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Introduction

A danger to democracy?

In modern democracies unelected bodies now take many of the detailed policy decisions that affect people's lives, untangle key conflicts of interest for society, resolve disputes over the allocation of resources and even make ethical judgements in some of the most sensitive areas. By contrast, our elected politicians often seem ill-equipped to deal with the complexities of public policy, lightweight in the knowledge they bring to bear, masters not of substance but of spin and presentation and skilled above all in avoiding being blamed for public mishaps.

The rise of the unelected is spread across the democratic world. Unelected bodies take different legal forms and different names are used to label them in different democratic settings. The variety of forms and terminology obscures the underlying growth in their importance. The key question is whether the increasing dependence of modern democratic societies on unelected bodies presents a new danger to democracy.

The alarm signals triggered by the rise of the unelected are not warnings about any sudden reversion away from democracy but about the risks of attrition. There appear, at particular points of time, to be good reasons why a problem area in public policy should be entrusted to an unelected body; but when this is repeated again and again over many of the practical issues that people face in their lives, the combined effect is a cumulative transfer of public power from elected politicians to unelected officials. Politicians compete for sound-bites but the real work of running democracies is now carried out by the unelected. We need therefore to be much more conscious about the implications for democratic theory and practice of the growing dependency of modern societies on the unelected.

The contrast between the ineffectiveness of the elected and the superior capabilities of the unelected has ancient roots. It goes back to the beginnings of democratic theory when it was formulated as a question of

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whether societies are likely to be better off entrusting their government to elites, composed of the wise, or to democratically elected institutions with all their manifest imperfections. At first sight, the rise of the unelected seems to pose this old question in a new form. Today's rise of the unelected seems to lead to a straightforward loss to democracy – as the importance of the unelected rises, so the importance of the elected declines.

Reinvigorating democracies

The unexpected message of this book is that the rise of the unelected is not a danger to democracy. On the contrary, their rise has the potential to make democratic systems of government more robust. In reaching this conclusion this book suggests that we should take the new bodies as a whole and view them as composing a new branch of government and forming the basis of a new separation of powers. Just as the old separation of powers, between legislatures, executives and the judiciary, added to the overall strength of democratic systems of government, so too can the new separation of powers.

The danger to modern democracies is not caused by the rise of the unelected, it comes from failing to recognise the significance of the new separation of powers and from failing to adapt systems of government to it. In systems of government that fail to make good use of what the unelected do best and what only the elected can do, democratic governments will neither be able to solve contemporary problems effectively nor be able to articulate the voice of democracy. Both unelected bodies and elected bodies will be weakened. Citizens will become suspicious of both with the result that democracies will become vulnerable to populism and to arbitrary and indiscriminate exercises of power.

The new branch

What underlies the new separation of powers is a distinction between the empirical component of public policy and the value judgements. The making of public policy involves both elements – the factual evidence and the social or political judgements to be made in the light of that evidence. Unelected bodies have an advantage in dealing with the empirical components of public policy and elected bodies in choosing the values to be reflected in public policy. We are seeing a basic institutional distinction emerge between the processes of gathering information and mobilising the latest knowledge in democratic societies and the processes for passing political judgement on that information and knowledge.

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Unelected bodies may sometimes be entrusted with making social or ethical judgements. Where they are involved in this way it is again because of their advantage in separating facts from spin and in navigating through the complexities of the related empirical background. Even in such cases, the importance of the distinction between assessing the facts and applying values to the evidence remains intact.

Citizens who question

Because the new branch of government is overwhelmingly made up of those with expertise and specialised knowledge, it is easy to view it as nothing but institutionalised elitism and a threat to democracy. Such a tempting diagnosis misses the most important impact of the new branch. The new branch strengthens democracy because it provides a safer environment for people to benefit from expertise and the latest state of knowledge, to gather information that is reliable and relevant to themselves, to trust the information and to draw their own conclusions for their own actions. It helps citizens distinguish between the different components of public policy and the different responsibilities of different contributors to public policy. When citizens disagree with the way public policy is being formulated, their questions and criticisms can be more precisely informed and more sharply targeted.

