

# Europe's 'Democratic Deficit': The Question of Standards

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**Abstract:** *Arguments about Europe's democratic deficit are really arguments about the nature and ultimate goals of the integration process. Those who assume that economic integration must lead to political integration tend to apply to European institutions standards of legitimacy derived from the theory and practice of parliamentary democracies. We argue that such standards are largely irrelevant at present. As long as the majority of voters and their elected representatives oppose the idea of a European federation, while supporting far-reaching economic integration, we cannot expect parliamentary democracy to flourish in the Union. Economic integration without political integration is possible only if politics and economics are kept as separate as possible. The depoliticisation of European policy-making is the price we pay in order to preserve national sovereignty largely intact. These being the preferences of the voters, we conclude that Europe's 'democratic deficit' is democratically justified.*

*The expression 'democratic deficit,' however, is also used to refer to the legitimacy problems of non-majoritarian institutions, and this second meaning is much more relevant to a system of limited competences such as the EC. Now the key issues for democratic theory are about the tasks which may be legitimately delegated to institutions insulated from the political process, and how to design such institutions so as to make independence and accountability complementary and mutually supporting, rather than antithetical. If one accepts the 'regulatory model' of the EC, then, as long as the tasks delegated to the European level are precisely and narrowly defined, non-majoritarian standards of legitimacy should be sufficient to justify the delegation of the necessary powers.*

## **I Introduction: Standard-Setting and Standard-Using**

When evaluating any product, process or institution, it is essential to distinguish between standard-setting and standard-using: between defining the norms to be used, and searching for solutions satisfying current norms. Standard-using is the technical task of measuring various dimensions of performance against given benchmarks. Standard-setting is a process of deliberation, and it is open to anyone to put forward a proposal as to what the standards should be and to use persuasion to influence others to accept the proposal.<sup>1</sup>

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<sup>1</sup> G. Majone, *Evidence, Argument and Persuasion in the Policy Process*, (Yale University Press 1989).

This paper argues that there is an urgent need to re-set the standards by which we assess the legitimacy of European integration and of the institutions which guide the process. To speak of re-setting the standards is to suggest that the debate about Europe's democratic deficit is still in the standard-setting stage – we are still groping for normative criteria appropriate to the *sui generis* character of the European Community (EC). It should be obvious, but it is easily forgotten, that arguments about the democratic deficit are really arguments about the nature, functions and goals of the EC. The reference to the Community rather than to the European Union (EU) is deliberate because I want to focus on the tasks assigned to the European institutions by Article 2 of the Treaty of Rome, as amended.

Since the legitimacy debate is still in the standard-setting state, current evaluations start from different normative premises to reach different, even contradictory, conclusions. Regardless of their substantive merits, all proposed solutions are methodologically flawed because they take for granted what is, in fact, contestable and in need of justification. In order to make the underlying assumptions explicit, I shall classify current arguments about the democratic deficit into four groups, according to the standards being used:

- Standards based on the analogy with national institutions;
- Majoritarian standards;
- Standards derived from the democratic legitimacy of the Member States;
- Social standards.

This classification does not pretend to be exhaustive, and its categories are not, strictly speaking, mutually exclusive; it is, however, analytically convenient as it helps to structure the critical analysis presented in the first part of this paper.

Arguments in the first group tend to equate Community institutions with familiar national institutions, or to assume that EC institutions will converge towards such models. The analogy with national institutions leads, for example, to the claim that the European Parliament (EP) should have an independent power of legislative initiative because national parliaments are so empowered.

The second group of arguments do not rely on the analogy with actual democratic institutions in the Member States, but on an abstract model of democracy, the pure majoritarian or 'Westminster' model. According to this model, parliament is the ultimate source of legitimacy in a representative democracy. The European Parliament is the only (or at least the principal) repository of democratic legitimacy in the Community. Hence increased powers to the EP, directly elected by universal suffrage, would substantially reduce the democratic deficit and restore legitimacy to the EC policy-making process.

According to the more traditional arguments in the third group, the legitimacy of European integration and of Community institutions proceeds from the democratic legitimacy of the Member States. The veto power of each Member State is, in Joseph Weiler's words, 'the single most legitimating element' of the integration process. Hence the shift to majority voting since the Single European Act is an important cause of the legitimacy problem: it weakens national parliamentary control of the Council without increasing the powers of the EP.<sup>2</sup>

Finally, arguments relying on social standards have become increasingly frequent in recent years. While such arguments are ostensibly about the democratic deficit, they

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<sup>2</sup> Weiler, 'The Transformation of Europe,' (1991) 100 *Yale Law Journal*, 2403–2473.

are in fact driven by a different agenda: dissatisfaction with the slow pace of political integration, or concerns about the future of the national welfare state in an increasingly integrated European market. According to these critics, the Community lacks legitimacy not only because it lacks a true legislative body, popularly elected executives and a truly pluralistic system of interest representation, but primarily because of its failure to provide sufficient equality and social justice. By the social standards prevailing in the Member States, the EC is a 'welfare laggard' and thus cannot count on the social acceptance enjoyed by the national welfare states.

All these arguments will be evaluated in the first part of the paper. In the second part, I shall advance the thesis that the process of European integration is inherently non-majoritarian, and that relevant standards of legitimacy and accountability should reflect this basic fact. The process is non-majoritarian not because the founding fathers distrusted democracy. Rather, they understood more clearly than today's leaders that economic integration without political integration is feasible only if politics and economics are kept as separate as possible. Depoliticisation of European policy-making is the price we have to pay in order to preserve national sovereignty largely intact. As long as the majority of the citizens of the Member States oppose the idea of a European super-state, while supporting far-reaching economic integration, we cannot expect democratic politics to flourish at the European level. These being the preferences of the national electorates, we are forced to conclude that, paradoxically, Europe's 'democratic deficit,' as the expression is usually understood, is democratically justified.

## **II The Inadequacy of Current Standards**

### *A The Argument by Analogy*

A recurrent theme in the debate about democracy in the EC is that the powers of the European Parliament, even after the Maastricht and Amsterdam Treaties, fall far short of the powers of an ordinary parliament, while the Commission still holds the monopoly of legislative initiative. In fact, a consistent application of legitimacy standards derived from the democratic practices of familiar national institutions – a parliament with an independent power of legislative initiative, an executive responsible to parliament, popular elections to decide who shall govern – leads to the conclusion that the democratic deficit in the EC is actually twofold.

First, the executive (the Council of Ministers and the Commission) rather than parliament, is responsible for legislation; and, second, within the executive, the bureaucratic branch (the Commission) is unusually strong with respect to the political branch (the Council) whose members are subject, at least in principle, to the control of national parliaments. Furthermore, because of the supremacy of European law over national law, the governments of the Member States, meeting in the Council, can control their own parliaments rather than being controlled by them. To reduce the mismatch between European and national institutions it is proposed to deny the Commission any role in the legislative process, and to assign the right of legislative initiative to the EP or, at least, to the EP and the Council.<sup>3</sup>

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<sup>3</sup> R. Vaubel, *The Centralization of Western Europe*, IEA Hobart Paper 127, (Institute of Economic Affairs 1995).

Arguments by analogy are popular both with scholars who oppose centralisation (like professor Vaubel) and with those who do not object to an expansion of European competences. Also Juliet Lodge, for example, views critically the vast difference between Community and domestic policy making: 'EC policy-making processes are largely dominated by bureaucracies and governments that provide little scope for parliamentary institutions (whether national parliaments or the EP) to intervene and to exercise roles traditionally believed to be the hallmarks of legislatures in liberal democratic politics.'<sup>4</sup>

The most obvious objection to the analogy with national institutions is that the *sui generis* institutional architecture of the Community has been designed by Treaties duly ratified by all national parliaments. One of the characteristic features of the EC is the impossibility of mapping functions onto specific institutions. Thus the EC has no legislature but a legislative process in which different political institutions have different parts to play. Similarly, there is no identifiable executive, since executive powers are exercised for some purposes by the Council acting on a Commission proposal; for other purposes (*e.g.*, competition matters) by the Commission; and overwhelmingly by the Member States in implementing European policies on the ground.<sup>5</sup>

The institutional arrangements designed by the Treaties are certainly unusual by the standards of the classical separation-of-powers doctrine, but they do serve important functions. Thus, if the Treaties make the decision-making powers of the Council and of the EP dependent on the proposals of the Commission, this is not to give a privileged position to a supranational bureaucracy against the democratically legitimated representatives of the Member States or the popularly elected members of the European Parliament. Rather, the Commission's monopoly of legislative proposals is a mechanism for linking more closely the Council and the EP to European law. The powers of oversight of the Member States given to the Commission by Article 169 of the Treaty of Rome supports this interpretation.<sup>6</sup>

Another striking difference between the national and the European levels is the fact that the Community is a system of limited competences. This is another reason for being sceptical of legitimacy arguments based on analogy. However, this feature of the EC has more general relevance, as will be seen in the second part of this article. For this reason it is treated in a separate section.

