5. Expansion through Self-Restriction: Functional Autonomy in Modern Democracies

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Introductory remarks

The present chapter deals with functional autonomy, a somehow contradictory feature of modern democracies. Functional autonomy means the deliberate self-restriction of majoritarian institutions like parliaments and governments with regard to certain fields of political action. Functional autonomy entails the transfer of political decision-making authority away from those authorities that possess direct or indirect democratic legitimation to organizations that not only lack democratic legitimacy, but also largely defy public control by the *demos*. Importantly, these organizations are granted autonomy, i.e. the ability to handle their respective environmental dependencies at their own discretion. As a result, collectively binding decisions taken in functional autonomies no longer follow political criteria and considerations, but are exclusively guided by external, i.e. non-political expertise.

Functional autonomies appeared in the course of the expansion of political responsibility to more and more societal spheres. This expansion of responsibility has accompanied the differentiation process of the political system as an autonomous function system more or less from the beginning on, but gained momentum since the mid-20th century, simultaneously to the global spread of democracy. Functional autonomy, so the general thesis of this chapter, can be considered a core mechanism through which modern democracies process their various environmental relations, ensure their capacity to act (i.e., to make collectively binding decisions) in a functionally differentiated environment, and try to keep the ability of the political system to expand in this environment and deal with the various expansionary claims of other function systems.

The relevance of functional autonomy as a feature of modern democracy not only results from the obvious persistence and firm institutionalization of respective decision-making structures. Moreover, the existence of functional autonomy reflects the willingness and capacity of modern democracy to accept a significant degree of internal contradiction regarding the democratic core principle of indi-

vidualized inclusion. To put it bluntly, we can even state that functional autonomy represents a kind of autocratic implant in modern democratic regimes which is, at the same time, considered a genuinely democratic mode of coping with certain decision-making issues. In this respect, understanding the operating, the emergence, and the embeddedness of functional autonomy in democratic regimes is key to a profound understanding of modern democracy as such.

To that end, the present chapter uses a differentiation theory approach which allows to examine the political system in its societal environment, and it proceeds in three complementary steps each of which illuminating functional autonomy from a different angle: The first part of the chapter approaches the rather abstract topic in an empirical way. It uses two anecdotical incidents to highlight the diverse and often controversial system-environment aspects that are linked to functional autonomy, to underline the practical relevance of this structural feature of modern democracy, and to outline its core characteristics. The second and more theoretical part deals with the remarkable relationship between functional autonomy and democracy with particular emphasis on three aspects: the contradiction between functional autonomy and key principles of modern democracy, the review of the two main lines of argumentation in the relevant literature that try to reconcile this contradiction, and the analytical distinction between functional autonomy and the internal functional differentiation of modern politics into political action fields. The third part addresses three case studies – an independent regulatory agency, central banks, and judicial review (or constitutional courts, respectively) – to systematically trace their evolution as structural elements of the political system with particular emphasis on their analytical key characteristics.

I. Approaching the subject matter of study

Setting the stage: Two anecdotal observations on functional autonomy and the contested retraction of majoritarian institutions

In the summer of 2016, the plans for a takeover of Kaiser's Tengelmann, a German supermarket chain with, at that time, 451 stores and roughly 16,000 employees, by Edeka, Germany's largest food retailer group (net food sales of 53 billion Euro and roughly 347,000 employees in 2015)[1], caused considerable political and public turmoil in Germany. A year earlier, in March 2015, the German Federal Cartel Office (*Bundeskartellamt*) had prohibited the merger on the grounds that it would have negative effects on the competition in purchasing and consumer markets, which, as the agency argued, would potentially affect both wholesalers and consumers (Bundeskartellamt, 2015, p. 8ff). In March 2016, the Minister of Economic Affairs,

1 See Edeka (2015) and https://de.wikipedia.org/wiki/Lebensmitteleinzelhandel (23.5.2018).

Sigmar Gabriel, to whom both corporations had applied for support, granted a special permit that allowed the takeover under strict conditions. Gabriel justified his use of this so-called ministerial approval *(Ministererlaubnis)* by pointing to the protection of labor rights and the preservation of 16,000 jobs at Kaiser's Tengelmann that were part of the strict conditions linked to the approval.[2] By granting this special permit, Gabriel not only overruled the previous decision of the Federal Cartel Office, but also flouted a special report of the monopolies commission (*Monopolkommission*) that vehemently objected the intended merger. The positive effects on the common good that the takeover would potentially yield, the report argued, were far from sufficient to compensate for the imminent negative implications resulting from the restraint of market competition (Monopolkommission, 2015, p. 62).

Gabriel's ministerial approval had two immediate consequences: First, the head of the monopoly commission, Daniel Zimmer, a law professor at the University of Bonn, resigned his office in protest of Gabriel's decision. In public statements, Zimmer accused the minister of being driven by the strong and (some would say) irrational reflex to "save and help" as well as the intention to offer visible evidence that he was doing the best for the voters who had given him a mandate to represent their interests (see e.g. Zacharakis, 2016). Second, two of Edeka's competitors that had also been interested in a takeover of Kaiser's Tengelmann, including the second largest German food retailer Rewe (net food sales of 40 billion Euro in 2015),[3] felt unjustly removed from the process and filed an appeal against Gabriel's decision before the competent Higher Regional Court (*Oberlandesgericht*). In July 2016, the court suspended the ministerial approval in an urgent legal procedure. According to the opinion issued by the court, there was a good reason to suspect that Gabriel's decision was biased and suffered from a lack of neutrality since the minister had allegedly made secret agreements with representatives of the corporations involved and therefore could not make an objective decision on this matter. Moreover, the court argued, the question of labor rights at Kaiser's Tengelmann did not concern the public good, and Gabriel's assumptions about the preservation of jobs were based on incomplete facts.[4] In late 2016, the conflict was settled when Edeka and Rewe reached an out-of-court agreement to divide Kaiser's Tengelmann between the two companies.

2 See the press release of Sigmar Gabriel, Federal Ministry for Economic Affairs and Energy, Berlin, 13.7.2016, https://www.bmwi.de/Redaktion/DE/Reden/2016/20160713-gabriel-zur-entscheidung-des-oberlandesgerichts-duesseldorf-im-ministererlaubnisverfahren-edeka-tengelmann.html (31.10.2019).

3 See https://de.wikipedia.org/wiki/Lebensmitteleinzelhandel (23.5.2018).

4 See https://www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2016/VI_Kart_3_16_V_Beschluss_20160712.html (12.11.2019).

Change of scene: Almost two years later, in October of 2018, the advocate general of the European Court of Justice (ECJ) presented a public statement on the European Central Bank (ECB) and its Quantitative Easing (QE) program, under which the ECB had been purchasing sovereign bonds issued by Eurozone member states on secondary bond markets since 2015 (see e.g. Janisch, 2018). The statement referred to an emergency petition (constitutional complaint) that a group of German politicians from the conservative camp had filed with the German Federal Constitutional Court in 2015 to stop the European Central Bank from participating in the QE program. The politicians accused the ECB of transgressing its mandate. The bank, they argued, was de facto engaging in state financing without a proper mandate, and was managing public finances by money press. The advocate general of the ECJ, to which the German Federal Constitutional Court had forwarded the appeal, did not share these concerns: He suggested that the QE program was legal and justified his claim by noting that the ECB's permission to purchase sovereign bonds is restricted to the secondary market, and direct bond transactions with the issuing governments are forbidden. Moreover, he pointed to the ECB's autonomy in monetary policy, its economic expertise and its obvious success in establishing the Euro zone. The final ECJ decision on the matter is pending.

In hindsight, this episode is obviously directly related to the ECB's behavior during the height of the Euro crisis in the summer of 2012, when ECB president Mario Draghi publicly declared that "[w]ithin our mandate, the ECB is ready to do whatever it takes to preserve the euro. And believe me, it will be enough" (European Central Bank, 2012). Draghi's statement was unanimously interpreted as an indication that the bank was willing to purchase sovereign bonds from Euro member states. In September 2012, the conditions of the respective monetary policy instrument, the Outright Monetary Transactions (OMT) program, were fixed by the ECB's Governing Council. This crisis strategy had both supporters and critics: On the one hand, many economic experts trace the eventual stabilization of the Euro directly back to Draghi's decisive statement and to the existence of the OMT program, although the latter was never applied in practice to any Euro member states (Spain, Ireland, and Portugal expressed interest but did not meet the conditions). On the other hand, there was sharp criticism, especially in Germany. Jens Weidmann, chairman of the German Federal Bank, argued that the purchase of sovereign bonds would redistribute risk between tax payers from different countries (see Braunberger and Ruhkamp, 2012). Because it was matter of economic (and not monetary) policy, his argument continued, such a decision on risk distribution should rest exclusively with democratically legitimated actors such as parliaments and governments, and was clearly not covered by the ECB mandate. Several German politicians from both the left and the conservative camp followed Weidmann and accused Draghi of having used the dynamics of the

crisis to act as a minister of economic affairs without democratic legitimation and to silently expand the bank's mandate and scope of action at the expense of national governments. These concerns culminated in several proceedings before the German Federal Constitutional Court, which were eventually transferred without judgement to the ECJ. In 2015, the European Court admitted that the ECB had indeed expanded its competences during the Euro crisis, however, the court did not consider the bank's behavior illegal. The German Federal Constitutional Court followed this decision.

What is at issue?

The two episodes reviewed above – the merger of two major food retailers and the related confrontation between the Minister of Economic Affairs and the Federal Cartel Office, and the political opposition to the operations of the ECB as channeled through the German Constitutional Court and the ECJ – are telling with regard to the topic of the present chapter. Both situations included conflicts within the political system during which certain expectations and relatively well-functioning scripts that usually remain latent were articulated, openly challenged, and thus became visible. Reconstructing these conflicts from the perspective of the theory of functional differentiation reveals some common patterns and key aspects that help narrow down the subject matter. Thus, we explore three conclusions related to a theoretical point of view that we can draw from these two episodes.

First and most obviously, these situations entailed *disputes on matters of competence* between multiple institutions involved in political communication (i.e., communication directed at making collectively binding decisions). These institutions, however, differ significantly in terms of their internal configuration, their democratic legitimation, and their position within the formal institutional structure of the political system: On the one hand, both episodes were either directly or indirectly focused on authorities from the legislative and executive branches of power (members of governments and parliaments), which indisputably rest on democratic legitimation and are subject to broad mandates to shape certain policy fields for the purpose of public welfare. On the other hand, these democratically legitimated (or majoritarian) authorities engaged in conflict with organizations that were unelected and explicitly claimed to distance themselves from political matters such as ideological disputes, party competition, and the fight for electoral votes, but still participated in collectively binding decision making and exerted significant political authority. In contrast to the majoritarian institutions, however, the latter were supposed to operate within limited and clearly defined boundaries: The Federal Cartel Office as an independent regulatory agency acts on the basis of the Act against Restraints of Competition (*Gesetz gegen Wettbewerbs-*

beschränkungen), from which it derives its mandate to protect economic competition. Concretely, the agency enforces the ban on cartels, is responsible for merger control, controls any abusive practices of dominant or powerful companies, and reviews procedures for the award of public contracts by the Federation.[5] In case of the ECB, several sets of formal rules – the ECB statute, the Treaty on European Union, and the Treaty on the Function of the European Union – explicitly limit the bank's authority to monetary policy, with the primary objective of maintaining price stability within the Eurozone (i.e. annual inflation below, but close to, 2 percent). To that end, the ECB may use clearly defined instruments such as minimum reserves, standing facilities, and open market operations (European Central Bank, 2011).

Second, both episodes encompassed the *clash of different function systems and their respective expertise within the political system* and, as a consequence, interleaving operations of the systems involved, i.e. the political, the legal, and the economic system: In the Edeka-Tengelmann case, the cartel office based its ban of the intended merger strictly and exclusively on economic considerations concerning the anticipated effects on competition and power relations in the markets that would potentially be affected – a line of argumentation that follows the cartel office's formal mandate and came as no surprise. Equally unsurprising were Gabriel's explicitly broad perspective on the issue and his reasoning on the potential public welfare effects of the merger. Generally speaking, Gabriel's stance was linked to his position as a federal minister, which ideally binds him to the promotion of the public good. Because the latter is a highly inclusive concept, Gabriel is responsible for society as a whole (within national boundaries) and is prohibited from limiting his assessment of the effects of his decisions to certain parts of society while neglecting others. In the given case, the need to serve the public interest was legally codified in the instrument of ministerial approval. Not only is the use of ministerial approval strictly bound to a concrete decision (i.e., ban) of the cartel office and implemented only at the request of one of the corporations involved, but it also requires justification based on either economic effects beyond competition (in this case jobs) or the overwhelming interest of the general public in the merger. To that end, the procedure of ministerial approval must start with a report of the monopolies commission, an advisory committee to the federal government without its own decision-making power, on the issue at stake. This report not only guarantees the incorporation of economic expertise throughout the procedure, but also increases public pressure on the minister to carefully evaluate and justify his decision. The minister's decision, however, is by no means bound to the commission's advice on the takeover. If complaints against the use of ministerial

5 See https://www.bundeskartellamt.de/EN/AboutUs/Bundeskartellamt/bundeskartellamt_node.html (24.5.2018).

approval are raised – as was the case in the given takeover – the Higher Regional Court decides on the issue.

The situation was even more complex in the episode concerning ECB policy during and after the Euro crisis, since this scenario involved the expertise of three function systems: In terms of its (politically determined) objective to stabilize the Euro and the financial system within the Eurozone, the ECB not only made decisions based primarily on economic expertise, but also acted in the operational mode of the economic system, i.e. in the form of sovereign bond transactions that result in actual payments and are expected to affect future payments. Conversely, the bank did not act in the operational mode of the political system, i.e. by issuing sanction-based provisions and standards, which it can and does, for instance, in the field of banking supervision. The ECB's policy was challenged by the argument that the actual effects of its operations would equal economic policy decisions (e.g. regarding the distribution of risk between political collectives and the distribution of national public funds). In contrast to monetary policy, critics argued, these issues should be a subject of political expertise and decided on the basis of political standards, which implies that the respective decisions must be made by democratically legitimated authorities and must consider aspects such as equality and both economic and non-economic effects on the public good. Finally, legal expertise was involved because these concerns were not directly addressed via decrees from the respective political institutions to the ECB, but rather were articulated via the legal system. With two core institutions of the legal system – the German Constitutional Court and the ECJ – becoming involved and being expected to settle the conflict, political concerns came to have a notable impact and could not be ignored. Thus, the clash between economic and political expertise was transformed into a clash between economic and legal expertise. This transformation, however, was not uncontested: Both in media coverage and among experts, there was a contentious discussion about the extent to which legal interventions in the operations of an independent central bank were appropriate.

