7. Between freedom and paternalism: an economic analysis of fundamental rights and the limits of public intervention

The constitution covers two areas. One is that of private individuals, members of the Agora and citizens of the Demos; it creates the essential space for them to promote their interests. The other deals with non-consensual institutions, to which it assigns mandates for advancing collective choices. It is important to delineate these two spheres, freedom and paternalism. Where do we draw the boundaries to separate Demos and Agora? Is it just a question of how to protect fundamental rights in specific cases (section 1)? Or is it important also to provide for a *systemic* separation between private and public action (section 2)?

1. AN ECONOMIC ANALYSIS OF FUNDAMENTAL RIGHTS

Public law and fundamental rights[1] have been advancing in tandem for centuries, going back to the English *Magna Carta*[2] and the French *Déclaration des Droits de l'Homme*. These texts contain a short list of rights to counter State authority. The list has gradually expanded to include various goods in the form of rights.

For traditional public law, protecting fundamental rights is not merely a tool for achieving welfare; it becomes an end in itself. According to this purely normative approach, law exists to safeguard values, which it *must* establish as rights that *must* be protected. In this light, rights are the legal reflection of significant ethical choices. Goods/rights, such as life, dignity and privacy, are not safeguarded merely because they are useful. They represent constant values applying across time both to the Agora and to the Demos. They protect us from the brutality of power holders; from 'irrational policies', such as those

1 *Loughlin* 2013; *Bellamy* 2013.
2 An economic analysis by *Leeson/Suarez* 2016.

of Hitler and Stalin, who regarded man as a means for attaining objectives. Fundamental rights represent the 'ethical restraint' within a legal order.[3] They are necessary even when applied against the interest of the many. Otherwise, one could argue that it would be 'efficient' to confiscate the property of Greek billionaires to reduce public debt. In fact, why not torture them, so that they give up their money faster?

Such a moralist approach, however valuable it may be, is quite restrictive. Fundamental rights are not just a legal way of discussing ethical values. If approached through the lens of economic analysis, they reveal many other aspects, dimensions and functions.[4]

1.1 Why Do They Exist? Fundamental Rights as Tools for Reducing Costs

Fundamental rights do not only exist because they constitute indisputable values. They also allow us to live our lives more efficiently; to make optimal choices; to satisfy important needs at the lowest cost. This applies to all rights, irrespective of their nature. The right to property[5] is necessary for enjoying an asset without the cost of endless bargaining and conflict with others, be that private individuals or the State. The same goes for the freedom of religion and expression;[6] it reduces the cost for one's beliefs and views to be respected.

The reduction of that cost is maximised by placing the most 'fundamental' of those rights at the highest level. Their constitutionalisation reduces the uncertainty as to whether they will be respected upon reaching public decisions. If included in supranational texts – Europe has two, the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union[7] – this cost decreases even further. Those texts achieve 'economies of scale'. They give rights a uniform content[8] and reduce the risk of their infringement at the national level. They create a common 'firewall' for the protection of human rights before the European Courts in Strasbourg and Luxembourg.

---

3 *Sen* 2006; *Campbell* 2013.
4 *Blume/Voigt* 2007.
5 Art. 1, First Additional Protocol, ECHR.
6 Articles 9 and 10, ECHR.
7 On the ECHR, *Harris et al.* 2018; *Van Dijk et al.* 2018. On the EU Charter, *Peers et al.* 2014; *Di Federico* 2010; *Leczykiewicz* 2019. On their coexistence, *Varju* 2014; *Violini/Baraggia* 2018.
8 *Halberstam/Reimann* 2014; *Bratza* 2013.

The economic explanation of constitutional rights[9] lies in the above reflections. Their existence is justified by the criteria of efficiency and rational choice. Rights shape the framework of freedom and security that persons need to satisfy their various needs. In their quality as supreme rules, they are not at the mercy of public decisions, even of those enjoying democratic legitimacy. Otherwise, those in charge could use their momentary power to the detriment of others, especially of minorities: discrimination due to religious beliefs or sexual orientation; confiscation of property in the name of the general interest. Granting constitutional status to a specific right reduces the cost of 'unfair' public decisions. Adding to that list guarantees of a social character minimises another risk, namely that the weaker are unfairly treated or more exposed to life's uncertainty costs. The recognition of individual and social rights makes not only collective but also private choices more effective; in other words, better.

Therefore, it is not coincidental that legal orders without written constitutions are equipped with a written list of fundamental rights: the UK has *Magna Carta* (1215) and the Habeas Corpus Act (1679), the UN has the Universal Declaration of Human Rights (1948). Conversely, those with constitutional texts but no such list acquire one at some point: the EU added to its primary law a fundamental rights Charter with the Lisbon Treaty.[10] Comparative research reveals that constitutional protection of rights is an indicator of maturity for the corresponding society and legal order. It captures a crucial *constitutional moment*[11] – a moment that ensures a workable relationship between the Agora and the Demos for the future.

1.2 Fundamental Rights as 'Goods'

1.2.1 The dual, private and public, nature of rights

Fundamental rights correspond to *hybrid* goods; to goods with a dual nature,[12] depending on the needs they satisfy. On the one part, they correspond to purely private goods; those rights cover one's personal needs by allowing one

---

[9] *Mackaay* 1997; *Cross* 1999; *Napolitano/Abrescia* 2009.134; *Alexy* 2002; *Barzel* 2002; *Bellamy* 2013; *Sugden* 1986; *Cooter* 2000.243.

[10] As of 1 December 2009, the Charter has had a legally binding character: article 6.1 TEU provides that 'The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union […], which shall have the same legal value as the Treaties'. *Gianfrancesco* 2012; *Bratza* 2013; *Di Federico* 2011; *Kellerbauer et al.* 2019.

[11] For the notion of 'constitutional moments', see *Ackerman* 1993, 2000.

[12] *Cooter* 2000. For the distinction of goods in economic terms see Chapter 2, section 1.1.1.

to buy and sell, to express oneself freely or to enjoy high-quality health and education services. On the other, the same rights are connected to goods which economic theory considers public. Economic freedom creates a framework for unimpeded and secure transactions; healthy markets are public goods, in the sense that they advance an efficient allocation of resources for all. Similarly, freedom of expression creates a 'market' of free thinking, from which the whole society benefits. Conversely, 'public' education has a social character, but also satisfies individual needs.