### *B A System of Limited Competences*

In the euphoria created by the Single European Act and the highly successful marketing of the 'Europe '92' programme, it became tempting to imagine that there was no effective barrier to the continuous, if incremental, expansion of Community competences. In those days, a distinguished jurist could write that 'there is no nucleus of sovereignty that the Member States can invoke, as such, against the Community,'<sup>7</sup> and few people seemed to object.

<sup>4</sup> J. Lodge (ed.), *The European Community and the Challenge of the Future*, (Frances Pinter 1989).

<sup>5</sup> Dashwood, 'The Limits of European Community Powers,' (1996) 21 *European Law Review*, 113–128, at 127.

<sup>6</sup> Mestmäcker, 'Über das Verhältnis der europäischen Wirtschaftsordnung zu den Mitgliedstaaten,' in *Veröff. Joachim Jungius-Ges. Wiss.*, (Hamburg 1994), 149–169.

<sup>7</sup> Lenaerts, 'Constitutionalism and the Many Faces of Federalism,' (1990) 38 *American Journal of Comparative Law*, 205–263, at 220.

Since Maastricht, however, the continuous accretion of powers to the Community is no longer on the political agenda. The new precise delimitation of Community powers was a major result of the Treaty of European Union (TEU). Article 3b of the Treaty, which enacts the principles of attribution of powers, of subsidiarity, and of proportionality as organising principles of the constitutional order of the Community, marks a shift in the Community's deep structure. In the words of professor Dashwood, the Article effectively rules out of court the notion of a Community continuously moving the boundary posts of its own competence.<sup>8</sup>

Moreover, the TEU defines new competences in a way that limits the exercise of Community powers. For example, Article 126 adds a new legal basis for action in the field of education, but the measures the EC can take in this field are limited to 'incentive measures' (e.g., programmes such as ERASMUS) and to recommendations. Any harmonisation of the laws and regulations of the Member States is explicitly excluded.

Similarly, Article 129 creates specific powers for the Community in the field of public health, but the competence is highly circumscribed as subsidiary to that of the Member States. Harmonisation of national laws and regulations is again ruled out, even though the Article states that health protection requirements shall form a constituent part of the Community's other policies. The other provisions of the Treaty, defining new competences in such areas as culture, consumer protection, and industrial policy, are similarly drafted. In sum, rather than rely on implicit competences, whose limits seemed out of control, the TEU opted for an explicit grant that delimits the modes of action and the reach of such policies.<sup>9</sup> With one significant exception (public health), the same approach has been followed, by and large, by the drafters of the Amsterdam Treaty.

These Treaties also throw new light on the limits of previous grants of power, especially the creation of subsidiary powers by means of Article 235 of the Rome Treaty. This Article enables the Council to take appropriate measures – acting unanimously on a proposal by the Commission and after consulting the EP – in cases where action by the Community is found to be necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and there is no specific power under the Treaty available for that purpose. The question as to whether Community action was necessary was considered by the political institutions as a matter within their complete discretion.

Since 1973, the Council has made liberal use of Article 235 to expand Community competences or to broaden the reach of Community legislation in such areas as economic and monetary union, social and regional policy, the free movement of workers and professionals, energy and environment, scientific and technological research and development, and co-operation agreements with third countries. In the light of such developments, it is not surprising that this Article has been considered the Community's equivalent of the 'necessary and proper,' or residual powers, clause of the US Constitution, which in fact covers much else besides the power to regulate interstate and foreign commerce. Such liberal interpretations are no longer tenable in view of the first paragraph of Article 3b of the Maastricht Treaty, (now Article 5 of the Amsterdam Treaty), which states the principle of attribution in terms of strictly limited competences.

<sup>8</sup> Dashwood, *loc cit*, n 5, at 113.

<sup>9</sup> Weiler, *loc cit*, n 2.

As Dashwood points out, Article 235 only makes sense post-Maastricht if the reference to the attainment of a Community objective 'in the course of the operation of the common market' begins to be taken seriously. This means that subsidiary powers would be created under this Article only for matters directly connected with the policies that lie at the very core of the EC, but not, for example, for programmes of technical assistance such as PHARE and TACIS, however worthy their objectives.<sup>10</sup>

In addition to the legal limitations one must also consider the material limitations. The Community has no general taxing and spending powers similar to those held by national governments; and with a budget of less than 1.3 per cent of Union GDP which, moreover, must always be balanced, it can only undertake a limited range of policies.<sup>11</sup> These limitations on the powers of the EC are important from the perspective of the present paper because questions of legitimacy are basically questions about the use of power. Hence, standards of accountability historically developed to control an omniscient state with virtually unlimited powers to tax and spend, cannot be applied without substantial modifications to a system of limited competences and resources such as the EC.

### C Majoritarian Standards and Non-Majoritarian Practices

Let us return to the criticism that parliamentary institutions – national parliaments or the EP – have too little scope in the EC policy-making processes. As we saw above (IIB), this criticism may be inspired by a misplaced analogy with national institutions; but it can also follow from a radical view of parliament as the only democratic representative institution. Such a view is the key assumption of the pure majoritarian, or 'Westminster,' model of democracy. In its most extreme version, the model asserts that majorities should be able 'to control all of government – legislative, executive and, if they have a mind to, judicial – and thus to control everything politics can touch. Nothing clarifies the total sway of majorities more than their ability to alter and adjust the standards of legitimacy.'<sup>12</sup>

In practice, most majoritarians admit that the will of the majority may have to be restrained by minority rights. However, these restraints should be informal – a matter of historical tradition and political culture, rather than of a formal-constitutional nature which cannot be changed by bare majorities. By majoritarian standards, all institutions that are not directly accountable to the voters or to their elected representatives – not only independent central banks or regulatory agencies but, as Spitz makes clear, also courts – are democratically suspect. For example, a serious legitimacy problem arises whenever a court strikes down a policy choice made by an electorally accountable branch of government and supplants it with a policy choice of its own, as the US Supreme Court has done on several occasions.<sup>13</sup>

It is of course true that the strict majoritarian model has never been seriously considered for the European Community. Yet many reform measures or proposals for remedying Europe's democratic deficit are inspired by some version of this model.

<sup>10</sup> Dashwood, *loc cit*, n 5.

<sup>11</sup> G. Majone, *Regulating Europe*, (Routledge 1996).

<sup>12</sup> Spitz 1984, quoted in Lijphart 'Majority rule in theory and practice: the tenacity of a flawed paradigm,' (1991) 129 *International Social Science Journal*, 483–493, at 485.

<sup>13</sup> M.J. Perry, *The Constitution, the Courts and Human Rights*, (Yale University Press 1982).

Thus, Article 158 of the Maastricht Treaty – according to which the Commission, as a body, must have the confidence of a majority of the European Parliament as in classical parliamentary systems, and a number of proposals currently debated in European circles: a downsizing of the Commission which would no longer include representatives of all the Member States, the generalisation of majority voting, a reform of the Presidency which would *de facto* limit the role of small countries – all point in the direction of strengthening the majoritarian features of the European political system.<sup>14</sup>

The tendency to equate democracy with majority rule is quite common but it is nevertheless puzzling, since the pure majoritarian model of democracy is the exception rather than the rule: most democratic polities, with the exception of Britain and of countries strongly influenced by the British traditions, rely extensively on non-majoritarian principles and institutions.<sup>15</sup> This is especially true of federal and quasi-federal systems. True federalism is fundamentally a non-majoritarian, or even anti-majoritarian, form of government since the component units often owe their autonomous existence to institutional arrangements that prevent the domination of minorities by majorities. As a great liberal historian put it, '[t]he true natural check on absolute democracy is the federal system, which limits the central government by the powers reserved, and the state governments by the powers they have ceded.'<sup>16</sup>

Among the most important and best-known non-majoritarian features of federalism are: a written constitution, which cannot be amended by simple majority vote; vertical and horizontal separation of powers; checks and balances; over-representation of small jurisdictions, as in the US Senate or the EU Council of Ministers; judicial review; and delegation of policy-making powers to officials who have limited or no direct accountability to either political majorities or minorities.

