10. The ascent of a new and efficient public law

Pairing law with economics offers another view of the Demos. It gives birth to a new, more unified[1] and 'efficient'[2] public law that evolves dynamically in a global, competitive arena for legal rules and institutions[3] (section 4); a public law with a different scope (section 1) and features (section 2), which serves liberal democracy differently (section 3).

1. RE-DEFINING THE SCOPE OF PUBLIC LAW

1.1 The Institutional Aspect of Public Law: Non-consensual Institutions and Public Decisions

According to economic theory, the quality of institutions is of primal importance. Denmark, a country with a more 'open' and 'efficient' Demos, is much better placed than Argentina, despite being smaller and poorer in natural resources.[4] Welfare largely depends on how 'non-consensual' institutions operate. The main mission of public law is to create and improve those institutions; to reduce the cost and increase the benefits derived from their operation; to put forward *an optimal system of public institutions for the Demos*.

This systemic view of public law complements the traditional one, which insisted on protecting individuals in specific cases of administrative or constitutional litigation. Moreover, it puts emphasis on the modalities for reaching public decisions. Institutions do not function independently of the people who staff them and of their egoistic/strategic behaviours. Ignoring the latter is like trying to regulate a car race without taking into account those who drive the vehicles. Public law has to shape public decisions in view of the persons

[1] *Elliott et al.* 2018 and the collected essays in *Ruffert* 2007.

[2] *Rose-Ackerman* 1988; *Sunstein* 1990; *Bishop* 1990; *Loughlin* 2013; *Spiller/Ferejohn* 1992; *Tiller/Spiller* 1999; *Tucker* 1987. A more critical approach by *Rodriguez/Weingast* 2015.

[3] In many cases, the evolution is the fruit of legal transplants into the domestic order. *Grajzl/Dimitrova-Grajzl* 2009; *Mattei* 1994; *Ogus* 1999; *Esty/Géradin* 2001.

[4] *Alesina/Spolaore* 2003.

involved. It sets the rules of the strategic games that take place within the Demos – of games much more complicated than chess or Monopoly.

1.2 The Functional Aspect of Public Law: The Efficient Pursuit of Social Welfare

Both legal and economic theory grant public law a similar function. Lawyers refer to the 'general interest', while economists use the term 'social welfare', even if they disagree about its specific content. 'General interest' and 'social welfare' are alternative ways to describe the aim of public action.

However, there is a fundamental difference between the legal and the economic approach. The former prefers to disregard efficiency, while the latter focuses precisely on that notion. For the economic analysis of public law, the mission of non-consensual institutions is not merely to serve the general interest or welfare; it is, rather, its efficient pursuit. *Public law governs the action of public institutions aiming at the efficient pursuit of social welfare*. Economic analysis does not prescribe a version of welfare different from the one described in the constitutional text, but it demands efficient ways to pursue it.

1.3 Public Law: A Sector with a Broader Scope

Moreover, economic analysis expands the scope of public law.[5]

For a start, the field of public law is also interested in structures that compete with, complement or even substitute the traditional bodies exercising public authority, such as: (a) supra-national or extra-national agencies (EU or WTO bodies); (b) non-'public' entities (global sports federations such as the International Olympic Committee[6] or the non-profit organisation for assigning domain names on the internet[7]); (c) entities having a consensual basis (such as self-regulation mechanisms); (d) structures lacking formal authority (such as lobbies).

Further, the pursuit of social welfare is not served only by command and control tools.[8] Apart from the triptych 'rulemaking–administrative action–enforcement', public institutions may prefer informal forms of action, such

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[5] *Mac Amhlaigh et al.* 2013.

[6] *Casini* 2012.

[7] *Internet Corporation for Assigned Names and Numbers* (ICANN), having its registered seat in California, USA.

