INDEPENDENT REGULATORY AUTHORITIES AS CONSTITUTIONAL A CTORS: A COMPARATIVE PERSPECTIVE *

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I. Conceptual problems and terminology

I.A. Impossibility of definition

"Statutory regulation by independent agencies … is rapidly becoming the most important mode of regulation, indeed the leading edge of public policy-making in Europe." (Majone, 1996, p. 47.)[1] This development represents an important challenge to constitutionalism. Independent authorities constitute a constitutional dimension that is not captured in constitutional theory. Independent authorities challenge the triadic arrangement separation. Doctrines of separation of powers have difficulties in accommodating the organizational anomaly of independent authorities. If they are not made visible on the constitutional landscape a major sphere of decision making and state activity will exist outside democratic control deprived of constitutional values.

Independent regulatory authorities (hereinafter: independent authorities, or IRAs) are (most often) expert bodies that perform public functions supported by government authority, in the name of the state (Strauss, 1984, 573.)[2] but can-

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* This article is based on a research supported by a generous sabbatical leave granted by ELTE Law School, Budapest.

1 A recent study on seven sectors in 36 countries found that in 1986 there were only 23 agencies across these sectors; by 2002 this number had increased more than seven-fold, to 169 (Gilardi et al 2006). The importance of independent authorities is reflected at the level of political interest, too. For example in Britain the Public Administration Select Committee produced regular reports on the issue. The Conseil d'État 2002 and the French Senate (Gelard, 2006) have produced major 'official' reports on AAI. Gelard 2006 served as a major inspiration for this chapter.

2 Il existe au sein de l'État des autorités autonomes, distinctes de l'administration, mais appartenant a l'État et dotés d'un pouvoir de décision [There are independent authorities within the State that are independent of the administration but pertain to the State and are attributed to have decision-making power.] (CE, Section, 6 decembre 1968. *Ministre des armées c/Ruffin,* concl. Rigaud, p. 626.)

not be directed by the political branches. They might not be accountable to the voters by design, and quite often not even to elected representatives of the people. Some of them supplant the choices of the political majority with their own, though without finality.

It is disputed what kind of public power is needed in order to qualify as 'authority.' The *Conseil d'État* concluded that decision making power ('*un pouvoir de décision*') is not indispensable, "at least in cases when the capacity to influence is overt" for example when the addressee in fact abides by the opinion." (Conseil d'État, 2001, p. 290.) Sometimes rule-making cannot have formal validity without the formal involvement of such consultative independent bodies.

Many independent authorities are hybrid institutions with regulatory power that comprises conflict solving powers including individual and general inquiry, inspection and investigation, enforcement, conflict settlement and sanction. Certain rights protective independent institutions (Mediateur, Offices in charge of anti-discrimination) are without formal decision-making power although they may influence legislation. To satisfy needs of expert legitimation the executive and even the legislative political branches rely on the fact finding or policy planning of the independent body without the formal power of rule setting.

In many jurisdictions the term refers to administrative agencies, acting primarily in different spheres of the economy. Similar organizational solutions and underlying concerns emerge in the area of rights protection and such institutions are now included into the category of independent authorities. In fact such function was deemed to necessitate the independence of the institution in charge of the protection of the right to free information.[3] Public institutions are detached from the political branches for a number of reasons and more and more types of independent entities operate in the public sphere.

I. B. Terminology

The study of independent authorities is further complicated because of lack of a uniform or consistent terminology. The terminology varies between Commission, Bureau, Council-*Conseil*, Agency-*Agence*, etc. Such bodies emerged even before the term was recognized by doctrine or positive law (for France see *Commission des Opérations de Bourse* – BOC in 1967). In Norway or The Netherlands positive law still does not know the term but scholarship identifies

[3] Conseil constitutionnel, décision no 84-173 DC du juillet 1084, considerant no 5. The German Constitutional Court found the efficient protection of rights crucial in the shaping of the autonomous broadcasting supervision authorities.

such bodies. In many countries, including France, where the government is constitutionally bound to direct the administration, independent authorities are conceptualized as administrative agencies. (Cassese et Franchini, 1996) The term used is independent administrative authority (AAI). The Romanian Constitution uses the term *autonomous* administrative authority. In Italy in order to avoid the constitutionally inevitable restriction on independence that applies to administrative bodies many of the powers of the authority are exercised in 'full autonomy.' The authority is sometimes called guarantor (*l'Autorita garante*).

Other constitutional regimes and theories envision their existence at the intersection of constitutionally recognized branches of power. There is talk about a Fourth Branch of power, "the headless fourth branch of government"[4] or at least a Third Force (Thatcher, 2005) separate of elected politicians, or independent authorities might be part of the *Pouvoir Neutre*.

As to the United States independent authorities are discussed as administrative agencies and the characterization of agencies is "executive" or "independent." The latter is called independent regulatory agency (IRA). Independent agencies are placed outside the presidential realm, but there are independent agencies *within* the executive but *outside* the departmental system which exercise important regulatory functions (the Federal Environmental Protection Agency, National Science Foundation). The distinction follows ad hoc political decisions (Strauss, 1984) and it is "based primarily on their respective location in the administrative architecture and secondarily on their distinct type of leadership." (Custos, 2006, p. 615.)

In the consideration of independent authorities as regulators one should also take into consideration certain tribunals or the tribunal like decisions of rights protectors, where the regulatory function is carried out, at least partly by mediating or deciding disputes with regulatory (normative) impact in the sense that the decision will affect many people in similar position.

The increasing importance of the institutional supervision of the political branches enhanced the constitutional importance of oversight bodies which provide authoritative information not only for the supervision of the legality of administrative bodies but of government in general, both for Parliament and the general public. Such oversight bodies are sometimes designed as parliamentary (congressional) entities (Controller General, General Accounting Office), but increasingly as *sui generis* constitutional entities as Auditors Council or Court of Auditors. Such broad understanding of AI is quite common, e.g., in Italy. Oversight bodies and constitutional courts intended to protect the constitution are also acting independently from political branches of power. Independent

4 Attributed to Senator Everett Dirksen, Time Magazine, 31 July 1964.

authorities are constitutionally to be classified together with other non-majoritarian institutions (Majone, 2001).

Moreover, in a few instances constitutions grant autonomous institution status to public entities which cannot be fully identified with public administration even if the functions of the institution are carried out in many legal regimes in a civil servant status. This is the case of science and higher education which are understood to be efficient only if operated within autonomous organizations. Increasingly, self-governing bodies are trusted with public functions of quality assurance. Where the state has to observe its neutral position vis-à-vis autonomous organizations it may create public foundations to carry out public functions. In matters of financial support (and subtle direction) of art and science independent professional entities with internal policy setting powers and procedural self-determination powers are set up sometimes with constitutionally protected autonomy [see *National Endowment for Arts v. Finley,* 524 U.S. 569 (1998)]. The need for a level of autonomy is also present in economic and in some other social activities which necessitates arguably a level of self-regulation by the concerned sphere of activity. Corporativist interests also claim to be granted autonomous positions with self-regulatory powers (see, e.g., medical chambers).

Professional self regulating bodies and corporativist decision-makers (e.g., tripartite boards determining wage minimum) emerge as independent entities with public powers. Finally, as part of the hollowing of the state public administration functions which were carried out by independent but government created entities are taken over by informal private entities. For example, over the past 15 years, consortia and informal standard-setting bodies have in many cases supplanted formal national and international standard development organizations. (Cargill, 2002)

II. History and functions of independent authorities

II.A. Pre-History

Transferring state responsibilities to appointed boards like Trinity House (founded 1514), Commissioners of Bankruptcy (1570), Bank of England (1694) has a long history (Flinders, 2004). With the consolidation of the modern rational state the board system lost its importance. It was believed that a civil service under a centralized executive will be able to run the state efficiently. Further, the emerging checks and balances were considered to provide adequate parliamentary and public control over the activities of the executive in the public administration. While such institutions and related beliefs were able in many regards to sustain a legal perception of the affairs of running the state,

a number of different factors pointed towards the establishment or recognition of bodies with a public function mandate which were deliberately decoupled from the system of the politically controlled executive branch.

II.B. United States

The organizational model for the modern independent authority emerged in the United States: The Interstate Commerce Commission (ICC) was the invention of Congress (Interstate Commerce Act of 1889).

The ICC was created in response to mass political discontent about politically discriminatory policies of railroad companies. ICC had regulative (law-making) supervisory and individual decision-making capacity (rate setting). While the Commissioners' appointment did not depart from what the US Constitution provides for Officers of the United States, the Commissioners were *not supposed* to serve at the pleasure of the President. A slightly different governance structure emerged with the Board of Governors of the Federal Reserve System that was created by Congress in response to an earlier bank panic. The Federal Reserve Act of 1913 (as amended) emphasizes that in selecting the members of the Board, the President shall have due regard to a fair representation of the financial, agricultural, industrial, and commercial interests, and geographical divisions of the country. The Federal Trade Commission was established in 1914 as a major instrument of President Wilson's trust-busting policies.

The ICC model became widely popular in the New Deal. Originally President Roosevelt intended dense regulatory intervention into the economic crisis of the Great Depression through the existing departments of the executive powers. The independent regulatory agency model was the result of a compromise with other branches of power.[5] Instead of further increasing the powers of the executive the new powers were located in between the sphere of influence of the political branches in the form of independent (non-executive) agencies [the Federal Communications Commission (1934), the U.S. Securities and Exchange Commission (1934), the National Labor Relations Board, (1935), etc.].

It is argued that by the seventies the sectorial independent regulatory agency model became anachronistic. "Most new regulatory programs have been entrusted to single-headed agencies squarely within the branch. These regulatory bodies typically regulate a wide variety of business rather than a particular

[5] Majone, 1997 argues that the emergence of regulatory bodies within the European Union can be explained as a compromise between the Commission and national powers: the independent authorities are placed outside the jurisdiction of the competing powers. This logic makes less sense in parliamentary systems with cabinet dictatorship, but it applies for the creation of depoliticized independent agencies as a compromise between parliamentary majority and opposition especially where co-decision is needed e.g., for reasons of supermajority.

industry.” (Melnick, 2002, p. 693.) Beginning with the seventies the regulatory agency model was applied increasingly in the area of social regulation and even in rights protection (disabilities, non-discrimination, consumer protection). The agencies were placed within the executive though often outside the departmental structure. Here the personal independence of the administrator from the President is not legally guaranteed but the regulatory, supervisory and coordinative functions are to a great extent carried out following an independent mandate established by law. A few independent agencies are part of the legislative branch under Congress. (See Government Accountability Office, formerly called the General Accounting Office, 1921).

II. C. The proliferation of independent authorities

II.C. 1. Circumstantial appearances

The early American federal model (the FTC prototype) had some impact on the Australian Constitution in 1900 that provides (ss. 101-104; also s. 73.) for the establishment of an Inter-State Commission, however, the Commission was operative for only about twenty years.