Non-majoritarian principles are important not only in federal or quasi-federal systems, but in all 'plural' societies, *i.e.*, societies that are 'sharply divided along religious, ideological, linguistic, cultural, ethnic or racial lines into virtually separate sub-societies with their own political parties, interest groups, and media of communication.'<sup>17</sup> Detailed empirical studies have shown that there is a strong correlation between the needs of cleavage management in plural societies and the number and importance of non-majoritarian features in their political systems.<sup>18</sup>

These findings are clearly relevant to the issue of Europe's democratic deficit. The EC is divided by a number of deep cleavages: linguistic, geographical, economic, ideological and, especially, the division between large and small Member States. Many non-majoritarian features of the Community system are best explained as strategies of cleavage management. However imperfect, such strategies have been essential to the progress of European integration, while a strict application of majoritarian standards would only produce deadlock and possibly even disintegration.

<sup>14</sup> Dehousse, 'Institutional Reform in the European Community: Are there Alternatives to the Majoritarian Avenue?', Florence: European University Institute 1995, *EUI Working Paper RSC 95/4*.

<sup>15</sup> A. Lijphart, *Democracies*, (Yale University Press 1984) also, *loc cit*, n 12.

<sup>16</sup> Lord Acton, in, William H. McNeill (ed), *Essays in the Liberal Interpretation of History*, (University of Chicago Press 1967), 393.

<sup>17</sup> A. Lijphart, *op cit*, n 15, at 22.

<sup>18</sup> A. Lijphart/R. Rogowski/R.K. Weaver 'Separation of powers and cleavage management,' in Weaver/Rockman (eds) *Do Institutions Matter?* (The Brookings Institution 1993).

*D Derived Standards of Legitimacy*

Widespread concern about the democratic deficit of European integration is a fairly recent phenomenon. According to the view prevailing before the Single European Act (SEA) and the Maastricht Treaty, the integration process derives its legitimation from the democratic character of the Member States. National parliaments ratify the Treaties; democratically accountable heads of state or government, meeting in the European Council, set strategic priorities; the Council of Ministers, composed of people who are normally elected members of the national executives, must approve Commission's proposals before they become European law. Thus the entire process is guided and controlled by sovereign democratic states.

This scheme of indirect legitimation, even if it was never free from ambiguities and doubtful assumptions,<sup>19</sup> was considered to be sufficient as long as the Community dealt mainly with such matters as tariff reductions and agricultural quotas. In fact, the scheme makes perfect sense in an intergovernmentalist perspective. For example, as recently as 1993, the German Constitutional Court, in the *Brunner* case, based the constitutionality and legitimacy of the Maastricht Treaty on the democratic legitimacy of the Member States which signed it. The Court argued that the TEU, like the previous European Treaties, is nothing more than an international agreement among sovereign states. The members of the Union, the Court said, remain the 'lords of the Treaties' (*Herren der Verträge*) and never surrendered their power to secede.

Roland Dumas, a former French foreign minister, carried the intergovernmentalist argument to its logical conclusion by suggesting that the best way to enhance the legitimacy of the Community would be to strengthen the European Council, which is the expression of the democratic legitimacy of the Member States.<sup>20</sup> Whether or not this proposal was seriously meant, it is clear that state-based standards of legitimacy imply that the veto power of the Member States is the most legitimating element of the integration process, so that the shift to majority voting can only aggravate the democratic deficit.

To evaluate the validity of such arguments it is necessary to recall that the institutional architecture of the European Union includes two distinct elements: an intergovernmental component, where international features dominate (European Council, Council of Ministers, and the second and third 'pillars' of the TEU), and a communitarian component where supranational features are most evident (European Parliament and Courts, Commission, and the policies and activities included in the first 'pillar' of the TEU).

Now, even if it is true that the democratic character of the Member States is sufficient to legitimate the intergovernmental component of the Union, such indirect legitimation cannot provide an adequate normative foundation for its supranational component. This is because one of the important tasks of the supranational institutions has always been to protect the rights and interests (as defined by the Treaties) of the citizens of the EC/EU, even against the majoritarian decisions of a Member State, or the unanimous position of all the Member States.

Indeed, Community law has developed as an autonomous legal system precisely on the basis of the economic and social rights – the four freedoms, a system of undistorted competition, prohibitions of discrimination for reasons of nationality or gender, and now also a high level of protection and improvement of the quality of the

<sup>19</sup> Dehousse, *loc cit*, n 14.

<sup>20</sup> *Ibid*.

environment – created by the Treaties. The Court of Justice has played a key role in this development by consistently assigning to EC law the role of protecting private individuals against Member State laws often conceived in a spirit of nationalism. Thus, one of the unanticipated consequences of economic integration has been the growth of an impressive body of rules and decisions protecting diffuse interests that often lacked effective representation or protection at national level. Since all the supranational institutions of the EC contribute to the protection of the economic and other rights created by the Treaties, if necessary against the short-term political interests of the Member States, they all derive at least part of their autonomous legitimacy from such protection.<sup>21</sup> I shall come back to this point in the second part of the paper (III).

### *E Legitimation through Social Policy?*

Autonomous standards of legitimacy for EC policies and institutions are also proposed by the fourth group of arguments. Here, however, legitimacy is derived, not from the protection of individual rights created by the Treaties, but from the creation of new social rights at European level. According to these critics, the democratic deficit of the EC is due to the failure to develop a European welfare state, or at least to give the Community a bigger role in trans-national redistribution of income. The concerns expressed here are not, primarily, about the weak position of the European or national parliaments in the integration process, nor about the loss of control of the process by the Member States, but about the future of social entitlements in the integrated European market. It is feared that competition between different national welfare regimes could lead to regime shopping, social dumping and far-reaching deregulation of labour markets.

A fully-fledged social policy at European level would not only prevent such negative developments; it would also increase the legitimacy of the EC just as, in the past, social policies proved to be an essential source of democratic legitimation for the nation state. Historically, social security, health and welfare services, education, housing policy, represented powerful symbols of national solidarity, providing needed legitimation to the process of integration of the national market. A comprehensive European social policy, it is argued, could do the same for European economic integration.

Actually, it is more likely that the result would be exactly the opposite. To begin with, it should be noted that the very modest role of traditional social policy in the process of European integration is largely due to the reluctance of the Member States, including the national parliaments, to surrender control of such a politically sensitive area of public policy, and to transfer the necessary competences and resources to the Community. This reluctance is clearly expressed in the Treaty of Rome. The enumeration of matters relating to the social field in Article 118, and the limited role given to the Commission in Title III, Part Three of the Treaty, indicate that the social policy domain, with a few exceptions such as the social security regime for migrant workers, was originally considered to be beyond the competence of Community institutions. Neither the Single Act nor the Maastricht and Amsterdam Treaties have provided true legislative competences in the social field. On the contrary, harmonisation of national laws and regulations in areas such as health care and social security is explicitly excluded.

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<sup>21</sup> Mestmäcker, *op cit*, n 6.

Integration of health and social security is opposed not only by national governments, but also by a majority of citizens in the Member States. According to Eurobarometer data for the period 1992–1995, only Greece and Portugal favour such integration with majorities of 52 and 51 per cent of respondents, respectively. If we exclude such potential net receivers of EC transfers, average support for social policy integration drops from almost 44 per cent to less than 34 per cent of respondents. Since 1989, support has actually declined among the wealthier Member States. The data also show that opposition to involving the Community in policies dealing with personal distribution of income is, in fact, long-standing.