[8] For example, in the field of environmental protection. *Cole/Grossman* 1999.

as information campaigns, non-binding texts (soft law)[9] and mediation procedures. This multi-form action is often evident in the case of independent regulators.[10] Sometimes, public policies are also achieved through self-regulation,[11] private law enforcement mechanisms[12] or other forms of incentives.[13]

New public law covers issues that once upon a time were considered 'legally irrelevant', as not directly related to the issuance of a binding legal act; for example, an internal evaluation mechanism applied to administrative agencies or the mechanics of cost–benefit analysis. Moreover, topics of civil or commercial law become of interest to public law as tools of public regulation, such as civil liability or contract clauses. All kinds of binding rules that set restrictions on the spontaneous behaviour of private individuals are somehow related to public law, even those included in the Civil Code or in consumer protection legislation. They are part of a *horizontal* public law that supplements the *vertical* public action. For example, the 'horizontal' property law provisions on neighbour nuisance go alongside the 'vertical' norms setting emission thresholds and land uses.

In its broad conception, public law includes all forms of economic and social regulation,[14] even those that do not use public authority for that purpose. Non-consensual institutions enjoy the monopoly of public force, but not a monopoly in serving the public interest. The latter can also be pursued by the mechanisms of the Agora. The intervention of non-consensual institutions is not to be taken for granted. It is not the object of some metaphysical trust in the Demos, but a matter of proof, namely that such action will be effective and efficient, following the subsidiarity principle.[15]

2. THE FEATURES OF THIS NEW PUBLIC LAW

By placing efficiency at the epicentre, economic analysis modifies some features of the 'old' public law. It shifts public law from the teachings of Hans Kelsen and Max Weber to the stream of 'Law and Economics'.[16] It introduces

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[9] *Friedrich* 2013. For example, the codes of ethics in the EU data protection regulation (GDPR). See articles 40–41 of Regulation (EU) 2016/679; *Voigt/Von Dem Bussche* 2017.71.

[10] Such as those provided for by EU law in the energy and antitrust sectors. See *Eberlein* 2005; *De Somer* 2017.

[11] *Coglianese/Mendelson* 2010.

[12] For example, special rules that facilitate claims for civil compensation due to infringement of competition rules. *Andreangeli* 2014; *Feess* 2015.

[13] Such as tax incentives. *Surrey* 1970.

[14] *Freeman* 2003; *Sampford* 1991; *Sand* 2013.

[15] See Chapter 5, section 1.1.

[16] *Mathis* 2014.

another method to assess and understand legality (section 2.1) and another approach of institutional mechanics (section 2.2).

2.1 Another Method to Assess Public Action and Legality

Public law evolves through cost–benefit analysis. It seeks the optimal organisation and action of public authorities. Efficiency becomes the core of its methodology through various tests. Should there be a public intervention (preventive efficiency test)? How do we design the bodies and procedures of the Demos (architectural/institutional efficiency test)? Which are the best means for applying public regulation (executive efficiency test)? Which is the best way to resolve disputes (remedial efficiency test)? In all four of these stages, the answers require the recording, understanding and comparative assessment of several choices.

The ultimate purpose of measuring efficiency is to locate and support with legal means the optimal public intervention – the one that economists would describe as *Iopt* (intervention optimal).[17] What does *Iopt* mean? Imagine the choices available to non-consensual institutions for pursuing any public policy, from organising primary education to rules about road safety. Plot them out on a diagram with the axes representing the advantages and disadvantages they entail. The best advantage–disadvantage ratio determines *Iopt*. It is the choice that public law is called upon to support before the parliament, the administration or the courts, so that the constitutional definition of welfare in a specific legal order is served most efficiently.

The 'efficiency test' lends a new aspect to the concept of legality. For a public decision to be legal, it must also be efficient. 'Efficient legality' is incorporated into public law via general principles – the triptych of subsidiarity, proportionality and sustainability – and the procedural instruments for measuring it. This new approach expands the limits of legal reasoning. The latter is not restricted to passive, normative interpretation of rules. It has to take into account additional issues that were previously considered as purely 'technical'; those related to a more positive, incentive-based perception of the legal norms.[18]

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17 *Den Hertog* 2010, 2012.
18 *Cooter/Gilbert* 2019.