The exercise of fundamental rights entails positive externalities. Not only does the individual consumption of the good, to which the right corresponds, generate private benefits; it also produces considerable social gains. Personal freedom benefits society in multiple ways. Part of the wealth a person produces returns to both the Demos and the Agora, be that in the form of taxes, of a new discovery in the field of medicine, or of a book developing the minds of others.[13] When the benefits for society are disproportionately higher than the private benefits, individuals must be given incentives to exercise their rights – to act not only for their own sake, but also to advance social welfare. Constitutions have established merit goods (education, health, social insurance, culture)[14] as social rights precisely for that purpose.

To put it more broadly, *the overall protection of fundamental rights is itself a 'holistic' public good.* It exceeds specific individual needs. It creates for all, equally and without exclusions, the necessary framework of freedom, security and justice for acting efficiently. The public nature of this good explains why fundamental rights are so important for public law.[15]

1.2.2 Price and cost of rights

According to economic theory, every good has its price. The same goes for rights. Given their dual nature, that price varies depending on the private or public aspect of such rights. It is correlated to the costs (private and public) incurred for their satisfaction.

As a private good, a right has a specific value for its holder, and a corresponding opportunity cost. Individuals are willing to exchange it for another good (and so, another right) to satisfy a different need. I use the right of a weekly holiday (a constitutional right in Greece) to exercise my religious freedom by going to church; to obtain information by reading the Sunday papers; to work and earn more money; or just to have fun. There is a subjective

---

[13] Knowledge can be considered as a global public good: *Henry* 2006.

[14] See Chapter 2, section 3.1.2.

[15] It also explains why the most 'fundamental' ones (life, dignity) are granted to everyone. They are not linked to citizenship, or to whether their holder complies with legality, has served in the army or has paid taxes.

price for every good, however 'fundamental' it may be. People are ready to demand a fee for the most sensitive aspects of their being: the inviolability of their private life (participants in a TV reality show); their dignity and their body (prostitution, surrogate maternity, organ trade); even their life (by taking on a dangerous job that pays more). Contrary to the paternalistic ethics of legal theory, no right is subjectively excluded from transactions (sometimes of a non-monetary nature).

The Demos bears the public cost of those rights.[16] It equals the resources required for satisfying the needs of all their holders: organising a police force to protect life; establishing an independent authority to ensure the confidentiality of communications; creating a public education and health system; providing justice to guarantee all other rights. Public cost may increase due to the inefficient use of a right by its holders. Low consumption of socially important goods by individuals, such as road safety or culture, requires public actions and the equivalent budget or manpower. In other circumstances, exercising a fundamental right generates negative externalities:[17] economic freedom is used to deceive consumers or pollute the environment; freedom of expression is used to bully or hurt others. In these cases, the social cost of the 'transaction' – that is, of the individual exercise of a right – exceeds the private benefit. Redressing that externality entails public intervention and therefore additional cost, which increases the public 'price' of the right.

1.3 The Inherent Relativity of Fundamental Rights

1.3.1 Balancing rights on their opportunity cost

The economic approach makes us realise the relativity of rights. Even when considered 'fundamental' or 'absolute', they are not entirely non-negotiable.

Regarding their holder, there is a trade-off relationship between them. Constitutional law may afford rights equal legal status, but each individual prioritises them differently, on the basis of their opportunity cost for him or her. That is the cost he or she would be willing to incur in order to enjoy a particular good/right more than another.

Rights that are related to freedom appear to be in opposition to those that guarantee security and solidarity. It has been asserted[18] that the prioritisation of human needs, as reflected in constitutional texts, evolved in three stages. In the first stage, that of absolute poverty and insecurity, individuals were willing to exchange freedom for an elementary survival; for some food that

---

16 *Sunstein/Holmes* 2000; *Napolitano/Abrescia* 2009.142.

17 See Chapter 2, section 3.1.2.

18 *Posner* 1987a, 2014a. On the same subject, *Acemoglu/Robinson* 2006, 2012.

a primal Demos would warrant and for protection against external risks. In the next stage, these individuals seek freedom to develop their personality: in States emerging from absolutist regimes, the constitution emphasises individual and political rights. In the third stage, that of maturity, what is sought is the optimum and most sustainable combination of security, freedom and solidarity based on their mutual costs. Moreover, modern societies promote new 'rights' to reduce specific risks (environmental or health) and to better manage uncertainty.

In other words, both the individuals and the Demos make choices regarding rights. Those choices are not set in stone; they evolve dynamically over time. The content of rights is always subject to change. Constitutions reflect the prevailing preferences. They balance between even greater freedom and even greater security or more solidarity and sustainability. Legal theory has long studied the balancing between equal, constitutionally protected rights.[19] For economic analysis, balancing relies on the comparative opportunity cost of those goods/rights, namely on how 'expensive' or 'cheap' it is to satisfy each of them compared to the others.

When balancing, it is important not to forget that the 'subjective/personal' and the 'objective/public' prices of constitutional goods are not identical. The former differs from individual to individual and relates to each person's preferences; I may value the freedom of expression, the possibility to earn money or a clean environment more or less than others. The objective price is the same for all. It corresponds to the second nature of rights, as public goods. It requires a uniform level of protection, which the legal order *systemically* guarantees. By determining the public price of each right, the constitution establishes the 'optimal level of protection provided to every citizen';[20] 'how much' a right is protected and how it is weighted, compared to other goods. To assess that price, economic analysis persists with its own method: cost–benefit analysis. Each right is safeguarded up to the point at which the cost of its infringement is higher than the benefits coming from its violation. This is the 'efficient' content of the right, to which its public price corresponds.

