Double Asymmetry and Its Alternatives

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Abstract. Whether double asymmetry is a sustainable solution to the 21st century problem of achieving peace and democracy in Europe is not self-evident against the background of the 20th century experience. However, given the fact that the two-dimensional lack of symmetry is unprecedented, there is no other way of answering that question than by taking its alternatives into consideration.

Such a comparison points in the direction, that a precautionary principle should guide the future constitutional engineering of the European Union. When push comes shove, it seems more likely that the Union will sustain if we stick to double asymmetry than if we are choosing one of the alternatives – to make the union altogether symmetric or to entirely abandon electoral accountability as our ultimate criterion. Three conditions of success are outlined. First, suprastatism must remain provisional. Second, offensive intergovernmentalism must prevail. Third, national democracies have to be vitalized rather than apathized.


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Most of today’s European politicians are convinced that the accession of the Baltic and Central European states to the Union will make up for the failure of three previous attempts at building a peaceful order. The first of these attempts was sought by the victorious Entente powers in 1919. The second and third were tried by the still more triumphant Nazi and Soviet forces during the fifty years between 1939 and 1989.

In the view of Europe’s leaders today, none of these three earlier attempts offered any sustainable solution to the problem of how to reconcile suprastatism and national self-determination. The first was based on the one-people-one-state doctrine in order to make the world safe for democracy. The second and third were the form of suprastatal rule developed by Nazi Germany and the Soviet Union. All three of them failed. At present, a new settlement – along a fourth path – appears to be within reach. How is this new attempt to be made sustainable in the perspective of these failures?

**Making the fourth attempt succeed**

In today’s European Union the provision of civil, political, and social rights are distributed in a vertically asymmetric way. The union provides some of the civil rights, mainly the commercially relevant ones. The family-related civil rights as well as the political and social rights are provided by the member states.

All rights are not ensured at the same level. The public might, at a pinch, accept this asymmetric provision even in the long perspective. So runs, at any rate, the view that has come to predominate on this question. By means of this structure, it is believed, a definitive end has been put to five hundred years of war within and between the European states.

In the Declaration on the future of the union, adopted by the Nice summit in December 2000, the problem of how to justify the fourth attempt was faintly outlined. The declaration charges the governments of the member states with taking, in the course of
their preparations for negotiations on revision of the treaties, the initiative for a debate on how suprastatism and national self-determination can better be reconciled.

According to the prime ministers and heads of state, the following issues were the most central ones, in the perspective how to secure the success of the fourth main attempt of reconciling suprastatism and national self-determination in the 21st century union. How do we best establish and monitor a more precise delimitation of powers between the European Union and the member states, reflecting the principle of subsidiarity? What should be the status of the charter of fundamental rights at the European level? How do we achieve a simplification of the treaties with a view to making them clearer and better understood without changing their meaning? And what should be the role of national parliaments in the European constitutional architecture?

These issues present themselves against the background of how easily the fascists overthrew the 1919 order, as well as how easily Nazi Germany and the Soviet Union established themselves as hegemons in the period between 1939 and 1989.

Or, to put it otherwise: when looking towards the future, today’s European politicians are facing a dilemma. They do not believe in the sustainability of the clear-cut interwar solution of one people, one state. Nor do they believe in the type of suprastatism administered by the Nazi Germany and the Soviet Union. They clearly favour the now established fourth attempt. At the same time, however, they are worried about the prospects of its asymmetrical structure. How are we to justify this fourth attempt at reconciling suprastatism and national self-determination?

In addressing the above-mentioned issues, the Nice summit officially recognised "the need to improve and to monitor the democratic legitimacy and transparency of the Union and its institutions in order to bring them closer to the citizens of the Member states."

One year later, in December 2001, the Laeken summit sought to address this need. Taking the Nice declaration as its point of departure, it appointed a convention consisting of representatives of the member states as well as the European parliament, the commission and the candidate countries.
The purpose of the convention was to pave way for the now ongoing inter-governmental negotiations on amending or replacing the established treaties. The recommendations of the convention appeared in the summer of 2003, after which the inter-governmental negotiations were brought to a standstill last December and have now started again under the Irish presidency. During the next few years, in 2005 and 2006, the Member states are scheduled to ratify the amendments to the old treaties – or a completely new treaty – agreed to in said negotiations.

**The notion of communicating vessels is too vague**

The problem of how to best justify the established asymmetry was outlined also in the conclusions of the Laeken summit. Little new was offered in this respect, as compared with the conclusions of the Nice summit one year earlier. The core question – how to improve the legitimacy of the fourth attempt – was described in the Laeken declaration as follows:

> The European Union derives its legitimacy from the democratic values it projects, the aims it pursues and the powers and instruments it possesses. However, the European project also derives its legitimacy from democratic, transparent and efficient institutions. The national parliaments also contribute towards the legitimacy of the European project. The declaration on the future of the Union, annexed to the Treaty of Nice, stressed the need to examine their role in European integration. More generally, the question arises as to what initiatives we can take to develop a European public area.

As in the case of the Nice declaration, no clear distinction is made between democracy and legitimacy. In both documents, these two words are used as if they referred to the same phenomenon, and bore the same relation to each other, as do communicating vessels. Both declarations boil down to a request that the convention suggest procedural and substantive improvements, in order to make the Union more legitimate. Greater legitimacy can be achieved, it is believed, if procedures and policies are changed. Nothing is said, however, about which is to be preferred in the event of conflict. Is democracy more important than legitimacy? Or is legitimacy rather the primary goal,
while democracy is merely a possible means for achieving a structure meeting with greater social acceptance?

If clarity is our primary aim we should not blur the distinction between democracy and legitimacy. We should not portray these two concepts as communicating vessels. If such a picture were right, namely, it would be possible to compensate for the lack of democracy by increasing the degree of legitimacy, as well as vice-versa.

