

Chapter 1

Introduction

Louis M. Imbeau and Steve Jacob

This book addresses the issue of the impact of uncertainty in constitutional design. To what extent do constitution drafters and adopters make their decisions «behind a veil of ignorance»? More fundamentally, can we infer from constitutional texts the degree of uncertainty faced by constitution drafters and adopters?

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* by the drafters and adopters about what let them to make their choices. Thus, behind the formal content of a constitution is hidden an informal statement about the very motivations of its creators. Looking at a constitution from each of these two viewpoints opens two different windows for uncovering the motivations that drove its drafters in the constitution-making process. The social-contract perspective tells us which institutions drafters and adopters agreed to put in place in order to reach their objectives. The discourse perspective helps reveal what these objectives actually were, in a context where uncertainty about future conditions was very high. This book adopts the second perspective. It looks at constitutions as discourses from which to infer the motivations of constitution drafters and adopters in the face of uncertainty.

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 analyse 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

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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 and 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 choice.¹

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 and 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

¹ 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».

constitutional document ensues from the constitutional level of decision-making², we may expect that it is submitted to the same motivational characteristic. Therefore, its content should reflect the general interest more than particular interests.

Thus, we may ask questions such as: 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 their drafters had at the time of adoption so as to assess whether this constitution reflects their own private interests more than the general interest (Imbeau 2009; Imbeau and Jacob 2011).

The book proceeds in two parts. The first part (Chaps. 2–4) introduces to the intellectual filiation of the project and to its theoretical and methodological foundations. The second part (Chaps. 5–13) presents nine case studies built on the same structure: historical account of the making of the constitution, results of the content analysis of the constitutional text, and discussion of specific issues raised in the analysis. Chapter 14 concludes.

In Chap. 2, Stefan Voigt compares «two main veil notions regarding their value in explaining real world constitutional choices», John Rawl’s ‘veil of ignorance’ and James Buchanan’s and Gordon Tullock’s ‘veil of uncertainty.’ Doing so, he surveys the political economics literature, looking at theoretical, experimental, and empirical approaches to evaluate how useful the notion of «veil» has been to explain the content of constitutions. He concludes «that the central conjectures of ‘veilonomics’ are unsatisfactory on theoretical grounds and refuted both experimentally and empirically».

Chapter 3 by Christine Rothmayr Allison nicely complements Voigt’s chapter as it discusses the socio-legal literature. She shows how different explanatory approaches have developed over time, some close to Buchanan’s idea of the role of uncertainty in constitution-making, and others radically different. The chapter first provides a brief overview on the general findings about the global spread of rights protection and then reviews the theoretical approaches, first discussing the literature that operates most closely with the concept of *uncertainty* and then by contrasting these approaches with alternative explanations that more or less ignore this concept. This allows the author to compare and contrast competing explanations of the empowerment of courts through constitutional change, in order to situate the role of *uncertainty* within the larger socio-legal literature on how and why constitutions change.

Chapter 4 by Louis Imbeau and Steve Jacob introduces the conceptual framework and the methodological apparatus developed in the Veil of Ignorance Project (VOIP) and presents some preliminary results. Imbeau and Jacob first expose the conceptual theoretical foundations of the project based on Buchanan’s interaction approach and on the notion of power. Then, they describe the content analysis

² 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).

method that was used to compare the discursive content of the constitutional texts analyzed in the following case studies. In the last section of their chapter, Imbeau and Jacob provide various measures of the opacity of the veil in 16 constitutions and test the validity of their results through a regression analysis.

In Chap. 5, Cristine de Clercy argues that «the American case surely constitutes a ‘best case’ scenario so far as aiming to probe the constitution-making process under conditions of deep and extensive uncertainty». She introduces the case by reviewing the founding of the American colonies and their move to declare independence from Great Britain. She then surveys the key events leading to the 1787 Constitutional Convention in Philadelphia, noting the position and interests of the Framers and the ratifying delegates. In the last section, she summarizes the results of the content analysis of the constitutional document concluding that the US constitution clearly reflects the general interest more than the drafters’ private interests.

Chapter 6 by Louis Imbeau and Thomas Eboutou introduces the case study on Canada by insisting on the historical context, the «rising tide of modern constitutionalism» as they call it, in which the Canadian constitution was drafted in the 1860s. They first depict the economic and political situation in the former British North American colonies and describe the way the constitution was drafted and adopted, and then how it evolved through the twentieth century. Their second section gives the statistical results of the content analysis of the 39 constitutional texts forming the Canadian constitution. From the results of a regression analysis, they conclude that the content-analysis method developed by Imbeau and Jacob might be measuring two types of uncertainty, economic uncertainty, which significantly covaries with real GDP growth but is independent of time (uncertainty is higher when growth is lower), and political uncertainty which covaries with time but not with GDP growth (uncertainty is lower as we get further away from the founding date). The authors interpret this last finding to mean that constitution drafters seem to be less uncertain of their future as they get more experience in living together.