Fundamental rights law is familiar with such trade-offs. Most European constitutions contain extensive guarantees for those subject to criminal prosecutions. They consider the cost of holding or condemning an innocent man to be higher than the cost of letting a guilty one go free. However, this balance is partially questioned in the case of certain crimes, such as terrorism. The social cost derived from committing acts of terrorism is (considered to be)

---

[19] *Bongiovanni/Valentini* 2009; *De Schutter* 2010.453; *Stone Sweet/Mathews* 2008, 2011; *Webber* 2010; more critically, *Benvindo* 2010.

[20] *Napolitano/Abrescia* 2009.143.

particularly high. This explains why anti-terrorism laws introduce more severe restrictions to several fundamental guarantees (duration of detention pending trial, confidentiality of communications, free movement of capital); in another context, that would be constitutionally unthinkable.

1.3.2 Rights are less 'waterproof' than we believe them to be

So, even 'absolute' rights are subject to trade-offs. The same goes for what legal theory calls the 'core' of fundamental rights; their non-negotiable content. This core is the fruit of an *ex ante* balancing that takes place at the moment when the constitution is born. It covers the most crucial aspects of a right, respect for which is *presumed* to generate a benefit higher than those arising from their infringement. On these grounds, constitutions exclude the core content of a fundamental right from an *ex post*, case-by-case trade-off against other rights or components of the general interest. Most European constitutions follow the above rationale when, for example, they prohibit death sentences for crimes committed in times of peace or the confiscation of property.[21] Such aspects of the fundamental rights of life and property become, therefore, constitutionally non-negotiable, at least in principle. Yet, is this core indeed so clear-cut and absolute? Usually not. Even concepts such as torture, which is absolutely prohibited under article 3 of the ECHR,[22] require further clarification. Just remember the discussion in the US about the use of water-boarding at Guantanamo.

Rights are not exempt from their inherent relativity, however high up we place them. For economists, the explanation of such relativity lies in the difference between the Pareto and Kaldor/Hicks criteria for measuring efficiency.[23] The core of a right reflects Pareto's approach. It functions as a veto, granted to every individual for stopping any choice that makes him/her worse off. The 'negotiable' content of rights can be restricted in the name of another good; this content is closer to the Kaldor/Hicks test. It is set aside if the benefits from that restriction are higher. We have already pointed out[24] that 'Pareto optimal' situations arise with some problems; they block evolution and favour those that are already 'better off'. Their legal protection should be prudent and exceptional.

---

[21] See Protocols 6 and 13 to the ECHR on the abolition of death penalty and art. 1 of Protocol 1 to the ECHR on the prohibition of confiscation of property. *Schabas* 2015.958,1097.

[22] See judgments of ECtHR *Ireland v UK* (1978); *Selmouni v France* (1999); *Dikme v Turkey* (2000).

[23] See Chapter 2, section 2.2.2.

[24] *Ibid*.

To avoid misunderstandings: the above reservations do not mean to imply that all rights should be expendable. Some values cannot but be absolute. Otherwise, guaranteeing the respective goods – life, dignity, freedom of conscience – would be meaningless. It is for this reason that the legal order makes these rights immune to *ad hoc* trade-offs. It is not permissible to even think of taking the life of the most abominable criminal to harvest his organs to save others. But we should not get carried away. The constitutional validation of even the highest goods does not automatically resolve all dilemmas. If there are two ships in distress, one with two people aboard and the other with 20, to which must the rescue helicopter go first? Economic analysis alone cannot (and should not) answer that question.[25]

1.4 Restrictions on Fundamental Rights – A Means to Redress Negative Externalities

The distinction between an *ex ante* inalienable ('core') and an *ex post* negotiable (subject to *ad hoc* balancing) aspect of the same right is related to another, equally important question. When and how should rights be restricted? For economic analysis, this question is put differently: *when are restrictions of rights efficient and when are they not*?

To give an answer, it is important to have in mind that the private benefits and costs from exercising a right do not equal the public ones. This means that, when individuals invoke their fundamental rights, they may provoke *externalities, not only positive but also negative*. Their holder aims at the egoistic satisfaction of his/her own preferences, irrespective of the harm inflicted on others or on society. Just think of a bank that offers high-risk products to inexperienced investors, an industry that pollutes the environment or a newspaper that does not respect privacy. All three exercise a fundamental right from which they draw a private benefit, without incorporating and paying the higher cost they cause those around them. The law introduces restrictions on fundamental rights to remedy the above problem and to protect both the general interest and third parties.[26] A comparative cost–benefit analysis is necessary to assess the advisable extent of such restrictions. This comparison relies on a proportionality test, applied by the competent court, domestic or European. The higher

---

[25] For some attempts to tackle with such dilemmas from a legal and a philosophical point of view, see *Giubilini et al.* 2018 (on mandatory vaccination); *Uniacke* 2011 (on self-defence).

[26] More rarely, a discrepancy between the private and the social value of a right is due to the fact that their holder shows poor interest in it. In these cases, the legal order introduces restrictions to waiving a right: no one can be sold as a slave, even if he is willing to; nor can anyone fully waive the right of judicial protection.

the benefit from exercising a right and the lower the negative externalities it entails, the less are its admissible restrictions and the more non-negotiable is its content. Moreover, individuals may apply their rights inefficiently due to their bounded and imperfect rationality. I use my right to go around freely to drive my car recklessly, or my consumer rights to buy hazardous toys for my children. Public intervention can reduce that risk by restricting such inefficiencies.

However, there is another risk, revealed by economic analysis: that of an excessively paternalistic interventionism, which imposes inefficient restrictions on rights. To avoid it, it is crucial to take a closer look at the nature of the goods each right is intended to safeguard. *Rights correspond either to scarce or non-scarce goods.*[27] Those of an economic nature (such as the right to possess property) belong to the former category. They allow their holder to use finite goods (a land, a house, the environment). They shall be open to stricter limitations due to scarcity. The same does not apply to the freedom of political or cultural expression. Expressing a view is not a scarce good; it can be produced and consumed in infinite quantities. Strict interventions on those forms of freedom do not usually lead to an optimum allocation of resources.

Now, let's examine how this distinction applies in practice.

