6. Games of public power: what economics teaches us about constitutions

The US and all the States in continental Europe have a written constitution. This is the first thing one learns as a law student. The fundamental nature of the constitution is so self-evident that we hardly ever think about it. But why do we need a constitution, and what kind of constitution do we need? Economic analysis gives its own answers to these questions.

1. THE CONSTITUTIONAL TEXT: THE DEMOS' FOUNDATION STONE

1.1 What Is the Constitution and Why Do We Need It?

According to Coase's theorem, law should aim at an efficient allocation of 'rights' and 'resources'. Constitutions play a similar role,[1] which is to make the Demos efficiently serve welfare when the Agora proves inadequate. They establish non-consensual institutions that fight against opportunism and egoism: the 'Greed and Chaos' of private individuals, according to Jerry Mashaw.[2] However, those institutions are not immune to the same malady of greed and chaos. They are created by persons who may abuse their authority, or behave in the 'market of public power' in a way that generates transaction and agency costs. The constitution is a remedy for this twofold inefficiency: on the one hand, for the inefficiency that derives from the Agora, by providing for public intervention in horizontal relationships; on the other, for the inefficiency that derives from the Demos, by applying checks and balances upon the exercise of public power. Constitutional law is a mechanism that reflects fundamental

[1] On the economics of constitutional law, see Chapter 3, section 2.2.3, *Cooter* 2000; *Cooter/Gilbert* 2019; *Van Aaken* 2008, *Siegel* 2010; *Parisi* 2003; and the essays collected by *Epstein* 2009.

[2] *Mashaw* 1997.

choices for reducing costs from two sources of action: the private and the public.[3]

1.1.1 A system of co-operative checks and balances for long-term cost reduction

The constitution reduces cost by establishing appropriate conditions for collaboration regardless of whether people act as private individuals or as holders of public authority. It counters opportunism, wheresoever originating, via incentives and prohibitions reflected in institutions, procedures, principles and rules.[4] Co-operation requires an efficient allocation of (private) rights and (public) authority. The constitution provides for three forms of allocation. The first is *horizontal*: it delineates rights among private individuals – the right to perform an economic activity against the right for the protection of workers or the environment. The second is *vertical*: it sets the limits between private initiative and public action – each person is entitled to the peaceful enjoyment of their possessions, but their property may be expropriated on the grounds of general interest. The third is *internal*, between bodies exercising public authority: it distributes power in such a way that each one of them counterbalances the competences of the others.

This allocative function of the constitution offers a two-sided benefit. On the one hand, it increases legal certainty. It solemnly assigns 'particles' of legal power to individuals and public institutions, in the form of rights and competences respectively. On the other, it allows every player, whether private or public, to prevent abusive behaviour by others. The constitution is a 3D system of checks and balances (horizontal, vertical and internal) against the inefficient concentration of power. It creates conditions for the co-existence of opposing forces, both in the context of the Agora and of the Demos. It intends to be a successful game of 'competitive co-operation'. Co-operation and competition are the two aspects – at first sight contradictory – of the constitutional mechanism. In game theory, the 'prisoner's dilemma' reveals man's non-co-operative tendency. Constitutionalism is a means to remedy this problem.

This model of collaborative checks and balances must operate *over time*. The temporal dimension is particularly significant. Constitutions exist as

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[3] *Ackerman* 1999; *Cooter* 1982, 1992; *Ginsburg* 2017; *Gordon* 1999; *Hardin* 1989; *Posner* 1987a.

[4] The Constitution 'provides for cooperative behaviors that are mutually beneficial for the increase of private and collective welfare'. *Napolitano/Abrescia* 2009.116. It creates the proper *incentives* for such optimal behaviours. It is important to understand those incentives in order to interpret constitutional rules properly: *Van Aaken* 2008; *Person/Tabellini* 2003; *Cooter/Gilbert* 2019.

a response to a *double uncertainty*. First, as to the future behaviour of those who acquire power: will those alternating in public office indeed serve the general interest? Second, as to how things will play out in everyone's life: we need a set of fundamental rights, individual and social, to protect us against all potential risks. If law generally exists in order to reduce uncertainty, this specific function is pre-eminently undertaken by the highest set of rules, the constitution itself. Its aim is to lift a double 'veil of ignorance': as to how all persons will behave (either as private individuals or as State officials), and in what situation they will find themselves in the unknown future.[5] This veil leads all of us to an 'existential' rational choice: to reduce uncertainty by limiting the scope for arbitrary action or opportunistic behaviour and by establishing social justice through the most basic law of the Demos: the constitution.

1.1.2 A text of consent

Describing constitutions as co-operative mechanisms also reveals their *consensual* nature. Both economic and legal theory often describe constitutions as contracts or agreements. For economists, consent increases constitutional efficiency. This text incorporates the preferences of those who create it. In addition, it reduces enforcement costs, since all have presumably agreed to its content.[6] Let's see how.

For the sovereign player – The People, in democracies – consent is equivalent to *self-limitation*. A constitution is a form of 'Ulysses Pact'. It ties those holding the ultimate power to the mast of the ship. In this way, they will not succumb to the sirens of abuse, to the tyranny of the majority.[7] Self-limitation of The People as a whole is not sufficient. The unanimous consent of each one of us is required as well; otherwise, it would be 'irrational' for the constitution to be born. No one would tolerate the existence of the Demos' non-consensual institutions – which have the authority to bypass their interests – if they had not agreed in advance to establish them. Following a utilitarian approach, the constitution (supposedly) reflects Pareto optimal conditions, which all accept because they benefit from them.[8]

Consent is achieved through the establishment of fundamental rights, which we shall discuss in the next chapter. Fundamental rights are the contractual counterweight to majority-based decision-making. Even when such decisions are contrary to individual preferences, they may not exceed certain limits:

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5 *Rawls* 1999 (1971); *Imbeau/Jacob* 2011.