A constitutional arrangement may qualify as democratic – in the sense that universal suffrage obtains and the majority can achieve a shift in government and policies by institutionalised means – without being legitimate. Conversely, a political order may be legitimate without being democratic. A high degree of legitimacy does not compensate for a lack of democracy. Nor does the converse obtain. In the name of clarity, rational argumentation and liberal values we want a political order that is both democratic and legitimate.

The idea of democracy and legitimacy as communicating vessels is too abstract and general. Instead of being illuminating, it serves to hide what is important from the point of view of our wish to maximise both values. If that is our purpose, we want to know how, to be more exact, the core values are mutually reinforcing.

**Double asymmetry**

In the Nice and Laeken formulations of the core issue if one balance between democracy and legitimacy is more acceptable than another one. In order to grasp the real world normative problem better, we should instead emphasise that the asymmetry between rights at different levels is double and mutually reinforcing in a way which is biased in favour of market liberalism.

Truly federal structures – like those in the United States, Canada, and Germany – are symmetrical both in terms of procedure and in terms of public policy content. The same can be said of truly confederal structures, such as the World Trade
Organisation. These too are symmetrical, in the sense that their rulings are not binding until they are ratified by each of the member states. All policies are decided at the level of the member state.

The European Union is neither a confederation nor a full-fledged federation. In two critical respects, the Union is asymmetrical. Democracy is not centralised to the same extent as the power to decide upon markets and their exchange and interest rate ramifications. In addition to that, market and welfare state issues are not decided at the same level.

This double lack of regular and balanced constitutional proportions is the most striking feature of our union. Recognising said asymmetry and its in-built bias furnishes a far better conceptual focal point than does the concept of democracy and legitimacy as communicating vessels – at any rate if our purpose is to focus upon what is normatively controversial in the present arrangements, or in the various alternatives thereto.

Asymmetry from the point of view of electoral accountability

Another name for the first of the two basic asymmetries is the democratic deficit. This expression has entered general usage, serving as an umbrella term for critical viewpoints of all kinds. However, the heart of the matter is easily discerned. The critical property is that of procedural asymmetry. The degree of suprastatism – measured against the criteria of majority vote, direct effect, and precedence for federal decisions – is not matched by a corresponding suprastatism in respect of electoral accountability.

This lack of procedural balance – powers are centralised to a greater degree than is the ability of citizens to hold the wielders of said powers accountable – emerges with particular clarity if we compare with federal states like the United States, Canada, Switzerland, Germany, and Austria. These polities contain a large suprastatal element too. Their federal authorities make decisions – on a majority basis – against which their member states have no right of veto.
In federal states of the normal kind, federal law has direct effect within the states, and enjoys precedence over state law. A distinct form for accountability corresponds to the degree of legal development in the direction of suprastatism. The peoples of the United States, Canada, Switzerland, Germany, and Austria enjoy the last word in deciding the political course taken on the federal level. They do this by voting in elections. Thus the electorate can hold the federal leadership accountable. The leadership must stand down, when the voters so desire.

By contrast, voting out the leadership of the European Union is impossible. In this organisation, it is not the European parliament, but rather the Council of ministers that exercises the final power. This power is applied through the legitimate exercise of authority by the governments of each member country. There is, in other words, no collective mechanism through which the ruling majority can be held accountable. As a citizen you can vote out your own government, but not the Council of ministers as a whole.

The strength of this construction is thought precisely to lie in the absence of a European electorate as the final arbiter vis-à-vis the central organs. Moreover, even if the sphere of co-decision has expanded somewhat during the last ten years, the European Parliament and European elections must be regarded as a façade. The real power lies with the other three European-level organs, the authority of which does not derive from European elections, but rather from the governments and heads of state of the member states.

To sum up the meaning of the first asymmetry: the heart of the matter is not the lack of electoral accountability in the member states. The point is rather that a democratic power base is lacking at the European level. This notwithstanding European law is decided upon by majority vote in the Council of ministers, has direct effect, and enjoys precedence within the member states.
Asymmetry from the point of view of policy content

The second of the two asymmetries refers to an imbalance in the sum total of public policies. In modern federations, a unified market and unified monetary system are accompanied by a corresponding federal mechanism for redistributing a considerable part of the gross national product across the federal territory.

This obtains in both regulatory and fiscal terms. Roughly speaking, one fifth of the gross national product is re-distributed via Washington, Ottawa, or Berlin in order to compensate for the social and economic rigidity caused by the equalisation of exchange and interest rates across their territories. Policies are not centralised just in the market and monetary regulatory respects. In addition, there are strong elements of social, regional, cultural, and labour-market regulation and revenue sharing in the centralised and federalised portions of public policies.

In the European Union, by contrast, most social – and hence democratically sensitive – regulation is controlled by the Member states. Where the use of the tax base is concerned, only somewhat more than one hundredth of the gross product of the Union is re-distributed – i.e., through the cohesion funds, the common agricultural policy, and the research programs managed by the suprastatal authorities.

All other federal constructs of this kind are monetary unions with a corresponding fiscal union. The European Union, however, is designed to work without the suprastate having the right to tax ‘its’ citizens, and without it possessing any effective powers in respect of social policy and democratically sensitive regulation.

Market liberalism is constitutionally privileged

Market and monetary policies can be decided upon according to a suprastate-without-democracy principle. By contrast, social policy has to be adopted in accordance with universal suffrage and electoral accountability within each Member state. Needless to say, negative integration of markets is far easier to achieve in such a system than is a
positive integration of social and political rights. The basic decisional rule is biased.
Double asymmetry works for market liberalism and against the welfare state at the
European level.

In the absence of constitutional statehood and suprastatal electoral accountability,
family-related legislation and fiscal powers cannot be made part of the suprastatal
structure in the same way as decisions concerning market and currency. A centralisation
of family-related legislation and of tax bases would mean taking a definite step in the
direction of statehood and democratisation. In that case, the source of political authority
would have to be found in a sovereign people of Europe, rather than in the peoples of the
member states.