On the one part, most legal orders institute limitations on the right to possess property.[28] Article 1 of the First Additional Protocol to the ECHR establishes the right 'to the peaceful enjoyment of possessions'; but it allows States 'to control the use of property in accordance with the general interest'. Compulsory acquisition of private property (expropriation) is also permitted to promote 'the public benefit'. Expropriation is necessary to avoid negative externalities, as when the individual possessing the asset refuses to sell or asks for an excessive price.[29] It is a legal instrument to apply the Coase theorem: to direct property rights to the party that will use them more efficiently (in this case, to the Demos for building a road or a hospital).[30] At the same time, the European Court of Human Rights requires a 'fair compensation' to be paid to the persons deprived of their property, so that they do not incur an 'excessive burden'.[31] This guarantee is necessary to prevent public authorities

---

[27] *Holderness et al.* 2000; *Stuart* 2002; *Hatzis* 2015.

[28] The right to property is of particular interest to economic theory. *Demsetz* 1967, 1968, 2003; *Calabresi/Melamed* 1972; *Rendleman* 2013; *Tullock* 1993; *Kaplow/Shavell* 1996; *Rachlinski/Jourden* 1998; *Parisi et al.* 2005.

[29] Either because he does not want to be deprived from the asset (endowment effect) or because he wants to 'blackmail' the community for a better price (prisoner's dilemma).

[30] *Merrill* 1986.

[31] See ECtHR judgments *James v UK* (1986); *Former King of Greece v Greece* (2002).

from abusing their power and, therefore, from acting inefficiently.[32] If they were allowed to unconditionally violate ownership rights, they would create systemic insecurity, thus reducing the value of *any* property right, as the latter could be infringed at any moment by the State.

On the other part, freedom 'to hold opinions' and freedom 'to impart and receive information' (article 10 ECHR) are not exposed to wide restrictions.[33] These freedoms do not merely satisfy personal needs; they advance a broader good, which is non-scarce and public.[34] They create a framework of free access to information that benefits civil society as a whole more than each person separately. The ECtHR wisely allows only for exceptional restrictions applied narrowly: those necessary to avoid extreme negative externalities of the freedom of expression ('in the interest of national security', 'for the prevention of crime' or 'for the protection of the reputation and rights of others').[35]

1.5 Economic Analysis – Another View for the 'Cathedral' of Rights

Fundamental rights are the 'cathedral' of modern constitutionalism and public law. As Calabresi would say, economic analysis sheds light on the unknown facets of this temple. It explains why rights exist, why they correspond to goods with both a private and a public aspect, why they have a cost and when their restriction may be justified. It also refutes the excesses of paternalism. Top-down interventionism for our 'own good' is treated with reservation. Instead of the lawmaker or the judge, individuals themselves should, in principle, have the opportunity to make their own choices. The judge intervenes efficiently only in a corrective manner, when there are externalities that require correction. There must be an existing, true problem to resolve, not merely a 'paternal view' about what is better.

Economic analysis is also valuable for another reason. It focuses on whether the protection of fundamental rights is *real*. It is not satisfied with promises that remain on the pages of the constitution. For example, prohibiting discrimination is insufficient. Everyday life must confirm the absence of discrimination, such as by the numbers of those coming from minorities that study at universities or of women that hold managerial positions in public services.

---

[32] *Farber* 1992b.

[33] *Posner* 1986.

[34] For a similar approach, regarding the First Amendment of the US Constitution, *McChesney* 1988; *Farber* 1991.

[35] See ECtHR judgments *Muller v Switzerland* (1988); *Sunday Times v UK* (1991); *Editions Plon v France* (2004); *Dink v Turkey* (2010). Even broader is the protection of free speech under the First Amendment of the US Constitution: SC *Snyder v Phelps* 562 U.S. 443 (2011).

If numbers prove the opposite,[36] equality is not respected and 'affirmative action' may be required.[37] The true content of a right lies in the way in which the needs such right warrants are satisfied in practice. The 'absolute' protection of human life has a better content – measured in additional years of life expectancy – in a legal order with an advanced health system than in a State with failing public hospitals.

In conclusion: the real 'value' of fundamental rights does not depend only on their constitutional definition; it is also related to the efficiency of the public institutions that undertake to protect them.[38] Rights require more than official declarations; they need an effective Demos to ensure them.

2. BEYOND RIGHTS: DELINEATING PRIVATE AND PUBLIC ACTION

Beyond rights, economic analysis examines whether the Agora or the Demos cover a need more efficiently, since those two systems operate under different models of action (consensual/non-consensual). What is the optimum ratio of State intervention and private initiative?[39] Most European States, particularly those of the South, are generous in bestowing rights. Nevertheless, some of them tolerate or even instigate an excessive, agora-phobic interventionism; an almost limitless expansion of public as against private action (section 2.1). The same does not apply in the EU. The EU follows an agora-centric approach, leading to a more creative Agora and a more effective Demos (section 2.2), and as such, to a different model for the separation and the co-existence of the two (section 2.3).

2.1 The Agora-phobia of Traditional Public Law in Europe

In many continental European countries, constitutions[40] and public law often shape an 'agora-phobic' State. That is a system according to which serving the general interest is set at risk when left to consensual institutions and to

---

[36] Under the influence of economic analysis, the use of statistics becomes a legal tool to diagnose whether a right is being infringed: see ECtHR judgment *DH and others v the Czech Republic* (2007) and CJEU judgments in cases C-127/92, *Enderby v Frenchay Health Authority and Secretary of State for Health* (1993) para 16, C-274/18, *Schuch-Ghannadan* (2019) paras 46 *et seq*.

[37] *Fryer et al.* 2008.

[38] *Blasi/Cingranelli* 1996; *Cross* 1999.

[39] *Ruffert* 2013.

[40] On the economic constitutions in Europe and the prevailing model of *Ordoliberalismus*, *Prosser* 2014; *Joerges/Rodl* 2004; *Hien/Joerges* 2017. See also Chapter 1, sections 1 and 2.

the 'sirens' of private profits. The agora-phobic State establishes individual liberties and free markets but is not completely confident in them. It perceives the concepts of freedom and general interest as being antithetical; thus, private initiative cannot (or will not) serve public goals, at least in principle. Only top-down action does, by State institutions enjoying democratic legitimacy.

