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Central Banks and Supreme Courts

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I. Law, money, and markets

Markets are crucially underpinned both by a legal system (property law, contract law, bankruptcy law, and so on) and by a monetary system. If either of these key elements of market infrastructure were missing it is hard to see how mankind could have ever progressed far beyond barter (the simultaneous exchange of goods of roughly equal perceived value). Indeed, without a rule of law, the physically weaker of the two parties might even fear that, after an agreed barter exchange, the stronger party might try to seize back the good previously handed over.

Given the essential role of both money and the rule of law for any market economy, it is not surprising that scholars have attributed the development of much of the legal system and money to Hayekian evolutionary processes whose underlying but generally somewhat unconscious purpose was to reduce Coasean transactions costs in the market context to a mimimum.

Let us quote some passages from a recent excellent book by Werin (2003) entitled *Economic Behaviour and Legal Institutions* (pp. 5-6):

> "Most coordination is of an economic nature; hence, it takes place within what is usually called the economic system. But a well-developed economic system can hardly exist unless accompanied by a legal system. Legal rules and arrangements profoundly affect the possibilities for people to act and the incentives behind the acts. This holds true not only for specific regulatory

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> rules that directly control individuals' economic decisions and dispositions. It also holds true for those parts of the legal system which, at least in democratically-oriented countries provide the basic framework, such as the general laws of property, contract, tort and crime. But law is not an exogenously given force, operating on human behaviour solely from the outside. It is itself influenced by the pressures of human activity and the wishes and aspirations driving it. There is an all-pervasive interaction between law and economic life."
>
> "Given the importance of law for the structure and performance of the economic system, to what an extent is law a result of endeavours by those who frame it to achieve these effects? This is the second problem, which basically is the opposite of the first problem as it concerns what determines law rather than what are the *effects* of law. It has only recently come under serious attack from a number of economists and legal scholars. Their research provides strong support for the idea that core parts of law and the economic system are evolving in response to one another. If names should be given, perhaps the most important ones are Ronald Coase, Guido Calabresi, Richard Posner, James Buchanan, Gordon Tulloch, Friedrich Hayek, Kenneth Arrow and Douglass North, some of them economists, some legal scholars."[1]

And finally, from p. 61:

> "Property rights and rules on rights of transfer instituted by *judge-made law* tend systematically to produce incentives that promote efficiency, that is, encourage wealth-increasing acts and counteract wealth-decreasing acts, with no direct consideration of the consequences for the distribution of wealth."

In a somewhat similar fashion, scholars have attributed the development of money to an evolutionary process, whereby barter led to indirect barter which led on to commodity moneys, for example precious metal currency, cowry shell currency, Aztec cocoa bean currency (see Melitz 1974). The progenitor of this line of thought and analysis is Menger (1892), as evidenced by the following quotes from his paper (pp. 248-9):

[1] We would include Mancur Olson in that distinguished list.

> "And so it has come to pass, that as man became increasingly conversant with these economic advantages, mainly by an insight become traditional, and by the habit of economic action, those commodities, which relatively to both space and time are most saleable, have in every market become the wares, which it is not only in the interest of everyone to accept in exchange for his own less saleable goods, but which are also those he does readily accept. And their superior saleableness depends only upon the relatively inferior saleableness of every other kind of commodity, by which alone they have been able to become generally acceptable media of exchange."
>
> So money is "the spontaneous outcome, the unpremeditated resultant, of particular, individual efforts of the members of a society, who have little by little worked their way to a discrimination of the different degrees of saleableness in commodities" (p. 250).
>
> "Money has not been generated by law. In its origin it is a social, and not a state-institution. Sanction by the authority of the state is a notion alien to it. On the other hand, however, by state recognition and state regulation, this social institution of money has been perfected and adjusted to the manifold and varying needs of an evolving commerce, just as customary rights have been perfected and adjusted by statute law" (p. 255).

This Mengerian analysis that money has evolved through a process of search to reduce transaction costs in market exchanges has remained dominant in the literature. Kiyotaki and Wright (1993) and the multitude of further papers that flowed from their seminal work is a good case in point.

There is another branch of literature on the evolution of money, in which it is argued that the Mengerian story is not supported by early empirical history, obtained for example from numismatism and anthropology. This branch is generally termed Chartalist or Cartalist (see Goodhart 2003). What is, however, interesting in this context is that in the account of the evolution on money, the linkages between the development of the legal system and of money are even closer than in the standard Mengerian approach.

Let us take two quotes. The first is from Grierson on "The Origins of Money" (1977). He wrote (pp. 19-21):

> "In any case, the generalized application of monetary values in commodities could scarcely have come about before the appearance of market economies, and monetary valuations were already in existence in what Sir John Hicks has felicitously christened 'customary' and 'command' pre-market societies, *A theory of economic history*, (1969), pp. 2 ff. (rise of the market), 63-8 (origins of money). He has to some extent telescoped the invention of money and the invention of coinage, and in my view he exaggerates the 'store of value' element in early money. Nor, if my argument that money antedated the development of the market is correct, is it the case that the standard 'should be something that is regularly traded'. In such societies they provide a scale of evaluating personal injuries in the institution which the Anglo-Saxons termed the wergild, and it is in this institution that the origin of money as a standard of value must, I believe, be sought..."
>
> "The general object of these laws was simple, that of the provision of a tariff of compensations which in any circumstances their compilers liked to envisage would prevent resort to the bloodfeud and all the inconvenient social consequences that might flow therefrom… The object of the laws is that of preventing retaliation by resort to force, and the principle behind the assessments is less the physical loss or injury suffered, than the need to assuage the anger of the injured party and make good his loss in public reputation."

The second quote comes from Wray (2003, pp. 97-98):

> "(And note that the verb 'to pay' derives from the verb 'to pacify'—indicating the original purpose of the payment of wergeld fines or bridewealth.) These 'tariffs' were established in public assemblies, and the common standards were based on objects of some value which a householder might be expected to possess or which he could obtain from his kinsfolk. Note, however, that these schedules did not use, nor did they require, a unit of account since specific payments were required for each type of inflicted injury – and as they were established in public assembly, the required payment would have been widely known…
>
> It may not be too far from the truth to argue that our monetary system developed out of the criminal justice system, rather than to replace inefficient barter in markets. While we view justice today as the process that forces criminals to 'pay their debt to society', in tribal society, justice meant compensation of victims in order to prevent bloodfeuds from developing. In a very interesting book, Innes (1932) argued that tribal justice was gradually replaced by the modern justice system that was designed to maximize payments to 'pacify' the elite. If correct, standardization of fines, fees, tithes, tribute, and, later, taxes, in terms of a monetary unit of account was accomplished to reduce the transactions costs of enforcement of 'justice' and centralization of collection rather than to replace inefficient barter. Note that even after the development of capitalism, the crown still relied on fines (levied on almost every conceivable activity) for a substantial portion of state revenues (see Maddox, 1769). Above we noted the importance of the imposition of a tax debt in generating a demand for the money issued by the

> state; taxes are of course just a set of specific fines – a 'fine' for owning property, a 'fine' for earning income, or a 'fine' for importing commodities – although no one today thinks of these activities as 'crimes'. While the modern economy has largely separated the state's fiscal system form its criminal justice system, they were closely intertwined until very recently."