6 At least, according to the founders of public choice: *Buchanan/Tullock* 1962; *Buchanan* 1977, 1990, 1991; *Hayek* 1978; *Van den Hauwe* 2000. See also *Mackaay/Rousseau* 2008.140; *Napolitano/Abrescia* 2009.121; *Holcombe* 2011.

7 *Elster* 2000.

8 *Buchanan* 1977; *Cooter* 2000.

the protected constitutional content of specific liberties (personal freedom, freedom of speech, protection of private property). To be Pareto efficient, the constitutions guarantee social rights as well (education, healthcare, sustainable environment). They place all citizens (or humans) in a better situation than they were in before those rights were instituted – whether this be those who already belong to a socially vulnerable group or those who may become unprivileged in some years, future generations included.[9] To succeed as a 'long-term insurance policy', constitutions need to protect and, so, benefit all.[10]

The above description is, by all means, idealistic. Conditions of unanimous consent will never exist. As with all human creations, the making of a constitution is an imperfect venture. Problems such as agency costs, failures in dealing with uncertainty or deadlocks in reaching collective decisions are present in the process. Even so, if this process is sufficiently open as to encompass the various expressions of the Agora, the constitution enjoys a strong chance of success in establishing an equally open Demos.[11] What applies for other legal institutions also applies for constitutions. Their performance is directly dependent on how accessible they are, even if there will always be some that are more favoured than others.

1.1.3 The main content of the constitution

Constitutions reflect the main options available to the Demos and the Agora. On the one part, they provide guarantees to individuals and social groups, via rights to which they attribute fundamental character. On the other, they organise the institutional edifice of the Demos. They establish the bodies that exercise public power, their competences, how they reach decisions to specify the various forms of the general interest. Constitutions have two aspects: a *guaranteeing* and a *mechanical* one. The former bypasses majority (through fundamental rights), while the latter is based on it.

These two aspects of the constitutional text are not clearly distinct. They co-exist as parts of a cohesive system of co-operative checks and balances. Fundamental rights, as counterweight to the power of the many; collective

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[9] Future generations are vulnerable by definition. All societies have the tendency to place the present first, to the detriment of the future (see Chapter 5, section 1.3). In this way, they impair inter-generational equality. The constitution must find a way to safeguard the next generations, as if it had to acquire their consent at the moment of its creation. Otherwise, it cannot survive in the long term.

[10] It is not a coincidence that constitutions are often drawn up at the end of difficult periods, such as wars or dictatorships. At this moment, the individuals better understand the importance of a consensual and stable pact that does not exclude anyone.

[11] *Ginsburg et al.* 2009.

decisions, as a response to opportunistic individualism; separation of powers, to overcome their potential abusive and inefficient exercise.

1.1.4 The form and the length of constitutional provisions

Economic analysis has its own approach to issues of constitutional form.[12] It relies on empirical comparative research, based on objective and measurable criteria, such as the existence of a written constitution; the length of the constitutional text; the list of protected rights; the periodicity of its amendments; the number of institutional veto players; the existence of a constitutional court, and so on. These studies are helpful to assess constitutional 'efficiency'.[13]

The first question that arises is whether the constitution must assume a written form. Could it remain informal, as in the United Kingdom? A solemn text appears preferable, as confirmed by comparative research. The verbal form for a long-term contract, the constitution, which is often concluded after wars or dictatorships, is not the most rational choice. The uncertainty cost as to whether it will be observed would be too high.

The next dilemma concerns the length of the text.[14] Do we need a long or a short constitution? Detailed or elliptical provisions? A lengthy, exhaustive rule increases legal certainty. However, it is too binding on those who assume its interpretation and implementation. They enjoy smaller margins for future adaptations. Interpretative narrowness renders constant amendments to the text necessary. This is not a good thing for constitutional provisions that want to last; the cost of amendment is high, while normative exhaustivity leaves no room for discretion to the interpreter. There seems to be a direct connection between the length of constitutional texts and the frequency with which they are revised or abandoned. Wordy constitutions change more often and bear an increased risk of obsolescence.[15]

Constitutional provisions should be brief and accurate at the same time – a difficult combination, indeed. On the one hand, when it comes to describing fundamental rights, the use of vague concepts seems preferable. It allows for adaptations to ever-evolving realities. The right to possess 'property' does not have the content it did a century ago. The freedom to 'communicate' or to enjoy 'privacy' has to evolve in tandem with the technological challenges of the digital age. On the other hand, a more detailed formulation seems appropri-

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[12] See the articles collected by *Voigt* 2012a.

[13] *Elkins et al.* 2009, who record the findings of the Comparative Constitutions Project (CCP) and classify national constitutions via 'constitutional comparative indices': *Ginsburg* 2010a, 2017; *Epstein* 2017.

[14] *Voigt* 2009. See Chapter 5, section 3.2.

[15] *Tsebelis* 2017; *Tsebelis/Nardi* 2016.

ate for procedural provisions, to prevent abuses by those having the power at a given time. Even so, excessive details will do more harm than good.

Considering the above, the EU Treaties are not a successful example of constitutional drafting.[16] They contain too much information. Probably, this is due to the member states' mistrust of the evolution of EU law in ways they cannot predict and control. Exceedingly detailed articles fetter those who are called upon to implement them. A typical example is the exhaustive provisions on single currency, in conjunction with draconian rules for budgetary discipline (articles 125 and 126 TFEU). By being so detailed and of almost absolute rigidity, they deprive the Union of tools to counter financial (and other) crises. Even worse, they aggravate the gap between the north and the south of Europe. A more flexible EU constitutional text would tackle those challenges in a much better way.[17] Dealing with the Brexit saga from the EU perspective revealed the same institutional and textual inefficiencies.[18]

1.2 Amendments and Interpretation

1.2.1 The simultaneous need for a hard but adaptable constitution

(Almost all) constitutions cannot be amended as if they were an 'ordinary' legal text. Comparative research reveals various forms of entrenched clauses to restrict constitutional change: the need for an increased majority in the House, involvement of several institutions holding a veto right, time limitations, provisions that may not be revised.[19]

