8. Modernising the Demos: institutional architecture and procedural mechanics in public law

For economic analysis, improving the State is mainly a matter of architecture and mechanics. The Demos is an institutional structure that makes collective choices through public decisions. Such decisions should ensure the optimal regulation of the society and the markets (the Agora), by applying efficiency principles and methods. Public law has the mission to establish the most successful institutions (section 1) and decision-making mechanisms (section 2). It is as simple as that (which is far from being simple).

1. INSTITUTIONAL ARCHITECTURE: DESIGN AND POWERS OF PUBLIC BODIES

Designing public institutions is not just a matter of constitutional order; it depends on their *ability to serve* the missions of the Demos, according to the powers attributed or delegated to them (section 1.1). We will apply this criterion to take a closer look at the various public structures of the modern State (with the exception of the judiciary, which is examined in Chapter 9). Political bodies (section 1.2), central administrative bureaucracy (section 1.3) and local governance (section 1.4) have been in place for centuries; public action through independent agencies (section 1.5) or private law instruments (section 1.6) is more recent. Their respective roles depend on the power play between democratic legitimacy and technocratic expertise in the modern 'administrative/regulatory State'. Public law cannot but adapt to this brave new world.

1.1 Who Should Act? The Power to Decide and to Delegate

The Demos has the authority to decide on everything that relates to the general interest – the Germans call it *Kompetenz-kompetenz*. It distributes this mission to its network of non-consensual institutions via the constitution. Traditional legal theory shows little interest in whether mandates are allocated efficiently within the Demos. Legal positivism confines itself to the letter of the constitution, to the logic of representative democracy and to the pyramid of legal

rules. It mainly entrusts rulemaking to institutions enjoying direct political/democratic legitimacy. Further delegation of normative powers to other bodies should be done only as an exception to the rule. A broader mistrust exists towards awarding extensive discretion to administrative authorities. 'Old' public law insists on the strict observation of the legality principle and on putting the administration under the direct supervision of the government, which, in its turn, is accountable to the parliament and/or the president.

Economic analysis of law understands delegation of powers as a *principal-agent strategic game*.[1] When it comes to rulemaking, the body that acts as principal (for example, the parliament) by assigning mandates to other institutions has an incentive to delegate insofar as two conditions are met: first, if it is not in a position to act on its own, and second, if the risk of the agent disrespecting its commands is lower than the advantages arising from delegation. In other words, the transfer of normative powers should be subject to a cost–benefit analysis. When the side effects of the principal/agent problem are manageable, delegation may be extensive.[2] The same balance applies when allocating mandates to administrative authorities for issuing individual acts. Political institutions (parliament, president, government) act as principals and the administrative authorities with delegated mandates as their agents. The broader the discretionary powers of the administration, the higher the risks of abuse and the supervision costs. However, it would be inefficient to tie the hands of administrative authorities excessively.[3] The latter usually have more expertise than their political principals and are faced with fewer information asymmetries, since they are closer to the matter for which public action is needed.

In this light, fear of extensive delegation no longer appears justified. Insofar as rulemaking is concerned, parliaments currently seem to lack the ability to produce exhaustive norms on the various fields of public regulation. For this reason, draconian prohibitions against the further assignment of normative powers to the lower levels of the Demos are a thing of the past.[4] In the USA, the Supreme Court abandoned the non-delegation doctrine as early as 1935, despite clear-cut constitutional provisions that state the contrary.[5] Similarly,

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[1] *Fiorina* 1986; *Cooter* 2000; *Napolitano/Abrescia* 2009.220; *Garoupa/Mathews* 2014; *Aranson et al.* 1982; *Epstein/O'Halloran* 1999; *Weingast/Moran* 1983; *Lowande* 2018; *Voigt/Salzberger* 2002.

[2] *Spulber/Besanko* 1992. See Chapter 4, section 2.3.2.

[3] *Kessler/Leider* 2016.

[4] *Iancu* 2012; *Lindseth* 2006; *Volden* 2002; *Voigt/Salzberger* 2002; *Von Wangenheim* 2011.

[5] In its first article, the American Constitution awards an exclusive mandate to Congress regarding rulemaking. However, for practical reasons, the US SC decided to

the CJEU is in favour of allocating broader competences to agencies other than the main EU bodies established by the Treaties.[6]

Soft law is an alternative means of indirectly enhancing delegated powers.[7] By drafting 'non-formal' documents, the administration exercises public regulation even in the absence of a mandate to issue specific acts. The significance of soft law is more visible in the EU, where the production of 'formal' norms via Directives, Regulations or Decisions is difficult and time-consuming. European competition law is a typical example. The European Commission deals with crucial issues, such as what constitutes a cartel, what criteria to apply in assessing a merger or how a fine shall be quantified, via non-formal 'Notices'.[8] The CJEU considers those texts to be partially binding to the authority that produces them.[9]

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bypass this clear provision of the constitutional text since the New Deal [SC *Panama Refining v Ryan*, 293 U.S. 388 (1935)]. Delegation is allowed as long as the lawmaker sets an 'intelligible principle' as to how the administrative authority will exercise its normative powers [SC *Mistretta v United States*, 488 U.S. 361, 372 (1989); *Whitman v American Trucking Associations*, Inc., 531 U.S. 457 (2001)]. If the instructions given by Congress leave vast room for discretion, the courts examine whether the regulator's choices are founded on a 'permissible construction' of the law: SC *Chevron U.S.A, Inc. v Natural Resource Defense Council, Inc.*, 467 U.S. 837 (1984); *Elliott* 2005; *Stephenson* 2010; *Stiglitz* 2018.