Popular opposition to a supranational policy regime in the social field is understandable. On the one hand, the welfare state represents the unique combination of national traditions and political compromises that formed the basis of the social democratic consensus in many West European countries after the war. On the other hand, the delicate value judgements about the appropriate balance of efficiency and equity which social policy expresses, can be made legitimately only within fairly homogeneous polities. Advocates of a European welfare state must face the fact that in several countries even *national* redistribution in favour of poorer communities is increasingly challenged in the name of fiscal federalism and regional autonomy. It is difficult to see how politically acceptable levels of income distribution could be determined centrally in a system like the EC, where economic, social, political and legal conditions are still so different.

For all these reasons, the development of welfare policies at European level would actually aggravate the legitimacy problem, reinforcing the popular image of a highly centralised and bureaucratised Community. In fact, the historical experience of both the American New Deal and the European welfare states shows that the expansion of redistributive social policies has been one of the main causes of political and administrative centralisation in this century. We may conclude that the attempt to legitimate the Community by developing European standards of social justice is bound to fail, under present circumstances, because it goes against the clearly expressed preferences of the governments and the citizens of the Member States.

### III Re-setting the Standards

#### *A The Democratic Deficit: One Problem or Two?*

The legitimacy arguments reviewed in the preceding pages, although different in their assumptions and conclusions, share a common perception of the democratic deficit as a problem peculiar to the EC. In a sense this is true. If the expression is taken literally – an absence or incomplete development of institutions which we take for granted in a parliamentary democracy – then a deficit of democracy is indeed a distinctive feature of a process within which economic and political integration not only move at different speeds but also follow different principles – supranationalism in one case, inter-governmentalism in the other. As I have already pointed out, such a historically unique approach to integration can succeed only if the economic and the political tracks are carefully kept separate. Hence a deficit of democracy will remain endemic to the EC as long as the Member States remain, for their people, the principal focus of collective loyalty and the real arena for democratic politics.

However, the expression ‘democratic deficit’ can also denote a set of problems – technocratic decision-making, lack of transparency, insufficient public participation,

excessive use of administrative discretion, inadequate mechanisms of control and accountability – that arise whenever important policy-making powers are delegated to bodies operating at arm's length from government, such as independent central banks and regulatory authorities. Such problems, far from being unique to the EC, are increasingly important at all levels of government as the shift from the positive to the regulatory state gains momentum throughout Europe.<sup>22</sup> Democratic deficit, in this second sense, refers to the legitimacy problems of non-majoritarian institutions, *i.e.*, institutions which by design are not directly accountable to the voters or to their elected representatives.

For example, when public utilities are privatised, they are subject to rules developed and enforced by specialised agencies such as the Regulatory Offices in the United Kingdom and similar institutions in other European countries. Such bodies are normally established by statute as independent administrative authorities combining expertise with a rule-making and adjudicative function. They are independent in the sense that they are allowed to operate outside the line of hierarchical control by the departments of central government, and that they are granted considerable discretion in the use of the powers delegated to them. While the usefulness of independent regulatory agencies is widely recognised, it is also felt that the agencies are constitutional anomalies that do not fit well into the traditional framework of controls, checks and balances. For these critics, the new mode of policy-making is too discretionary and suffers from weak accountability to Parliament, weak judicial review, an absence of procedural safeguards, and insufficient public participation.<sup>23</sup>

The extent of delegation to politically independent institutions is even more striking in the case of central banks. Thus, the Maastricht Treaty gives the European Central Bank (ECB), which is not a Community institution within the meaning of Article 4 of the Treaty of Rome, the power to make regulations that become European and Member States' law without the involvement of national parliaments, the European Parliament, or other Community institutions. Moreover, since the governors of the national banks – which together with the ECB form the European System of Central Banks (ESCB) – are members of the ECB Council, the national banks must also be independent as a condition for membership in the ESCB.

Notice that since the independence of the ECB is guaranteed by the Treaty, it has an even stronger legal basis than the *Bundesbank's* independence. However, Article 88 of the German Constitution (Basic Law) has been amended expressly to provide for the transfer of the powers of the *Bundesbank* to the independent ECB. In this sense, the independence of the ECB forms part of German constitutional law and any attempt to change the ECB's status at European level would, in addition to having to be ratified by all the Member States, require an amendment of the German Constitution. Not surprisingly, the democratic deficit of the ECB is becoming a topic of intense discussion.<sup>24</sup>

<sup>22</sup> Majone, 'From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance,' (1997) 17:2 *Journal of Public Policy*, 139–167.

<sup>23</sup> R. Baldwin/C. McCrudden, *Regulation and Public Law*, (Weidenfeld and Nicholson 1987); Prosser, 'Regulation of privatized enterprises: institutions and procedures,' in L. Hancher/J. Moran (eds) *Capitalism, Culture and Economic Regulation*, (Clarendon Press 1989); Veljanovski, 'The Regulation Game' in C. Veljanovski (ed), *Regulators and the Market*, (Institute of Economic Affairs 1991).

<sup>24</sup> Gormley/de Haan, 'The democratic deficit of the European Central Bank,' (1996) 21 *European Law Review*, 95–112.

But why are political leaders willing to transfer such far-reaching powers to non-majoritarian institutions? Why, for example, do the same politicians who always preferred to have a hand on the monetary levels suddenly opt to transfer control of monetary policy to a system of independent central banks? Before discussing ways of reducing the democratic deficit of such institutions, we have to understand the logic of delegation.

### *B Delegation as a Solution to the Commitment Problem*

The willingness of legislators and political executives to delegate policy-making powers to independent institutions has been explained in various ways. Older theories emphasised cognitive factors: politicians have neither the expertise to design policies in detail nor the capacity to adapt them to changing conditions or particular circumstances. Specialised agencies, staffed by neutral experts, can carry out policies with a level of efficiency and effectiveness that politicians cannot. This argument is not wholly convincing, however. There are areas, such as taxation, where elected politicians show themselves to be quite capable of designing very detailed policies. Today, parliamentary committees and technical departments of government routinely hire high-level consultants or rely on in-house expertise to conduct extensive policy analyses.

A more sophisticated explanation is that delegation to specialised agencies reduces legislative decision-making costs by allowing legislators to economise on the time and effort required to identify desirable refinements to legislation and to reach agreement on these refinements. Thus, McCubbins and Page suggest that decision-making costs increase as legislation becomes more specific because of the greater difficulty of reaching agreement as possible outcomes are excluded.<sup>25</sup> Legislators' resources are limited; hence, spending time and effort refining legislation reduces their ability to advance other legislation or to take other actions.

Delegation has also been explained by the wish to avoid blame by shifting responsibility for policy failures to other decision makers. Fiorina, the main proponent of the blame-avoidance thesis, has argued that broad delegation allows legislators to reduce the political costs of making more specific decisions: 'legislators not only avoid the time and trouble of making specific decisions, they avoid or at best disguise their responsibility for the consequences of the decisions ultimately made.'<sup>26</sup> He also points out that the choice between narrow and broad delegation is a choice between more and less certainty of regulation or regulatory standards. Everything else being equal, risk-averse legislators should prefer a narrow delegation.

Both the transaction-costs approach of McCubbins and Page and of other authors,<sup>27</sup> and Fiorina's blame-avoidance hypothesis have merit, but they fail to explain why, at least in Europe, delegation to non-majoritarian institutions was rather infrequent in the past and is so popular now. The reason for this failure is that both approaches miss what is probably the main reason, today, for delegating policy-making powers to such institutions: the commitment problem and its implications for policy credibility.

<sup>25</sup> McCubbins/Page, 'A theory of Congressional Delegation,' in M.D. McCubbins/T. Sullivan (eds), *Congress: Structure and Policy*, (Cambridge University Press 1987), 409–425.

<sup>26</sup> Fiorina, 'Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?,' (1982) 39 *Public Choice*, 33–66, at 47.

<sup>27</sup> M Horn, *The Political Economy of Public Administration*, (Cambridge University Press 1995).

As Juan Linz reminds us, government *pro tempore* is an essential and defining characteristic of democratic governance.<sup>28</sup> The time limit inherent in the requirement of elections at regular intervals is a powerful constraint on the arbitrary use by the winners of the electoral contest of the powers granted to them by the voters. At the same time, the fact that those defeated in the elections can look forward to victory at the next elections, a few years hence, is an important incentive to stay in the democratic game.<sup>29</sup>

However, the requirement of elections at regular intervals and the consequent segmentation of 'democratic time' into relatively short intervals produce negative effects when the problems faced by society require long-term solutions. Under the expectation of alternation, politicians have few incentives to develop policies whose success, if at all, will come after the next elections. At best, they will heavily discount the present value of such policies to themselves.