A degree of rigidity is necessary to preserve the effectiveness of the constitutional text. Otherwise, fundamental guarantees would not survive in the long term. If they could be overturned by a simple parliamentary law or presidential decree, their establishment would become meaningless. Entrenched clauses are a safety net against future opportunism by those in power. Moreover, the stability of the constitutional text reduces the costs of uncertainty. It is rational for private individuals to fear that their situation may worsen at any moment due to public decisions made by the legislator or the government. But there is

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[16] For a law and economics overview of the EU constitutional model see the contributions in *Schmidtchen/Cooter* 1997; *Stephan* 2007; *Eger/Schäfer* 2012 (especially *Voigt* and *Tsebelis*); *Pernice/Maduro* 2004. For after the fall of the European Constitution and the eurozone crisis, see the collection of studies in *Joerges/Glinski* 2014; *Fabbrini et al.* 2015; *Papadopoulou et al.* 2017; *Barber et al.* 2019.

[17] *Joerges* 2019.

[18] *Hinarejos* 2015; *Mangiameli* 2017; *Fabbrini* 2017; *Armstrong* 2017; *Gordon* 2019; *Amato* 2019.

[19] *Rasch/Congleton* 2006; *Ginsburg/Melton* 2015; *Voigt* 1999; *Boudreaux/Prichard* 1993; *Bucur/Rasch* 2019.

a solid protection against that risk: such unfavourable changes cannot bypass constitutional red lines.

However, the advantages of hard constitutional rules do not make amendments totally pointless. The constitution must also be adaptable to the uncertainties of the future. The revision process is a tool for managing unforeseeable risks. Moreover, it allows future generations to include their own preferences in the basic law. An unchangeable text would manifest two weaknesses. First, it would allow those who benefit from its imperfections to enjoy them permanently. Second, it would run an increased risk of being overturned, its abolishment being the only way to remedy imperfections. An absolute revision ban would be like a longevity drug that ultimately kills its users. The longest-lived constitutions – including the US Constitution – have survived through many amendments.

The EU Treaties suffer from excessive rigidity. After a period of successive amendments (Treaties of Maastricht, Amsterdam, Nice and Lisbon), a new revision seems extremely unlikely. The procedure outlined in article 48 TEU involves dozens of veto players: EU institutions and all national parliaments.[20] The number of consents and ratifications required makes it impossible to amend. In such cases, those benefiting from the *status quo* hide themselves behind the letter of existing provisions. They assert that any change of the European *acquis* requires a revision of the Treaties, which they know is purely theoretical. Isn't this what the north constantly replies to the demands of the European south? Isn't this what the German Constitutional Court held in May 2020, to challenge a more realistic and open interpretation by the CJEU of the EU Treaties on public financing?[21]

1.2.2 The antithetical functions of constitutional interpretation

The interpretation of the constitution – by the competent courts, in particular – performs two antithetical functions. It is both a tool for ensuring stability and a substitute for the amendment process. Insisting on the letter of the constitutional text and on the vision of those who drafted it (textualism)[22] strengthens its rigid and binding nature. Otherwise, a *contra constitutionem* interpretation could erode fundamental guarantees. However, the exceptional character of the amendment process renders an up-to-date reading of the text necessary. This need justifies interpretational activism to ensure a *living constitution*,[23] to

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[20] *De Witte* 2012; *Aurel*/*Neuhold* 2017; *Cygan* 2013.76; *Craig* 2019.

[21] *BVerfG*, Judgment of the Second Senate of 05 May 2020 – 2 BvR 859/15 – paras 1–237, presented in Chapter 4, section 1.2.4.

[22] *Scalia* 1997, 2011.

[23] *Ackerman* 1999, 2007.

redress information asymmetry and uncertainty problems dating back to when the text was drafted.

Those two approaches to constitutional interpretation are directly conflicting. The first – which we could describe as the 'prudent' option – tends to favour the letter of the text, in the name of security. The second – the 'bold' option – insists on revealing the *ratio*, the living spirit of the constitutional rules. The challenge is to identify the optimum combination of prudence and boldness. Judges will succeed in this task by weighing the costs and benefits of both approaches.

It seems that constitutional interpretation is, often, more open to activism than to a faithful reproduction of the text itself. There is a good explanation for that. Constitutional rules are more suitable for broader interpretation than 'ordinary' legal norms. Since the cost of amending the constitution is much higher, the interpretative power of the judge must be commensurately wider.[24] In economic terms, the room of interpretational discretion increases proportionately to the replacement cost of the norm to be interpreted. Let us set the extreme limits of interpretation on a scale of 0 to 10: price 0 equals a total dependence from the letter of the provision, while price 10 refers to an, almost, *extra legem* interpretation. The more difficult it is to amend an outdated written norm – as is often the case for constitutions – the greater is the judicial duty to adapt it into real life through interpretation. This helps to redress inefficiencies caused by the high cost of changing the text. Having said that, prudence is also crucial: the distance from the constitutional letter should be the shortest necessary.

Practice has shown that judges undertake greater initiatives when constitutional revision is unforeseeable. EU law is an excellent example.[25] The first and most notorious case-law steps of the '*acquis Communautaire*' – judgments of the CJEU in Cases C-6/64 *Costa/Enel* (1964), C-222/84 *Johnston* (1986), C-213/89 *Factortame* (1990) and C-6/90 *Francovich* (1991) – were rendered in the period 1957–1992. At that stage, the European Court in Luxembourg took the initiative to promote European integration because it rightfully considered the amendment of the founding Treaties as practically impossible. Interpretative boldness gradually declined in the period of successive revisions, from the Maastricht to the Lisbon Treaty (1993–2007). Recently, the need for judicial activism has returned: we pointed out a few pages previously

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[24] *Cooter/Ginsburg* 1996 adopt a similar approach, from a different viewpoint. They assert that courts are bolder in interpreting rules of law when they are less concerned about whether the legislative power will overturn their judgments by introducing new rules with a different content. In other words, the more difficult lawmaking is, the more court activism increases. See also *Vanberg* 2001.