6 In 2014, the CJEU rendered a judgment (Case C-270/12, *UK and Northern Ireland v European Parliament and Council* (2014), known as the *ESMA* ruling) that mitigated the strict non-delegation doctrine established for decades by its previous case-law (Case 9/56, *Meroni v High Authority* [1958]). According to the *Meroni* ruling, European agencies created beyond the institutional framework provided for in the EU Treaties may not acquire a 'discretionary power implying a wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy'; the Court held that such a delegation improperly 'replaces the choices of the delegator by the choices of the delegate' and leads to an 'actual transfer of responsibility'. In the ESMA ruling, the Court opted for a pro-delegation interpretation of what constitutes a 'wide margin of discretion'. It rejected the complaints against Regulation (EU) 236/2012 conferring extensive powers to the European Securities and Markets Authority in the field of supervising (and indirectly regulating) financial transactions. After the ESMA ruling, EU bodies may claim an enhanced role: *Simoncini* 2018. More broadly on EU executive discretion, *Mendes* 2019.

7 *Weeks* 2018.

8 Indicatively, see Commission Notice on Immunity from fines and reduction of fines in cartel cases (2006/C 298/11).

9 'Even though guidelines cannot be considered rules of law that the administration must observe in every instance, they contain rules of conduct that indicate the tactics that must be applied, from which the administration may not deviate in a specific case without determining the related grounds, which must be compatible with the principle of equal treatment': see CJEU judgments in cases C-167/04 P, *JCB*

1.2 A New Role for Political Institutions

Parliament is perhaps the body that has seen its role change the most during the past years. The eighteenth-century revolutions made it the most powerful player, which creates rules in the name of democracy. However, lawmaking is now an extremely complex task. It requires expertise, monitoring, the ability constantly to combine norms with an ever-changing reality. Parliaments do not possess the know-how, the infrastructure or the procedural mechanism for such an efficient regulatory intervention. They must confine themselves to setting the general policy rules and delegating the greater part of public regulation to other structures of the 'administrative/regulatory State'. To make up for this loss of normative power, parliaments exercise a more thorough oversight over the public institutions that act on their behalf; instead of producing all the norms themselves, they appoint others (government, independent agencies) and make them responsible for their actions. Efficient parliamentary accountability mechanisms reduce the supervision costs and counterbalance the principal-agent problems arising from broad delegation.[10] Briefly, parliaments are changing: they evolve into a body that only makes strategic decisions and supervises more systematically those public institutions that implement them.[11]

The other main political institutions of the Demos did not remain unchanged either, especially those at the top of the executive (the president or the prime minister, depending on the political system). Constitutions seek an optimal balance between powers and responsibility (both political and legal), so that such single-person offices steer the ship efficiently without becoming uncontrollable. Presidents or prime ministers are usually all-powerful. If their ministers do not abide by their commands, they can be replaced at any time. This prerogative drastically reduces agency problems within government action and allows the head of the executive to be accountable for the entire government, as against the parliament and The People.

Traditional public law focused on the political relationship between the government and the parliament via constitutional provisions: vote of confidence for the government; political accountability of the ministers; impeachment procedures against the president, and so on. Yet, those rules do not ensure the technocratic quality of governmental decisions. This requirement leads to organisational solutions that reduce ministers' dependence on their political principals: a prohibition on the same person cumulating the capacities of

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Service v Commission (2006) para 207; C-189/02 P, C-202/02 P, *Dansk Rørindustri v Commission* (2005) para 209.

[10] *Adserà et al.* 2003.

[11] *Bamforth/Leyland* 2013; *Epstein/O'Halloran* 1999.

cabinet minister and MP, and eligibility restrictions so that a minister cannot use his position as a tool for re-election, are some examples.[12] Ministerial posts are more and more often entrusted to experts with less incentive to exploit their positions politically. Another trend is to form small cabinets composed of political persons that only decide on strategic policy issues; it is up to the senior administrative officials at the upper level of the ministry to make almost the totality of public decisions.[13] The United Kingdom and Italy are good examples of this model,[14] which is also followed by the EU.[15]

1.3 Central Administration and Bureaucracy

Nevertheless, the production of transparent, reviewable and efficient public decisions in the context of public administration is extremely difficult, due to the multiple agency costs involved.[16] Administrative law has tried to resolve this problem at the central level by establishing parallel bureaucratic hierarchical pyramids,[17] that is, the ministries, which correspond to the various fields of public action (justice, economy, education, and so on). Each ministry is headed by a member of the government, who bears the political responsibility for the relevant administrative action. The hierarchy supposedly ensures a direct line of supervision, from the lowest ranking public servant to the sovereign People: administrative officials are accountable to their superiors, up to the minister; the minister is accountable to the parliament or the president; the latter is accountable to the voters.

This hierarchical rationale does not always prove effective. Civil servants are not soldiers who obey their officers and risk their freedom or life if they do not; they are called upon not only to follow instructions without questioning them, but also to take initiative. Furthermore, tying central administration to its political chiefs does not solve the agency problem; the ministers may

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12 *Persson/Tabellini* 1999, 2003; *Craig* 2006.

13 Those officials come from the higher echelons of the civil service and are chosen from a pool of candidates by the government, either on a discretionary (spoil system) basis or through an open and impartial process.

14 *Lijphart* 1999.

15 The EU has adopted a similar model of organisation. The Commission has a stable composition. Its members – who undertake, to a degree, functions similar to those of a minister – are appointed for a fixed term and bear a quasi-political responsibility as against the European Parliament. However, a considerable part of the decisions taken on behalf of the Commission is reached by senior members of the European civil service.

