial policy making. What connects this debate with that about administrative regulation is the general issue of the role of non-majoritarian institutions in democratic societies.

The recent rise of judicial review in Europe, like the multiplication of regulatory agencies, shows that the triad of government powers is no longer considered an inviolable principle. At the same time, courts find their policy-making role enlarged by the public perception of them as guarantors of the substantive ideals of democracy when electoral accountability in the traditional spheres of government seems to be waning (Volcansek 1992:5). Similarly, the rise of independent regulatory agencies is not explained only by the need to develop expertise in highly complex matters, to provide greater continuity and stability than cabinets, and to provide flexibility in policy formulation and in the application of policy to particular cases. As was mentioned in section 2, independent agencies can also protect citizens from bureaucratic arrogance and reticence, favour public participation (while the opportunity for consultation by means of public hearings is often denied to government departments), and focus public attention on controversial issues, thus enriching public debate.

However, it is not sufficient to acknowledge such advantages. In practice, it has always been understood that for many purposes reliance upon qualities such as expertise, professionalism, consistency and independence has more importance than reliance upon direct political accountability. The problem is to specify those purposes and, if the purposes are accepted, to show how independence and accountability can be made complementary and mutually supporting rather than antithetical. Traditional theories of political control of the bureaucracy do not answer these questions. Instead, they raise an apparently insoluble dilemma: either the regulatory agencies are part of the hierarchy of state administration, and then they cannot be independent; or else they are independent, but in this case to whom are they accountable?

The tendency to assume that independence and accountability are mutually exclusive is due to the conventional view of control as "self-conscious oversight, on the basis of authority, by defined individuals or offices endowed with formal rights or duties to inquire, call for changes in behaviour and (in some cases) to punish" (Hood 1991: 347). For a highly technical and discretionary activity like regulation a more appropriate notion of control is one which Christopher Hood has called "interpolable balance": a view of control that takes as its starting point a need to identify self-policing mechanisms which are already present in the system, and can contemplate a network of complementary and

overlapping checking mechanisms instead of assuming that control is necessarily to be exercised from any fixed place in the system (ib.:354-55).

The American experience shows precisely that regulation can be monitored and kept politically accountable only by a combination of control instruments: clearly defined objectives, oversight by specialized Congressional committees, presidential power of appointment, strict procedural requirements, obligation to justify proposed regulations in cost-benefit terms, professional principles, public participation, substantive judicial review (Majone 1993b). As was stated in the introduction, when such a system works properly, no one controls an independent agency, yet the agency is "under control" (Moe 1987).

We must return now to the basic question of when reliance upon expertise, policy consistency and independence may be more important than reliance upon direct political accountability. I argue that the answer to this question lies in the distinction between efficiency and redistribution. The 19th century Swedish economist Knut Wicksell was probably the first scholar to emphasize the importance of this distinction and the need to deal with efficiency and redistribution decisions through separate collective decision processes. Redistribution of income and wealth can only be achieved by majority vote since any issue over which there is unavoidable conflict is defeated under a unanimity rule. Efficiency issues, on the other hand, may be thought of as positive-sum games where everybody can gain. Hence, such issues could be settled, in principle, by unanimity. The unanimity rule guarantees that the result of collective choice is a Pareto-efficient position, since anybody adversely affected by the collective decision can veto it. (Mueller 1989:96-111).

Following Wicksell's argument, we may distinguish between efficiency oriented policies and institutions, which attempt to improve the conditions of all, or almost all, individuals and groups in society; and redistributive policies and institutions that improve the conditions of one group in society at the expense of another. By what was said above, in a democracy redistributive policies and institutions can only be legitimated through direct political accountability, while efficiency oriented policies and institutions are basically legitimated by the results they achieve.

To see the connection with the previous discussion of regulatory (and other non-majoritarian) institutions, recall that the normative justification of economic and social regulation is the correction of market failures such as monopoly power, negative

externalities, information failures, or insufficient provision of public goods. By correcting or reducing market failures, regulation increases the over-all efficiency of the system. As was pointed out in section 2, the adoption of efficiency as the main normative criterion implies, *inter alia*, that regulatory instruments should not be used for redistributive purposes. Regulatory policies, like all public policies, have redistributive consequences; but for the regulator such consequences represent policy constraints rather than policy objectives. Only a commitment to efficiency, i.e. to the maximization of aggregate welfare, can justify the political independence of regulators. By the same token, decisions to redistribute resources from one social group to another cannot be taken by independent experts, but only by elected politicians or by officials directly responsible to elected politicians.