Government *pro tempore* has other significant implications. The new institutional economics rightly emphasises the importance of well-defined property rights for the efficient allocation of resources through markets. Now, the right to exercise public authority may be thought of as a sort of property rights – political property rights.<sup>30</sup> In fact, the distinction between economic and political property rights tended to be fuzzy in pre-democratic times; under the 17th-century system of sale of public offices, one type of property rights could easily be converted into the other.

Political property rights are used by politicians to make choices about policy and the structure of government. However, such property rights are ill-defined since '[w]hatever today's authorities create . . . stands to be subverted or perhaps completely destroyed – quite legally and without any compensation whatever – by tomorrow's authorities.'<sup>31</sup> The difficulty of democratic politicians to achieve policy credibility is a consequence of ill-defined political property rights. Because a legislature or a majority coalition cannot bind a subsequent legislature or another coalition, public policies are always vulnerable to reneging and hence lack credibility.<sup>32</sup>

Delegation to politically independent institutions is one method of achieving credible policy commitments. In this perspective, delegation amounts to a transfer of political property rights in a given policy area to decision-makers who are one step removed from election returns. The stronger the legal basis of independence, the better defined are the rights of the new 'owners.' The strongest basis of secure political property rights is a constitutional guarantee of independence, as in the case of the European Central Bank; but statutory independence may be sufficient when the policy objective enjoys widespread popular support, as is the case of price stability in post-war Germany.

Let us now briefly consider the logic of delegation at the EC level. Here, the commitment problem is compounded since national policy-makers may lack credibility not only domestically, but also in the eyes of policy-makers from other Member States. The difficulty of achieving credible commitments without the help of

<sup>28</sup> Linz, Juan, 'Democracy's Time Constraints,' paper presented at the Second Vienna Dialogue on Democracy, *Democracy and Time*, Vienna: Institute for Advanced Studies.

<sup>29</sup> A. Przeworski, *Democracy and the Market*, (Cambridge University Press 1991).

<sup>30</sup> Moe, 'Political Institutions: The Neglected Side of the Story,' (1990) 6 *Journal of Law, Economics and Organization*, 213–253.

<sup>31</sup> *Ibid*, 227.

<sup>32</sup> Shepsle, 'Discretion, Institutions, and the Problem of Government Commitment,' in P. Bourdieu/J.S. Coleman (eds), *Social Theory for a Changing Society*, (Westview Press 1991).

institutions explains why delegation to EC institutions in areas such as environmental regulation has gone well beyond the functional needs of the Single European Market.<sup>33</sup> The existence of transboundary pollution problems, for example, does not in itself require the delegation of responsibility for problem-solving to the supranational level. Member States could search for common solutions through inter-governmental agreements, as they do in many important areas such as justice and home affairs.

The problem with intergovernmental agreements in areas where a good deal of regulatory discretion is unavoidable is that it may be difficult for the parties concerned to know whether the discretion is used properly. For example, if the agreement imposes heavy fines on industrial polluters, national regulators will be tempted not to prosecute domestic firms as rigorously if they determine the level of enforcement unilaterally rather than under supranational supervision. Although the monitoring capacities of EC institutions are limited, they are still superior to those provided by inter-governmental agreements. Hence, the delegation of regulatory powers to the European Commission will increase the credibility of stringent regulations.

In sum, delegation is an important strategy for achieving credible policy commitments at both national and supranational level. As Gatsios and Seabright write: 'The delegation of regulatory powers to some agency distinct from the government itself is . . . best understood as a means whereby governments can commit themselves to regulatory strategies that would not be credible in the absence of such delegation. And it is an open question in any particular case whether the commitment is most effectively achieved by delegation to national rather than supra-national agencies.'<sup>34</sup>

If we accept that for some purposes reliance upon qualities like independence and credibility has more importance than reliance upon majority rule, then we must look for new standards of legitimacy and accountability. The American debate about the 'fourth branch of government' provides useful suggestions on how independence and accountability may be reconciled.

### *C Independence and Accountability in the Regulatory State*

While the pure majoritarian model of democracy is opposed to any delegation of powers to non-majoritarian institutions, the pluralist or Madisonian model<sup>35</sup> – which aims to share, disperse, limit and delegate power – provides a much more favourable constitutional environment for the development of such institutions. This may explain why the United States was the first country to establish a tradition of judicial review and judge-made law, and also to delegate policy-making powers to independent regulatory commissions (IRCs) and other agencies on such a scale that American scholars have coined the expressions 'regulatory state' and 'fourth branch of government.' The latter denotes the regulatory branch, whose significance next to the legislative, executive and judicial branches, is thus explicitly acknowledged.

Such is the tenacity of the paradigm that equates democracy with majority vote, however, that even in the country of James Madison doubts about the democratic

<sup>33</sup> Majone, *op cit*, n 11.

<sup>34</sup> Gatsios/Seabright, 'Regulation in the European Community,' (1989) 5:2 *Oxford Review of Economic Policy*, 37–60, at 46.

<sup>35</sup> R. Dahl, *A Preface to Democratic Theory*, (University of Chicago Press 1956).

legitimacy of the 'fourth branch' have never completely disappeared. Thus, a political scientist writing in the 1950s, but expressing views held by a number of scholars and politicians before and after him, argued that the independence of the IRCs '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 the substitution of the voice of the expert for the voice of the people.'<sup>36</sup>

In reality, the independence of American regulators, far from being a dogma, has always been constrained and controlled in various ways. Even the IRCs are independent in the sense that they operate outside the presidential hierarchy and that – as asserted by the US Supreme Court in *Humphrey's Executor vs United States* (1935) – commissioners cannot be removed from office for disagreement with presidential policy. All regulatory agencies and commissions are created by congressionally enacted statutes and regulators are appointed by elected officials. The programmes they operate are defined and limited by such statutes; their limited authority, their objectives and sometimes even the means to achieve those objectives can be found in the enabling laws.

Furthermore, regulatory discretion is constrained by procedural requirements that have become increasingly stringent over time. Since passage of the Federal Administrative Procedure Act (APA) in 1946, regulatory decision-making has undergone a far-reaching process of judicialisation. 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.

APA requirements for rule-making, as distinct from adjudication, are considerably less demanding: before promulgating a rule, the agency must provide notice and opportunity for comments; when it promulgates the rule, it must produce a concise statement of the rule's 'basis and purpose,' and the rule can be set aside by a court only if it is 'arbitrary, capricious, or abuse of discretion.' As Martin Shapiro has observed, such differences in procedural 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.<sup>37</sup>

However, with the growth of environmental and risk regulation in the 1960s and 1970s, rule-making (*e.g.*, standard-setting) became much more important. Hence, federal judges began to develop stricter standards of judicial review for rule-making proceedings. Starting from the general and apparently innocuous requirements contained in the APA, they succeeded in formulating new principles to improve the transparency and substantive rationality of rule-making. For example, the courts have demanded that both the essential factual data on which a rule is based and the methodology used in reasoning from the data to the proposed standards, be disclosed for comment at the time the rule is proposed. The agency's discussion of the basis and purpose of its rule must detail the steps of the agency's reasoning, and significant comments received during the public comment period must be answered at the time of final promulgation.<sup>38</sup>

As a consequence of these judge-made procedural requirements, today rule-making has to be accompanied by records and findings even more detailed and elaborate than

<sup>36</sup> M. Bernstein, *Regulating Business by Independent Commissions*, (Princeton University Press 1955).

<sup>37</sup> M. Shapiro, *Who Guards the Guardians?*, (University of Georgia Press 1988).

<sup>38</sup> Pedersen, 'Formal records and informal rule-making,' (1975) 85 *Yale Law Journal*, 38–88.

had been originally envisaged for formal adjudication. The progressive judicialisation of regulatory proceedings makes the arguments in favour 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.<sup>39</sup>

This does not mean that regulatory decisions should be taken in a political vacuum. The authority of Congress to define broad policy objectives and the responsibility of the president to co-ordinate the entire regulatory process, are not questioned. However, the experience of the 1980s has shown that a president, for ideological reasons, can try to impede an effective implementation of statutory objectives, for example, in the area of environmental protection, while members of Congress are often too concerned with their own re-election to worry about the coherence of regulatory programmes.