Indeed, a modern application of this traditional approach has recently surfaced: an article by K. Gattas in the *Financial Times* (August 6, 2003, p. 18) under the heading "US finds blood money is price of keeping Iraqi peace". It included the following passage:

> "This compensation money will put an end to attacks against US soldiers by relatives of those killed by Americans," explains Taha Bdawi, the city's US-backed mayor. "This is a tribal, traditional society, where the principles of *tha'r* (revenge) and *fidya* (blood money) are still in force." Tribal custom demands that for every man killed, four men from the enemy tribe must die, or one man if it was an accidental death. But a vendetta can be avoided through financial compensation – the current price is 1m Iraqi dinars (about £388) for an accidental killing and 4m dinars for premeditated murder."

Thus, there are important inter-connections between the evolution of the law, of money and of markets. In yet another sense the successful operation of both legal and monetary regimes and systems requires a degree of self-restraint by governments, and can be perceived as a form of commitment device imposed by government on itself. Government is about the exercise of power; central government is where power is centralised and concentrated.

With such a monopoly command over power, the government could use force to extort resources from its subjects. Long-term self-interest will lead it to commit not to do so, as described in his final book by Olson (2000). The main commitment device in that respect is the constitutional acceptance by government to abide by the rule of law. Of course, governments can bring about a change in the law, but this is subject, in most countries, to some form of Parliamentary democracy and to various checks and balances.

By the same token governments can take advantage of their (monopoly) control over the monetary base to extort resources from the community via the inflation tax. Governments generally have had the greatest need for additional resources when their own power was

threatened, by war or civil rebellion. In those circumstances the other sources of revenue such as taxes or borrowing, would often become harder to tap. Glasner (1989) has written (p. 31):

> "This brief survey of the ancient use of the state monopoly over money as an instrument of wartime finance should at least establish the plausibility of my contention that this monopoly was founded on security considerations. Not only is there no evidence that the state established a monopoly over coinage to improve the efficiency of the monetary system, ascribing that monopoly to the desire for monetary efficiency cannot explain why control of the monetary system has been so generally presumed to be an attribute of sovereignty. That feeling, engendered by centuries of historical experience, must stem from a real, if only historical, connection between control over money and the protection of sovereignty. That connection would also explain the otherwise surprising fact that counterfeiting was a treasonable offense under English law."

And also on p. 39:

> "The national defense rationale for the state monopoly over money implies that governments optimally exploit the monopoly by avoiding inflation in peacetime. If they don't avoid inflation, they risk being left defenceless in wartime. Governments that invest in the monopoly over money by not inflating in peacetime therefore improve their chances of surviving in military competition with other governments. So it would seem that there is a tendency for governments that create inflation in peacetime to be weeded out."

When the monetary base consisted primarily of commodity money, there were limits on the ability of the government to impose an inflation tax. The most common way that this was done then was through debasement of the currency (see Sargent and Smith 1995). But the shift from the gold standard to a fiat money system removed any natural constraints on the ability of governments to print money and to impose an inflation tax.

The ability of a government to obtain extra resources by running the printing presses faster has been tempting, especially since governments are inveterate debtors, and thereby benefit from unanticipated inflation and "easy money". Many have fallen to such temptation. Bernholz (2003) noted that (p. 8):

> "all hyperinflations in history occurred after 1914 under discretionary paper money standards except for the French case during the Revolution of 1789-96, when a paper money standard was introduced with assignats."

As Barro (1970) and Cagan (1956) have shown, once inflation gets beyond a certain level, the extent of real resources extracted by government declines, as flight from domestic moneys accelerates. Furthermore inflation is inimical to longer-run sustainable growth. Nevertheless, there is always a short-term incentive for the government to abuse its monopoly control over monetary creation to extract greater resources for itself. But the more that the government is thereby tempted, the less efficient the monetary system becomes. Ultimately as hyperinflation sets in, flight from the domestic monetary system even erodes any benefits to the government itself.

The standard answer to this problem (of time inconsistency) has been for the government to commit to a monetary regime that would publicly constrain it from (excessive) money creation. Adherence to the gold standard was just such a commitment device. Moreover, it worked extremely well in the late 19th and early 20th centuries, allowing a degree of free movement of goods labour and capital that has barely been re-attained in recent years (and is still far from it for labour).

The collapse of the gold standard in the 1930s was followed by price controls in World War II, and then by a lengthy period, under the Bretton Woods system, in which price stability depended, in a somewhat *ad hoc* fashion, on policies of restraint being followed in the centre country, the United States. When the restraint lessened, under the influence of Vietnam and Johnson’s “Great Society”, the Bretton Woods system also buckled.

During subsequent decades, governments and economists have searched for some alternative nominal anchor to enable governments to commit to price stability. Of course in many individual countries this has meant pegging, fixing to, or adopting the currency of another larger and hopefully more stable country or currency zone. But, for a variety of reasons the largest countries (and the euro-zone), along with some others, will want to

maintain domestic monetary autonomy, with floating exchange rates against other major currencies.

The adoption of monetary targets was the first such attempt to find an anchor, but this was abandoned by most countries by the mid-1980s, in some large part because the relationships between money and nominal incomes (velocity) proved to be excessively volatile. The next step has been the adoption of inflation targets. But Chancellors and Ministers of Finance have regularly promised to reduce inflation to some low figure, "cheap talk". The extra "magic" ingredient, beginning with New Zealand at the end of the 1980s, was to grant the central bank independence to use the levers of monetary instruments, essentially control over short-term interest rates, to achieve the target of price stability set for it by the government. By this public delegation of power to an independent body, the government effectively commits itself not to misuse that power for its own, short-term, advantage.

So the exercise of both monetary and judicial powers has now been delegated to an independent body, the members of which are nonetheless ultimately appointed by the government, but responsible to the people. In both cases, the government sets out the underlying objective, to maintain price stability (or in the case of the USA, the various goals set out in the Humphrey Hawkins Act), and the rule of law, before whom everyone should be equal. Even so, the government retains the right to change the objectives to be sought, in the monetary sphere by varying the specific objectives to be followed, and by passing new legislation. Finally, at times of national crisis, a government may over-ride the independence of both institutions. As already argued in Goodhart (2002), the move to central bank independence makes the position of the monetary authority somewhat analogous to that of the highest-level court in a country.