In the official view, the answer to the question of the desirability and sustainability of
double asymmetry is contained in the 1997 stability pact, and in the supporting ideas of
interlocked core executive governance and strengthening the Euro-Zone by policy
convergence. In the stability pact, member state governments promise each other not to
assist one another any more than they are presently doing within the framework of the
small union budget, which is based on the principle of a membership fee (Gustavsson
2002: 94 ff.).

Or, to put it otherwise: national hardships in social and fiscal policies, caused by the
suprastatal decision-making in the market and monetary policies, provoke an extra
precaution in the national public opinions. When it comes to centralising the social and
fiscal powers as well, this is politically very important. And conversely, the logic of
election campaigns and public opinion in the member state contexts make governments
more inclined to decide upon markets, currencies and interest rates outside the reach of
electoral accountability.

In noting this mutual reinforcement of the two asymmetries and their the in-built
constitutional bias, I have said nothing about whether this characteristic trait of the union
is good or bad. That is a matter for an overall political evaluation. The important thing,
in this context, is that double asymmetry is a fruitful concept for describing what is
worth discussing in relation to the established construct and its possible alternatives. This is so because the concept addresses fundamental empirical aspects of procedure and public policy in combination.

**Regulatory or democratic suprastate as federal vision?**

To begin with, the European Union was understood as “a classic compact among states, a legal agreement entered into by sovereign powers to secure certain ends, and for the purpose of which states accepted certain constraints". The "community", of which the Rome Treaty spoke, was "a horizontal community of states, not of individuals" (Caporaso 2003: 380.).

Over the years, the notion of the community as a community of states and not of individuals has gradually changed. The process whereby this was achieved is commonly referred to as the constitutionalisation of the treaties. This expression refers to the process by which, as a result of European court of justice rulings, the treaties have successively evolved. They have gone from a set of legal arrangements binding on sovereign states, into a vertically integrated regime conferring juridically enforceable rights and obligations on all legal persons and entities, public and private, within the territory of the union. The constitutional construct was thereby transformed from a traditional international organisation into "a multi-tiered system of governance founded on higher law constitutionalism" (Stone Sweet & Caporaso 1998:102.).

The constitutionalisation of the treaties had an important consequence – whether intended or not – for democratic development, interpreted as the extension of rights. Citizenship, as made up by rights, is commonly thought of as a layer of protection against arbitrary governance, and a buffer against movements of public opinion.

Rights … identify the proper kinds of participation in markets and the state. They may be generous and entrenched, or thin and non-entrenched. The thesis that rights are narrowly attached to market-creation and perfection is the ‘thin citizenship’ view. The alternative, that rights are robust and have breadth beyond what would be required to market exchanges, implies ‘thick citizenship’. (Caporaso 2003: 380, my emphasis.)
What was made suprastatal during the 1970s, 1980s, and 1990s was exclusively the thin citizenship related to market creation. The thick aspects – political rights in terms of democracy, and civil and social rights in the form of a welfare state – remain under the jurisdiction of the member states. The built-in bias has meant that thin and thick citizenship has not become centralised to the same extent. Or, to put it otherwise: negative and positive integration is not being decided by the same decision rule (Scharpf 1996 b: 109ff.). Thick and thin citizenship has thus been *unevenly* centralised – or if you prefer to put it that way – unevenly de-nationalised (Zürn 1998: 64ff.). That is the fundamental empirical fact upon which I think the future-oriented European debate should focus.

The normative implications of this uneven centralisation or de-nationalisation are far from self-evident. Whether double asymmetry should be considered something worth preserving, or whether instead it ought to be abolished, can and should be explored from the point of view of our federal vision. Is our fourth attempt designed in the best possible fashion? That depends on the constitutional objective towards which European Union politics is supposed to be striving. Are we heading for a democratic suprastate, or for a regulatory such?

If our federal vision is a *democratic* suprastate, then the uneven centralisation of thick and thin citizenship is not a good idea. If democracy is our primary norm, we should regret the fact that market and monetary regulation is unaccountable, in the sense that the citizens of the union as a whole cannot enforce a shift in policies and in office-holders.Implicitly, then, we are wont to compare the European suprastate with the kind of suprastate operating in such member states as Germany, Austria, or Spain. Politicians in these countries decide at the federal level by majority vote, and the laws thereby promulgated have direct effect, as well as precedence over decisions taken at the state level. Correspondingly, the citizens of said countries are able to enforce a shift in policies and in office-holders, by means of majority voting and universal suffrage.

If we shift our basic norm, however, and view the suprastate not as a parliamentary
democracy but as a regulatory suprastate, it becomes considerably easier to accept the asymmetry between thick and thin citizenship. A regulatory state would then be seen as a mechanism for controlling and managing non-political externalities. Considered in this light, the powers of the European Union are rightly limited. It can do only what the Member states allow it to do: devise regulatory structures for the management of distinctively international problems. All of the really important powers – aiming at security, tax bases, and fiscal redistribution – are to be kept strictly under democratic rule within each single member state. Only commercially important aspects of national power having to do with the market and the currency are to be delegated to the Union – and in accordance with the principle of independence, rather than that of accountability.

The central normative problem of the regulatory suprastate, according to the Italian political scientist Giandomenico Majone, is "how to control and validate the exercise of legislative powers by administrative agencies that do not enjoy the democratic legitimacy provided by the electoral process" (Majone 2001: 271.). The debate along this second line of thought elaborates on the criteria of expertise, proceduralisation, and subsidiarity. Why should citizens trust independent regulators? The answer is that the delegation of powers to objective and independent agencies is viewed as an important means whereby governments can commit themselves to regulatory strategies that would not, in the absence of such delegation, be credible.

From the point of view of a regulatory rather than a democratic suprastate, the concept of delegation is normatively problematic. On the one hand, delegation from the member states’ parliaments legitimises the independence and non-accountability of the regulatory suprastate. On the other, the objectivity and even-handedness of the suprastate’s operations may nevertheless become perverted through that very thin link to public opinion and the electorates of the member states. As long as the Commission is an elected and collegial body, it can easily produce "flawed and politically motivated decisions" (Majone 2001: 271.).