In such a situation, only the courts seem to be able to provide the necessary continuity of regulatory programmes since they, more than any other branch of government, are committed to preserving continuity of meaning in statutory law. What is needed, therefore, is a partnership between courts and regulatory agencies. The courts should insist that regulators continue to pursue with vigour the environmental and other regulatory objectives set by Congress in the 1960s and 1970s, even when Congress and the president are tempted to cut back on regulation in the name of economic growth or political ideology. In return, judges should protect the independence of regulators.<sup>40</sup>

But is government by judges and technocratic experts compatible with democratic accountability? The supporters of agency independence answer that if courts require the regulatory process to be open to public input and scrutiny, and to act on the basis of competent analyses, the regulators are not necessarily less accountable than elected politicians, who often design laws with numerous opportunities to help particular constituencies.<sup>41</sup>

#### *D Procedural Legitimacy*

The American debate on the legitimacy and accountability of the regulatory branch of government reveals two distinct dimensions of the issue: a procedural dimension and a substantive one.<sup>42</sup> Procedural legitimacy implies that the agencies are created by democratically enacted statutes which define the agencies' legal authority and objectives; that the regulators are appointed by elected officials; that agency decision-making follows well-defined procedures, which typically define the rights that various interests have to participate directly in the decision-making process; that agency decisions must be justified, and especially that they are open to judicial review, and are adequately monitored by the political principals.

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<sup>39</sup> Shapiro, *op cit*, n 37.

<sup>40</sup> *Ibid*, at 127.

<sup>41</sup> S. Rose-Ackerman, *Rethinking the Progressive Agenda: the Reform of the American Regulatory State*, (The Free Press 1992) at 34.

<sup>42</sup> For a similar distinction in the context of EC institutions, see Weiler 'After Maastricht: Community Legitimacy in Post-1992 Europe,' in W.J. Adams (ed), *Singular Europe*, (University of Michigan Press 1992).

Substantive legitimacy depends on such features as the expertise and problem-solving capacity of the regulators, their ability to protect diffuse interests, a rational selection of regulatory priorities, the congruence of agency actions with statutory objectives and, most important, the precision of the limits within which regulators are expected to operate. The substantive dimension of regulatory legitimacy will be discussed in the next section. Here, I examine the procedural dimension, focusing on the requirements of transparency and public accountability since this is the area where the democratic deficit of European regulators, both at the national and EC level, is most obvious.

The simplest and most effective way of improving transparency and accountability is to require that regulators give reasons for their decisions. This requirement activates a number of other mechanisms for controlling regulatory discretion such as public participation and debate, peer review, complaint procedures, and judicial review. In the words of Martin Shapiro, 'giving reasons is a device for enhancing democratic influences on administration by making government more transparent. The reasons-giving administrator is likely to make more reasonable decisions than he or she otherwise might and is more subject to general public surveillance.'<sup>43</sup> For example, the procedural requirements introduced by American courts to improve the transparency and substantive rationality of rule-making, have been achieved by elaborating the giving-reasons requirement of the APA (*supra*).

The framers of the Treaties establishing the European Communities were well aware of the special importance of giving reasons for institutions not directly accountable to the voters or to their elected representatives. Article 5 of the Paris Treaty establishing the European Coal and Steel Community states that 'the Community shall . . . publish the reasons for its actions,' while Article 15 of the same Treaty provides that '[d]ecisions, recommendations and opinions of the High Authority shall state the reasons on which they are based.' Similarly, Article 190 of the Treaty of Rome requires that '[r]egulations, directives and decisions of the Council and of the Commission shall state the reasons on which they are based.'

It is important to note that there is no *general* requirement to give reasons in the law of most Member States, so that these Community provisions were not only different from, but in advance of, national laws.<sup>44</sup> For example, English public law still lacks a general obligation on public administrators to give reasons for their decision. Only recently have English courts begun to develop specific obligations to give reasons in the absence of a general duty by determining whether the refusal to give reasons was fair.<sup>45</sup>

The jurisprudence of the European Court of Justice shows that the Court is quite prepared to impose the obligation of giving reasons upon the national authorities in order that individuals be able to protect their rights in so far as they arise under Community law. In the *Heylens* case (Case 222/86[1987]ECR4097), the Court reasoned that effective protection requires that the individual be able to defend his or her right under the best possible conditions. This would involve judicial review of the national authority's decision restricting that right (in the *Heylens* case, the right of free movement of workers). For judicial review to be effective, however, the national court

<sup>43</sup> Shapiro 'The giving-reasons requirement,' (1992) *The University of Chicago Legal Forum*, 180–220, at 183.

<sup>44</sup> T. C. Hartley, *The Foundations of European Community Law* (Clarendon Press, 2nd Edition, 1988).

<sup>45</sup> Thomas, 'Reason-giving in English and European Community Administrative Law,' (1997) 3:2 *European Public Law*, 213–222.

must be able to call upon the authority to provide its reasons.<sup>46</sup> A question still debated by legal scholars is whether Article 190 of the Rome Treaty – according to Shapiro ‘one of the world’s central devices for judicial enforcement of bureaucratic transparency’<sup>47</sup> – will be used by the ECJ to move beyond formal requirements towards substantive judicial review of regulatory decision-making in the EC.

Needless to say, much remains to be done to improve procedural legitimacy. The enactment of an Administrative Procedure Act for the EC would provide the Community with a unique opportunity to decide what kind of rules are more likely to rationalise decision-making, to what extent and in which form interest groups should be given access to the regulatory process and the possibility of dialogue with the Commission, or how judicial review, especially substantive review, could be facilitated. The proliferation of committees, working groups, and agencies, shows how urgent is the need for a single set of rules explaining the procedures to be followed in regulatory decision-making. The growth in the number of such bodies, the overlap of their activities, and the divergence’s between the rules governing their functioning create a real lack of transparency.<sup>48</sup> In such a situation, where it is difficult for the citizens of the European Union to identify the body which is responsible for decisions which apply to them, procedural legitimacy is reduced to a vanishing point.

The need for greater transparency and accountability in regulatory decision-making exists also, indeed is even more urgent in some respects, in the Member States. If the problem of regulatory legitimacy seems to be more acute at the European level, this is because, relative to other functions of government, the regulatory function is much more important here than at national level. Thus, a European APA would not only contribute to the legitimacy of the Community policy-making system, but also serve as a useful model for the Member States.

### *E Substantive Standards of Legitimacy*

The legitimacy of non-majoritarian institutions depends also on their capacity to engender and maintain the belief that they are the most appropriate ones for the functions entrusted to them. Thus, constitutional lawyers use functional standards to justify the exercise of judicial review, despite its anti-majoritarian character, in order to protect individual rights that are not adequately represented in the political process. The argument is that the judiciary has the prime responsibility in the protection of human rights because it has the essential ingredient for this task, which is lacking in the political branches: it is ‘insulated from political responsibility and un beholden to self-absorbed and excited majoritarianism.’<sup>49</sup> As another scholar puts it, if judicial review serves a crucial governmental function that no other practice realistically can be expected to serve and if it serves that function in a manner that somehow accommodates the principle of electorally accountable policy-making, then that function constitutes the justification for striking down a policy choice made by an electorally accountable branch of government.<sup>50</sup>

<sup>46</sup> *Ibid.*, 218.

<sup>47</sup> Shapiro, *loc cit.*, n 43, at 220.

<sup>48</sup> Dehousse/Joerges/Majone/Snyder ‘Europe After 1992: New Regulatory Strategies,’ 1992 Florence, *EUI Working Paper*, Law 92/31, at 30.

<sup>49</sup> J. Choper, *Judicial Review in the National Political Process: A Functional Reconsideration of the Role of the Supreme Court*, (University of Chicago Press 1980), at 68.

<sup>50</sup> Perry, *op cit.*, n 13, at 24.

