9. Economic analysis and the resolution of public law disputes: the scales, the sword and the blindfold of justice

Themis is the ancient goddess of justice (*Justitia*, in Latin mythology). She holds a scale in one hand, a sword in the other; she is blindfolded, in depictions after the fifteenth century. The scale and the sword are attributes of good counsel and authority. The blindfold guarantees impartiality. Economic theory offers its own version of this image. First, it examines the trial as a quasi-rational game (section 1). Second, it focuses on the judge and his role (section 2).

1. HOW USEFUL ARE THE SCALES AND THE SWORD FOR AN EFFICIENT RESOLUTION OF PUBLIC LAW DISPUTES?

Economic analysis of law has mostly engaged with the resolution of private law disputes.[1] In these cases, the object of litigation is negotiable. Following the Coase theorem, under conditions of zero transaction costs[2] the parties would be led to a compromise. Litigation confirms the failure of the parties to reach an efficient consensus.[3] This is not necessarily true for disputes deriving from the sovereign action of the Demos.[4] Legality is non-negotiable in principle. Moreover, the opponents – the private individual acting as plaintiff and the defendant public authority – do not stand on an equal footing in terms of sovereignty.

Despite the particularities, public law litigation – which includes constitutional and administrative law cases – is no less of a game. Legal orders have

[1] *Cooter/Rubinfeld* 1989; *Kobayashi* 2017.

[2] Transaction costs are reduced when the parties behave fully rationally and have the ideal legal counsel; they are then fully aware of their interests and of how 'fair' or 'unfair' their claims are.

[3] For this reason, civil litigation processes must operate as mechanisms for removing the obstacles that prevented the parties from attaining a compromise solution. See *Deffains/Langlais* 2009.106; *Landes* 1971; *Daughety/Reinganum* 2017.

[4] *Adler* 2010.

the mission to render it efficient; to internalise the externalities arising from the judicial resolution of the disputes (section 1.1) and to counter the opportunism of the players (sections 1.2 and 1.3).

1.1 Judicial Resolution of Public Law Litigation; Positive and Negative Externalities

What functions does judicial resolution of public law litigation fulfil? Certainly, it guarantees the protection of citizens against the Demos almighty. This aspect, crucial as it may be, is not the only one. Dealing with such disputes has an additional, *institutional* function; it may help cure the inefficiencies of public institutions.[5]

Constitutional and administrative court judgments produce important *positive externalities*. Private plaintiffs initiate the procedure in their own interest but ultimately serve the whole community. They have the incentive and the information to challenge and reveal the inefficiencies of public action. Court judgments serve the Demos by identifying the potential failures of collective choices. They legitimise and improve public intervention by ratifying, modifying, correcting or annulling it. Thus, the social benefit of public law litigation often exceeds its private benefit. For that reason, private individuals should be given incentives to bring their case against the Demos before the courts. For example, by granting a broad *locus standi* for challenging the constitutionality of laws, as in Germany, Spain or the USA,[6] constitutional review is beneficial not only to the complainant but to the entire legal order. Based on a similar rationale, the EU requires national courts to assess *ex officio* the compatibility of domestic norms with European rules and to refer the hard cases to the CJEU (art. 267 TFEU).[7] Apart from protecting the litigants, this mechanism safeguards a crucial public good: the supremacy and the uniform implementation of the European *acquis*.[8]

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[5] For the institutional benefits of dispute resolution, see *Zwart* 2009. In terms of ancient tragedy, the private litigant is not the protagonist but the messenger; the person who announces to the judge/*deus ex machina* the administrative maladies that are to be remedied. If we were playing Sophocles' *Antigone*, the key role before the judge would not be that of Oedipus' daughter but that of King Creon, the carrier of public authority. Creon is the tragic hero whom public law may not ignore. The courts shall correct his errors to protect Antigone but, mostly, the Demos itself and the universal values of justice.

[6] On the economics of constitutional review, *Ginsburg/Versteeg* 2014; *Garoupa* 2019; *Vanberg* 2001.

[7] Case 106/77, *Amministrazione delle finanze dello Stato v Simmenthal* (1978).

[8] Case 314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost* (1987). A public choice approach on the EU's preliminary ruling mechanism is given by *Tridimas/Tridimas* 2004.