That position is not entirely comfortable. Both the central bank (CB) and the highest-level court wield great powers, but their members have not been elected; they are appointed. By definition they do not have democratic legitimacy; how else can they demonstrate that they have wielded their powers legitimately? They are in close contact with government, and their decisions affect the popularity and options open to government. Yet they are required to act at arms-length. How can this best be achieved? The same procedural questions, e.g. of the nature of the appointment process, the procedures for making decisions, the role of the Chairman (Chief Justice) of the committee, the treatment in the published reports of the discussions, dissents and decisions of the courts, have to be met and resolved both in the monetary and in the legal regime. There is no reason *a priori* to expect the procedural decisions adopted in the legal field in one country to have much in common with the decisions reached in the case of monetary policy, for CBs, in that same country. The independent legal system in our democracies has been evolving for centuries; operationally independent CBs are creatures of the last couple of decades. Despite the constitutional similarity, as we see it, of the independent judiciary and the independent CB (Goodhart 2002), for most people the law and monetary policy are regarded as being in separate (mental) boxes. Moreover the government officials dealing with questions of law (e.g., Attorney General, Lord Chancellor, etc.) are separate and distinct from those dealing with monetary policy and CBs (Treasuries, Ministries of Finance and their respective Ministers). We are not aware of any attested cases in which the regime and structure of the CB was consciously modelled on that of the highest-level court, or legal structure, in its own country.

Nevertheless, as the first part of this exercise – the subject of Section II – we decided to compare and contrast the main procedural decisions for the law and monetary policy in two main instances, in the UK and USA. We focus on the UK and USA because we are more

familiar with their procedures, and because we have found more documentation on their (legal and central bank) procedures than for other countries.

As is reported there in much more detail, we were surprised by the degree to which the key legal and monetary procedures in these various respects were similar within countries and varied between countries. This, however, leads on to the question, "So what?" and, less confrontationally "Why?". After all, we had, in effect, a cross-country study of the institutional arrangements of only four observations, two CBs and two highest-level courts.

We believe that we can also answer the "So what?" and "Why?" questions. In Section III we try to set out various hypotheses to explain these inter-country, cross-disciplinary differences. The answer that we prefer arises from a political science focus. This is that there is a "democratic deficit" concern about delegating power in any democratic country to a non-elected (but appointed) body. Although the arguments for so doing in these fields (law and monetary policy) are convincing (primarily time inconsistency and professionalism), nevertheless a way has to be found of overcoming the democratic deficit. There are various methods of doing the latter, and these have differed, for historical, political, and constitutional reasons in the UK and USA (and in the EU). Because, we claim, of this political science explanation, the procedural choices, for both the highest-level court and the CB, will be similar within countries and differ across countries.

II. Institutional comparison

The focus of our comparison of judicial and monetary systems in the UK and USA is on the highest-level courts in both countries: the Appellate Committee of the House of Lords (Law Lords or LL) in the UK,[2] and the Supreme Court (SC) in the USA. We begin with a

[2] The jurisdiction of the UK high court extends over three legal systems – England and Wales, Northern Ireland, and Scotland. The LL function as the final court of appeal for each system according to its own law. In addition, the LL, sitting as the Privy Council, act as court of last resort in cases brought by former colonies or dependencies. We do not include the Privy Council in our analysis.

discussion of judicial independence and then turn our attention to the appointments process for judges, the decision making procedures including the role of the lead or chief judge, the importance of consensus, and the communications strategy. Where important, we add some remarks on this same relationship, between the European Court of Justice (ECJ) and the European Central Bank (ECB), in the case of the euro-zone.[3]

Independence

Within the field of law, judicial independence in common law systems is widely acknowledged to date from 1701 with the passage of Britain's Act of Settlement (see Stevens p. 1). The Act established regular salaries for judges, severing the link between judgments passed and compensation, and required the vote of both houses of Parliament before a judge could be removed. In effect, it protected judges so that they could do their job without being subject to political whim. Stevens says that the Act was an "inarticulate effort" (p. 9) to achieve the separation of powers established later in the century in the USA under Article 3 of the US Constitution.

As with central bank independence in the UK and USA, judicial independence is defined somewhat differently in the two countries. In England, the judiciary is not "separate" as it is in the American system. Rather, in the UK, all power derives from the monarchy and the sovereignty of Parliament, under which the judiciary functions. The American system relies on three co-equal arms of government, the legislature, the executive, and the judiciary, as proscribed in Articles 1-3 of the Constitution. Scholars seem to agree that the LL do not have the same wide-ranging powers with respect to the legislature as does the SC. For example, Robertson states that the LL possess "no power of judicial review equivalent to the constitutional override power" of the SC (p. 4). Although the SC does exercise substantial

[3] For matters relating to EU legislation, the ECJ is the court of last appeal.

power with respect to the interpretation of legislation, it is worth noting that the Constitution vests in the US Congress all right to enact legislation.

The difference with regard to judicial independence in the UK and US might best be framed in economic jargon in terms of goal and instrument independence. In the US system of three separate, co-equal powers, the SC possesses goal independence in the sense that it must define for itself the trade-off between strict interpretation of written law and the striking down of it (notwithstanding Article 1 mentioned above). Like the FOMC and its multiple objectives for monetary policy, the SC's objectives as between interpretation of law and the vetoing of it, are not clearly stated and the court must define its objective.[4] A key development in this respect was the landmark case in 1803 of *Marbury v. Madison*, in which the SC determined that the judiciary had the power to declare Congressional legislation unconstitutional.

In contrast, the LL do not have co-equal status with Parliament, and thus do not compete in terms of a legislative role. The British tradition has been one based on the application of the existing law rather than in the making of it (see discussion below). This can be seen as analogous to instrument independence where, like the MPC which is given an inflation target by the government and the freedom to choose how best to achieve it, the LL are asked to interpret the existing law but receive no additional instruction in this pursuit.

Despite these differences in legal independence in the UK and USA, in practice judges in both countries have taken similar approaches to the application of law. Both legal

[4] Indeed, given the separation of powers in the US system, it is not clear which branch of government – executive or legislative – would narrow the SC's goal were instrument independence to be preferred.

systems are grounded in common law, in which the roles for precedent, *stare decisis*,[5] and judicial restraint figure importantly. In Britain, legal thought was heavily influenced by Albert Venn Dicey whose work *Introduction to the Study of Law of the Constitu*

Appointment of judges and monetary policymakers

In the UK and USA, justices on the highest-level court are appointed to lengthy terms based in part upon their success in the law, broadly similar to the practices for appointing monetary policy officials to the FOMC or the MPC. In both countries, a high proportion of judges sitting on the highest court have previously served as judges in the appeals court. The nine justices on the SC are nominated by the President and approved by the Senate to life terms. Twelve LL are appointed by the Queen upon the recommendation of the Prime Minister to a position as life peer in the House of Lords and to serve as "Lord of Appeal in Ordinary" until age 70 (after which time the peer sits as a legislator in the House of Lords and may be called upon as necessary to hear cases until age 75). Since 1984, the Queen designates one LL as "senior" and another as "deputy."

