The Legitimation Crisis of Non-Majoritarian Institutions

Claudia Landwehr (University of Mainz) and Matthew Wood (University of Sheffield)

Abstract

Expert agencies and commissions are now a mainstay of governance worldwide. Policymakers see these non-majoritarian institutions (NMIs) as useful for fulfilling ‘credible commitments’ to policies that need long term solutions to complex problems, being staffed with experts in the policy field not beholden to electoral pressures. Their ‘credibility’ is also a key element of how NMIs are justified as legitimate institutions within political theory. And yet, this is not usually the reality NMIs find themselves. Rather, their scientific expertise is often challenged, their democratic credentials brought into question, and their competence held under scrutiny by politicians and the media. This makes them vulnerable to constant reform and abolition (‘quango-cide’). In Jürgen Habermas’ words, they face legitimation crises. This paper examines how NMIs combat these crises and gain/maintain their status as political authorities. Using three case studies of NMIs in Germany and the United Kingdom, it shows how the legitimation crises of NMIs differ between institutional contexts, and how they respond to particular forms of crisis in particular ways. Three forms of crisis are identified – mapping onto Habermas’ pragmatic, ethical-political and moral types of discourses. It is argued that in order to properly achieve ‘credibility’ NMIs need to fight on all three discursive fronts, but some more than others depending on their institutional form, policy area and national culture. Theories of NMI legitimacy, we argue, ought to account for the dynamism of ‘credible commitment’ rather than simply assume it exists ipso facto.

Introduction

In 1976 Gerald Kaufman published a seminal book – Are Government Organizations Immortal? - that identified numerous factors that prevented government sponsored agencies from being abolished. While subsequent research on agency termination has proved Kaufman largely incorrect, - agencies are not ‘immortal’ as he claimed - this has not stopped scholars advocating the long term benefits of government sponsored autonomous agencies. Giandomenico Majone (1996, p.4) most famously claimed in his equally seminal Regulating Europe that ‘the delegation of regulatory powers to an independent institution is—once again—a means by which governments can commit themselves to regulatory strategies that would not be credible otherwise’. The benefits of non-majoritarian institutions (NMIs), apparently, are to create ‘credible commitments’ to policies that politically ‘biased’ elected governments would otherwise change according to electoral demand. Majone (1996, p.4) did recognize the democratic tensions involved in this process, asking: ‘How is their exercise of ... power to be democratically controlled?’ His solution, tested by several scholars subsequently (Keefer and Stasavage, 2003; Elgie and McMenamin, 2005; Breen and McMenamin, 2013), was to decide in principle which powers should be delegated, and which decisions should be made by elected institutions.
The solution ... divides the general problem into two parts: first, the type of issues that can be legitimately delegated to independent experts; and, second, the means by which indirect accountability may be enforced (Majone, 1996, p.5)

The assumption here is that the expertise of the non-majoritarian institution (NMI) is sufficient to lend it credibility - and hence authority - in highly complex policy areas requiring long term commitments to resolve complex issues such as, *inter alia*: climate change, crime, structural inequality, educational underperformance, and other ‘wicked’ or contentious policy problems. But what if ‘credibility’ is harder to come by in these areas than Majone suggests? What if, as Maarten Hajer (2011, p.17) has argued, there is a ‘crisis of authority ... in many different policy areas, from the environment to healthcare, from criminality to education’? A number of scholars have shown how increasingly mediatized policy environments (Schillemans, 2016) and the growth of policy ‘blunders’ (McConnell, 2015) demonstrates how authorities, including NMIs, are finding exercising their ‘monopoly over authority’ (to paraphrase Weber’s words) increasingly difficult in practice. The consequence of these developments is that NMIs do not simply institute ‘credible commitments’ in a straightforward way given the particular policy area, but rather their expertise (scientific, moral or otherwise) is questioned from a number of directions, and their decisions do not exist in a political vacuum. As such, a key question for NMIs relates not only to when they should or should not be used (on which there is a vast literature, see Goetz, 2014) on the basis over different theories of ‘democratic legitimacy’, but rather: *what challenges do NMIs face in achieving the perception that they are credible governors?*

This article argues that NMIs face a range of distinct crises, which challenge their status as ‘credible’ governing institutions and have to be responded to in particular ways in order to preserve the NMI in question and enable it to provide the ‘credible commitment’ it was created for. Using three case studies of NMIs created in Germany and the United Kingdom, the article tracks three institutional crises in three different policy areas (medicines regulation, bioethics and politicians’ remuneration). In each case the NMI faced a distinctive dynamic of ‘crisis’, focused on criticisms about normative fairness (the UK), moral ‘legitimacy’ (Germany, case one) and scientific competence (Germany, case two). These were managed by ministers reducing the size and remit of the NMI (Germany case one), democratizing its institutional processes (Germany case two), or elaborating its case and extending its authority (the UK). In order to conceptualise these differences, we utilize Jurgen Habermas’ distinction between different types of political problems and their corresponding discourses: factual, ethical-political and moral. We argue that Habermas’ distinction helps us to disaggregate or tease apart the difficulties faced by NMIs during crises, and the dimensions along which they attempt to legitimate themselves.

This article begins by arguing for shifting the debate around NMIs from arguments about the conditions under which they might be considered legitimate or accountable, to the conditions under which they are legitimated. Secondly, it develops a framework for disaggregating the challenges faced by NMIs using Habermas’ work and mapping this onto existing literature of the conditions for NMI survival and termination. Following a brief section on methodology, the three case studies are introduced and justified. Sections four-six highlight each NMI, the challenges they faced, and the way they defended or tried to defend their ‘credibility’ during each policy crisis. The conclusion then posits the implications for future research into NMIs, suggesting that their dynamic and differentiated legitimation strategies entail differentiated criteria upon which their legitimacy ought to be developed, normatively speaking.
NON-MAJORITARIAN INSTITUTIONS – FROM LEGITIMACY TO LEGITIMATION

NMIs are ubiquitous across Western liberal democracies, both at national and supranational levels (Holzinger and Schmidt, 2015). Diverse in their design and functions, they perform crucial tasks of economic and social regulation, give ‘expert’ advice to political executives, and administer government programs. Despite their importance, NMIs are often accused of being undemocratic, and contributing to the wider ‘depoliticisation’ of decision making that constitutes what Vibert (2007) worryingly refers to as the Orwellian ‘rise of the unelected’. Hence, the ways in which they can be reconciled as ‘democratically legitimate’ decision makers has become a central question for scholars of European governance (see Kohler-Koch and Rittberger, 2007 for a discussion). The democratic legitimacy of NMIs was posited as an issue of central concern by Giandomenico Majone (1996, p.284) in Regulating Europe:

(Independent) regulators wield enormous power, yet they are neither elected nor directly responsible to elected officials. How is their exercise of that power to be controlled? This, in a nutshell, is the question before us.