Nevertheless, bringing a public law case before the courts also generates *negative externalities*. All potential litigants – whether as plaintiffs or defendants – act rationally, at least in principle. They rely on a cost–benefit analysis to decide whether to initiate and accept litigation.[9] They evaluate the benefits by assessing the gains from a favourable judgment and the chances of success. This calculation is not easy to make due to increased uncertainty and the psychological biases of the parties. Behavioural studies have shown that litigants feel excessive optimism about the outcome of their trial.[10] Moreover, they consider litigation costs:[11] on the one hand, the *pecuniary cost* – the expenses that each party will bear; on the other, the *cost in time*, until the resolution of the dispute. The latter mainly depends on the duration of the trial. Delays prolong uncertainty and reduce the utility of the final judgment for both the winning party and the legal order.[12]

However high it may be, the cost from the trial that is borne by the litigants (private cost) is lower than that borne by the legal order (social cost).[13] This social cost is higher in monetary terms. Justice is a very expensive service for the State to provide, and the parties are often not bound fully to cover if they lose the case. The cost is even higher in terms of time; each additional dispute referred to the already overloaded courts entails systemic delays in dealing with all disputes. When the average period for issuing final judgments in public law cases becomes excessively long, the whole judicial mechanism is deemed 'failed'. The ECtHR used that term to describe the administrative courts in Italy and in Greece and to declare that those countries 'systemically' violated the right to effective judicial protection.[14] In such circumstances, the social value of judicial resolution is nullified. The performance of the courts depends not only on the quality of their judgments but also on their ability to issue them in due time.[15]

The above negative externalities are difficult to resolve due to the *inelasticity of judicial resources*. Justice is not a good whose quantity can be increased by deploying a larger number of judges or courtrooms. It is a scarce resource; it cannot cover demand when the latter exceeds the maximum input that the judicial system can handle under conditions of 'good justice': sufficient access to the courts for private individuals and fast, high-quality examination of the cases by judges with appropriate skills and powers. 'Good justice' is nothing

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9 *Priest/Klein* 1984.
10 *Bar-Gill* 2006.
11 *Reinganum/Wilde* 1986; *Shavell* 1982; *Deffains/Desrieux* 2015.
12 *Vereeck/Mühl* 2000.
13 *Kaplow* 1986.
14 See *Athanasiou and others v Greece* (2010); *Scordino v Italy (No.1)* (2006).
15 *Palumbo et al.* 2013; *Voigt* 2013; *Rosales-López* 2008.

but a common good, exposed to the risk of abuse by the litigants. The risk lies in the large disparity between private and social cost. This disparity drives the parties to become free riders in many ways: exercising judicial recourses that are doomed to be rejected; filing voluminous court documents or repeatedly demanding postponement. It is crucial to study those opportunistic behaviours in order to safeguard the public good of justice.[16]

1.2 The Paradox of Overloaded Courts and Its Explanation

Let us return to the Coase theorem. When litigants are sufficiently rational and informed,[17] one would expect that the number of disputes referred to the courts would be low. Therefore, the overburdening of the courts with cases that are not 'a matter of life or death' for the parties seems to be a paradox, a situation that does not reflect the assumed rationality of the litigants.

In administrative litigation, the phenomenon of massive pending disputes appears even more paradoxical. It would be reasonable to expect that a considerable part thereof would rarely arrive before the courts or would be speedily resolved. Private individuals who are harmed by an administrative act may ask their lawyer to predict whether their recourse has chances of success; if the odds are bad, it is rational for them to desist from judicial action.[18] If the private party has strong chances of winning, the administration – which bears the duty to serve legality – is expected to correct its action by withdrawing or modifying the challenged act; in other terms, to terminate the dispute before or just after it reaches the courts.

The above remarks reveal an unpleasant truth. The abundance of public law disputes is more likely the result of a conscious choice made by the parties, that is, to participate in a trial in which they will most probably be defeated. They follow that path either because they do not bear the respective cost themselves, or because they draw some benefit from the procedure. Courts are particularly exposed to the opportunism of participants.[19] Private individuals (and their lawyers) exercise recourses with manifestly low chances of success

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[16] For example, litigation may be used for rent-seeking: *Parisi* 2002.

[17] For the significance of the information available to the litigants, see *Bebchuk* 1984.

[18] In disputes regarding purely legality issues, private individuals face reduced information deficits. It is all about understanding the relevant rules and their proper implementation according to established case-law. With the proper assistance, it is not hard to safely assess those legality issues before going to the courts. This is the reason why, in several legal orders (Germany, France, Italy), private litigants bear the obligation to seek the assistance of a lawyer before filing a court case against the administration.

[19] *Guthrie* 2000.

when they take advantage of the various postponements and delays of the trial. The administration persists with 'lost' cases when the legal order does not sufficiently force public officials to prevent the imprudent use of the judicial process. This problem is aggravated by the high agency costs that affect the behaviour of public authorities before the courts. The officials who issued the challenged unlawful act have no incentive to correct it; they can wait for the final court decision. The elected heads of administrative bodies often suffer from 'juridical myopia'.[20] It is in their interest to keep in force an unlawful decision that temporarily serves their interests. If the courts are slow in rendering justice, such a decision will be overturned only after their term of office has expired.

