

EU as the Fourth Branch of Member State Governments?

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Introduction

The debate on the democratic legitimacy of the EU has by now accumulated a remarkable amount of findings and insights. Common to those who stress the incomparability of the EU and the nation states—and are quick to point out the fallacy of subjecting the EU to the democratic criteria of its component member states—is the tendency to highlight the EU’s efficient regulatory role as a way to defend its democratic legitimacy. If we treat the EU as what it really is—namely the fourth branch of member state governments rather than a full-fledged polity, then the criticism that the EU lacks democratic legitimacy is clearly, goes the argument, based on questionable ground. The EU is already the fourth branch in many aspects. But does this role provide it legitimacy? This paper argues that, performing identical functions as (or even supersedes) the fourth branch of member state governments in terms of problem-solving ability and efficiency does not make the EU as democratically legitimate as independent agencies in member state governments. Three specific reasons are discussed in this paper. First of all, independence does not automatically translate into pareto efficiency. While this is true in domestic context as well, the non-pareto results produced by the EU *cum* independent agency will have more severe negative impact than those produced by independent agencies in a state. Secondly, representation is still relevant even as independent agencies are called for to resolve particular problems. Independent agencies work well in domestic context because of their relationship with the representative aspect of the government anchored in a fixed *demos*. Finally, the success of the EU-as-fourth-branch thesis depends on a clear separation between regulatory policies and redistributive policies. As long as regulatory policies are still redistributive in nature, the thesis will not be able to successfully explain away the legitimacy problem. Sorting out whether the EU can be seen as the fourth branch of member state governments is crucial to the EU’s future developments. If the EU-as-fourth-branch thesis is valid, then the current efforts to politicize European affairs and engage in European citizens are detrimental to the EU governance and ought to be replaced by an approach that guards the independence and distance of the Union.

EU as a legitimate fourth branch

Decision making in the EU has long been criticized as illegitimate. Defenders of the EU’s legitimacy, however, claim that the EU is judged as undemocratic or illegitimate only because it has been compared to idealized and utopian conceptions

of democracy that no existing government can live up to (Moravcsik 2008: 172). Comparing the EU to a traditional state with extensive powers of coercion, a hierarchical bureaucracy, and large welfare budget is problematic because the EU is more akin to a regulatory state. In the “real world,” democracy is best understood as constitutional democracy where “much of politics is deliberately insulated from direct majoritarian control. Existing, seemingly highly legitimate, democratic systems make extensive use of insulated institutions” (Keohane et al. 2009:9). Placing increasing autonomy in the hands of insulated leaders who have a broader and longer-term mandate or delegating increasing power to semi-autonomous authorities is therefore far from “undemocratic.” In fact, these leaders or regulatory institutions can improve the ability of national democracies to represent the diffuse interests of the public exactly through their independence and autonomy from the pressures of voters (Moravcsik 2002:611-3; Keohane et al. 2009:10). If regulation is made by majoritarian institutions, the outcome is inherently redistributive in a zero-sum manner. If, in contrast, regulation is made by independent institutions that are required to act in the public interest, then the outcome will become positive-sum (Hix 1998:51).

Over the past decades, the EU has entrenched its role as the surrogate regulator of member state governments. Being better insulated from short-term political considerations and equipped with informed and expert knowledge, the EU has the comparative advantage of taking the interests of all of Europe into consideration while being able to make the necessary moves (Majone 1994:94). In the mean time, the EU has also functioned to strengthen the relative position of national executives who, in comparison with parliaments, can better represent the more diffused interests. As a result, the publics of the member states have been able to achieve goals that they otherwise would be unable to achieve. Democracy is emphatically not about government acting as the majority prefers (that is, government by plebiscite), but about empowering the people to rule, in the long run, after due deliberation. Hence, the EU’s power to impose checks, constraints, and corrections on majorities that “are not well-informed, rights-regarding, or fairly represented” must be justified (Keohane et al. 2009:15), as it helps to block the tyranny of majority.

Being capable of blocking the tyranny of majority, however, is far from the only reason that the EU should be deemed legitimate. As more and more problems become transnational in nature, and as European integration creates more and more trans-border externalities, a transnational or supranational independent body is called for to achieve pareto-efficiency in solving these transnational problems. The EU is

created to fulfill just this role. It is by producing universally supported pareto-optimal outcomes that the legitimacy of the EU can be secured. In contrast with the input-oriented or procedural legitimacy normally associated with majoritarian institutions, the existence of independent regulatory institutions depends on their problem-solving capacity, or the so-called output-oriented or consequential legitimacy (Caporaso 2005; Dehousse 1998; Scharpf 1999:6).