Third, as this latter aspect indicates, both episodes in some way touched upon the general issue of the *acceptance of political decision-making* as well as upon the question of who may and should make decisions in whose name and through which channels of influence. In this regard, both episodes vividly illustrate the dominance and obtrusiveness of non-political expertise within political communication: In the Edeka-Tengelmann case, the importance of non-political expertise is particularly evident in the fact that the head of the monopolies commission, whose advice was not followed by the minister in his eventual decision, immediately resigned from office in protest of the ministerial approval. Moreover, the tone dominating the debates that accompanied the conflict for months provides evidence that public sympathies were unevenly distributed among the parties involved. In a press release on the occasion of the withdrawal, the monopolies com-

mission bluntly rejected the minister's line of argumentation and countered with an argument using a strictly competition-based concept of the common good.[6] In the same vein, media coverage and expert statements – notably, not only decidedly liberal voices – poured scorn on Gabriel, called the court decision his personal disaster and a loss of face, and openly questioned the reasonableness of the ministerial approval (see for many Podszun, 2016; Schwenn, 2016; Zacharakis, 2016). Few appreciated Gabriel's approach (e.g. Haucap, 2016), while the independence of the cartel office remained completely untouched in the debate. Non-political expertise was no less obtrusive in the ECB episode. The perceived threat to democratic core institutions caused by a non-majoritarian organization expanding its competence at the expense of the majoritarian institution was not defeated by political means. Instead, politicians used the law as an instrument for changing policies and showing the ECB its limits (or at least trying to do so). The constitutional court acted as a channel of political influence that in the given situation was obviously considered more reasonable and promising than its purely political alternatives.

Functional autonomy as a key feature of modern democracies

These two episodes, as well as the public turmoil accompanying them, suggest that what is at stake here is not some minor detail of political institutional structures, but rather a basic pattern and key feature of modern democracies. The competence conflicts, the collision of function systems and their respective expertise, and the issue of the public acceptance of collectively binding decisions can be considered manifestations of a remarkable *simultaneous expansion and retraction of the political system*. This simultaneous expansion and retraction has been in progress since at least the mid-20th century and thus seems to go hand in hand with the rise of democracy as the sole legitimate model of political rule in modern world society: On the one hand, there has been a permanent expansion of the competencies and responsibilities of state politics. The commitment of early modern states to the promotion of the common good ("gemeines Wohl", see Stichweh [2007, p. 30]) focused on economic regulation (in particular with regard to taxes), the military (with regard to warfare and domestic security) and so-called "policey" (*Policeyordnung*), which covers various aspects of public order such as dressing, gambling, hygiene and others. Ever since, the tasks and responsibilities that nation states assume have widened significantly and continuously, over time expanding into an increasing number of societal spheres (such as education, health, science,

6 See the press release of the Monopolies Commission, Bonn, 17.3.2016, http://www.monopolkommission.de/index.php/de/pressemitteilungen/37-ruecktritt-des-vorsitzenden-der-monopolkommission-wegen-ministererlaubnis-fuer-edeka-kaiser-s-tengelmann (12.11.2019).

etc.) and penetrating or at least touching on ever more aspects of citizens' everyday lives (Micklethwait and Wooldridge, 2014, p. 9). In turn, citizens have reacted by making more claims that tend to hold state authorities responsible for an increasing number of societal grievances. In the late 20th century, this dynamic culminated in democratic governments that presented themselves and acted as problem-solvers who take responsibility and are held accountable for society as a whole (see e.g. Greven, 1999; Luhmann, 2000; Willke, 2014). Numerous quantitative and qualitative indicators provide evidence of this ongoing trend: Around the world, public spending has increased over recent decades (e.g. Di Matteo, 2013; Gwartney, Lawson and Hall, 2014; Micklethwait and Wooldridge, 2014); specialized policy areas and the corresponding administrative institutions have steadily multiplied, which has facilitated to consider and process an increasing number and variety of topics in political decision-making (on public sector employment in the USA see Light, 1999); the number of and differentiation between categories by which states address and arrange individuals has constantly increased (for migration policy see e.g. Atac and Rosenberger, 2013; for labor market policy see e.g. Weinbach, 2014); and welfare states and their institutions have increasingly intervened in their societal environment with the explicit goal of influencing the forms and processes of inclusion into non-political function systems (see e.g. Flora and Alber, 1981; Halfmann, 2002; Marshall, 1992 [1949]).

On the other hand, this universalization of the modern political system has been accompanied by a remarkable shift in and changing character of collectively binding decision-making. In more and more policy fields, political decision-making authority has been transferred away from the core institutions of democratic regimes, i.e. legislative and executive bodies (parliaments and governments), with immediate or at least indirect democratic legitimation shifting to organizations that lack democratic legitimacy, largely defy public control, and are situated outside the hierarchies and instruction structures of the legislative and the executive powers. The most obvious examples of this shift are central banks, constitutional courts and courts in charge of judicial review, and independent regulatory institutions. Although the historical evolution of these three types of institutions followed rather different paths, they are united by the fact that their political importance peaked in the late 20th century: While the first central banks (in the form of state banks) emerged in the 17th century, the idea of independent central banks is a comparably recent phenomenon. These banks were probably the most important consequence of the breakdown of the Bretton Woods system of fixed exchange rates in 1973, and they have spread rapidly across the globe (for quantitative analyses see e.g. Crowe and Meade, 2007; for a qualitative approach see e.g. Maxfield, 1997; Polillo and Guillén, 2005; on central banks and the emergence of monetary policy see Weinert, 2002). Similarly, the concept of constitutional jurisdiction originated in the 17th century. Modern constitutional courts as independent or-

ganizations, however, appeared significantly later. Their emergence and institutionalization beginning in the early 20th century was strongly shaped by the works of the Austrian legal theorist Hans Kelsen. It began in Western Europe and later, i.e. after the political regimes of the Soviet Union and many Eastern Bloc countries had collapsed, continued in Eastern Europe and beyond (Stone Sweet, 2002; see also the contributions in Tate and Vallinder, 1995a). Compared to central banks and constitutional courts, independent regulatory agencies are a relatively young institution. They first appeared in the United States in the late 19th century, when regulatory agencies in the spheres of transport infrastructure and trade were created by the federal government (Interstate Commerce Commission, Federal Trade Commission, Shipping Board). While the emergence of further independent agencies was limited to the United States during the first half of the 20th century, the concept eventually took root in Western Europe in the 1970s and 1980s (beyond individual pre-existing agencies in some countries) and has since spread across most of the globe.

We refer to these structures and organizations as *functional autonomies*, and based on initial assessment, we contend that their diverse empirical manifestations share three core characteristics. First, functional autonomies are *political* in the sense that they are actively and effectively involved in processes of collectively binding decision-making. Thereby, functional autonomies are usually endowed with a mandate to address a specific regulatory issue within clearly defined boundaries. Second, in doing so, i.e. in dealing with their specific regulatory issue, functional autonomies are strongly expected – and sometimes explicitly advised – to prioritize issue-related, *non-political expertise* (from economy, law, science, etc.). Further, these organizations are expected to both ignore political standards such as ideology-related considerations and evade inherently political constraints stemming from party competition, the struggle for political power, and the like. Third, to that end, functional autonomies are granted *autonomy*, i.e. the ability to consider various environmental dependencies, including dependency on core democratic institutions, at their own discretion in the course of operating (for this understanding of autonomy see Luhmann, 2009 [1980], p. 155; Stichweh, 2009, p. 44). Autonomy is granted to specialized organizations, which either may be preexisting and have a (pre)defined range of activities and competence that is extended through the act of delegation and the concession of autonomy, or they may be created and configured particularly for the purpose of dealing with certain regulatory issues. Perhaps most importantly, autonomy is granted by majoritarian institutions on a permanent basis. This implies that by establishing spheres of autonomy, majoritarian institutions, and through them ultimately the people – the *demos* – itself, deliberately restrict themselves by not only agreeing to remain on the sidelines of selected political decision-making processes, but formally ensuring this restriction. They commit themselves to conducting general forms of

supervision and control at most, but explicitly forego the right to control (in the sense of supervising and intervening in internal decision-making processes), or at least to ratify decisions made by those organizations to which the respective powers were delegated. Moreover, once autonomy has been granted, interventions by elected politicians in the respective spheres are usually considered highly illegitimate or even undemocratic.

This autonomy is enforced in both the social and temporal dimensions: In the social dimension, autonomy is instituted through the conditions and mechanisms used to select, appoint and remove the personnel of the respective organizations. Although elected politicians usually have the ultimate say in the selection and appointment of the leading personnel in these organizations, the selection procedures are arranged in ways that explicitly exclude, or at least reduce the importance of, political criteria such as ideological proximity, party membership, and not least personal loyalty. Instead, it is strongly expected or even formally required that the search for, and eventually the appointment of, suitable candidates will be guided by professional standards, i.e. professional qualification and expertise as well as – equally relevant – standards of personal integrity (see, as an impressive example, the recent conflict over the nomination of Brett Kavanaugh for the U.S. Supreme Court). In practice, this may be reinforced by involving experts in the appointment process, e.g. by endowing expert commissions with the formal right to propose candidates or by making expert consultations mandatory for elected politicians prior to the final appointment decision. In line with this, a public justification of an appointment decision on the sole grounds of political criteria is considered highly illegitimate (see again the example of the Kavanaugh appointment). Compared to the appointment process, the removal of the organizational leadership usually fully evades the influence of elected politicians. Appointments are usually for fixed terms of office or, in rare cases, for a lifetime (e.g. judges at the U.S. Supreme Court). The options for premature removal are usually very restricted, imposing strong justification pressure on elected politicians who wish to depart from these fixed terms and dismiss individual persons earlier. This latter aspect concerns not only the social dimension, but also the temporal dimension. Fixed office terms and limited removal power as well as the political irreversibility of decisions *(Sachentscheidungen)* and the strong restriction of political influence on agenda setting in functional autonomies facilitates a decoupling from the temporal structure of democratic politics, which is strongly marked by election periods in both social and factual respects. As a result, decisions made about and within functional autonomies usually bind not only current politicians, but also future politicians and may significantly limit their scope of action.

Taking these characteristics together, it is evident that although majoritarian institutions explicitly step back from active involvement in certain areas of decision making – or to use Luhmannian terminology, they replace action with expe-

rience (Luhmann, 1995 [1984], pp. 84-85) – these decision areas are not removed from the scope of political responsibility. In other words, functional autonomy does not imply the retraction of collectively binding decision making as such, i.e. the withdrawal of the political system from its claim to control and be responsible for certain societal fields. Rather, this type of collectively binding decision making can be considered a specific form of governing "by proxies" that is carried out by organizations that are accountable to neither voters nor elected politicians.

II. Defining functional autonomy within modern democracies

Democratic contradictions: Contextualizing functional autonomy

To understand functional autonomy as an ubiquitous and somehow contradictory feature of modern democracy, we must start with the standard mode of democratic politics, in particular the question of how political power is commonly legitimized in democratic regimes. Following the key rationale of democratic rule, the binding force underlying political decisions for a given collective is justified by reference to *individualized inclusion*. Individualized inclusion entails the right to political participation being granted to persons solely on the basis of their individuality, while any non-political affiliations or resources (such as education, gender, wealth, religion and many more) are considered neutral. By implication, decisions that bind a certain collective are legitimate if, and only if, they are either made directly by the collective itself, i.e. through popular vote, or made by authorities that are directly or indirectly elected by the members of the collective and can therefore claim to represent the will of this collective (for theoretical reflections on representation see Pitkin, 1967; Rehfeld, 2006).

The key democratic principle of individualized inclusion and, accordingly, the radical neutralization of non-political characteristics also apply to the content of political decisions, and this means: to interpretations of the common good, which acts as the contingency formula (*Kontingenzformel*) for modern politics[7] and as the ultimate benchmark and legitimation of political power (Luhmann, 2000, p. 122; 2012 [1997], p. 282) (incidentally, this holds true for both democratic and autocratic regimes). The public good, however, is itself a fluid concept in every respect, i.e. it is an empty or "sociologically amorphous" notion (see also Offe, 2002; Weber cited in Sigmund, 2008, p. 83) that must be fixed and filled with content to be applicable and manageable in political processes. To that end, modern democracy and the principle of individualized inclusion require the *procedural determination*

7 Following Luhmann (2012 [1997], p. 282), the contingency formulae of function systems "assert system-specific indisputability, for instance, scarcity for the economic system, limitationality for the science system".

of the common good. In practice, this occurs via public debates between political parties, associations, and other collective entities that compete for public support with their respective ideas of the common good (Münkler and Bluhm, 2001, p. 9f). Most importantly, these negotiations, which usually result in majority decisions, must be open to the participation of all members of the collective in general, even though it is rare for all members to actually claim their right to participate and no one can be forced to do so. The predominant reliance on the social dimension, i.e. on aspects of inclusion, in fixing the common good implicitly precludes any objective (external) criteria by which the outcome could be evaluated (see Mayntz (2002) and Offe (2002), who thoroughly problematize this lack of criteria). In other words, if the procedure of fixing the common good effectively meets the requirement of (direct or indirect) individualized inclusion, no externally imposed standards can legitimately be applied to assess and potentially modify the resulting interpretations of the common good, which then form the basis for concrete political measures. Moreover, in the absence of external benchmarks, almost anything can become the subject of negotiation and thus potentially be placed at disposal – with the exception, usually, but not always, of a few references or basic values such as human rights or human dignity being understood as unambiguous premises of democratic rule.[8]

Functional autonomy blatantly departs from these democratic core principles. Importantly, this departure is not an unintended side effect but rather constitutes the very core of the phenomenon. Spheres of functional autonomy are brought into being through majoritarian institutions – i.e., through decisions by executive and legislative authorities – that delegate certain well-defined decision-making powers from their own sphere of influence to organizations that lack democratic legitimation, thereby withdrawing the immediate control and influence of the majoritarian institutions (i.e. in the form of the right to ratify decisions). These organizations may be preexisting, with a (pre)defined range of activities and competence that is extended through the act of delegation and the concession of autonomy, or they may be created and configured specifically for that purpose, i.e. for making selected collectively binding decisions.

Functional autonomy, we can conclude, is part of the political system and as such dedicated to the common good, but *suspends the principle of individualized inclusion* within certain boundaries. This, in turn, implies that the definition and promotion of the common good regarding certain fields of political action is no longer proceduralized, i.e. left to pluralistic debates and consensual or majority decisions that are, in general, open to all members of the political collective. Instead, *procedural determination is replaced by substantive determination*. In this

8 See as a counterexample some public referenda in Switzerland which are in conflict with human rights and other principles of international law.

way, democratic regimes return, within the limits of a certain field of political decision-making and action, to mechanisms that were prevalent in pre-modern politics and are currently employed in autocratic regimes. In both of these contexts, the political leadership claims the prerogative to interpret the common good and implements its concepts largely irrespective of public consent (Münkler and Bluhm, 2001, p. 9f) such that any given interpretation may be based on any political or non-political standards (e.g. individual wisdom or preferences, religious constraints, economic efficiency, and many others). In this respect, the particularity of functional autonomies lies in the fact that they replace the pre-modern sovereign ("prince") or the modern autocratic ruler with the dynamics and expertise of other, non-political function systems that the political system grants authority – or one could even say, submits itself to – within its own boundaries. To put it in provocative terms, functional autonomy means that the distinction between democratic and autocratic rule – and especially the latter's technocratic aspects – re-appears within the democratic order.