The ECHR[21] required the national orders in Europe to address some of those failures. Countries such as Italy, France and Greece were forced to take measures for accelerating administrative justice: pilot trials; judgments without prior hearing (if the outcome is manifest) or before single-member courts; prohibition of successive postponements. These rules introduce counter-incentives to litigants – mainly the private ones – who attempt to draw benefits from delays. They are an excellent example of applying the teachings of economic analysis to the field of justice. Unfortunately, they are not enough. The judicial system suffers from abusive conducts arising from both parties to litigation. It is important to fight dilatory and opportunistic strategies coming from the administration as well. The task is not easy, since the Demos is not a common litigant.[22] There are, however, some issues that could be corrected; for example, trial costs. Many European States do not impose court expenses upon defeated administrative authorities or their representatives; these costs encumber the State budget. Under such circumstances, the administration, when acting as litigant, has the incentive to abuse the scarce resource of justice. To improve things, the administration should bear its costs before the courts. This should be true both for the specific authority and for those who act on its behalf.

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[20] For the 'short-sightedness' of elected officials in general, see Chapter 4, section 2.2.1.

[21] *Schabas* 2015.291.

[22] For example, according to administrative law systems inspired by the French and German models, administrative acts are presumed lawful until they are overturned by a court decision. Presumption of legality of administrative acts is crucial to ensure legal certainty and the effectiveness of public action. But it also provides an incentive for the administration to act illegally, until it is censored judicially; and so, not to correct its errors until a court judgment imposes the requirement.

1.3 Thinking Out of the Box: Alternative Dispute Resolution for Public Law Cases

The mechanics to resolve constitutional and administrative litigation must become more efficient.[23] The procedural rules before the courts should be exposed to cost–benefit analysis to measure whether they improve the quality of justice or, on the contrary, cause more harm than good. Digital technology is also extremely helpful, as it reduces information asymmetries and red tape within administrative courts. E-justice tools (databases, filing documents in electronic form)[24] allow for grouping similar cases; they support the reporting judges to process cases more quickly and avoid conflicting judgments.

Economic analysis of law is also extremely fond of alternative dispute resolution (ADR) as a means for dealing with litigation outside the courtrooms. ADR reduces the input of cases to be tried,[25] which is of paramount importance for accelerating the operation of the courts. However, by contrast to private litigation, ADR is not easily transplanted to administrative law cases (constitutional litigation is out of the question).[26] Despite the difficulties, ADR can be useful, especially when the dispute is of a purely pecuniary nature: calculating a claim for damages against the State; fixing the exact sum of fines or taxes. In such cases, there is room for compromise before and outside the courtrooms – at least, to the extent that such cases concern the assessment of evidence (the extent of the damage, the income to be taxed) rather than the interpretation of the law. The various forms of ADR are not suitable for all types of public law disputes. Arbitration is better for public contracts claims. Mediation and extrajudicial settlement are more effective for social security cases and monetary disputes.[27] Quasi-judicial recourses before independent bodies are appropriate for reviewing the legality of individual administrative acts. Whatever the specific form, economic analysis sets a crucial condition: to be successful, ADR must 'predict' the outcome of the dispute, as if it were to be resolved by the courts.[28] The result of ADR must closely reflect the one that the parties would expect from the court. Only then will they opt against bringing the case to

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[23] On the economics of courts' performance, *Posner* 2005; *Rosales-Lopez* 2008. On the optimal number of courts, *Voigt* 2012b.

[24] *Cerrillo*/*Fabra* 2008; *Reiling* 2006.

[25] *Dragos/Neamtu* 2014; *Fisher* 2017b; *Deffains et al.* 2017.

[26] We have already mentioned that the legality of public action is not negotiable. Moreover, the representatives of the State are usually risk averse. They are wary of proposing or accepting a compromise, to avoid being accused of partiality.

[27] Especially if the outcome of the settlement is ratified by a court: *Wood* 2011.

[28] *Shavell* 1995; *Deffains/Langlais* 2009.141.

justice; ADR allows them to reach the same solution at a lower cost in terms of both time and money.[29]

2. HOW BLINDFOLDED ARE THE EYES OF THEMIS? THE IDEAL JUDGE FOR RESOLVING PUBLIC LAW DISPUTES

Legal theory often describes judges in a rather metaphysical manner – as impartial priests of Themis, free from preferences and passions. Like the blind seers of antiquity, they perceive not the future but the ideal of justice. They perform a 'legal sacrament', that of the trial. Accordingly, most European countries opt for a *monastic model*;[30] for courts composed of 'monks', life-long career judges, with purely legal backgrounds and tasks. Economic analysis does not entirely agree with the above image,[31] whether as to the character of the judge (section 2.1) or as to the mandates that he/she fulfils (section 2.2).