A better-informed citizenry makes it much more difficult for elected politicians to play fast and loose with the facts or to claim privileged access to knowledge. This means that the rise of the new branch creates a radically different environment providing a new and effective check on the behaviour of the elected branches. The elected branches face a much more questioning attitude to what they say and do and a need to redefine their roles.

The more questioning attitude of informed citizens and the checks provided by the new branch are a challenge to which the elected branches of democratic systems of government currently respond with a great deal of confusion and even resentment. This book argues that, faced with the rise of the unelected, the role of the traditional elected bodies is not diminished but it does change its character. In the new separation of powers the traditional institutions of representative democracy need to change both what they are doing and the way they carry out their functions. Resentment against a more questioning public opinion is not the answer.

Reform

This book argues that the advantages of the new separation of powers can be captured, and the dangers to democracy can be avoided, by a clear

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understanding of what it is that gives unelected bodies their legitimacy and in what ways they can be held accountable. The standard answer does not distinguish between the two questions and gives the same response to both – unelected bodies derive their legitimacy from, and are accountable to, the elected bodies of democracies. By contrast, this book distinguishes between legitimacy and accountability and provides a different answer. It is that the new branch stands on its own claim to legitimacy. This claim is based on developing the principles and procedures appropriate to empirical inquiry analogous to those of the social and physical sciences. The framework of accountability is provided by the way in which the other branches of government reorient their functions in a new system of checks and balances.

According to this account, what distinguishes the new branch and provides the basis for its legitimacy is the greater rigour with which it approaches facts, seeks information, weighs the state of empirical knowledge and tries to draw evidence-based conclusions for public policy. This does not imply that there is some simple line connecting gathering the facts of a situation, empirical analysis of those facts and a public policy conclusion. If the making of public policy was that simple then elected politicians could do it. Unelected bodies have arisen for the opposite reason. The 'facts' are often estimates, the evidence usually incomplete, the science may be contested and the analysis needs to highlight uncertainties and probabilities. It is in steering through the difficulties of the empirical analysis and the uncertainties in the body of knowledge underlying public policy where unelected bodies have an overwhelming advantage over the politicians.

The new separation of powers and framework for accountability have a number of clear implications for the reform of democratic systems of government. These reform messages are important for national systems of government but, in addition, both for the European Union and for the world of international institutions, the reform implications are far-reaching too. Both have blurred the key distinctions in public policy-making and the basis for the new separation of powers. Both now face major overhaul.

The rise of the unelected

In recent years, most democracies around the world have seen a striking expansion in the number and role of bodies in society that exercise official authority but are not headed by elected politicians and have been deliberately set apart, or only loosely tied to the more familiar elected institutions of democracy – the parliaments, presidents and prime

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ministers. The world of the unelected is a hugely varied world. Unelected bodies include independent central banks, independent risk management bodies, independent economics and ethics regulators, regimes of inspection and audit and new types of appeal bodies. It is also a large and growing world. Around 200 unelected bodies now exist in the United States and around 250 in the United Kingdom. Other countries, even with different democratic traditions and structures, are following suit. In addition, the role of the judicial branch of government, in most democracies traditionally set apart from the jostle and scramble of democratic politics, has also grown.

Political scientists refer to such unelected bodies charged with official powers and authority as 'non-majoritarian institutions'.[1] This is a cumbersome and ungainly term and so this book uses the less precise but more informal term of 'unelected bodies' to refer to the same institutions.