The American model of rule making through independent [regulatory] agencies became fashionable worldwide only beginning with the 1970ies with the denationalization and deregulation of industries. The proliferation of such agencies was expedited by the pressure and coordination coming from international organizations (EU, OECD, IMF, lending institutions).

In Europe independent authorities appeared circumstantially as legal anomalies. Insular public institutions emerged in Germany, resulting from the efforts to establish non-politicized institutions by the Allied Forces (Bundesbank). The system of independent broadcasting that emerged under Allied command was constitutionalized with the decisions of the Constitutional Court. It was understood that broadcasting should be controlled in a way that safeguarded its independence from the state (*Staatsferne*, literally “distance from the state”). (Humphries, 1998) In France and Germany needs of economic credibility have created institutions ahead of the great diffusion of the model. Once again the FTC prototype was influential.

II. C. 2. Great Britain – The ‘Second Wave’

British independent authorities run against the strong supremacy claim of Parliament which required accountable public administration in the form of ministerial representation in the House of Commons. The established commissions and boards were places under ministerial departments. With the increase of the

state at the beginning of the 20th century much of new state functions were again entrusted to boards partly in order to keep the function away from party politics. By 1941 Ivor Jennings wrote that "we shall soon reach the stage where it can be seriously asked whether we have democracy when we are governed by a vast array of boards, commissions, corporations, companies, authorities, councils, and the rest whose relation to Parliament or to a local electorate is remote." (Flinders, 2004, p. 771.)

At least since World War II an increasing number of quasi autonomous bodies with delegated governance power were created in Britain, many of them as public corporations following the pre-war model of the BBC. The next wave of establishing independent agencies is related to deregulation that resulted in the 'quango' (quasi autonomous non-governmental organizations) state. "By definition, quangos have a role in the practice of government, but are not government departments or even sub-sections of government departments: they are agencies of government that operate to a greater or lesser extent at arm's length from Ministers." (Macleavy et Scott 2005, 7) There are others, with variable autonomy of execution, including some with fully independent regulatory powers, and only formally related to Ministers (OFTEL, OFCOM). On the other end of the spectrum are the consultative bodies.

Among the strictly independent agencies the Competition Commission was established in 1948 with general competences, followed by the Independent Broadcasting Authority, 1954 (Independent Television Commission 1990, merged into the Office of Communications, OFCOM in 2003). In order to protect public interest in the privatized sectors sectorial bodies emerged (e.g., Office of Water Services, 1989; Office of Telecommunications, OFTEL, 1984, merged into OFCOM in 2003). Other independent regulatory authorities are in charge of general public interests, created or shaped in response to European legal requirements (e.g., Data Protection Registrar, 1984, reorganized in 2000).

It became an important part of the electoral program of New Labour to 'sweep away the quango state' (Tony Blair at the 1995 party conference.) Notwithstanding reorganizations in the past decade the number of independent regulators, tribunals, etc., is still increasing. Estimates differ as to the numbers (reaching hundreds and even thousands) because definitions of quangos and NDPBs (Non-Departmental Public Bodies) differ. Some of these are "Next Steps Agencies" with routine administrative tasks. (Scoffoni, 2006, p. 430.) The expenditure of executive NDPB's remains around one third of central governmental expenditure.

II. C. 3. The 'Third wave'

The proliferation of independent authorities in Britain is related to a great extent to the privatization of the Thatcher years and similar privatization driven regulatory agency creation occurred in other Westminster type parliamentary systems like in New Zealand. A third wave in the creation of independent authorities was more related to fundamental rights protection. The example of France is notable in this regard with the establishment of the Commission nationale de l'informatique et des libertés (CNIL). In 1977, the legislative committee of the Senat proposed that the Commission be made into an independent administrative body with personally independent elected members, because of concerns that the data base will be centralized under the Ministry of Interior. The invention of the Senat became a model for later legislation in matters first of rights protection starting with the Conseil superieur de l'audiovisuel in 1986 but also for regulation of certain sectors of the economy. Currently there are at least 39 agencies, out of which 22 are characterized as independent expressly in the authorizing statute. (Conseil d' État, 2001; Gelard, 2006, p. 41.) The French concept emphasizes that the authorities operate as administrative bodies, that is within the executive functions. Similar trends emerged in other European countries first in the privatized economic sectors but also in areas of social and rights protection.[6] Most of the solutions rely on collegial bodies.

The idea of independent (regulatory) authorities became quite popular in the transition to democracy in (post totalitarian) countries in the process of institution building when solutions considered to be the most advanced at the time were easily transplanted. Such adaptation was also facilitated by the popular dislike of political partisanship and by an increasing acceptance of independent agency models proposed or required by international organizations. Similar good governance expectations of donors contributed to the world wide spread of the IRA model.

II. D. Constitutional recognition

The recognition of independent authorities today seems to have reached the level of constitutions. Some economic regulatory agencies are expressly mentioned in the constitutions but mostly in a non-systematic way. Such bodies are often located outside the traditional branches of power. Only exceptionally guarantees of independence (e.g., appointment rules) are provided.

The growing constitutional importance of independent authorities and the resulting constitutional tensions due to the difficulties to place such institutions in the prevailing tripartite system of government branches resulted in some in-

[6] For the variety of models in broadcasting regulation see Hoffmann-Riem, 1996.

stances in constitutional reforms that expressly acknowledge the specificity of such institutions. According to the 1997 revision of the Constitution of Portugal "the law may create independent administrative entities (Article 267-3). Some recent constitutions were written with specific recognition of certain public authorities as independent. Such constitutionalization might be path-setting.[7]

Chapter 9 of the Constitution of South Africa on State Institutions Supporting Constitutional Democracy is exemplary of the new trend.[8] It provides a whole list of state institutions attributed with the task to strengthen constitutional democracy in the Republic (Article 180). These are fundamentally non-regulatory, rights protective decision-making bodies including the Auditor-General and the Electoral Commission. These institutions "are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice" (Section 2, Article 180). Further independent institutions named as such in the South African Constitution include the Broadcasting Authority and the Public Service Commission. The Greek Constitution as amended in 2001 has general rules (Article 101a) applicable to independent authorities. Beyond the standard guarantees of independence (fixed tenure, personal and functional independence) according to Section 2 of the same Article: "The matters relating to the selection and service status of the scientific and other staff of the service organized for supporting the operation of each independent authority, shall be specified by law. The persons staffing the independent authorities must possess the corresponding qualifications, as specified by law. Their selection is made by decision of the Conference of Parliamentary Chairmen seeking unanimity or in any case by the increased majority of four fifths of its members. The matters relating to the selection procedure are specified by the Standing Orders of the Parliament."

The Greek Constitution names four such bodies, while the Polish Constitution deals in detail with the Supreme Chamber of Control, the Commissioner for Citizens' Rights and the National Council of Radio Broadcasting and Television. It follows that a distinction between independent bodies under the constitution and those determined by statute emerges.

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[7] In order to overcome the difficulties caused by the absence of AI in the Italian Constitution the governmental project of the constitutional reform of 2004 proposed to constitutionalize the form of independent authorities in detail.

[8] Likewise, the Polish Constitution of 1997, places independent institutions in a specific chapter.

II. E. Alternative forms

Notwithstanding the above mentioned trends certain constitutional democracies resist the formal recognition of independent authorities, partly for constitutional reasons, partly because of their conviction that the problems handled by such authorities can be handled within the frame of a professional civil service operating within a public administration under executive guidance. Jean-Marie Ponthier points out that "in a country like Germany the 'principle of democracy' stands against a too wide independence, since all public authorities have to be controlled by an authority legitimized by Parliament. Moreover, there are various methods to secure this independence. The incompatibilities are determined in every case. The non-submission to government is also represented as a guarantee of independence, which does not preclude, if it is possible, the recognition of certain powers to the governmental authority, such as the dismissal in case of permanent incapacity to perform duties (Spain), or in case of penal conviction." (Ponthier, 2006, p. 182.)

Notwithstanding the position of the German Constitution that seems to limit the possibility of locating administrative entities outside the hierarchically government subordinated public administration, "bodies which are functionally comparable to independent administrative authorities surely exist in Germany. It had been a question of doubt but the application of the criteria released from the practice of the *Conseil d'État* confirms this." (Gelard 2006, II. p. 191.)[9] After all the federal law may create entities related to the federal government to carry out public federal functions. In light of the legislative practice such laws may expressly provide that the entity be independent of the executive to which it is technically related. Most of these entities are *Bundesoberbehörden* in the sense of Article 87 par. 3 of the Basic Law. For example, as a collegial body see Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway (*Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen*). The Federal Commissioner for Data Protection and Freedom of Information (*Bundesbeauftragte für den Datenschutz und die Informationsfreiheit*) is elected by the Federal Parliament and exercises his functions in his individual capacity. An alternative model is offered with the State Media Authorities (*Landesmedienanstalten*), which are responsible for the supervision of private broadcasters and for licensing. Members are elected by Land Parliaments (the executive is not involved) often with supermajority and the members are representatives of social interest groups.

[9] Allemagne, Christian Autexier, Mmes Hélène Langlois, Jessica Richter et Bettina Süskind.

II. F. Transnational sources of independent authorities

The dynamic transfer of constitutional powers to international and transnational organizations resulted in a new source of creating independent agencies both at national and transnational level. The European Union is a particularly important source of such developments. The European Central Bank represents the ultimate independent authority. It is true that the so-called Meroni Doctrine (1958) of the ECJ reinforces the assumption that the EU institutions cannot delegate their own powers to ad hoc bodies not envisaged in the Treaty, and even less so with broad discretionary powers (see also Article 7 of the EC Treaty).[10] But if we admit that "moral authority or the exercise of a decisive influence may determine this type of institution" (Chevallier[11]) there are independent bodies that play important roles in defining national and transnational regulatory policies. The European Commission claimed that "At EU level, [by 2006 at least 16] independent agencies have been created. The majority of these bodies have either an information gathering task, (…) or they assist the Commission by implementing particular [policies of the Union]. In three cases EU agencies have a regulatory role." By creating the so-called `technical` organs which participate in what the Commission labels as co-regulation, hybrid authorities emerge.[12] Such bodies (even without judicial personality) resemble independent authorities given that their authority derives from the expert capacity of the members whose advice is to be taken into consideration. The bodies are independent in the sense that the members act in their individual professional capacity. The most well known and extremely influential example of such quasi independent authorities is offered in the comitology.[13]

Given the impact of such transnational and intergovernmental (Europol, Eurojust) governance on the member states the national constitutional systems are effected without so far fully acknowledging that traditional assumptions on democratic accountability at the national level became hollow. However, the recent constitutional concerns regarding the European arrest warrant, although based on substantive rights concerns are also indicative about the precarious nature of the above institutions in the national constitutional systems.