If the EU is nothing more than a cluster of regulatory agencies solving trans-border externalities that had emanated from the integration process, then the EU should be deemed as performing identical functions as the fourth branch of member state governments. Seen this way, the Union is not any less democratically legitimate than regulatory agencies that exist within most advanced industrial democracies. This is why Moravcsik proposes that, in assessing the democratic legitimacy of the EU, instead of comparing the EU with the entire body of a full-fledged democratic polity, one has to dissect the governing body and group problems or issue areas into relevant categories before actually gauging how democratic the Union is. Hence, it is far more reasonable to adopt the following standard: “is EU governance as democratic as the (presumptively legitimate) domestic decision-making procedures of its member states in dealing with similar issues?” (Moravcsik 2008:172) Noting that the EU deals disproportionate with issues that, even within the context of a nation state, are left to the independent agencies, Moravcsik concludes that the view the EU is undemocratic is but an “impression.”

[M]ost analysts view the EU in isolation, and thus fail to appreciate fully the symbiotic relationship between national and EU policy-making—a division of labour in which commonly delegated functions tend to be carried out by the EU, while those functions that inspire and induce popular participation remain largely national. This gives observers the *impression* that the EU is undemocratic, whereas it is simply specializing in those functions of modern democratic governance that tend to involve less direct political participation (Moravcsik 2002:606).

Delegating power to “foreign” entities which are external not only to the “government” itself but also to its “constituency” is plausible mainly because the division of labor between member states and the EU corresponds seamlessly with the dichotomy between redistributive and regulatory policies. Hence, politics is still dealt

with at the national level, where democratic representation is relevant. The EU, in contrast, is apolitical given the sole task of positive-sum resource allocation. Understood this way, the EU is not meant to be “by the people” nor “of the people”—functions that are still left for the nation states to fulfill—but is only meant to be “for the people.” (Schmidt 2004: 982)

EU-as-fourth-branch thesis fails to explain away democratic deficit

Even if the EU is comparable to independent regulatory institutions of any given democratic state in terms of its *raison d'être*, this can hardly lead to the conclusion that the EU should be considered democratically legitimate just because independent agencies in democratic states are usually considered democratically legitimate. Majone argues that, in the absence of popular support for the federal vision, those who believe the EU should be governed democratically have committed “the logical fallacy of composition: inferring the property of a whole from a property shared by its component elements” (Majone 2005:3) In other words, the kind of democracy that is possible in each member state is not necessarily possible for the EU as a whole. By analyzing the EU “by means of the same concepts and criteria we use for its component units—as if the Union were a state,” a category mistake is committed. Those who conceptualize the EU as the fourth branch of member state governments as a way of defending its democratic legitimacy appear to be committing a similar fallacy of composition: Noting that independent regulatory institutions are considered democratic in domestic context, the conclusion is drawn that the EU should be considered democratic as well since it can be successfully analogized to independent regulatory institutions in the member states. This reasoning ignores the fact that, being ensconced in a political system with well-functioning executive, legislative, and judicial branches and being anchored in a *demos* are crucial to the independent regulators’ being considered legitimate in the domestic context.

That democracy at the European level has its limits as long as a European *demos* is absent and the European public is not ready for a federal Europe is a valid point. With creativity, however, there can be a whole range of possibilities for improving the situation of democratic deficit—with the recognition of its existence being a prerequisite. Based on this belief, I focus on the EU-as-the-fourth-branch thesis and provide three reasons why the EU cannot be complacent with its democratic performance: First of all, the assumption that independence yields pareto efficiency is questionable empirically. While this is not unique to the EU, the non-pareto outcomes

would be more detrimental to citizens when they are produced by the EU, as opposed to the national, institutions. Secondly, the EU-as-fourth-branch thesis strips away the relevance of representation or input competition entirely. Lacking the power to throw out the rascals responsible for non-pareto outcomes produced at the European level, the only choice left for citizens to do is to wish that the so-called experts are capable while always having the broadest public interests in mind. It is in this context that the paper tries to bring back the relevance and importance of representation. Finally, related to both points just mentioned above is the extent to which regulatory policies can be realistically considered non-redistributive.

1. Independent agencies produce non-pareto outcomes as well

The assumption that delegating regulatory powers to independent agencies would yield pareto efficiency is questionable. The co-variation between independence and pareto efficiency is positive intuitively but not necessarily so empirically. Delegation by definition involves a certain degree of autonomy. In illustrating the usefulness and necessity of independence in these agencies, Gormley and Balla point out that the more complex the nature of an issue area the more autonomous the relevant agencies would be.