‘The answer’, Majone suggests, ‘ultimately depends upon the model of democracy one adopts’. Arguing for a conception of democracy in the ‘consensual’ tradition, Majone states that NMIs are necessary for creating efficient policies that would otherwise be damaged by electorally motivated politicians. Only ‘redistributive’ issues that involve significant resource implications with significant ‘winners and losers’ should, he argues, be dealt with by ‘majoritarian’ (elected) institutions. In sum, the argument is: ‘If governance beyond the nation-state can be effective and efficient, then legitimacy based on outputs is sufficient’ – ‘output’ legitimacy based on effective ‘outcomes’ supplements ‘input’ legitimacy constituted through effective representation and citizen involvement (Kohler-Koch and Rittberger, 2006, p.41). While this argument has primarily been targeted at European level governance, the emergence of ‘multi-level governance’ (Flinders and Bache, 2004) has made it relevant across multiple spatial scales, as the ‘hollowing’ effect on government has taken power ‘downwards’ as well as ‘sideways’.

Other scholars, such as Durose et al (2015) have suggested that NMIs (‘arm’s length bodies’, as they call them) might be considered legitimate from a more pluralistic viewpoint. They can be seen as centres of coordination within ‘polycentric’ systems of governance (Ostrom, 2010), and provide the potential for ‘citizen-led spaces for local organizing and decision-making’ (Durose et al, 2015). This argument suggests that, if we view NMIs as arenas of decision making at the centre of diverse governance networks, then they contain the ‘radical’ potential for reorganizing or reconstituting the nature of decision making in line with non-representative theories of democratic decision making from deliberative to agonistic and participatory democracy (Torfing, 2010). While the hopes behind such a view appear quite far-fetched, it does suggest how NMIs would likely play an important role in the establishment of an alternative form of democracy to the representative parliamentary state.

This article does not dispute or attempt to adjudicate these arguments for how NMIs may be normatively reconciled as ‘legitimate’ within a democratic political system. Rather, it suggests that scholars interested in NMI legitimacy asking the question: ‘what are the checks on the uncontrolled exercise of executive power?’ (Hodgson, 2006, p.253) ought to be interested in a preceding question about how NMIs ‘emerge’ as centres of
executive power. Majone’s quote above – that NMIs ‘wield enormous power’ – deserves scrutiny here, because it serves to preface the way in which he articulates (and other scholars articulate) what the democratic ‘dilemma’ of NMIs is, and how it may be resolved. Simply put, once we assume NMIs have ‘massive power’ then the key question is how to control that power, or harness it to shift control directly to citizens. By contrast, if NMIs’ ‘power’ is not taken as self-evident, but as varied, and if we take NMIs as what Henisz and Zelner (2005, p.363) call ‘emergent institutions’ that are ‘still subject to evaluation’, then one cannot simply shift to the question of how to reconcile a ‘powerful, yet unaccountable’ agent within a democratic framework. This is because we are unsure of how that ‘power’ works, how it is challenged, and what its implications may be for the role and position of that agent in the governance system as a whole.

Empirically, NMIs clearly have variable tasks, levels of independence and influence (Gilardi and Maggetti, 2012). Certainly, some NMIs, such as independent central banks that determine the supply of money within an economy, do wield ‘enormous power’, and questions about their accountability to government are central to their justification within democratic states (Keefer and Stasavage, 2003). More contested, however, are the powers of NMIs providing other forms of social coordination, policy advice or visibly contentious normative decision making. The UK Food Standards Agency, for example, has faced a number of recent challenges to its authority following the well-documented ‘horse meat’ scandal, even though it was not principally responsible for the mis-marketing of meat, but its suitability for consumption. At a supranational level, the European Aviation Authority faced criticism from all sides about its response to a volcanic eruption in Iceland in 2011, which was to close most air space in northern Europe, causing widespread disruption. In such instances, the question about the NMI’s democratic credentials does not concern how it can be held to account for its ‘power’ despite offering a ‘credible commitment’, but rather about how ‘credibility’ comes about and is sustained, or how the ‘commitment’ is interpreted or questioned by important policy actors. The argument, advanced by Majone and others, that NMIs offer ‘credible commitment’ and a potentially ‘new’ arena of democratic legitimacy, becomes a point of empirical enquiry, rather than merely presupposed.

Re-positioning the question this way is useful because as a number of scholars have argued, the position of NMIs in governance systems is under-conceptualised, and ought to be open to empirical question rather than skirted over. Perhaps the most prominent proponents of reconceptualising the power of NMIs are Sabel and Zeitlin (2008) with their ‘experimentalist governance’ thesis. The power of independent ‘networked agencies’ is, they argue, complex, especially in the European Union:

Subsidiarity in this architecture implies that in writing framework rules the lower-level units [including NMIs] should be given sufficient autonomy in implementing the rules to be able to propose changes to them. But in return for this autonomy, they must report regularly on their performance, especially as measured by the agreed indicators, and participate in a peer (Sabel and Zeitlin, 2008, pp.273-274)

As such, Sabel and Zeitlin (2008, p.309) argue that ‘the new architecture of EU governance is not ‘soft law’, but neither is it traditional ‘hard law’ of a form that grows out of and is reducible to principal-agent rule making’. Rather, there are ‘dynamic’ forms of rule-making and accountability, in which NMIs are given power to develop general ‘frameworks’, which are then assessed and re-assessed, in a complex ‘compound’ of governance forms (Egeberg and Trondal, 2012). While Sabel and Zeitlin’s argument has been made in relation to the European scale, again it is important to emphasise their argument increasingly applies at nationals as well, as while states have continued to be
central actors in the life of national politics, the ways they exercise power are increasingly complex, delegating ‘soft’ advisory or monitoring tasks to non-state and quasi-state actors, rather than ‘hard’ legal powers (Bell and Hindmoor, 2008).

The implications of these ‘new’ modes of governance are that, in many instances, NMIs are faced with the situation where they are neither given wholesale authority by governments to implement particular laws, nor are they merely ‘one among many’ in an entirely pluralistic environment. Their position is more ambiguous – they are delegated authority to create, implement and enforce rules, but their stewardship of those rules is constantly subject to external scrutiny and contestation by government, industry, and legislative oversight, encompassed by multiple accountability mechanisms (Brandsma and Schillemans, 2013) and the practice of ‘peer review’ (Eberlein and Kerwer, 2004). Such contexts of open-endedness lead NMIs to situations where their fundamental purposes and goals can be challenged, as Maarten Hajer notes:

Authority is not something one can possess. It is not a feature or by-product of a particular function or institutional role. In our mediatized world, hierarchy is cancelled out. A variety of opinions is easily accessible, critique is easily presented, and authority is more easily lost than gained (2009, p.455)

In this context, the precarity of NMIs becomes increasingly salient, and their scientific respectability or presumed competence becomes something to be continually nurtured, rather than merely presumed. Recent literature on the ‘mediatization’ (Schillemans, 2012) or ‘media accountability’ (Maggetti, 2012) of NMIs make clear that they come under sustained scrutiny by the media, which acts as a key device for legitimating (or revoking) their scientific credibility. Literature on ‘reputation’ (Carpenter, 2010) shows that, when carefully cultivated, perceptions of scientific competence and respectability can be powerful informal tools of authority – more so than formal independence - which can in turn shape how interest groups, for example, make claims of NMIs themselves (Gilad et al, 2015).