[25] *Stone Sweet* 2000.

that the cost of changing EU primary law has again become excessive. The same is true for the European Court of Human Rights in Strasbourg. Its judges show a high degree of imagination and interpretative freedom, in the attempt to modernise the emblematic but outdated list of fundamental rights of the Rome Convention (1950).[26]

1.2.3 In search of the optimal constitution: the advantages of interpretation over the amendment process

Ultimately, it is time to ask ourselves the following question: what is the most 'efficient' way to draft the text, set the level of rigidity and interpret the constitution? Combining the findings of the previous analysis, the ideal constitution[27] seems to have three main characteristics: it is relatively rigid; it includes guarantees and procedures described in a general and rather concise way; it is open to constant interpretation. If this hypothesis is correct, then all States shall move towards less frequent constitutional revisions, to reduce rather than increase the size of the text. A mature legal system trusts its public institutions enough to confine itself to a succinct constitutional text.

But it is not so in practice. Revisions have been more frequent in Europe during the past 30 years.[28] Constitutional amendments do not promote laconism. Instead of eliminating, they add details and reduce the margins for interpretation. The reasons for 'excessive revisionism' are to be found in day-to-day politics. When constitutional change is the child of normality rather than of a difficult historical period, it seems to involve a higher cost of opportunism on the part of those who initiate the amendment process. Blaming the constitutional text is, for politicians, a clever way to deflect people's attention from governance failures.

This brings us to another dilemma. Is it more 'efficient' to adjust the constitutional text through judicial interpretation rather than through its formal amendment? Without excluding the need for a formal revision in exceptional cases, I tend to reply in the affirmative. Judicial intervention generates, by definition, lower agency costs and myopia than are occasioned by political players participating in the amendment process. Moreover, a direct involvement of the electorate in that process would not fully cure the problem. It offers democratic legitimacy, but it also creates tensions, populist pressure and inter-generational

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[26] See, for instance, ECtHR judgment *Hornsby v Greece* (1997), on the scope of the right of access to court (article 6 ECHR) extending to the enforcement of judicial decisions, or the judgments *Powell and Rayner v the United Kingdom* (1990) and *López Ostra v Spain* (1994), qualifying environmental nuisance or harm as a violation of art 8 ECHR (respect of private life).

[27] *Epstein* 2017; *Ginsburg* 2017.

[28] *Tushnet* 2018; *Dixon*/*Holden* 2012; *Levinson* 1995.

inequalities. Constitutions need sobriety and far-sightedness to prosper. Therefore, direct revision of the constitutional text is not necessarily the best option. Nobody can guarantee that it will remedy ills instead of causing even more. This is especially so when the debate is reduced to everyday political bickering. A dispassionate, bold, open and updated reading of the constitution by the courts is often sufficient for correcting most of its defects with the lowest costs.[29]

2. THE STRATEGIC GAME OF ALLOCATING AND EXERCISING PUBLIC POWER

The main constitutional mission is to allocate power within the Demos. Continental legal theory deals with this issue via two fundamental concepts: representative democracy and tripartite separation of State functions (legislative, executive, judicial). Inspired by the American model, economic analysis follows a similar but not identical approach.[30] It perceives the political system as a *multiplayer game* (section 2.1). Such a game may be efficiently organised not by a rigid separation of powers, but through a more complex *system of checks and balances* (section 2.2).

2.1 The Game and Its Players

2.1.1 Which political system?

Economic theory praises the advantages of liberal democracy. Comparative and empirical analysis prove that this political system is the most efficient to pursue welfare.[31] Yet, there are several alternative forms of democracy and mechanisms for reaching democratic decisions.

2.1.1.1 The various forms of democracy

Constitutions in continental Europe and the EU Treaties (10.1 TEU) establish *representative* democracy.[32] Even though economic analysis identifies defects in this political system too,[33] it seems better than *direct* democracy.[34] The

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[29] *Voigt* 1999; *Hayo/Voigt* 2016.

[30] *Metelska-Szaniawska* 2018.

[31] See Chapter 4, section 1.2.5 and *Lijphart* 1999.

[32] There are, however, doubts as to how 'representative' the EU democratic model is, especially after the 2008 crisis. *Piattoni* 2015.

[33] Mainly due to increased agency problems, political transaction costs and the Arrow impossibility theorem. See Chapter 4, section 2.2.

[34] On direct democracy from a law and economics perspective, *Breton* 1974; *Matsusaka* 2019; *Cooter/Gilbert* 2010, 2019. For a more optimistic approach on direct

latter involves high transaction costs. Imagine voting every day on each public decision that affects our lives! Even in the brave new world of the internet, it would be practically unfeasible. Furthermore, our vote would merely depict our preferences at a specific moment – an imperfect picture not taken in cold blood. Referenda – the modern-day, institutional aspect of democracy – do not just bypass the political agents of The People (which is not necessarily bad), but also undermine the long-lasting, co-operative mission of the constitution.[35] Behind their seemingly consensual character, they unbind the 'People-Ulysses' from the mast, to make decisions under the influence of all kinds of Sirens. Constitutionalism, as a response to the tyranny of the majority and to populism, is better served by institutions of representative, not direct, democracy.[36]

The existence of the above risks does not necessarily mean abandoning any institution that grants a more active role to The People in the decision-making. On the contrary, economic analysis considers citizens' participation a vital element. It allows the revelation of individual preferences before collective decisions are reached. Participatory mechanisms – such as public consultation prior to a new regulation – occupy an important place in modern administrative law.[37] Active citizens must not be reduced into simple voters. Consultations are an effective substitute for referenda, to complement representative with participatory democracy.