Such independence enables skilled, creative leaders to manage their agencies more effectively. For example, during the 1990s, Alan Greenspan was widely credited with using his extraordinary influence over the nation's monetary policy to help propel the economy into one of its most robust periods of growth ever. Although Greenspan's effectiveness was derived in no small part from his personal credibility and experience, *his agency's independence from Congress and the president enabled him to pursue his vision of sound monetary policy without interference and distraction* (Gormley & Balla 2004:13, emphasis added).

With 20-20 hindsight, questioning the wisdom and correctness of Greenspan's policies is easy but unfair. Yet this example does demonstrate that independence would not necessarily lead to pareto efficiency, even in the long run. Independence gives relevant agencies a certain advantages such as insulation from voters and concentration of specialized knowledge, but so does it create problems such as capture, biased knowledge and path-dependency. These problems are especially pronounced when political parties are weak, specialized interests are strong, and

unorganized interests are under-represented, such as is the case in the EU (Caporaso 1996:42).

Unless objective measurements are available to guarantee that the advantages can more than compensate the problems, the so-called “pareto efficiency” that all independent agencies would automatically achieve is but a myth. Whether or not the policy outcome of an agency is satisfactory is often influenced by the belief that *since the decisions are made by a group of experts, certainly they will produce the best possible outcome*. This tautology reveals that, since it is not realistic to lay down criteria for “satisfactory,” “unsatisfactory,” and “unacceptable” policy outcomes prior to policy making under most circumstances, the perception that independent agencies can be and are being held accountable because those failing to achieve pareto efficiency will be replaced/closed is a misperception. Were individuals running the independent agencies capable of assessing the benefits and costs that flow from all possible courses of action comprehensively, “independence” could more readily be translated into “pareto efficiency.” In reality, however, administrators can only have limited knowledge about the full set of options and the consequences of each alternative. The fact that decision makers have only bounded rationality necessitates them to search for shortcuts in order to produce results within limited time. Moreover, values can only be imperfectly anticipated because the experience of a value can be very different from the anticipation of that value. Hence, instead of optimizing, decision makers “satisfice.” That is, administrators arrive at outcomes without first examining all possible alternatives, but consider options only until finding one that seems satisfactory or acceptable (Simon, 1997). This process involves simplifying, categorizing and dissecting problems with the aim to make the issues manageable to relevant administrators. Pareto efficiency becomes achievable only when one focuses on one fragment of a bigger problem at a time.

2. Effective regulation does not render representation irrelevant

While independence leads to pareto as well as non-pareto results is a fact not unique to the EU, the non-pareto results produced by the EU *cum* independent agency will have more severe negative impact than those produced by independent agency in a state. The secrecy of the Council, the weakness of political parties, the strength of special interests, and the distance of ordinary citizens from policy networks all render the decisions of independent agencies more detrimental when they are not pareto-optimal. Independent regulatory agencies are but the fourth branch at the national level—an appendix to the other three branches. No democratic systems had

ever gained legitimacy based on output legitimacy *alone*, neither would the EU (McCormick 1999:148). While the strengths of independent agencies are dependent on the isolation from voters, they are also dependent on the quality of the institutions of representative democracy (Bekkers *et Al.* 2007:300-301). In fact, too much output may even serve to decrease rather than increase the legitimacy of the Union (Jolly 2007:4).

Even though independent agencies are “independent,” such independence is still taking place within and being related to a *demos*. Much as this *demos* defines the parameter of the power of the other three branches, so it should form the reference group for whom the independent agency is making decisions for. In other words, independence does not exist in a vacuum; a relationship still exists between the insulated agencies and the *demos*. When the executive or legislative branch of a state delegates regulatory power to an agency, such delegation is deemed legitimate because it does not involve any modification of the *demos*. The agency responsible for maximizing the interests of “the people” has an unambiguous concept of who “the people” is. In assessing whether such agencies have achieved “effective” regulation, the questions “effective for whom?” and “pareto-efficient from whose perspective?” get a clear answer. Apart from well-functioning representative bodies, the existence of a lively public sphere is also crucial for keeping independent agencies abreast with what citizens’ concerns are and what their idea of “best interests of the nation” is.

The same cannot be said about delegation in the EU. The EU is not equipped with well-functioning representative bodies nor a working public sphere to inform the EU (*cum* independent agencies isolated from voters) what “the best interests of the EU” is. Rather than relieving European voters of the anxiety with regard to the democratic deficit problem, the interpretation of the EU as functioning just like any given independent agencies can raise new alarm: Maximizing the interests of the entire Europe (as defined/understood by a group of experts) may run counter to the interests of individual countries. Who is there to decide when and how one country’s interests should be sacrificed in order to achieve the greater good? Individual citizens’ interests are now determined by a group of experts who somehow—even in the absence of a European public sphere and a well-functioning representative body—just “know” where the best interests of these individuals—whether German, French, Slovenian, or Polish—lie. The EU-as-fourth-branch thesis, in other words, fails to answer how institutions “are anchored in the legitimacy of democratic mechanisms which link institutions to the public.”(Ward 2004:3)

A mechanical and narrow-focused reading of the chain of delegation seems to suggest that little oversight power is being lost when domestically elected politicians delegate regulatory power to the EU (Moravcsik 2006, 2008). The chain of delegation from voters to legislators to executives to EU agencies appears to be mirrored by a chain of accountability running in the opposite direction. Analyzing such power delegation through a holistic perspective, however, would reveal that the EU is only a truncated political system.