In sum, issues around NMIs’ democratic legitimacy are complex, and cannot be reduced simply to questions of ‘holding powerful actors to account’ via principal-agent connections, or alternatively the ‘multiple fora’ of media scrutiny or direct citizen involvement. A crucial preliminary question is to assess empirically how NMIs sustain their position as authoritative actors in a governance network, because this is ‘fuzzy’ and indeterminate. This, in turn, will tell us something important about the nature of NMI authority, and hence how it may be shaped and rendered democratically legitimate. Arguably, existing studies of European governance have tended to adopt a priori standards for legitimacy, deriving from those specific desired indicators of autonomy and accountability, and subsequently measuring how these operate empirically. And yet, the ‘standards’ (accountability, autonomy, etc) established in the literature have not in practice promoted credibility and trust in the way they are theorized to, as Bovens et al (2010, pp.189-190) lament: ‘institutional tweaking and reinforcement of accountability mechanisms and regimes will probably never be enough to cause citizens and political actors in various national settings to shift their loyalties, expectations and political activities’. By contrast, Busuioc et al (2011, pp.849-850) note, to examine ‘How these seemingly contradictory goals are reconciled’ in practice, it is necessary to ‘trace their development over time, focusing not only their de jure character, but also on their de facto manifestation’.

The key point is that before we can ask questions about how to ensure NMIs are democratically legitimate, we need to know more about how they interact with their political environments in order to effectively sustain themselves as authoritative
governors. Were we to proceed from an understanding of sovereign power implicit in
traditional notions of representative democracy, we would not need a detailed
understanding of how those authorities acted with their political environments in order
to assess how to render them democratically legitimate – we could rely upon a
traditional Lockean understanding of sovereign accountability. Some political
authorities with high levels of power – like the military, security departments,
government treasuries and other arenas of ‘high politics’ - may warrant the latter
approach. We may assume that their ‘politicization’ via direct government (sovereign)
control can enhance their democratic legitimacy. In the case of many NMIs, however, the
nature of their power is of a peculiarly dynamic, ambiguous form, such that the former
question needs to be answered first before attention turns to normative democratic
questions – knowledge about the form and exercise of political authority necessarily
precedes assessment of how such authority can be rendered democratically legitimate.
And yet, as Sharon Gilad (2012, p.157) has argued, ‘it is surprising how little we know
about the informal institutional structures and dynamics that mediate bureaucracies’
responsiveness to external signals and demands’. Given their ‘hybrid’ form, this is
especially the case for NMIs, and for this reason we proceed from an assessment of how
NMIs are legitimated, using empirical cases of how they manage political crises in
differential and particularistic ways.

_The Legitimation Question_

‘Legitimacy’ is an unwieldy concept, and has been approached with trepidation by some
political scientists. The concept, however, retains a theoretical and normative pull as
one of the central concerns of the discipline. Following careful conceptual
disaggregation, it can be used as a useful ‘multi-level’ (Radaelli, 1999) tool both for
examining macro-level existential questions about a public institution’s very existence,
and micro-level questions about how it generates and sustains its position on a day-to-
day basis. With the need for conceptual clarity in mind, this article follows David
Beetham’s (1991) seminal _The Legitimation of Power_, in which he disaggregated the
question of ‘legitimacy’ into three separate questions that make up a comprehensive
assessment:

1. Philosophical: by what standards should we evaluate certain socio-economic
   relations as legitimate or illegitimate?
2. Legal: how can certain socio-economic relations or forms of conduct be
   legitimized or delegitimized by reference to their conformity to particular legal
   rules?
3. Social scientific: how are particular institutions or rules legitimated or
   delegitimated by those they (seek to) govern, and for what reasons?

To avoid confusion, it is important to note that in this article we address only the third
question of legitimation, we seek to understand how NMIs respond to ‘legitimation
crises’. These are defined as ‘critical incidents’ (or turning points) where NMIs face
severe public criticism, which severely damages their esteem, trust and reputation in
the minds of important veto players in government, and actors in a policy community,
thus endangering their continued authority and long term existence. In these situations,
NMIs face the need to defend themselves, their decisions, and the importance of their
continued relevance in the policy domain. Existing research has emphasized the
importance of NMIs developing legitimacy over time (Groenleer, 2014; Busuioc et al,
develop a legitimacy over time’. ‘This article argues that by disaggregating legitimation
across different dimensions we can uncover how NMIs face legitimation challenges, and respond to those challenges, in ways that are specific to the form of NMI, policy area and political dynamics in question. So, by contrast to an attempt at encompassing all the elements of legitimacy possible, we disaggregate legitimation and delegitimation dynamics across three dimensions that highlight specific challenges and particular ways of responding to these challenges. These fit with Jürgen Habermas’ three types of political problems and their corresponding discourses: pragmatic, ethical-political and moral.

Jürgen Habermas coined the term “legitimation crisis” in the 1970s (Habermas, 1976). At a time when Germany faced the first deep economic recession after more than 20 years of continuous economic growth, his diagnosis was bound to attract particular attention. Habermas (at the time more strongly influenced by Marxist thought than today) argued that contradictions in the capitalist economy would lead to political decisions and outputs that fall short of people’s expectations and eventually undermine support for the democratic political system. While Habermas’ crisis diagnosis referred to the political system on the whole, his focus always being more on the macro, systemic level than on specific components of the system, we do believe that the concept can also be applied to single institutions such as the NMIs that are in focus here. According to Habermas, the legitimation crisis is caused by an underlying rationality crisis in which decision-makers come to be viewed as unable to find rational and effective solutions to pressing problems. The NMIs we discuss here constitute intermediate-level decision-making systems whose authority depends on their ability to foster beliefs in their rationality and legitimacy, i.e. on the success of their legitimation strategies. The legitimation crisis of an NMI obviously has far less severe implications than that of a political system as a whole. However, at a time when NMIs constitute an increasingly critical element in systems of government, their legitimacy crises may well impinge on the legitimation of the system.