16 See Chapter 4, section 2.3.

17 As described by *Max Weber* (1922).

advance their own preferences instead of the general interest.[18] In many cases, it might prove more beneficial for social welfare to entrust public choices to persons who do not act in the expectation of being re-elected.[19] Modern public law shares that view and attempts to transform administrative services into technocratic structures that make efficient choices, far from the sirens of politics; it promotes *new public management* policies,[20] creates high-level public administration schools[21] and establishes internal evaluation and monitoring mechanisms. The venture is neither easy nor guaranteed success. Apart from the difficulties we have already mentioned (monopolistic and informational inefficiencies),[22] the incentives to attract highly skilled officials to central administration do not seem to be sufficient or sustainable. Civil servants are subject to formalistic regimes in terms of work conditions, remuneration and opportunities for promotion. The conditions that would drive them to improve throughout their career are often missing.[23]

In conclusion, the organisational question remains open: which is the optimal combination of politicians and administrative bureaucrats?[24] Strengthening the role of elected officials makes it easier for them to impose their will upon the administrative authorities, in accordance with the logic of democracy; but with the risk that public choices serve political interests rather than social welfare. Emancipating the central administration allows it to serve the general interest without being hampered by a political agenda, but there are still risks of abuse. Neither of the two options is without its drawbacks. This has led to alternative solutions in organising public action: on the one part, to decentralisation and local governance; on the other, to independent agencies.

1.4 Decentralisation and Local Governance

Decentralisation and local governance aim at remedying the inefficiencies of an oversized central administration, which makes choices far away from those concerned. Self-governed local authorities maintain an even weaker relationship with the central State; their leaders are chosen directly by the residents of specific cities or districts (municipalities, prefectures or regions).

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[18] *Napolitano/Abrescia* 2009.211.

[19] *Mashaw* 1985, 1997; *Pildes/Sunstein* 1995; *Sunstein* 1993, 1996, 2002a, 2014; *Rose-Ackerman* 1986, 1992, 1996.

[20] *Pollitt/Bouckaert* 2011; *MacLauchlan* 1997.

[21] Such as the French *Ecole Nationale d'Administration* (ENA).

[22] See Chapter 4, section 2.1.

[23] *Moesen* 1994.

[24] *Hammond/Knott* 1996; *Bawn* 1997; *Alesina/Tabellini* 2007, 2008; *Moe* 2006; *Turner* 2019.

Economic analysis is in favour of transferring some collective choices 'downwards', closer to the citizens.[25] This is regarded as a correct application of the subsidiarity principle to reduce inefficiencies and to increase competition between self-governed units. Local governance makes voters less apathetic; it provokes them to decide about matters that concern them directly and to express their preferences. However, such structures featuring autonomous democratic legitimacy may occasion other failures and do more harm than good. Many of the maladies that afflict the Demos (such as corruption) appear more seriously in the context of local authorities. The latter can be too close to the issues to be regulated and too exposed to compact pressure groups (local businessmen, the residents of a specific area). This increases the risk of capture and the short-sightedness of local leaders; instead of the common good, they will advance private preferences that ensure their re-election, even to the detriment of the general interest.

The solution to the above problems lies in the correct application of the subsidiarity principle: local institutions are to be given only those competences that they can exercise more efficiently than the central government (organising local economic activities, waste collection, and so on). To the contrary, it would be disastrous if they were called upon to decide about major and ambiguous projects of broader interest, such as building a nuclear plant or a motorway; elected local officials might try to block them in order to keep their seat.[26]

1.5 Independent Agencies

Independent agencies are among the most significant institutional innovations that economic analysis has brought to administrative law. In their modern form,[27] they were mainly developed in the USA,[28] before expanding globally.[29] By establishing them, the Demos tries to remedy two of its defects: on the one part, the distortions caused when decisions are reached by entities of political

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[25] *Kollman et al.* 2000.

[26] Having said that, it is useful to ask for the municipalities' view about such projects; involving them reduces the information asymmetry for the central administration in matters of which representatives of the local community have greater knowledge. This is the reason why local authorities are invited to participate in consultations prior to environmental approvals. See the EIA Directive 2011/92/EU (article 6) and the SEIA Directive 2001/41/EC (article 6). *Holder*/*Lee* 2007.85; *Coenen* 2009.

[27] The Ombudsman was a form of independent agency established in Scandinavian countries as early as the nineteenth century. It did not depend on the executive and undertook the mission to protect citizens against maladministration by any other governmental or administrative authority.

[28] *Breger*/*Edles* 2015.

[29] *Shapiro* 2010; *Verhoest et al.* 2012.

origin; on the other, the malfunctions of common administrative structures due to low-quality personnel, lack of incentives and political interference. The existence of independent agencies is supposed to lead to more efficient public choices through their increased know-how[30] and the absence of any form of influence. In addition, they are considered to bring the Demos closer to the Agora than any other model for organising public action.

In Europe, the EU strongly promoted the proliferation of independent authorities.[31] They are established for regulating SGEIs under liberalisation[32] and for treating all service providers impartially, irrespective of whether they are private or public; 'common' administrative institutions (a unit within the Ministry for Telecoms or Energy) would run the moral risk of favouring the historical public monopoly, still belonging to the State. Yet, independent agencies do not exist only in that field. Beyond market regulation, similar structures are put in place to guarantee fundamental rights (data protection)[33], the accuracy of public statistics[34] or the proper collection of public revenue.[35] Why does the EU have such a preference for independent agencies? It seems that, apart from promoting market-oriented regulation, its hidden desire is to create national administrative bodies less dependent on the domestic political system. Being independent, regulators in the fields of energy, statistics or data protection may care more for the proper application of EU norms than for following the instructions of their parliaments or governments. In other words, they may operate as EU double agents; as a Trojan horse for invading the internal legal order.[36] By strengthening the mandates and the networking

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[30] Which is necessary due to the increased scientific skills required for regulating network infrastructures, such as energy, telecoms and transport: *Maresca* 2013; *Künneke* 2018.

[31] *Lavrijssen/Hancher* 2013.

[32] In fields such as competition, energy or data protection: *Eichenberger/Schelker* 2007.

[33] In the field of data protection, Regulation (EU) 2016/679 (GDPR) establishes a 'Consistency Mechanism' and creates an EU independent body to secure its functioning (European Data Protection Board; see art. 60 *et seq.*): *Voigt/Von Dem Bussche* 2017.

[34] Regulation (EC) 223/2009 (as amended) requires that the heads of national statistical institutes are independent (article 5a) and establishes a Community statistical authority, Eurostat (article 6).