The next dilemma concerns the alternative models of representative democracy. Which one is best: parliamentary, presidential or hybrid (semi-presidential)?[38] Constitutional economics rely on a cost–benefit analysis to compare presidential and parliamentary systems.[39] We have already seen[40] that the former generates higher transaction costs in decision-making and more

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democracy, see *Frey/Stutzer* 2006; *Blume et al.* 2009. On the Swiss model and how it affects the distribution of wealth, see *Feld et al.* 2010.

35 *Blount* 2011; *Hug*/*Tsebelis* 2002; *Setälä*/*Schiller* 2009.

36 This is the only way to avert tragedies like the one that struck ancient Athens after the naval battle of Arginusae. The plenary of the citizens, influenced by demagogues, imposed a capital sentence on the Athenian generals on religious grounds (for not collecting the corpses of the dead warriors), even though they had won that battle during the Peloponnesian War. A few years later, the war ended with Athens' total defeat and the abolition of democratic institutions by the Spartans. *Xenophon*, Hellenica, 1, 7, 4–16 and 34–35. A public choice view of the Athenian democracy is found in *Arvanitidis*/*Kyriazis* 2013.

37 See Chapter 8, section 2.4.

38 Another issue discussed is whether a one-chamber or a bicameral parliament is more efficient: *Levmore* 1992; *Tsebelis* 2002, 1995; *Iaryczower et al.* 2013; *Congleton* 2006; *Testa* 2010; *Heller* 2001.

39 *Moe/Calwell* 1994; *Saiegh* 2019.

40 See Chapter 4, section 2.3.

acute agency problems, especially when the House and the president come from different political camps. Having said that, The People enjoy a broader margin to disapprove politicians that fail to follow their mandate. They may use the House to restrict the president, and vice versa. The presidential system is less representative of the various political and social components (since winner takes all), compared to parliamentarism. Nevertheless, it may lead to smaller budget deficits and lower corruption compared to the parliamentary system.[41]

These comparative analyses[42] are useful, but only up to a limited extent. In many cases, how the system works depends less on its parliamentary or presidential character and more on the powerplay between political institutions at a given point in time. France has a president and a bicameral House; in other words, a model with multiple players and counterweights. But in 2018, the party of President Macron could control the absolute majority in both chambers. At that point, checks and balances in France were less active than was the case in parliamentary systems, such as those of Italy or Greece, where a fragmented parliament had made political coalitions necessary.

2.1.1.2 Electoral mechanics, the most decisive factor

The electoral system is perhaps even more important than the parliamentary or presidential nature of the system. Political dynamics depend considerably on the mode of elections. Majoritarian or proportional? With one or multiple rounds of voting? Do candidates come from a party list or can they be directly selected by the voters (close or open list)? Who and which criteria define the size of constituencies? Are there single seat or multiple-member districts? The answers to those 'technical' questions shape the political system more than the constitutional provisions that describe it.[43] Just remember the thriller of the 2020 US Presidential elections and the various technicalities that played a decisive role for Biden's victory.

When the electoral system aims at constituting a one-member office (president, mayor) it is majoritarian by nature. He/she who obtains the absolute or relative majority will be elected. In appointing the members of the parliament or another multi-membered institution, the electoral system may be either majoritarian or proportional. In the former, the winner takes all. In the latter, each party elects representatives in proportion to its voting results. Proportional models increase the chances of smaller parties or individual candidates of

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[41] *Napolitano/Abrescia* 2009.148; *Persson et al.* 2007; *Alesina/Tabellini* 1990. *Contra Mitsopoulos/Pelagidis* 2017.

[42] *Lijphart* 1984.

[43] *Duverger* 1992 (1951); *Napolitano/Abrescia* 2009.145; *Issacharoff/Miller* 2010; *Blais* 1988; *Knutsen* 2011; *Grofman* 2006.

being elected. Yet, they involve higher 'political transaction costs',[44] both in reaching public decisions and in making politicians accountable for their bad choices. More resources (time and public funding) need to be invested to achieve a majority in the 'parliamentary vote market', while the responsibility is diffused among the several components of the majority. Conversely, the majoritarian electoral model involves lower transaction costs and enables decisions to be made faster. However, it is less representative. It reduces the number of players, and, as a result, weakens the checks and balances within parliament. Sooner or later, it leads to a two-party political system.

There are many variations of both models.[45] The main reason for creating a hybrid electoral mechanism is to achieve a better cost–benefit equilibrium. For example, Greece, Germany and Turkey follow the proportional model but set a minimum threshold nationwide for participation in the allocation of MP seats (3 per cent, 5 per cent and 10 per cent respectively).[46] In Greece, the winning party gets bonus seats (from 10 to 15 per cent of the seats in parliament). Those methods limit transaction costs in achieving consensus and make it easier to establish a viable governmental majority (which is necessary in times of crisis).[47] In France, majoritarian elections in two rounds (for both the president and the House) reduce, to a certain extent, the poor representation of the losers. It allows those defeated in the first round to demand concessions for supporting the candidates in the second round.

When it comes to specifying the technicalities of the elections, any and all details matter. Delineating the constituencies and dividing the electorate depending on its features (racial, economic, ethnic) can be a means to win or even to distort the vote.[48] Predetermined lists, where voters are not given the opportunity to choose among candidates of the same party, have the advantage of reducing the transaction costs derived from the MPs' direct dependence on their constituents. However, they create other, sometimes bigger, risks. This is especially so when lists are drawn up in conditions of non-transparency within the party, which allow pressure groups to capture the candidates behind the scenes. Lobbies may determine in advance the composition of public institutions from inside party centres, even before the elections have been held.