In his more recent writings, Habermas has moved somewhat away from his origins in critical theory and has offered a rather positive reconstruction of representative democracy as deliberative democracy (Habermas, 1996). In Between Facts and Norms, he describes how deliberative processes between the life world and civil society on the one hand and the political system on the other hand enable the legitimation of political decisions. In this context, Habermas distinguishes between three types of political questions and corresponding discourses that are components of the practical reason that citizens and decision-makers apply in answering the superordinate question “What shall we do?” (Habermas, 1994 [1992]: 197): pragmatic, ethical-political and moral:

1. **Pragmatic** questions and discourses concern the selection of adequate means for given ends. They can give rise to conflicts over facts in which different actors or groups try to defend opposing validity claims about facts and causal relationships. In pragmatic discourses, speakers try to establish the truth of assumptions or premises and seek to derive conclusions for the instrumental adequacy of alternative options or strategies. In pragmatic discourses, empirical or scientific evidence is likely to play a central role.

2. **Ethical-political** questions concern matters of identity and community. In corresponding discourses, political communities seek to find out “who we are” and “how we want to live” (Habermas, 1994 [1992]: 198). Ethical-political questions may give rise to disputes over what is good for our community at this point in time or about what constitutes a “common good”.
3. **Moral** questions are questions of justice. They concern norms that take the form of categorical imperatives: options that entails moral wrongs according to these norms may not (and not only: should not) be chosen, even if they promote other goods. The ‘correctness’ of moral norms is independent of time and place. However, in most political communities, there is no consensus on the validity of moral norms and priorities between them. Disagreements on moral norms may lead to particularly acrimonious conflicts over whether actions or rules are morally correct or not and about how conflicting (and perhaps equally accepted) norms should be prioritised in their application.

Obviously, the three types of questions and discourses can only be distinguished at an analytical level, and empirical discourses will typically involve aspects of all three. However, in many political conflicts, one question seems to dominate the others. For example, the debate on how to fight climate change is first of all a pragmatic one, since most people seem to agree that climate change should be prevented. Immigration is a clear example of an ethical-political question, or rather: one that most societies chose to treat as an ethical-political one (what is good for us, now and here) rather than a moral or pragmatic one. Finally, questions such the permissibility of assisted dying or research with human embryos are typically treated as moral ones.

We assume that NMIs are set up to complement and sometimes to replace political deliberation between civil society and the political system. This delegation of a discourse to an NMI may be motivated by the perception of a lack of expertise and credibility in a specific discourse or by the wish to escape electoral accountability for potentially unpopular decisions. However, it is only possible to delegate rather specific questions and discourses to NMIs, which are functionally specific bodies. Our assumption is that NMIs are set up to take on tasks of either pragmatic, ethical-political or moral legitimation. Depending on the type of discourse they are supposed to complement, their own design and decision-making processes face specific legitimation challenges. Failure to meet these challenges can lead an NMI into a legitimation crisis. In contrast to national democracy, an NMI that is unable to cope with such a crisis will simply be terminated and silently disappear from the political stage. In the following, we not only try to explore the specific legitimation challenges NMIs confront, but also their strategies to cope with them, seeking to identify determinants of survival.

**Methodology**

In this article we use case studies as ‘illustrative’ in the sense that ‘the aim is to give the reader a “feel” for a theoretical argument by ... demonstrat[ing] the empirical relevance of a theoretical proposition by identifying at least one relevant case’ (Levy, 2008, pp.6-7). Here, we provide three case studies that illustrate our theoretical argument that NMIs face different kinds of legitimation crises that require them to respond in different ways: two in a country where it is likely NMIs will face legitimation crises (Germany), but where existing research does not uncover how those crises differ substantively, and one where crises are less likely to occur (the UK) and where, again, existing research has not shown how the dynamics and responses to those crises diverge. In Germany, a large number of veto players and a relative lack of history of NMIs generates the expectation that NMIs will face political pressure relatively easily, so this does not represent a
massive hurdle for our argument. However, we choose two cases where we show the dynamics of those crises and the response the NMI gives in order to survive, diverge in analytically important ways unrecognised by existing research. Our analysis shows that two NMIs in Germany face legitimation crises that diverge significantly in terms of the pressures placed upon them and their response. We then present a case in the UK that offers a tougher test of the applicability of our theoretical argument. As a majoritarian system the UK has a long history of NMIs and relatively few veto players who could challenge an NMI’s status. Not only that, we show that the NMI in question – the Independent Parliamentary standards Authority – faced a different kind of crisis situation requiring a different response, which maps onto Habermas’ ethical-political form of legitimation.

In using this methodology, we demonstrate the theoretical applicability of our argument. NMIs in a political culture conducive to crisis face differing dynamics of legitimation crises, and respond differently. Moreover, NMIs in institutional systems less conducive to legitimation crises can also face such crises, but of a different kind. This second point is especially important because it points to the need for more extensive empirical exploration, and we set out how we propose to do this in our conclusion. Table 1 summarises the case studies and the key arguments derived from them.

Table 1: Illustrative Case Studies and Their Application

<table>
<thead>
<tr>
<th>Case Study NMI</th>
<th>Formation</th>
<th>Form of Crisis</th>
<th>Outcome</th>
<th>Effect on authority</th>
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<tr>
<td>IQWiG (Germany)</td>
<td>Advisory agency to the Schroeder government on federal funding for controversial drugs</td>
<td>Pragmatic Disputes about its refusal to use cost-benefit analysis common in medical economics</td>
<td>Reduced institutional role from official advisory body to one among many sources of advice to Federal Joint Committee</td>
<td>Reduction</td>
</tr>
<tr>
<td>National/German Ethics Council (Germany)</td>
<td>Advisory council to Schroeder government on bioethical policies</td>
<td>Moral: The council represented only a one-sided (liberal) moral discourse</td>
<td>Reformed into a democratically inclusive body informing wider public discourse</td>
<td>Re-configuration</td>
</tr>
<tr>
<td>Independent Parliamentary Standards Authority (UK)</td>
<td>Advisory agency to Labour government on MPs’ salary and expense rates</td>
<td>Ethical-political: Allegations its recommendations would see unjust pay increase for MPs</td>
<td>Public defence of the ethical-political justification for increasing salaries and eventual implementation</td>
<td>Assertion/expansion</td>
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Case Study 1: Pragmatic crisis - the Institute for Quality and Efficiency in Health Care (Institut für Qualität und Wirtschaftlichkeit im Gesundheitswesen, IQWiG), Germany

The German IQWiG as an independent expert advisory body was set up in 2004 by the red-green coalition government as part of a major reform package aiming to improve service provision in the German health care system. The health care system was one of the coalition's first reform targets of the Schröder government after it had come into office in 1998. The social democrats were critical of rising co-payments and insurance contribution rates, both of which are regressive in their distributional effects. Moreover, they wanted to break the pharmaceutical industry's traditional stronghold in German health politics and redirect resources from drugs to service provision and prevention. In 2003, a positive list for drugs had passed the Bundestag (the first chamber of parliament), which was supposed to render the default for coverage decisions negative: no drug would have been covered without an explicit appraisal decision. However, the positive list was blocked by an opposing majority in the Bundesrat (the federal chamber). Inspired by the model of the already successful British NICE (National Institute for Clinical Excellence), the red-green government nonetheless stuck with its goal of introducing cost-benefit analysis to the German healthcare system.