A still more serious threat to the credibility of European regulatory policies, Majone argues, is the threatening parliamentarisation of the Commission. The strengthening of
the European parliament is positive for the overall legitimacy of the integration process. "From the point of view of regulatory policy-making, however, the new powers of the EP raise issues of commitment and consistency that are very similar to those … in the national context" (Majone 2001: 272).

Thus the dual problem of independence and accountability should be tackled at national and European levels simultaneously. According to Majone’s view, the sustainability of the fourth attempt depends crucially on the ability to "find coordinated, rather than vertically distinct, solutions. The emergence of transnational regulatory networks is an important step in that direction, and may prefigure the shape of transatlantic regulatory co-operation in the coming years." (Majone 2001: 272). The problem will be solved to the extent that scientific expertise at a truly global level is making up for electoral accountability in nation-states as the basic constitutional principle.

**Four alternative recommendations**

Thus far I have tried to clarify the empirical meaning and normative implications of double asymmetry and its resulting in-built bias. I have asked myself what the historically established European Union looks like and how its construction might be evaluated. Now I will lay out four alternative recommendations in the current future-oriented debate.

Which of them is the best one? My overall norm is that of sustainability and precaution in the historical striving for peace and democracy in this part of the world. How do we best proceed in order to avoid that the 21st century will turn out to become as belligerent and conflict-ridden as the 20th one?

Two of these four discernible alternatives have as their key idea to abolish the double asymmetry and thus making the established order constitutionally symmetric. The other two, correspondingly, are trying to find the best possible arguments to preserve double asymmetry in the belief that it is essential to the historical sustainability of the fourth attempt to establish an internally peaceful Europe.
Re-nationalising established suprastatal powers

If we stick to the notion that symmetry is preferable to asymmetry, we find that re-nationalising the regulatory suprastatal powers offers an obvious solution to the problem. The structure would then be entirely confederal. National decision-making and non-binding co-operation would be the guiding principle throughout. Democratic requirements are easily fulfilled in this option.

However, when we consider another basic normative requirement as well – that, as democrats, we ought to take a piecemeal rather than a utopian (Popper 1945: 138ff) approach – we arrive at a somewhat different conclusion. If our purpose is to take responsibility not just for the results at which we aim, but also for the actual
consequences of our actions in pursuit thereof, we may find that a contrary position seems more reasonable. For the economic turbulence following on a dismantling of the single market would probably be of such a magnitude as greatly to outweigh any satisfaction we might feel about aiming – in our utopian vision – at a perfectly symmetrical political and constitutional construct.

_Further centralisation of civil, political and social rights_

Symmetry might also be achieved by turning the notion of re-nationalisation on its head. Instead of abolishing the asymmetry through re-nationalisation, we could smooth out the uneven parts by democratising the powers which has already been centralised and open up for centralisation of the provision these social, political and civil rights, which are effected by the centralised market and monetary policies.

If the European suprastate were transformed into something resembling the American, Canadian, German, or Austrian suprastates, there would be an democratically accountable executive and legislature at the very heart of the Union. The Union would become a democratic suprastate, in the sense that all European elections would play a decisive role in shifting suprastatal policies, bringing them within reach of a truly European electorate and public debate.

From a piecemeal-engineering point of view, however, this second – and constitutionally very elegant – solution to the problem of the constitutional outcome is as questionable as the first discernible alternative. That is because the politicians must – in this case too – take the actual consequences of their democratising ambitions into account.

The important thing, if we choose to democratise the suprastate, is that policies based on the majority outcomes of European elections be considered legitimate. I find it hard to believe that, in such a case, the present concentration on market and monetary policy could be upheld. There is an obvious and very great risk – or possibility if you prefer – that parts the European public will look upon the union and not the member states as the primary source and active promotor of social and economic security of its citizens. The
problem would then be that such security must come as a right contained in a comprehensive European citizenship, from which the provisional of national rights are being delegated.

The point is that not all parts of an imagined European citizenry will suddenly accept majority rule in social and family-related policies. Some of them will indeed want the suprastate to develop into a welfare state and to defend a thick citizenship. Those parts of the European citizenry who will be paying the bill for such a welfare-oriented suprastate will remain sceptical; they will balk at federal taxation, they will be reluctant to foot the bill incurred by an all-European majority vote.

"Europeans have lot in common, including a history that inspired them with some very rational reluctance to give up the stateness on which the coherence of their societies critically depends", as Claus Offe remarks. However, European states are too old, in the sense of "burdened with too much history and endowed with their own specific accomplishments achieved in the course of that history, to be plausible candidates for some outright fusion" (Offe 2003: 86.).

It is unlikely that we will see, for example, any fusion of the sort that took place in the German re-unification of 1990. In the latter case, after all, there was more than just a process of negative market and monetary integration; there was also an outright positive integration of all civil, political and social rights at the same time. In practise, this meant that majority rule was accepted in Germany as a whole. As to Europe as a whole, a corresponding fusion of different societies and overall rights provision seems improbable in the foreseeable future. It would seem excessively venturesome to establish majority rule before a European political society has come into being. And, to organise the union as an overall regulatory welfare state without electoral accountability seems even more venturesome, if we want the fourth attempt to succeed and not deteriorate into fascism or communism.

A chicken-and-egg counter-argument would seem appropriate here. Might not a political society, a demos, arise as a consequence of an imposed further centralisation of civil,
political and social rights? For much the same reason as Claus Offe, I doubt whether this would eventuate under modern and democratic conditions in the member states. We should not forget that only states which are already democratic are eligible to join the European Union. The core problem lies, then, in the absence of any inspiring idea capable of driving efforts to establish majority rule at a level higher than that seen in existing democratic nation-states.