In conclusion, there is no ideal electoral mechanism, despite the imaginative solutions that are suggested from time to time.[49] For decades, Greece had a system involving two dominant parties, and political stability. Theoretically,

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44 See Chapter 4, section 2.2.3.
45 *Moser/Scheiner* 2004.
46 *Colomer* 2004; *Gallagher*/*Mitchell* 2005; *Herron et al.* 2018.
47 *Gallagher* 1992.
48 *Napolitano/Abrescia* 2009.151; *Benoit* 2001.
49 *Tsebelis* 2014; *Alfano/Baraldi* 2015.

this meant that the country incurred lower political transaction costs in shaping public decisions. But the system bankrupted the public treasury, belying the theory that such problems are a feature of countries with fragmented parliaments and frequent elections. The United Kingdom, the birthplace of parliamentarism, opted for a majoritarian, one-round referendum to answer an almost existential question with potentially cataclysmic, long-term consequences: Should the UK remain in the EU or leave? This was probably the worst mechanism by which to deal with such a strategic dilemma, irrespective of whether the outcome will prove good or bad in the long run.[50] We must confine ourselves to one undisputed truth: the electoral mechanism moulds the conduct of most players in the Demos; therefore, its failures can be catastrophic.

2.1.2 The players

In classical constitutional law, emphasis is put on the players with the most powerful mandates: the president, the parliament, the government. Economic analysis focuses on all players who determine by any means the content of public decisions – irrespective of whether they are invited to decide officially or to influence collective choices indirectly, even behind the scenes.

2.1.2.1 Political and non-political players

European States use the democratic/electoral process to organise political institutions. Constitutions focus on these political players. They award them the leading role in reaching collective decisions. This role reflects their democratic legitimacy.

However, the modern power game exceeds the framework described in constitutional texts. Such power is constantly transferred from political to non-political institutions. This transition towards an *administrative/regulatory State*[51] entails the delegation of increasingly broad decision-making mandates to non-political players. The latter not only execute but also shape collective choices. By doing so, they participate in policymaking, despite their lack of direct legitimacy. Political institutions are no longer called upon to exhaustively regulate a public policy through parliamentary or presidential acts. They confine themselves to mapping out strategic choices in the name of The

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[50] *Markakis* 2017; *Armstrong* 2017.

[51] See Chapter 3, section 2.2.2, *Ferejohn/Shipan* 1990; *Mashaw* 1985, 1997; *Bamberger* 2006; *Farina* 1989; *Von Bogdandy et al.* 2017; *Bagley/Revesz* 2006; *Bressman et al.* 2010; *Eskridge/Ferejohn* 1992; *Rose-Ackerman* 1992; *Oliver et al.* 2010.

People. For the most part, they supervise whether public servants and technocrats follow those instructions.[52]

The disparity between what is depicted in constitutional texts and real life is particularly obvious in EU primary law. The TFEU dedicates some 80 articles (223 to 309 TFEU) to describe the EU institutions, the legally binding acts and the lawmaking process. Apart from technocratic bodies in the banking sector (European Central Bank, European Investment Bank, Funds), there is only one concise and superficial reference to the purely administrative mechanism of the Union, in article 298 TFEU. In carrying out their mission, the EU institutions 'shall have the support of an open, efficient and independent European administration'. Obviously, these few words do not correspond to the much broader role of the EU's administrative services. The influence of 'eurocrats' through European Commission units, various committees and other agencies[53] is not exhausted in merely 'supporting' decisions reached in advance. Their importance, as non-political players with eminently constitutional significance, affects both European and national policies.[54] Wherever EU law is applied, public decisions depend to a large extent on the directions given by EU administrative officials.

The judiciary is another crucial player of a non-political nature that has strengthened its position over time.[55] It is supposed to review public decisions made by political and administrative institutions from a purely legal aspect.[56] The role of the courts is not unrelated to the other checks and balances set by the constitution. The fewer they are, the more important this role becomes for avoiding abusive use of power.[57] In many European countries this function is entrusted to both constitutional and administrative courts, the latter having jurisdiction to control the various actions of the regulatory State. Judges enjoy enhanced independence at both institutional and individual level.[58] Such guaranties are necessary to avoid the political capture of the judges, especially at the highest level. Article 255 TFEU introduced an additional safety net for that purpose: the national candidates to hold office at the CJEU – often nominated

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[52] See Chapter 8, section 1.2.

[53] As for example the European Environment Agency (EEA), the European Food Safety Authority (EFSA) or the European Chemicals Agency (ECHA). *Geradin* 2005; *Vos* 2014; *Busuioc/Groenleer* 2014; *Everson et al.* 2014; *Lavrijssen/Hancher* 2013. A critical approach by *Falke* 2014; *Everson* 2014.

[54] *Bignami* 2020.

[55] *Guarnieri*/*Pederzoli* 2002; *Cohen* 2014; *Vanberg* 2019; *Craig* 2010b. On the impact of judicial decisions on bureaucracy, see *Hertogh*/*Halliday* 2004.

[56] And to preserve institutional balance. Such function is even more important at the EU legal order. *De Vitte* 2018.

[57] And as a constraint on the tyranny of the majority. *Fleck/Hanssen* 2013.

[58] See Chapter 9, section 2.1.1.

by political institutions – are examined by an advisory panel of experts (which mainly includes former EU judges); this panel gives an opinion on their 'suitability to perform the duties' before final appointment.[59]

Judicial independence is a hot issue in the debate regarding constitutional review. Should review of the constitutionality of laws be assigned to a special 'constitutional' court or should it be entrusted to the ordinary courts instead?[60] Even though most European systems (France, Italy, Germany, Poland, Belgium) have adopted the first option,[61] it is not a solution without problems. Constitutional courts, particularly at the stage of selecting their members (as is increasingly happening in the USA),[62] are exposed to political transaction costs. Yet, the central function of constitutional judicial review is to counter the various costs that are attributed to political players: the latter may advance self-serving aims, fall hostage to pressure groups, define welfare in a short-sighted way by transferring the burdens to future generations, and so on. These costs can only be mitigated by an institution whose members are not infected by the same disease, one that is not the fruit of a political process – as when constitutional review is diffused among ordinary courts and exercised by bodies without political derivation or dependence. Such a review is easily accessible to all, encouraging every citizen to demand compliance with fundamental rules. Even if it involves higher uncertainty costs and increased time delays, these inefficiencies may be reduced through co-ordination mechanisms, such as 'pilot' trials before the supreme courts, or through the submission of preliminary questions to them.