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[10] The official position of the Commission was more permissive: "The Treaties allow some responsibilities to be granted directly to agencies. This should be done in a way that respects the balance of power between the institutions and does not impinge on their respective roles and powers. (…) Agencies cannot be granted decision-making powers in areas in which they would have to arbitrate between conflicting public interests, exercise political discretion or carry out complex economic assessments." European Governance A White Paper, Brussels, 25.7.2001 COM(2001) 428 final p. 24.

[11] Cited in Genot, 1991, p. 16.

[12] European Governance. A White Paper, Brussels, 25.7.2001 COM(2001) 428 final p. 22-23.

[13] This expression refers to the number of committees which assist the Commission in exercising its executive competences. See the decision of the Council fixing the modes of the exercise of executive competences conferred upon the Commission. JOUE, 17 juillet 1999, L 184, p. 23.

When independent authorities are deeply inserted into international networks[14] the essential question is to ask whether it implies a complete importation of the political system or not. (Frison-Roche, 2006, p. 23) It is argued that European regulatory agencies should take over the role of national regulators given that the regulated sectors exist on a European level. (cf. Stoffaës, 2003, 2005)

Majone (1996) claims that the European Union is a 'regulatory state.' The EU has limited resources and in order to enforce its policies it has to rely on national regulators. The regulators of Member States "have a more and more important role in the application of community law."[15] For this reason in a growing number of sectors "in accordance with the principle of the separation of regulatory and operational functions, Member States should guarantee the independence of the national regulatory authority or authorities with a view to ensuring the impartiality of their decisions. This requirement of independence is without prejudice to the institutional autonomy and constitutional obligations of the Member States or to the principle of neutrality with regard to the rules in Member States governing the system of property ownership laid down in Article 295 of the Treaty. National regulatory authorities should be in possession of all the necessary resources, in terms of staffing, expertise, and financial means, for the performance of their tasks."

III. Inpedendence

III. A. Governance

Independence has a number of meanings. "The commission is to be nonpartisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly quasi judicial and quasi legislative.[16] Non-partisanship is often understood to mean integrity and impartiality, though impartiality refers more to equal distance from competing parties in a conflict.

The adjective independent is somewhat misleading. "This independence is not considered as absolute in any country, it is always relative, it is always a question of balancing. The slight difference is between countries in which it is believed that not even the legislator is entitled to interfere with these authorities and those, which constitute the majority, in which it is believed that these authorities shall be subject to the legislator, which is the only organ to have the power to take final decision(s)." (Ponthier, 2006, p. 180.)

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[14] On regulatory networks ('gouvernement en réseau') see Dehousse, 1997.

[15] European Governance A White Paper, Brussels, 25.7.2001 COM(2001) 428 final p. 23.

[16] *Humphrey's, Ex'r v. United States* 295 U.S. 602, 624 (1935).

Independence of the authorities refers to a distance from constitutionally recognized branches of power. What is really at stake is integrity of a service or body where integrity is to be understood also in relation to a politicized state. Given the circumstantial establishment of independent authorities there is no clear relationship between the level of autonomy granted and the needs of the function carried out. Independence comes at a price, even if it is necessary for reasons of depoliticization, professionalism and credibility. The executive is constitutionally the body responsible for the administration which allows the coordination. Independent authorities (especially those regulating a specific economic sector) are responsible for and interested in their sector *only*. Because of lack of coordination within the executive such sectorialism might result in inconsistent policies. (See, e.g., the enormous differences in risk regulation).

Appointment, dismissal, qualification, fixed term, conflict of interest rules (*incompatibilité*) of commissioners and other independent authority leaders are considered fundamental guarantees of authority independence. In the majority of states independent authorities are institutions of collegial structure, and even Great Britain seems to shift towards this model. But collegial structure is not an indispensable condition. It enables staggering (mandates with fixed tenures) of the mandate of the commissioners which may preclude the long time domination of the will of a single appointing political power.

In most legal systems the mandates are non-revokable (resulting sometimes in constitutional debates) and the majority of texts creating independent authorities foresee the non-revokable character of the mandates. The prohibition of an immediate employment in an affected corporation is quite well established. The tenure of mandates is fixed by the law which establishes the independent authority between 4-8 years but the non-revokable character of the mandates is not always present. The incompatibility has already been present in the ICC model:[17] the (originally five) Commissioners were required not to have interest in the regulated industry (railways) and hence the emerging independent agency model was a denial of the professional regulatory model that was based on the participation of the concerned and has prevailed at the time at the state level as in the case of state medical boards.

The qualification requirements are considered contributory to independence and intended to prevent the filling of independent authorities with politicians (and political appointees). However, it is not generally required otherwise than calling for the admission of “qualified personnel” to the Authority, although in certain areas of economic regulation the requirements are more specific including longer professional experience in the regulated area. Formal exclusion

[17] In France renewability is exceptional. The mandate of the members of the Competition Council (*Conseil de la concurrence*) is 6 years and renewable.

of politicians and the requirement of expert track record cannot per se guarantee a different outcome.[18] In parliamentary systems appointments to an independent authority might be quite partisan, with the important exception of Great Britain. Between 1990-2001 46% of the French, 36% of the German and 77% of the Italian IRA appointees had public party affiliations though their overwhelming majority had considerable professional expertise. (Thatcher, 2005.) In many countries appointments are dictated by political loyalty considerations and even where professional criteria are satisfied political parties elect their own professional loyalists. This is in conflict with the European ideal of professional qualification: "The Ombudsman shall be chosen from among persons who are Union citizens, have full civil and political rights, offer every guarantee of independence, and meet the conditions required for the exercise of the highest judicial office in their country or have the acknowledgement competence and experience to undertake the duties of Ombudsman."[19]

US statutes are generally silent on the matter of qualification and non-partisanship. Nevertheless, professional qualifications are expected: "Like the Interstate Commerce Commission, its members are called upon to exercise the trained judgment of a body of experts 'appointed by law and informed by experience.'[20] The form of legal organization[21] may offer additional guarantees of independence.

The matter that raises constitutional conflicts concerns appointments and removal (dismissal). These matters are believed to be crucial for independence of the authority. However, such independence remains relative; at least as long as the independent authority was replaced by another independent authority, the French Constitutional Council did not recognize the constitutional value of the principle requiring the independence of members of independent administrative authorities.[22]

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[18] See, e.g., the controversy regarding the appointment of Jean-Michel Hubert as head of the new French telecommunications regulator, the ART in 1996.

[19] Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom) Article 6 par.2.

[20] *Humphrey's*, at 624.

[21] Most independent authorities have legal personality or are special entities of public law (public law institutes – *Anstalten des öffentlichen Rechts* in Germany) which provides a level of independence. Others have private law status but carry out public functions (see, e.g., Austria in matters of economic regulation). A proper legal status may allow a separate treatment in the budget. Notwithstanding their legal status, the American independent authorities do not dispose the competence to take legal actions.

[22] The substitution of the CNCL with the *Haute Autorité de la communication audiovisuelle* had not „in itself, the effect of depriving the legal guarantees from restraints of constitutional

III. A. 1. Appointment and removal

III. A. 1. a. United States

According to the Appointment clause [U.S.C.A. Const. Art. 2, § 2, cl. 2] any Officer of the United States "exercising significant authority pursuant to the laws of the United States" *must be* appointed by the President with the advice and consent of the Senate [*Buckley v. Valeo*, 424 U.S. 1, 126 (1976)[23]]. Alternative modes to determine the composition of such authorities were held unconstitutional. It is within this frame that the independence in appointment is provided for IRA. Sect II of the Interstate Commerce Act provided: "Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. Not more than three of the Commissioners shall be appointed from the same political party." The IRA prototype contained important additional guarantees of independence: the appointments were to fixed terms and were staggered.

In a way the independence of the IRA is dynamic and relative in the sense that they exist at the intersection of congressional and executive power and their fate depends on the prevailing understanding of checks and balances among the political branches. Exactly because the IRAs have legislative powers and contribute to the power of the legislative branch this has to be balanced by the control of the Executive branch over independent authorities in line with the constitutional requirements of the separation and balancing of powers.

As to removals: for a while the general rule seemed to be that the Congress has no power to make provision for removal of executive officers appointed by the President with consent of the Senate.[24] However, the Supreme Court in *Humphrey's Ex'r v. U.S.*, upheld the Federal Trade Act, holding that "illimitable power of removal is not possessed by the President [with respect to Federal Trade Commissioners]."[25] For more senior appointments the Congress may fix the period of holding office and forbid removal by the President of members thereof during their term of office except for cause. As a general principle removal has to be limited to non-political and even to non-professional grounds, the independent authority is protected against sanctioning its actions for political disagreement.

character" and that the legislator could „decide to terminate the mandate of the members of the *Haute Autorité*, at the moment it chooses for this substitution" Décision 217 DC du 18 septembre 1986, CNCL. para. 5.

[23] Appointment to the Federal Election Committee by the Presidents of the Houses confirmed by majority vote of both Houses of Congress was held unconstitutional.

[24] *Myers v. U.S.*, 272 U.S. 512 (1926).

[25] *Humphrey's*, at 628-629.

Most independent authorities are run by principal officers who are appointed in the cooperation of the President and Senate. Exceptionally, independent authorities, e.g., 'independent counsel' are run by 'inferior officers.'[26] The fact that the office of the inferior officer is not terminable at will by the President is not an unconstitutional restriction of presidential power. Such independence is not so essential to the functioning of the Executive Branch because the powers transferred to independent counsel are not final and therefore not decisive.[27]

III. A. 1. b. France

There are specific appointment rules for officers of the civil service in the French constitution. Appointments are reserved to the President and the Council of Ministers: "general officers, (…) and heads of central government services shall be appointed in the Council of Ministers" (Article 13.) but the formal appointment to independent authority takes place by a decree of the president of the Republic, by a decree of the Council of Ministers etc. Sometimes appointment powers are identical with the power to designate and the appointment remains within the executive branch.[28] For example, the Ombudsman of the Republic is appointed by a decree of the President of the Republic adopted in the Council of Ministers.[29] But nomination might be distinct from the power to designate, i.e., it is distinct from the constitutionally envisioned appointment power. The respective statutes provide for the form of designation (including exceptionally election by public bodies[30]). The diversity of the sources of designation is remarkable. The typical appointment is not shared among the political branches but different officials coming from different branches of power appoint their 'own' council members to the independent authority. (The solution follows the constitutionally mandated prototype of the *Conseil constitutionnel*.) The *Conseil superieur de l'audiovisuel* is representative in this regard: it has nine members appointed for six years (non-renewable and staggered terms): three of them are appointed by the President, three by the President of the Senate and three of them by the President of the National Assembly. The

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[26] "Inferior officers," for purposes of appointments clause, are officers whose work is directed and supervised at some level by others who were appointed by presidential nomination with advice and consent of the Senate.

[27] *Morrison v. Olson*, 487 U.S. 654 (1988).

[28] At times of cohabitation such joint appointment amounts to political co-decision.