2.1 Which Judge?

2.1.1 The judge: yet another player in the game of power

Public law judges intervene beyond the narrow context of the legal dispute they are invited to resolve. In addition to the private litigant, they safeguard the systemic efficiency of public action.[32] They are called upon to correct defects regarding the content of general rules and their application by public authorities. Furthermore, they protect democracy, by ensuring that public officials do not abuse their mandate.[33] Moreover, they are the last to intervene. By annulling or amending public decisions, they shape collective choices, alongside politicians and technocrats. They are far more than solvers of legal disputes; to a certain extent, they become co-regulators.[34]

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[29] The success of an ADR process depends on whether it manages to 'imitate' the result of the judicial process. In France, the extrajudicial resolution rate of tax-related disputes exceeds 90 per cent. Transplanting a similar process to Greece fails. It results in the use of quasi-judicial recourses that never validate the private complainant nor give the impression that the case was treated 'fairly'. They add more delays to the dispute resolution mechanism since the taxpayer will finally go before the courts.

[30] *Landes/Posner* 1975; the term is also used by *Napolitano/Abrescia* 2009.276.

[31] *Choi et al.* 2010. See the collection of articles in *Epstein* 2013.

[32] *Forsyth et al.* 2010.

[33] *Jordão/Rose-Ackerman* 2014.

[34] *Miles/Sunstein* 2006; *Aranson* 1990; *Clarke et al.* 2010; *Ramello* 2012. This is more obvious in the context of the EU sectoral legislation for liberalising services of general economic interest (SGEIs). The courts systematically test and shape the acts for regulating those liberalised markets. For example, the pricing of telephony or energy

At the same time, judges are not hermits, nor do they possess superhuman abilities. They are individuals entrusted with public powers. They participate in the strategic power game of the Demos, along with other officials.[35] Since they are human, they act rationally[36] (and only to a certain extent[37]). They consider the pros and cons of strategic choices, both for the institution to which they belong and for themselves.[38] They have preferences and influences: their religion, political ideology, ecological concerns or a favourite football club. They show a strong *esprit de corps*; they care for the prestige of their court and of the judicial system in general. Judges are 'agents' of justice, acting *ex parte* and in the name of The People; they cannot be immune to principal-agent problems.[39]

Focusing on the human nature of judges[40] is necessary in order to understand and improve their work. Courts do not exist independently of their members. *Jurismetrics* – the statistical study of the opinions that judges adopt in sensitive cases – is helpful in many ways.[41] It shows the links between the courts and other parts of the Demos and the Agora, and the way in which the model for selecting judges (especially those of the supreme administrative and constitutional courts) affects their future behaviour. Do political institutions promote judges who are more reluctant to invalidate administrative acts or to raise constitutionality issues? How do judges act after their appointment? Do they remain friendly to their political principals in the long term?[42]

Economic analysis dismisses the myth that judges enjoying constitutional guarantees of independence and impartiality become completely neutral.[43] It invites us further to examine why a specific interpretation of the legislative or constitutional text was chosen in a dispute; to look for the extra-legal influences (ethical, political, economic) that evolve case-law. Moreover, it focuses

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services is governed by decisions of the independent regulator which take their definite content only after they have been reviewed by the courts. It is not inaccurate, therefore, to qualify the latter as co-regulators in that context.

35 *Posner* 1993b. This is more obvious for the courts of the highest level, such as the US Supreme Court: *Wahlbeck et al.* 1998; *Vanberg* 2001, 2019. For administrative litigation see *Smith/Tiller* 2002.

36 *Smyth* 2005.

37 *Tversky/Kahneman* 1974; *Simon* 2004; *Sunstein et al.* 2002.

38 *Landes/Posner* 1975.

39 Like all other public institutions, courts are not immune to this malady: *Merrill* 1997.

40 *Mathis/Diriwächter* 2012; *Stearns* 2000; *Epstein et al.* 2011; *Tushnet* 2013.

41 *Shepherd* 2011; *Sunstein* 2008.

42 *Huber/Gordon* 2004; *Gann Hall* 1992.

43 This does not mean, however, that guarantees of judicial independence are not crucial: *Ferejohn* 1999; *Melton/Ginsburg* 2014; *Melcarne/Ramello* 2015.

on the principal-agent costs and inefficiencies[44] that stem from the judges – for example, when they are eager to postpone hearings without providing good reason.[45]

2.1.2 How much of an 'expert' must the public law judge be?

This question has two aspects.