2.2 Another View on Institutional Mechanics

Modern public law has an important 'mechanical' aspect.[19] It focuses on the institutional design of public structures and procedures; on issues that in Europe were addressed by political scientists rather than lawyers.[20]

In the past, public law did not pay much attention to issues related to the structure of the Demos and its administrative authorities. It relied on the authority of bodies enjoying political legitimacy (parliament, government) to organise the other public institutions as seemed fit; to create or abolish administrative authorities and to grant them competences. This vast discretionary power – which the French call '*pouvoir d'organisation du service public*' – was exercised in the name and under the auspices of the constitution. Economic analysis sees things differently. It requires the re-design of the procedures and structures of the Demos in the name of efficiency. It adds new topics to public law, such as independent authorities, rules about transparency in administrative action, the obligation to draw up impact assessment studies or to undertake consultation processes.

In addition, public law evolves towards a less phobic approach regarding the assignment of powers within the Demos. It becomes less dependent on the two pyramids to which it had strictly adhered for centuries: the pyramid of legal norms and that for a unitary, vertical organisation of public authorities. Emphasis is placed on the internal aspect of public action – on what happens within the Demos. Here again, we have come a long way from traditional public law, which attributed legal significance only to actions involving external legal consequences, that is, to enforceable public decisions. In the absence of an act that meets the conditions of enforceability, what occurred within an administrative authority was indifferent. By contrast, the centre of gravity for economic analysis lies behind the scenes, in the internal power game of non-consensual institutions. This trend raises new questions for public law. How do we design and operate an administrative body that does not suffer from principal-agent problems? How do we make public institutions collaborate and avoid monopolistic failures? Which is the best procedure to reach optimal public decisions? Who should participate in it and how? What are the most effective review mechanisms and the institutional checks and balances to ensure the quality of public decisions?

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19 *Bressman* 2007; *Güth* 2017.
20 *Gersen* 2010; *Kovacic* 1998; *Greffe* 2006.

3. EVOLVING LIBERAL DEMOCRACY

3.1 Expertise, the Third Pillar of Public Law

Traditional public law stands between 'paternalism' and 'freedom', which correspond to the pillars of democracy and liberalism. Democratic, 'paternalistic' decisions set limits to free private action in the name of the general interest. Conversely, fundamental rights set limits to public interventionism in the name of human freedom.

There is now a third parameter, which we may call 'technocratic efficiency'. Public decisions do not merely serve the general interest or defend specific rights; they must also rely on scientifically sound choices.[21] In the new paradigm of public law, the two previous forms of legality – democratic legitimacy and respect of fundamental rights – are not sufficient. Efficiency is now added to the equation. Modern public law balances between three pillars: 'democracy, rights and expertise'.[22]

Technocratic efficiency then becomes an additional, indispensable source of legitimacy. Public action shall not only be democratic and respectful of liberty. It must also lead to good governance and to efficient policies.[23] The technocratic quality of a public decision lends *autoritas* to the institution that made it, even in the absence of a direct democratic process. For example, the officers of the European Commission's services for the environment (DGEnv) are neither elected by the people nor appointed by their political representatives. However, these so-called 'Eurocrats' often protect the environment much more effectively than national parliaments or local authorities. The achievements of their work legitimise their actions in the eyes of the European citizens.[24]

Nevertheless, there is no need to exaggerate. Efficiency and expertise cannot become a substitute for liberal democracy; they are merely an improvement. The pillar of technocracy complements the other two. It allows bodies enjoying democratic power to act in a better way; to avoid political or ideological biases and decide in an objective, neutral manner. In the new public law, the 'experts' are upgraded as compared to the 'politicians', but they do not replace them.[25] This would be both undemocratic and inefficient: the optimal collec-

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[21] *Weimer/De Ruijter* 2017. On 'scientification' and 'politicisation' as mutually complementary paths, *Weimer* 2014.

[22] *Rose-Ackerman* 1988, 1996; *Shapiro* 2005.

[23] *Caranta* 2011; *Ruffert* 2011; *Oellers-Frahm* 2012.

[24] *Weimer/Pisani* 2017 adopt a more critical approach.