Despite general similarities in the judicial appointments process, there are some notable differences. Tables 1 and 2 show background data on highest-level court judges in the UK and USA, respectively. Appointments to the LL are drawn to a greater extent from a narrowly defined professional elite than are appointments to the SC. Virtually all LL have previously served as a judge on the second highest-ranking court in England and Wales, Scotland, or Northern Ireland. By contrast, about 40 percent of SC justices are appointed from the US Court of Appeals and, if other senior judicial positions are taken into account, the percentage of SC appointments from the judicial ranks rises to only 60 percent. Moreover, SC appointees are very likely to have held some prior political appointment (about 30 percent), or to have an affiliation to the same political party as the nominating President (nearly 90 percent). By comparison, only 7 percent of LL have held prior political positions. These data suggest that highest-level court appointments in the UK are based primarily on

applied to ordinary common law cases. But in dealing with constitutional questions it has been found essential to keep the law as flexible as possible." (p. 67)

technical expertise, while comparable appointments in the US require a combination of technical and political skills.

In both systems, the position of senior judge is a separate appointment. In the USA, the Chief Justice requires a separate Presidential nomination and Senate confirmation process even in the case of a sitting SC judge (since Franklin Roosevelt, two of five Chief Justices have been appointed from sitting justices on the court). In the UK, the only judge with a political role that overlaps with his judicial function is the Lord Chancellor who serves as a member of the cabinet (head of the Lord Chancellor's Department which administers the courts), head of the judiciary (the 13th LL), and speaker of the House of Lords. Although the Lord Chancellor infrequently hears a case brought before the UK's highest court, the overlap between judicial and political roles particularly with respect to the choice of judges, has made the office of the Lord Chancellor the target of substantial criticism. The Lord Chancellor's role, the desirability of an independent court, and the government's proposal last June to establish a supreme court, have little direct bearing on our analysis and we do not deal with these issues here.[6] As already noted, the Lord Chancellor almost never hears a case brought before the Lords, and, as regards potential political influence on the appointments process, Salzberger and Fenn (1999) found no evidence that LL are appointed to the highest-level court as a reward for their decisions in the appeals court (in cases where the government was the defendant).

The importance of technical expertise and political attributes for monetary policy officials in the UK and USA bears some similarity to the background characteristics of highest-level court judges. The FOMC is composed of seven Board members and five

[6] Ample discussion of this issue is provided in W. Goodhart (2003a, 2003b), Le Sueur and Cornes (2001), Stevens (2002), and Steyn (1999).

Presidents of the twelve Federal Reserve Banks.[7] Board members are appointed in a similar fashion to SC justices (nomination by the President and confirmation by the Senate) to non-renewable terms of 14 years.[8] Reserve Bank Presidents are appointed by regional boards of directors, subject to the approval of the Fed Board, to renewable terms of 5 years.[9] Thus, the FOMC by design is made up of government appointees (the Board members) and quasi-private sector representatives (the Bank Presidents). This public/private split bears some similarity to the appointment of "internal" and "external" members to the Bank of England's MPC. The five internal members have direct responsibility for the institutional operations, while the four external members (who are appointed by the Chancellor) have with very few exceptions been appointed from a narrow group of professional economists who are expert in the relevant fields.[10]

Tables 3 and 4 provide background information on FOMC and MPC members (with separate categories for Board members and Bank Presidents in the case of the Fed, and internal and external members in the case of the MPC) with respect to education and type of prior work experience. Appointees to the Fed's Board and internal MPC members generally have had formal training in economics (with the former more likely to hold PhDs than the latter), and large fractions of both groups have had public sector experience either in central banking or other areas of government. In contrast, Bank presidents tend to have a more diverse background and are more likely to have been involved in business and private sector pursuits than are external MPC members, the majority of whom are academic economists.

[7] The President of the Federal Reserve Bank of New York has a permanent seat on the FOMC. Four other Bank Presidents are selected according to an annual fixed rotation.
[8] As with the SC Chief Justice, the Fed Board Chairman is subject to a separate nomination and confirmation process. An appointed Chairman serves for 4 years; the term can be renewed so long as the 14-year term as Board member has not expired.
[9] Reserve Bank Presidents must retire at 65 unless they were appointed after the age of 55, in which case they may serve for 10 years but must retire at the age of 70.

Decision making procedures

By all accounts, the LL operate in a relatively informal fashion that permits give-and-take as necessary before a formal judgment is taken on a case. As with members of the MPC, the LL appear to be individually accountable with respect to their judgments. Robertson (p. 18) notes that "The Law Lords come to their decisions very freely, with little peer group influence or pressure, largely according to individual conceptions they hold about their role." This informality and individual accountability is at odds with the practices of the central bank and highest-level court in the USA, where procedures tend to be more formal and individual accountability is not an operative concept.[11] Robertson reports that the extent to which the LL are individually accountable greatly exceeds that of comparable judges in other countries (p. 16); we conjecture that this may arise because the former do not appear to place great emphasis on decision making by consensus (discussed further below).

Most of the cases coming before the LL have been granted leave to appeal by an Appeal Committee (composed of three LL); in a few instances, the leave to appeal is a right or is granted by a lower court. The LL hear cases in panels of five[12] designated by the principal clerk in the Lord Chancellor's Department, who may take into account expertise of the particular judges[13] in addition to the needs of the schedule. In general, a panel is headed by the senior or deputy LL, and is notified of a particular case about three weeks prior to hearing it argued, with written materials distributed a few days in advance. Oral arguments in a case range from a day to several weeks, with the average hearing lasting about 2½ days. Apparently, the LL engage in informal discussion throughout the hearing, something that Paterson terms a "process of continuous consultation" (p. 90).

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[10] Term lengths differ depending on the type of appointment. It is worth noting that the terms in office for monetary policy officials in the UK and USA are substantially shorter than those for high-court judges.
[11] In the USA, institutional accountability is well-developed while individual accountability is not.
[12] If the case is highly contentious, the panel is composed of seven judges.
[13] Expertise includes knowledge of the law of Northern Ireland or Scotland should the appeal arise from those jurisdictions.

Following the hearing, the judges meet in conference to discuss the case, with the presiding LL calling upon other members of the panel in inverse order of seniority to offer their analysis and opinion. According to a number of legal scholars, little effort is made to persuade the LL to agree to a single opinion. The presiding LL designates which judge will write the opinion, although Paterson notes that this assignment tends to be "the product of collective agreement" (p. 93), and the writing process averages about six weeks. More than one opinion (majority or minority) may be drafted; in fact, the LL frequently issue concurring opinions that reach the same decision but offer different reasoning. It is uncommon for one opinion to address directly arguments raised in other opinions. Ultimately, the findings of the LL are subject to presentation and vote by the entire House, but this is a matter of formality only. The work of the judges is completed with little or no staff assistance, although since 2000, the LL have employed four judicial assistants.