It lacks a broad, representative parliament with real capacity for law-making. It lacks a European dimension to its party system, with the result that group interests are not assembled into broad and coherent programmes. The consequence is a weakening of public discussion and a failure of the EU to take on popular meaning in terms of our most significant ideological dimensions (left-right, populist-elitist, activist-limited role for state)” (Caporaso 1996:42).

Regulation in the EU becomes unique in that one group of people has delegated politicians to govern this group, yet these politicians further delegate power to supranational independent agencies that have the interests of—not this particular group of people—the larger sum of several groups of people in mind. A shift of *demos* has to take place in the process of delegation. The original group of people (the small yet clearly existent *demos*) is asked to trust these independent agencies on the ground that “insulation from voters is necessary for achieving pareto efficiency.” What this line of argument fails to mention is that “the people” (the larger yet nonexistent *demos*) for whom the pareto optimum is supposed to serve is unspecified, and certainly larger than the original group. The fourth branch works in advanced countries because it shares the same base with the other three branches. It is through this common ground that it can relate back to the other three branches. For the EU to be deemed as legitimate as a fourth branch in a member state, the other three branches have to be present and well functioning at the same, European level. The insulation of regulators may be conducive to good policy output. The connection of regulators to majoritarian institutions, however, is no less crucial. In the case of the US, “ ‘although many administrative agencies are independent of the political branches in theory, they are subject in fact to a considerable measure of political influence by the President and the Congress’ (Freedman 1978: 261).... It is precisely the interplay between majoritarian and non-majoritarian processes in the American system that guarantees legitimacy for executive agencies.” (Hix 1998:52)

Even Majone thinks that apart from the quality of the institutional design and the general framework of accountability, the “relation of the institution to the other elements of the governance system” is also important for the legitimacy of non-majoritarian an institution. His emphasis in observing the relation between the regulatory institution and the other elements of the governance system is, however, on how strong the “distinctive institutional competence” of a given non-majoritarian institution is: the “legitimacy of a non-majoritarian institution depends, in the final analysis, on its ability to generate and maintain the belief of being, of all feasible institutional arrangements, the most appropriate one for solving a certain range of problems.” Majone uses the example of the European Central Bank to illustrate that, due to its distinctive institutional competence, the legitimacy problems of the ECB has become circumscribed and manageable (Majone 2005: 11). In contrast, in Krugman’s observation of the EU’s disappointing crisis management ability in the current financial tsunami, Krugman highlights the *no-demos* problem in the EU. Even with the fact that many European economies are as integrated to one another as many of the states are in the US, no government is in a position to take responsibility for the European economy as a whole. What Europe has, instead, are individual national governments that are “reluctant to run up large debts to finance a stimulus that will convey many if not most of its benefits to voters in other countries.” Under such circumstances, many expect the EU’s monetary policy to be more forceful, because while there is not a European government, there is a European Central Bank.

But the ECB isn’t like the Fed, which can afford to be adventurous because it’s backed by a unitary national government—a government that has already moved to share the risks of the Fed’s boldness, and will surely cover the Fed’s losses if its efforts to unfreeze financial markets go bad. The ECB, which must answer to 16 often-quarreling governments, can’t count on the same level of support. (Krugman 2009)

That the EU as the fourth branch cannot be related back to the other three branches is evident also in the contradictory ways the EP is being portrayed by those who deny the existence of legitimacy problem in the EU. To demonstrate that it is still the European people who have the ultimate control of the EU, Moravcsik insists that the EU employs two “robust” mechanisms of democratic oversight: “*direct accountability* via the EP and indirect accountability via elected national officials in