[25] On the combination of expertise with executive power at EU level, see the contributions in *Weimer/De Ruijter* 2017 and *Bignami* 2020. For a critical approach to the EU regulatory State, *Joerges/Glinski* 2014.

tive decisions cannot be reached far from the people concerned and those who represent them. Otherwise, there is a risk of a *concealed authoritarianism with a technocratic mantle*; of harmful choices disguised as impact assessments or expert opinions, to become less visible and less accountable.[26]

3.2 Moderate Paternalism

The new methods of shaping public action may also render it friendlier to human freedom. Economic analysis of public law promotes what has been called 'libertarian paternalism',[27] an amalgam of commands and free choices that respects rather than underestimates the Agora. Rather than imposing binding rules and sanctions, the Demos 'nudges' people to act in conformity with their own and the general interest. These nudges towards more rational and socially responsible behaviour are reminiscent of the methods of Socrates. They encourage the citizens to be informed; they help them understand what is at stake and then seek the optimal behaviours for themselves and others – as active rulers of their own fate, rather than as mere recipients of commands from above.

Nudging may take various forms:[28] information campaigns instead of increased policing to reduce road accidents; horrific photos of patients on cigarette packs instead of even stricter smoking restrictions; asking people to pay for plastic bags at supermarkets[29] rather than imposing prohibitions in the name of ecology; giving incentives for recycling and for using greener energy.[30] Libertarian paternalism is moderate, self-restrained and ready to 'think outside the box', beyond the old 'command and control' public policies. It makes the Demos' actions compatible with the subsidiarity principle. Coercion is the last resort, only if proven to be necessary and efficient.

3.3 Systemic and Institutional Liberalism

This new public law better respects the essence of liberalism. It does not just establish a list of rights, but calls the Demos to adopt a 'holistic' libertarian approach – not a pseudo-liberalism *à la carte*, one that protects only some

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[26] See Chapter 5, section 2.1.2 and Chapter 8, section 2.4; *Perez* 2015.

[27] See Chapter 4, section 1.1.2 and *Sunstein/Thaler* 2003; *Thaler/Sunstein* 2003, 2008; *Sunstein* 2011a, 2013; *Amir/Lobel* 2012; *Schnellenbach* 2016. *Contra Veetil* 2011.

[28] For EU policies, see *Alemanno/Sibony* 2015.

[29] See Directive (EU) 2015/720 adopting measures to reduce the consumption of lightweight plastic carrier bags.

[30] *Swanson* 2002; *Buchholz*/*Rübbelke* 2019.

aspects of freedom. *Liberalism is systemic by nature*. It either flourishes across the State and the legal order or it does not exist at all. Dictatorships that suppress political or religious beliefs but protect open markets (as with Pinochet in Chile) are certainly not liberal. The opposite also applies: caring for human privacy and dignity without allowing for free economic transactions does not make a regime liberal. The Demos must be 'agora-centric' in all aspects of life to call itself liberal.

Economic analysis teaches us another thing about liberalism. To be real and effective, fundamental rights need open institutions of political, social and economic nature. It is the institutions, both private and public, that provide the appropriate framework for using freedom efficiently, which leads to rational choices, the optimal allocation of resources and social welfare. *Institutions transform freedom from a personal virtue into a system*. Public law's modern role is to implement this institutional-systemic dimension of liberalism within the Demos.

4. SOME FINAL THOUGHTS ON THE DEMOS, THE AGORA AND PUBLIC LAW

The title of this book was originally *Demos and Agora: Public Law under the Light of Economic Analysis*. Looking back through its pages, an initial point to consider is that title. The correct order for the pair would be not 'Demos and Agora' but rather 'agora and demos'. The Agora comes first, in history and in practice. Horizontal and consensual relationships cover human needs before the 'visible hand' of public institutions is needed (which it usually is). The Demos is established to complement the Agora and to remedy its shortcomings. However, it shall not forget to respect and to be inspired by the Agora, even in fields in which the Demos is paramount. Nevertheless, I chose to put Demos first, since the object of this study is, primarily, *the Demos*.