Before turning to the empirical details of functional autonomy and its concrete empirical manifestations in democratic regimes, we address two additional analytical questions about what functional autonomy is (and what it is not) in order to shed light on its position in modern democracies and introduce some order to the broad literature on the topic. To this end, we first discuss the question of whether, and if so how, the obvious contradiction between the core characteristics of functional autonomy and the main principles of democracy is justified and potentially reconciled in theory. Second, we ask how functional autonomy can be distinguished from those structures and institutions that reflect the internal functional differentiation of the political system. The latter is in many respects the closest relative of functional autonomy and represents another mode in which the modern political system attempts to expand into its (functionally differentiated) societal environment, i.e. seeks to apply its claim of control and regulation to ever more spheres of modern society.

Rational decisions and impartial representatives: Justifying functional autonomy

Reviewing the existing political science literature, it is striking that the phenomena referred to as functional autonomy here are widely discussed in different empirical contexts and within various analytical perspectives. In particular theoretical studies deal prominently with the inherent contradiction between democratic principles and the functioning of those spheres of political decision making (and the corresponding organizations) within democratic regimes that deliberately evade democratic legitimation. Attempts to justify and eventually resolve that contradiction boil down to two general lines of argument, which can be subsumed

under the terms *rationality* and *representation*. Both lead to a similar conclusion: they reconcile functional autonomy and democratic principles. However, they do so by taking different approaches and relying on divergent assumptions. Moreover, since key aspects of both lines of argumentation regularly appear in self-descriptions of democratic regimes, reconstructing them is not simply an intellectual game, but reveals much about how modern democracy conceptualizes itself and observes its societal environments.

The line of reasoning subsumed here under the term *rationality* focuses on the factual dimension (*Sachdimension*) of political decision-making and assumes objective standards of good, i.e. efficient and rational, decisions. It is most prominently linked to Jon Elster (1979; 2000), but is also reflected in the writing of Alan Blinder (e.g. 1997) and Giandomenico Majone (e.g. 1996), both of whom strongly influenced academic and political debates on non-majoritarian institutions during the 1990s. The core of the rational choice-inspired approach is simple and starts with the general mistrust directed at the members of any political collective in general, including politicians and ordinary citizens (voters) alike. For different reasons, both groups are considered unable to make sound (or rational) political decisions. To illustrate this point, Elster famously drew on the story of Odysseus and the sirens from Greek mythology. To resist the bewitching singing of the sirens and keep his boat on course, Odysseus advised his fellow sailors to clog their ears with wax and to tie him, Odysseus, to the mast until they had safely sailed through the critical passage. Under certain circumstances, Elster concluded, even the wise and strong hero must restrict himself via external forces in order to master a difficult situation and achieve the optimal outcome. Applied to the political system, self-restriction of the sovereign is necessary because the unforeseeable and distorting effects of individual passions and/or systemic irrationalities on decision processes inevitably prevent optimal outcomes from being realized. Individual passions stem mainly from the nature of human beings, which is characterized by limited knowledge, myopia, the tendency to ignore unpleasant information, and the like. Systemic irrationalities result from the basic features and structures of democratic regimes, such as party competition, lobbyism, and election cycles. The latter, as Majone emphasized, account for temporal inconsistency in political decision-making, which lowers the credibility of certain policy decisions in the eyes of voters, reduces their willingness to comply with these decisions, and probably even generates discontent with democracy as such. Majone concluded that taken as a whole, these developments eventually impede efficient governance (at least in certain policy areas) in democracies. Conversely, a welcome side-effect of self-restriction would be an increase in citizens' satisfaction with democratic politics.

Regarding the scope of self-restriction, i.e. the question of whose political capacity will be limited, Elster's original version of the argument envisioned the

self-restriction of the entire political collective, i.e. of politicians and voters, both of whom would be protected from themselves. Further versions put forward by Elster himself and others consider more thoroughly the distinction between different groups, i.e. between political performance roles and the audience, and shift the focus to the former. To identify those policy fields for which self-restriction seems to be appropriate, Majone suggested drawing on Wicksell's distinction between efficient and redistributive policies: "Efficient policies attempt to increase aggregate welfare, that is, to improve the conditions of all, or almost all, individuals and groups in society, while the objective of redistributive policies is to improve the conditions of one group at the expense of another" (Majone, 1996, p. 10). Consequently, efficient policies should be shielded from political influence in order to achieve the best results for all, while redistributive policies require legitimation through majority decision. A similar approach was used by Blinder (1997, p. 119f), who distinguished between political decisions with a universal effect, for which he recommended purely technical criteria, and decisions with particularistic effects, which must be resolved on the basis of value judgements. Notwithstanding the analytical clarity and plausibility of these distinctions, the empirical applicability seems limited for at least two reasons: First, the distinctions imply that any political issue unequivocally falls under one of these two categories, which appears highly unrealistic given the complexity of most political decisions and their potentially unforeseeable effects. Second, they implicitly require that policy issues in general have quantifiable effects and clearly identifiable beneficiaries, what in practice excludes most political problems.

The line of argumentation subsumed here under the term *representation* takes a normative stance on democracy and revolves around representation as a specific mechanism of political inclusion. This perspective was proposed explicitly and prominently by Pierre Rosanvallon (2011), but also reflects important aspects of the theory of political representation (Pitkin, 1967), especially the discussion of the "unelected" (Montanaro, 2012; also Rehfeld, 2006; 2009; Saward, 2009). Rosanvallon (2011, p. 17ff) started with the observation that participation and the rule of majority alone are insufficient sources of legitimacy for democratic regimes. Although they are key principles of democracy, he argued, neither effectively ensures the representation of the will and interests of the entire political collective. For Rosanvallon, political representation through majoritarian institutions (parliaments and governments) is distorted for at least two reasons: First, democratic majoritarian institutions fail to adequately represent two significant parts of the political collective (the people): the minority whose interests and will are factually overruled or – depending on the election system and institutional order – represented to a lesser degree than the majoritarian interests, and the members of the collective who do not vote or engage in other forms of political participation but are still subject to political decision making. In effect, the majority on

the one hand and the "invisible" or "real" people on the other diverge, with the former being represented in majoritarian politics and the latter being excluded (Rosanvallon, 2011, p. 69ff). Second, the overwhelming dominance of individual (in contrast to common) interests within society means that these interests are inevitably channeled into the political system (mainly through party competition and individual politicians), affect political decision making, and prevent true representation.

Consequently, especially in policy fields that touch upon central aspects of social life, majoritarian institutions must be complemented by mechanisms and institutions that ensure that any political decision effectively identifies with the general public, including both its active and passive parts, and not simply with the interests of the majority or of individual parties or politicians (Rosanvallon, 2011, p. 75ff). The positive equality of all members of the political collective through "one person, one vote" must be complemented by the negative equality of all, which according to Rosanvallon is expressed in and ensured by radically impartial political decision-making. This logic of impartiality is reflected in the idea of an autonomous state administration and civil service (*Berufsbeamtentum*) that are based on professional (rather than political) standards and effectively escape the influence of majoritarian institutions and political parties. The same logic, Rosanvallon continued, underlies independent regulatory institutions, whose decision-making is strictly oriented toward technical (i.e. non-political) criteria. By using these criteria, they represent the interests of the political collective as a whole because they effectively ban – or at least claim to do so – any type of individual interest. Following this line of reasoning, non-majoritarian institutions gain legitimacy through their ability to credibly reject particularity (Rosanvallon, 2011, p. 97ff).

In contrast to the rationality approach and its implicit lack of confidence in the members of the political collective, whether politicians or voters, and in their ability to distance themselves from their own passions and recognize what is actually in their best interest, the representation approach points to another type of mistrust. While the audience's – the people's – ability to recognize and articulate its interests is uncontested, serious doubts are raised whether the structures and dynamics of democracy are suited to represent these interests, i.e. to adequately handle them in the process of decision-making and to translate them into concrete policies. Thus, compared to unlimited majority rule, the restriction of majoritarian institutions produces better outcomes in terms of more appropriate representation.

Modes of political expansion: Functional autonomy vs. functional differentiation of the political system

Although quite different in their basic assumptions and underlying intentions, both the rationality and the representation arguments come to the same conclusion: In order to overcome the shortcomings inherent to democratic regimes, majoritarian institutions must be restricted in their competences and scopes of action, at least in specific respects. The resulting gap must be filled by non-political expertise, which is expected to unfold within the political system and flow easily into collectively binding decision-making. This process will guarantee either the rationality or the impartiality of collectively binding decision-making. Seen from the perspective of differentiation theory, both lines of argumentation recognize that the internal operations of the political system are interlinked with its manifold environmental relations, and describe this linkage and its consequences for political decision-making.

It is obvious, however, that functional autonomy as conceptualized so far is neither the only way that the political system deals with its environments nor the only channel through which non-political expertise finds its way into political communication. Indeed, civil servants with special expertise (and without democratic legitimation), expert commissions, and think tanks – to name but a few – are regularly and in various ways involved in collectively binding decision-making. This involvement is related to, and is a manifestation of, another fundamental feature of modern political systems, namely the internal differentiation of political communication according to factual aspects. This differentiation is reflected in the emergence of policy fields such as economic policy, education policy, science policy, health policy, and others, which are each directed toward the regulation of the respective societal sphere. As with functional autonomy, there are strong reasons to assume that the internal functional differentiation of the political system is closely linked to the expansionist tendency of the political system vis-à-vis its environments – even more so because once policy fields are established, their number rarely dwindles, but rather usually grows. In this respect, the emergence and stabilization of individual policy fields can be seen as an indicator of which societal spheres and problems the political system considers relevant, feels responsible for at a given moment and thus adopts as "political" – what, as Luhmann (2010, p. 37f) pointed out, is per se an open question.

The internal functional differentiation of the political system is clearly reflected in both the executive and the legislative branches of power: The dominant structure of national governments and also of sub- and supranational forms of political rule follows the logic of functional differentiation in the sense that governments consist of ministers who have competences related to individual policy fields and who are the heads of ministries, i.e. specialized agencies with expert

(i.e. not primarily political) personnel.[9] Similarly, in most countries a significant share of parliamentary activities occurs in cross-party committees or working groups within party factions that are formed along policy areas.

Political decision making in all these institutions often refers to complex issues and thus regularly requires the consideration of professional expertise from the respective societal sphere (or function system) in order to gather relevant information, carefully evaluate different alternatives, and assess potential consequences. Accordingly, expert advice is commonly integrated in political communication within both the executive and legislative branches in many different forms and through various channels: It may appear in the form of interaction (e.g. expert hearings) or written material (e.g. reports, position papers), on a regular basis (e.g. annual expert reports) or only on occasion, and formally (e.g. through institutionalized consultation) or informally (e.g. through networks). Further, it may either involve external experts (e.g. from research institutes, corporations, etc.) or rely mainly on specialized state agencies and similar institutions that are explicitly designed to supply political decision-makers with expertise but have no decision-making competence of their own (e.g. expert councils, supervisory authorities, advisory boards, etc.).

Despite this diversity of forms and channels through which external expertise finds its way into political communication and decisions, it is possible to draw a clear analytical distinction between functional autonomy on the one hand and the diverse manifestations of the internal functional differentiation of the political system on the other hand. As has already become clear, this distinction does not lie in the presence of non-political expertise within political communication as such, but rather boils down to the structuring of political and external expertise in collectively binding decision-making, to be precise to the question which of these is (institutionally) subordinate and which is superordinate. In this sense, we speak of *functional autonomy* if, and only if, non-political expertise acts as the ultimate and irrevocable criterion according to which political decisions are made within the boundaries of a clearly defined field of action on a permanent and formalized basis (i.e. not occasionally). This implies the (self-)restriction of the political in the sense that political criteria (like values or ideological principles) are either subordinate to certain external standards or do not surface at all during the decision-making process, and that the decision makers were selected and nominated according to professional criteria and not through majority decision.

9 Usually, the dominance of professional standards applies to the personnel below the upper echelon of the respective institutions (i.e., ministries and other agencies). The head of the organizations and often also certain parts of the leading personnel can indeed be dismissed – or formally: assigned to non-active status – for political reasons (e.g. the respective category in German law are so-called political servants or *politische Beamte*).

Consequently, they lack democratic accountability (toward the voters or the voters' elected representatives) and they escape direct democratic control (again by the voters or elected representatives).

The *internal functional differentiation of the political system* into policy fields, in contrast, is not about deliberately shifting control from state politics to non-political expertise, but rather consists of a swelling of the political itself as a result of the internalization of external expertise into a given set of political meanings, values, and knowledge. This implies that decisions are made by politicians who are democratically elected and accountable to the people and who are strongly expected to act as representatives and not professional experts. Further, it means that any non-political expertise can only be part of the preparation stage of the political decision-making process and must be subjected to political assessment (i.e. according to ideological aspects, party commitments, coalition agreements, and the like) before being incorporated into the actual decision-making. Thus, even when non-political criteria prove pivotal for a concrete decision, this dominance of external expertise will and must be presented as the result of a political decision that was made by thoroughly considering all relevant circumstances and alternatives. Any subjugation to factual constraints or any prioritizing of non-political expertise can only be justified as an individual and temporary solution to a specific problem that may be submitted to re-examination and change. Thereby, the influence that was given to non-political expertise may be reduced at any time. In effect and in contrast to functional autonomy, legislative and executive authorities must avoid the impression of thoughtlessly relinquishing command and systematically and permanently restricting political considerations in collectively binding decision-making.

III. Exploring the subject matter: Empirical manifestations of functional autonomy

The first part of the present chapter has offered insights on the relevance of functional autonomy as an inherent and irreplaceable feature of modern democracies based on two recent episodes: a conflict surrounding the merger of two retailers and a complex dispute over the alleged transgression of competences on the part of the European Central Bank. On that basis, the second part provided a concise examination of the analytical core of functional autonomy and its relation to democratic principles: It elaborated on the contradictions between functional autonomy and the core principles of democracy (especially individualized inclusion); it reviewed the main lines of justification related to these contradictions as they can be found in previous research; and it reflected on the theoretical distinction between functional autonomy and the internal functional differentiation of the political system into policy fields. The following third and final part of the analy-

sis complements this theoretical examination by adding an important missing piece: It fleshes out the theoretical frame in empirical terms, i.e. with regard to the emergence and unfolding of concrete manifestations of functional autonomy, in order to substantiate the assumption that functional autonomy arises and reproduces itself as an internal structure of the political system and especially of modern democracies. This assumption implies that functional autonomy results from the political system's permanent interplay and confrontation with its societal environments in the course of its differentiation (*Ausdifferenzierung* or "outdifferentiation", Luhmann 2013 [1997], p. 65). It must be considered as an attempt of the political system to expand its impact on certain parts of this environment by radically subjecting its internal structures to the expertise, and sometimes even the operational mode, of the respective environmental segment.