At the same time that unelected bodies are playing a much larger role within states across the world, people have become aware of the important role that they play in the international arena outside the compass of state structures. At the global level the unelected bodies are the international institutions and organisations that are sometimes recognised for their words and sometimes for their deeds but most of all for their acronyms. There are about seventy international bodies that have universal or intercontinental memberships. Most people, even the well informed, would be hard pressed to define the precise role of individual institutions such as the OECD or the BIS in the world of international institutions, let alone associated bodies such as the FATF[2] or the FSF.[3] Nevertheless, there is a correct perception that, taken together and in conjunction with international networks of national unelected officials,

[1] Non-majoritarian institutions have been defined in formal terms as government entities possessing some grant of specialised public authority that are neither directly elected by the people nor directly managed by elected officials. See Thatcher and Stone Sweet (2002). The phrase has developed as a way to bring together a variety of terms for describing unelected bodies reflecting different forms in different countries.

[2] The Financial Action Task Force. A key body housed with the Organisation for Economic Cooperation and Development (OECD) bringing together national officials charged with combating money laundering and terrorist financing and instigator among other activities of a 'know your client' approach to banking and other relationship dealings.

[3] The Financial Stability Forum. A body housed with the Bank for International Settlements (BIS) that brings together central bankers, finance ministries and financial regulators to develop core standards relating to the stability of the international financial system and to help co-ordinate emergency actions if needed. Sector-specific international regulatory bodies involved with it include the Basel Committee on Banking Supervision (BCBS), the International Accounting Standards Board (IASB), the International Association of Insurance Supervisors (IAIS) and the International Organization of Securities Commissions (IOSCO).

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they are more important than in the past. Equally to the point, they do not fall within the orbit of democratic politics.

For democracies in Europe, the European Union adds yet a further dimension. An unelected body – the Commission – sits at the centre of institutional arrangements and there are in addition over thirty other unelected bodies in the EU that have been created mainly in recent years.

The importance of the unelected

The combined effect of these developments is that bodies set apart from electoral politics now play a much larger role in the life of democratic regimes than in previous periods. In practice they may have greater impact on people's daily lives than the activities of elected politicians. The words of an independent central bank governor may carry more weight in financial markets than the words of a finance minister and the pronouncements of an independent inspector of schools may carry more clout with the public than those of an education minister. Public reaction to a food or medicine scare or a pension and savings scandal may direct criticism at an independent agency just as much as any minister or Cabinet member with nominal responsibility to the electorate.[4] A far-reaching change in the pensions expectations for an entire generation may be triggered as a result of an accounting change policy prompted by an international body of whose role people are quite unaware,[5] a tribunal attempts to suspend the elected Mayor of London and a court decides the outcome of a US presidential election.

The drama of a court that decides the outcome of a presidential election is, it is to be hoped, a rare occurrence. More typically, unelected bodies in national settings shun the limelight. With the exception of independent central bankers who are required to give their views on the general state of the economy, the unelected do not pontificate on matters of grand politics such as 'the state of the nation', or a nation's place and

[4] On 17 November 2004 two heads of independent agencies in the UK subject to public criticism resigned on the same day: the managing director of the National Assessment Agency in charge of national curriculum tests and the head of the Child Support Agency responsible for ensuring maintenance payments are made by parents who have separated.

[5] In 2000 the UK's Accounting Standards Board (an affiliate of the Financial Reporting Council) adopted FRS 17 a new standard that has effectively spelt the end of defined benefit pension arrangements. In adopting the new standard the Board noted the importance of coming into line with a revised standard of the International Accounting Standards Committee (IASC) that adopted a standard similar to a United States standard FAS 87. (See Financial Reporting Standard 17. Accounting Standards Board. London. Nov. 2000. Appendix III.) Other countries following international accounting or US standards confront the same consequences for pension schemes.

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standing in the world outside, or on matters of war and peace. Their importance stems from a different source. They affect the fundamental fabric of people's lives in intimate and immediate ways.