Before concluding, one last point should be briefly examined. For years political scientists and even some economists have been saying that efficiency and redistribution cannot be separated in practice. If this were true, Wicksell's analytic distinctions would have limited policy relevance. In reality, the two issues can be separated in a number of important cases. This is not the place for a detailed discussion of the technical conditions under which this is possible. It suffices to say that when there are no "wealth effects", value creation and value claiming (to use the suggestive terminology of negotiation theorists) can be treated as distinct and separable process. Absence of wealth effects means that every decision maker regards each possible outcome as being completely equivalent to receiving or paying some amount of money, and that there are no a priori restrictions on monetary transfers. Now, the celebrated Coase theorem states that when there are no wealth effects, all decisions about resource allocation or institutional arrangements are unaffected by the wealth, assets, or bargaining power of the parties: efficiency alone determines the outcome. Only the decision of how benefits and costs are to be distributed is affected by the resources or power of the parties (Milgrom and Roberts 1992: 35-39).

The assumption of no wealth effects is least likely to be valid when the decision makers are individuals and when large cash transfers or significant changes in personal living conditions are involved (ib.: 36). When the decision makers are large organization or governments, however, the assumption is often plausible. A good illustration is the use of issue linkage in European policy making; for example, an efficiency-increasing reform

of the common agricultural policy and proposals for monetary union have been linked to budgetary concessions for Britain and to significant increases in the level of resources transferred to the poorer member states, respectively. In these as in many other cases, linkage has been crucially important in overcoming distributional obstacles to efficient forms of co-operation among the member states.

In general, decision making in the European Community/European Union can be usefully analyzed as a two-stage process along the lines suggested by Coase theorem. At the first stage, the Commission examines a variety of projects to be undertaken at the supranational level and then makes a proposal which promises to increase aggregate welfare. Typically, the proposal will produce very different patterns of benefits and costs for the member states, so that it is difficult to reach agreement. At the second stage, therefore, the Commission suggests ways to overcome distributional obstacles by compensating the losers. This ability to separate the stages of value creation and value claiming is arguably the most important contribution of the Commission to the process of European integration. It is also an important justification of the political independence of the European executive.

8. Conclusions

To sum up, non-majoritarian institutions are bound to play an increasingly important role in Europe. Rather than opposing this development in the name of abstract principles, it behooves students of public policy and public administration to understand the reasons for the current popularity of politically independent institutions, to define more precisely their place among the structures of democratic governance, and to devise suitable methods of accountability.

The growth of non-majoritarian institutions is at the same time a symptom and a consequence of the failure of the interventionist and welfare policies of the past. In country after country voters have expressed their opposition to the uncontrolled expansion of the state, and to its capture by political parties and special interests. It is also becoming increasingly apparent that the crisis of the welfare state is not just a fiscal one, but an ideological one as well: the loss of legitimacy of a model of democracy which reduced

politics to a zero-sum game among redistributive coalitions, while leaving individual rights and diffuse interests unprotected.

The search for a solution to these problems must start from the recognition that policy and politics, efficiency and redistribution, public and private interest need to be separated much more clearly than in the past. Non-majoritarian institutions are important elements of the solution precisely because of their insulation from the electoral cycle, their limited scope, and their commitment to a problem-solving style of policy making. The same features explain the usefulness of European institutions for the member states: the distance of these institutions from narrow sectorial interests and electoral concerns is an important reason why it is sometimes possible to achieve in Brussels efficient solutions which powerful redistributive coalitions had blocked for a long time at the national level.

How to preserve the advantages of political independence without abandoning the fundamental democratic principle of public accountability is, to repeat, the central issue of non-majoritarian institutions at all levels of government. Although different methods of securing accountability are appropriate to different institutions, some common underlying principles can be identified. Only the most important ones will be recalled here.

First, statutory and institutional objectives should be well defined and focused in order to have clear yardsticks for judging performance. Second, decision-making procedures should be transparent and known to all concerned parties. As the American experience shows, procedural rationality can be greatly enhanced by judicial review and requirements of public disclosure, information and participation. Finally, professionalism is an essential foundation of agency independence. Expertise is needed not only to ensure the substantive rationality of decisions, but also to reduce the risk of an arbitrary use of agency discretion.

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