[35] In Greece, the European Commission insisted on transforming the central authority for the collection of public revenue into an independent agency (article 1 *et seq*. Law 4389/2016); *Dellis* 2019.

[36] *Dellis* 2019. See Chapter 4, section 2.3.1.

of independent regulators,[37] the EU converts these structures into tools for reducing agency costs arising from other national authorities.[38]

'Old' public law in Europe does not feel comfortable with independent agencies since they are not fully compatible with many of its founding principles. They create a breach with the strict separation of powers and the subordination of administrative organs to authorities with democratic legitimacy. Those agencies do not engage with narrowly 'administrative' tasks only; they create rules, conduct investigations, resolve disputes. Their actions are not subject to the supervision of the relevant ministry. They enjoy broad discretionary powers in drafting and implementing their budgets. Judicial control over their decisions is limited in practice; judges often rely on their presumed independence and expertise to avoid in-depth review of their decisions on the merits.[39] Therefore, independence creates an increased risk that those agencies abuse their mandates.[40] Instead of resolving the principal-agent problem within the Demos, they may take advantage of it, with the additional drawback that they lack democratic legitimacy. Moreover, they are more vulnerable to pressure groups.[41] By capturing the members of the regulator outside the spotlight of political life, lobbies may succeed in advancing their interests (approval of a chemical substance, calculation of electricity charges) in a way that would not be possible if the decision had to be made by parliament or the government.

Under the guidance of economic analysis, modern public law tries to counter the weaknesses of the independent agencies model in three ways. The first is by insisting on the status, impartiality and expertise of their members. EU legislation and CJEU case-law oblige member states to protect members from all kinds of intervention, pressure or influence.[42] The second is by increasing publicity and participation of all interested private parties in their decision-making process:[43] such an open procedure leads those agencies to more transparent and agora-centric choices. The third is by making them accountable to institutions enjoying democratic legitimacy, mainly to parliament.[44] Such form of accountability allows for a broader review of their action – not just the legality of specific decisions but also the efficacy of their overall policy.

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[37] See Directive (EU) 2019/1 on strengthening of the competition authorities of member states (ECN+ Directive).

[38] *Faíña et al.* 2006.

[39] *Plemming* 2010.

[40] *Majone* 1997; *Olson* 1999; *Black* 2013; *Everson et al.* 2014; *Halberstam* 2010.

[41] See Chapter 4, section 2.3.2.2.

[42] Art. 4 of the ECN+ Directive. Also see CJEU judgment in case C-288/12, *Commission v Hungary* (2014) paras 54–55 and 61; *Chamon* 2019.

[43] *Ottow* 2015.

[44] *Rose-Ackerman* 2018; *Chamon* 2016; *Scholten* 2014; *Curtin* 2005; *Busuioc/Groenleer* 2014; *Bignami* 2011.

1.6 Beyond Non-consensual Institutions: The Demos as Businessman or as Contracting Party

The above structures concern the sovereign action of public institutions: the exercise of public authority via rules, individual decisions or physical actions in the name of the general interest. Over time, the Demos has broadened its role by undertaking non-sovereign activities, such as the direct provision of merit goods (education, health, water supply, energy, radio and TV, communications, transport, and so on). The question arises as to how these activities may be organised more efficiently. Historically, administrative law has tackled this issue in three ways.[45]

Initially, it referred to the same structures as for sovereign action: it delegated the provision of goods to decentralised administrative services or to separate legal entities governed by public law and subject to ministerial supervision. Those units acted as public authorities and provided the goods for free or for a symbolic consideration. This choice promotes the consumption of goods with positive externalities (education, health, culture), but increases the costs. Both the provider (public school or hospital) and the users have poor incentives to make efficient use of resources.

To counter the above problem, the Demos turned to solutions closer to the market model, at least for some of those goods. It established State companies for public utilities (transport, postal services), governed by private law, to which it granted exclusive rights. Such companies are more flexible than traditional administrative authorities; they have the ability to imitate the Agora and to become more efficient, closer to consumer needs.[46] Unfortunately, they have not always proved successful.[47] In many countries (especially in southern Europe), poor supervision on monopolistic public companies reduced them to instruments for bypassing budgetary discipline[48] and for multiplying the

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[45] *Wollmann*/*Marcou* 2010; *Chapus* 2001.627; *Gaudemet* 2020.

[46] On the benefits arising from the 'corporatisation' of the public sector, *Stiglitz*/*Rosengard* 2015.

[47] *Backhaus* 1994.

[48] In a private company, the shareholders have a direct economic incentive in ensuring its efficient operation. In a State-owned company, politically appointed officials who represent the interests of the Demos as shareholder do not share that incentive. The company does not operate profit-wise, a criterion that, if nothing else, ensures efficient management of resources. Rather, it serves a political view of the general interest as to the provision of specific services. The accumulation of losses does not function as a counterincentive to maladministration, since it does not lead to the dissolution of the company; the latter may survive through constant public funding.

agency problem within the State.[49] Politicians used them to offer favours and to give jobs to their own electorate. Their management followed the inefficient instructions of their political principals or promoted private interests (the suppliers of the enterprise). For those reasons, State companies often end up being an organisational cloak for rent-seeking.

At a third stage, public law adopted the teachings of economic theory more thoroughly. It used privatisation tools to counter State company failures, via the liberalisation of the relevant public utilities, the sale of those enterprises to private players and, finally, intervention through public contracts. When free markets fail to cover socially important needs, the Demos does not necessarily establish a public monopoly and become the direct provider; it prefers to *buy*, on behalf of society, the goods that private operators do not offer through consensual transactions. It serves its role as welfare state guarantor through public contracts rather than as an entrepreneur:[50] it grants subsidies for running unprofitable maritime routes; it covers expensive health treatments; it finances universal services in telecoms; it awards the construction of the necessary infrastructure to private providers. The EU has clearly adhered to this new approach. Since the 1980s, it has introduced rules to liberalise SGEIs and regulate public procurement.[51] It is not coincidental that the decline of the public company model and the rise of public procurement law happened in the same period. Largely, public contracts acted as substitutes for the entrepreneurial branch of the State.