Which Demos? Economic analysis is valuable for every Demos – for every system of non-consensual institutions that enjoys, more or less, a natural monopoly: that of sovereignty and public force. Many such systems exist today: national, sub-national or supra-national. I have focused on those of unified Europe and of its member states, without ignoring the other shore of the Atlantic. I have examined their institutions, together with their ability to achieve their ultimate mission, the efficient pursuit of welfare.

Unfortunately, public law often falls considerably short of reality. It then enters into a state of crisis, as do all practices that suffer from a lack of realism. Along with its public law, Europe is also in crisis: both the national Demoi and the wannabe Demos of the EU. The agony of Brexit is nothing other than a failure of the involved public law systems (the British and the EU) to reach a prompt, optimal decision.

Periods of unrest incubate extreme and populist views.[31] In the case of public law, such views are pulling in two opposite and equally false directions. On the one side, there is a cynical demand to reject traditional public law guarantees altogether; to focus exclusively on economic efficiency, on a form of productivity that ignores the crucial social aspects of welfare. On the other, there is a romantic obsession with the past, which praises the inflated and dysfunctional State of the twentieth century – a model that lacks efficiency and sustainability.

However, the truth lies elsewhere, far from the excesses of 'State-phobia' and 'agora-phobia'. When public law is ailing, it is not because of its values but because of its lack of realism. Redressing this issue does not require us to forfeit the values of western democracy in the name of efficiency. Nor does it require a futile persistence with failed models for public action in the name of these values. We do not need another cathedral of public law. Democratic liberalism, the welfare state and the guarantees of the rule of law are the best edifices ever construed in history. Nonetheless, we need to observe another view of this cathedral – one that will allow us to examine how better to serve the values for which it was built.

This debate can be reduced to just one term: *efficiency*. The enemies of the Demos invoke it to demand the demolition of the cathedral as totally inefficient. However, the defence against the failures of the Demos is again to enhance its efficiency. For some, it is a poison to destroy public law. For others, for us, it is the antidote so it can be cured and survive. *Economic analysis, the method that focuses on efficiency, is the means for saving public law*. It is what public law has forgotten to acquire – especially in continental Europe – in order to preserve its achievements and its role. We must not disregard it; nor must we be quite so suspicious of it.

The 2020 coronavirus pandemic made all this extremely evident. It is impossible to fight the COVID-19 disease or to stimulate the economy without public intervention. In other words, we cannot save the Agora without the Demos acting as *Deus ex machina*; like an ancient God appearing at the last act of the Tragedies to solve the problems of the humans. Yet, to establish successful public policies on those life and death matters depends mainly not on the constitutional values of each legal order – which are, more or less, the same, especially in Europe – but on the ability of the non-consensual institutions to efficiently act in real life.

For centuries, public law operated as a dogmatic model of legal norms and principles, paternalistically imposed from above to private individuals. Economic analysis has shown that this system does not exist in a vacuum; nor

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[31] *Pinelli* 2019; *Bignami* 2020.

is it always the best way to solve a problem. The Coase theorem makes it clear that the intervention of public institutions entails benefits but also costs. It has a dark side, a range of inherent inefficiencies: information deficits, a monopolistic nature, problems of collective action, huge agency costs.

Revealing the efficiencies and the inefficiencies of the Demos is fundamental. Sometimes this is misunderstood as devaluating representative democracy, undermining the welfare state and impairing the protective function of public law, since it focuses on improving institutions rather than defending those whose rights have been violated. But this is not so. Positive economic analysis of public law confirms the advantages of democracy. It offers an instrument for achieving more successful social policies. It benefits, instead of harming, citizens. If the old public law offered protection through rights, modern public law protects them through better institutions.

If economic analysis of public law was a Platonic dialogue:

- *'Efficiency is important for making a better Demos'*, some say.
- *'But it cannot be everything and sometimes it is misleading'*, others reply.
- *'The perfect Demos is the one that gives efficiency a just value, however tough it might be'*, (almost) all agree.