In the original plans, IQWiG was to be modelled after a blueprint of NICE and supposed to make authoritative recommendations in decisions over the coverage of controversial drugs. These plans were opposed by manufacturers and providers however, so that IQWiG was eventually equipped with fewer competences than intended. Compared to NICE, technology assessment and appraisal (coverage decision-making) are in result institutionally separated in Germany: coverage decisions are taken by a corporatist body that represents service providers (contracted doctors and hospitals) on the one hand and health insurance funds on the other (the Federal Joint Committee, FJC). The FJC can charge IQWiG with reports, which it can take into account in its decisions. However, it can also draw on other sources of evidence and is free not to follow IQWiG's recommendations. The institutional separation of technology assessment from coverage decision-making may inadvertently have promoted IQWiG's credibility as an independent expert agency, as it unburdened its members from taking budget considerations into account in their decisions.

Nonetheless, IQWiG struggled to gain authority in health technology assessment. Its first chair, the physician Peter Sawicki was known to be rather pharma-critical and influenced by the Cochrane foundation's approach of critically assessing drugs for comparative advantage in major meta-studies. Under Sawicki's management, IQWiG developed a very specific, non-standard method of technology assessment. In short, IQWiG refused to carry out the kind of cost-benefit or cost-utility assessments that are standard in health economics (although different schools and approaches exist here as
well). Making use of methods like the Quality-Adjusted-Life-Year calculus, these assessments enable a comparison of treatments pairs across different conditions, e.g. an assessment of the cost-benefit of a drug for hypertension compared with that of a cancer drug. IQWiG, by contrast, insisted on assessing only the comparative benefit of different drugs for the same condition, comparing, for example, different drugs for diabetes. IQWiG thus evaded the discussion on priority setting and rationing in service provision by ruling out a ranking of services which would have enabled the definition of a basic health care package.

Within expert circles, IQWiG’s method came to be regarded as peculiar and was openly criticized. Claxton and Sculpher, for example, write in *Health Economics*: “By effectively ignoring the implications of resource scarcity, it [IQWiG] fails to inform the German health care system on whether new technologies offer value” (Claxton and Sculpher 2010: 1135). Kuhlmann et al. argue that “IQWiGs efficiency threshold is entirely inadequate” (Kuhlmann et al. 2012: 123, own translation). While a number of health economists criticized IQWiG for its resistance to state-of-the-art cost-benefit analysis and for not moving the debate on priority setting – which most of them deemed necessary – forward, manufacturers, patient groups and the parliamentary opposition were similarly critical. Soon after it had taken up its work, IQWiG published a negative report on a group of insulin analogs, recommending that they should not be funded. Considerable protest from patients, doctors and manufacturers resulted. Critics not only pointed out the benefits of insulin analogs and the lack of alternatives for certain patients, but also accused IQWiG of health care rationing – which was and still is a taboo in German health politics. The protest dwindled after insulin analogs were found to increase the risk for certain cancers, leading to an abrupt slump in demand.

While Angela Merkel’s first grand coalition government left IQWiG untouched, the conservative-liberal government that came into office in 2009 was highly critical of its performance, and in particular, of its pharma-critical chair. Along with a number of conservative and liberal ministers from the German Länder, Philipp Rösler, who was to become minister of health after the 2009 election had signed a critical statement on IQWiG that, apparently in understanding with the association of major pharmaceutical manufacturers (Verband Forschender Arzneimittelhersteller, VFA) criticized IQWiG as a threat to the manufacturers’ international competitiveness and Germany’s attractiveness as a location for industry. Soon after Rösler had come into office, Sawicki’s contract as IQWiG chairman was up for renewal. After an auditing firm commissioned by Rösler had found irregularities with regard to Sawicki’s company car (which could not be confirmed later), the contract was not renewed and CDU-member Jürgen Windeler was appointed as the new chair by the ministry of health (cf. Landwehr and Böhm 2014).

In 2011, a new law initiated by the conservative-liberal government (Arzneimittelneuordnungsgesetz, AMNOG) changed the German system of drug appraisal completely. In essence, the new law reversed the course towards explicit rationing as part of which IQWiG had been set up by the red-green government and instead introduced price negotiations with manufacturers. Under this new drug appraisal regime, IQWiG supports negotiations with reports on the comparative
advantage of drugs. In its new role, IQWiG is no longer under pressure to either justify its methodology (as it is no expected to carry out cost-benefit assessments) nor under attack for recommending rationing decisions. While according to its chair and the ministry, IQWiGs has been strengthened, its new role is purely advisory one and is hardly noticed in the public.

The story of IQWiG’s legitimacy crisis can be interpreted as follows: IQWiG was originally set up to advance the introduction of cost-benefit assessment, and eventually explicit rationing, into German health politics. While this was a clear goal of the red-green coalition government, the German public was mostly opposed to it. Under these conditions, the establishment of IQWiG and the commissioning of its sister body, the Federal Joint Committee (FJC) with rationing tasks were an attempt to both avoid electoral blame and win support and credibility for the respective policy program. However, an agency can only gain authority in pragmatic discourses if the goals for which it seeks to provide adequate instruments are consensual, which was clearly not the case for IQWiG. Sensing public resistance to rationing, IQWiG adopted a less controversial methodology, but was nonetheless attacked as a rationing institution. In the end, it proved neither willing nor able to gain support for cost-benefit assessments, but was equally unable to attain public support. While it was not terminated as an agency, IQWiG was, by subsequent governments, practically reprogrammed to support price negotiations with manufacturers. Its legitimacy in this new, more circumscribed and less controversial role has not been challenged. For its original task, however, IQWiG did not achieve authority and legitimacy.

**Case Study 2: Moral crisis - the National Ethics Council and German Ethics Council, Germany**

In the years 2000/2001, German politics and the German public were confronted with a deep bioethical conflict. New research, in particular in the United States, indicated a high potential of studies using human embryonic stems cells. Producing embryonic stem cells, which at the time inevitably meant killing human embryos, was not allowed in Germany. However, German researchers had tried to import stem cells from the US, making the attempt public to force the legislator to take action and close what was seen as a gap in legislation, thus achieving legal certainty. The decision was made difficult by the fact that the government and each of the four parliamentary parties were as much internally divided over the issue as the German public. One side argued that by ruling out research with embryonic stem cell lines in Germany would mean to deny desperately ill patients the hope for a cure, but also damage the international competitiveness of German biomedical research. The other side argued that by enabling the import of stem cell lines would create demand for new ones and eventually cause the killing of embryos abroad. This side not only saw the issue as one of protecting human life and dignity, but also feared a slippery slope that would eventually lead to genetic engineering and euthanasia.