To that end, the following section shifts to concrete examples and sheds light on specific historical processes. In doing so, the key players involved in the introductory episodes, i.e. an independent regulatory agency, a central bank, and a constitutional court, once again become the focus of the discussion. Clearly, the formal founding of these three institutions, the ways they were shaped through various reforms and reconfigurations, and the historical contexts in which they emerged have been extensively examined elsewhere and described in much more empirical detail than is possible in the present chapter. Thus, the following description does not claim to provide a comprehensive picture of any of their particularities, let alone make a singular contribution to the historical research on the subject. In line with the general objective of this chapter, however, the following discussion identifies and illuminates the major aspects and general patterns of the emergence of functional autonomy in the political system. To be more specific, it traces the evolution – what means: the sequence of variation, selection, and eventually the (re-)stabilization of new social structures (Luhmann, 2012 [1997], p. 273)[10] – of independent regulatory agencies, central banks, and judicial review with an emphasis on the elements that were identified above as constitutive for functional autonomy: (1) The identification of an issue as political, i.e. the adoption of a problem by the political system; (2) the incorporation of non-political expertise in collectively binding decision-making; and (3) the dynamics of the self-restriction of majoritarian institutions.

Importantly, the selection of the three cases is not a coincidence: Independent regulatory agencies, central banks, and constitutional courts (or more broadly:

10 According to the Luhmannian theory of evolution (Luhmann, 2012 [1997], p. 273), variation means "unexpected, surprising communication" within a social system; selection is the choice of "meanings promising for developing structures, which are suitable for repeated use, which can form and condense expectations" while rejecting other innovations; restabilization refers to the state of the system and its environmental relation(s) after selection.

judicial review) not only represent three of the most relevant empirical manifestations of functional autonomy, but also – as an evolutionary theory perspective makes clear – they significantly vary in the process of their emergence. Their distinct trajectories indicate that the political system does not follow a fixed script in the way how it handles and shapes its environmental relations. Rather, it seems to thoroughly observe its environments and carefully react to their respective specificities and dynamics. This lack of a fixed script makes it even more striking that a common pattern – i.e. the above-described basic elements of functional autonomy – clearly emerges from these different trajectories.

Independent regulatory agencies

In many respects, independent regulatory agencies must be considered as the most obvious and purest manifestation of functional autonomy. To get a handle on the empirically diverse field and to understand their emergence, we examine the Interstate Commerce Commission (ICC) as an exemplary case. The ICC was founded in the United States in 1887 to regulate the emerging railroad system (and later also trucking, bus lines, and the telephone system), specifically with regard to pricing and safety issues. In its more or less definitive shape, which resulted from the Transportation Act of 1920, the ICC fully meets the analytical criteria of functional autonomy: It is exclusively in charge of railroad regulation and thus directly involved in collectively binding decision-making in and for this specific policy sphere. With competences including rate setting, safety issues, counteracting discrimination, and the protection of competition in the railroad sector, its operations not only affect the major players in the railroad industry, i.e. the rail companies, but also concern every individual who is in one way or another connected to the railroads, whether as passenger or client. Thus, the operations of the ICC directly or indirectly involve a large part, and likely the majority, of the population and of domestic commerce. In its decision making, the ICC is expected and was created to follow criteria that meet primarily the requirements of the objects of regulation. Vice versa, it is supposed to ignore political considerations and especially party preferences as much as possible. To that end, the members of the commission were selected based on their general professional expertise and were required to have no economic or personal links to the railway sector in order to preclude conflicts of interest. The political impartiality (which was interpreted mainly as bipartisanship) of the commission should be ensured by strict regulations of the commissioners' party affiliations. Further, majoritarian institutions explicitly restrict themselves from the commission by abandoning any claim to intervene in the ICC's operations and to overrule or negate its decisions.

To understand the emergence of independent regulatory agencies, the case of the ICC, as specific as it may appear, is instructive for at least two reasons: First,

the ICC was the earliest example of a full-fledged independent regulatory agency and as such represents something like the prototype of this specific form of political regulation. Second, the commission later became an important role model in the realm of regulatory policy which triggered the creation of similar agencies in various policy fields, through the mid-20th century in the United States (Cushman, 1941, p. 5) and mainly during the 1970s and 1980s in Western European democracies (Rosanvallon, 2011, p. 75ff; Thatcher and Stone Sweet, 2002, p. 9ff). Thus, the emergence and formation of the ICC must be considered as representative also beyond this individual case and they provide more general insights into the logic and functioning of independent regulatory agencies and into the underlying dynamic of political differentiation. Although it might appear smooth and purposeful in retrospect, the ICC's formation was uneven and continued for several decades. Major steps included the Interstate Commerce Act of 1887, which replaced state-level rules by federation-wide regulation, and the Transportation Act of 1920, which determined the definitive form of the ICC. The period before and between the institution of these two laws was characterized by intensive and controversial political debates, especially on the issues of political self-restriction and the concession of autonomy to a non-elected institution, which are worth considering in detail. [11]

Experiments on railroad regulation and the founding of the ICC

The founding of the ICC in 1887 was preceded by a period in which the railway as a new form of technical infrastructure took root and thrived and the railway sector was discovered by politics and adopted as an issue for regulation. The rise of the railway in the United States started in the early 1830s, and the expansion and relevance of the railway sector peaked during the so-called Gilded Age, the era of rapid economic growth and the fast expansion of industrialization between the 1870s and the turn of the century. The societal importance of the railroad sector arose from the fact that it was not only a key product of the technological progress of the period, but also one of the main vehicles of industrialization: the rapidly growing track network facilitated the settlement of even the most remote regions as well as the transport of passengers and freight across the country, so that it became crucial for almost any other industry (such as commercial farming, mining, etc.). At the same time, there were good reasons to consider the railroads a risky technology: the trains were driving at previously unknown speeds of more than 100 kilometers per hour, while a consistent traffic regulation (such as a signaling system) and technical assistance (e.g., through radio communication) were still lacking. During the first half of the 19th century, the intense competition among

11 The subsequent reconstruction of the formation of the ICC is based on the detailed and extensive analysis of Cushman (1941, pp. 19-145).

the privately owned railroad companies, which was fueled not least by active political support (e.g. facilitated access to credit and land), not only increased these risks, but also had adverse effects for passenger, clients, and dependent industries, which were noticeable mainly in the rate system. Strong price discrimination against individual regions or companies and large price fluctuations put the growing number of people who were dependent on the railroads either in their everyday lives or economic activity in a difficult and sometimes hopeless situation.

The outstanding societal importance of the railroads in combination with the massive technical risks and access problems for large parts of the society inevitably forced the railroad sector into the view of the political system. By the middle of the century, the contradiction between (economic) profit seeking, which relied on the self-regulation of the market, and the (political) objective of promoting the common good stimulated the political reflection on this issue and a search for appropriate means and ways to expand into this particular part of society. The first regulatory efforts in the railroad sector and the realm of interstate commerce were made at the state (i.e. subnational) level in the middle of the 19th century in an experimental manner of "trial-and-error" (Cushman, 1941, p. 20ff). However, the unequal regional importance of the railroads, which resulted mainly from the contrast between their high practical relevance in the Midwest and their relatively low importance at the East coast, led to widely varying regulatory engagement of the individual subnational political authorities. This in turn resulted in inconsistent and heterogenous regulatory structures across the country.

Not least due to the federation-wide scope of the railroad system, the practical effects of the highly fragmented state level regulations were negligible. Instead of moderation and the mitigation of the above-mentioned problems, the 1870s and 1880s witnessed a phase of overexpansion in the railroad sector, which even intensified the adverse effects of cutthroat competition and an unreliable rate system. This, in turn, fueled public demand for federal control, which gradually found resonance with the political system. Between 1868 and 1886, approximately 150 legislative proposals were submitted in Congress, suggesting two alternative modes of regulation: either by the judiciary (which eventually became the position of the House of Representatives) or by a commission established for that purpose (the position of the Senate). To decide on this issue, the political system attempted to listen to its environment: based on talks with different stakeholders in and around the railroad sector, the so-called Cullom committee (officially, the Interstate Commerce Committee), which was created specifically for this end, issued a report in which it clearly opted for the latter proposal, i.e. the founding of a regulatory commission.[12]

12 See also https://www.archives.gov/legislative/guide/senate/chapter-07-interstate-commerce.html (1.11.2019).

The committee's report eventually tipped the scales toward the creation of the Interstate Commerce Commission through the Interstate Commerce Act in 1887 (Glass, 2015). In its initial form, the ICC was set up to support the implementation of railroad regulations primarily through consultancy and information gathering, and was explicitly restricted from any decision-making (regulatory) competences. Importantly, the respective societal environment, i.e. the railroad companies themselves, resisted the newly generated commission. They unanimously perceived the ICC as an adversary, feared being placed at a disadvantage, and strictly refused to cooperate in the sense of providing information that would have been necessary for more effective regulation. The commission was further weakened by a series of court decisions during its first years of its existence. Consequently, the ICC's impact was limited and the social problems connected to the railroad industry persisted, while public pressure for more consistent and resolute political interventions increased.

Despite its limited effects, the ICC represented an innovative, formerly unknown mechanism that was created within the political system to act upon its environment. As Cushman (1941, p. 19) explained: "The extension in 1887 of federal regulatory power to the nation's railroads was indeed an important exercise of economic control; but it was much more than that: it was a shift in the center of control in the federal system. [...] The Interstate Commerce Commission was an innovation not because it was endowed with a new type of power, but because it represented a new location of power in the federal system". Although it did not yet represent a full-fledged functional autonomy in its first configuration and its regulatory achievements did not impress the political authorities, several key features of functional autonomies already appeared in outlines: First, the ICC arose out of the political system's reflection on the limitations of its own regulatory capacity. The conventional political steering instruments appeared inappropriate in the face of an environment that was perceived as complex, vague and highly dynamic, "so that it would be impossible to deal effectively with it by the simple and traditional mechanism of passing penal laws and enforcing them by court process" (Cushman, 1941, p. 46). Second, the political system found that distant observation was insufficient to expand into this environment, i.e. to turn this environment into an object of collectively binding decision-making. Instead, the political system clearly recognized a need for immersion in this environment to acquire the necessary expertise and integrate this expertise as a pivotal factor in collectively binding decision-making. And third, the efforts of the political system to immerse in this environment were accompanied and motivated by a vague notion of the fundamental incompatibility of three factors: political operation modes and criteria, the integration of external expertise, and decision-making structures flexible enough to meet the respective environmental requirements. In sum, the political system acknowledged the need for self-restriction. In this last regard, it

is noteworthy that early forms of political self-restriction were less concerned with the influence of political criteria as such and more concerned with impartiality as secured through strict limitations on partisanship. In a similar vein, the high salaries offered to the commission members, who were appointed by the president, were meant to attract the most competent candidates – candidates who should, as a necessary condition for appointment, lack any personal or economic links to the railway sector in order to avoid conflicts of interests. In other words: non-qualification rather than qualification was required as a condition for appointment: "Who are they [the commissioners, E.M.] to be? They are to be five gentlemen who know nothing whatever of their business. That is the first requisite; that is a qualification not to be varied from under any circumstances" (statement of a member of the House of Representatives, cited after Cushman, 1941, p. 63).

Expanding responsibilities: Amendments of the ICC in 1906 and 1910

A second stage in the formation of the ICC included two amendments, one in 1906 and a second in 1910, which can be considered as gradual affirmations of the innovation of political regulation by means of a commission. Both amendments substantiated the path that the initial version of the ICC had tentatively suggested by connecting to it and by reinforcing and stabilizing individual aspects of it.

The Hepburn Act of 1906 significantly extended the ICC's regulatory competence and strengthened its autonomy by granting it decision-making power that did not depend on the ratification by other (i.e. legislative or executive) authorities. More precisely, the ICC gained the formal authority to set and enforce rates in the railway sector. Although it was still not supposed to act on its own initiative, but solely in response to complaints from railroad corporations, the commission's provisions, once taken, were obligatory for the companies and other players involved. They could be suspended only by court order. Importantly, this new part of the ICC's competences and, by implication, its stronger autonomy from majoritarian institutions was a main issue in the Congressional debates prior to the Hepburn act. These debates evolved mainly around the constitutionality of delegating a quasi-legislative function to an authority that was explicitly meant to decide on related matters and act independently from the democratically legitimized parliament. While such delegation was eventually declared unconstitutional, Congress reconciled the enlarged competences of the ICC with constitutional provisions: Since the ICC's activities only completed goals that had been predefined by Congress ("to fix just and reasonable rates"), it was argued, the commission's function could officially be categorized as purely administrative, while legislative power rested with the parliament. As flimsy as this framing may appear at first glance, it was remarkable in terms of both its inherent logic, which literally ignored democratic inconsistencies rather than addressing them, and its subsequent impact

on political language use – this form of framing soon prevailed and revealed a decisive preference for the new regulatory mechanism over alternative solutions.

The Mann-Elkins Act of 1910 further stabilized the regulation strategy represented by the ICC as such. It enabled the commission to regulate rates proactively, and expanded its scope of responsibility to telephone, telegraph, and cable companies and thus to further essential parts of the domestic commerce infrastructure. Additionally, the act stressed the commission's autonomy vis-à-vis both the influence of executive authorities and political considerations as such: strong claims to autonomy had already dominated the Congressional debates prior to the amendment, which had centered mainly on issues of executive control. In the course of these debates, the proposal to restrict the commission's autonomy from the executive by involving the Department of Justice as a decision-making body in cases of conflict was rejected. The key argument pointed to the ability of the ICC to represent the interests of the people without distortion due to its deliberately apolitical setup and its isolation from party competition, which Congress believed should not be placed at risk: "The commission is now, and was intended to be from its organization, an independent tribunal of the rights of the people and the carriers. The Department of Justice is a political department of this Government, and its appointees who direct the policies of the department are the representatives and the supporters of the present political administration of the country" (minority report, House of Representatives, cited by Cushman, 1941, p. 100). Moreover, the alternative solution that was eventually adopted did not last: The Commerce Court, which was added to the ICC for the purpose of solving conflicts, had been abolished by 1913.