The relaxed, informal procedures of the LL bear more similarity to those of the MPC than to the more formal process followed by the highest-level court in the USA. SC cases are scheduled well in advance following the application and approval by a subset of four justices of a grant of review (*writ of certiori*). Thus, information pertaining to a case is available well in advance of its hearing. The schedule alternates between hearing of cases and writing of opinions in 2-3 week segments throughout the term year that commences in October and ends in early summer. The justices sit *en banc* for the hearing of each case, and oral arguments are strictly limited to 30 minutes for each side (60 minutes in constitutional cases). At the end of each week of hearings, the justices meet in conference to discuss the cases under consideration. The Chief Justice leads these conferences, speaking first and then calling on the other justices in order of seniority to give their analysis and preliminary opinion. The most senior justice in the majority assigns the writing of the opinion, often taking it for himself. Written opinions are circulated and must be formally endorsed by other justices in

order to secure the majority. A minority opinion is also drafted to address explicitly the arguments made in the majority opinion. The opinion writing process may occur quickly or take a long time, depending largely upon the contentiousness of the case in question.

The procedure of circulating and commenting on written opinions is very important for the SC, and appears to substitute for the LL's more informal oral discussions. Much of the verbal to-and-fro appears to take place between the individual justices and their law clerks (about four per justice) who handle the preparation of cases and initial drafting of opinions. The opinion process creates opportunity for convincing undecided justices; Lazarus recounts several instances in which this process is used to build support. Justice William Brennan wrote that he "circulated 10 printed drafts before one was approved as the Court opinion. It is a common experience that dissent[er]s change votes, even enough votes to become the majority." Paterson notes that this process "creates a potential for tactical voting by a Chief Justice who can see that the view which he favours is not going to prevail, in that he may vote with the majority in order to control the opinion assignment and thus attempt to minimise the damage inflicted by the decision of the Court on the view which he actually holds" (p. 93).

Thus, the Chief Justice plays a central role in the SC in terms of controlling the discussion and determining the outcome,[14] and this role seems quite similar to that of the Fed chairman in meetings of the FOMC. Transcripts of FOMC meetings reveal that the Fed Chairman directs the discussion and that, in the crucial "second" round in which the policy stance is debated and voted upon, Chairman Greenspan has talked first, giving a clear indication of his views and his preferred policy. The policy eventually adopted by the group virtually never deviates from Greenspan's initial proposal, although the extent of dissent voiced during the discussion is greater than the official dissenting vote (see Meade 2002). In

[14] Lazarus writes (p. 399): "Next to the assignment power, this prerogative of initially framing the discussion of every case is perhaps the most powerful tool associated with being Chief Justice."

both the MPC and LL, the hierarchy of the committee is flatter than in the USA, with the relationship among members one more of symmetry than asymmetry. The non-hierarchical structure of the MPC is associated with a greater willingness to register official dissent relative to the FOMC, although it is difficult to determine whether or by how much the lack of hierarchy contributes to this.

Importance of consensus

Legal scholars have addressed the question of consensus and the pressure to achieve it, asserting that it exists to some extent in both the UK and USA because a frequent, high rate of dissent may undermine the authority of the institution and ultimately, the law. However, for the LL, the pressure for consensus appears to be balanced against individual accountability (Paterson pp. 108-109):

> "… on multiple judgments, dissents and the pursuit of unity, the prevailing ethos on these matters in the House of Lords is that of laissez-faire. By and large, it is up to the individual Law Lord whether he writes or not, and whether he dissents or not. Except in a small minority of appeals the support for unity in the court is only tentative, there is little resistance to dissents on the ground that they are detrimental to the authority of the court and attempts to reconcile differences in the court are the exception rather than the rule."

No such balancing appears in the writings on desirability of consensus in decisions of the US highest-level court. The American Bar Association has written that "… dissenting opinions should be discouraged in courts of last resort" (Canon 19, Canons of Judicial Ethics, American Bar Association). Danielski (1967) indicates that expectations of consensus have lessened somewhat since 1940, and in another study, Epstein, Segal, and Spaeth (2001) discuss the "norm of consensus" that existed on the SC from 1800 until the 1940s.

Meade (2002) finds a similar "norm of consensus" on the current-day FOMC, as the meeting transcripts reveal a much higher rate of disagreement than do official votes. Clearly, contentious decisions should not require unanimity, but frequent dissent may expose an institution to criticism and raise questions about its legitimacy. Beck (1994) asserts that the

imperative for unanimity is likely stronger in the case of the FOMC than the SC because the Fed derives its independence from Congress rather than from the Constitution. In contrast to the FOMC, discussions of the MPC frequently emphasize the role played by individual accountability in the decision process.

All this would suggest that dissent rates for the UK institutions would be higher than those for the US highest-level court and central bank. However, as table 5 shows, SC decisions are characterized by a very high rate of dissent (19 percent) when compared with those of the LL (only 5 percent in recent years); we are unable to explain these figures. Results for the respective monetary committees are more in line with the previous discussion: the frequency of dissent in decisions of the FOMC is 8 percent, compared with 17 percent for the MPC. It is worth noting that the practice of the counterpart European institutions is very different with respect to dissent. Neither the ECJ nor the ECB release any information on voting, and only disclose the majority opinion or policy outcome. The ECJ admits that dissents are registered but that their release would undermine support for the majority opinion, while the ECB claims that despite the "one man, one vote" stipulation of the Maastricht Treaty, all decisions are reached by consensus and no vote is taken.

Communications strategy

As a general rule, the CBs and highest-level courts in the UK and USA communicate actively with the public in terms of the announcement of decisions and publication of related materials. Both the FOMC and the MPC publish minutes and voting records of monetary policy meetings; the FOMC tape records its meetings and publishes transcripts after five years. Although there is no formal reporting of judges' conferences for either the LL or the SC, both courts publish written opinions and voting results. Oral arguments before the SC and LL are open to the public, and judgments of both bodies are announced publicly.

This relatively open pattern of communications for CBs and highest-level courts in the two Anglo-Saxon countries contrasts sharply with the practices of the European institutions, particularly with regard to meeting minutes and votes. However, the ECJ and the ECB do provide a substantial amount of information on the majority decision either via written judgments (the former) or press conference (the latter).

III. An explanation of the differences in decision-making procedures

What we claim to have established in Section II is that, in respect of the procedures both of the legal system (LL/SC) and of the monetary systems (MPC/FOMC), the UK is more individualistic than the USA. There are several dimensions involved, e.g. publication of dissents, the extent to which there is central leadership – and support for that leadership – in the relevant committees. From the account given in Section II, we feel certain that however these dimensions might be weighted, the UK would come out as the more individualistic. In the literature that attempts to assess the degree of central bank "independence", there have been several studies attempting quantitative measurement (e.g. Alesina (1989), Grilli *et al.* (1991), Cukierman (1992), Eijffinger and Schaling (1993)), often yielding different rankings. But we did not want to produce any such quantitative index of individualism since this would be both subjective and necessarily imprecise.

