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Are All Constitutions Constitutional?

A research program in constitutional political economyⁱ

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A Constitution is a *social contract* defining a set of rules by which the governed agree to be governed. As such a Constitution ascribes power resources to governors while restraining the way they are expected to use them. But a Constitution is also a *discourse* on the distribution of power resources that the Constitution drafters want to see implemented in society. More specifically, it tells a story about the types of power that need to be ascribed or restrained and those that need not. Looking at a Constitution from both viewpoints opens a new window for uncovering the motivations that drove its drafters in the constitution-making process in which they were involved. In particular, it helps reveal the impact of uncertainty on constitutional choices.

The idea that constitutional choices are made under uncertainty and that this uncertainty determines the characteristics of such choices was first presented by James Buchanan and Gordon Tullock in their seminal work, *The Calculus of Consent*. They wrote:

Recall that we try only to analyze the calculus of the utility-maximizing individual who is confronted with the constitutional problem. Essential to the analysis is the presumption that the individual is *uncertain* as to what his own precise role will be in any one of the whole chain of later collective choices that will actually have to be made. For this reason he is considered not to have a particular and distinguishable interest separate and apart from his fellows. This is not to suggest that he will act contrary to his own interest; but the individual will not find it advantageous to vote for rules that may promote sectional, class, or group interests because, by presupposition, he is unable to predict the role that he will be playing in the actual collective decision-making process at any particular time in the future. He cannot predict with any degree of certainty whether he is more likely to be in a winning or a losing coalition on any specific issue. Therefore he will assume that occasionally he will be in one group and occasionally in the other. His own self-interest will lead him to choose rules that will maximize the

utility of an individual in a series of collective decisions with his own preferences on the separate issues being more or less randomly distributed (Buchanan & Tullock 1962: 78).

Buchanan and Tullock's perspective was positive as they wanted to describe how constitutional decisions were actually made. Following their lead, John Rawls (1971) then proposed his *maximin* criteria in a normative perspective. He saw a decision behind a «Veil of ignorance» (i.e., under uncertainty) as a thought experiment that could show how rational decision-makers should attend to the preferences of the least advantaged group in society when they are ignorant of their actual and future positions in society. We argue here for a return to the original positive perspective to assess the role of uncertainty in constitutional choiceⁱⁱ.

Constitutional political economy distinguishes between constitutional choice and 'in-period' choice, or equivalently between choice *among* constraints and choice *under* constraints. The first refers to the choice *of* rules, the second to choice *within* rules (Brennan and Hamlin 2001: 120-127). Brennan and Hamlin argue that these two types of choice have important characteristics that differentiate them – motivational, informational, social-capital, and public-good characteristics. We focus here on motivational characteristics, i.e., on the degree decision-makers choose in their own private interest or in the general interest when making choices. In constitutional choice, rational decision-makers attend to the interest of the many. Because they do not know what their future position in society will be, their «individual interests fade into the background and are replaced by the general interest of all agents» (*Ibid.*: 120). Indeed, «the uncertainty introduced in any choice among rules or institutions serves the salutary function of making potential agreement more rather than less likely. Faced with genuine uncertainty about how his position will be affected by the operation of a particular rule, the individual is led by his self-interest calculus to concentrate on choice options that eliminate or minimize the prospects for potentially disastrous results» (Brennan and Buchanan 1985: 30). However, 'in-period' choices are devoid of this type of ignorance as they are to last for a shorter period of time and as they are easier to change once adopted. In this context, decision-makers choose in their own interest. Assuming that a given

constitutional document ensues from the constitutional level of decision-makingⁱⁱⁱ, we may expect that it is submitted to the same motivational characteristic. Therefore its content should reflect the general interest more than particular interests.

In this project, we ask the questions: Which Constitution belongs to the constitutional level of decision-making and which does not? What explains the variation? Adopting a cognitive perspective, we read national Constitutions as an indication of the motivations that the drafters of a given Constitution had at the time of adoption so as to assess whether this Constitution reflects their own private interests more than the general interest. We proceed in three steps. First we formulate a conceptual framework based on power analysis to distinguish three distributions of power that decision-makers want to maintain or modify through their choices. Second we detail a content analysis method that helps us systematically extract the power relations embedded in Constitutions as discourse. Third, with the support of several national teams, we proceed to the actual content-analysis of national Constitutions with specific emphasis on validity tests. Fourth, we look for the determinants of the variation thus uncovered. Results will be put together in an edited volume.

Here is a tentative working schedule:

- Fall 2010: Completion of the Codebook
Building of a web site for the project
Contact with new prospective collaborators
- Winter 2011: Reliability tests
- Spring 2011: One-day workshop at the European Public Choice Society (EPCS) meeting in Rennes
Launching of content analysis of national Constitutions
- Fall 2011: National data to be sent to convenors
Writing of national analyses
- Spring 2012: Presentation of results at the World Public Choice meeting in Florida
Corrections of national analyses; chapters due by December 2012
- Spring 2013: Publication of an edited volume

Any individual or team interested in participating to this project is welcome to contact us:

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ⁱ An important part of this presentation is an excerpt from Imbeau and Jacob, forthcoming.

ⁱⁱ For example, such a perspective has been applied to the analysis of the constitution-making process that followed the breakdown of the Soviet Empire in the early 1990s. Rowley (2008: 24) noted that «scholars recognized that Rawls's «veil of ignorance» played no role in [that] process».

ⁱⁱⁱ As Brennan and Hamlin argue, «capital-C Constitutions [i.e., Constitutional documents] are only a small part of the set of rules that govern 'in-period' choices. Equally, capital-C Constitutions often include elements that are not small-c 'constitutional' in our sense at all» (2001 : 117).