Facing and resisting political headwinds

Having gained far-reaching autonomy by 1910, the ICC proved its persistence as an integral part of the political institutional structure even when it came under significant pressure in the context of the First World War. Prior to the war, between 1911 and 1917, several minor reforms were implemented in order to strengthen the competences of the ICC and its position in the political system. Emergency measures that came into effect when the United States entered the war in 1917, however, interrupted the effect of these reforms. The Act of 1918 nationalized the railroad sector and placed it under central administration by the executive; thereby, rate setting authority as one of the ICC's key responsibilities was transferred directly to the president. Apart from that, however, the ICC was largely untouched by the radical centralization policy. It kept not only its structural form, but also the majority of its competences, most notably the authority to monitor the rates in the railroad sector in response to complaints lodged by individual companies and to ratify these rates with respect to the interests of these companies (among them mainly shippers). Remarkably, strong appeals in the legislature were pivotal to the

persistently influential position of the ICC during the war: strong arguments in favor of the persistence of the commission as an autonomous and powerful institution in the sphere of railroad regulation were raised in both chambers of Congress, which were justified primarily by references to the president, who lacked the expertise and skills that the ICC had acquired over decades: "You can not arrive at a just and reasonable rate with a hop, skip, and jump. Even the President of the United States or the Director General of Railways can not do that. No man, no bureau, commission, or other creation of the law is so qualified to fix railway rates as the Interstate Commerce Commission" (statement of a member of the House of Representatives, cited by Cushman, 1941, p. 198).

When domestic politics had returned to normal after the war, the general tendencies towards a strong and autonomous commission continued. The Transportation Act of 1920, which can be considered as a preliminary finalization of the ICC, did not only initiate the re-privatization of the railroad sector, but also further strengthened and broadened the commission's competences by including, inter alia, the monitoring of financial interrelations among railway companies, the regulation of mergers and acquisitions, and the preparation of a proposal for the consolidation of the sector. Crucially, the ICC's attitude towards its object of regulation, i.e. the railroad sector, shifted to a more constructive approach that included an increased consideration of the inner logic of the sector, the shift from negative to positive sanctions, and the involvement of a broad(er) set of stakeholders. The "old policy of restriction and discipline" was replaced by "a positive governmental responsibility to see that an efficient and self-sustaining transportation system should prevail" (Cushman, 1941, p. 115).

In subsequent decades, the ICC was subject to several minor amendments; however, these did not significantly change the commission's path. Rather, the ICC in its existing form served as a role model for similar regulatory agencies that were founded mainly during the first half of the 20th century in the United States (e.g. the Federal Trade Commission [1914], the Federal Communications Commission [1914], the U.S. Securities and Exchange Commission [1934], or the Consumer Product Safety Commission [1975])[13] and later, during the second half of the century in Western Europe (such as the National Commission for Computers and Freedom [1978] or the High Authority for Audiovisual Policy [1982] in France (Rosanvallon, 2011, p. 100f), and the Federal Cartel Office [1958] or the Regulatory Agency for Telecommunication and Postal Services [1998] in Germany [Döhler, 2002]). At the end of the 20th century, most of the ICC's functions were gradually transferred to other independent regulatory agencies, among them mainly the Federal Railroad Administration and the Surface Transportation Board. The ICC itself was abolished with the passage of the ICC Termination Act of 1995.

13 See https://en.wikipedia.org/wiki/Interstate_Commerce_Commission (29.4.2019)

Overall, this third, stabilizing stage in the emergence of the ICC emphasizes both the extent and the effective irreversibility of political self-restriction and the concession of autonomy. It becomes obvious that once the commission had been established, its growing and increasingly specialized expertise helped it gain momentum and become autonomous up to the point where it proved superior to even the most powerful political authorities, among them the president himself. Thereby, the shift in the ICC's (self-)conception in relation to its environment emphasizes the aspect of responsivity, i.e. the anticipatory listening to and tuning into certain parts of its environment, which had appeared in outline form in the founding of the ICC in 1887 and had accompanied its development since that time. Its continuous unfolding and institutionalization provide insight into the way in which the political system expands: the self-selected responsibility of the political system is no longer restricted to the retrospective correction of negative effects that concrete economic operations have on the common good. Instead and more broadly, the political system feels responsible to prevent such effects by anticipatively changing the operational mode of the economy to increase its alignment with the political ideas of the common good.

Interim conclusions

In sum, the formation process of the ICC is a clear example for the emergence of functional autonomy from the clash of two function systems and their competing expansionary claims: On the one hand, the political system intentionally expands, extending its regulatory claim on the railroads as a newly emerging and thus unknown societal phenomenon. On the other hand, the economic system expands simultaneously with regard to the same object by subjecting it to its distinct operational mode. Eventually, this culminates in a situation in which further political expansion – in the sense of the effective realization of regulatory claims – requires a strategy that enables the political system to cope with the competing expansion of the economy. In this situation, the decisive step towards the adoption of railroad regulation as a political issue was initiated out of the general public, which expressed its dissatisfaction with the given state of affairs and addressed it to political authorities. Within the political system, it was then specified and translated into regulatory policies, initially against the fierce resistance of the railroad sector as the object of regulation.

While the adoption of railroad regulation as a political issue appears relatively clear cut, the path that led toward the institutionalized integration of non-political expertise in political decision-making and the self-restriction of majoritarian institutions was rather erratic and controversial. In this respect, the formation process of the ICC bespeaks a two-dimensional search for both the appropriate type of expertise and an adequate mode of regulation. Most obviously, the uncertainty regarding the type of expertise needed for regulation directly stems from

the fact that the railroad as such was at the time a radically new phenomenon. Effective regulation required not only a previously unknown set of expertise regarding technical, economic, and legal matters, but also a new type of expert – one that no one knew exactly how to find or recruit for the ICC, and in fact, no one could accurately describe. This uncertainty, together with the resistance against regulation in the railroad sector, pushed the political system towards a gradual and tentative path of expansion. In its search of appropriate coping mechanisms for the problem of railroad regulation, it started to reduce the initial distance to the railway sector it tried to observe. In the course of observation, the political system more and more carefully listened to and tuned into this particular part of its environment to access its functioning, and the political system sought, in a kind of trial-and-error approach, to include its findings into regulatory measures.

Concerning the mode of regulation, i.e. the inclusion of this expertise into political decision-making with regard to the implementation of regulatory acts and the compliance of the objects of regulation, it is striking that and how the general idea of political self-restriction was vaguely present from the outset. The idea appeared at an early stage of the formation process, when Congress decided to establish a regulatory commission instead of charging the judiciary with the task of railroad regulation. From then on, however, it unfolded and stabilized rather reluctantly. Initially, the newly founded ICC was only used for advice, while the majoritarian institutions insisted on their exclusive decision-making competence. The delegation of more competences to the ICC and the strengthening of its autonomy vis-à-vis parliament and government did not happen until the first regulatory efforts had proved ineffective – both due to the resistance on part of the objects of regulation (through the non-acceptance of regulatory measures), and due to the overload of the majoritarian institutions (parliament) with complexity (i.e. the inability to operate in the sense of taking decisions). And even then, self-restriction was far from self-evident, but repeatedly subject of political discussion, in which it had to be justified time and again. The parliament, i.e. both chambers of congress, seemed to literally force itself to self-restriction.

Against this backdrop, it is somewhat ironic that the specific expertise of the ICC was eventually considered so powerful and indispensable that the self-restriction and concession of autonomy, once institutionalized, came to appear irreversible to the political system itself. In times of political upheaval when the commission's autonomy was explicitly called into question, its unique and irreplaceable expertise was even raised as a major argument by those defending and maintaining the ICC's strong position in the institutional structure of the political system. Rescinding the ICC's autonomy, it was argued, would inevitably come at the cost of political expansion, i.e. it would imply the retraction of the political system from the respective sectors of its environment.

Central banks

Central banks have a long history, with their institutional core going back more than 300 years. It was not until the 20th century, however, that they spread across the globe and became an almost mandatory part of the institutional structure of nation states and an important symbol of national identity: "When a new nation state seeks to establish itself, the foundation of an independent central bank will be an early item on the agenda, slightly below the design of the flag, but above the establishment of a national airline" (Capie, Goodhart and Schadt, 1994, p. 91). While merely 18 central banks existed in 1900, their number increased to 161 in 1990 (Capie, Goodhart and Schadt, 1994, p. 6) and further to 192 in 2019.[14] This means that there are currently almost as many central banks as nation states in the world, and that, as a consequence, monetary policy, i.e. collectively binding decisions concerning inflation, money value, and often also banking system stability, is in the hand of central banks almost everywhere across the globe. Thus, although the banks differ in their concrete institutional design and their independence vis-à-vis national governments, the overwhelming majority of contemporary nation states neither chose to put monetary policy in the hands of ministries or other democratically legitimized authorities, nor did they opt to forego monetary policy and subject the issue of monetary stability and inflation to market mechanisms and the dynamics of the private banking system. Even though free banking, which leaves monetary stability to the dynamics of the financial system, never completely disappeared as a concept or economic vision, it did not gain much ground in practice at any time (apart from a few more or less marginal exceptions mainly during the 19th century) (Capie, Goodhart and Schadt, 1994, p. 85).

Central banks qualify as a form of functional autonomy in the political system in several respects: Depending on their concrete tasks and objectives, central banks usually decide upon interest rates and money supply with the direct goals of controlling inflation and ensuring monetary stability, which in turn are considered important determinants of economic prosperity. Because money acts as the reference point of economic communication as such[15] and because every citizen is usually somehow engaged in economic activity, central bank operations and decisions, by implication, affect all members of the political collective more or less directly. The most visible and immediate effects are doubtlessly on the banking

14 See Bank for International Settlements (BIS), Central bank and monetary authority website, https://www.bis.org/cbanks.htm (31.10.2019).

15 In a systems theoretical perspective, money can be considered as the coding of scarcity which doubles the scarcity of goods. Money acts as a reference point for economic communication since the possibility of receiving payments and the open use of money render property liquid and almost universally transformable (Baecker, 2006, p. 48ff; Esposito, 2008, p. 126).

system and corporate actors, but central bank operations are not less relevant and binding to individuals – whether in their role as consumers (regarding inflation) or as depositors and borrowers (regarding interest rates).

Highly complex economic expertise is ever-present in central bank operations: It dominates individual monetary policy decision-making of both the more and the less independent banks; most central banks comprise research departments, through which they are firmly and often prominently integrated in relevant economic discourses; and perhaps most importantly, the technical expertise of central bank governors and their reputation in the financial community count as crucial factors in order to guarantee the credibility of the bank and the feasibility and effectiveness of its decisions (Capie, Goodhart and Schadt, 1994, p. 55). Further, the importance of economic expertise is reflected in the self-conception and self-presentation of central banks, which oscillate between two poles: On the one hand, many banks explicitly reference their opacity and illegibility for "ordinary" people, with the former Fed-chairman Alan Greenspan's legendary "Fedspeak" and his "mumbling with great incoherence" (Rowen, 1991) as one of the most drastic expressions (Blinder et al., 2001, p. 65ff). On the other hand, banks publicly commit themselves to more transparence and clarity in their statements, like most recently the (then designated) ECB chairwoman Christine Lagarde, who emphasized her intention to reach the "general public" instead of "traditional expert audiences" in her future communication on behalf of the bank (Committee on Economic and Monetary Affairs, 2019, p. 31).

In their operations, central banks enjoy considerable autonomy vis-à-vis governments and parliaments. Although the degree of autonomy varies across national contexts, its configuration boils down to a handful of key parameters (see e.g. Capie, Goodhart and Schadt, 1994, p. 55ff; Cukierman, Webb and Neyapti, 1992; Lijphart, 2012 [1999], p. 226ff): the formal rules of the appointment and the terms of office of the central bank governor; the content and rigidity of central bank objectives as well as the authority to issue and change these targets; and restrictions on central bank loans to governments. With regard to these parameters, central bank autonomy – and, conversely, the self-restriction of majoritarian institutions – is higher the longer the governor's terms of office, the stronger the barriers to preliminary dismission, and the clearer the focus on inflation relative to other potential objectives (e.g., unemployment or economic growth). Additionally, some authors (e.g. Cukierman, Webb and Neyapti, 1992) suggest to consider the turnover of the governor as a criterion for the practical (and not only the formal) autonomy of central banks (the lower, the more autonomy).

First steps towards monetary policy

Tracing the formation of central banks from their first appearance to their current form as key elements of modern polities and especially of democratic regimes requires beginning with a few remarks on the emergence of money in pre-modern society and its development in the transition to modernity. Both – money and central banks – have always been closely intertwined and can hardly be understood one without the other. That said, it is even more remarkable that the first form of money – coins – is inextricably linked to political power. Coins first appeared as a means of payment in the late 7th century B.C., and since that time, political rulers – mainly kings, but later also other dignitaries – have claimed the right to mint and issue them (Peacock, 2006). In the transition to modernity, the privilege of minting was transferred, largely without dispute, to the governments of the newly emerging nation states and continues to be held by governments in the present.

Thus, while coins have been "political" money from the outset, banknotes have a different history. Not only did they, once established, become much more relevant for the economic system than coins, but their relationship to the political system has been much more strongly influenced by economic and political dynamics alike. To begin with, banknotes did not appear in Europe until the 17th century and thus considerably later than coins. They were a product of the pre-modern banking system, which had evolved since the 13th century and provided the opportunity to save and borrow money against money, a function that was especially relevant to merchants. At some point, financial institutes began to issue receipts on private assets (coins and other kinds of assets) that they had taken into safekeeping. Little by little, and mainly for practical reasons, these receipts were used and circulated as means of payment. As such, they first spread in England and Sweden and later more broadly across Europe. Banknotes, we can conclude, arose from the differentiation process of the economic system in the transition to modern society, whereas coins emerged as a premodern phenomenon and were closely linked to monarchical power. In contrast to coins, the functioning of banknotes requires the existence of a banking system and thus rests on the self-referentiality of the economy (i.e. on payments that refer primarily to other payments and/or payment expectations) which gradually unfolds in the course of differentiation (Esposito, 2010; Goeke and Moser, 2018, p. 89ff). And finally, it is important to note that the emergence of banknotes was a decentralized process that occurred both outside political power and independently from territorial boundaries.

It was not until the formation of the early nation states that the territorial aspects of money – in the shape of national currencies – became an issue: The emergence of nation states since the 18th century has been accompanied by a significant expansion of political responsibility and regulatory demands. This expansion culminated in the institutionalization of sovereign rights (*Staatliche Hoheitsrechte*),

such as the right to adopt and implement laws, to levy taxes, and to set up armed forces. For different reasons – among which territorially bounded economic interests, fiscal considerations (linked to seigniorage), and the construction and strengthening of a national identity were likely pivotal (Helleiner, 2003) – the claims for exclusive sovereign responsibility expanded to money and banknotes and eventually led to the emergence of national currencies. First and foremost, this increase in political responsibility implied that money was territorialized, i.e. the validity of individual currencies was limited in spatial terms through political regulation, and the right to issue banknotes *(Notenprivileg)* was monopolized in the hands of the state. Early central banks – the first of which was the Bank of England which was founded in 1694 – evolved when this exclusive right was sold to private financial institutes, usually so states could finance wars or cover sovereign debt (Capie, Goodhart and Schadt, 1994, p. 4ff; Hutter, 2014, p. 198ff).