2.1.2.2 Visible and invisible players

Economic analysis also sheds light on the 'darkest' players in the game of public power. Legal theory usually focuses on 'visible' players – those to whom the constitution assigns mandates. Yet, there are other key factors, such as political parties and pressure groups. Their significance is considerable, even when the constitutional text does not grant them any official role.[63]

Political parties[64] can be beneficial for the political system. They are useful to reduce transaction costs in collective decision-making. They limit opportunism by imposing discipline upon the MPs or cabinet ministers who are their members. This is their greatest advantage, which explains why they have prevailed over individual candidates and less structured political collaborations.

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59 *Tridimas* 2004; *Bobek* 2015.
60 *Garlicki* 2007; *Stirn* 2017; *Garoupa* 2019.
61 Together with many other national orders: *Ramos* 2006.
62 *Bonica*/*Sen* 2017.
63 *Benson*/*Baden* 1985.
64 *Munger* 2019.

However, their considerable size generates inefficiencies, similar to those which economic theory attributes to big firms:[65] increased agency costs; dysfunctional internal procedures; inertia; low incentives for innovation; creation of oligopolistic structures to limit political competition.[66] This is the reason why incumbent parties, despite their ideological differences, often join forces before the elections in attacking newcomers; in other words, they operate as cartels. To remedy these problems, economic theory uses the open market as a raw model for organising political parties. It asks for internal democracy and transparent procedures to create competitive conditions within the party mechanism and make party decisions reflect the interests of its members.[67] Open political competition must also be established as to the external action of the parties. Legislation on party financing, election campaigns or equal access to mass media focus on creating such a framework.[68]

If parties have become more accountable to constitutional law thanks to economic analysis, this is not the case with pressure groups. Constitutions continue to ignore them, probably because they are incompatible with an idealistic description of the political system. In previous chapters, we revealed the amount of influence exercised by lobbies.[69] Public law attempts to reduce their impact by an overall improvement of the Demos' institutional edifice: transparency in reaching public decisions; creation of truly independent authorities; increased vigilance in awarding public contracts; obligation of politicians to reveal the source of their assets. Yet, there is no golden recipe for eradicating all evils arising from pressure groups. It is pragmatic to accept that our democracies have to live with them. We must take account of them when describing the political game and take their presence into account when attempting to improve the existing system of checks and balances.

2.2 From Separation of Powers to Checks and Balances

2.2.1 The formalistic separation of powers and its limits

The tripartite separation of State powers[70] is a basic principle of all liberal democracies. Its mission is to reduce inefficiencies. If public power were concentrated in the hands of one player, this person or institution would have the

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[65] See Chapter 2, section 3.4.2.

[66] On the importance of political competition, *Alfano/Baraldi* 2015.

[67] *Crutzen et al.* 2010.

[68] *Daley/Snowberg* 2011.

[69] See Chapter 3, section 2.1.2 and Chapter 4, section 2.2.2. In the context of the EU decision-making process, *García-Lorenzo* 2003.

[70] *Ackerman* 2000; *Carolan* 2009; *Metelska-Szaniawska* 2018; *Moellers* 2013; *Loughlin* 2010.445; *Kyritsis* 2017; *Saunders* 2018; *Sunstein* 1981; *Salzberger* 1993.

incentive to abuse its dominance. *Separation of powers is nothing but a market design tool for organising the Demos*. Instead of an inefficient, vertical monopoly that would prevail if the same player made the rules, applied them and enforced compliance, constitutions create 'three competitive sub-markets of authority': the legislative, the executive and the judiciary.

Unfortunately, we often miss the point. Separation of powers is not there to reflect just a theory, a legal dogma. It serves a practical need; that is, to establish the appropriate institutional barriers for avoiding the conversion of power into a monopoly. This dimension is more apparent in US law. As James Madison put it, when explaining the model of checks and balances: 'ambition will be made to counteract ambition.'[71] If European constitutionalism has traditionally promoted a more formal and static separation, Americans insist on the practical need for 'dynamic counteraction' between 'ambitious' players.

The gap between those two approaches is not negligible. The approach of continental law lends emphasis to the different 'nature' of the three public powers. It puts the accent on the particularities of drafting a rule, implementing it and resolving the arising disputes. It considers that those tasks correspond to totally different 'functions'. For that reason, they shall be assigned to *formally* distinct public institutions. Separation of powers takes a rigid, almost absolute form. Any overlapping is negatively perceived and should be avoided.

However, formalistic separation does not warrant optimal conditions for competition between the holders of public power. By simply creating three 'waterproof institutional compartments of authority' – which correspond to the legislative, executive and judicial functions of the Demos – the result may be to establish three monopolies instead of one: that of legislators, ministers or judges enjoying full immunity and mutually tolerating each other's abusive behaviours in their respective fields of action.[72] Formal distinctions often dissimulate the absence of real competition. In Greece, Germany and the United Kingdom, the bodies corresponding to the legislative and the executive power (parliament and government) are 'formally' separated. However, the close relationship between them ultimately establishes a mighty single player: the governmental majority in the House. A formalistic approach also ignores the beneficial consequences of functional overlaps between institutions, as when the administration legislates by means of regulatory acts or imposes sanctions – a function akin to that of a judge. Conversely, courts do not only resolve disputes, but shape the normative framework through their judgments. Such overlaps are unavoidable or even desirable for improving public action.

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[71] *The Federalist Papers*, No. 51 (1788).

[72] On the necessity to make judges accountable for their actions, *Voigt* 2008.

To put it simply, *sovereignty cannot be parcelled out in clearly distinct portions*. Think of a soccer team. Its players may have their initial positions (defenders, midfielders, forwards) but their role is dynamic. It evolves during the game. An excessively rigid separation of functions is as inefficient as a football system that would not allow stoppers to score or strikers to save a goal on the line.