[There is one categorical dis-analogy between the historical process of nation-building and the hypothetical future process of building a European regime-cum-demos. Historically, nation-states have come into being along two alternative trajectories, the fusion of small units into bigger ones through national unification, or the splintering off of peripheries of empires (including colonial empires) in a process of national liberation and independence through separation. Unity and liberty are the two the two driving forces and guiding values alternative pathways to national statehood. (Offe 2003: 76).

Two rhetorical questions make my criticism of the alternative of further centralisation clear: what is the unifying idea in the fourth attempt? From what preceding forms of political oppression do citizens in European democracies seek their liberation? The implicit analogy with the nineteenth- and twentieth-century unification and liberation movements in countries like Germany, Italy, and Poland does not seem altogether convincing. That experiences from the more recent 20th century attempts at re-organising Europe are closer at hand has also to be taken into account.

Keeping suprastatal regulatory powers under the visibility threshold

More is not to be said about the two abolitionist alternatives. They are theoretically very interesting. In practice, however, they are not very frequent in the debate. Most politicians and commentators are not arguing for a re-nationalisation of centralised regulatory powers. Nor do they argue for a further centralisation of national powers in order to smooth out the established double asymmetry.

Most of the active politicians and commentators are instead looking for a solution along the lines set out in the German constitutional court’s decision in 1993 (Winckelmann 1994: 751-799.). According to that verdict the ratification by the Bundestag of the
Maastricht treaty was declared compatible with the democratic principles laid down in the German constitution.

In coming to that decision, the court stressed three criteria: marginality, predictability, and revocability. As long as sovereignty remains with the Bundestag and the German citizenry, reasoned the court, the suprastatal regulatory powers may be considered provisional. Thus the democratic requirements laid down by the constitution may be said – at a pinch – to have been reasonably well-satisfied. That is because most legislative and fiscal powers remain in the hands of the Bundestag, while the portions of sovereignty which have been "pooled" are being used in a foreseeable fashion. Finally – and most decisively – this pooling of sovereignty can still be revoked by the Bundestag, at least in principle.

The decision of the German Constitutional Court furnishes a reasonably elegant defence of double asymmetry. In my view (Gustavsson 1997, 1998 and 2000), this is still the best available route out of the dilemma. As the debate has developed over the last few years, the argument for trying to avoid the constitutional policy relevance of the lack of suprastatal democracy now comes in two variants: the one more defensive and cautious; the other more aggressive, ingenious, and constitutionally venturesome.

The more defensive and cautious argument supporting double asymmetry is given by political scientists like Robert Dahl and Fritz Scharpf. To them it is self-evident that "international organisations are not and are not likely to be democratic" and that "this is not to say that they are undesirable" (Dahl 1999: 32). However, since the chains of delegation are so long, and suprastatal decision-making does not take place even in theory in the shadow of elections. And since the suprastate is not likely to become democratic, we should be cautious in expanding its authority.

"In weighing the desirability of bureaucratic bargaining systems in international organisations", Robert Dahl writes, "the costs to democracy should be clearly indicated and taken into account. Even if we concluded that the gains, or expected gains, outweigh these costs, that is no reason to ignore them entirely" (Dahl 1999: 34). In Scharpf’s view,
the interest expressed by citizens in democratic accountability varies, in accordance with
the differential manner in which taxes, fees, and legal provisions are felt and are
politically visible at the household level (Scharpf 1999: 30f.).

Legal provisions bearing on conditions within families or affecting the status of
employees at work are more easily “seen”, as are policies applied in connection with
taxes and expenditures. Policies of this type are therefore harder to institute if those
responsible for making them cannot be held democratically accountable. That portion of
the norm-giving power that bears on the mobility of capital, goods, and services, on the
other hand, is not so clearly visible at the household level. The regulation of the common
market has not, therefore, called forth any drive for democratisation (Gustavsson 2002:
87 ff.).

The cautious normative implication of the so-called visibility threshold, or – more
pregnantly in German – *Wahrnehmungsschwelle* (Scharpf 1999: 30), is that suprastatal
policy-making procedures should not be expanded beyond the areas of market and
monetary policies. The redistributive and cultural effects of public policies of the latter
type are not easily discerned at our kitchen tables. At a pinch, therefore, suprastatism
without democracy might be tolerated in such areas – since the alternatives are worse.

However, as soon as suprastatism is expanded into the areas of foreign, police, asylum,
and welfare policies – well above the visibility threshold, in other words – suprastatism
without democracy seems neither realistic nor desirable. From the standpoint of
conventional wisdom – democracy interpreted as universal suffrage, thick citizenship,
and realistic prospects for shifting policies and holding office-holders accountable – it is
hard to accept more suprastatism without more democracy.

When it comes to the bulk of national sovereignty and competencies, it is far better to
co-ordinate and co-operate than to pool delegated powers. In the latter case, after all, an
enhanced problem-solving capacity can be had without also getting – besides – public
policies which are not formally binding, and which disempower the national democracy.
Abandoning the norm of electoral accountability

A more aggressive, ingenious, and constitutionally venturesome line of argument is the one aiming at a redefinition of the very concept of democracy. The approach redefines the policy relevance of the lack of electoral accountability at the suprastatal level. The European Union should not, these theorists argue, be considered a democratic, but rather as a regulatory and transparent, state in-the-making.

The key to this new and interestingly polemical strand of normative democratic theory is the assertion – in the formulation of Robert Keohane and Joseph Nye – that accountability can take multiple forms. Direct electoral representation is not the only relevant form for contemporary international governance. Accountability can be created through actions ‘in the shadow of the elections’. It can also be created by rules, monitored by independent organisations and by courts. Accountability can also be accomplished through markets, and as a result of publicity. We seek … to consider how various forms of accountability – not merely electoral accountability – could be instituted, in ways that give publics more influence on policy and that enhance the legitimacy of international governance …

… Accountable actions are explainable and sanctionable. Principals can require agents to give reasons so that they can make judgments about agents’ actions and can also directly or indirectly sanction their agents if displeased with their actions …

Notice, however, that accountability does not necessarily imply democratic accountability. A minister can be accountable to a king or a dictator. Private firms are accountable to investors in the equity markets … or to other elites with sources of power not derived from electoral strength. For an agent to be accountable, the agent must face adverse consequences if his or her actions are inconsistent with the values and preferences of the principals. Since principals require information to hold agents accountable, measures to assure accountability require mechanisms for transmission of information as well as enforcement. (Keohane & Nye 2003: 388f).