By the same token, we would claim that the European institutions (ECJ/ECB) are in turn more collective, less individualistic, than the American ones. This judgment is made less confidently than the ranking of UK/US for two reasons: first, our own knowledge of the European institutions is less; second, there is at least one dimension in which American procedures are more collectivist or centralised and that concerns the leadership of the SC and FOMC. The Chief Justice (SC) and the Fed Chairman (FOMC) appear, to the public eye, more influential than the President of the ECJ or the President of the ECB. Leadership and influence in committees are, however, in some large part personal attributes. One can, for

example, seek to measure how far each Chief Justice or Fed Chairman has managed to carry his respective committee with him, and, as shown in Belden (1989), it varies significantly from leader to leader. Thus, a view that Greenspan is a more dominant leader than Duisenberg is as much, or more, a judgment about the man rather than the procedural characteristics of the relevant institution (FOMC or ECB). That said, we are more impressed, in our assessment of the place in the scale running from individualistic to collective in the treatment by the US and European institutions of dissent. That there is argument and differing viewpoints in the discussions in the European committees (ECJ/ECB) is sure and obvious, just as in committees elsewhere. But once a judgment has been made in the European committees, there is no further official or formal revelation of such arguments or dissents. Only the arguments and reasoning behind the (majority) decision are publicly revealed. We regard this as the touchstone of a collectivist approach. Both the UK and the US report, in detail, the identity of the dissentients and their general arguments.[15]

One immediate natural response to such differentiation is to argue that one end, or other, of the scale from individualism to collectivism in decision-making procedures is in some abstract, or Platonic, sense the more appropriate. With the ECB and MPC being newly established institutions, and differing quite markedly along this scale, there has been a predictable attempt to claim that one end of the scale is in some sense "better" than another. Buiter (1999) is, perhaps, the standard bearer for the individualists, and Issing *et al.* (2001) for the collectivists. According to Issing *et al.* (pp. 131-132):[16]

> "The case for individual accountability is sometimes presented as a step in the direction of increasing accountability (e.g., Buiter 1999), since it brings into the open individual motives and responsibilities. There are, however, no

[15] And, in the case of the FOMC, specific verbal arguments are revealed in the transcripts which are released with a lag of five years.

[16] As far as we know, there has been less discussion of alternative decision-making procedures in this vein amongst legal scholars. The historical evolution of the US and UK legal systems has been so long drawn-out that existing procedures may have come to seem 'natural'. We are not aware of what discussions took place in Europe in the context of establishing the procedures of the ECJ.

> simple short cuts to ensure accountability of a monetary policy council, and concerns over individual incentives must be balanced with the need for effective collective decision making. Decisions are the outcome of a process of collective reasoning which is more than a mere exchange of views. This collective process can shape the final outcome (the decision) more than each single vote. Once this feature of councils and committees is recognised, the case for individual accountability becomes debatable.
>
> To begin with, it is not clear what public advantages would derive from the knowledge that, after a certain decision was taken, a particular member of the committee or council was against it, but also unable to convince the other members of his or her opinions. Accountability ultimately means bearing the consequences of *decisions*, not *intentions*. Since choices are made collectively when a committee or council is the decision making body, collective accountability appears to be the natural choice."

We take a somewhat different line. We were both surprised and impressed by the degree to which the comparative decision-making procedures in the law and in monetary policy appeared at roughly similar points along this (individualistic/collectivist) scale in the UK and USA, (and also, as far as we could ascertain, in Europe), despite the institutional evolution of the two sets of systems (monetary and legal) being quite separate. Our surmise is that there may be a common thread within the "national" circumstances of these countries (if the EU can be so described), which leads to a similar kind of response in setting decision-making procedures in each case.

We do not seek to find such common factors in stereotypes of national characteristics, which we regard as largely myths. Our view is different and relates to the difficulty of delegating powers that are important to the welfare of society to a non-elected body within a democracy. The answer that has been adopted in the UK, and in other countries with a British tradition, like New Zealand, is to give such bodies operational independence, but not goal independence. The analysis of that within the context of the UK's MPC is straight-forward, and has been frequently set out (Fischer 1994, 1995). Our claim is that the approach championed by Dicey is the UK legal equivalent. That is that the role of the LL is to interpret the law as it has been set out in the Statutes and Laws passed by Parliament, and not to seek

to amend or to challenge or to revise them in any way (just as it is the role of the MPC to achieve the target set out for it by the Chancellor in Parliament). This, for example, we believe is why there was so much fuss about the case Pepper v. Hart when the LL sought to move on from interpretation of the meaning of the statute as it was written, to the interpretation of the intention of Parliament when it was in the process of legislating it. Moving to the latter position both widens and makes fuzzier the status of goal independence for the LL.

The Constitution of the United States makes reliance on a similarly tight setting of the goals of the legal system impossible there, so alternative ways of overcoming the "democratic deficit" have to be found. In the USA it was made, intentionally, difficult for the executive and legislature to amend or to revise the Constitution, which plays a central role in the governance of that country. So, interpretation of the Constitution is both integral to the operation of the USA, undertaken by the SC, and <u>cannot</u> be overturned and made null by the decision of the democratically elected executive (President) and Houses of Congress. Thus, in decisions which affect society in the USA, the SC has a power, largely through its interpretation of the Constitution, which the LL has not shared. Unlike the LL, which has been subservient to Parliament, the SC has been more co-equal in power.

The comparative position in the case of US monetary policy (*vis a vis* the UK) is less clear-cut and more nuanced. Unlike the legal system, the Fed (and FOMC), was established by Congressional legislation, and that means that the Fed is essentially more subservient to Congress than is the SC.[17] Nevertheless, the Fed has been allowed considerably more goal independence than the Bank of England's MPC. Under the Federal Reserve Reform Act of 1977, the goals that the Fed was asked to achieve were both broadly drawn and inter-related,

[17] In writing about central bank and judicial independence, Lastra and Miller (2001) argue that "the problems of legitimacy for central banks are less than for a court exercising judicial review because the central bank's powers are explicitly conferred by legislation adopted in the political process" (p. 40).

so that there could be trade-offs between them, allowing the Fed some considerable lee-way to choose their relative weights. Be that as it may, the constitution of the Fed, (with its emphasis on sharing representation within the FOMC amongst the regional districts, and the attempts made in the mechanism of appointments for Reserve Bank Presidents, for example, to achieve a balance between the interests of the various key clients of the Fed, e.g. the member banks, local business, the central authorities), is representative of the way in which the democratic deficit of a non-elected powerful body is handled within the US.

Both the FOMC and SC have the power to take actions that are opposed by the executive and legislature. (While this can happen in the UK also, the lack of goal independence makes it less likely, and the ability of Parliament to re-set the monetary target or the law leaves the final outcome in their hands.) This means that the possibility of conflict between the SC and to a lesser extent the FOMC, and the executive or legislature is greater in the USA than in the UK. It is less with respect to the FOMC, because the ultimate subservience of the Fed to Congress makes the Fed (even) more sensitive to the political winds (to an extent which the goal dependent MPC or LL does not have to be). There are many examples, and numerous books and papers have been written demonstrating how the SC and Fed react to the changing political climate.