The first concerns whether it is preferable to bring public law disputes before 'common law' or 'special' courts. This dilemma has engaged public law since its birth, from the years of the French–British antagonism between Maurice Hauriou and A.V. Dicey about which of the two systems is better: the continental system, providing for special administrative law applied by separate courts; or the Anglo-Saxon one, which sets the administration under the same rules and courts that exist for private disputes. In the era of economic analysis, the question 'common law or *droit administratif*?' remains fundamental. It is mainly raised by those who express State-phobia. These scholars[46] assert that common law is more efficient to regulate human relationships; there is no need for either a separate (administrative) law or separate judicial systems. Europe follows the opposite path. Common law seems insufficient; efficient public intervention requires both a special administrative law and different judges to apply it.

Europeans seem to have won this battle. Administrative courts or special administrative law sections within general courts are better counterweights to public intervention. Most European States have copied either the French model of a supreme body that resolves public law disputes (*Conseil d'Etat*) or the German model of several special jurisdictions for administrative, tax or social security cases. Even those legal orders that persist in a unified judicial model also establish administrative litigation sections within it. In England, the administrative court is part of the Queen's Bench Division, one of the three sections of the High Court of England and Wales. In the USA, federal public law disputes are referred to the United States Court of Appeals for the D.C. (District of Columbia) Circuit. Specialisation seems to be natural selection, in the Darwinian sense of the term. Judges with better expertise and experience in administrative law ensure the optimum treatment of such cases. The same goes

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[44] *Posner* 2005.

[45] The judges that manifestly delayed in rendering their final judgment may be liable to compensate the private litigants for the damages they suffered from such delays. This solution is followed in France as a means to accelerate the rendering of justice in accordance with the right to effective judicial protection (article 6 of the ECHR). See CE, 19.10.2007, *M. Blin*.

[46] See *Harlow* 1980. For more on this debate, see *Bignami* 2016; *Loughlin* 2010.440; *Freedland* 2006; *De Poorter/Rubin* 2007.

for constitutional litigation; despite the problems,[47] the creation of a supreme court specialised in constitutional litigation seems to be the favoured option for most legal orders.[48]

The second aspect of the question is harder to answer. Are legal skills sufficient for judges who review public decisions, or do they also need the know-how that would be required if they had to take the challenged decision in the first place? Is it perhaps preferable that experts from other disciplines (economists, engineers) participate in administrative courts to illustrate the scientific and regulatory implications of the pending case? An affirmative answer would question the established monastic system of judges–jurists. This debate is familiar to public law. In France, for example, the judges of the *Conseil d'Etat*, the *Cour des Comptes* and the other administrative courts graduate from the *Ecole Nationale d'Administration* (ENA). Apart from legal topics, the syllabus of this school includes fields such as economics, management and decision-making. French administrative judges may assume non-judicial duties or even work for the administration for a while during their career. The British have taken this idea further by creating sector-specific dispute resolution bodies,[49] the tribunals.[50] The presiding judge is a jurist, but the other members may be experts from other fields (town planners, energy specialists, and so on). The tribunals are part of the judicial system[51] and their decisions can be challenged before ordinary courts (judicial review at the Queen's Bench Division).[52] In the USA, a similar function is awarded to bodies that resolve disputes within the federal administration and independent authorities (Administrative Dispute Resolution Act, 1996). Those bodies apply a quasi-judicial procedure and respect all the main guarantees of a trial. They are headed by persons (hearing officers) that enjoy impartiality and independence guaranties similar to a judge.[53] The EU has also copied this model in competition law cases.[54]

The above models try to reconcile two opposing aims: on the one part, the need for judges who possess the non-legal abilities to improve the challenged public decision, apart from resolving a dispute;[55] on the other, the need to

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47 See Chapter 6, section 2.1.2.1.

48 *Stone Sweet* 2012; *Tushnet* 2006.

49 For example, in the fields of competition (Office of Fair Trading and Competition Appeals Tribunal) and town-planning (Planning Inspectorate).

50 *Cane* 2010; *Elliott* 2013.

51 Tribunals Courts and Enforcement Act (2007).

52 *Cane* 2010.

53 *Cane* 2009; *Verkuil* 1992.

54 Decision by the President of the European Commission 2011/695/EU.

55 *Lubbers* 2010.

ensure that rendering justice remains a distinct and independent function. The second aspect seems to prevail at the end. Even where hybrid courts exist, as in Britain, the cases are ultimately brought before jurists who decide from a purely legal standpoint. Public law judges cannot become universal scientists, exempted from their 'technocratic ignorance'; they will remain partially 'blind' on some technical and scientific issues. Modern systems opt for the following compromise. At the first stage, they try to find the best combination between the legal and the non-legal treatment of cases (independent authorities, tribunals, hearing officers). At the final level, they retain the conventional justice model of judges–jurists. They prefer 'legal prestige' over 'extra-legal expertise'. Supreme administrative judges use legal reasoning as a counterweight to public authority. Their institutional *autoritas* emanates from their legal skills and not from their conversion to pluri-disciplinary experts. The same goes for constitutional judges, even if the legal order allows for non-jurists to become members; the best lawyers among them will lead the way.[56]

2.2 What Powers to the Judge?

How deep and how intense must judicial review of public decisions be?[57] Or, conversely, how 'blind' must the judge be to bodies having democratic or technocratic legitimacy? How should judges intervene to make the Demos better?