Taking their point of departure in this idea of broadening – and thus actively redefining – the meaning of democracy in relation to the European union and its member states, Keohane and Nye end up in a schema with five categories:
- electoral accountability
- hierarchical accountability
- legal accountability
- reputational accountability
- market accountability

In my view this is certainly a step forward, in the sense that we get a broader view of linguistic usage and conceptual possibility. I am not so sure, however, that this represents a step forward when it comes to solving the problem of how to reconcile suprastatism and electoral accountability in a system of double asymmetry. Is this enumeration of different meanings really as helpful as Keohane and Nye seem to believe? The problem does not necessarily disappear as a challenging issue simply because comparable problems are indicated in the society and economy at large.

By pointing to a broader range of issues illuminated by the various meanings of the key word, Keohane and Nye certainly broaden our understanding. But what is their message for the current treaty revision process? Is it the same good old precautionary principle – applied to the problem of double asymmetry – as that advocated by Dahl and Scharpf? Or is their argument – when push comes to shove – actually something else, something bolder?

The most interesting and challenging of the five interpretations, in that regard, is the notion of legal accountability. How could this be made into a fruitful criterion for defining the practise of a regulatory suprastate – one bereft of electoral accountability – in fields beyond competition law and monetary policy?

James Caporaso stresses that the regulated areas are complex, and do not easily lend themselves to *ex ante* legislation. "Instead a logic of delegation is implied in which specialised agencies are granted broad mandates to make and implement rules" (Caporaso 2003: 378.). This constitutes a real dilemma:

On the one hand, independence is necessary for agencies to be credible. If the Competition Directorate of the Commission were strongly politicized,
so as to make policy outcomes the resultant of group pressures, cartel policy would not be socially optimal. On the other hand, removal of agencies’ work from direct political control runs another type of risk, that agencies will become fiefs of their own not responsive to any principal, or develop a cozy relationship with those whom they are to regulate (Caporaso 2003: 378.).

Caporaso’s insistence that there be a democratic principal which has instructed its agents – the Court, the Commission, and the Central Bank – leaves us no radical way out of the dilemma. Available methods include "clear statutory objectives, judicial review, transparency, budgetary discipline and monitoring by interest groups" (Caporaso 2003: 379.). In practise, this means stressing the importance of transparency and the continual publication of documents. Public access must become the rule. Secrecy and confidentially should be the exception –and they must be justified in due order.

In seeking definitively to redefine the policy relevance of the suprastate’s lack of electoral accountability, Giandomenico Majone has come one step further in his thinking. In his latest book chapter (Majone 2001: 270ff.), he points to the weak point in the strategy of redefinition. That is the Achilles’ heel of delegation.

As long as the independent regulatory bodies – at their outset, as well as every now and then – derive their powers from any sort of principal, they can easily produce "flawed and politically motivated decisions" (Majone 2001: 271). Majone argues, in other words, that what needs attacking is the very notion of there being a "principal" instructing an "agent". What must be set aside is the modern notion that sovereign states – whether founded in princes or in peoples – delegate their authority. The market and the exchange of ideas, then, ought to be considered entirely self-regulating. Thus can a final solution to the problem of double asymmetry be found.

When push comes to shove

During the last hundred years three main attempts at reconciling the need for suprastatal rule with the striving for national self-determination have failed completely. Now we are in the midst of a fourth attempt. Heading for a success in that respect does not only mean
that we want popular government to be as extensive, intensive and effective (Ross 1946: 175 ff) as possible. Another important basic norm is that of *piecemeal* instead of utopian constitutional engineering (Popper 1945: 138 ff).

This supplementary great debate adds something to the question of whether the notion of double asymmetry should be abandoned and – if not abandoned – how it should best be justified. When deciding which of the four discernible alternatives to strive for, we should not disregard the question of feasibility and possible side effects. This means that we should consider the problem in a Popperian perspective as well. In brief: what should be our decisive criterion when push comes to shove?

In the Popperian view, we should be alert to the unintended consequences of our policies and programs, and be prepared to modify or abandon a course of action if events falsify our expectations. Public policies should aim not at maximising happiness but at minimising avoidable suffering. Public policies should be formed in small, clearly stated stages so that the falsifiable premises of policy can be tested.

Striving uncritically for the pure ideal of either type of suprastate – democratic or regulatory – would appear to be expressive of what Karl Popper described as utopian constitutional engineering. According to a utopian approach,

we must determine our ultimate political aim, or the Ideal state, before taking any practical action. Only when this ultimate aim is determined, or a rough outline at least, only when we are in the possession of something like a blueprint of the society at which we aim, only then can we begin to consider the best ways and means for its realisation, and to draw up a plan for practical action. (Popper 1945: 138).

This is opposed to another kind of political thinking, which may go by the name of *piecemeal* constitutional engineering. According to the piecemeal approach, by contrast, we should

be aware that perfection, if at all attainable, is far distant, and that
every generation of men, and therefore also the living, have a claim; perhaps not so much a claim to be made happy, for there are no institutional means of making a man happy, but a claim not to be made unhappy, where it can be avoided. They have a claim to be given all possible help, if they suffer. The piecemeal engineer will, accordingly, adopt the method of searching for, and fighting against, the greatest and most urgent evils of society, rather than searching for, and fighting for, its greatest ultimate good. This difference is far from being merely verbal. In fact, it is most important. It is the difference between a reasonable method of improving the lot of man, and a method which can be applied at any moment, and a method whose advocacy may easily lead to an intolerable increase in human suffering (Popper 1945: 139.).