Chancellor Schröder personally took a liberal stance on bioethical questions, including research with human embryonic stem cells, but was cautious not to raise resistance from his own party and the public. Seeking to inform and advance the discourse on
bioethics, he set up the National Ethics Council, an independent advisory body, by decree in April 2001. The National Ethics Council was staffed with 25 members, mostly university professors from different disciplinary backgrounds, but with a clear dominance of natural scientists and liberal scholars. Although the Council approached its first task – a report on the import of embryonic stem cells – cautiously and did not arrive at a unanimous verdict, it was, from the very beginning, criticized as Schröder’s “nodding through-body” (or ‘rubber stamp’ Reich 2010: 33; Rogalla 2001; Thelen 2001). The accusation was that Schröder had set up the Council not to enrich the discourse on bioethics, but to foster acceptance for his own liberal position. Bogner and Menz (2002) take a more nuanced position, arguing that the point in setting up the Council was rather to demonstrate that even experts would not arrive at a moral consensus and that a political decision was necessary and inevitable. Whatever Schröder’s true motives behind its establishment were, the National Ethics Council was unable to gain authority due to its “birth defect” of being set up by decree and lacking a democratic mandate.

Not only opposition politicians (Hüppe 2004; Kölner Stadtanzeiger 2005), but also parliamentary experts in the parliamentary study commission on bioethics criticized the National Ethics Council for lacking a democratic mandate (dpa 2001). Jens Reich summarizes:

“The public receptions of the ‘National Ethics Council’s’ reports and events was broad, but almost exclusively negative. It was criticized that the Ethics Council could not agree on consensual points of view and instead tried to achieve farness by pointing out controversial standpoints and alternative options for action. But in particular, it illegitimate birth out of the will of the executive was permanently branded. Nonetheless, the actual influence on political decisions and the public awareness of bioethical problems remained rather low.” (Reich 2012: 29, own translation)

In 2007, the new grand coalition government (Merkel I) changed the legal status of the Ethics Council and its members. A law drafted by the ministry of education and research passed the Bundestag with a large majority (CDU/CSU, SPD and FDP) in April 2007, changing the name of the council to “German Ethics Council” as well as the appointment procedure for its members: half of the council’s members are now appointed by the Bundestag, the other half by the federal government. Despite the fact that the council was thus given a stronger democratic mandate, critics did not fall silent. The Left party and the Greens (now in the opposition) continued to bemoan its liberal bias and lack of democratic legitimation (as the small Bundestag opposition effectively had hardly any influence on appointments), and several MPs argued that parliamentary study commissions were a more adequate forum for bioethical discussions.

In subsequent years, the Council produced a number of highly controversial reports. A report in which a slim majority of members supported the introduction of pre-implantation diagnostics under tight restrictions was criticized both as too restrictive and too permissive. A proposal to lift the ban on sex between adult siblings met severe criticism from conservative politicians and Catholic clerics. These occasional attacks on substantial positions taken by the German Ethics Council seem to be part of a wider
democratic discourse on bioethics in which the council has become recognized as a legitimate and trustworthy voice besides others. These days, the council’s function is one of enriching the discourse rather one of advising the government on steps to take. Despite the birth defects of its predecessor body, the German Ethics Council may even be seen as complementing and democratizing the German debate on bioethics. As Kai Arzheimer shows, the resistance to liberalization may be sustained by a Christian democratic / New Left issue coalition that has less backing in the German public (Arzheimer, 2015). While its recommendations may often be lopsided towards liberal positions, the council thus closes certain argumentative gaps in the discourse.

In sum, the case study of the National/German Ethics Council shows that an independent expert body can contribute to moral discourses by providing arguments and assessing the justification of different positions. However, the National Ethics Council’s birth defect as Schröder’s rubber-stamp body without democratic mandate deprived the body of any chance to gain authority and legitimacy. Only its re-establishment as a democratically authorized forum in 2007 for bioethical debate allowed it to gain public acceptance. Despite the trust and authority the council has gained, its reports are (and should be) viewed as one among many voices in the bioethical discourse rather than as recommendations to the government that could be implemented without further discussion and complex decision-making processes.

**Case Study 3: Ethical-political Crisis - The Independent Parliamentary Standards Authority**

The Independent Parliamentary Standards Authority is a non-majoritarian institution set up in the UK in 2009 by the Parliamentary Standards Act (2009, c.13). Its job is ‘regulate the expenses system’ within the UK national parliament and ‘administer and pay MPs’ expenses and their salaries’. Set up in response to a crisis in 2008 when the Telegraph newspaper uncovered evidence of Members of Parliament (MPs) abusing their right to claim expense reimbursements for activity related to parliament, including, for example, the purchase of a duck house for a country estate, IPSA is arguably a classic example of an NMI established to adjudicate on ‘ethical-political’ issues (see above). Whereas before the crisis, expense claims were managed internally by Parliamentary staff, and a committee of MPs decided on MPs’ pay levels, following the crisis it was deemed that ‘The public want to have full confidence in the parliamentary system ... so that the cloud of suspicion is lifted and the reputation of the House [of Commons] can be restored’ (Hansard, 23 Jun 2009, Vol.494, part 97, Col.678).

IPSA’s ‘credibility’ as an NMI hence rested upon the idea it would set and monitor MPs’ expenses and salaries at an acceptable level, and would prevent ‘gaming’ of a previously ‘corrupt’ system. IPSA was seen as a moral guardian of public money, aiming, in its own words to ensure ‘the highest standards of integrity and morality’ (IPSA, 2013, p.93). In contrast to QWIP and the German Ethics council, IPSA's legitimacy is hence based upon its presumed ethical-political authority, the ‘credibility’ coming from the fact that it is (supposedly) divorced from pressures towards self-interested utility maximization, instead acting, in its own words, ‘with the public interest in mind’. As part of IPSA’s remit, it was charged with reviewing and recommending a ‘new settlement’ for how much MPs and ministers should be paid. Its report and recommendation, circulated in June 2013 sparked a 'legitimation crisis'.