[29] For similar arrangements see, e.g., the Governor of the Bank of Italy appointed by the President of the Republic by decree after the deliberation of the Superior Council of Bank of Italy (Conseil superieur de la Banque d'Italie) upon the proposition of the President of the Council of Ministers, or the appointment of the President of the Hungarian Bank.

[30] Certain members of the CNIL are elected: two by the Economic and Social Council, two by the general assembly of the *Conseil d`État*, two by the general assembly of the *Cour de Cassation* and two by the general assembly of the *Cour des comptes*.

political influence is clear, though at times of cohabitation and because of the staggering (1/3 renewal every three years) the political orientations might become less pronounced in the decisions of the independent authorities. The model is followed in many countries but the CSA model is not prevailing in France. As to independent authority members coming from the judiciary they are either elected or designated by presiding magistrates; presidents of professional bodies may designate professionals, and many independent authorities are characterized by mixed regimes of designation involving professional, judicial and executive bodies.

III. A. 1. c. Parliamentary systems

Governmental appointment is the general solution in Britain. Quite often the appointments are ministerial (though some of the independent authorities are self-appointing). Independence is achieved by avoiding partisan appointments and the bodies operate without direct ministerial instruction and political accountability. The British government claims that the executive appointment system allows for a better representation of women and a more proportional representation of minorities.

In continental parliamentary systems where governments have constitutional responsibility for the administration, appointments are made primarily directly by the executive, or Parliament. Formal co-decision like in the US is less common, or of limited constitutional value where the executive power is politically not separate from the majority in Parliament and/or presidents and monarchs have primarily representative function. Following the logic of parliamentarism there are many instances of Parliamentary elections in continental systems,[31] sometimes by one chamber, or even a parliamentary committee. In some cases it is the President of the country who has appointment or recommendation powers and this, notwithstanding the otherwise very limited power and legitimacy of the President, may temper parliamentary majoritarianism. The Czech Constitution provides that the President of the Republic should appoint the Members of the Monetary Council. When in 2000 President Havel appointed the Vice-President to become Governor of the Czech Bank lack of countersignature was not found to be a constitutional condition, notwithstanding the lack of political responsibility of the President because "one component of the guar-

[31] The logic of parliamentarism is exceptionally also followed in the European Union. The European Ombudsman is appointed by the European Parliament after each election of the EP and for the term of the legislature. The Ombudsman`s mandate is renewable. Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom) (JO L 113 du 4.5.1994, p. 15).

antee of the CNB's independence is that the power of appointment is in the hands of a non-partisan President... ."[32]

Hungary, a strictly unicameral country with a parliamentary regime represents an interesting combination of continental and US models in order to prevent party domination. In regard to the broadcasting regulatory authority and the governing bodies of public broadcasters, the board members are elected technically by Parliament but parliamentary majority and opposition parties have *equal representation*.[33] Notwithstanding clear statutory requirements of independence loyalty along political party lines is openly expected. This is reinforced by the possibility of reelection.

In some countries independence is promoted by limiting the appointment powers of the political branches and granting the right of nomination to non-governmental bodies. Beyond the French examples, in Portugal e.g., the "High authority for social communication" belongs to this category with a magistrate president appointed by the Superior Council of Magistrates and 5 members elected by the National Assembly. The government also nominates one member while the others are designated by the National Council of Consumption (Conseil national de la consommation), by journalists and by employers' organizations of the social communication. A further step towards isolation by a method of designation is represented by the German Bundesbank: here appointments to the Directorate are made after consultation with the current board members.[34]

Self-governing bodies may exercise public functions and shall be mentioned in the context of independent authorities. For example, biomedical and pharmaceutical regulation and authorization is carried out in an increasing number of countries by independent appointed bodies representing professionals. The Swiss Federal Institute of Intellectual Property (*Suisse Institut Féderal de la Propriéte Intellectuelle*, IFPI) has autonomous power to determine charges for its public services. This is representative of practices that exist in many other countries in the area of intellectual property. The *Conseil* of IFPI is composed, among others, of patent lawyers and representatives of large companies with significant interest in intellectual property.

Finally, some agencies operate at least partly in quasi judicial chambers. In Germany the decisions of the Federal Network Agency in its rule making capacity are taken by organs of collegial structure *(Beschlußkammer)* which ren-

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[32] Pl. US 14/01, Czech Constitutional Court.

[33] In Italy there are many different appointment procedures e.g., nomination was conferred to the Presidents of the Parliamentary Assembly.

[34] Art. 7. *Gesetz über die Deutsche Bundesbank*. See for a similar role in Italy, supra.

ders possible the guarantee of a quasi-jurisdictional independence, but its members are appointed by the federal minister. In Belgium, the Federal Ombudsman has an administrative jurisdiction. The functions of certain tribunals in Britain are also to be considered here.

III. A. 1. d. Transgovernmental models

Transnational independent authorities like the agencies of the EU offer a new form of independence guarantee. Here appointment is made by national (mostly executive) bodies and European institutions. Even if the national appointees are ex officio members or otherwise dependent of the national executive not a single national or Union entity is capable of exercising decisive influence. Article 8 of the Council Regulation on the establishment of the European Environment prescribes that "The Agency shall have a management board consisting of one representative of each Member State and two representatives of the Commission. In addition, the European Parliament shall designate, as members of the management board, two scientific personalities particularly qualified in the field of environmental protection, who shall be chosen on the basis of the personal contribution they are likely to make to the Agency's work."[35] The members of the Europol and Eurojust enjoy a status which guarantees the independence of their members; the latter are appointed by the governments of the Member States. These institutions depend closely on the Council, to which they are responsible.

III. A. 1. e. Summary

The guarantees of independence vary by jurisdiction. Most often the independent authorities are headed by a collective body though individual leadership is also significant, especially in the context of rights protection. The involvement of the different branches of power in the appointment diminish the likelihood that one political branch, party or interest group will dominate over the authority. Additional safeguard measures include the inclusion of magistrates and appointees of professional bodies, and even self-selection. In collegial systems staggered mandate helps to diminish the dominance of the political majority of the day. Fixed non renewable terms prevent dependence. The prohibition on removal without cause is the rule, while removal on specific grounds is often curtailed by complicated procedures where different political authorities have to agree and/or are subject to judicial review. Conflict of interest rules apply for appointment, during and after holding the office. Such measures did not save, e.g., American IRAs from being accused of operating a revolving door that

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[35] Council Regulation (EEC) No 1210/90 of 7 May 1990 on the establishment of the European Environment Agency and the European Environment Information and Observation Network

leads their staff to regulated industry and back. Formal rules cannot guarantee independence and there is independence without formal provisions. Independence is a state of mind (Frison-Roche, 2006. p. 73).

III. B. Institutional guarantees of functional independence

III. B. 1. Operational independence

III. B. 1. a. Non-interference

Operational independence is generally guaranteed by the statute establishing the independent authority. Such statutes often provide that the independent authority shall not be subject to instructions or orders of any state body. The independent authority operates independently of public functions, so no other public authority of the State can inflict tasks on them, control or even sanction them. Special legislative prohibitions may preclude the legal possibility of executive (ministerial) intervention. Such prohibitions might be constitutionally suspect as they might be in violation of the constitutionally granted plenary power of the executive in matters of administration. But such provisions are often missing in the establishing statute, especially where the administration is constitutionally bound to be directed by the government. This is the case, among others in Spain, though some authorities were provided with such immunity. (Rodriguez, 2001, p. 422.) In Great Britain quangos operating within departments are without specific statutory protections. In Germany, for example The Federal Competition Council (*Bundeskartellamt)* is subject to hierarchical control (*Dienstaufsicht*) and case supervision (*Fachaufsicht*) of the Federal Ministry of Economy and it is subject to the general instructions of the Ministry.

Non-interference may also follow from general separation of powers considerations: to the extent that the AI is outside the executive the Government shall not have the powers for such influence, while the legislative branch might be restricted again by the nature of its constitutional functions and prescribed forms of operation which limit Parliament primarily to legislation. Elected politicians have nevertheless often retained formal powers beyond supervision and appointment. At the same time, they faced very few formal constraints over how they could use those powers. The examples indicate that, at least in more mature democracies such powers were not used as politicians gained more from the arms' length relation.

In fact, in some countries, it is argued that the constitutional role of Parliament is satisfied by powers of supervision. Such control might be direct, at least as long the AI is part of the administration. E.g., according to Article 162 of the

Portugal Constitution “In the performance of its scrutiny functions the Assembly of the Republic shall be responsible for scrutinising compliance with this Constitution and the laws and considering the actions of the Government and the Public Administration.” Considering that according to the same doctrine the Executive power is in reality responsible to Parliament for its administrative actions in order to be able to be accountable for its performance, a government that is constitutionally responsible for the administration shall have some power to supervise the independent authorities. Such powers are, however, limited by the independence requirement (See accountability, infra).

III. B. 1. b. Structural independence

The determination of the internal structure and procedure is generally left to the AI. The legal norm that establishes the entity may determine internal bodies for example where the composition of internal bodies like expert commissions is important to safeguard the credibility of the expert body. Some AI have statutorily established quasi-judicial chambers. Here the needs of impartiality and professionalism of the administration of justice require that structure, procedure and qualifications be determined externally. The conditions of employment (the denial to depart from standard civil service remuneration and employment conditions) may further reduce operational independence.

Budget is an important condition of institutional independence. In this regard self-determination or even co-determination powers are not granted, as a rule. Given the precarious constitutional nature of the AI, in most instances they are not recognized as independent chapters or even budget lines, and have no power to determine their own budget.[36] However, in some systems some independent authorities may participate in formal or informal negotiations in the budgetary process. The independent authorities may have more independence in programming of the execution of the budget and budgetary management. But the existing solutions do not seem to follow any consistent structuring serving independence. The American IRAs, notwithstanding their considerable personal and regulatory independence depend of the executive in matters concerning recruitments of personnel remuneration etc., and have no power to negotiate procurement matters. Budget attached strings made these agencies less dependent of executive politics but influenced by Congressional committees. Such dependence enables the bodies preparing the budget to channel the scope of the activities of the independent authorities. “Nevertheless, it does not

[36] In Germany the *Bundesoberbehörden* are attached to one of the federal ministries, with a separate budget in the budget list. In certain exceptional cases, the possibility exists for the authority to collect taxes for the services provided by the independent authority. In the French budgeting system LOLF they do not constitute even a program.

imply anything else but relatively marginal possibilities, since the Congress is essentially only invited to accept or reduce in its entirety the credit demands of the independent authorities and to control the reliability of their estimates." (Scoffoni, 2006, p. 297.) The monetary weapon turns out to be decisive but not too helpful at the same time. French and British authorities with much more limited regulatory power than their American colleagues have experienced that Parliament and the executive, while preparing the budget do not use the resulting means of influence. Once again, in an uncertain and rapidly changing environment political traditions and culture seem to substitute constitutional arrangement that is slow to emerge.