the Council,” (Moravcsik 2008: 175, emphasis added) even though he had just conceded that “it is not hard to see why so many observers of the EU view it as democratically illegitimate.... The European Parliament is institutionally weaker than its national counterparts, and *its elections are decentralized, apathetic affairs, in which a small number of voters act on the basis of national rather than EU concerns* (Moravcsik 2008: 172, emphasis added). The reason it is difficult to decide whether to persuade readers that the European Parliament is “strong and powerful” or “weak and powerless” is because the *demos* is unspecified and shifting. Hence, when readers need to be persuaded that the only directly elected institution in the EU is powerful, Moravcsik reminds us that the European Parliament “now enjoys the right....to accept, reject or amend legislation in a manner difficult for the member states to reject” (Moravcsik 2008: 175). When, in contrast, readers need to be persuaded that the EU is not a superstate, the emphasis shifts: “The EU’s ability to act (even where it enjoys unquestioned legal competence) is constrained by exceptional checks and balances among multi-level institutions..... The Commission must propose (by majority), the Council of Ministers must decide (by supermajority), European parliamentarians must assent (by absolute majority)....” (Moravcsik 2008: 174). The bottom line is that efficient and transparent outputs are not enough; competition over inputs is also required to make the EU legitimate. Europe’s citizens need to have the chance to choose between rival programmes and elites—a condition current EP elections fail to fulfill (Hix 1998:55). Output legitimacy, in other words, can at best supplement input legitimacy rather than replace it. (Magnette 2005:12) Governments can be considered accountable only if “citizens can discern representative from unrepresentative governments and can sanction them appropriately... An ‘accountability mechanism’ is thus a map from the outcomes of actions of public officials to sanctions by citizens” (Manin, Przeworski, and Stokes 1999:10).

The difficulty of measuring the EP’s power highlights the problem of shifting *demos*. When there is a constant shift between the small-yet-clearly-existent *demos* and the large-yet-nonexistent *demos*, problems with democratic accountability and legitimacy are bound to happen. This is also why the effect of increasing the power of the EU remains undetermined. If we follow Moravcsik’s point that the European people still have the ultimate control of the EU through “direct accountability” via the EP, then increasing the power of the EP would also increase the legitimacy of the EU. However, increasing the power of the EP has been widely seen as move that would further disempower the European people because it is a representation of different national peoples rather than of one European people. Recent findings that even as politics in the EP steadily normalizes, the European publics remain as disengaged as

ever from European elections further confirms this insight (Hix et al. 2007). Without a *demos*, the minority cannot be expected to accept the legitimacy of a majority decision (Weiler 1995:228; Jachtenfuchs 1995: 127-9).

The shifting-*demos* phenomenon pinpoints the problem with not having the corresponding well-functioning three branches. Even though insulation from voters is considered necessary for regulatory agencies to create pareto-optimal policy outcomes, as was illustrated above, the best outcomes cannot be guaranteed. In a democratic state, those who delegate power to these agencies are still ultimately responsible for the policy outcomes produced. Voters can be reasonably nimble and agile at removing or punishing decision-makers/power delegators responsible for bad policy outcomes when the *demos* of the three branches corresponds with that of the fourth. The fact that “throwing out the rascals” is difficult with EU governance has to do not just with the non-hierarchical nature of executive power in the EU (Hix 1998:50) but also with the constant shift of *demos*. The entire electorate of any given member state constitutes but one twenty-seventh of what lies at the receiving end of EU’s policies. The fragmented power structure in the EU combined with the even more fragmented nature of Europe’s yet existent *demos* make the exercise of the right to remove decision-makers responsible for bad policy outcomes fictional. With nothing being done to ensure that the EU can produce the kind of policies that citizens appear to want from it, EU policy-making has so far failed to “make the citizens of member states co-shapers of European integration rather than mere consumers, or approvers, of its outputs.” (Warleigh 2003:23) Under such circumstances, whether the outcome of a policy proves to be pareto-efficient or not and whether decision-making is being monitored becomes almost irrelevant.

Whether the EU *as is* is as democratically legitimate as the circumstances—mainly of integrated European economies—would allow (as Majone, Moravcsik, and Zweifel seem to suggest) is a question worth debating. Recognizing that the EU is as democratic as it can possibly be is, however, different from saying that the EU has no democratic deficit. Contrary to Majone’s claim that “[a]ny reasonable conclusion as to what is, or is not, compatible with democracy must carefully distinguish between the national and the European levels” (Majone 2005:4), the definitions of “democracy” and “legitimacy” have to remain unchanged in order for meaningful theoretical and policy debates to take place. Majone insists that, since “pro-European sentiment was always an elite phenomenon, no other approach would have worked,” hence, “there is a real trade-off between democracy and integration” (Majone 2005:4,10). Using the same logic, globalization and the resulting multilateral

institutions would leave citizens to choose either affluence or democracy, but not both. Such claims would render calls for democratization in countries like China utterly irrelevant in today's highly interdependent world so long as the leaders of these countries formulate public policies based on their own beliefs of how the wealth and well-beings of the people can be most efficiently maximized. The truth is that the EU can already be as democratic as it can possibly be but, due to the impact it has on the way democratic politics operate, still falls short of what is normally deemed "democratic." Denying the existence of democratic deficit, then, is to redefine the word democracy in order to suit the image of a "democratic" EU (Hix 1998:51). Recognizing that European integration would unavoidably create a certain negative impacts on democracy is different from asserting that the room for improving democratic legitimacy in the EU governance is zero. Sticking to the traditional definitions of democracy and legitimacy and get to the bottom of the EU's democratic legitimacy problem will never turn the EU into an idealized democracy but will help alleviate some of the problems associated with the clearly existent democratic deficit.