The grant of autonomous powers to the European institutions, too, is best understood in functional terms. As mentioned in section II D, one of the important tasks of EC institutions has always been to protect the individual rights created by the Treaties, even against the majoritarian decisions of a Member State or the unanimous preference of all the Member States. EC competences that serve to protect such rights are legitimated, and limited, by this function.<sup>51</sup> In particular, the important powers given to the Commission are justified by the functions attributed to that body by Article 155 ('... the Commission shall ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied . . .') and by Article 169 (monitoring the Member States with respect to the fulfilment of their obligations under the Treaty) of the Rome Treaty.

Also, the Commission's right of legislative initiative – which, as we saw in the first part of the paper, is regarded by many as the root cause of the democratic deficit – is best understood as a way of ensuring that EC policies are directed towards the advancement of the general interests of the Community (as defined by the Treaties) as opposed to national or sectoral self-interests. Like any bureaucracy, the Commission has interests of its own, and is not free from pressures from special interests when making decisions. It is, however, better placed than the other political institutions to take into account the general interests of the Community in its legislative proposals. The members of the Council are often swayed by short-term considerations relating to the needs of their own constituencies, while the European Parliament is not yet institutionally suited to develop a coherent legislative strategy to achieve the objectives laid down in the Treaties.<sup>52</sup> On the other hand, the fundamental interests of the Commission are aligned with those of the Community as a whole. Indeed, the Commission has never subscribed to the view that there is no conception of the Community public interest which is independent of the competition between individual state preferences.<sup>53</sup> On the contrary, it has always seen itself as the guardian of that interest. This commitment is credible not only because it is sustained by institutional self-interest, but also because the Treaties are considerably more explicit than national constitutional documents in identifying the public good: the four economic freedoms, a system of undistorted competition, prohibition of discrimination on the basis of nationality or gender and, since the Single European Act, the protection of non-commodity values like environmental quality. By the same token, an unlimited expansion of Community competences is the most serious threat to the legitimacy of EC institutions since it undermines the credibility of such functional justifications. This is why the more precise delimitation of Community powers achieved by the Maastricht Treaty is so important from a normative point of view. As we saw in section II B, Article 3b of the Treaty, which enacts the principles of attribution of powers, subsidiarity, and proportionality as organising principles of the EC's constitutional order, dispels the notion of a Community whose potential regulatory reach into the domain of the Member States is virtually limitless. It also throws new light on the limits to the possibility of creating subsidiary powers by means of Article 235. After Maastricht, subsidiary powers can be created under this Article only for matters directly connected with the core business of the EC, the establishment and

<sup>51</sup> Mestmäcker, *loc cit*, n 6.

<sup>52</sup> Craig, 'Democracy and Rule-making Within the EC: An Empirical and Normative Assessment,' (1997) 3:2 *European Law Journal*, 105–130, at 118.

<sup>53</sup> *Ibid*, at 127.

regulation of the internal market. Thus, paradoxically, the same Treaty that stimulated the current debate on the democratic deficit also laid the foundation on which the autonomous legitimacy of EC institutions could be firmly re-established.

Accountability by results is another important standard of substantive legitimacy. The standard is particularly relevant when two conditions are satisfied. First, objectives must be clearly specified: ambiguous or multiple objectives make it difficult to assign precise responsibilities. Second, the outcomes of the agent's decisions must be objectively measurable to avoid that the evaluation itself be too discretionary and possibly unfair. When these two conditions are met, accountability by results is a powerful tool in the hands of political principals to control the discretion of their administrative agents.

Because inflation can be measured with a high degree of accuracy, this mode of accountability has received a good deal of attention in the area of monetary policy. Laws establishing the independence of central banks normally define the banks' objective(s), a structure of accountability and, in some cases, also specific policy targets. Price stability may be the sole objective of the central bank, as in the case of the Reserve Bank of New Zealand, or the primary objective, with support of the government's economic policy as a secondary objective. For both the *Bundesbank* and the European Central Bank, price stability is the primary, not the sole, policy objective, although the secondary objective has hardly played a role in the *Bundesbank's* decisions, and the same will be probably true of the ECB.

Now, a key measure of the degree of a central bank's independence is the question when the bank's views can be overridden.<sup>54</sup> As already mentioned, the status of the ECB, with minor exceptions, can be modified only through Treaty amendment, which requires the unanimous consent of the Member States. Thus, electorally accountable politicians can override ECB's policies only through an extremely demanding procedure. The only accountability requirement for the ECB is to present an annual report on the activities of the ESCB and on the monetary policy of the previous and the current year to the European Council, the European Parliament, the Council and the Commission. As an extra guarantee of independence, the ECB has financial autonomy in that its income and expenditures do not fall under the Community budget. Although such a high degree of independence raises serious problems of legitimacy, it was probably necessary under present circumstances. On the one hand, the ECB will have to establish its reputation as an inflation fighter within a short time period; on the other hand, preferences about desirable levels of inflation differ widely among the Member States, so that it is difficult to imagine the Council defining precise policy targets for the Bank to achieve.

The arrangements designed by the Federal Reserve Bank of New Zealand Act 1989 follow a somewhat different model. Because price stability is the sole objective of the Bank, the law introduces very strict mechanisms of accountability. Responsibility lies with the Governor, not with a Board, as in the case of both the *Bundesbank* and the ECB. The Governor must agree a target range for inflation with the government, over a period of three years, and can be dismissed if he fails to deliver the inflation target, although his contract contains some clearly defined escape clauses.

Thus, the independence of the Bank of New Zealand has a contractual rather than a statutory or constitutional basis. The underlying theory is that of the principal-agent model, while the institutional design of the ECB (as of the *Bundesbank*) is inspired by

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<sup>54</sup> Gormley and de Haan, *op cit*, n 24.

the idea of a fiduciary relationship between the Bank and its political sovereigns. Several economists have argued that a contractual arrangement between the central bank (the agent) and the government (the principal) is superior in terms of efficiency as well as accountability. I have already suggested some reasons why a contractual arrangement would probably be less than optimal for the ECB, at least in its initial stages. A detailed discussion of this issue is beyond the scope of the present paper, but this brief comparison of alternative institutional arrangements for central bank independence suggests some lessons of general relevance for the design of other non-majoritarian institutions.

#### *F Accountability as a Design Problem*

Whether political independence and democratic accountability may in fact be reconciled depends crucially on the way in which the relationships between electorally accountable politicians, non-majoritarian institutions, and the general public are structured. As was mentioned, political principals create independent agencies, define their legal authority, objectives and decision-making procedures, and appoint key personnel. Such powers can and should be used not only to provide *ex ante* legitimacy, but also to design institutional arrangements capable of ensuring democratic accountability over time.

In this connection, it is interesting to note that before the 1980s most research on political-bureaucratic relations tended to cast doubt on the possibility of effectively monitoring and controlling the bureaucracy. However, more recent studies, inspired by advances in agency theory and supported by sophisticated statistical analyses, show that effective oversight is possible – provided democratic leaders take design problems seriously. This new research on political control makes two key assumptions.<sup>55</sup> First, bureaucratic agents are bound by contract to serve electorally accountable principals; their primary duty is faithful implementation of the law. But, second, through time the interests of politicians and bureaucratic experts tend to diverge. This is because political coalitions change from those existing when the principals adopted a certain policy, and also because bureaucracies develop separate interests through institutionalisation and external pressures. The important point is that sophisticated politicians recognise these dangers and can take countermeasures.

Thus, political oversight is possible if elected politicians design agencies with suitable incentive structures. It is up to the principals to structure relationships with their agents so that the outcomes produced through the agents' efforts are the best the principals can achieve, *given the choice to delegate in the first place*. Agency theory, as applied to problems of political control,<sup>56</sup> suggests that the following institutional choices are crucial for the design of an effective accountability structure:

- the extent to which decisions are delegated to an independent body rather than taken by the principals themselves, with the choice ranging from 'no delegation' to 'full delegation.'
- The governance structure of the agent: ministerial department, single-headed agency, commission, self-regulatory organisation, private organisation, and so on. The single most important dimension along which these institutions vary is their degree of independence from the political process.

<sup>55</sup> Wood/Waterman: 'The Dynamics of Political Control of the Bureaucracy,' (1991) 85 *American Political Science Review*, 801–828.

<sup>56</sup> Horn, *loc cit*, n 27, 47–55.