Agora-phobia derives from three 'constitutional' features of this old-fashioned public law. First, national constitutions usually do not establish the subsidiarity principle regarding public action: that Demos is necessary and effective only where the Agora is unable to deliver. Second, they establish fundamental rights, but not (sufficiently) the relevant institutions that are crucial for their enjoyment. Third, they monopolistically organise a series of economic sectors; those qualified as *services publics* – a key notion for French administrative law – to be secured but also provided by the Demos. These three features are complementary. They lead to a Demos which does not respect the subsidiarity principle, broadens the list of *services publics* and underestimates the importance of the market or other consensual institutions.

We have already addressed subsidiarity, a fundamental principle that guarantees the *liberal acquis* in a legal order.[41] In what follows we will examine the other two aspects of the problem: the poor constitutional protection of consensual institutions, especially that of competitive markets (section 2.1.1), and the excessive use of the '*service public*' concept to multiply public intervention and create monopolies (section 2.1.2).

2.1.1 The (ignored) role of the markets and other consensual institutions

Constitutional declarations do not suffice to protect fundamental liberties. Rights require *institutional guaranties* as well. Freedom of religion is meaningless without the unimpeded functioning of every church, temple or place of worship. Freedom of expression needs newspapers, radio, television and the internet. Gender equality is imperfect if we cannot institutionalise our personal relations though cohabitation agreements or marriage. Institutions offer individuals the necessary framework for self-determination; to express preferences

---

[41] See Chapter 5, section 1.1. Subsidiarity imposes the need to look for the right 'dose' of regulatory interventionism by assessing the costs and benefits it entails. Is it preferable to regulate *ex ante* by instituting detailed obligatory behaviours, or to intervene *ex post* to correct any inefficiencies? In the latter case, will this intervention be made *ex officio* by State authorities or will it be left to the affected individuals to bring the case to the courts? Common law systems tend to prefer this latter, less interventionist approach (*Posner* 2014a.491), instead of formulating exhaustive rules, to establish 'indefinite' concepts and standards which courts specify through case-law (*Kaplow* 1992).

and make rational choices. They are components of the Agora. Public law shall protect their existence and ensure that they are sufficiently open.

In the ambit of economic relations, the most important consensual institution is that of an open market operating in a competitive environment. This is so not only for protecting individual rights but also for promoting social welfare and the general interest. Unfortunately, many national constitutions in Europe do not share that view. They choose not to use the terms 'market' and 'free competition' in their texts. One should not forget that such texts were established either after the Second World War (France, Germany, Italy) or in the 1970s, after the fall of dictatorships (Greece, Spain, Portugal). In those times, while the State had to play a crucial role in reconstructing public infrastructures and covering basic needs, the institutional significance of the market was less evident. Even today, any proposition to amend the constitutional text by adding a reference to open markets is met with fierce opposition. It is seen as undermining the social role of the State, as a surrender to 'neoliberalism'. This was one of the major criticisms against the constitutional text that was proposed for the EU at the beginning of this century, and finally rejected.[42]

Nevertheless, the Agora, as a network of consensual institutions, advances both the private and the general interest. It is important to civil and commercial but also to public law. A healthy, competitive market can be the institution for promoting both utilitarian choices and socially important services – those that the Demos has the mission to guarantee. For example, healthcare, education, communication, information, energy, transport, even environmental protection are sometimes achieved through private initiatives. Those businesses are not of lesser importance for social welfare simply because they do not emanate from the State, nor do they cease to serve the general interest. The goods they produce still have the same nature and social importance irrespective of who is the provider, the Agora or the Demos. This is precisely the agora-centric approach that economic analysis contributes to public law. The Demos still retains the authority to intervene and 'make the markets work' in a way compatible with the general interest. But when 'markets do the job', it shall not restrict them; even less so, it shall not assume their role.

In conclusion, open markets are not just the institutional field for the enjoyment of private economic rights. They are also a *common good* – priceless and accessible to all – serving both individual and collective interests. Linking the market economy with social welfare – another word for defining the general interest – is not paradoxical; it is within the spirit of liberalism. For that reason, national constitutions should establish rather than ignore competitive markets.

---

[42] *Dehousse* 2006.

Unfortunately, to a large extent they still do the opposite, especially in the field of '*services publics*'.

2.1.2 *'Les services publics'* and the role of the State

'*Le service public*' (*servizio pubblico*, public utilities, *Daseinvorsorge*) is a key notion for public law in Europe and an important genome of its DNA.[43] It encompasses all needs that the State warrants as crucial to our lives; it gives essence to the principles of the welfare state (*le principe de l'Etat social*) and solidarity. According to the 'laws of the public service' (*lois du service public*[44] for French administrative law), the State shall ensure that those needs are provided for constantly, with high-quality standards and in equal, accessible conditions for all.

No one could possibly disagree on that point. Nevertheless, many States applied this theory to diminish the number of economic sectors open to competition; to multiply State-controlled entities; to breed clientelism and inefficient monopolies. The problem does not emanate from the constitutional choice to promote the welfare state and solidarity. It lies within the notion of '*service public*', as perceived by traditional public law; and for two reasons.

First, the list of 'services publics' is far from being clear and exhaustive. It potentially includes every activity or good that the lawmaker qualifies as such for being 'vital' for society. Such legal definition is inherently vague. It may cover just about everything. For the French,[45] 'services publics' are the police and education (*services publics administratifs*), health and social security (*services publics sociaux*) and purely business activities (*services publics industriels et commerciaux*), such as automobile production.[46] Even snake extermination and funeral services[47] were for some time regulated as 'services publics'!

Second, activities falling under the (legal) category of 'services publics' are often structured as monopolies, under the strict control of the State. Contrary to the US, where services 'vested with a general interest'[48] and public utilities

---

[43] *Wehlander* 2016; *Neergaard et al.* 2013; *Hancher*/*Larouche* 2011; *Van De Gronden*/*Rusu* 2013; *Frenz* 2016; *Sauter* 2014; *Szyszczak et al.* 2011; *Wollmann*/*Marcou* 2010.