Before tackling the core of this enigma, it is important to stress that judges may increase the Demos' efficiency even beyond resolving disputes. They may assist – as in France[58] – the bodies that reach public decisions (government, parliament) to improve their choices; for example, when drafting a law or a regulatory act. Their advice, apart from being legally state-of-the-art, is dispassionate and impartial, not exposed to the need for re-election. The *judge-consultant* reduces two kinds of transaction costs: first, the information deficit of the decision-making body as to what the law requires; second, the agency problems in public action, by setting legal limits on the political players.[59] After resolving a dispute, judges should undertake another crucial role: that of ensuring the Demos' efficient compliance with their judgment and with legality in general. Paradoxically, many legal orders in Europe seem to ignore

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[56] As in France, regarding the *Conseil Constitutionnel* and in the EU, regarding the CJEU. In the US, there has been no member of the Supreme Court without a law degree since 1957.

[57] See the collected essays in *De Poorter et al.* 2019.

[58] *Brown* 1973.

[59] In France, the members of the *Conseil d'Etat* are assigned various extrajudicial mandates. *Gaudemet* 2020.69.

this, in the name of a strict separation of powers. They confine the administrative courts to a telegram-sized *mandamus*, either to dismiss the recourse or to annul or modify the challenged public decisions. Such imposed silence and lack of judicial powers regarding proper compliance with judgments is a huge handicap.[60] The administrative and constitutional judges that render justice in a case are the most suited to making the Demos correct its mistakes. American constitutional history might have been different if the Supreme Court, when it condemned racial discrimination in education (*Brown* 1954[61]), had not enjoyed the power to intervene in everyday life and give 'orders' to the public institutions on how to implement this judgment, even on how school buses would operate.

Let us return to the heart of the matter: to the powers given to the judge, not before or after, but in resolving the dispute; to the content and the extent of judicial review on the 'legality' and the 'constitutionality' of public decisions – or their 'conformity' with EU legislation.[62] In France, judicial review in administrative law cases may vary as to its intensity (*contrôle minimum, restreint, normal, de proportionnalité*).[63] In the USA, the standard of review oscillated between activism (hard look, *de novo* review) and deference, before the Supreme Court inclined towards the latter with the *Chevron* case.[64] Similar concerns have engaged almost all models of administrative and constitutional justice both in civil law and common law systems.[65] In EU law, the intensity of judicial review performed by the CJEU in economic and politically sensitive cases is a popular subject for research and debate.[66]

Traditional public law in Europe suffers from a fundamental contradiction as to the extent of judicial review. On the one side, this review is not supposed to extend up to the 'extra-legal' assessments that led to the creation of the

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[60] Though it must be admitted that, in recent decades, the situation has improved. Administrative courts in the European states have at their disposal some instruments, procedures and sanctions to impose compliance with their judgments. Nevertheless, the principle of the separation of powers, as rigidly applied in Europe, sets serious limits on their power to instruct precisely the administration on how it should act, or even to issue an administrative act in its place in case of non-compliance. On judicial review and the separation of powers at EU level, *Ritleng* 2018; *De Witte* 2018.

[61] SC *Brown v Board of Education of Topeka*, 347 U.S. 483 (1954).

[62] *Schwarze* 2002; *Wilberg/Elliott* 2015; *De Poorter et al.* 2019.

[63] *Seiller* 2016.235.

[64] SC *Chevron U.S.A., Inc. v Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Cohen/Spitzer* 1996; *Elliott* 2005; *Miles/Sunstein* 2006.

[65] *Bell et al.* 2016.