After a long period of consultation, IPSA published its first draft paper proposing MPs' pay to be scaled down and on par with other parts of the civil service, starting with a salary of £74,000 in 2015 (a 10.3% one-off increase) indexed to annual growth in average earnings in the whole economy thereafter (IPSA, 2013, pp.7-8). These recommendations were met with a large outpouring of public opposition. In the consultation period from 11 July-20 October IPSA received 550 written responses, 530 posts on its website, and 3,450 responses to an online survey. The online survey showed a large majority against the proposals – 12% for with 88% against. Moreover, a ComRes poll commissioned by IPSA showed significant opposition to any pay increase for MPs. 66% were against it, compared to 24% in favour. When asked the same question with the caveat that any rise would not increase costs to the taxpayer, more respondents were still opposed than for (45% to 43%), although clearly this was by a much funder margin. Critically, this suggests opposition to the proposals, although ameliorated to some extent by assurances that the proposals would not impose material costs on the electorate, were not dependent upon feelings of material self-interest. Rather, opposition appeared to take on a more moral or ethical character. Submissions to IPSA’s consultation (IPSA, 2013) challenged the ethical nature of increasing MPs’ pay substantially:

‘MPs’ salaries have been held down for many years preceding the recent recession and the current period of public sector pay restraint, though that was the fault of the MPs themselves while they had the power to set their own pay and reject our recommendations and those of Sir John Baker.’ (SSRB)

As low ranking civil servant who is the sole bread winner of a family of four who has had only 1 pay rise in 4 years of 1% and can't even afford basic living standards......disgusting! (IPSA Website, 2015)

At this stage the proposals were particularly contentious, such that Prime minister David Cameron stated that the increase was ‘simply unacceptable’ (Guardian, 2015). The first pay increase was not scheduled, however, until after the 2015 elections. In 2015 IPSA was mandated to conduct another public consultation investigating whether its recommendations should change after ‘take[ng] into account all relevant circumstances as part of our review of our determination of MPs’ pay’ (IPSA, 2015a, p.10) following the May general election, in accordance with rules set out by the Parliamentary Standards Act. In June 2015 IPSA’s second consultation was published, and, surprisingly, it stood its ground about the need for an increase in MPs’ salaries to £74,000:

we can see no clear reason why the economic circumstances today should lead us to depart from the determination of £74,000 that we reached in December 2013 ... We remain of the view that it is right to increase MPs’ pay to £74,000 for all the reasons we set out in December 2013 (IPSA, 2015a, p.11)

By reasserting the policy it originally faced significant criticism for, IPSA attracted widespread opprobrium. Several important political figures from left and right criticised it:

'Now is not the time for the cost of politics to be going up. Ipsa is hopelessly out of touch. The national debt is still rising and taxpayers are keeping their belts
tight, so it's inappropriate to recommend even higher pay for MPs.' (Daily Mail, 2015)\(^1\)

"It would be grossly hypocritical for any MP who voted for years of pay cuts for public sector workers to accept a 10% increase for themselves. At a time when the Chancellor is asking every Government department to cut billions more from their budgets, and public-sector employees have been offered a 1 per cent increase, this decision needs stopping.' (Daily Mail, 2015)\(^2\)

This opposition led to several MPs stating that any increase they did receive would be given immediately to charity. 57,000 people signed a petition against the pay rise, while International Secretary Justine Greening argued:

"how anyone can think that this kind of a proposal is acceptable is utterly beyond me ... They are in charge of making the right proposal and they have got it wrong." (Telegraph, 2015)\(^3\)

Analysing the reasons given for opposing the pay increase, it is clear that the ethical-political implications were put centre stage. Accusations of 'hypocrisy' were bandied around and contrasts drawn between the substantial one-off increase and pay cuts received by public sector workers and other low paid groups in society. At the least this proposed increase was contrasted with the alleged need for fiscal constraint, with the emphasis being that the increase would send the 'wrong message' in times of supposed government frugality. Indeed, as one parliamentarian commented to IPSA: 'I ... accept that there is never a good time to implement this. However, you have decided to choose the WORST POSSIBLE TIME to do this!' (IPSA, 2015). Similarly, a member of the public submitting an opinion to IPSA also typifies the outrage:

Are you kidding me!!!!!, how dare you increase MP's wages, we hear nothing but austerity this and austerity that, we have benefits capped, services cut and all other "needed austerity" measures and you have the tenacity to suggest a payrise to those already better off. IF WE HAVE TO FEEL THE AUSTERITY MEASURES SO SHOULD THEY "all in this together" was the line we were fed, more lies (IPSA 2015b, p.7)

So, it appears from the above analysis that IPSA faced a legitimisation crisis of the ethical-political kind set out by Habermas. Tasked with producing an ethically sound set of guidelines for setting MPs’ pay at a fair rate compared to other professions, IPSA confounded those expectations by proposing a substantial increase. The upshot was a crisis for IPSA and its ‘credibility’ was thrown into doubt. However, following the May 2015 election IPSA's recommendations were implemented for the new parliament, beginning in September 2015. After opposing its June 2015 report, David Cameron confirmed support for the NMI’s recommendation on July 16\(^{th}\) 2015, following a further briefing by IPSA that it would stick to its recommendation. The Prime Minister stated:

"My view is this money is paid straight to MPs. It’s a matter for Ipsa. Personally I think the right thing to do is to be paid the rate for the job and that's what I will

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\(^3\) http://www.telegraph.co.uk/news/politics/11656293/Greening-watchdog-behind-MP-pay-rise-needs-sorting-out.html [05.06.15], last proof: 13.07.15.
do. As many MPs have said, it gives you an opportunity to do more in terms of charitable giving and things like that but I think MPs ... you’re paid a rate for the job and you should take the rate for the job and it’s done independently. I don’t actually think this was the right decision but the bit I’m responsible for, ministers’ pay, cut and frozen.” (quoted in Guardian, 2015)4

The pay rise was hence not overruled by the Conservative administration (ministers had power of veto over it due to its establishment in secondary legislation), and its pay rise came into force. The only significant, if small, concession to public opinion was that future increases in MPs’ salaries would be linked to public sector pay changes, as opposed to changes in the economy as a whole.

This remarkable about turn from opposition to (reluctant) support for IPSA’s position by Cameron can, on the one hand, be put down to contextual factors. Firstly, once the pay increase recommendation was accepted by the new conservative government, it became an individual matter for MPs whether they chose to take the pay increase, or as several have subsequently done, donated it to charity. In this sense, the fact that IPSA was an advisory rather than executive or regulatory body meant that its ‘recommendation’ was less toxic. At the same time, however, it can be argued that the very advisory nature of the NMI’s role that meant that its decision was more open to contestation. As one commentator advised, IPSA’s decisions could be made less contestable by giving it greater formal power: ‘Make Ipsa’s annual pay awards binding. And neutralise the issue’ (Telegraph, 2015).5 It is also important to note that other aspects of IPSA’s agenda had significant support, such as tightly controlling parliamentary expenses, and ‘naming and shaming’ MPs who failed to repay debts owed on parliamentary credit cards (Daily Mail 2015).6 So, in this sense, IPSA arguably had a surplus of political capital in other areas that could be expended on the specific issue of MPs’ salaries.