[44] 'Les Lois Rolland' including the principles of equality, continuity and adaptability of the public service. *Rolland* 1928.508.

[45] *Gaudemet* 2020.395; *Braibant*/*Stirn* 1997.139.

[46] The Renault car industry was so designated when it was nationalised in 1945.

[47] Until 1993, funeral parlours were *services publics administratifs*, organised as a municipal monopoly (TC 20.01.1986 *SA Roblot*). Following the abolition of the monopoly, they became *services publics industriels et commerciaux* (CE, *avis*, 19.12.1995).

[48] *Munn v Illinois*, 94 U.S. 113 (1876).

are left to private operators (with the notable exception of the US Post) and gradually open to competition, in Europe the dominant model was (up to quite recently) that of a public monopoly: State-owned companies providing for transport, electricity, telecoms and TV broadcasting on an exclusive basis.[49] Even when a socially important activity was entrusted to a private provider (a maritime company connecting an unprofitable shipping line), the latter operated as a *concessionaire* of a public service. This provider held exclusive or special rights, protected from any potential competitor. In short, being a 'public service' meant that an industry was organised outside the Agora.

The traditional 'services publics' theory cannot avoid inefficiencies. Its main flaw is that it ignores the economic features of the activities in question. The fact that a good or a service is 'vital' for the society should not mean it is exempt from competition rules. It needs to be established that there cannot be an open market for it; or that such a market, even regulated, does not guarantee its provision in conformity with the general interest, namely that the users of those services will not satisfy their needs in equal, undisruptive, good quality and economically accessible conditions. By contrast, if such conditions can be assured, there is no need for the State to place such 'services publics' outside of the market. The regulation of that market would be enough.

Let's take as an example the production and distribution of bread and milk, two goods that undoubtedly cover vital needs. After the Second World War, the State in many European countries had to impose ration coupons. Now, both bread and milk operate in conditions of intense competition. If they were once treated as 'services publics', no longer is this the case. The same goes for medicines, mobile telephony or banking, three highly competitive markets. They will always be crucial, but not as 'services publics', at least in the sense in which old public law wanted them to be. What today seems unfeasible for markets to provide properly, may become possible at a later time (and vice versa).

Furthermore, even when a market faces serious failures, why should the remedy be to eradicate competition in all cases, especially when this ends up creating inefficient structures? This critique mainly applies to the provision of merit goods, which, according to economic theory, are not of purely public nature.[50] These include education, healthcare, social insurance, transport, energy, water supply, and so on. Those activities do not necessarily constitute natural monopolies; in some cases, the market is able and willing to provide them. Nevertheless, profit-seeking providers do not operate in socially optimal

---

[49] See Chapter 8, section 1.6.
[50] See Chapter 2, section 1.1.1.

conditions. Therefore, those economic sectors should remain under the guarantee of the State, but not necessarily as public monopolies.

The agora-phobic approach identifies the role of the State as the direct or indirect (through 'concessionaires') monopolistic provider of *services publics.* By doing so, it unduly places beyond competition activities that could benefit from it, causing an unnecessary waste of resources and the inefficiencies of an unjustified monopoly. Moreover, it shows poor confidence in the regulatory supervision of those economic activities. However, if the Demos fails as a regulator using sovereign powers, why should it succeed as a monopolistic entrepreneur?[51]

In conclusion, it is important to move away from the old view of '*les services publics*' towards a more 'agora-centric' one – to evolve towards an approach that, before creating monopolies, examines the degree to which the general interest can be attained with market structures and public regulation, and up to which point. This is (still?) impossible for some sectors, as in the case of urban transport and water supply; but this is not so for energy, coastal shipping and many others. Anyway, the most efficient structure for an activity better to serve the general interest is more a matter of economic analysis than of legal theory.[52] Public law in Europe will hopefully arrive at that conclusion in the light of EU law.

2.2 *Deus ex Machina Europeus*: EU and Its Agora-centric Model

The EU is not just an economic forum; it evolved into a Union with broader mandates (articles 2 and 3 TEU[53]). However, its approach remains market-oriented. It relies on a 'social market economy with a high level of competitiveness'. According to the 'economic constitution' of the Union,[54] the creation of a healthy internal market – mainly though free movement,[55] regulatory harmonisation[56] and free competition – is the mechanism to achieve

---

[51] This is the reason why modern States often ensure the provision socially important goods through public contracts and subsidies and not by establishing monopolistic public-owned companies. See Chapter 8, section 1.6.

[52] Depending on the nature of the good to be provided. According to economic theory, 'public service' activities may correspond to goods having a totally different nature. Police ensure security, which is a public good; telecoms are private goods; education and health are merit goods, as explained in Chapter 2, section 1.1.1.

[53] See Chapter 1, section 1.2.

[54] *Auby/Idoux* 2017; *Joerges/Rodl* 2004; *Eger*/*Schäfer* 2012; *Sauter*/*Schepel* 2009; *Blanke* 2012; *Ruffert* 2013; *Schiek et al.* 2011; *Spolaore* 2013; *Fabbrini* 2016.

[55] For a law and economics view on free movement, see *Brücker/Eger* 2012.

[56] *Garupa* 2012.

optimum allocation of both resources and social welfare, and, even more, to pursue different kinds of actions in the name of the general interest.[57]

Member states must abide by that model, even if their national constitutions do not share the exact same view. Their domestic policies promoting various aspects of the general interest (health, environment or consumer protection) cannot introduce restrictions 'incompatible' to the economic freedoms established by the Treaty.[58] The CJEU applies a compatibility test to restrictive measures, which presents similarities to the constitutionality review at national level; it is, though, much stricter.[59] As in their own legal orders, member states are entitled to evoke public interest grounds to justify State interventionism;[60] however, they need to substantiate that their action is proportionate and effective. The burden of proof lies with the national authorities and leads to a real cost–benefit analysis of the measures under scrutiny: 'the reasons which may be invoked by a member state in order to justify a derogation from the principle of freedom of establishment must be accompanied by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that member state, and by precise evidence enabling its arguments to be substantiated'.[61] Aims of a 'purely economic nature', such as prohibition of establishing supermarkets in order to protect local businesses,[62] are not acceptable.[63] It is not permitted to divert from the market model only to improve the economic situation of some of its players.