Nevertheless, conflicts between the democratically elected arms of government and the unelected SC and FOMC can and do occur. Perhaps the conflict between Roosevelt and the SC in the 1930s is the best known example, but there are many others, both for the SC and FOMC. There are several avenues for reducing such tension. The most important is via the appointment process. In the USA, appointments to the SC and Fed Board have two dimensions, professional <u>and</u> political – with the latter dimension far more important than in the UK, which emphasises the first criterion. Indeed, UK commentators frequently profess to be shocked by the overtly political requirement for appointment in the USA, often failing to

note that the *quid pro quo* in the UK is a much narrower ambit of power, i.e. no goal independence. Thus, the President nominates to both the SC and FRB, and normally seeks to appoint one of his own party (indeed often more narrowly of his own ideological stamp), who at the same time has the requisite professional qualifications. The Senate has to ratify the appointment. It cannot, by the rules of the game, object overtly to the candidate's political affiliation, but only to his or her professional capabilities. It will nonetheless be noted that it is invariably Democratic (Republican) senators who criticize the professional standing of candidates nominated by a Republican (Democratic) President.

This politicisation of appointment (both to Fed Board and SC) is not an unfortunate aberration, as many in the UK see it, but a delicate compromise between the need for overall democratic control, and at the same time to delegate effective power (for the various reasons adumbrated), to a non-elected body of professional experts. It has the effect that a viewpoint which is supported by Presidents, and Congress, for long enough will by the simple process of the turn-over of committee members become reflected in the make-up of those committees. If the Democrats or Republicans dominate the executive branch for long enough, then the SC and FRB will come to reflect their viewpoint. How extreme the viewpoint almost certainly depends on whether the same party controls both the executive and the legislative branches.

This does have disadvantages. When the appointment has no fixed term of office, or alternatively a very long one, this can put pressure on an incumbent from the party not in office to stay on too long, a condition noted more in the SC than in the Fed (due to length of terms and average time in them). It can become disturbing when the decision itself is immediately and importantly political, as in Bush vs. Gore (Dershowitz 2001). It also means that an incoming President has to wait some considerable time before he has the opportunity to stamp his own preferences, in the physical form of his appointments, on the relevant body.

This is one of the checks and balances of the US Constitution. It means that a President probably needs re-election before being able to shape the SC or FRB decisively, conditional on the age and health status of the sitting justices.

But what happens if, in the shorter run, with a given SC or FOMC, there is a major conflict between the body and the elected arms of government? Say that the FOMC refuses to expand the economy, or the SC declares an Act “unconstitutional”, when such a measure formed a major plank of the incoming government’s manifesto, and post-election democratic mandate? Again all this has a somewhat stronger resonance with the SC than with the FOMC. Since the Fed is a creature of Congress, both parties are aware that, in the last resort, Congress could rewrite the Federal Reserve Act to force the Fed into subservience; the Fed is likely to aim to be sufficiently flexible to prevent this from happening (there are several examples in Meltzer 2003). Keefer and Stasavage (2003) examine this process in a formal model and find that a system based on a separation of powers is less likely than a system with no separation of powers to forge the consensus necessary to re-write the legislation of an independent agency.[18]

In contrast, the SC was established under the Constitution, and cannot be altered by an Act of Congress. So what happens when there is a short-run conflict? In a review of the first century of the SC, William Rehnquist (1988) discusses Congressional attempts to control the court when, in the aftermath of the Civil War, the “radical Republicans” in Congress passed legislation reducing the number of SC justices from ten to seven in order to prevent President Lincoln’s successor (Andrew Johnson) from making additional appointments that would not

[18] A direct implication of their model therefore is that the Fed enjoys greater *de facto* independence than the Bank of England because its legislation is less likely to be re-written.

be supportive enough of the Reconstructionist effort. Rehnquist notes that "the Court reached a nadir in its prestige and authority" (p. 488) during this episode, only gradually rebuilding its influence over the subsequent two decades. Timberlake (1991) describes a battle with the SC during the same time period in which President Grant "appointed two new Justices to the Court whose opinions on legal tender were well known" (p. 27) in order to reverse the SC's previous judgment that US notes were not legal tender for Civil War debts.

However, even in the most severe cases of conflict, the SC (and to a lesser extent the FOMC) has the power to delay the policies of a democratically elected government for some (uncertain but possibly quite long) lapse of time. But ultimately, in the long term, the democratic will prevails.

How about Europe, or to be more precise, the countries forming the European Union (EU)? Clearly the constitutional position is more complex and evolutionary than in the case of the USA or the UK (prior to its entry into the EU).[19] The EU is not a unitary country, but involves a set of institutions and competences where powers have been transferred from national to supranational states. This has one immediate consequence. There is clearly a need for (legal) interpretation of such Treaties, and this is amongst the main roles of the ECJ, established as a key component of the original European Coal and Steel Community in 1952.

In this respect the ECJ is akin to the SC, and not to the LL. It cannot be denied goal independence (as were LL under the Dicey approach), and therefore has a clear power to interpret the Treaties as it thinks fit. But the EU has not chosen the American route whereby the democratic deficit is ultimately constrained by giving all new appointments a political dimension. Appointments have a national dimension, but, subject to that, have been – as far as we are aware – much more in the British model, i.e. conditioned only on professional

[19] It should be noted that enactment of a European Constitutional Treaty, such as that drafted by Giscard D'Estaing and his committee, would enhance the powers of the ECJ.

expertise, than on the American one. So what would happen if a ruling of the ECJ ran into serious conflict with the strongly expressed views of the Council of Ministers, and the democratic political mandate of (most of the large) member countries, i.e. if the problem of a "democratic deficit" loomed large? We do not know.

Like the ECJ, the ECB was also established by a treaty. The Maastricht Treaty[20] sets out in Article 105 what the objectives of the ECB shall be, and in this respect the ECB's goal independence is limited. But the language of the Treaty is quite broad,[21] giving the ECB considerable lee-way in interpreting how to define its objectives for itself. For example, the ECB can establish not only its own definition of price stability, but also the time horizon relevant for achieving that. This distinguishes it from the MPC, though the ECB has less goal independence than the FOMC.

More important than the question of the interpretation of price stability is the question of what would happen if the democratic political will in the EU decided to attach more weight to other objectives, say exchange rate stability or a reduction in unemployment.[22] The question of what would happen if the Council of Ministers should seek to adopt a fixed exchange rate has been addressed in the Treaty of Maastricht, but in a somewhat confused fashion (Article 109). What would happen, however, if the democratically elected authorities of the EU wanted less weight placed on "price stability" relative to output growth, or a different measure of such stability (or horizon) than that adopted by the ECB? To achieve that outcome the members of the EU would have to revise the initial Treaty, and that requires

[20] The formal name for this treaty is the Treaty on European Union signed in Maastricht.

[21] Article 105.1 states: "The primary objective of the ESCB shall be to maintain price stability. Without prejudice to the objective of price stability, the ESCB shall support the general economic policies in the Community with a view to contributing to the achievement of the objectives of the Community as laid down in Article 2. The ESCB shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 3a."