III. B. 2. Conclusions

After a learning period formal independence is mostly observed in more mature democracies: decisions are not statutorily reversed, budgetary constraints are seldom applied and personal choices seem to reflect considerations of non-partisanship. This is not to say that the formal guarantees of independence are necessarily sufficient. A further constraint on regulatory agency autonomy originates from the influence of the regulated entities (see capture, *infra*). In the prevailing separation of powers models constitutional uncertainty continues given the supremacy or exclusive responsibility of the branches in areas where the independent authority operates. Elected politicians use alternative methods of control and independent authorities may have lesser autonomy in practice than on paper or at least they show loyalties that undermine their integrity. However, formal independence is acceptable, even advantageous for politicians.[37] Elected politicians found that the practical benefits of independent authority autonomy and the costs of applying their formal control outweighed agency losses, and hence accepted agency autonomy. (Thatcher, 2005) The United Kingdom seems to be even today a good illustration of the place conquered by independent authorities in a European system. After having imposed their independence upon the political power they confirmed their rule making competences by demonstrating the elected decision makers the strategic advantages (for example, assuming certain unpopular decisions) which they may obtain from their "autonomous" intervention. (Scoffoni, 2006, p. 437.)

[37] In political science the Principal-agent (PA) framework is used for studying delegation of public power held by the political branches to agencies. Principals delegate because they believe that agencies can handle information asymmetries, will take blame and will make more credible commitments (see Central Banks, *infra*).

IV. Powers

IV. A. Regulatory, supervisory, law enforcing, and adjudicatory powers

The typical and most influential independent authority function is rule making. This is constitutionally problematic because legislation is reserved to legislative bodies in the constitution. In its judgment of 18 September 1986, the French *Conseil constitutionnel* admitted that the provisions of Article 21 of the Constitution „did not prevent the legislator from conferring the competence to fix the (…) norms permitting the implementation of an Act on an authority other than the Prime Minister" provided that it is confined to "a domain determined by and falling within the framework established by acts and regulations."[38] But the regulatory power is limited. The *Conseil constitutionnel* has pronounced elsewhere that the empowerment of the *Conseil Superieur de l'Audiovisuel* to "fix by regulation not only the deontological rules on advertising, but the entirety of the rules related to institutional communication as well" misinterpreted Article 21 of the Constitution on account of its "too wide scope of application."[39]

In the United States the legislative power of IRA is admitted and it is justified as delegated legislation. "An administrative agency's action is quasi-legislative in nature if it appears that the agency determination is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group. As such, agency rulemaking is quasi-legislative in character." (Dietz et al., 2006) Rule-making powers are based on legislative authorization (delegation) but at least in the United States such Congressional authorization is extremely vague. American courts presume that by establishing a regulatory authority with specific tasks Congressional silence or biased language is to be interpreted as conferral of legislative power. (A standard statutory formulation is to grant power "to make such rules and regulations … as are necessary to carry out the provisions of this chapter"). Other constitutional systems are more restrictive as to non-specific delegation. The German Basic Law requires specific authorization for delegated legislation.[40]

In addition to rule-making (often resulting in norms with unclear hierarchical position) the regulatory function is based on the assumption of an expertise based unbiased service of the public interest that is intermingled with other

[38] Décision 217 DC du 18 septembre 1986, CNCL, para. 58.

[39] Décision 248 DC of 17 January 1989, CSA, para. 16

[40] Article 80 [Government Ordinances] (1) The Government, a Minister or the State governments may be authorized by statute to issue ordinances. The content, purpose, and scope of the authorization so conferred must be laid down in the statute concerned…

functions. It was for these reasons that "the model of combined-function agency" emerged. (Asimow, 2000, p. 158.) In administering the provisions of the applicable statute, that is to say, in filling in and administering the details embodied in the general standards of the law, IRAs act in part quasi legislatively and in part quasi judicially. In the United States, according to the 1946 Administrative Procedure Act both independent and executive agencies are authorized to make rules (to carry out general policy) and to adjudicate (in regard to individual rights). For example, Federal Trade Commission Act Section 6 (15 USCA s 46), among other things, gives the commission wide powers of investigation in respect of certain corporations subject to the act. Many such investigations have been made, and some have served as the basis of congressional legislation. In making investigations and reports thereon for the information of Congress in aid of the legislative power, it acts as a legislative agency.

Likewise a number of European agencies (e.g., audiovisual supervision agencies) not only provide for rule setting but grant licenses and supervise (among others ex officio) the satisfaction of license and statutory conditions, and apply sanctions in case of rule violation, and may influence legislation by their reports. Independent governmental commissions in Great Britain are also exercising a mix of governmental functions. The commissions are established to set standards with the force of law, especially in regard to private sectors of the economy and then enforce those standards.

IV. B. Procedures in independent authorities

IV. B. 1. Rule setting

The 1946 US Administrative Procedure Act requires that in formal rulemaking hearing is to be held where a commissioner or an impartial administrative law judge presides. As to informal rulemaking it shall go through notice, comment and publication. Hence the rule-making is made transparent and participatory; disregard of the requirement may result in judicial voiding of the rule itself.

In many European countries procedural guarantees are sometimes not clear, especially in rule-making; secrecy is advocated in certain areas of economic regulation. The requirement to provide a statement of basis and purposes is less stringent. Even the duty to motivate legislation is relatively week in the European Union (Article 253 of the Treaty of the European Union) as only lack of motivation (but not a statement on alternatives) serves as ground of nullity.

In Europe participatory rights in rule-making are not a general requirement and where such rights exist they are often diverted to serve the interests of the regulated actors, just like in the United States. The importance of consultation

for national regulatory agencies is recognized in European Union law with regard to the transnational dimensions of regulation. European telecommunication legislation might serve as a good example here. "It is important that national regulatory authorities consult all interested parties on proposed decisions and take account of their comments before adopting a final decision. In order to ensure that decisions at national level do not have an adverse effect on the single market or other Treaty objectives, national regulatory authorities should also notify certain draft decisions to the Commission and other national regulatory authorities to give them the opportunity to comment."[41]

IV. B. 2. Law enforcement

As to the enforcement of law in the United States commissions must issue a complaint stating the charges and giving notice of hearing upon a day to be fixed. The parties have all due process rights at the hearing. In case of finding a prohibited behavior a report in writing is issued stating its findings as to the facts, and to issue and cause to be served a cease and desist order. If the order is disobeyed, the enforcement is asked from the courts. In Europe it is not always clear that the rule of law guarantees of administrative procedure are applicable in the context of independent agencies which are outside ordinary public administration; recently, however, serious efforts were taken towards solutions that satisfy due process requirements, see the telecommunications directive, *supra*. As to decisions directly affecting interested parties in Europe, the fair procedure requirements of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms shall apply. Further, judicial supervision is instituted in many countries. In Italy Act no. 2000-205 (Article 7) left all questions in relation to public services, comprising several economic services related to administrative acts, to the exclusive competence of the administrative judge.

V. Central Banks: An Example of Self-sustaining Independence and Its Reasons

V. A. Why we need an independent central bank?

One has to look at the modes of operation of independent authorities in order to understand their constitutional implications. Central banks offer the best example, not only because of a high level of constitutionalization but because, partly due to transnational networking central banks may have achieved the maximum

[41] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services ("Framework Directive"), (Recital 15).

of independence possible. "Independent central banks have gained in stature around the globe as they have delivered low inflation, been perceived as necessary …, and benefited from the erosion of support for elected officials' economic authority (e.g., in Japan)." (Posen, 1995, p. 260.) The expertise based independence of central banks is representative for other independent economic regulatory agencies: all these institutions are expected to enhance the credibility of the economic system by limiting the intervention of elected politicians in order to make private investment more attractive. (Henisz, 2000) "Politicians 'use' of central bank independence to signal creditworthiness in middle-income developing countries will rise with the objective need for international financial resources measured through the balance of payments." (Maxfield, 1997, p. 36.) Given the regulatory competition for investment once a credibility enhancing mechanism is accepted by a government other governments intending to compete have to adopt the measure. The result is the rapid diffusion of banks and other independent economic regulators. (Telecommunications regulation in the European Union is another case to the point.)

The idea of efficient market economy presupposes the isolation of the market from politics and "politicians, who all too often cannot be trusted with [economic] policy, both because they lack any competent understanding of what monetary policy does for – or to – the society and because they have personal political interests in misusing such policy." (Hardin, 2002, p. 84.) Central bank independence is intended to serve monetary stability and, therefore, it applies to an area of economic activities where distrust in politics is particularly proper. The assumption of expert agreement regarding 'disinterested' monetary policy is a central one in justifying the independence of central banks. The decisions of the central bank are presented as purely professional, as if the means or even goals would be taken for granted or at least subject only to professional disagreements although, in reality, "monetary policy formulation is far from scientific and objective." (Levy, 1995, p. 5.) Further, central bank independence reflects an economic orthodoxy, namely the 'quasi-constitutionally' imperative need for prize stability.

V. B. Actual independence

The ideal of central bank as a politically neutral institution that enables 'pure professionalism' is represented by the European Central Bank (ECB).[42] Contrary to a national bank, there is simply no available political institution that could have exercised governmental influence in the European Union. The ECB is prohibited to accept instructions from EU governing bodies or national governments (though the majority of the Board of Governors are national bank

[42] Latin American and some post-communist constitutions (e.g., Poland, Lithuania) have detailed constitutional rules on the decision-making and guarantees of independence.

presidents). The personal independence guarantees of the ECB "spill" to the participating national bank presidents (5 years term, non-removability, etc.). These expectations are in a way *super-constitutionally* entrenched – member states cannot do anything about it.[43] In the case of European Union a network of member states' central banks consolidated itself around the ECB; such networking helps to shield the ECB from nation state political actors. This international networking that results in an independent sub-governmental network policy fits into the emerging international network governance. (Slaughter 2004)[44]

Of course, there are alternative historical models of bank independence.[45] Contrary to the "isolationist" ECB model, the Federal Reserve has a dual task; it has to take into regard employment, too, and not only monetary (prize) stability as is the case with the ECB.

Formal guarantees of independence are not always necessary for independent and transparent operation nor are such guarantees sufficient to obtain independence. *Vice versa,* several empirical "results indicate that inflation is negatively correlated with the degree of de jure autonomy of the central bank in industrialized countries but not in developing countries. A possible explanation is that … in these countries, the de jure autonomy of the central bank is a poor proxy for its de facto autonomy." (Guttierez, 2003, p. 1.)

The independence and neutrality of the central bank is certainly not required by any traditional separation of powers doctrine of liberal constitutionalism. (Giordani and Spagnolo, 2001) One could say that the insulation of central banks contradicts the traditional doctrine of parliamentary sovereignty in financial matters but the constitutionalization of central bank independence is a necessary precommitment in a democratic (vote-maximizing) system. Precommitment is necessary because otherwise "the incumbent party may engage in stimulative monetary policy in the period immediately before an election, in order to increase economic activity, raise employment, and create a strong, if temporary, sense of well-being among the voters." (Miller, 1998, p. 436–437;

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43 The German Basic Law, Article 88 [Banque fédérale] expressly recognizes the European Central Bank as an independent authority in the context de L'Exécution des Lois Fédérales et l'Administration Fédérale.