2.2.2 On checks and balances

Excessive concentration of authority is more effectively countered if emphasis is given to how players mutually confront each other in the game of public power – how they force each other to account for their actions.[73] Separating functions within the Demos is not enough. It is far more important to establish a network of institutions which operate as checks and balances upon each other[74] – to provide for an adequate number of *veto players*[75] who will oppose opportunistic behaviour, wheresoever originating.

The concept of veto players is broad. Apart from the main institutions within the constitutional order, it includes all those who may or must intervene so that a public decision is made, implemented or overturned. Modern mechanisms of checks and balances involve numerous players beyond the traditional ones: independent authorities, public servants, parliamentary minorities, political parties and lobbies, local authorities with increased competences, EU bodies. Active citizens assume an important role as well, exceeding that of participating in elections. They are given the right to participate in public consultations before reaching a public decision, or to judicially challenge their constitutionality afterwards. These mechanisms counter the monopolistic failures and the inherent principal-agent problem of public action.[76] They avert the risk that one person (or institution) will become so powerful as to pursue its own agenda to the detriment of general welfare.[77]

This evolution towards a more composite system of checks and balances is evident in EU primary law.[78] The TEU provides that 'the functioning of the Union shall be founded on representative democracy' (10.1 TEU), without

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[73] *Persson et al.* 1997; *Reitz* 2006.

[74] *Saunders* 2018; *Cane* 2016.

[75] *Tsebelis* 2002.

[76] Another crucial issue is to instal internal checks and balances within each one of the three powers – parliamentary rules that safeguard the procedural rights of the opposition, for example.

[77] If, conversely, the number of players is increased excessively without any real need, transaction costs upon shaping public choices increase commensurately, and needlessly.

[78] *Von Bongdandy/Bast* 2010; *Blanke/Mangiameli* 2012; *Golecki* 2011; *Griller/Ziller* 2008; *Carolan/Curtin* 2018; *Hatje* 2019; *Garben et al.* 2019.

referring to the separation of powers principle. Article 13.1 TEU introduces a mechanism of co-operative checks and balances (it calls it an 'institutional framework') comprising seven 'institutions'. Those institutions act 'within the limits of their powers' with 'mutual sincere cooperation' (13.2). Each body performs a variety of functions. Legislative and budgetary duties are assigned 'jointly' to the Parliament and the Council (14, 16 TEU); the former also exercises 'political control', and the latter 'policy-making and coordinating functions'. The Commission undertakes several missions, ranging from the implementation of the EU Treaties and policies to the representation of the EU, or to making legislative proposals (17.1, 2 TEU). The Court does not merely resolve disputes; it 'ensures that in the interpretation and application of the Treaties the law is observed' (19.1 TEU). Apart from supervising systemic banks, the European Central Bank participates in shaping the 'Union's monetary policy' (282 TFEU).

2.2.3 Decision-making and accountability in constitutional mechanics

The above analysis raises a more iconoclastic question. Is the traditional triptych 'legislature–executive–judiciary' accurate to describe the players in the game of public power in the modern Demos? Wouldn't it be better to distinguish them depending on whether they engage in the making or the review of public decisions – to describe two, instead of three, key missions: *decision-making* and *accountability*? Organising the Demos is more about mechanics than principles: it aims at establishing an efficient model of checks and balances in making and reviewing public decisions, which is not an easy task, to say the least.

Decision-making is a more delicate and difficult venture than that presented in public law textbooks. It should identify the best combination between several, often contradictory, aspects of social welfare. It requires a process that optimally involves several players with different features: political legitimacy, technocratic qualifications, implementing skills. The mandates assigned to them shall ensure their 'competitive cooperation'. Their interaction is presumed to reflect the best possible collective choices. Decision-making also needs functioning accountability mechanisms:[79] modes for exercising control, attributing responsibility and, eventually, imposing sanctions, to reduce the moral hazard of decision-makers. It is equally hard for public law to organise the accountability of players which enjoy extensive legitimacy (politicians) or are of a considerable size (administrative bodies). These players act as

[79] *Bamforth/Leyland* 2013; *Caranta* 2011; *Craig* 2006, 2013; *De Visser* 2013; *Harlow* 2002, 2011; *Le Sueur* 2013; *Shapiro/Steinzor* 2008; *Tushnet* 2013; *Adserà et al.* 2003.

representatives (agency problem) for satisfying needs, which, of their nature (such as public goods), involve immense enforcement costs. Room for abusive behaviours is great, while the absence of workable accountability processes is a clear indication that a Demos has become fragile or, even worse, a failed State.[80]

This complex model of decision-making and accountability counterweights presents two important characteristics.

First, public law mandates are often of a hybrid nature. The borders between making and reviewing a decision are rather unclear. Ultimately, both functions determine the content of public choices. When parliament appoints the members of an independent authority, it exercises not only a decision-making mandate but also an *ex ante* control over another body. Conversely, judicial dispute resolution is a form of both reviewing and regulating. Shall shops be open on Sundays? Is it 'constitutional' to provide for same sex marriage? Those questions are ultimately answered by judges.

Second, checks and balances are not bits and pieces and they cannot be treated as such by law. They operate in a systemic manner. They are mechanical parts of a coherent system made by interactive bodies, mandates, rules and procedures.[81] Each of them, irrespective of whether it has a primarily decision-making or reviewing character, affects public action integrally. This has a spill-over effect on all the other aspects of the public law system, thus impacting its efficiency. For example, an imperfect model for deciding and/or reviewing the State budget can inflate the public debt, impair the sustainability of social policies, feed political opportunism, provide wrong incentives for administrative inertia or judicial activism, and so on.

In conclusion, constitutionalism and public law focus on the dynamic relations between players involved in the power game. They aim at ensuring the *optimal balance* between them. The method for achieving this – a complex model of competitive and co-operative counterweights – has evolved since the tripartite separation of powers by Aristotle, Locke and Montesquieu.

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[80] *Rotberg* 2004; *Nay* 2013.
[81] *Bignami* 2011.