At the same time, however, the issue of MPs’ salaries was still potentially toxic, and one with high opposition both in the media and public, so how it retained its authority still represents a puzzle. Here, it can be suggested that the way IPSA acted had a significant effect on retaining its authority. IPSA did not back down in re-stating the moral case for ‘fairness’ in its recommendation. In 2014 the Chief Executive of IPSA, Marcial Boo, stated that:

"They are there to represent us all, to form laws, to send young people to war. It is not an easy thing to do. We want to have good people doing the job and they need to be paid fairly.” (Independent, 2014)7

Again, Boo restated his point regarding fairness in an interview reported in the Telegraph:

"Obviously, it is for Parliament to decide whether they want to take back responsibility for setting their own pay. I don’t believe that’s right. I think we are

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4 http://www.theguardian.com/politics/2015/jul/16/ipsa-goes-ahead-with-10-pay-rise-for-mps
in a better position as a country now”. MPs do “an important job”, he says. “They are there to represent us all, to form laws, to send young people to war ... They need to be paid fairly.” (Telegraph 2014)

In its final report in July 2015 IPSA reaffirmed its line of thinking, whilst acknowledging the criticism:

IPSA was established as an independent regulator in order to take difficult decisions, without being swayed by the political circumstances of the time. We are not ignorant of these, nor of their difficulty. But we believe that there is a long-running problem with MPs' pay which needs to be dealt with decisively, and sorted out once and for all ... we have not seen anything by way of evidence that is new or compelling such as to cause us to change our decision, made in December 2013, that the level of MPs' pay should be £74,000 per year, with effect from 8 May 2015 (IPSA, 2015b, p.12).

Given the subjectivity of the ethical issue at stake around equal pay, the acknowledgement of disagreement was crucial. As Stansbury (2009) argues using cases of moral disagreement in businesses, a ‘deliberative’ approach to leadership – taking account of unavoidable moral disagreements and difficulties - is crucial to ensuring the acceptance of business decisions as valid in the wider community. In this particular case of moral opprobrium, where the problem was posited as a ‘philosophical dilemma’ about equal treatment, IPSA arguably had a more subjective challenge to play with, which at once meant it could be morally challenged, but also could claim credibility by establishing ethical criteria about the need for MPs to get 'fair pay' for the work they do, and sticking to that criteria (Coombs, 2015, p.112). IPSA acknowledged the existence of disagreement, but argued from its ethical standpoint that MPs should receive fair pay for the work they undertook. In this case, then, it can be argued that an NMI managed a moral legitimation crisis by showing ethical leadership – acknowledging the issue in question was contested, but sticking to its principled stance in order to re-assert or reclaim its credibility against public onslaught.

**Conclusion**

This article has shown that ‘credible commitments’ ought to be treated by NMI scholars not only as normative theoretical justification for their existence in a democracy, but as variable sociological processes through which they achieve authority and legitimacy. NMIs face differential challenges to their credibility that can be cast in terms of ‘legitimacy crises’ and resolve these crises in divergent ways. We have argued that a central function of NMIs is to complement different political discourses and decision-making processes that can – following Habermas – be classified as moral, ethical-political, and pragmatic ones. Our analysis shows that NMIs thus have quite different positions and contested roles within the polity, and hence how they should be integrated within democratic governance frameworks represents a differentiated challenge, rather than one that can be resolved through a priori normative theorising and universal application. An understanding of the variable dynamics through which NMIs gain

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and sustain their authority is a crucial preliminary to positing what their role should be within a democratic system of governance, and how that role might be achieved.

Our cases illustrate this theoretical argument by demonstrating the variability of contestations over NMIs’ credibility. Credibility and hence authority, we argue, is something to be won rather than merely instituted, and it is also critically challenged. Such challenges are resolved, with different resultant effects on authority, in different ways that we mapped onto the nature and dynamics of the challenges. The first case (see Table 1) was resolved through reducing the institutional role of IQWiG, so while the institution was retained, its scope of authority was reduced and it was given different tasks. Secondly, in the case of the Bioethics Council we saw not so much a reduction in scope of authority, but instead a democratization of the institution, as its mandate and accountability were strengthened. Lastly, the IPSA case shows an NMI expanding and asserting its authority by openly asserting the policy that is the matter of dispute. So we might characterise the cases broadly speaking in terms of ‘retreat’, ‘recalibration’ and ‘expansion’ of authority, in the face of credibility challenges.

This argument has important implications for the study of NMIs, empirically and normatively. Firstly, it adds to our understanding of the roots of NMI authority and legitimacy. From this analysis, it can be suggested that under ‘pragmatic’ discourses NMIs can only gain authority and legitimacy if the goals it seeks instruments for are consensual. Their goals cannot be legitimated by the instruments they adopt. Under moral discourses, we may argue that NMIs can gain authority if they are viewed as independent, pluralistic and trustworthy. They are unlikely to gain authority if they lack a clear legal status and democratic mandate and if they are viewed as lopsided “rubber-stamp institutions” by which governments seek expert confirmation for already decided-upon policies. Lastly, in the case of ethical-political discourses we suggest that NMIs can achieve authority and legitimacy if they engage in public discourses and justify their decisions appropriately. These arguments require further exploration through more wide-ranging empirical enquiry, which should focus on how closely the particular findings can be mapped onto different discourses. Do ethical-political discourses enable NMIs to ‘fight their corner’ and gain greater acceptance? Do pragmatic discourse areas constrain NMIs in terms of the instruments they use, given the highly scientific nature of those areas? Are NMIs in moral discourse areas more likely to need democratization in order to achieve authority?

Secondly, and lastly, this article has important implications for normatively theorising the democratic role and position of NMIs within wider systems of governance, that require us to think carefully about the democratic justification that is made for them. While such considerations cannot be undertaken in length in this article, we stress here that the implications for democratic theorising about NMIs must account for their peculiar position outside of traditional normative theoretical understandings of the legally sovereign nation state. Specifically, since their authority, as we have shown, is variable, then . This can lead to them expanding their authority in the face of public challenge (as the case of IPSA shows), having it significantly curtailed (as IQWiQ shows), or finding it
recognfigured (as the Ethics Council found). Theorised from this perspective, NMI s might be thought of as increasingly powerful authorities in the public sphere, perhaps requiring vigilance about the mandate they (purport to) wield, or merely one part of a pluralistic set of ‘expert’ bodies advising government, perhaps requiring a focus on how they can hold the government to account themselves through their expert knowledge. Again, this is an important question for future research, how NMI s can be justified within an ambiguous and contingent political reality. As the political theorist Michael Saward (2000, pp.4-5) argued, democracy ‘is not wholly fixed in its make-up and dimensions; the elements of democracy, such as participation, accountability, responsibility and an ‘open society’, can be interpreted and interlinked in new and sometimes surprising ways to respond to, or to reflect, new circumstances’. Mapping and accounting for those circumstances, however, is, as a prior exercise, crucially important.

References