Considered from a differentiation theory perspective, the widening of regulatory demands on money equals the expansion of the political system into spheres of its societal environment previously untouched by (or, not an explicit object of) collectively binding decisions. In the course of this expansion, an early form of monetary policy appeared in outline and implied some structural restrictions of the economy: the issuing of banknotes was territorialized and centralized via political power and, in these respects, was withdrawn from the dynamics of economic operations. This political intervention in the economy, however, was moderate because it did not (yet) include the limitation of the amount of money, which was still left to the decision of the issuing banks.

The birth of modern central banking

The period from the mid-19th century until the outbreak of the First World War in 1914 proved crucial for the formation of central banks and for political regulation and (self-)restriction in the sphere of monetary policy. In this respect, it is important to consider the heated debate among British economists on the appropriateness and necessary extent of political influence on money and currency issues with regard to monetary stability. The debate was triggered by the rapid proliferation of banknotes as a means of payment during the early and mid-19th century, and it centered on the question of whether the supply of money should be limited by requiring the gold coverage of banknotes, or whether it should be left to the dynamics of the financial system. While the so-called currency school, with David Ricardo as its most prominent representative, argued for extensive or even complete coverage and thus for strong regulation, the banking school called for complete flexibility and the abolition of any restrictions (Herger, 2016, p. 16ff). The currency school eventually prevailed, and its ideas and principles laid the foundation for the creation of a two-tier banking system, which divided the financial system into two levels: on the upper level a central bank with a superior

status which is in charge of regulating money supply, and at the subordinate level commercial banks which are concerned with credit allocation to the private sector, deposits, and any other money-related issues. From the mid-19th century onward, this two-tier structure was adopted by more and more Western European countries, with Britain and its 1844 Bank Charter Act acting as a pioneer and role model. For several decades, the two-tier system existed in parallel with the free banking system, i.e. a much less regulated monetary regime in which banknotes are issued in a market and several issuing banks compete with one another (Herger, 2016, p. 21). Eventually, however, the two-tier system completely replaced free banking and has survived more or less unchanged until present day.

Once adopted, the two-tier banking system triggered a remarkable dynamic which, backed by economic theory of that time (especially Bagehot, 1873), further strengthened the already dominant position of the central banks, culminating in the function of so-called lenders of last resort. This function goes back to the initiative of central banks themselves – in particular, again, the Bank of England –, and basically entails the purposeful allocation of short-term loans by central banks to troubled financial institutes in order to solve liquidity problems. After it had proven effective regarding the stability of the financial system due to both its structural and psychological effects, it was gradually adopted by policy makers and integrated into political regulation. The function of the lender of last resort was made mandatory for more and more central banks and fixed legally, i.e., in terms of the conditions for application, the design of individual measures, and the scope of action (see e.g. Herger, 2016, p. 19f).

In sum, although this particular mechanism of short-term liquidity provision has always been explicitly restricted to banks with liquidity problems and unavailable to those with solvency problems, it constitutes a selected interruption of the regular financial market mechanism at a particular, clearly defined point through political regulation and thus based on political decisions. Henceforth, central banks act separately from market dynamics and the need of short-term profit-maximization. They instead assume the position of an institution whose primary function is to serve the long-term interests of the financial system, however these are then identified and fleshed out in practice (Capie, Goodhart and Schadt, 1994, p. 10ff). The economic factors behind this shift, however, are blatantly obvious: The role of the lender of last resort is rooted in a genuinely economic initiative that resulted from the (politically induced) strong position of central banks within the financial system. And it was designed according to principles that emerged from and proved themselves in the course of economic operation. Overall, it can be considered a reactive (rather than proactive) expansionary move of the political system toward the economy, which resulted from careful observation of its economic environment.

The monopolization of note issue, the introduction of a two-tier banking system, and the function of the lender of last resort, which took root during the 19th century, are usually considered key indicators for the emergence of central banks in their modern form (Capie, Goodhart and Schadt, 1994, p. 6). They were accompanied by another, no less significant change within financial system regulation: Since the mid-19th century, again with Britain, which at that time had a dominant position in the global economy, taking the lead via the Bank Charter Act of 1844, more and more nation states adopted the gold standard. They tied the value of their national currencies to a fixed amount of gold (i.e. the British Pound equaled to 7.32g of fine gold, the US-Dollar to 1.5046g) and guaranteed the respective convertibility. The gold standard was supposed to prevent the unlimited and uncontrolled increase in paper money and, by implication, stabilize the money value. Amongst others, it laid the groundwork for the idea that monetary stability should be the main objective of central banks, which was picked up and further developed several decades later, after the breakdown of the Bretton Woods system (see below). In contrast to the post-Bretton Woods system, however, the central banks under the gold standard were almost completely deprived of any significant decision-making competence. Their key responsibility was limited to guaranteeing the gold parity by mutually adjusting the supply of money and the gold reserves – a function that is today still present in the so-called "reserve banks" that were founded during this period (e.g. India, United States) (Herger, 2016, p. 26). The banks' main instrument was interest rate setting for private financial institutes, which borrowed their money reserves from the central banks. Both the position and the operational mode of central banks under the gold standard became more and more standardized until the early 20th century, including the independence vis-à-vis national governments as an increasingly important part of the self-conception of central banks (Capie, Goodhart and Schadt, 1994, p. 15).

Reflecting on the emergence of central banking from the mid-19th century until the early 20th century from the perspective of differentiation theory, at least three aspects are noteworthy: First, there was a further significant and, in retrospect, lasting expansion of the political system on economic issues, during which central banks gained shape and monetary policy was formed. The particular course of this expansion bespeaks a remarkable dynamic of mutual increase between economic operating and political observation and regulation.

Second, the strictly limited function of central banks under the gold standard, which went so far that they became factually replaceable by private financial institutions (Herger, 2016, p. 26), can be considered an early version of political self-restriction in the field of monetary policy: The gold standard not only restricted economic operating, but also delimited the leeway of political decision making by rendering monetary policy factually obsolete. In other words, by implementing the gold standard, both function systems involved in monetary issues deliberate-

ly abstained from certain possibilities for action. That said, it is no coincidence that central bank independence from politics became an issue in that period, notwithstanding the banks' limited scope of action. Moreover, the gold standard implied a common reference point of monetary issues that tied the political and the economic (financial) system symmetrically to the material ecological environment (i.e. gold deposits and discoveries) and to the technosphere (i.e. available technologies for gold mining). Both spheres follow their distinct logic and cannot be directly accessed by political or economic operations. Consequently, neither political decisions nor economic dynamics, but rather the total amount of gold, determined the price level: deflation occurred when gold mining did not keep pace with the increase in the quantity of goods, and inflation occurred as a result of unexpected gold discoveries or technological progress in the mining industry.

Third, theoretical reflections and academic debates on economic and financial market issues at the time of the gold standard, which can be subsumed under the label of classical economics *(klassische Nationalökonomie)* and was represented by Smith, Ricardo, Mill, Say, and others, appear remarkable in two respects: First, classical economics obviously played a crucial role in the formation of central banks and the structuring of the financial system. And second, its content and form offer clear evidence of functional differentiation. While preceding economic-political doctrines like mercantilism were primarily concerned with economic dynamics in view of political objectives (i.e. filling the state treasury, increasing the wealth of the sovereign), classical economics rests on the general conviction that the economy is not by itself subordinate to politics, and political intervention into economic operations, in any form, is not self-evident, but rather requires substantive economic justifications to count as legitimate.

From the gold standard to the Bretton Woods regime

The gold standard had been experiencing a global diffusion since the 1870s. It was suspended with the beginning of the First World War, when priority was given to financing government deficits and gold was withdrawn from circulation in order to pay for the war (Capie, Goodhart and Schadt, 1994, p. 15ff). Not even in the tense pre-war situation, however, did central banks surrender their independence vis-à-vis politics without resistance, as an anecdote about the Bank of England illustrates (see Capie, Goodhart and Schadt, 1994, p. 53): At the outbreak of the war, "the Prime Minister […] invited the Governor of the Bank […] to make a written promise: 'that during the war the Bank must in all things act on the directions of the Chancellor of the Exchequer […] and must not take any action likely to affect credit prior consultation with the Chancellor'". The governor of the bank first refused to sign, insisting on the function of the bank. After a few weeks, however, he gave in and agreed to submit to the government – a decision that was represen-

tative for the changed position of central banks around the world on the eve of the war (Capie, Goodhart and Schadt, 1994, p. 53).

The emphasis on the primacy of politics and the reduction of political self-restriction continued during the period of war and beyond. The gold standard was resumed, albeit half-heartedly, during the inter-war period. The problematic economic effects of this strong form of economic and political self-restriction, however, were already perceptible. Its rigidity, which prevented central banks from counteracting the economic downturn by increasing the supply of money, was considered one of the main causes of the Great Depression during the 1930s, which triggered fundamental reflections on objectives of monetary policy and on the role of central banks and their independence from government. On the one hand, the conviction of the basic necessity of central banks prevailed and was even reinforced. During the post-Second World War era, not only democracy as a form of political order spread in the so-called West, but also central banks, which had started to expand since the early 20th century, became an almost indispensable part of the institutional structure of nation states (Capie, Goodhart and Schadt, 1994, p. 55). On the other hand, however, the rise of Keynesianism as economic doctrine was accompanied by strong arguments in favor of a more active state management of monetary issues (Capie, Goodhart and Schadt, 1994, p. 26). Against this backdrop, it comes as no surprise that the general approach to monetary policy became more interventionist, including, inter alia, the nationalization of many central banks and the conceptualization of monetary policy as part of a broader national economic strategy (Capie, Goodhart and Schadt, 1994, p. 54).

Remarkably, political self-restriction vis-à-vis central banks nonetheless did not disappear, but rather changed its form: In 1944, shortly before the end of the Second World War, the pure gold standard was replaced by the Bretton Woods regime, a form of monetary management among independent states that combined the gold standard with a foreign exchange standard (Capie, Goodhart and Schadt, 1994, p. 22ff; Herger, 2016, p. 39ff). The agreement provided a gold parity only for the US-Dollar, to which the other signatory states tied their national currencies in fixed exchange rates with only minor leeway for adaptions. By implication, the US-Dollar was, henceforth, the global reserve currency, and the US federal reserve bank committed itself to sell the US-Dollar against gold at a fixed price in unlimited amounts. Simultaneously, the function of the national central banks of the other Bretton Woods member states was reduced to reacting to the Fed within an extremely narrow scope of action. To ensure the smooth functioning of the entire regime, the International Monetary Fund was established as a global supervisory institution.

The abandonment of the gold standard and the transition to the Bretton Woods regime appeared to be a fundamental structural change within the economic system, and it was and is reflected as such in economic theory. The shift appears

less radical, however, from a differentiation theory perspective and with regard to the emergence of central banks as a form of functional autonomy. The symmetric self-restriction of the political and economic systems that the gold standard had initiated continued under Bretton Woods. Moreover, the general mistrust towards untamed market dynamics with regard to money and currencies, which had already been reflected in the adoption and rapid expansion of the two-tier banking system and had intensified under the gold standard, persisted. Under the Bretton Woods regime, it was reflected in the radical restriction of leeway in monetary policy by binding economic operations and political decisions alike to a common reference point. The most notable difference from the gold standard was a change in the construction of this reference point: By moving to the Bretton Woods regime, the political and economic (self-)restriction no longer referred exclusively to the technosphere and the ecological environment of the society. Rather, the reference point was at least partly shifted to political structures by supplementing gold by the (fixed) exchange rate relations between national currencies, which were the product of political reflections and negotiations.

Currency flexibilization and the evolution of the independent central bank

The Bretton Woods regime got under pressure in the wake of the global economic turbulences during the 1960s, and it was officially abandoned in 1973. Its abandonment opened the way for the complete flexibilization of exchange rates among the dominant currencies in the world (such as the US-Dollar, the British Pound, the German Mark, and several others) – in other words, it facilitated the transition to a global market regime in currency issues without permanent state intervention. The flexibilization of the global currency market led to a shift in the monetary policy focus: While the major reference point of the Bretton Woods regime were the exchange rate relations between nation states and their respective currencies, the post-Bretton Woods context, in which mandatory fixed currency relations were the exception,[16] implied the re-nationalization of currency issues and the re-emergence of effective monetary policy at the national level.

This shift, in turn, led to a fundamental change in the relevance of central banks as the key players in monetary policy, and it raised the question of how to shape their new role and responsibilities. An answer – or rather, a proposal – was provided by economic theory, which now held the conviction that inflation, rather than exchange rates and foreign trade indicators, should be considered the main factor influencing monetary stability. This, accordingly, shifted concerns about domestic economic issues instead of global imbalances in the focus of monetary

16 Some (mostly small) countries voluntarily renounced autonomous monetary policy. They chose fixed exchange rates and tied their national currencies to one of the global lead currencies or to so-called currency baskets.

theory and policy alike (Capie, Goodhart and Schadt, 1994, p. 27ff). Three key parameters of the post-Bretton Woods conception of central banks clearly reflect this changed theoretical position: They included first price stability as the main objective for central banks and as their major performance indicator; second interest rates and money supply as the central instruments of monetary control; and third the conviction that these objectives would best be served by a radically autonomous central bank, whose operations are strictly shielded from the influence of majoritarian institutions (Capie, Goodhart and Schadt, 1994, p. 27ff; for a skeptical position with regard to the economic benefits of central bank independence see McNamara, 2002).

These developments show that although central banks had already existed as a politically and economically relevant institution for more than three centuries, and although economic historians usually identify the modern version of these banks emerging since the early 19th century (Goodhart, 1991), it was the experience of the Bretton Woods effects and the post-Bretton Wood phase that eventually produced the central bank in its current form: as an institution that is effectively and exclusively responsible for monetary policy and to that end is equipped with a large scope of action; that claims radical autonomy from democratically elected authorities; that explicitly and comprehensively relies on monetary theory and economic principles as decision-making guidelines; and that is unbound by formal decision making rules (on the global expansion of central bank independence see Crowe and Meade, 2007; Polillo and Guillén, 2005).

A comparison of the post-Bretton Woods regime to the preceding stages in the emergence of central banks highlights a fundamental change in the logic of the political regulation of monetary issues and the related forms and degrees of the self-restriction of majoritarian institutions: The formerly relatively symmetrical (self-)restriction of political and economic operations in monetary policy tipped toward the political system in the latter period. On the one hand, the guiding principle of central bank independence prompted the considerable liberalization of the financial system. The strong external limitation through the gold standard and later the Bretton Woods regime was converted into a form of economic self-regulation, i.e. the regulation of monetary issues by economic expertise, mainly in the form of monetary theory and implemented via central banks. On the other hand, the post-Bretton Woods era witnessed the increased self-restriction of majoritarian authorities vis-à-vis the central bank, whereby the reference point of monetary policy is now located in the economic system and thus completely underlies economic dynamics.