44 In the case of broadcasting regulatory agencies the European Platform of Regulatory Authorities (EPRA) provides legitimacy and protection as a sub-governmental international network. National regulators of the EU member states in the telecom, electricity and securities sectors cooperate as gouvernement en reseau. This creates new legitimacy for the participants.

45 See Bank of England (post-1997 reform), the Bank of Canada, the Swedish *Riksbank*, and the Reserve Bank of Australia. In these countries the medium term inflation target is (still) set by politicians while in the ECB model the target is jointly agreed between the National Bank and the Government.

Cukierman, 1995) One could argue that the independence guaranteed at statutory level is not a very serious legal precommitment. The majority of the day may alter it, reshaping decision-making bodies or altering the terms of the President of the Bank. Appointment of independent minded Bank Presidents is often a matter of contest. (Maxfield, 1997, p. 57.) In Poland and in Hungary, whenever the President of the National Bank was an appointee of the 'previous' government the government of the day criticized him for being loyal to the government that appointed him.

VI. The emergence of neutrality in the public space

Independent authorities in their infinite variation represent a fundamental challenge to the prevailing model of constitutional democracy because such institutional solution intends to place state and other public activities outside the existing branches of power and beyond democratic control of the general public (the electorate). The existence of independent authorities cannot be explained by efficiency considerations. After all ministries and departments may have equivalent expert knowledge and civil service rules might provide sufficient protection for making these professional considerations prevail. Nevertheless, "the reason put forward" was that the "traditional State [was] incapable to fulfill the missions concerned" (Frison-Roche, 2006, p. 24.) Furthermore, the AI enables the executive and legislation to develop public policies which are unpopular without taking the blame for it.

In response to the increasing suspicion regarding the incapacity of the modern state (as a network of organizations), the state pretends to be non-partisan or neutral in an increasing number of instances. (Manetti, 1994, Sajó, 2001, pp. 369–389.) Institutional arrangements are developed to make that claim credible. Neutrality has become an important dimension and value of state activities, including civil service, government speech, science, arts funding, etc. These activities are increasingly located outside the public space that was traditionally constitutionally controlled. Neutrality expresses the need or wish to keep (political) government outside certain socially divisive matters or areas that are believed should follow their own professional considerations. The state does not take sides and hence does not distinguish in a partisan way between friends and foes. (Schmitt, 1996) For this reasons (and also related to ongoing privatization of previous state functions in the welfare state) in last decades government is increasingly identified with *neutral institutions* in the process where allegedly apolitical governance replaces partisan political government. Independent authorities, being independent from political powers, and being allegedly motivated by professional considerations only bear witness to such neutralization.

From the perspective of constitutional theory such neutralization fits into the tradition of the liberal state as envisioned by Benjamin Constant who, incidentally, was the only public supporter of an independent administration in 19th century French thought. (Conseil d'État, 2001, p. 251.) Constant developed a concept of *pouvoir neutre* to provide neutrality (non-partisanship) *within* the state. The neutral power emerges in constitutional monarchy to solve the conflicts among the branches of power and social groups and it pertains to the king (head of state).[46] The ministers (the executive) are an active power with responsibility, while the king is inviolable and his neutral power is non-political. The neutral power cannot "annihilate" the other powers, its role is that of preserving the other powers. Modern, expertise based non-political entities take over the place of the monarch. The neutral power is above the "common condition," remains uninvolved in the common agitation, it is impartial. (Constant, 1961. p. 19-21.)

Independent authorities ranging from professional self-regulative bodies with public mandate and sanctioning power to mixed legislative-adjudicative and strategic national policy setting powers are to be understood as part of the process of neutralization. The example of central banks and the problems surrounding independence indicate that in many regards neutralization is only a new form of exercising power, where the influence of political power is well hidden; in consequence private power can be presented as 'natural' self-determination. Such activities are often described as serving Parliament or being under Parliament or defending the Constitution or constitutional rights.

The meaning of "neutral" and "neutralization" in the context of the state and government is ambiguous. Historically state neutrality referred to non-involvement in matters of religion. The neutral state *refuses the take position* in matters of religion (world-view). A second idea of neutrality developed in the context of international law where neutrality referred to non-interference in the armed conflict of other states. A third tradition of neutrality refers to impartiality: here, contrary to the other meanings, neutrality is safeguarded against the involvement of the decision-makers in public affairs. This kind of impartiality characterizes the decision-maker (arbiter, judge, and some regulators). Impartiality satisfies minimalism in morality. Impartiality is satisfied if "the rule serves no particular interest, expresses no particular culture, regulates everyone's behavior in a universally advantageous or clearly correct way. The rule carries no personal or social signature." (Walzer, 1994, p. 7.) Independent authorities and other social institutions were created to provide non-interference,

[46] Carl Schmitt used this approach to justify the use of power of his client, Reichspresident Hindenburg in his debate with Hans Kelsen. Kelsen argued that the powers claimed by Schmitt to the President shall be granted to a Constitutional Court.

hence they are *insular* and in some instances autonomous (self-managing) even impartial in the sense of universally advantageous. This serves as a source of legitimacy.

Neutrality has become an increasingly attractive virtue of the liberal state. The non-involvement of the state in certain matters that were dividing the society in a fundamental, identity shaping way is seen to be the guarantee of social peace or truce. In a way, social peace by neutralization lies at the heart of Madison's dream of constitutionalism. He sought to find governmental neutrality against the factionalism that is transferred through the branches of power. However, in the democratic representative system government power became the prey of party partisanship. To the extent that the state machinery is the easy prey of (intolerant or simply interest-maximizing) majorities, additional *internal* neutralization is a reasonable alternative.

The modern state is identified not only with its representative institutions but also with the administrative structures operated as public bureaucracies. Public bureaucracies do offer a degree of neutrality in the sense of not necessarily being politically partisan. However, the depoliticization of public administration remains incomplete within various democratic spoils systems. Administrative decisions, especially those that affect communities in a substantive way, remain discretionary. Furthermore, these decisions threaten the optimal operation of autonomous spheres of life e.g. business, science etc. But while industry is divided between capitalists and labor, and may require public, hopefully less biased, intervention, the design of modern science, art and many professions is based on the assumption that only these communities are able to handle their own problems; external interference would be detrimental. Autonomous bodies might be biased but, in principle, are beyond partisan politics and, therefore, their rule-making and decisions are deemed to be neutral in the sense of the non-political. The independence of neutral institutions and the neutrality of the regulation of other sectors serve important interests.

The modern state, like any other complex organization, has plural commitments. Democratic politics limits the state's capacity in keeping its commitments. Democratic welfare states are structurally determined to over-commit themselves. One way out of the resulting inefficiency is to delegate the whole commitment-making process to institutions that are beyond the reach of ordinary politics (see the central bank example, *supra*). In a complex modern society the state as public power increasingly moves out and away from certain public spheres and allows a certain autonomy for the regulated sphere, which is deemed neutral (not subject to direct governmental/political interference). But in the welfare state such spheres must remain subject to regulation (though in some instances self-regulation may prevail.) State neutrality is increasingly

provided by the creation of neutral (politically non-subordinated) organizations within the public administration that supervises the neutralized social spheres (the market, education, health care etc.). Impartial institutions (like courts and constitutional courts in particular) also contribute to the neutralization of the state.

"In modern democracies, most policies are chosen by institutions with some degree of independence, that is, insulation from popular pressure." (Drazen, 2002, p. 2.) These are legitimated in terms of their professional expertise, hence the growth and cult of *independent expert bodies*.

VII. Constitutional Problems and Issues

To the extent independent authorities take over regulatory, adjudicative and administrative functions it raises constitutional concerns in regard to all traditional branches of power, both in terms of accumulation of powers and because of the potential incursion into the sphere of other branches. Except a few express recognitions of the existence of AI in more recent constitutions the existence of an entity with administrative, regulatory and even adjudicative functions challenges constitutional orthodoxy and positive constitutional law. Democratic orthodoxy is challenged, too in the sense that such entities are often very far from any democratic control and accountability reaching the point of self-perpetuation.

VII. A. Checks and balances

VII. A. 1. A branch of power outside the tripartite division?

American jurisprudence has attempted to keep IRAs within the tripartite system of separation of powers. While the constitutionally mandated presidential prerogatives of appointment are respected in the case of independent authorities they are also constitutional in being created by Congress. Congress has authority to establish entities which have quasi legislative and quasi judicial agencies and such agencies may discharge their duties independently of executive control. Such entities exist under the umbrella of Congress but the Supreme Court tries to avoid the issue of subordination or full location of an independent authority. The FTC was characterized "as an agency of the legislative and judicial departments."[47] To the extent that it exercises any executive function, as distinguished from executive power in the constitutional sense, it does so in the discharge and effectuation of its quasi legislative or quasi judicial powers, or as an

47 *Humphrey's* at 629.

agency of the legislative or judicial departments of the government."[48] The emphasis here is on constitutional appointment powers. The appointments clause is the bulwark against one branch aggrandizing its power at expense of another branch, but it is more: it preserves another aspect of the Constitution's structural integrity by preventing diffusion of appointment power. By vesting the President with exclusive power to select principal, or noninferior, officers of the United States, the appointments clause prevents congressional encroachment upon Executive and Judicial Branches. It is argued that appointment means the primacy of the presidential selection. The President has enough control over the commissioners, hence there is at least some closeness to the executive.[49]

The 'unitary president' vision of the constitution (Yoo et al., 2005) insists on the leadership of the President in all administrative matters; indeed some historical evidence indicates that the Presidents resisted all the times full independence and presidential oversight exists to this very day over agency rulemaking. Such understanding is clearly challenged by the existence of quasi executive agencies which have law-making capacity to execute laws. There is "strong evidence that the framers imagined not a clear executive hierarchy with the President at the summit, but a large degree of congressional power to structure the administration as it thought proper." (Lessig and Sunstein, 1994, p. 2.) Such attempts seem unrealistic in the modern complex administrative state and the powers of the President regarding the executive branch do not necessarily imply oversight of all the administration. It is argued from the constitutional perspective that given the existing level of conjoining powers of independent authorities they do not fatally encroach into the balance of powers.[50]

Where there is a tendency to place all administrative and other public power exercising entities within the executive branch (e.g., in France) independent authorities are perceived as purely administrative. In Spain, in order to avoid conflict with the text of the Constitution, commentators consider such entities to be autonomous and not independent.[51] The result is an uncertain level of independence (supra). The French *Conseil constitutionnel* and the Austrian Federal Constitutional Court find the existence of independent authorities constitutionally acceptable given the limited nature of their intervention in legislation and execution. The empirical soundness of the assumption of such limited departure is questionable but it indicates that there remains a constitutionally

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[48] *Humphrey's* at 628.