First, their influence extends into most areas of daily life. The air we breathe, the water we drink, the food we eat, the electricity we use, the phone calls we make, the value of the coins and banknotes in our pockets, our access to media, the disputes we get involved in, are all influenced in basic ways by their activities. Secondly, unelected bodies have a crucial impact at key stages in a person's life-cycle. In the early stages of life they may influence the nutrition we receive, the quality of schools we attend and the value of the types of education diplomas we receive and our job prospects. At a later stage in life they may decide the information or financial structure that determines the benefits from a pension arrangement, and they may affect the choices we have of medicines or treatments to combat wear and tear in the final stage of our lives. Thirdly, the unelected affect the way we are able to deal with life's accidents and chances, fortunes and misfortunes. They may, for example, have a decisive say over the risks we take in using different forms of transport, or eating different foodstuffs. Thus, when all are added up, unelected bodies can be seen at the sharp end in most fields of public policy in which modern government is active – the bodies that in a myriad of ways affect the quality of our daily life, our life chances and our life prospects (see box 1).

While the unelected play a much larger role in the life of democracies, by contrast the stature of the traditional elected institutions seems severely diminished. Not only do ministers seem to exert less control over public policy but Members of Parliament also find themselves further removed from positions of influence and less equipped to be able to scrutinise what is going on effectively. Parliaments not only do not control governments but do not appear to control the unelected bodies either.

We experience this shift in the influence of traditional democratic institutions in diffused ways – when an unelected central banker warns a finance minister to 'keep off my turf'; or when a distant and unfamiliar body such as the FATF spreads a 'know your client' policy through the enforcement authorities of the world with the effect that people find themselves asked for personal information to carry out transactions such as selling an investment or transferring money that was once a purely private transaction; or when an unelected body from another country reaches across traditional 'sovereign' borders.

Sometimes the effect of the unelected on the 'feel' of our democracies may be entirely beneficial – for example in relation to those unelected bodies with a role in enforcing freedom of information or in opening up

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Box 1: The influence of the unelected

INFLUENCING OUR DAILY LIFE

UK's Energywatch makes the first energy 'super-complaint'. '*Yesterday, Energywatch filed a 60 page dossier with OFGEM, the energy regulator, detailing a "myriad" of problems with energy billing which it said were causing debt and misery for consumers . . . Last year 40,000 consumers called Energywatch to complain about their bills.*' '*The complaint, which can lead to fines for businesses that fail consumers, is one of two that will be handed to the OFT (Office of Fair Trading) in the next few months.*' *The Times*, 7 April 2005.

The Australian Child Support Agency 'no stranger to controversy but claims greater success'. '*Compared with its overseas counterparts, it (the Australian Child Support Agency) has been a resounding success, according to Matt Miller, its general manager . . . More than 90 per cent of separating couples with children are registered with the agency, which transferred A$2.4bn (£1bn) in support to more than 1.1m children in the last financial year.*' *Financial Times*, 10 Feb. 2006.

AFFECTING KEY STAGES IN THE LIFE CYCLE

'Mothers got wrong advice for 40 years'. '*Breast feeding mothers have been given potentially harmful advice on infant nutrition for the past 40 years, the World Health Organisation (WHO) has admitted . . . Health experts believe the growth charts [used] may have contributed to childhood obesity and associated problems such as diabetes and heart disease in later life.*' *Sunday Times*, 23 April 2006.

The UK Accounting Standards Board sets out the accounting treatment for retirement benefits such as pensions and medical care during retirement (FRS17). Nov. 2000. '*FTSE 100 companies alone are estimated to have deficits of almost £70bn. Several companies have sought to reduce liabilities by closing defined benefit schemes and by switching to career average rather than final salary arrangements.*' *Financial Times*, 8 Feb. 2006.

UK's NICE rules on treatment for Alzheimer's. '*Drugs should be funded for patients with moderate Alzheimer's but not those with mild or severe forms of the disease according to the body which advises the Government on drugs . . . Between 290,000 and 380,000 people are estimated to suffer with Alzheimer's in England and Wales.*' *Daily Telegraph*, 23 Jan. 2006.