If we are guided by the criterion of utopian constitutional engineering double asymmetry does not appear in a good light at all. As a matter of piecemeal practise, however, it might be preferable to its alternatives. This is the position taken by Robert Dahl and Fritz Scharpf, in their defence of the fourth attempt at solving the problem of how to reconcile the need for a reasonable amount of suprastatism with that of national self-determination.

Economic interdependence, Scharpf argues, is nowadays so far-reaching that it would be irresponsible to adopt a strategy of abandonment. The re-introduction of Member state self-determination into the negatively integrated single market – the confederal solution – would not just violate the treaty. "[E]scalating national protectionisms would not just mean the end of the Union, it would also plunge the European economy into catastrophic straits" (Scharpf 1996a: 149.).

Nor, Scharpf avers, should the suprastatal order be democratised. The legitimacy of the suprastate is admittedly weak. In practise, however, a strategy of democratising suprastatism – in accordance with the federal solution – would lead to unacceptable results. For it would mean that, during a transitional period of uncertain length, the more legitimate law would be superseded by the less – all in order to achieve a better state of affairs in a distant future. This would mean, in practise, that Member state democracies would decline without an offsetting improvement in the democratic quality of the suprastate.
Much is therefore at stake if politics at the European level cannot act while politics at national level has lost its effectiveness. The only means of avoiding this horror scenario is to employ the limited opportunities of action at both levels, national and European, in such a way that the existing but limited opportunities for effective policy at both levels are exploited and predictable frustrations side-stepped. This has important implications for the relationship between European and national policy. (Scharpf 1996a: 150).

The thrust of the argument is that we must – when comparing discernible options – identify, specify, and attempt to falsify our premises. It bears stressing, however, that a piecemeal approach implies no a priori defence of what has been historically established as the fourth attempt. The point is that the premises underlying each and every step in the development of our new historical attempt must be rendered clear and falsifiable. Premises supporting double asymmetry are as important to clarify and to corroborate as premises underlying its alternatives.

In the piecemeal view, neither more asymmetry nor less should be considered, by definition, to be either better or worse. Preferred outcomes must be argued for in terms of falsifiable propositions concerning the anticipated consequences of accepting double asymmetry vs. not accepting it. The question is which option is preferable to the available alternatives at any particular time.

What is considered better and worse must be allowed, moreover, to change over time and in accordance with experiences gained. A step in the direction of more – or less – double symmetry is not by definition any better or any worse. Double asymmetry is no goal in itself but rather a means for something else. It can only be justified to the extent that it contributes to making the fourth attempt a more successful attempt at securing peace and democracy than the three previous ones.

**Three Conditions for Success**

Having thus clarified the problem, I now turn to its resolution. What are the political prerequisites for turning a monetary union without a fiscal union into a success and thus avoiding not only federalism but also authoritarian measures and a complete failure?
It must be judged as a high-risk project, especially against the background given in this paper, to attempt to hinder the further growth of the suprastate while at the same time trying to preserve and develop democratic rule inside the member states. Taking such a risk can only be justified, I argue, if three conditions are met and broadly understood. These three conditions deserve special attention when trying to avoid a full-scale constitutional disaster – as a consequence of the fact that elections in the member-states to not result in any conceivable political difference in terms of policy content.

**Suprastatism must remain provisional**

The first condition concerns the suprastatal but non-accountable first pillar, which regulates the centralised powers over the market and currency. How can suprastatism and democratic accountability be reconciled? By suprastatism I mean the particular combination of majority voting, direct effect and precedence for federal law that distinguishes a federal form of government from a confederal. By democratic accountability I refer to a system in which it is possible to replace the holders of political office through general elections founded on universal suffrage and civil rights, and to achieve an alternative set of policies thereby.

All federal elements in a political structure face the problem of how to reconcile suprastatism and democratic accountability. How can decision-making be carried out on a suprastatal basis while maintaining the accountability of office-holders, i.e., ensuring that leaders can be replaced and policies changed through elections?

The most common solution to the problem is to strike a balance between the one-state-one-vote principle, on the one hand, and the one-citizen-one-vote principle, on the other. This is accomplished through a two-chamber system, in which the states are equally represented in the one chamber and the citizens equally represented in the other. Not only Canada and the U.S. have overcome opposition in this way, but also Austria, Germany, Spain, and Switzerland.

A great and interesting exception to this general rule is the European Union. Its member states are democracies. Governance within the first pillar, however, diverges from the
usual pattern by which suprastatism and accountability are combined. Within the framework of the first pillar, decision-making is suprastatal in character, while at the same time it is beyond the reach of collective judgement and review.

The argument most frequently used in defence of the EU's constitutional asymmetry is the one set forth in the 1993 verdict (BVerfGE, 17, 155-213) of the German Constitutional Court. The question facing the Court was whether the Law of Accession to the Treaty on European Union – which the Bundestag had passed by a large majority in December 1992 – could be reconciled with the demands for democratic accountability enshrined in the German Basic Law. Not until the Court had answered that question in the affirmative could the Maastricht Treaty be ratified.

The Court argued as follows: the suprastatism established in the first pillar of the Union Treaty is provisional. Sovereignties are delegated rather than surrendered. Such a delegation of sovereignties is acceptable, according to the Court, as long as the criteria of the Basic Law are upheld. According to these criteria, the use of common competencies must be marginal in relation to the functioning of German democracy as a whole, and the uses to which these competencies are put at the European level must be predictable. The delegation of sovereignty must also be revocable; that is, the German authorities must retain the prerogative to re-assume the powers delegated if the criteria of marginality and predictability are not met.

The German Constitutional Court deemed these three criteria to have been met, and so concluded that the ratification of the Treaty was consistent with the demands for democratic accountability laid down in the Basic Law.

The German Constitutional Court’s position has in fact been widely embraced – as indeed it should – in order to rescue the idea of a monetary union without a fiscal union. One of the most elaborated versions of this position can be found in the work of Fritz Scharpf (1994: 131 ff.). He calls for an overall European arrangement which is compatible both with the demands for autonomy put by the member states and with the
advantages associated with collective action arising from the principle of provisional suprastatism.