[22] We are perfectly aware of the theories that claim that no central bank should, or could, be given a real objective, since it can only influence nominal variables. Indeed we subscribe to that view ourselves. This does not, however, *ipso facto* mean that the democratic political will may not seek to ask a central bank to do so.

unanimity. With the continuing expansion of the EU, unanimity for Treaty revision is probably more difficult than amending the Constitution of the United States.

Again the members of the Governing Council of the ECB, notably the Governors of the member national central banks, are appointed more on the British model, by professional expertise conditioned on nationality, than on the American. So it is difficult, though not impossible, to envisage turn-over on the ECB (and ECJ) bringing views there closer to those of the elected politicians. In that sense, the ECJ and ECB have a greater "democratic deficit" than in the equivalent cases in the UK or USA.

It is against that background, we would argue, that these EU institutions have both adopted collectivist procedures, especially for reporting on decisions. If there is a potential for conflict between these committees and their democratic political authorities, with no clear means of conflict resolution, then it strengthens the hand of that committee to present the final decision as if it were unanimous (a collective) and its supporting arguments, without reference to dissentient arguments. If the politicians are baying for your blood, it hardly helps to put over an unpopular decision by saying it was approved by 10 to 8 votes, with some persuasive arguments put forward against that decision. In the UK, the House of Commons and executive effectively set the objectives for the LL and MPC, so there is no "democratic deficit". In the USA, the "democratic deficit" is mitigated by the politicisation of the appointment process. In the EU, we would argue, the "democratic deficit" gives strong incentives to these independent, but powerful, committees to establish a common, collective front.

So we claim that a significant, large part of the reason for the differing procedures of these legal and monetary policy bodies in the UK, USA, and EU derives from a political science root. How do you deal with effective power in the shape of goal independence in a democratic society? In the UK, they traditionally did so by minimising such independence;

in the USA, by the politicisation of appointment; and in the EU, by the committees maintaining a common front in the face of the politicians.

So what? Does any of such rather general analysis matter? To some it obviously does, perhaps not to others. We would, however, end by indicating a looming problem that EU entry has for the legal profession in the UK (unlike the MPC which simply and immediately disbands on entry into EMU). In the past, the British legal profession has handled legal issues along the UK route of minimising goal independence, but that option is no longer possible, or available, for the interpretation of EU treaties, regulation, directives, or other legislation. This means that the relevant legal bodies in the UK may, and will, come into conflict with the UK executive and House of Commons to a far greater extent than ever before. If our hypothesis is correct, such emerging conflict is likely to bring with it changes in the appointment and decision-making procedures in the relevant legal bodies, but – not being lawyers – we would not want to be more specific than that.

Table 1. Professional Background of UK Law Lords, 1970-2002

Period	% Appointees with background including senior position in: Academic	Political	Judicial	% Appointees Formerly England/Wales Court of Appeal Judge	Appointments (number)
1970-1989	9	9	100	68	22
1990-2002	40	5	100	60	20
Total	24	7	100	64	42

"Senior Position" defined as:
Political: Member of Parliament or House of Lords (prior to appointment as Law Lord);
Academic: Any non-honorary position (including visiting positions);
Judicial: Court of Appeal or High Court Judge (England and Wales), Superior Court Judge or Member of the College of Justice, Scotland, or Lord Chief Justice (England and Wales, Scotland or Northern Ireland), Justice of European Court of Justice (ECJ).
Note that majority of appointees not formerly England/Wales Court of Appeal Judge are Scottish Justices formerly in similar positions in Scotland.
Source: Barrett (2001), *Who's Who 2003* (2003).

Table 2. Professional Background of US Supreme Court Justices, Roosevelt-Clinton

President or Party	% Appointees with a background including Senior Position in: Academic	Legal-Political	Political	Judicial	US Court of Appeal Judges (%)	Party Affiliation shared with President (%)	Appointments (Number)
Total	24	33	30	58	42	88	33
Democrat	39	33	44	39	28	89	18
Republican	7	33	13	80	60	87	15
Clinton	100	0	0	100	50	100	2
Bush	0	50	0	100	50	100	2
Reagan	33	33	33	100	67	100	3
Ford	0	0	0	100	100	100	1
Nixon	0	50	0	50	50	75	4
Johnson	50	50	0	50	50	100	2
Kennedy	50	50	50	50	0	100	2
Eisenhower	0	20	20	80	60	80	5
Truman	0	25	75	50	50	75	4
Roosevelt	38	38	50	13	13	88	8

Source: Epstein *et al*. (1994), Tables 4-6, 4-8, 4-9;
http://a257.g.akamaitech.net/7/257/2422/14mar20010800/www.supremecourtus.gov/about/biographiescurrent.pdf;
http://beta.oyez.org/oyez/resource/legal_entity/108/.

"Senior Position" defined as:
Legal-Political: State or Federal A.G., Federal Assistant or Deputy A.G. or Solicitor General;
Political: Governor, Member of State or US Congress, Member of President's Cabinet;
Academic: Professor or Dean;
Judicial: US Court of Appeal (USCA) Judge, State Supreme Court Judge or State Appeals Court Judge.

Table 3. Professional Background of FOMC Members

	Fed Board Members 1951-87 (%)	Fed Bank Presidents 1951-91 (%)	Fed Board and Bank (%)
PhD in economics	66	46	54
Academic experience	78	46	59
Worked as economist	91	60	73
Banking or business degree	41	23	30
Private banking experience	69	40	51
Law degree	38	29	33
Industry experience	53	31	40
FR Bank experience	78	73	75
FR Board experience	44	13	25
Government experience	91	27	53
Appointments (number)	32	48	80

Source: Havrilesky and Gildea (1992), Havrilesky and Gildea (1995).

Table 4. Professional Background of Bank of England MPC Members, 1997-2003

	Internal Members (%)	External Members (%)	Total (%)
Economics degree	78	100	89
Of which: PhD	22	44	33
Academic	33	70	53
Of which: Professor	33	50	42
Business economist	11	50	32
Other private sector	50	25	38
Bank of England	56	22	39
Other civil service	33	78	56
Appointments (number)	9	10	19

Source: Bank of England biographies of current MPC members:
http://www.bankofengland.co.uk/cvs/index.htm; *Who's Who 2003* (2003).

Table 5. Cases and Dissents, Monetary Policy Committees and Highest-level Courts (selected periods)

Institution	Period	Cases/Mtgs per year[1]	Nonunanimous decisions (%)	Frequency of dissent[2] (%)
Law Lords	1952-1968	30	23	7
Law Lords	1997-2002	59	19	5
MPC	6/97- 9/02	12	63	17
Supreme Court	1953-67	112	63	18
Supreme Court	1983-97	118	59	19
FOMC	2/70-8/02	8	48	8

[1] Before 1981, the FOMC met 12 times per year.
[2] For the LL, frequency of dissent estimated assuming cases decided by a 5-judge panel.
Source: Blom-Cooper and Drewry (1972) and own calculations.

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