In addition, undistorted competition is a key notion for EU law. The Treaties include a core of 'constitutional' rules, which apply to both private and public entities.[64] Member states bear the duty to refrain from unduly restricting

---

[57] An economic overview of European integration can be found in *Baldwin/Wyplosz* 2019.

[58] Especially to the fundamental freedoms for the movement of goods, persons, services and capital (articles 26, 28–37, 45–66 TFEU). Any measure that 'renders less attractive' one of the four freedoms is in principle prohibited. It can be justified only on 'imperative' general interest grounds (article 36 TFEU).

[59] When examining whether a national measure that restricts free movement is compatible with the principle of proportionality, the CJEU balances the general interest grounds invoked by the member states with the 'general economic interest' of the Union to establish an open internal market: Case C-400/08, *Commission v Spain* (2010) paras 63 *et seq*.

[60] National measures 'can be justified on imperative grounds in the general interest subject to the condition that they are capable of ensuring the attainment of the aim sought and do not exceed the level necessary for attaining same': Case C-169/07, *Hartlauer* (2009) para 44.

[61] Case C-161/07, *Commission v Austria* (2008) para 36.

[62] Case C-400/08, *Commission v Spain* (2010) para 94.

[63] Case C-96/08, *CIBA* (2010) para 48.

[64] Articles 101–109 TFEU.

competition in all circumstances, even when using public authority (articles 3 and 4, TEU); for example, they may not regulate a specific economic sector (TV broadcasting) in such a way as to allow the dominant player to abuse its position in the market.[65] Restrictions are also set on 'state monopolies of a commercial character' (article 37, TFEU). The same goes for 'public undertakings and undertakings to which member states grant special or exclusive rights'; they must in principle comply with competition rules (article 106.1, TFEU). Moreover, State aids 'which distort or threaten to distort competition by favouring certain undertakings or the production of certain goods … shall be incompatible with the internal market' (articles 107 *et seq.*, TFEU). The prohibition of State aid is a rule that almost all national constitutions prefer to ignore. It not only safeguards the proper functioning of the European internal market; it also prevents other serious pathologies of the Demos, *inter alia* by reducing rent-seeking and improper spending of public funds on a national level (politicians distributing subsidies to their clientele).[66]

Competition rules are also partially applicable to 'undertakings entrusted with the operation of services of general economic interest' (SGEI).[67] SGEIs are the equivalent for EU law of the *services publics* of domestic administrative law. They fall under the competition rules 'in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them' (article 106.2, TFEU). SGEIs can no longer be *de jure* excluded from the market, as they were in many member states for many years. Even more, the Union tries to create markets where none existed before. Secondary legislation advances 'aggressive' liberalisation policies in specific fields, such as energy, electronic communications or railways. The liberalisation process leads to a new, market-oriented model of public regulation.[68] Custom-made economic rules for each sector gradually enhance competition. They abolish pre-existing exclusive rights and ensure equal access for all potential providers to the necessary infrastructure (electricity grid and gas pipelines).[69] At the same time, social regulation and strong supervision guarantee undisrupted quality services and equal access. To achieve that goal, EU legislation imposes 'universal service' obligations: a minimum level of services for all users at an accessible price, even when the players of the liberal-

---

[65] Case C-260/89, *ERT v DEP* (1991).

[66] *De Cecco* 2012.

[67] *Geradin* 2000; *Prosser* 2005; *Neergaard et al.* 2013; *Herzog* 2006; *Szyszczak* 2007; *Schweitzer* 2011; *Ølykke/Møllgaard* 2016. For a more critical approach, *Burke* 2018.

[68] *Hancher*/*Larouche* 2011; *Cremona* 2011; *Sauter* 2014.

[69] *Baldwin et al.* 2010.

ised sector are not willing to ensure it on their own.[70] It is the European answer to the '*lois du service public*', adapted to a market-oriented environment and free from the agora-phobia of the past.[71]

2.3 Towards a Modern Institutional Separation of the Demos and the Agora

'Old' public law in Europe used to bisect human activities and economic sectors, depending on their importance for the general interest: on the one hand, a 'public' part, which the State undertakes and organises outside the market; on the other, a 'private' part, which alone is left to private initiative, because it is considered of lesser value. The European Union brings to modern public law a different form of separation between private action and public intervention.[72] National lawmakers retain broad discretion in determining the components of social welfare in the name of the general interest; but they are not to decide on their own whether such goals will be pursued outside the Agora. EU law makes that choice in advance to a large extent, by requiring States to serve the general interest, as far as possible via the social market economy model. Economic freedom is the rule and paternalism the exception. Public intervention remains important and often necessary. Still, it becomes subsidiary. The Demos has to prove that its action is necessary and proportionate; in other words, effective and efficient.

---

[70] *Prosser* 2000, 2005; *Graham* 2010. For financing such services, *Szyszczak/Van de Gronden* 2013.

[71] Economic analysis is important when applying the EU rules on SGEIs. For example, in Case C-320/91, *Corbeau* (1993), the CJEU referred to two economic notions, 'cross subsidies' and 'cream skimming', when investigating whether the public monopoly of postal services in Belgium was compatible with the Treaties (paras 17 and 18). The Court followed an equally 'economic' rationale in its judgment in case C-280/00, *Altmark* (2003), on how to cover the costs for 'public service obligations' imposed on private providers without distorting competition.

[72] *Sauter/Schepel* 2009.

Figures 7.1 and 7.2 depict the limits between Demos and Agora.