[49] *Ryder v. U.S.*, 515 U.S. 177 (1995).

[50] *Mistretta v. United States*, 488 US 361 (1989).

[51] According to Art. 97 it is the government which controls administration. (cf. Rodriguez, 2001, p. 412.)

protected margin of legislation. However, Custos (2006, p. 62.) claims that "unlike the French IRAs who may be confined to a secondary rulemaking power, the American IRA enjoys a primary rulemaking power". Note that the requirement that delegated legislation shall contain 'intelligible principles' is understood with utmost deferentialism in the United States. But American regulatory law-making is constrained by the legislative branch in the form of regulatory review. The Supreme Court found that 'legislative veto' is unconstitutional[52] (but the 1996 Congressional Review Act provides that before the agency rules take effect, agencies must submit them to each House with a cost-benefit analysis). Congress may always replace regulation by law. Further congressional oversight is exercised through authorization, appropriation, and investigation. Congress may ask for specific reports. Executive control exists in the sense that the General Services Administration administers the assets of the agencies. Where there is no contrary provision in the relevant statute the President too may regulate matters falling within the authority of the IRA. A similar possibility exists in France for the Government. (Frison-Roche, 2006, p.120.) Both cases raise issues of legal uncertainty.

While rule-making seems to prevail today, at least in the activities of the most important independent authorities, the "organizational scheme of the independent agencies was designed with the adjudicatory function in mind." (Verkuil, 1988, p. 263.) Adjudication results in orders (including licenses, awards or sanctions). This is the equivalent of the licensing (rule application) function of European independent authorities.

Judicial review, especially regarding the procedural fairness (hearing rights etc.) of rule making and adjudication provide oversight and restriction of regulatory and administrative powers. Such oversight borders impairment of independence of the regulatory agencies and as such indicates once more how relative and probably non-central independence is. Even if the 'arbitrary and capricious' standard applies in most of the cases in fact courts do engage in a reasonableness analysis of the administrative decision including rule setting. The 'hard look' approach applies to policy choices, too.[53] But as Justice Jackson's (dissenting) stated : "a determination by an independent agency, with 'quasi-legislative' discretion in its armoury, has a much larger immunity from judicial review than does a determination by a purely executive agency."[54]

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52 *INS v. Chadha*, 462 U.S. 919. (1983)

53 *Citizens to Preserve Overton Park Inc. v. Volpe*, 401 U.S. 402 (1971); *Motor Vehicle Manufacturers' Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983).

54 *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 491 (1952).

As to rule making, the standard objections of delegated legislation are applicable. Locke's argument was that people never granted the power to legislate to transfer the delegated power (Locke, 1957, 141, p. 244.). As to the Supreme Court of the United States is concerned: "Congressional delegations of authority to the Executive Branch [were upheld only] on the theory that Congress may wish to exercise its authority in a particular field, but because the field is sufficiently technical, the ground to be covered sufficiently large, and the Members of Congress themselves not necessarily expert in the area in which they choose to legislate, the most that may be asked under the separation-of-powers doctrine is that Congress lay down the general policy and standards that animate the law, leaving the agency to refine those standards, "fill in the blanks," or apply the standards to particular cases."[55] Delegation is valid only if it offers intelligible principles. The American Supreme Court has repeatedly held that Congress does not necessarily violate this nondelegation doctrine when it assigns other actors rule-making power.[56] The French position is that the the independent administrative authorities use of legislative power is of limited importance and its intensity does not undermine constitutional principles: "Considering that these provisions confer the exercise of regulatory power on national scale on the Prime Minister, without infringing the powers vested with the President of the Republic [and] that they do not prevent the legislator from conferring the competence to fix the norms permitting the application of an Act on an authority other than the Prime Minister, their application is subject to the condition under which this empowerment may not concern other measures than those with limited impact both as to their scope of application and as to their content."[57] "The Constitutional Council admits with reluctance this delegation of regulatory power, of which the Government is thus dispossessed (…) However, in reality, the Authorities vested with such a power widely exercise it." (Frison-Roche, 2006, p. 119.)

VII. A. 2. Mixed powers

The functions and powers of many agencies represent a mixture of powers. Constitutional theory states as a principle that separate entities shall exercise such functions. Many independent authorities exercise a mixture of governmental functions, something that is at least suspicious from a separation of powers perspective – and the stricter the constitutional concern about separation the greater the suspicion is. It is against fundamental principles of the rule of law to allow an adjudicatory entity to carry out investigation, to rule on the

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[55] *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 675 (1980) per Justice Scalia.

[56] See, e.g., *Currin v. Wallace*, 306 U.S. 1, 15 (1939) (Hughes, C.J.).

[57] Décision 248 DC of 17 January 1989, CSA, para. 15.

basis of its own findings and to rule in matters where the agency itself is an interested party. Furthermore, according to a great number of constitutions it is impermissible to grant judicial powers to non-judicial bodies or if the AI is judicial than it is impermissible to grant such judicial body non-adjudicative powers. The standard answer to such objections refers to the lack of finality of the decision which is subject to judicial review and to the allegedly limited constraint involved in the sanctions at the disposition of the independent authority. As the Italian Constitutional Court found that the regulations issued by the Communications Regulatory Authority (Agcom, Garante per la radiodiffusione e l'editoria) "are without specific constitutional relevance, irrespective of the position of independence granted to it, … because it does not have the competence to declare with finality the will of one of the branches of power."[58] Such claims are particularly problematic in light of the subpoena powers of US agencies or the ECJ approved investigatory powers under European law of the competition authorities in disregard of standard criminal procedure guarantees.

In terms of administrative functions to be carried out by independent authorities a constitutional problem arises to the extent a constitution provides for a specific responsibility (exclusive power) of the executive (the government). There are attempts to save separation of powers by reducing the *amount* of executive (administrative) powers that can be transferred. The Austrian Constitutional Court has developed certain ultimate limits to the delegation of administrative functions. "According to the conditions elaborated by the decisions taken by the Constitutional Court, these restraints are the followings:

- the creation of an independent administrative authority shall respond to a global and major necessity
- the fundamental competences of the State (internal and external security, police powers related to pubic order) can not constitute an object of delegation to an independent administrative authority
- the delegation of competences to independent administrative authorities is subject to a control as to its efficacy and clarity
- in conformity with the Constitution management powers and responsibilities concerning the administration of the major State organs shall be preserved." (Gelard II 2006, 223-224.)

Such limited reliance on AI is also reflected in the jurisprudence of the Conseil constitutionnel that authorized only limited legislative powers of the AI (see above).

[58] Ordinanza n. 226 del 1995.

VII. B. Legitimacy problems of independent authorities

VII. B. 1. Lack of democracy and accountability

The transfer of decision-making to neutral public institutions and the rise of non-governmental self-regulatory institutions remain problematic. Policy-making institutions that are insulated from the democratic process are not necessarily fully neutralized in the sense of being exempt from political (power) influence, but they are insulated *vis-à-vis* the democratic process. Such insulation may also allow elected officials, government bureaucracies and interest groups to exercise even *more* political influence than in a transparent democratic setting. The *design* of insulated public institutions is, after all, left overwhelmingly to legislation.

Regulatory "privatization" also contributed to limiting democratic accountability. Government (public) functions (and assets) were transferred at least partly to non-governmental public foundations or corporations (legal entities). This "public management" is much heralded as increasing social participation and limiting political partisanship. In reality, the governing boards might be composed of cronies or politically reliable cadres (replaced to the extent possible by the next government). As non-governmental, quasi-private entities carrying out public functions, the entities are not subject to standard supervision; indeed, this is seen as political interference into independence. All these features enable asset stripping, with predictable impact on the trustworthiness of independent public foundations and supervising independent authorities. The withdrawal of the state from certain public domains is often determined by major performance failures accompanied with successful resistance to government of the regulated. Quite often politicians seek to avoid responsibility and AI are the design of choice for such purposes. 'Independent agency' was the favored model for delegating responsibility in times of public distrust in political decision-makers. "Recent food crises have highlighted the importance of informing people and policy makers about what is known and where uncertainty persists. But they have also undermined public confidence in expert-based policy-making. Public perceptions are not helped by the opacity of the Union's system of expert committees or the lack of information about how they work. It is often unclear who is actually deciding - experts or those with political authority. At the same time, a better informed public increasingly questions the content and independence of the expert advice that is given."[59] Even expertise became suspect: "It is not as obvious today as it seemed in the 1930s that there can be such things as genuinely "independent" regulatory agencies, bodies of impartial experts whose independence from the President does not entail correspondingly

[59] European Governance A White Paper, Brussels, 25.7.2001 COM (2001) 428 final p. 23.

greater dependence upon the committees of Congress to which they are then immediately accountable; or indeed, that the decisions of such agencies so clearly involve scientific judgment rather than political choice that it is even theoretically desirable to insulate them from the democratic process."[60]

The broader the delegation of power the greater are the chances of both increased professionalism in agency decisions but also the ability of regulators to act in their own interests and in the interest of specific regulated groups. Such dangers are increased by lack of standards which result from unconstrained delegation and discretion coupled with lack of formal and democratic mechanisms of accountability. American IRAs are accountable to both Congress and President but such accountability is limited because of the placement of independent authorities outside the traditionally accountable branches. The President and the Congress possess the power to demand that the members of the independent authorities give an account of their activities in writing, while Congress and its committees have powers to hold hearings.

As to accountability to the executive (especially in presidential systems) "[w]hen fundamental policy decisions are made by administrators, immunizing them from presidential control would have two significant consequences: first, it would segment fundamental policy decisions from direct political accountability and thus the capacity for coordination and democratic control; and second, it would subject these institutions to the perverse incentives of factions, by removing the insulating arm of the President, and increasing the opportunity for influence by powerful private groups." (Lessig and Sunstein, 1994, p. 98.)

Even where there are standards and some form of ex post parliamentary or judicial control, the standards of expertise provide protection to the agency as the regulator claims to be the depository of expertise. Parliament and its committees have no time and knowledge to exercise significant systematic oversight. The importance of accountability was, however, constitutionally recognized in the Greek constitution: The matters concerning the relation between independent authorities and the Parliament and the manner in which parliamentary control is exercised, are specified by the Standing Orders of the Parliament." [Article 101a (3)] In a Westminster type checks and balances system, especially without a written constitution there seems to be little internal limit on the way public administration is organized and executive functions can be delegated without much constitutional concern. However, delegation raises serious constitutional problems in terms of lack of accountability of the government and its ministers to Parliament, a cornerstone of British parliamentarism. It is true that the House of Commons does have the capacity to scrutinize

[60] *Synar v. United States*, 626 F. Supp. 1374, 1398 (D.D.C.) (per curiam), aff'd sub nom. *Bowsher v. Synar*, 478 U.S. 714 (1986). (per Judge Scalia)

specific incidents when necessary (Flinders, 2004, p. 781.) but direct accountability to Parliament is precluded because it is the minister who is accountable. Parliamentary supervision is often satisfied in the form of an annual report to Parliament prepared by the IA. Such report is more about the problems of the supervised area and it intends to influence policies and less an opportunity to scrutinize the activities of the independent authority. Flinders argues that in Britain the quango system is actually intended to shelter the extended state from parliamentary scrutiny: "ministerial responsibility was convention designed for the most part to prevent Parliament from trawling deeper waters in relation to the state." (Flinders, 2004, p. 780.)