As a reformist and piecemeal constitutional engineer, Scharpf argues that we should attempt to achieve as much democracy as possible. If our purpose is to defend the principle of democratic governance in Europe, we must proceed on the basis of a realistic picture of the political options facing us in view of the completed internal market and a monetary union without a fiscal union. In practice, this means that technocratic rhetoric, rule, and practices make it easier to let first pillar issues remain submerged from political view. This way many sensitive issues that are democratically provocative, such as family related legislation and demands for fiscal redistribution via Brussels, could be deliberately avoided (Scharpf, 1999: 29 ff.).

**Offensive intergovernmentalism must prevail**

As a corollary to this first idea a corresponding condition is important. When it comes to the second (foreign policy), third (justice and home affairs), and – as I name it – fourth (social policy) pillars the handling of these issues need to remain openly and explicitly grounded in the legitimacy of each individual member-state electorate. These issues should be handled as far above the threshold of political visibility as possible. This should be done because the method of co-ordination, as opposed to suprastatism, is the only proper method of avoiding the centralisation of additional legal and fiscal powers without seeing any possibility of a corresponding centralisation of responsibilities.

By the – still informal – fourth pillar of the European Union I am referring to offensive intergovernmentalism. This is said in contrast to the more defensive safeguarding of external and internal sovereignty in defence and police matters.

To adapt words taken from the Presidency Conclusions from the Lisbon European Council in March 2000, offensive intergovernmentalism can be described as ‘a new open method of co-ordination’ that has been applied to reducing unemployment levels. It does not come about through suprastatism, as in the first pillar, but through co-
ordination in the new, informal fourth pillar. This new form co-ordination is created by concerted action, comparison, and benchmarking in order to become ‘to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion.’ (Lisbon European Council. 23 and 24 March 2000. Presidency Conclusions, para. 5.).

- Implementation of the strategic goal [of employment, reform and social cohesion] will be facilitated by applying a new open method of co-ordination as the means of spreading best practice and achieving greater convergence towards the main EU goals. This method, which is designed to help Member States to progressively develop their own policies, involves:

  - fixing guidelines for the Union combined with specific timetables for achieving the goals which they set in the short, medium and long terms;

  - establishing, where appropriate, quantitative and qualitative indicators and benchmarks against the best in the world and tailored to the needs of different Member States and sectors as a means of comparing best practice;

  - translating these European guidelines into national and regional policies by setting specific targets and adopting measures, taking into account national and regional differences;


Offensive intergovernmentalism is meant to strengthen the Euro-zone by policy convergence through “benchmarking, policy transfer and lesson-drawing” (Dyson, 2000: 260.). Policy failure should not only be defined in relation to inflation, budget deficits and public debt. As important in the perspective of democratic accountability and visibility is job creation, a stable public sector infrastructure with good schools, good daycare, family allowances and pensions in order to improve labour market flexibility and to avoid social exclusion.

**National democracies should be vitalised rather than apathised**

Accepting the restrictions formulated by the German Constitutional Court as marginality, predictability and revocability there does not seem to remain any better alternative than sticking to democratic accountability and visibility within each single
country.

However, concentrating on democratic accountability and visibility within each single member state will have a practical consequence. If the member-states are to surrender national powers to a democratically unreachable monetary union it should – as a counterbalance – vitalise rather than apathise the system of nation-wide political parties, interest groups, and open government.

Otherwise the national political life inside a monetary union without a fiscal union – in periods and areas of recession and deflation – would have to face a very hard choice. A breakdown of nation-wide political parties and trade unions would force the member states to choose between taking the step up to a fiscal union or giving up political rights and free elections in order to prevent social unrest and populist political parties from gaining influence. In order to make the stability pact work, while avoiding a fiscal union and maintaining basic human rights the member states will need more rather than less national democracy.

National political parties, popular movements, and public opinion will have to stress the importance of the second, third, and fourth pillar issues. These are not marginal in the meaning of the German Constitutional Court. Conversely, it is because of their democratic marginality that the powers regulating a unified market and unified currency have been centralized without a corresponding growth in democratic accountability at the European level. For the stability pact to work in practice, the citizens must know that the bulk of powers are still within democratic reach inside each member state.

Let us assume that we succeed in persuading ourselves that first pillar issues are relatively unimportant. Assuming that this can be done, it does not seem totally unrealistic that national democracies could be vitalised to such an extent that we would be able to manage a system of a monetary union without a fiscal union.

However, this demands far more enlightened understanding and reformist insight than has hitherto characterised the agitation in favour of further European suprastatism and
political co-ordination. Over the last decade this has all too often been presented in the simple-minded format of ‘informing’ reluctant and misinformed fellow-citizens about the historical necessity of yielding to the inevitable.

As isolated principles, provisional suprastatism and offensive intergovernmentalism are not going to contribute much to the political sustainability of monetary union without fiscal union. Those two principles will have to be accompanied by – and embedded in – a democratic culture fostering politics in the ’Abraham Lincoln’ sense of government not only for and by the people but also through the people.

It is a common mistake to underestimate public opinion. Especially, I think it is important to avoid making that error in deliberating the political sustainability of a monetary union without a fiscal union. Unlike what neo-liberals are ideologically inclined to believe, citizens ever since the French revolution have been taught to emphasise the importance of free will, choice and – which is especially important in this context – learning from experience and rational argument.

Supposedly, intellectual freedom will remain and prosper. In that case widespread public concern about critical rationalism and enlightened understanding will keep reminding us that the absence of these core elements renders the idea of democracy meaningless. If there is no choice, why should governments be accountable to national electorates?

References

*BV*erfGE [Entscheidungen des Bundesverfassungsgerichts], 89, 17, 155-213.


**Lisbon European Council 23 and 24 March 2000. Presidency Conclusions.**