[66] *Stone Sweet* 2004; *Rosas et al.* 2013; *Dawson et al.* 2013; *Nehl* 2019; *Widdershoven* 2019. A comparative analysis of CJEU and USSC constitutional review by *Rosenfeld* 2006.

norms applied to a case; on their social and economic background; on whether these norms are indeed required and successful. Those are 'opportunity' and not strict 'legality' choices, not to be made by the judge. The latter must also respect the room for discretion that the law grants to administrative authorities. On the other side, however, the legality review does not fully impede the assessment of public decisions on the merits. Courts examine 'the limits' within which the administration exercises its discretionary powers.[67] It is unclear whether this review remains restricted to purely legal matters. The judges may announce a limited review but in practice substitute their choices for those of the administration. Moreover, the courts check the compatibility of laws and regulatory acts with the constitution and international or European law. Here too, the dividing line between 'legality' and 'opportunity' is rather fluid. To avoid being accused of activism, the courts use ambiguous terms and emphatic adverbs to disapprove of a specific measure. They qualify it as 'obviously' or 'manifestly' 'unreasonable', 'unfair' or 'disproportionate'.[68] Nevertheless, there is no objective legal method to grade what is 'manifest' or 'unfair' and what is not. Consequently, the intensity of the judicial review is almost indeterminate. In one case, it may avoid controlling clearly erroneous assessments by the lawmaker and the administration; in another, it may intervene excessively in their work. Readers of this book can surely think of such extreme examples drawn from their countries' constitutional and administrative justice.

Economic analysis invites us to perceive the dimensions of judicial review differently:[69] to relate the powers to be granted to the administrative and constitutional courts to the efficiency of their use. Those powers should extend up to the point at which the cost of their increase exceeds the respective benefit. In other words, the marginal intensity of judicial review is equivalent to its marginal cost; it results from a cost–benefit analysis. On the one part, judges must have the mandate to engage with State failures that they are capable to identify and remedy, irrespective of the 'political/administrative' and 'democratic/technocratic' origins of the body under scrutiny. The contrary would be inefficient. What is important is not whether a public choice raises pure 'legality' issues or not, but whether its flaws can be successfully remedied through judicial intervention. If so, there is no reason why the courts should not be entitled to step in. On the other part, judicial intervention should not allow judges to impose upon the other institutions of the Demos their subjective preferences on a matter of public regulation. Such a substitution would be sub-optimal for two

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67 *De Poorter et al.* 2019; *Scalia* 1989; *Daly* 2012; *Hertogh*/*Halliday* 2004.
68 *Bongiovanni/Valentini* 2009; *Morrone* 2009.
69 *Richardson* 1999.

reasons. The first is due to its fragmentary character. Courts deal with regulatory issues in a case-by-case pattern. Their approach in the context of specific disputes is too narrow and suffers from information asymmetries. Second, judges lack both democratic legitimacy and scientific expertise. As jurists, their opinions on political or scientific issues are imperfect by definition.[70] It is not the task of the courts to determine a country's tax or economic policies.[71] This is so not only because the excesses of judicial activism violate the separation of powers, but also because they lead to inefficient choices.

Judges should not be afraid to enhance their role, as long as they do not fall into the trap of 'destructive' maximalism.[72] The teachings of economic analysis assist them to redefine judicial review on the legality of public decisions and to check the actual impact of such decisions in real life; to exercise an efficiency test on them, through general principles of law (proportionality, subsidiarity and sustainability) and through instruments of economic origin (impact assessment, cost–benefit analysis).[73] Such an 'economic' approach broadens the notion of legality and reduces the aspects of public action that are left judicially unchecked.[74] The *ex ante*, evidence-based evaluation of all public decisions that we examined in the previous chapters[75] complements their *ex post* judicial assessment.[76]

Judicial review of this kind presents an important advantage. It offers greater margins for intervention to the courts, while protecting them against excesses of activism.[77] Courts may focus on the mechanics of efficiency instead of expressing subjective opinions on opportunity issues. In other words, they can insist on the modern procedural and structural aspects of public law that ensure efficient public choices: transparency, consultation procedures, impact assessment, independency of the regulator, accountability, monitoring. Judges may be strict on those matters and avoid interfering with the substance of public regulation, given that they are neither politicians nor experts.[78]

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70 *Von Wangenheim* 2005; *Jordão/Rose-Ackerman* 2014.

71 *Kantorowicz* 2014.

72 *Molot* 2000; *Gamble/Thomas* 2010.

73 See Chapter 5, section 1 and Chapter 5, section 2.

74 This is obvious when the courts are called upon to review issues of economic regulation, such as, pre-eminently, the application of competition law. See *Slesinger* 1995; *Essens et al.* 2009; *Ottow* 2009; *Markovits* 2014. But it also extends into other fields of administrative law, such as the protection of the environment: *Voigt* 2019.

75 See Chapter 5, section 2.1; Chapter 8, section 2.2 and Chapter 8, section 2.3.

76 *Alemano* 2011, 2013.

77 *Lewans* 2016; *Nowag/Groussot* 2018.

78 *Miles/Sunstein* 2006; *Donnelly* 2010.