In Chap. 7, Nathalie Schiffino and Steve Jacob provide an overview of the making of the Belgian constitution in 1831, comparing the context in which it was drafted with the contemporaneous context of the 1993 constitution. Focusing on the change from a unitary regime in 1831 to a federal regime in 1993, they argue that domestic cleavages (catholic–liberal and bourgeoisie–working class in 1831; French–Flemish in 1993), consociationalism, and the international context (civil wars in Europe and foreign surveillance on the process of decolonisation from the Netherlands in 1831; EU membership in 1993) were important sources of uncertainty, in addition to the unframed process of devolution that has been going on in the more recent period. In the second part of their text, Schiffino and Jacob proceed to the content analysis of the two constitutional texts to conclude that constitution drafters worked behind an opaque veil of ignorance.

The following case study presented in Chap. 8 by Agnes Strauss describes in detail the making of the German «Basic Law» or *Grundgesetz*. It shows how, in the aftermaths of the military defeat in the Second World War, representatives from *Länder*, meeting at the Constitutional Convention at Herrenchiemsee in 1948

and at the Parliamentary Council in 1948–1949, interacted with Western allies (American, British, and French) to draft a constitution that would reflect the interests of the German drafters while pleasing the occupiers. In the second part of the chapter, the results of the content analysis of the *Grundgesetz* are presented. The author concludes that, because of the regular intervention of the Western Allies in the drafting process, «it is not easy to distinguish from the final constitutional text, to which degree the variables [identified in the content analysis] reflect the existence of a veil of ignorance and to which degree they reflect the compromises from the interests of the different veto players».

Chapter 9 by Emma Galli and Veronica Grembi applies Buchanan and Tullock's uncertainty hypothesis to the process of drafting the 1948 Italian constitution, especially with respect to the territorial organization of the Italian state. The chapter provides a vivid reconstruction of the main steps of the evolution of the relations between the central state and the periphery from the unification in the nineteenth century to the present time. Then, the authors compare the level of uncertainty relative to the design of the different levels of government, national, regional, and local. The results of their content analysis of the constitutional text show that uncertainty was significantly higher with regard to the regional level as compared to the national and to the local levels.

George Tridimas in Chap. 10 provides a wide overview of the constitutional history of Greece, surveying the six constitutions of 1844, 1864, 1911, 1927, 1952, and 1975, as well as the three revisions of 1986, 2001, and 2008. Then, he investigates the pattern of power relations in five post-WWII Greek constitutions in the period 1952–2008, a time span that covers the monarchical constitution of 1952 and the republican constitution passed in 1975 and its revisions. He records «an inexorable trend of increasing authority and instrumental and positive power relations». He concludes that «the hypothesis that constitutional writing in Greece was the result of disinterested framers designing institutions behind a veil of ignorance to cope with uncertainty receives less than solid support».

Is the Swiss constitution really constitutional? This is the question that Karin Ingold and Frédéric Varone raise in Chap. 11, arguing that Switzerland is a special case. After outlining the historical background of the Swiss constitution from its genesis in 1874, they proceed to the analysis of the results of the content analysis to assess the importance of uncertainty in the constitutional process in Switzerland. They conclude that their empirical results confirm that direct democratic instruments, such as mandatory referendum for constitutional amendments and popular initiatives, reduce uncertainty as citizens are part of the drafting and adoption process.

Chapter 12 looks at constitutional design during post-communist transition in Estonia. This period, Ringa Raudly argues, is particularly insightful for testing the veil of ignorance hypothesis as these countries were simultaneously moving from one-party to multi-party systems, from command to market economies, and from government unconstrained by laws to the rule of law. In a first section, the chapter gives an overview of the historical setting in which the Constitutional Assembly was convened, how the constitution was drafted, and what the motives

and objectives of the framers were. A second section describes the content of the Estonian 1992 constitution in terms of the power relations framework, and a third section discusses the findings of the Estonian case study in the light the theoretical propositions presented in Chap. 4.

Thomas Eboutou builds Chap. 13 on the fundamental political economy premise that constitutional decisions are fundamentally different from in-period decisions, the former being characterized by higher uncertainty. He argues that the constitutions of Chad and Cameroon are more of an in-period than of a constitutional type of process as the Chadian and the Cameroonian presidents strongly controlled the drafting and adoption processes and therefore were pretty confident about the outcome. After telling the story of the two drafting processes, Eboutou turns to the analysis of the power relations in the two constitutional texts and concludes that the Chadian and Cameroonian cases reveal two weakness in the framework presented in Chap. 4, namely the absence of a measure of error and the importance of lawyers' legal writing style with regard to the third hypothesis which relates negative formulations to uncertainty.

In the conclusion, Cristine de Clercy reviews the comparative findings generated in the nine case studies and then considers these in light of the original theory concerning how uncertainty influences constitutional creation.

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