Public contracts present several advantages when compared to State companies and monopolies. They are more compatible with the subsidiarity principle, since they let markets supply what is required for serving public objectives. They create *competition for the market*,[52] through open and non-discriminatory tender procedures, under strict public procurement rules. They involve lower supervision and agency costs, since they do not establish permanent, politically controlled State-run structures in the form of companies. Moreover, they are suitable for forging more efficient synergies between the Demos and the Agora. For example, concession contracts or public–private partnerships (PPPs) for the construction and operation of public infrastructure (motorways, harbours, airports) increase the role of private operators but also transfer the long-term economic risk to them. The private part of the contract has the incen-

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[49] Even in the years before Greece was 'officially' considered as being in crisis (2011), the debts of just two State enterprises, Olympic Airways and National Railways, equalled almost 10 per cent of GDP: *Triantidis* 2016.

[50] *Szyszczak/Van de Gronden* 2013. See Chapter 4, section 2.1 and Chapter 7, section 2.2.

[51] *Morettini* 2011.

[52] *Williamson* 1976.

tive to ensure its efficient performance. Still, public contracts manifest their own serious failures as well; the Demos often procures goods that are more expensive and of lower quality, while the risk of corruption remains high.[53]

2. PROCEDURAL MECHANICS IN PUBLIC DECISION-MAKING

Administrative law has always focused on procedural issues to ensure the 'formal' legality of public decisions. Economic analysis also considers those issues to be crucial for increasing the quality of collective choices and for making them transparent and controllable.[54] In the USA, the debate on improving the State is linked to that on the efficiency of the Administrative Procedure Act (APA, 1946).[55]

Modern legal orders do not seem to insist so much on the distinction between the different types of public decisions and processes (section 2.1), but focus rather on the establishment of a common body of rules and tools to ensure 'good' administration and 'better' regulation (section 2.2). They require all collective choices to be reasoned (section 2.3), under conditions of transparency and with the participation of the concerned stakeholders (section 2.4). Their aim is to shape an efficient public decision-making process (section 2.5).

2.1 The Osmosis of Public Decision Types and the Importance of Rulemaking

For a long time, teaching public law meant emphasising the differences between the various categories of public decisions. A law enacted by parliament had to be distinguished from a presidential decree; individual administrative acts should not be confused with regulatory decisions. Those are different *types* of public decisions that do not stem from similar procedures; nor are they submitted to the same forms of judicial review. Moreover, administrative law focused on adjudication: on the individual administrative acts that implement general norms in specific cases and directly affect private interests. It protected the latter with a number of formalities: duty of the administration to motivate its decisions, right of prior hearing and access to the file for the addressees of an unfavourable act.

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[53] It is useful to examine such issues from the viewpoint of economic analysis (*Sanchez-Graells* 2009, 2015) and game theory (*Lee* 1989).

[54] *Asimow/Dunlop* 2009.

[55] *Lubbers* 2008; *McNollgast* 1999; *Shapiro*/*Glicksman* 2004; *Breyer et al.* 2017.

The above description is no longer entirely accurate.[56] Economic analysis of law leads to an osmosis between the various types of public decisions, irrespective of their parliamentary, presidential, governmental or administrative origin and of their regulatory or individual character. All those acts have a common feature. They reflect collective choices made by non-consensual institutions in the name of social welfare. They need to be efficient, a requirement that is served by similar procedural tools: *ex ante* impact assessments;[57] a transparent mechanism that reduces information asymmetries; a process that provides the proper incentives and counter-incentives to those who participate in the 'strategic game' of decision-making. As iconoclastic as it may sound, a national parliament enacting a law for organising the legal profession, EU bodies issuing a directive on the free movement of students, an independent agency regulating electricity production and a local administrative authority that grants an environmental licence to an industrial site are not so different after all. They all need to follow a similar procedural logic for their choices to be efficient.

Nevertheless, the regulatory impacts of public decisions may differ considerably. The broader the scope of a decision, the more important its effects in efficiency terms. This self-evident truth leads us to see public decision-making differently; to put the emphasis not on the procedure for taking individual administrative acts but on the one for drafting rules and policies – *on rulemaking rather than on adjudication*. In the past, administrative courts and administrative law codes in Europe mainly dealt with the issuance of unfavourable individual acts. New public law does something else: it tries to improve the conditions for shaping better norms and regulations. If so, it will also succeed in reducing the potential failures in the following stage – that of implementation of the regulatory framework in individual cases.

2.2 A Procedural *Ius Commune* for 'Good Administration' and 'Better Regulation'

Since the beginning of its existence, administrative law has attempted to shape a common body of procedural principles and rules.[58] The French *Conseil d'État* referred to a number of unwritten principles (*principes généraux du droit*), such as good administration, equal treatment, rights of defence and legitimate expectations. The Germans and the Americans incorporated similar

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[56] *McNollgast* 2007.
[57] *Wittman* 2017.
[58] A comparative analysis in *Auby/Perroud* 2016.

rules into codes of administrative procedure.[59] The creation of a *ius commune* for administrative action,[60] mainly through codification,[61] is a rational choice for any legal system: it achieves economies of scale; it reduces supervision costs on administrative behaviour and remedies specific inefficiencies (inertia, agency problems); it advances legal certainty and institutional trust, which are two very important public goods.