American courts seem to have already adopted this approach when controlling *policy* choices made by administrative and regulatory authorities.[79] Their review is focused more on the process and on the methods to evaluate regulatory choices than on their substance. The CJEU follows a similar path: it declares that, in an 'area which entails political, economic and social choices … the Court cannot substitute its own assessment for that of the EU legislature',[80] but it checks all the more thoroughly whether better regulation instruments were duly used in the decision-making process.[81] Legal theory attempts to identify whether these new trends in judicial review make it more profound and more interventionist than that exercised in the past.[82] The answer is not obvious. In reality, it is a *different* form of judicial scrutiny, more compatible with the modern, evidence-based model for public regulation. There will never be unanimity as to its ideal intensity.[83]

In any event, we should not exaggerate. Judicial review will never restrict itself to forms and procedures; this is neither feasible nor desirable.[84] Courts judging public law disputes will not be persuaded to express complete tolerance as against the substantial choices made by politicians or experts. It is

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[79] The model of the administrative/regulatory State relies on the delegation of broader mandates to experts and on efficient policy choices. As noted by US Justice Stephen Breyer (*Breyer* 1986), the role of the judge is to 'break the vicious circle' of regulatory arbitrariness: first, by allowing administrative authorities to adopt 'reasonable' interpretations of the law; second, by blocking 'arbitrary and capricious' choices upon formulating their policy. In American law, these two – to a certain degree antithetical – aspects of judicial review are reflected in two well-known judgments of the Supreme Court: *Chevron U.S.A, Inc. v Natural Resource Defense Council, Inc.*, 467 U.S. 837, 1984 and *Motor Vehicle Manufacturers Association v State Farm Ins.*, 463 U.S. 29, 1983. *Riker/Weingast* 1988; *Gely/Spiller* 1990; *Stack* 2010; *Plemming* 2010; *Stiglitz* 2018.

[80] Cases C-5/16, *Poland v Parliament and Council* (2018) para 170 and C-203/12, *Billerud Karlsborg and Billerud Skärblacka* (2013) para 35. *Hofmann et al.* 2011; *Nowag/Groussot* 2018. On the intensity of the CJEU judicial review on complex economic matters, *Da Cruz Vilaça* 2018; *Nehl* 2019.

[81] See Chapter 8, section 2.3.

[82] *Cooter/Ginsburg* 1996; *Garoupa/Mathews* 2014; *Zwart* 2009; *Magill/Ortiz* 2010; *Kelso* 2013; *Cane* 2010; *Craig* 2010a; *Jordão/Rose-Ackerman* 2014. I tend to agree with the latter, who consider that US courts currently exercise the most systematic and successful review on regulatory policy issues, without falling into the trap of activism. Their success, especially in comparison with the French *Conseil d'Etat*, lies in the fact that they focus more on reviewing regulatory choices than on specific acts.

[83] *Eskridge/Ferejohn* (1992) use game theory to prove that judicial review must be particularly intense, to constitute an appropriate institutional counterweight to regulatory powers. *Strauss/Rutten* (1992) advance the opposite view, invoking the fragmentary nature of the judicial review.

[84] *Epstein/Landes* 2012; *Papaspyrou* 2018.

rational for them to claim a bigger role, especially when constitutional rights are at stake.[85] By undertaking interpretative initiatives, the judges keep the constitution 'alive'; they act as guardians of principles and values in the legal order and not as policymakers.[86] The distinction between matters of principle and matters of policy is not an easy one to make.[87] It is, however, crucial for determining the fair limits of judicial activism. In the case of principles, bold judicial intervention is necessary for preserving the rule of law. It safeguards the efficiency benefits of liberal democracy,[88] as long as the judge does so in moderation, avoiding the seductive calls of paternalism. In policy issues, the lion's share should be left to the policymaker, whether politician or technocrat.

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In conclusion, economic analysis does not want to blindfold the judge's eyes. It takes us back to the goddess Themis of classical antiquity before the sculptors of the Renaissance deprived her of vision. Judges need not be blind to reach a correct judgment (in any case, they will always 'take a peek' from behind the blindfold). What is important is how public law courts use the scales and the sword in their hands. For this task, economic theory provides them with new tools. It expects them to determine, on their own, how and when they will act and how and when they will restrict themselves. More than being passive enforcers of legal provisions, judges play a catalytic role both in specific cases and in the overall task of attributing justice. Their success depends less on the mandates they are given and more on the way they exercise their powers. Understanding economics may help them make better use of their powers.

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[85] As *MacNollgast/Rodriguez* 2008.15(19) aptly note, 'courts might cherish hegemony or at least priority at matters of individual rights and fairness rather than administrative performance'. See also *Webber* 2010. A bold judicial interpretation of the constitution is necessary and preferable when compared to the cost of its revision. See Chapter 6, section 1.2.3.

[86] *Epstein et al.* 2001.

[87] *Dworkin* 1977, 1985.

[88] See Chapter 4, section 1.2.5.