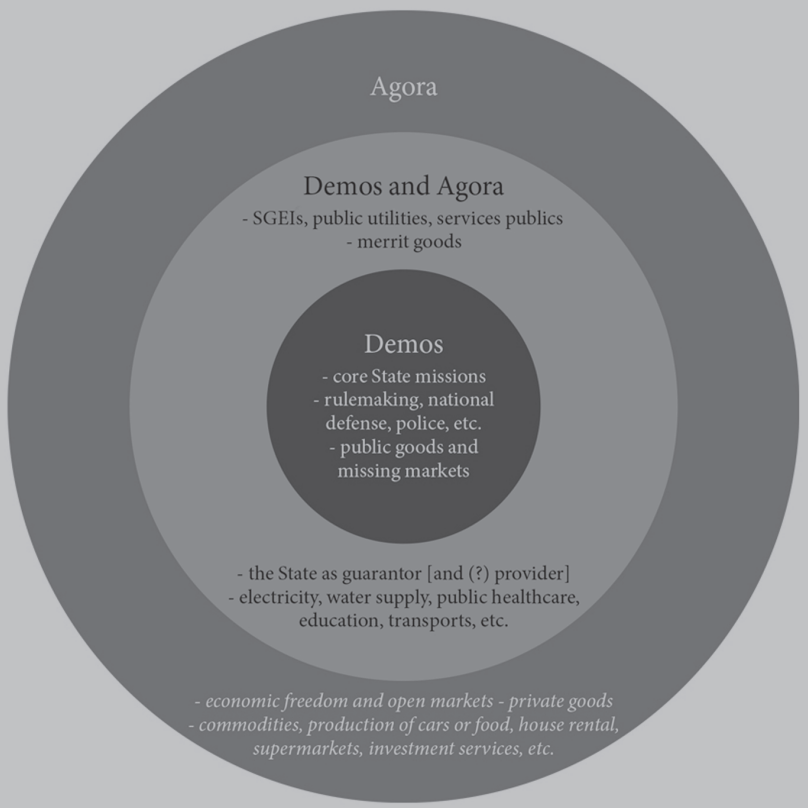

Figure 7.1 The respective roles of the State and markets

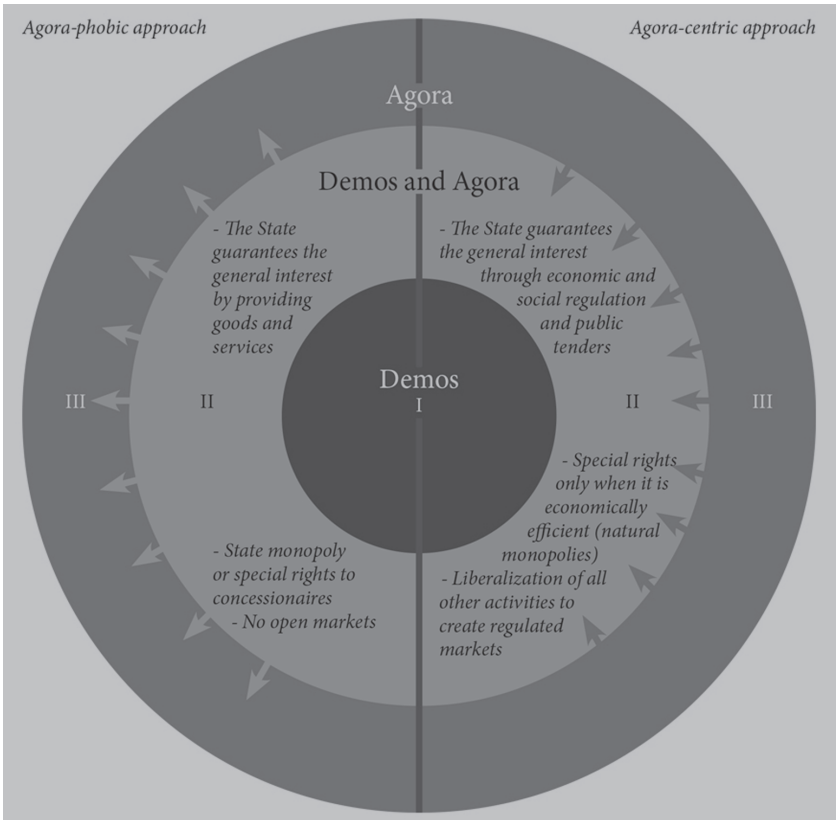

Figure 7.2 Agora-phobic and agora-centric approaches of the Demos/ Agora separation

The three concentric circles of Figure 7.1 include all human activities and goods, both private and public. The smallest circle I covers the field of exclusive public action; police, national defence, administrative licensing. Circle III is left to private initiative: supermarkets, building a house, car production. The friction lies in the middle, in circle II. It refers to 'sensitive' needs that markets may not satisfy properly: power supply, healthcare, education, and so on. Circle II is a grey zone as to the relations between Demos and Agora. It raises two questions. First, regarding its size: how far to expand circle II, reducing accordingly the area of circle III? Second, as to the role of the Demos: should it be predominant or discrete?

Public law in Europe is familiar with this separation. The first circle corresponds to the State 'core' – to the Demos imposing 'order', in the broad

sense of the term. Circle II includes all activities of increased social importance. The administration guarantees them in two ways: first, by directly providing the specific goods; second, by strict supervision of the respective activities. Circle III is that of activities that private individuals exercise freely (as long as they comply with the public order requirements of circle I).

From the viewpoint of economic theory, circle I refers to missing markets; to purely public goods, such as national defence. These goods are linked to State sovereignty, which is a natural monopoly. Circle III is that of purely private goods. Here, the Agora's 'invisible hand' satisfies needs in the most efficient way. Circle II concerns sensitive activities with increased risk of market failure. How do we deal with such a risk? The question has two potential answers. Traditional public law opts for agora-phobia. It entrusts the activities of circle II almost entirely to the Demos. EU law is less phobic. It assigns them to the Agora, up to the point that this is feasible and more efficient.

The difference is depicted in Figure 7.2.

In the agora-phobic model, the Demos tends to push back, as far as possible, the Agora. Circle II is State-owned to a large extent and also excluded from competition. The State increases the area covered by circle II for expanding its role. The agora-centric model is exactly the opposite. The Agora gains ground the further we move away from circle I. Regulated markets provide even the socially vital goods of circle II if this proves to be more efficient. The Demos becomes a provider of such goods only if it is impossible to create an operating market. Otherwise it intervenes only as a regulator. When conditions are ripe for creating a mature market, these activities are transferred to circle III, despite their increased social value (air transport, mobile telephony).