3. Regulatory policies are redistributive

The problems of bad representation and absence of *demos* would be less pronounced had policies formulated by the EU been largely non-redistributive as the proponents of the EU-as-fourth-branch thesis suggest. The thesis sees a division of labor between member states and the EU: with the former being responsible for redistributive policies and the latter for non-distributive, regulatory policies. Under the concept that the market can be separated from the state, politics is thought to be dealt with at the national level where democratic representation is relevant, while the EU is apolitical given the aim of positive-sum resource allocation. Proponents of the thesis acknowledge that efficiency-enhancing policies still have redistributive implications but insists that the redistributive problem can be easily resolved if the efficiency gains are large enough to compensate the losers. In other words, taking place against a backdrop of common benefits, the distributional effects of policies dealing with externalities and public goods are of a different order, with the first-order problem being finding the pareto frontier, and concerns over the distribution of benefits and costs being only the second-order problem. Majone points out that the two-stage decision-making process of the EU—problem-solving followed by bargaining—is ideal for resolving this problem, for Member States that are negatively affected in the first stage can be duly compensated in the bargaining stage (Majone 1998: 28).

Such an understanding of the politics of redistribution is overtly simplistic. Problem-solving according to the standards of efficiency and collective good not only involve burden-sharing and allocation of costs, but also brings about questions of rights and justice.

This concept rests on the insight that actor-neutral reasons are needed to justify a norm. Reasons based on self-interest do not fulfill the requirement of impartiality: morality entails upholding norms simply because they are right and because violating them is wrong, hence some disputes cannot be settled with reference to mutual advantage. Simply establishing an equilibrium outcome does not imply that it is right. When cooperation affects the interests and identities of the members, when it has distributive effects, conflicts have to be resolved with reference to higher-ranking principles and moral norms revolving on *what is equally just for all*. (Eriksen 2005:22)

The argument that finding the pareto frontier is the first-order concern and the distribution of benefits and costs is the second-order concern is problematic also because “voters’ preferences are not fixed or purely exogenously determined.” (Follesdal and Hix 2006:545) If voters’ preferences are fixed and exogenous to the political process, then there would be no difference between a democracy and a benevolent authoritarianism.

A key difference between standard democratic and non-democratic regimes.... is that citizens form their views about which policy options they prefer through the processes of deliberation and party contestation that are essential elements of all democracies. Because voters’ preferences are shaped by the democratic process, a democracy would almost definitely produce outcomes that are different to those produced by ‘enlightened’ technocrats.” (Follesdal and Hix 2006:545)

Specialized knowledge of experts, therefore, does not necessarily embody disinterested solutions to problems (Calhoun 2002:165; Joerges 2001; Caporaso 2005). In fact, inherent to regulatory policies is the ‘capture’ problem—the tendency for

regulators to protect special interests at the expense of the general public due to the asymmetrical lobbying capabilities and the ‘revolving door’ syndrome (Middlemas 1995:612). Given the rampant rent-seeking behavior surrounding the making of regulatory policies, the guiding principles for politicians responsible for these policies are rarely pareto-efficiency. What drives these politicians is, rather, “the provision of a *politically* optimal distribution of rents across groups seeking to influence government policy” (Caporaso 1996:43). The Olsonian biases that favor organized producer interests at the expense of unorganized consumer interests reveals that regulatory policies are far from apolitical (Olson, 1965).

If the economic theory of regulation is read with a liberal dose of capture theory, Olsonian interest-group theory, and Schattschneider’s emphasis on the partial (and highly biased) nature of interest-group politics (1960), it is easier to see why large, concentrated, well-organized and well-financed groups will usually win out in carving up the pie (Caporaso 1996:43).

Regulation, in other words, is simply “redistributive politics in another form: where interests compete for ‘capture’ of the regulator, and then redistribute rewards once they have done so” (Hix 1998:40).