The above *ius commune* on 'Good Administration' was recently supplemented by another set of principles and tools, under the name of 'Better' or 'Smart' Regulation.[62] This 'toolkit' serves a broader scope, which is to incorporate into the decision-making process the elements required for pursuing efficiency. It introduces a transparent cost–benefit analysis mechanism for general use applicable in the context of any public decision. Better Regulation procedural requirements co-exist and complement the Good Administration principles and rules. They both aim to create a 'Good' Demos that should become even 'Better'. By combining all these requirements and principles, legal normativism meets economic reality. In some cases, both approaches put forward the same objectives; for example, the impartiality of the decision-maker or the duty of the public authorities to act transparently and to motivate its choices. Therefore, another osmosis needs to be noted: that occurring between the legal and the economic view on procedural mechanics. This pairing presents the advantage of rendering economic tools more familiar to lawyers. It is easier for a judge to impose respect for a better regulation requirement by relating it to a legal obligation arising from the principles of good administration, such as the duty of public institutions to conduct impact assessment studies and the obligation to state reasons for their regulatory choices.

The EU is an interesting field of study, where administrative procedure rules[63] evolve together with better regulation tools. It has not yet adopted an administrative procedure code, despite the initiatives of the European Parliament in the name of an 'open, efficient and independent EU administration'.[64] Even so, the EU Charter of Fundamental Rights establishes the 'right to good administration' (article 41), which includes a series of procedural guarantees: that of each person 'to have his or her affairs handled impartially,

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[59] *Singh* 2001; *McNollgast* 1999.

[60] *Pünder* 2013.

[61] *Auby* 2013.

[62] *Baldwin et al.* 2010, 2013; *Kirkpatrick*/*Parker* 2007; *Weatherill* 2007; *Baldwin* 2005; *Wiener* 2006.

[63] *Ruffert* 2007; *Hofmann et al.* 2011. See Chapter 5, section 2.2.2.

[64] European Parliament resolution of 9 June 2016 [2016/2610 (RSP)] includes a proposal for a Regulation that would codify the principles of EU administrative procedure.

fairly and within a reasonable time'; to be heard before any unfavourable individual measure; and to have access to the administrative files, together with the obligation of the administration to justify its decisions. Primary law establishes additional general principles[65] that govern the action of EU institutions: transparency and openness (articles 11 and 15, TFEU, articles 1 and 10, TEU); obligation to motivate regulatory choices (article 296, TFEU); access to documents (article 42 EU Charter); equality before the law and non-discrimination (articles 20 and 21 EU Charter); protection of personal data (article 8 EU Charter); the right to an effective remedy (article 47 EU Charter); presumption of innocence and rights of defence (article 48 EU Charter). These principles derive from the member states' common constitutional traditions and the ECHR.[66]

The EU Better Regulation initiative[67] aims at 'designing EU policies and laws so that they achieve their objectives at minimum cost'.[68] It has a broader scope and a more holistic view than the rules of administrative procedure. It refers to 'policies' rather than to the issuance of public decisions and covers the 'whole policy cycle',[69] from design and preparation, to adoption, implementation, *ex post* evaluation and revision. It relies on established legal principles – transparency, proportionality, impartiality, participation, democratic legitimacy – but also adds a number of procedural innovations: forward planning, impact assessment, fitness check of the existing regulation, stakeholder consultation, constant quality control, implementation support and monitoring.[70] To that end, the EU Commission has created a special 'toolbox' that contains the various specifications and instruments for better regulation.[71] More recently, it has introduced a Regulatory Fitness and Performance Programme (REFIT), with the aim to constantly improve EU-derived legislation. In November 2017, the Juncker Commission established a Task Force on 'Subsidiarity, Proportionality and Doing Less More Efficiently'. It also adapted the Better Regulation Toolbox to combine three components: political

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[65] European Parliament (IPOL), *The general principles of EU administrative procedural law. In-depth analysis for the Legal Affairs Committee*, June 2015.

[66] *Ibid* and *Stirn* 2017.43; *Varju* 2014; *De Búrca* 2011; *Chalmers*/*Tomkins* 2007.

[67] *Willems* 2016; *Wiener* 2006; *Garben/Govaere* 2018 with several contributions on this subject.

[68] EU Commission Staff working document, *Better Regulation Guidelines*, Brussels, 7 July 2017, SWD (2017) 350, p.4.

[69] *Ibid*, p.5.

[70] The OECD also advances similar regulatory reform policies. See Recommendation of the OECD Council on Regulatory Policy and Governance (2012); OECD, *Regulatory Policy Outlook*, October 2018; and OECD, *Better Regulation Practices across the European Union*, March 2019.

[71] See Chapter 5, section 2.2.2.

legitimacy, technocratic quality and business-oriented efficiency. Despite its tendency to over-regulate in some areas, the EU Commission seems to be a rather successful example of a public institution that follows economic analysis methods for evidence-based policymaking;[72] as Jean-Claude Juncker himself explained, it seeks 'to make sure that we are only acting where the EU adds value'.[73]

2.3 The Need to Substantiate All Types of Regulatory Choices

Domestic law has long since established the obligation of administrative authorities to give reasons for their individual acts; this duty ensures correct implementation of the normative framework, protects private individuals and facilitates judicial review of everyday administrative action. Nevertheless, traditional public law does not impose the same requirement upon the producer of legal norms, the almighty parliament. Rulemaking is, more than anything, the outcome of a democratic process. Judges lacked the legitimacy to examine the material or scientific evidence that led parliament to enact a law and review it on the merits.

Economic theory sees things with a totally different eye. If something seems incomprehensible, it is the omission to demonstrate the correctness of any collective choice, irrespective of whether it takes the form of an administrative act, a governmental regulation or even a parliamentary statute. Public regulation shall always rely on appropriate evidence and assessments. This duty reduces the information deficits that are endemic to all public authorities and is necessary to show that collective action is compatible with the principles of subsidiarity and proportionality. All kinds of public decision-making need to substantiate that their choices are both lawful and 'technocratically efficient'. In a nutshell, public law is moving from the duty to state the legal reasons of individual administrative acts prior to their issuance to a much broader requirement: the obligation of any decision-maker to provide the necessary evidence that demonstrates the efficiency of any collective choice at any stage of public action.[74]

To prove efficient, public policies and decisions need to rely on scientific evidence and on state-of-the-art methods to collect it. Public institutions use *impact assessment studies* to abide by this requirement. Those studies apply the various forms of cost–benefit analysis for evaluating the posi-

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[72] *Schout/Schwieter* 2018.