- The rules that specify the procedures to be followed in administrative decision-making. Examples are the already mentioned reason-giving requirements, and rules defining the rights of various groups to participate directly in the decision-making process.
- The allocation of resources, in particular, the agents' employment conditions, and the extent to which the agency is to be financed by taxes or by the sale of its services.
- The extent of *ex post* monitoring through ongoing legislative and executive oversight, the budgetary process, judicial review, reorganisations, citizens' complaints or professional sanctions.

A judicious selection of the values to be assigned to these variables, in the light of the nature of the delegated tasks and of the relevant political and institutional setting, will go a long way towards ensuring that independence and accountability are indeed complementary and mutually supporting, rather than antithetical, values.

Our present understanding of the logic of delegation casts doubt on the validity of the received view concerning the delegation of powers by Community institutions to *ad hoc* bodies not envisaged by the founding Treaties. That view, expressed by the so-called *Meroni* doctrine, holds that delegation is only possible under conditions that effectively negate the autonomy of such bodies. This is one reason why the European agencies created in the early 1990s were denied the power of rule-making, enforcement and adjudication normally granted to American regulators, and even lack the more limited powers enjoyed by, for instance, the Regulatory Offices in Britain and the *Autorités Administratives Indépendantes* in France. Even the European Agency for the Evaluation of Medicinal Products, which comes closest to being a fully fledged regulatory body, cannot take decisions concerning the safety and efficacy of new medical drugs, but must submit opinions concerning the approval of such products to the European Commission.

Now, it is a moot point whether the *Meroni* precedent (Case 9/56, [1958] ECR 133), which deals with delegation to outside bodies, is relevant for the new agencies. After all, on several occasions the Court has ruled that extensive discretionary powers may be delegated to the Commission – provided, the delegation specifies the basic principles governing the matter in question – and the same principle is thought to apply where a Community institution delegates power to itself.<sup>57</sup>

Be that as it may, one can only agree with Michelle Everson that the case of *Meroni* vs *High Authority*, which dates from the 1950s, should be seen as a creature of its time: the judgement of the Court reveals a heavy reliance on outdated economic and political theories. Thus, the Court assumed that control, to be effective, must be exercised directly and in great detail by the delegating authority. By this criterion, European agencies could never be truly independent, but should remain within the administrative domain of organs such as the Commission.<sup>58</sup> By contrast, contemporary theories of administrative control emphasise the need to identify self-policing mechanisms which are already present in the system; and instead of assuming that control is necessarily to be exercised from any fixed place in the system, these theories contemplate a network of complementary and overlapping checking mechanisms.<sup>59</sup> More generally, the *Meroni* doctrine, like older theories of political-

<sup>57</sup> Hartley, *op cit*, n 44, 110–115.

<sup>58</sup> Everson, 'Independent Agencies,' in G. Winter (ed), *Sources and Categories of European Union Law*, (Nomos 1996), 601–627, at 620.

<sup>59</sup> Hood, 'Concepts of Control over Public Bureaucracies: 'Comptrol' and 'Interpolable Balance'', in Franz-Xavier Kaufmann (ed), *The Public Sector*, (de Gruyter 1991) 347–366.

bureaucratic relations, takes a pessimistic view of the possibility of controlling administrative discretion, apparently unaware of the potentials of institutional design. In fact, as we saw above, careful institutional design can provide a number of instruments which political principals may use to minimise the danger of bureaucratic drift and reconcile independence with accountability.

The experience of countries with a long tradition of independent regulatory bodies, such as the United States, leads to similar conclusions. Independent agencies can indeed be kept politically accountable, but only by a combination of control instruments: clear statutory objectives, oversight by specialised legislative committees, strict procedural requirements, judicial review, appointments of key personnel, budgetary controls, reorganisations, professionalism, public participation, monitoring by interest groups, even inter-agency rivalry. When such a multi-pronged approach is used carefully and fully, no one controls an independent agency, yet the agency is 'under control.'<sup>60</sup>

#### IV Conclusion

At the beginning of this paper it was suggested that arguments about Europe's democratic deficit are really arguments about the nature, functions and goals of the EC/EU. Those who assume that economic integration must necessarily lead to political integration tend to apply to the European institutions, seen as the kernel of a future European federation, the same standards of legitimacy which prevail at the national level.

Fully fledged federalism, however, is only one possible trajectory of the process of European integration, and one that does not enjoy widespread political support at present. In fact, after the Maastricht and Amsterdam Treaties, and the decision to proceed with the enlargement of the Union, the federalist goal seems to recede into an ever more distant and indistinct future. But even assuming a growing demand for greater political union as a result of deepening economic and monetary integration or of external threats, there is no reason at all to think that the political and constitutional arrangements of the future will mirror the institutional architecture of the nation-state. Overlapping jurisdictions, legal pluralism, extensive delegation of powers to transnational organisation – in short, a new 'medievalism' – is a more likely scenario.

The key question which has been raised in this paper, therefore, is whether it is realistic and methodologically correct to assess the legitimacy of present institutions and policy-making processes with reference to norms that are largely irrelevant today and may not become relevant in the future.

Our normative conclusions are grounded in a positive model of EC institutions which deliberately eschews loaded terms like federalism, inter-governmentalism, and even neofunctionalism – if the latter label is interpreted to mean an allegedly irresistible expansion of Community competences. This 'regulatory model' of the EC<sup>61</sup>

<sup>60</sup> Moe, 'Interests, Institutions and Positive Theory: The Politics of the NLRB,' (1987) 2 *Studies in American Political Development*, 236–299.

<sup>61</sup> Caporaso, 'The European Union and Forms of State: Westphalian, Regulatory, and Post-Modern,' (1996) 34 *JCMS*, 29–52; Dehousse, 'European Institutional Architecture after the Amsterdam Treaty: Parliamentary System or Regulatory Structure?,' (1998 forthcoming) *CMLR*; Mc Gowan/Wallace, 'Towards a European regulatory state,' (1996) 3:4 *JEPP*, 560–576; Majone, 'Market Integration and Regulation: Europe after 1992' (1992) 43:1–2 *Metroeconomica*, 131–156; Majone, *op cit*, n 11.

shifts the focus of attention from state building or intergovernmental bargaining to the delegation to European institutions of specific functional tasks that can be tackled more efficiently and/or credibly at the supranational level.

Among the delegated tasks rule-making is by far the most important one, since the internal market would not even exist without an intricate system of regulations supplementing the prohibitions of quantitative and other restrictions to trade between Member States. Hence, the willingness of national governments to accept far-reaching limitations of their sovereignty in regulatory matters. Such is the extent of delegation in this area that it is heuristically useful to think of the EC institutions as the regulatory branch – the ‘fourth branch of government’ to use the America phrase – of the Member States.

All democratic political systems solve collective-action problems by delegating authority to take actions in particular areas from individuals or institutions to whom it was originally granted – the political principals – to agents or trustees. The important issue for democratic theory is to specify which tasks may be legitimately delegated to institutions insulated from the political process, and which areas should remain under the direct control of the political principals. It has already been suggested (see section II E) that the distinction between efficiency and redistribution is highly relevant to this issue. Efficiency-oriented policies attempt to increase the aggregate welfare of society, while redistributive policies are designed to improve the welfare of one particular group in society at the expense of other groups.

In a nutshell: redistributive policies can be legitimated only by majoritarian means and thus cannot be delegated to institutions independent of the political process; efficiency-oriented policies, on the other hand, are basically legitimated by results, and hence may be delegated to such institutions, provided an adequate system of accountability is in place. It is of course true that efficiency-enhancing policies, like all public policies, will normally have redistributive impacts. This is not a serious problem if the efficiency gains are large enough to compensate the losers, and if it is politically feasible to do so. However, it is well known that compensation is often difficult at national level because of the veto power of special interests.

At European level, by contrast, Member States that are negatively affected by a collective decision, at least in the short run, are generally compensated in some way. This possibility of separating the two stages of decision-making – problem-solving, and bargaining over the distribution of the gains – is not the least advantage of having a supranational level of governance. As long as the tasks assigned to this level are precisely and narrowly defined, non-majoritarian sources of legitimacy – expertise, procedural rationality, transparency, accountability by results – should be sufficient to justify the delegation of the necessary powers.