In comparison with governance in a state, special interests in the EU governance have a much bigger room to influence and manipulate policy output. The weakness of European parities, the secrecy of the Council, the under-representation of unconcentrated groups all contribute to the thriving of special interests. Given this condition, increasing the international regulatory structures should naturally raise alarm. Hence, Caporaso believes that while “Majone’s work attempts to reconcile independence and accountability—as they can be in principle,” he “understates the anti-democratic possibilities of independent regulatory agencies. Even Majone, whose treatment of regulation policy is sympathetic, sees dangers resulting from a lack of transparency in regulatory structures (1994:41)” (Caporaso 1996:42). Caporaso also points out that as European integration opens up space and increases mobility for industrial and financial capital, the position of labor relative to capital is further undermined. In short, “the regionalization of the European economy, guided by the EU, is not a politically innocent process.... Relations between the state.... and the economy have changed to the advantage of capital” (Caporaso 1996:44).

That EU policy making is inherently redistributive is evident also in the depictions of what multilateral institutions such as the EU actually achieve by the 2009 *IO* article by Keohane et al. Apparently deviating from earlier claims made by the proponents of the thesis, the central argument of the 2009 *IO* article is essentially that multilateral institutions can enhance democracy *exactly because they help to redistribute resources* (determining winners and losers) in a supposedly more desirable and just way in comparison with how trade and other issues would operate in the absence of such institutions. Instead of successfully demonstrating that regulation is indeed non-distributive, Majone and Keohane et. al. only succeeded in showing that they are confident in fair redistribution when it's done by specialized regulators. The arbitrariness in this faith is obvious: *Who* should determine whether the public goods or efficiency gains are “large enough” to compensate the losers? Who can be neutral and unbiased enough to re-assign winners and losers fairly?

If it is plausible to interpret the EU as an independent regulator, one has to provide answer to the question: “independent from what/whom?” Those who see the EU as an independent agency tend to place the emphasis on “insulation from *voters*” given that most of the criticisms on the EU’s democratic legitimacy are directed toward the representation problem understood in the context of majoritarian politics. Insulation from voters, however, certainly does not imply insulation from *special interests*. Scholars have long pointed to the problem of EU regulatory policies favoring or unevenly reflecting small factions of special interests (Caporaso 1996; Hix 1998; Eberlaine and Grande 2005). Yet surprisingly, in advancing the argument that multilateral institutions such as the EU can enhance democracy, Keohane et. al. place “combating special interests” as the key reason for the democracy enhancing ability of such institutions.

The difference between the ideal international regulatory institutions prescribed by Keohane et. al. that could help enhance democracy and the real-world regulatory institutions currently exist in the EU is striking. The former are neutral and unbiased non-stakeholders who are capable of making what's unfair and unjust fair and just. The real-world regulatory institutions in the EU, in contrast, are characterized by “informalized governance” where stakeholders in a given policy area are key players in the setting of regulatory policies. Instead of making what's unfair and unjust fair and just and enhancing democracy, it is possible that the exact opposite could happen. Eberleine and Grande point out that functional pressures seldom translate seamlessly into corresponding regulatory authority. Such pressures tend to be mediated and absorbed by contextual and domain-specific factors. Partly as a result of the political

resistance from member states, the EU framework of rules does not fully match the functional need for uniform EU rules. The consequent *regulatory gap* is filled by the *transnational regulatory networks*. Far from being a “regulatory state” as Majone has described, the EU is more like a “regulatory regime” with only limited power for rule-setting, implementation, and dispute settlement (Eberleine and Grande 2005:90-95). “When wide fields of market regulation are left to coregulation by stakeholders.... or when wide ranges of organized interests are consulted upstream and downstream from the actual decision, one is entitled to wonder if the concept of representativeness still makes sense.”(Magnetete 2007:250)

Access to informal transnational regulatory networks is necessarily selective. On the one hand, formulation of policies will be fair and representative only if all crucial stakeholders are included in the process. On the other hand, if everyone has equal access, the goal of effective policy making will become unattainable. From the Commission’s view point, it has become increasingly difficult to “manage the logistics of ever-growing numbers of lobbyists and in particular to reconcile the policy of open access with the principle of equal opportunity” (Christiansen, Føllesdal and Piattoni 2003: 3). In spite of the Commission’s efforts to guarantee fair participation by affected interests, it is difficult to agree on criteria defining an actor’s representativeness. “Beyond formal criteria, political inequalities also flow from deeper inequalities in the distribution of political capital and cognitive resources among organized interests.”(Magnetete 2007:250) In the end, not only does the informalization of regulation privilege ‘decision-relevant’ or ‘blockage-capable’ interests and excluding others, but the effectiveness of such networks also requires that paths to decisions, or influences, not be disclosed. Such preferential arrangements linking EU and national officials to interest groups and other actors can at best lock in particular political visions and administrative practices and at worst become potentially clientelistic and nepotistic. The streams of selective choices that have to be made will end up ossify the system that privilege the insiders *vis-à-vis* the outsiders. From the viewpoint of democratic legitimacy, such informal governance will very likely end up in a democratic *cul-de-sac* (Eberleine and Grande 2005:106; Christiansen, Føllesdal and Piattoni 2003: 5)