Interim conclusions

The particularities of the emergence of central banks as a form of functional autonomy become apparent if we compare them with the appearance of the ICC. From the point of view of differentiation theory and the above discussed understanding of functional autonomy, the emergence of the ICC reflects a more or less linear and resolute process of the framing of certain dynamics in the railroad sector as a political problem, and the adoption of this problem by the political system. The straightforward initial politicization of particular societal circumstances, however, went hand in hand with a high degree of uncertainty concerning both the kind of expertise that would be needed for regulation and the appropriate form and extent of political self-restriction that would be necessary to ensure the effectiveness of regulation and the acceptance by its object, the railroad sector.

The emergence of central banks follows a different pattern in almost all these respects. To a certain degree, this may be due to the fact that central banks, in contrast to most other forms of functional autonomy, did not arise in the context of democratic order, but considerably earlier. Their roots go back to the late 17th century, when they first appeared as organizations. Subsequently, they unfolded their activities and established themselves as political and economic actors in the transition to modernity and thus simultaneously to the differentiation of the political system and the emergence of modern nation states. The latter gradually adopted them as a part of their institutional structure, usually long before these states turned into democracies. The particular pace of the adoption of monetary issues as a policy field, the perception of the need for regulation and political self-restriction, and in the institutional design of central banks and their responsibilities clearly reflect these contextual dynamics.

Regarding the process of the adoption of monetary issues as a political problem and the formation of monetary policy, it is important to note that the first central banks were not founded as a political reaction to the observation of public dissatisfaction, but rather as an attempt to manage governmental funding problems. Inflation and currency stability were discovered and adopted as political issues much later, but then taken as a reason for the expansion of the political system into the economic – or, more precisely, the financial – system. Thereby, economic (and mainly monetary) theory that claims to speak and act on behalf of the economy turned out as a major driving force in this process by actively articulating the need for regulation. And even more: in case of central banks and monetary policy, political regulation did not only occur primarily on the initiative of the object of regulation, but was also significantly shaped and (pre)defined by it. During more than 300 years of central bank history, monetary theory was more or less permanently coming up with concrete proposals for regulative mechanisms. The general approach and content of these proposals, however, considerably varied over time.

The outstanding role of economic theory affected both the consideration of non-political expertise in monetary policy making and the pattern of political self-restriction towards the economy. Not only the framing of monetary policy was in itself a changeful process that accompanied rather than preceded the formation and institutionalization of central banks, but also ever new coping mechanisms and processing modes for monetary issues appeared and dissolved, not least because of changes in monetary theory. These variations were reflected in the search for a reference point of monetary regulation, which should be able to purposefully restrict economic dynamics in selected respects, but at the same time neither suppress nor politicize them, i.e. completely subject market dynamics to political decisions. The reference points that were selected and institutionalized at different points in time shifted from the technosphere and ecological environment (gold standard) at least partially to the political system (Bretton Woods) and from there further to the economic system (post-Bretton Woods).

This process went hand in hand with different and changing forms of political self-restriction. Remarkably, all these forms were radical and far-reaching and, most notably, instituted without significant resistance from the affected majoritarian authorities. Since the implementation of the gold standard, it was never seriously contested that the legislative and executive authorities abandon their scope of action and delegate monetary policy decisions to central banks. At most the setup and framing of central bank activities was from time to time subject of political debate. And even more: Albeit political self-restriction in the realm of monetary policy had first occurred under non-democratic conditions, it was not seriously challenged in the course of democratization. Instead and somehow counterintuitively, it was even strengthened after 1945 and spread simultaneously to the rise of democracy in the Western world during the 20th century.

Judicial review & constitutional courts

The picture of the empirical manifestations of functional autonomy would be incomplete without considering a third prominent case: judicial review, which ensures that the decisions made by majoritarian authorities (e.g. laws, acts, governmental actions) are subject to third-party review and can be invalidated against the background of existing (constitutional) law. In practice, judicial review is exerted in democratic contexts either in a decentralized manner via delegation to the general court system and its hierarchy, usually with a Supreme Court at the highest position (e.g. United States), or – in a more recent version – in centralized form by a specialized constitutional court (e.g. Germany).

Notwithstanding these structural variants, it is obvious that judicial review as such can be considered a form of functional autonomy in several respects: Court decision have a strong political dimension since they effectively bind ex-

ecutive and legislative authorities, i.e. those authorities which plausibly claim to represent the political collective (the people). In doing so, the courts directly influence policy decisions (Voßkuhle, 2018). This influence may be exerted either procedurally or substantially (Hirschl, 2008, p. 121ff): It is exerted procedurally when the courts oversee the compliance of political decision-making with principles of equal opportunity, transparency, accountability, and the like; and when they actively intervene in case of violations by (in-)validating the concrete actions and decisions of executive and legislative authorities. Court decisions affect the substance of public policy-making when the courts themselves decide political controversies by effectively making political decisions (like, for instance, on the right to same-sex-marriage, on abortion rules, or on minority discrimination). In both respects, court decisions often do not only address current political issues and conflicts, but draw boundaries that inevitably and significantly shape future policy-making as well as the political debates surrounding it.

Thereby, it goes almost without saying that judicial review gives strict priority to legal, i.e. non-political expertise and principles. Courts claim to and must, for the sake of their credibility, permanently demonstrate that although they might indeed decide on the same issues as majoritarian institutions, they do so deliberately and solely on the basis of legal principles and not in consideration of political criteria. In other words, their emphasis is exclusively "upon the role of reason and of principle in the judicial, as distinguished from the legislative or executive, appraisal of conflicting values" (Wechsler, 1959, p. 16) (see also e.g. Cole, 2019; Vallinder, 1995). Importantly, operating according to legal principles does not only concern decision-making criteria, but also implies the adoption of two procedural particularities of the legal system: First, courts in general act only upon application. In contrast to legislative and executive bodies, courts do not choose the issues on which they decide by their own initiative, but instead react to and thus depend on the selections made by systems in their environment by which they are addressed (see e.g. Lepsius, 2011, p. 164; Voßkuhle, 2018). Second, and closely linked to the first particularity, the competence of courts concerned with judicial review is limited solely and exclusively through the mode of acting on application, what means that the scope of judicial review is by no means restricted by the substantial specification of a certain field of responsibility. Rather, as Hirschl (2004, p. 169) vividly illustrated by citing the former Chief Justice of the Supreme Court of Israel, Aharon Barak: "Nothing falls beyond the purview of judicial review. The world is filled with law; anything and everything is justiciable". Both specificities – acting only on application and the basically unlimited responsibility – are important differences from the two examples of functional autonomy discussed above, i.e. independent regulatory agencies and central banks.

Finally, the autonomy of judicial review vis-à-vis majoritarian institutions and, inversely, the self-restriction of the latter are apparent on all dimensions:

With respect to the fact dimension, autonomy consists both of the power of the courts to invalidate majority decisions and, vice versa, the inability of democratically elected bodies to overrule or otherwise bypass court decisions. Besides, it is here where the strong standing of (political) liberalism vis-à-vis democracy finds one of its most vivid expressions. Autonomy on the social and time dimensions is mainly based on the formal conditions of judgeship. The appointment procedure at least officially claims to exclude any political tactics and to focus exclusively on the professional expertise and personal qualifications of the candidates. This is not least due to the awareness that the acceptance of court decisions hinges on public confidence in "the independence, integrity and professional competence of justices serving at the constitutional court" (Voßkuhle, 2018, p. 481). If public confidence in the integrity of judges is shaken or even betrayed, the institution as such may be seriously damaged and its capacity to act might be negatively affected (as was evident in the fierce conflict over the appointment of Brett Kavanaugh as a justice of the U.S. Supreme Court). In a much more formalized manner than the ostentatious political impartiality of the appointment procedure (which is, in fact, not always fulfilled), autonomy is granted to the judges through fixed terms of office or even appointment for life, which are protected with high barriers to preliminary dismissal. Finally, autonomy is rooted in the fact that judges make their decisions free of not only intervention by elected politicians, but also of time pressure derived from urgency (Voßkuhle, 2018, p. 480). In this regard, they strongly contrast with majoritarian institutions, whose decision-making is framed by electoral terms, voter expectations, coalition agreements, and the like.

With regard to the political context of judicial review, its autonomy is usually considered crucial to modern democracy as such, not least because it sits at the very core of the self-conception of democratic regimes. This is most evident with regard to the fact that a strong and autonomous judicial review which restricts the scope of action of majoritarian institutions on the grounds of existing (constitutional) law undisputedly counts as a key feature and important stabilizer of democracy in both political theory and practice. Conversely, when legislative or executive authorities restrict the scope of action of judicial review and intervene into its competences, these actions are considered an assault on the democratic order itself.

Autonomy of judicial review, however, is also a sensitive issue beyond emergency situations and in the normal operation of the democratic polity. Notwithstanding the high public expectations, strong regulation, and ostentatious confessions of political actors concerning political impartiality, the actual or supposed effects of party affiliation or ideological preferences give rise to almost constant debates about the selection of candidates, their confirmation, which usually requires legislative majorities in some way or another, or their exercise of duty. In this last regard, the question of political-ideological interpretations of the law,

i.e. of whether judges are subliminally guided by their political preferences and values as they make decisions on constitutional issues, is among the most debated issues related to judicial review.[17]

Similar to the analyses of independent regulatory agencies and central banks, the particularity of judicial review as a specific appearance of functional autonomy becomes evident in a review of the historical conditions of its emergence and formation. Again, the focus of the following examination is not exclusively on the internal structures and operations of the political system, but also on the boundaries that separate the system from its functionally differentiated environment and the way it copes with this environment. In this respect, it is important to note that the relationship between the political and the legal systems stands out in general (i.e., with regard to other issues than functional autonomy) among the diverse environmental contexts. Under the condition of the rule of law, both the political and the legal systems find their ultimate legitimacy in each other – a matter of fact that Teubner (2015) describes as the mutual externalization of legitimacy paradoxes between both systems. Both deliberately use the respective other system and its differentiation and autonomy for their own stabilization: any form of legal regulation originates from the political system, while the polity subjects to the legal principles which it created. Consequently, the concession of autonomy towards the legal system leads inevitably to some form of self-reference. With regard to functional autonomy, this particular interrelation differentiates the law system from other function systems that also act as reference points of functional autonomy but have origins that are clearly distinct from politics.

The first occurrence of judicial review: Ensuring the constitutionality of legislation

Judicial review has its roots in the formation of the early American state. Although historical research shows that the practice of judicial review was, in some way or other, already been known to the colonial governments (see Ginsburg, 2008, p. 82), its first instance occurred in 1803 with a decision of the Supreme Court of the United States under Chief Justice John Marshall in the famous (and complex) Marbury vs. Madison case (Vallinder, 1995, p. 17ff). Marbury vs. Madison, which was triggered by the attempted nomination of state judges during the change of presidency from Adams to Jefferson in 1800/1801, came as a sudden and unex-

17 See most recently Devins and Baum (2019), whose empirical analysis suggests that the impact of partisan affiliation and majorities among the judges on the decisions of the U.S. Supreme Court is much weaker than usually assumed in public discourse; also see the regular efforts on the part of the German Constitutional Court and the humble self-descriptions of the constitutional judges as "servants of law" ("Knechte des Rechts"), who try to dispel the suspicion of partiality with references to the democratic "esprit de corps" of the institution itself, which allegedly transgresses individual ideological standpoints (see Beckmann, 2016; also Vanberg, 2005).

pected impulse to the young political system. It led to the decision that the Congress cannot pass laws that contradict the Constitution, and that it is up to the judiciary's responsibility to interpret what the Constitution permits.

The court decision initiated a readjustment of the relationship between the political and legal systems, which was underpinned by the general mistrust of unrestricted majority rule that had accompanied modern democracy more or less from the very outset: It had been indicated in the Federalist Papers and was shared a few decades later by political thinkers such as Mill or Tocqueville, among others, who warned against a "tyranny of the majority" as a kind of a built-in, and thus inevitable, threat in democratic regimes. The readjustment not only confirmed the autonomy of the judiciary vis-à-vis the executive and legislative power, but also established the judiciary's supremacy over parliament and government in cases of doubt, which became and remained a key characteristic of the political system of the United States (Ginsburg, 2008; Vallinder, 1995).

Examining the emergence of judicial review in the early 19th century United States and at its subsequent institutionalization in the American polity, three aspects are especially noteworthy for understanding its relevance and specificity in this historical context: First, it is important to note that not only democracy as such was an exceptional form of political rule at that time, but also the restriction on majority rule as implied by independent (autonomous) judicial review was highly unusual for the few early democratic regimes. Another important early democracy, Great Britain, firmly refused this kind of restriction and even today has neither a written constitution nor an institutionalized form of autonomous judicial review; a similar pattern is found in Sweden (Lijphart, 2012 [1999], p. 212ff). Thus, notwithstanding the popularity that autonomous judicial review gained later on in the 20th century, initially it was not uncontested and existed parallel to alternative structures, i.e. simultaneous with democratic regimes with largely unrestricted majority rule. Seen from this perspective, the situation in a way resembled the parallel existence of central banks and free banking systems in the second half of the 19th century (see above). Free banking, however, eventually proved much less persistent than polities without judicial review: it had factually vanished and been replaced by two-tier systems by the early 20th century.

Second, it is remarkable that judicial review emerged relatively suddenly and much less gradually and hesitantly than other forms of functional autonomy. Notwithstanding later changes in structural details, among them most notably the invention of the constitutional court as a designated body, the key features – the supremacy of legal expertise in a particular sphere of collectively binding decision-making, and the explicit self-restriction of majoritarian institutions – were in place immediately and have remained more or less unchanged until today.

Third, with regard to functional differentiation and especially the differentiation of the political system, the emergence of judicial review appears as an in-

herently political initiative – its first instance, Marbury vs. Madison, occurred on an impulse that emerged from the political system and the interplay of different state authorities. It thus can be considered an expression of the self-reference of the political system; initially, other function systems were irrelevant. Thereby, the liberal attitude underlying the limitation of majority rule emphasizes the individual citizen and the protection of his or her freedom vis-à-vis the state. However, while citizens are a crucial reference point, they are included less as active political participants and more as individuals who are inevitably affected by political decisions but whose activities that require and use individual freedoms are mainly directed towards other societal spheres.

The invention of the constitutional court

The 20th century witnessed an impressive quantitative expansion of judicial review across the globe (Vallinder, 1995), which is commonly traced back to the spread of liberal democracy in the aftermath of the Second World War. Additionally, it might have been underpinned by the increasing international influence of the United States in two respects: The strong position of the Supreme Court in the American polity became an important political role model for many democratization processes, and the strong international standing of American political science and its "obsession with courts and legal procedures" (Tate and Vallinder, 1995b, p. 2f) doubtlessly fostered the rise of autonomous judicial review as a key ingredient of modern democracy.