[73] *Juncker J-C.*, State of the Union Address (2017). Available at: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_17_3165.

[74] *Aldy* 2018; for EU legislation, *Garben/Govaere* 2018.

tive and negative impacts of alternative regulatory choices.[75] EU law provides for regulatory impact assessment prior to the issuance of EU norms (Directives or Regulations) and when it entrusts regulatory choices to domestic players, such as independent agencies.[76] The EU Commission stresses that impact assessments should be of high quality, comprehensive, proportionate, evidence-based, transparent, unbiased and open to stakeholders' views and to all institutions concerned.[77] Their technical characteristics are thoroughly described in the 'toolbox' that we examined in Chapter 5.[78]

Impact assessment allows for an efficiency test of public choices even in the courtrooms. The CJEU has highlighted its significance in two ways. The first is in the field of environmental law. All domestic authorities bear the duty to conduct environmental impact studies before approving a project with potential environmental effects – not only those authorities of administrative nature, but national parliaments as well (Cases C-287/98, *Linster*;[79] C-182/10, *Marie-Noëlle Solvay*[80]). The second is regarding the judicial review of EU secondary legislation. In its judgment in case C-5/16 *Poland v European Parliament and Council*, the Court was invited to examine whether the EU institutions failed to carry out a proper impact assessment to analyse the consequences of a new scheme for trading greenhouse gas emission rights before taking a Decision on the matter.[81] Despite the EU legislature's 'broad discretion as to the assessment of highly complex scientific and technical facts',[82] and the very limited scope of judicial review (reduced to 'manifest error of appraisal or a misuse of powers, or whether the legislature has manifestly exceeded the limits of its discretion'), the Court examined the evidence included in the impact assessment study, in order to decide whether the EU institutions were able 'to produce and set out clearly and unequivocally the basic facts'.[83] Even if those documents are not binding on the parliament or

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[75] *Noguera* 2013; *Larouche* 2013b; *Alemano* 2011.

[76] For instance, Directive (EU) 2018/1972, establishing the European Electronic Communications Code.

[77] EU Commission Staff working document, *Better Regulation Guidelines*, Brussels, July 7, 2017, SWD (2017) 350, p.17. See also the Recommendation of the OECD Council on Regulatory Policy and Governance (2012).

[78] See Chapter 5, section 2.2.2.

[79] C-287/98, *Linster* (2000).

[80] C-182/10, *Solvay and Others* (2012).

[81] Case C-5/16, *Republic of Poland v European Parliament and Council of the European Union* (2018).

[82] *Ibid*, paras 150 and 151; see also CJEU judgment in Case C-343/09, *Afton Chemical* (2010) paras 28 *et seq*.

[83] *Ibid*, para 153. In the following paragraphs, the judgment cites specific parts of the impact assessment report which, according to the Court, successfully support the

the Council, they allow the Court to review whether these bodies 'took into account during the legislative procedure the available scientific data in order to exercise their discretion properly'.[84]

2.4 Transparency and Participation

The tools for evidence-based public choices are not a panacea. Scientific analysis may be biased or promote hidden agendas. Those who draft an impact assessment study enjoy privileged access to crucial information and have an incentive to conceal or distort it in a way that serves their interests. Consider a company that submits an environmental study in order to obtain a permit for an industrial plant: it is rational for the applicant to present an embellished version of its activities. The same goes for a minister trying to pass legislation in favour of a pressure group.

Two characteristics of the decision-making process may reduce this serious problem: first, broad publicity of the draft decision and of the information that substantiates it; second, the participation of interested stakeholders and third parties in the process. Transparency and participation are major counterweights to the inefficiencies of public institutions.[85] They reduce the risk of regulatory capture and information asymmetry.[86] They bring to the fore issues that were ignored or distorted behind the scenes: the waste of public resources caused by awarding a contract to a friend of the minister; the shortcomings of a legislative initiative; the environmental risks generated by a project. The 'public concerned',[87] who will suffer the consequences of those choices, possess crucial information. They may shed light on the negative impacts and make their objections clear to the decision-maker; they have an incentive to do so.

Modern public law establishes forms of 'passive' and 'active' information to citizens. Passive information is offered to the general public without prior request. For example, publication of public decisions in the 'Official Gazette' or on the internet prevents the administration and its assignees from exploiting information asymmetry; it averts concealed behaviour and reduces supervision

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challenged Decision and demonstrate that the key facts and data were duly taken into consideration.

[84] *Ibid*, para 163.

[85] *Coglianese et al.* 2009; *Donnelly* 2010; *Hood/Heald* 2006.

[86] *Epstein/O'Halloran* 1999; *Farber* 1992a.

[87] This term is used in articles 1.2.e and 6.4 of Directive 2011/92/EU, on Environmental Impact Assessment (EIA), to describe the group of persons that are entitled to participate at the consultation after the deposit of the EIA Study and prior to its approval.

costs. The right to active information grants, for those wishing to be involved in the decision-making process, access to necessary data for their efficient participation; it allows the public concerned to consult the impact assessment studies and the other documents already included in the file.