Hence, even Keohane et. al. have to concede that

the empowerment of general interests is by no means an automatic result of the involvement of multilateral institutions. Publics may be insufficiently involved in

fundamental decisions, and after such decisions are made, collusion between special interests and multilateral institutions is also possible. The interests that are prioritized by multilateral institutions may be factional ones, and diffuse interests may be undermined. (Keohane et. al. 2009:15)

They insist, however, that their emphasis is that

while particular rules may be badly designed, or may themselves be biased in favor of special interests, the proper remedy is, in general, to open the process to a fuller public discussion and to revise the rules rather than to remove the multilateral constraints. Removing constraints would thwart both public preferences and public interests by enabling special interests in each country to enact protective measures at the expense of exporters elsewhere and of their own publics (Keohane et al. 2009: 16).

Apart from the most radical Eurosceptics, few critics of EU democracy would argue for the removal of EU regulatory constraints. As was argued earlier, the difference between those who consider the EU's democratic legitimacy problematic and those who deny the existence of democratic deficit is that the former believe there is significant room for improvement while the latter believe that, as is, the EU's democratic legitimacy is flawless given the circumstances. If—as Keohane et al. are forced to concede—the EU does have problems of arriving at fundamental decisions with insufficient public involvement, collusion between special interests and institutions of the Union, and prioritizing factional interests at the expense of diffuse interests, and yet removing EU regulatory constraints is not considered an option, then the only reasonable thing left to do is to find ways to reduce the democratic deficit.

Conclusion

As a response to the criticism of the EU's democratic deficit, defenders of the EU's democratic legitimacy have put forward a line of argument that focuses on the “composition fallacy” of the criticism. Rather than comparing the EU to a full-fledged democracy, these scholars argue that the Union should be compared to the fourth branch of member state governments. I have demonstrated in this paper that this

EU-as-fourth-branch thesis, even if a valid reading of the EU in terms of its *raison d'être*, tried but failed to explain away the legitimacy issue of the Union. Among other things, insulation from voters can hardly guarantee pareto-efficiency, the trump card of the fourth branch thesis that overrides all other concerns of democracy. This deficiency, while not unique to the EU, has more serious consequences when the following two reasons are taken into account. Unlike power delegation from the executive or legislative branch to independent agencies in the national context where the electorate corresponds with the parameter of people subject to the impact of policies produced by independent agencies, the delegation of regulatory power to EU institutions is a process that involves a shift of *demos*. To say that the EU is not any less democratically legitimate than independent agencies of a state because the two are comparable in terms of policy-producing efficiency is to ignore the fact that those at the origin of power delegation (national *demos*) are different from those at the receiving end of policies (the non-existent European *demos*) in the EU regulatory system. Aggravating the problem is the fact that a clear distinction between regulatory policies and distributive policies is achievable only in the most superficial sense. Not only are regulatory policies at the EU level inherently redistributive, but the informalized governing style of the regulatory regime also systematically favors organized special interests over diffuse interests.

If, given the above reasons, the EU *cum* the fourth branch cannot be considered to be as democratically legitimate as its domestic counterparts, then the concerns of the EU's democratic deficit still remain valid. Even though by now it seems evident that some kind of tradeoff between democracy and economic integration is inevitable, no theoretical or empirical studies have succeeded in demonstrating that democracy at the European level is at the best it can be. Moreover, not only is it realistic to assume that there is still room for improving democracy at the European level, but presuming that more can be done also seems to be a more responsible attitude for theorists and practitioners alike. The next logical question is *how* the democratic legitimacy of the EU can be enhanced. Since the Laeken summit, the EU has been experimenting with the approach of politicizing European affairs and engaging in the European citizens. Consulting the public, however, has been blamed for where the Treaty reform process went wrong. Involving citizens in determining which way the EU is going is "bad public policy" based on "bad social science." For Moravcsik, the collapse of the constitutional project "should be a sobering lesson for those who would promote yet another attempt to *politicize* the EU issue by pressing for ratification of this or any other European constitution." (Moravcsik 2006:235) Moravcsik argues that efforts to promote participation and legitimacy through populist and deliberative forms of

democracy were doomed to fail, because “*it runs counter to our consensual social scientific understanding of how advanced democracies actually work.*” (Moravcsik 2006:221-2) The criticism of the public-consultation approach is based on the understanding that the EU should be likened to independent agencies of the member state governments rather than a full-blown polity. As this paper has illustrated, this analogy works for the *raison d’être* of the EU but not for the democratic legitimacy of the Union. This finding should have significant implications for future developments of the EU. Its validity would be a recommendation against further consolidation of the “independent/insulation” quality of the Union.

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