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AFFECTING LIFE'S RISKS

WTO rules against Europe in GM food case. '*The World Trade Organisation ruled yesterday that European restrictions on the introduction of genetically modified foods violated international trade rules, finding there was no scientific justification for lengthy delays in approving new varieties of corn, soyabeans and cotton . . . The European Commission halted the approval of new GM varieties in 1996 but began limited approvals again in May 2004, after the US launched the WTO case . . . The WTO decision also found against separate national bans established by Austria, France, Germany, Greece, Italy and Luxembourg.*' *Financial Times*, 8 Feb. 2006.

New opening for biotechnology medicines. '*The European Medicines Agency yesterday threw open the door to a new generation of cheap biotechnology medicines . . . The decision by the agency removes a big obstacle in Europe to so-called bio-similar products – generic copies of biopharmaceuticals already on the market . . . The ruling also puts the EU ahead of the US, where the regulator is dithering over approval.*' *Financial Times*, 28/29 Jan. 2006.

Air safety and new pilots. '*The minimum number of flying hours for trainee pilots is to be halved under new rules . . . The changes are being supported by the International Civil Aviation Organisation (ICAO) which has come under pressure from Lufthansa, the German airline, to reform pilot licensing.*' *The Times*, 13 Feb. 2006.

new channels of redress. But the net effect of having so many decisions that affect the fabric of daily life being taken outside traditional democratic channels is that modern democracies now seem very far from providing for popular government. Nor is it clear how the new bodies fit within traditional notions of the rule of law. The rise of the unelected means, therefore, that there is a fundamental question to be answered about what role the traditional institutions of democracy such as popularly elected assemblies should now play (see box 2).

A challenge both to democratic practice and to democratic theory

The rise of the unelected is a challenge to democratic practice that goes far beyond the apparent diminution in the role of traditional institutions. Unelected bodies seem to reduce the scope for traditional political debate by treating issues as ones of technocratic problem-solving or as questions

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Box 2: Affecting the 'feel' of democracy

UK Freedom of Information Commissioner 'Strikes blow for disclosure'. *'Government departments are likely to be forced to reveal minutes of top-level meetings after a landmark ruling by the freedom of information watchdog. Richard Thomas, the information commissioner, has ordered the Department for Education and Skills to comply with a request to disclose minutes of senior management meetings . . . He estimates more than 100,000 FOI requests were made last year.' Financial Times*, 13 Jan. 2006.

'Bundesbank "hawk" set to join board of ECB'. *'On fiscal policy, Mr Stark is a passionate defender of the EU's much abused "stability and growth pact" which is supposed to impose fiscal discipline on member states . . . That means he is unlikely to have much patience for eurozone finance ministers who try to resist interest rate moves.' Financial Times*, 14 Feb. 2006.

'Perceived infringements of sovereignty'. *'The Public Company Accounting Oversight Board . . . is putting auditors under the microscope . . . its mandate extends beyond the US, encompassing any auditor that works for companies traded on the US stock market . . . The inspections . . . have prompted grumblings in some quarters about perceived infringements of sovereignty.' Financial Times*, 20 Feb. 2006.

London's Elected Mayor reacts to suspension by the Adjudication Panel for England. *'Commenting on his four week suspension as Mayor of London the Mayor said, "This decision strikes at the heart of democracy. Elected politicians should only be able to be removed by the voters or for breaking the law. Three members of a body that no one has ever elected should not be allowed to overturn the votes of millions of Londoners."' The Times*, 25 Feb. 2006.

of good administration. Increasing reliance on experts also appears dangerously disconnected from the real world because it seems to rest on the view that public policy can be based on a narrow rationality when in practice so much that is involved in politics concerns emotion, strength of feeling and instinctive values and judgements. Politics as an arena for raw expression cannot just be cast aside.

The rise of the unelected is also a problem for the theory of democracy. When all is said and done and after all qualifications to majority rule

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