Accountability is often operationalized as ex post facto executive control of legality. Rule of law consideration may necessitate intervention. However, given considerations of independence, the role of government might be limited and instead of the power of overruling independent authority decisions violating legality, it may refer the matter to a judicial organ for final review. In Portugal the powers of the independent administrative authorities can not lead to a disregard of the fundamental orientations of the determining functions of the executive power." On account of this, the doctrine acknowledges the government a power of "ultimate indirect political governance" over the independent administrative authorities which renders possible, for example, via the determination of the economic policy, the framing of their actions. (Gelard 2006, 389.).

Beyond the actual requirement and/or possibility for parliamentary accountability calling to accounts is presented as ex-post interference that borders preemptive action.[61] Therefore, mechanisms of accountability are hardly ever designed. As expressed by various organs of the Council of Europe in regard to broadcasting supervision the European "ideal" of independence is an agency that is *not responsible to any political branch*. Accountability is granted through transparency, which is provided by regular reports and duly reasoned decisions open to review by the competent jurisdictions and made available to the public. (Council of Europe 2000, para. 26). Recently the European Union went even further: "In order to ensure the manageability and consistency of the process of scientific advice, the Authority should be able to refuse or amend a request providing justification for this and on the basis of predetermined criteria."[62]

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[61] "It is clear from organizational studies ... that accountability costs, both in distracting an organization from its primary purpose and in preventing sensible risk taking". (Flinders, 2004, p. 779.)

[62] Regulation 178/2002 of the European Parliament and the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, Recital 47.

Such defensive positions are quite problematic. The level of non-interference by the political branches varies according to the specific function. Nearly absolute protection might be required to protect against distortions of elections by political interest but such interests are not present in other instances. The more distant the interest of politicians the less convincing the argument of total insulation including lack of accountability is. Even central banks are expected to satisfy conditions of accountability to government from an efficiency (price stability) perspective where accountability is seen as part of cooperation (Andersen, et al., 1986). Such conditions call for transparency, at the very least. For example, the Federal Reserve Board conducts its meetings in public. Transparency helps to provide guidance and information for coordinated behavior of the interested parties. Transparency is, however, a very poor proxy for accountability. In fact transparency does not seem to have much effect on it. Transparency is primarily a channeling of information that to some extent may help the bank to guide market behavior through signs.

To the extent independent authorities exercise delegated legislative authority and in particular given the lack of intelligible principles in such delegation the growth of independent authorities undermines democracy. (cf. Bellamy, 2006) The public-interest view of democracy argues that so long as delegated authorities enact policies that are 'for' the people, then the absence of institutional forms that facilitate democracy 'by' the people are likewise unnecessary. This argument is made in particular in regard to the EU which not only suffers from week influence of elected powers and is notoriously influenced in its decision making by expert networks but is also 'exporting' independent authorities.

VII. B. 2. Capture

The personal composition of independent authorities, the specificities in goal setting and lack of democratic accountability run the risk that the agency regulation setting and law implementation of the independent authority will serve the interests of incumbents of the regulated industry. The first independent authority, namely the Interstate Commerce Commission is considered a classic example of regulatory capture. ICC was accused for decades of acting in the interests of railroads and trucking companies by restricting competition. The agency-theory based approach assumes that an interest group has more power when its interest lies in inefficient rather than efficient regulation, where inefficiency is measured by the degree of informational asymmetry between the regulated industry and the political principal (Congress). (Laffont and Tirole, 1991) In the United States the influence of professional organizations is facilitated by the very same guarantees of participatory rule-making which were created in order to foster transparency. "The rise of citizen groups, the complexity of each of the regulated industries, result in competing strategies of

instrumentalization of the agencies, that make the capture phenomenon a dynamic process." (Custos, 2006, p. 636.) The influence of the regulated industry on regulation is also noticeable in the European Union.

VII. B. 3. Pre-commitment

Are independent authorities less burdensome and perhaps more efficient forms of regulation emerging in the context of deregulation? Is their legitimacy thinner than the one offered by being the trendiest best practice of the day? Independent authorities seem to undermine traditional constitutional structures and principles though not in the sense of running the risk of authoritarian power concentration. Independent authorities may offer at least partial remedy to the legitimacy crisis of representative government run by political parties but at the price of undermining democratic accountability. These developments reinforce trends of professional self dealings. Independent authorities, especially in the economy exist as a means of industry coordination with stabilizing effects that may not always offset the distortions caused to free competition. Are they simply efficiency driven solutions to practical problems of handling increasingly complex and increasingly transboundary socio-economic problems? The distinct contribution of the independent authorities to constitutionalism consists in reinforcing pre-commitment: "The real comparative advantage of agencies, however, is the combination of expertise and commitment. Long-term policy commitment is notoriously difficult to achieve in a democracy, which is a form of government *pro tempore*. The time limit imposed by the requirements of elections at regular intervals is a powerful constraint on the arbitrary use by the winners of the electoral contest of the powers entrusted to them by the voters." (Majone, 1997) Pre-commitment is a *par excellence* constitutional virtue and function. Independent authorities serve this function by committing political powers which are otherwise supreme in their sphere of function to minimize their intervention.

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SUMMARY

Independent Regulatory Authorities as Constitutional Actors: A Comparative Perspective

ANDRÁS SAJÓ

The essay is devoted to an area of constitutional theory that is difficult to define: it attempts to specify the place of independent regulatory authorities (IRAs in short) in constitutional models that are based on the traditional division of powers but which are not quite identical in the several countries. The examples are taken especially from the United States, Germany and France.

After presenting the difficulties of finding an exact definition for the term of independent regulatory authorities, organs and organizations, the author briefly describes the emergence and excessive multiplication in successive waves of modern IRAs, right from the beginnings when in 1889 the Interstate Commerce Commission was set up in the United States, down to their spectacular coming into a dominant position at the end of the twentieth century. The author enumerates the types of IRAs and evaluates their various versions; and points out the motivations behind founding them. Among the motivations he mentions that the state is now facing a larger number of duties than ever before; there is a need for the protection of human rights; it is imperative to satisfy the requirements posed by the various supranational organizations (as the European Union) and by the international organizations.

The paper offers an in-depth analysis of where the IRAs are located in the constitutional structure of various countries – and the examples cover, in addition to the above-mentioned countries, Portugal, Poland and Hungary. Various approaches are possible: for instance, in the United Kingdom the state boldly relies on the IRAs while keeping them out of the constitutional domain, while in Greece the IRAs have been incorporated into the constitutional model.

The essay discusses how do the IRAs gain independence from the traditional branches of power. In the course of presenting various forms of achieving independence (for instance, through governance, appointment and removal), the author weighs and evaluates the advantages and disadvantages of independence. Then he reviews the various types of the powers of the independent organizations and authorities (regulatory, supervisory, executive and decision-making powers). Central banks are discussed as a typical example of IRAs in several respects.

Finally, the author takes a close look at the problems that derive from the emergence and spread of IRAs and the challenges they pose to the state's established constitutional set-up. Note that the IRAs conduct their functions – state functions and functions related to public life – bypassing democratic control and outside the existing branches of power.

RESÜMEE

Vergleichende Übersicht der unabhängigen Behörden

ANDRÁS SAJÓ

Die Studie beschäftigt sich mit einem nur schwer zu umgrenzenden Gebiet der Verfassungstheorie: sie versucht, die unabhängigen Behörden innerhalb der traditionellen Verfassungsmodelle zu platzieren, die auf die Aufteilung der Gewalten aufbauen, aber in den einzelnen Ländern doch Abweichungen aufweisen. Sie tut dies in erster Linie über die Vorstellung der Beispiele der Vereinigten Staaten, Deutschlands, Groß-Britanniens und Frankreichs.

Ausgehend von der Bestimmung des Begriffs der unabhängigen Behörden, Organe und Organisationen, genauer gesagt den terminologischen Schwierigkeiten dieser, stellt der Verfasser kurz die Geschichte der Herausbildung und Überhandnahme der unabhängigen Behörden in mehreren Schüben vor – von den Anfängen, vertreten durch die 1889 gegründete amerikanische Interstate Commerce Commission, bis zu ihrem spektakulären Raumgewinn Ende des 20. Jahrhunderts. Der Verfasser typisiert und bewertet einzelne Formen der unabhängigen Behörden und weist auch auf die Gründe ihrer Schaffung hin. Dabei können über die bedeutende Erweiterung der staatlichen Aufgaben hinaus, der Schutz der Menschenrechte und auch der Zwang eine Rolle spielen, den Ansprüchen zu entsprechen, die die verschiedenen supranationalen (EU) oder internationalen Organisationen stellen.

Danach analysiert die Studie (neben den obigen Modellen, unter anderem unter Anführung portugiesischer, polnischer und ungarischer Beispiele) detailliert, wie diese Organe in den Verfassungsstrukturen platziert sind. Die Palette ist breit: vom britischen Beispiel, das sich kühn auf die unabhängigen Behörden stützt und die Frage außerhalb der Verfassungsproblematik behandelt, bis zum griechischen Modell, das die unabhängige Behörde "verfassungsmäßig macht."

Die Analyse schenkt dem Unabhängigwerden der unabhängigen Organe von den traditionellen Gewalten besondere Aufmerksamkeit. Im Laufe der Vorstellung der Erscheinungsformen des institutionellen Unabhängigwerdens (z.B. Leitung, Ernennung, Absetzung) wägt und bewertet sie auch die Vor- und Nachteile der Unabhängigkeit. Danach beschäftigt sich der Verfasser mit den charakteristischen Zuständigkeiten der einzelnen Typen der unabhängigen Organe und Behörden (Regelung, Überwachung, Durchführung und Entscheidungsfindung). Die Institution der Zentralbanken wird als in vielerlei Hinsicht charakteristisches Beispiel der unabhängigen Organe behandelt.

Zum Schluss untersucht der Verfasser die wichtigsten Probleme, die sich aus dem Erscheinen und der Verbreitung der unabhängigen Organisationen, Organe ergeben, sowie die grundsätzlichen Herausforderungen, die sie an die Verfassungseinrichtung stellen. Solche Organisationen rücken nämlich die staatlichen Tätigkeiten, die Tätigkeiten des öffentlichen Lebens, die Funktionen der öffentlichen Gewalt – die demokratische Kontrolle umgehend – außerhalb der bestehenden Gewalten.