Public authorities guarantee participation mainly through open consultation[88] – a transparent process that allows third parties to submit their views before a decision is reached. To serve their purpose, consultations must meet certain criteria: to be available to a broad circle of individuals and stakeholders; to provide necessary information, particularly through web-based tools; to give sufficient time for notification, processing and participation; to ensure that the input from the participation is duly taken into consideration. The consultation process is one of the most important innovations in public law, a major meeting point of the Demos and the Agora. It allows civil society to remedy the shortcomings of collective decisions. It complements representative with participatory democracy. It establishes a co-operative platform of checks and balances through an organised confrontation of opposing interests in a context of enhanced transparency. By doing so, it improves public action and enables accountability. In other words, *consultation performs a systemic function with major positive externalities*. It maximises the collective advantage from the participation of the concerned public. This benefit far outweighs the respective private benefit of each participant to advance his or her own interests. For example, if consultation forces the decision-maker to block an unsuccessful regulatory reform or a project with catastrophic environmental impact, the social benefit is much higher than the individual gains obtained by the participants.

The EU and many of its member states first introduced public consultation in the field of environmental licensing.[89] It is now part of the legislative process and an indispensable 'Better' Regulation tool before taking any major decision.[90] Failure to conduct a proper consultation is a procedural error that results in the annulment of the affected administrative acts.[91]

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[88] *Wagner* 2016; *Smismans* 2016; *Baldwin et al.* 2013.339. See Chapter 6, section 2.1.1.1.

[89] As a means to publicly review and correct EIA studies. See the abovementioned Directive 2011/92/EU. *Case* 2001; *Coenen* 2009; *Edgar* 2013. CJEU judgment in Case C-128/09, *Boxus* (2011).

[90] See *Better Regulation Guidelines* (2017), Tools #53–56.

[91] Courts seem to be less activist in the case of legislative acts. Consultation on draft legislation to be passed is part of the parliamentary process. In many legal orders, such process is considered as part of the *interna corporis* of the House and exempted from judicial review. This is not fully the case for EU law, which is not founded on a rigid principle of separation of powers. Judicial review on secondary legislation also covers consultation issues. See the abovementioned CJEU judgment in case C-5/16, *Republic*

2.5 Efficiency: The 'Rule of Reason' of the Decision-making Process

The procedure for reaching public decisions is part of a broader game. Like the constitution, this mechanism too is 'alive' – a dynamic tool to achieve the targets set.[92] None of the parties in the decision-making process, whatever their capacity – ordinary citizens, representatives of social or business interests, public authorities – are neutral; they act according to their own agenda. Such opportunism of the players is to be taken into account when drafting or implementing procedural rules. Public decision-making should become a mechanism of participatory checks and balances that neutralises or manipulates opportunism to ensure efficient and consistent[93] public action.

In the USA, economic theory was applied to study the way in which the rules of administrative procedure could be used to reduce the agency costs occasioned by the delegation of broad mandates to independent federal authorities.[94] It has also shown that legal interpretation of procedural norms may affect the powerplay between administration and justice, together with the efficiency of public action. Courts tend to impose strict procedural requirements upon the administrative authorities, to counterbalance the ever-increasing power that such authorities enjoy. In this way, however, they may encumber public action with excessive formalities. Administrative authorities follow the exact opposite path; they opt for informal and elliptical rulemaking, soft law tools, poor justification of their choices. Thus, they reduce their own procedural burdens and accordingly increase the investigation costs that courts incur upon reviewing their decisions, together with the costs of legal uncertainty.[95]

European law is familiar with this debate. Let us take as an example public procurement rules and procedures, a subject exhaustively covered by EU secondary legislation.[96] These provisions and their judicial interpretation have produced an increased formalism in the name of transparency and equal com-

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of Poland v European Parliament and Council of the European Union (2018) paras 153 *et seq*.

[92] *Thibaut/Walker* 1978; *Mashaw* 1990; *De Figueiredo et al.* 1999; *Von Wangenheim* 2004.

[93] Consistency refers to the way public institutions have exercised their powers in the past (precedents). Administrative authorities shall follow such precedents when deciding upon similar cases, or at least bear the obligation to sufficiently explain the reasons why they opt for a different solution. *Jacob* 2012.

[94] *McNollgast* 1987, 1989, 1999, 2007; *Bamberger* 2008; *Bressman* 2007.

[95] *Tiller/Spiller* 1999.349 (370); *Hanssen* 2000.

[96] *Bovis* 2016; *Ølykke/Sanchez-Graells* 2016; *Bogojevic et al.* 2019. For more on the law and economics approach of EU legislation on public procurement, see *Sanchez-Graells* 2015.

petition of the tenderers.[97] Nevertheless, this approach may generate serious side effects:[98] inability of the contracting authority to choose the candidate that will best meet its requirements; tenderers having an incentive to file objections and appeal to justice for insignificant formal defects; long delays in concluding public contracts; the tendency for bigger players to invoke formalities through an army of lawyers and to set aside weaker candidates (who might well supply the Demos at lower prices). It also incentivises the awarding authorities to seek ways to bypass the formal public procurement procedures in order to reduce their red tape costs; in other words, to solve a problem by creating another one.[99]

In conclusion, procedural rules require a realistic approach, the criterion being their ability to promote the best collective options.[100] Efficiency is the *raison d'être*, the *objective*, but also the *limit* of every provision that refers to the 'formal legality' of public action. On the one part, the quest for efficiency leads to the establishment of procedural guarantees such as transparency, impartiality, participation, the duty to substantiate choices or the right to defence of the subjects of the administration; on the other, it restricts those requirements to the minimum necessary to avoid useless forms of red tape. The 'just value' of procedural norms – to rephrase Aristotle – arises from assessing the cost and the benefit from complying therewith.[101]

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[97] With some notable exceptions. The Italian Consiglio di Stato (sez. V – sentenza 21.9.2005, n. 494) reversed judgments of the lower administrative courts for being too eager in 'hunting mistakes' (*'caccia all'errore'*).

[98] Without necessarily preventing anticompetitive behaviors such as bid-rigging: *Weishaar* 2013.

[99] *Greenstein* 1993; *Dekel/Dotan* 2017.

[100] In many cases, procedural rules predefine the substance of the case. In the context of competition law, *Cosnita-Langlais/Tropeano* 2018.

[101] *McNollgast* 1990; *De Figueiredo/Van den Bergh* 2004.