An important part of this surge was the early 20th century invention of a structural variant that soon became quite influential: Kelsen's model of a constitutional court, which entails the delegation of judicial review to a designated body standing outside the general legal system and the court hierarchy. The first constitutional court was implemented in Austria in 1920. In the aftermath of the Second World War, constitutional courts were established mainly in post-fascist countries (Germany, Italy, Portugal, and Spain), whereof the German *Verfassungsgericht* became a particularly influential model (Ginsburg, 2008, p. 85f; Müller, 2013, p. 247ff). The initial appearance of constitutional courts primarily in post-fascist contexts was probably not a coincidence, but must be considered as a reaction to those countries' experience of democratic regimes being literally beaten at their own game by systematically undermining democratic key principles – an experience which Kelsen (2018 [1929]) himself had vaguely anticipated, who as early as in the 1920s recognized democracy as the only form of government that nourishes its enemies at its own breast. Given this structural weakness, Kelsen concluded, a strong constitutional court should help prevent these enemies from becoming

superior, i.e. reaching a position which allows them to effectively undermine key democratic principles.[18]

Compared to the initial stage of the emergence of judicial review, this later stage includes not only the diversification of the structural forms, but also the pluralization of the motives and principles: First, the initial reference to liberal principles is still present, and the general idea of protecting the citizens against excessive state intervention persists, in part due to a change of the understanding of democracy in the 20th century that puts particular emphasis on liberal principles and their integration into democratic structures (e.g. Plattner, 1998) and eventually effects a tight coupling of democracy and judicial review. Second, against the backdrop of the fascist experience, the idea that citizens need protection against the state is complemented by the opposite attitude, i.e. a strong distrust in the people's sovereignty. This distrust leads to the understanding of judicial review as a protection of democratic rule against the people and the general will. It entails an emphasis on "checks and balances" as well as the relative weakening of parliaments within the institutional structures of Western European democracies, inter alia by subjecting them to constitutional courts (Müller, 2013, p. 247ff). Notwithstanding these motives, the (unelected) judiciary has gained enormous trust on the part of the general public, which – especially during this second stage – exceeded even the public trust in democratically elected bodies and/or individual politicians (see e.g. for the case of the German Constitutional Court: Vorländer and Brodocz, 2006). Third, these two aspects, which aimed at the stabilization of democratic rule by means of judicial review, were supplemented by a function of judicial review that pointed to the quality of political decision-making: improving legislation in procedural terms by introducing a strict hierarchy of legal norms that should make law making more effective. This function, which was categorically new, went hand in hand with the pragmatic and technical approach to the constitutional underpinning of the state, which was also represented by Kelsen's constitutional theory (Müller, 2013, p. 247ff; Rosanvallon, 2011, p. 138ff). It implied a new emphasis in the understanding of the constitutional court, which shifted away from the role of a watchdog over the constitutionality of laws in the context of the liberalism-democracy dichotomy and toward the role of a "negative legislator" in the context of the hierarchy of legal norms (Rosanvallon, 2011, p. 138ff). As such, the mid-20th century version of judicial review, in particular the constitutional court, claims to complement and improve parliamentary legislation. It can be considered as the attempt to extend the repertoire of mechanisms for collectively binding decision-making that occurs in the course of an overall expansion

18 In a similar vein, Böckenförde stated a few decades later that the liberal secular state lives on premises which it cannot itself guarantee, and on this basis argued for the necessity of autonomous legal systems in democratic regimes (Böckenförde, 2013 [1967], p. 112f).

of political responsibilities. By implication, this claim shifts the focus of judicial review away from political authorities and to the objects of political regulation – and thus to those societal spheres and issues for which the political system considers itself responsible. In other words, judicial review reflects no longer merely the self-referentiality of the political system, but involves a dose of external reference. The processing of external reference, however, strongly differs from the examples of functional autonomy discussed above: In the case of judicial review and constitutional courts, non-political expertise is not used to govern or regulate the system from which it comes, i.e. judicial review must not be considered a form of indirect self-regulation of the legal system. Instead, legal expertise is employed by the political system for the regulation of other (third) function systems.

Politicization & competing expressions of the general will

Towards the end of the 20th century, a third stage of the emergence of judicial review began. Although there was no clear turning point or major historical rupture such as the Second World War that separated the third stage from the preceding one, some significant changes in judicial review are evident. Probably the most obvious change was a wave of quantitative expansion: As a consequence of the breakdown of socialist regimes throughout Eastern Europe and parts of Asia and the beginning of profound political transformation in the post-socialist countries, the mere number of nation states with judicial review increased significantly since the late 1980s. Most notably, this new wave did not just capture the newly democratizing states – or those that pretended to democratize. Instead, judicial review changed from being considered a structural option that could or could not be adopted to being considered an imperative that was addressed even to authoritarian regimes, notwithstanding its fundamental incompatibility with autocratic regime structures. As a result, by around the turn of the millennium the overwhelming majority of the nation states in the world had established some form of judicial review, at least on paper.[19]

In addition to this increase in number, judicial review experienced qualitative changes, primarily in the form of a stronger involvement in policy making. By the end of the 20th century, an increasing number of courts endowed with judicial review were no longer merely engaged with principle decisions *(Grundsatzentscheidungen)* and procedural issues of policy making. Instead, many courts had become much more directly involved in genuinely political questions, i.e. in controversies that cannot be decided by politically unbiased reference to legal norms alone, but in which any decision necessarily entails political partiality and a commitment to certain ideological principles and values (Hirschl, 2008, p. 123). In practice, this

19 Own research based primarily on https://en.wikipedia.org/wiki/List_of_supreme_courts_by_country (11.11.2019), Maddex (2007), and various websites of national constitutional courts.

includes the whole range from seemingly small, state-level policy issues (e.g. the funding of public schools) to so-called nation-building questions "concerning the very definition, or raison d'être, of the polity as such" (like ethnic, linguistic, or religious issues) (Hirschl, 2004, p. 172; see also Tate and Vallinder, 1995b). Consequently, supreme and constitutional courts worldwide transformed into "a crucial part of their respective countries' national policy-making apparatus" (Hirschl, 2008, p. 123). An effect of the politicization of judicial review is the increasingly conflictual character of the appointment processes of judges, which Devins and Baum (2019) observed especially for the U.S. Supreme Court: Until the 1990s, the mandatory approval of candidates by the Congress was largely unanimous, and even the rare cases of rejection were supported by both parties and caused little controversy. Since the early 2000s, in contrast, the hearings and confirmation of judicial candidates have become a highly contested issue that has provoked fierce conflict between Republicans and Democrats.

The relevant literature discusses several drivers of this trend toward the judicialization of politics, most notably institutional political factors such as federalism, constitutional characteristics, and the number of parliamentary chambers (for an overview and critical discussion see Hirschl, 2004, p. 31ff). Most interesting from a differentiation theory perspective are those factors that can be subsumed under the label "judicialization from below" (Hirschl, 2008, p. 130) and that directly point to political inclusion: First, the broad public awareness for and the firm societal standing of human rights at least since the 1970s have encouraged and mobilized movements to use constitutional rights litigation as a mechanism to advance political change (Eckel, 2009, p. 458ff; Moyn, 2010, p. 176ff). Second, courts have been increasingly considered an alternative mechanism to conventional decision-making procedures in everyday politics and in the struggle between government and opposition. Especially oppositional actors both within and outside the parliament have (often successfully) tried to achieve their policy goals outside the majoritarian decision-making institutions via judicial review (Hirschl, 2008, p. 130; Michelsen and Walter, 2013, p. 40ff). Overall, the effects of these changes on political inclusion – or more specifically, on participation – perfectly fit to Rosanvallon's (2011, p. 138ff; also Rosanvallon, 2012) interpretation, who considers (constitutional) courts and their activities an important mechanism of expressing the general will. As such, they complement and compete with legislative and executive authorities and in doing so eventually increase citizens' influence on political decision-making.

Interim conclusions

The examination of the emergence of judicial review from a differentiation theory perspective adds some important aspects to our understanding of functional autonomy: First, the formation of judicial review and of constitutional courts as

its special organizational manifestation inverted the general pattern that was evident in case of independent regulatory agencies and central banks. In contrast to the latter, the emergence of judicial review did not begin with the politicization of a problem outside the political system, i.e. an issue which the political system detected in its environment, for which it assumed, for whatever reason, responsibility, and to which it reacted with internal structural changes (such as the establishment of an organization). Instead, the emergence of judicial review was triggered by an inherently political conflict, namely irritations regarding the balance of power and the separation of political authorities. This internal struggle resulted in the strengthening of the supreme court and thus factually in the establishment of a powerful institution, which was primarily meant to use legal expertise and procedures to stabilize democracy itself.

Second, the reference to other function system, i.e. to the environment of the political system, occurred much later when judicial review (and constitutional courts) factually turned into authorities for the regulation of other societal spheres by the end of the 20th century. Importantly, this shift was not so much the result of formal planning. Rather, one key driving force behind the changing role of judicial review was its use and effects in political practice and the manner in which actors applied to the courts both from within the political system (e.g. in the case of legislative and executive authorities, oppositional parties, and the like) and from outside. Much in line with this evolutionary and audience-driven development, this process did not occur as a consecutive replacement of individual structures and functions, but rather as a form of overlaying and interplay.

Third, the emergence of judicial review entailed, from the beginning on, as a constitutive feature the clear-cut and radical self-restriction of majoritarian authorities. Moreover, the basic form of judicial review had appeared in more or less a single step and has remained largely unchanged since that time, i.e. it was not subject to significant variation. Instead, in case of judicial review and constitutional courts, the variation or search process obviously set in after the initial emergence of judicial review and did not primarily concern its institutional core.

In sum, the emergence of judicial review can be described as a search for how a given structure and firmly institutionalized legal expertise could be used in the political system with regard to collectively binding decision-making. In the course of this shift that legal review experienced, there was a transition from the self-reference of the political system to external reference and thus a transition from an institution that was expected to reflect on and supervise collectively binding decision-making to an authority that is directly involved in collectively binding decision-making with regard to the regulation of other function systems and/or societal spheres. In other words, in the case of judicial review, it was not the institutionalized form as such and the self-restriction of majoritarian authorities that emerged gradually and hesitantly, but rather its orientation to the external

environment of the political system. This relates to and aligns with the expansion of the political system, but it does so differently than other functional autonomies: Judicial review is not a mechanism for the self-regulation of the system of law, but rather a new mechanism to regulate other, or third, function systems. Internally, it provides the political system with new structures to cope with complexity, which is constantly increasing due to expanding political responsibilities. Externally, judicial review helps to pluralize the opportunities to participate – the opportunities to raise one's voice – and to enhance the acceptance of political decisions by those who are subject to political regulation. In this last respect, the process of the emergence of judicial review also illustrates how the gradual transition from self-reference to external reference goes hand in hand with the shift from passive consideration to active inclusion of citizens.

Concluding remarks

The present chapter shed light on the phenomenon of functional autonomy, which is an essential structural feature of democratic political rule in modern society through which the political system expands into its environment by deliberately restricting majoritarian institutions and the applicability of political standards and expertise. To enhance our understanding of functional autonomy, the chapter offered a concise theoretical definition, which boils the phenomenon down to three key elements: First, functional autonomies are political in the sense that they are actively and effectively involved in processes of collectively binding decision-making. Second, in doing so, i.e. in making decisions on their specific issues, functional autonomies are strongly expected – and sometimes explicitly advised – to prioritize issue-related, non-political expertise. Third, functional autonomies are granted autonomy vis-à-vis majoritarian institutions and principles, i.e. they are able to consider various environmental dependencies, including the dependency on core democratic institutions, at their own discretion in the course of operating.

Importantly, this theoretical and somehow abstract definition is not an end in itself. It rather allows us to identify a broad spectrum of – at first sight – diverse structural elements of modern democracies as different manifestations of functional autonomy and to relate them to each other. In this regard, the theoretical definition was applied to three of the most prominent and representative empirical manifestations and their formation processes: the ICC as an example of independent regulatory agencies, central banks, and judicial review. The examination of the emergence and structural configurations of these empirical cases from this specific theoretical perspective illustrated and substantiated the assumption that functional autonomy is an important mode through which modern democratic regimes deal with the complexity of their functionally differentiated

environment. Thereby, all three cases show important similarities: the close interrelation between the formation of functional autonomies and the emergence of new policy fields; the recognition in the political system that specific external expertise is needed to effectively handle the respective regulatory issues; and, finally, the radical incorporation of this external expertise into collectively binding decision-making that goes hand in hand with the (more or less controversial) self-restriction of majoritarian authorities.

At the same time, however, the empirical examples reveal that and how the similar patterns are the result of rather different paths of emergence. Tracing these paths from the perspective of differentiation theory does not only highlight the different schemes of emergence, but also underlines that each scheme entails a considerable degree of contingency, i.e. left much leeway for variations and junctions that might have become starting points for the development of alternative structures. These variations were obvious in several respects: regarding the politicization of societal issues, the modes of processing external expertise within political communication, and the role that majoritarian institutions as decision-making authorities themselves assumed.

Against this background, the fact that a common and clearly identifiable structural pattern nonetheless appeared and stabilized can be taken as evidence that functional autonomies are the outcome of the deliberate self-restriction of majoritarian institutions with regard to maintaining the ability of the political system to operate, i.e. to make collectively binding decisions with reference to its societal environment. In other words, self-restriction appears as a form of self-assertion. Its institution followed the distinct rationality of the political system, which must not be understood as the purposeful pursuit of optimal decision-making or most efficient regulation in the narrow sense of these concepts. Instead, it can be considered as the striving for self-reproduction in a complex, uncertain, and dynamic environment through the permanent and careful listening to this environment and the ongoing adaptation to environmental changes without abandoning the own (i.e. political) function under the condition of democracy. Vice versa, there is not much evidence for the interpretation of the modern democratic polity as a defenseless entity that is overpowered by its environment (or by certain environmental segments) and unable to oppose this external attack.

That said, it is important to emphasize that the present chapter did not aim to provide a definitive and all-embracing analysis of functional autonomy, but rather an attempt to narrow down a wide and complex topic in theoretical and empirical respect. After having done this, various follow-up questions arise, whereof two shall be mentioned in conclusion because they appear especially relevant with regard to the overall focus of the book: First, notwithstanding the fact that functional autonomy is an important structural feature of democratic regimes enabling them to cope with their environments, it would further deepen our understand-

ing of modern democracies to systematically explore the question which environmental segments and which kind of external expertise most likely trigger the formation of functional autonomy as a mode of political regulation (e.g., instead of inducing further internal functional differentiation of the political system). Second, with regard to the dichotomy of democratic and authoritarian forms of political rule, further research could investigate which equivalent structures appear and stabilize in autocratic regimes that fulfil the function of dealing with complex and uncertain societal environments and facilitate political regulation under the condition of functional differentiation. This issue is all the more important because totalitarian regimes that are based on the more or less complete suppression of functional differentiation (like the Soviet regime, see Moser [2015; 2016]) factually disappeared. Since the late 1990s and early 2000s, they have been replaced by a new form of autocracy which not only accepts, but even tries to use functional differentiation for its own purposes, what, in turn, makes the tension between autocratic rule and (functional) autonomy and the need for appropriate control mechanisms obvious.

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