

# **LAW AS CREDIBILITY: THE CASE OF PRESIDENTIAL TERM LIMITS**

Antonio Estella<sup>\*</sup>

## **I. INTRODUCTION**

One of the most crucial dilemmas political actors have to face is how to give credibility to their promises without losing flexibility. To provide credibility to their promises, political actors may use a number of instruments. One of them is known as ‘commitment technologies’. A commitment is a way to tie political actors’ hands. More technically, a commitment is a way to eliminate one of the alternative courses of action - or strategies- available to political actors, or a way to make that alternative very costly for them.<sup>1</sup> For example, a political actor promises to regenerate politics -end corruption- in a given state. He, then, commits himself not to be president for more than two mandates. To this end, he proposes a constitutional amendment to insert a presidential term limit (henceforth, “PTL”) clause in the Constitution. This amendment would render credibility to his commitment not to be president for more than two mandates. In turn, this would make trustworthy his promise to combat corruption.

When speaking about commitment technologies, it is important to differentiate between two elements; the content of the commitment and the form it adopts. Ideally speaking, and to continue with our example, one could encapsulate the commitment not to be president for more than two mandates in a number of forms. One could, for example, make a constitutional or other whatsoever legal amendment. Another possibility would be to make a political commitment; for example, the incumbent could announce his commitment to the political party he belongs to and to the society at large. There are still other ways to encapsulate commitments. For example, religion or morals do encapsulate commitments; at least, they do for those who believe in a particular religion or hold a particular set of ethical rules. However, for political

---

<sup>\*</sup> Associate Professor of Administrative Law and Jean Monnet Professor of European Union Law, University Carlos III of Madrid. Currently serving as Advisor on European and Constitutional Matters to the Spanish Minister of Justice. Part 5 of this paper has been done in collaboration with José Luis Ferreira, Associate Professor of Economics, University Carlos III of Madrid. David Law, Gil Carlos Rodriguez Iglesias and John Huber have provided very useful comments on earlier versions of this paper. Only the author is responsible for the mistakes and omissions that this paper may have.

<sup>1</sup> J. ELSTER, *Ulysses and the Sirens*, Cambridge, Cambridge University Press, 1984.

actors, at the time to make a commitment, the main choice is between politics or law.

In this article, I shall try to answer two related questions. First, when does it make sense for a political actor to choose law instead of politics in order to encapsulate commitments? My argument is that political actors, if rational, would be expected to choose law instead of politics when they are interested in giving the maximum degree of credibility to a particular commitment. However, choosing law may imply a loss of flexibility. Therefore, if rational, political actors should choose politics instead of law when looking for more flexibility than credibility. Of course, this argument relies upon a certain vision of law as credibility, according to which law is the most sophisticated institutional technology designed to give credibility to commitments. I shall explain this vision in the first part of this article.

The second question relates to the conditions under which political actors will choose law instead of politics. In other words, the second question relates to the conditions under which political actors will want more credibility than flexibility. My argument here will be that this decision is contingent upon the political actors' motivations lying behind the commitment, both at the time they make the commitment and at the time they have to implement it.

In order to illustrate this discussion, I will use a particular example, the example of presidential term limits. It must be clear from the outset that my purpose is not to explain the emergence and evolution of this commitment. I will use the PTL example only as a way to better illustrate the principal arguments of this paper.

## **II. LAW AS CREDIBILITY**

As stated before, the first question I want to address is when it is rational for a political actor to choose law instead of politics for commitments. On one hand, political actors make promises continually. Politics is based -at least, in part- in the political actors' capacity to make promises. However, the interesting thing about politics is not political actors' agency to make promises, but rather the capacity to make the others believe that they will fulfil the promises they make. In other words, one of the main issues in politics is how political actors solve, or attempt to solve, their credibility problems. Therefore, when a political actor promises, for example, that he is going to reduce taxes, it is legitimate that people question -at least, to a certain extent- whether the political actor will implement his commitment. Note that the importance of this lies in the fact that, other things being equal, people's support to the political actor will be

contingent upon the capacity he has to make them believe in his promise. Thomas Schelling formulates very nicely the importance of credibility in politics in the following passage:

“After facts, and predictions, we come at last to intentions. Can the president convince us that he is determined to do what he has said he will do? Can he persuade us that he will not change his mind as the costs accumulate and the risks become vivid? Has he correctly assessed the costs and the risks, or does his adamant determination reflect innocent miscalculation?”<sup>2</sup>

The story of the debate around presidential term limits in Spain may be useful to further show the credibility problems a political actor has to face. Contrary to what happens in the US Constitution Twenty-Second Amendment,<sup>3</sup> the Spanish Constitution does not establish a clause limiting the number of presidential terms. But also differently from what happened in the US tradition before the Twenty-Second Amendment was enacted, in Spanish young democracy there has not been a political tradition of limiting presidential mandates. The American tradition was started by George Washington and was respected, in spite of several unsuccessful attempts to break it, until Franklyn Delano Roosevelt came to power. Once FDR's second mandate was approaching its end, the Second World War exploded; which, according to all chronicles, was at the basis of FDR's decision to burst the PTL American tradition. FDR won not only a third mandate, but also a fourth one.<sup>4</sup> After this episode -considered by some as one of the most regrettable chapters of American constitutional history-,<sup>5</sup> republicans prompted an amendment to the US Constitution in order to introduce a PTL clause, which took effect in 1951.

---

<sup>2</sup> T. SCHELLING, “Establishing Credibility: Strategic Considerations”, *American Economic Review*, May 1982, pp. 78-ff.

<sup>3</sup> This amendment reads as follows: “No person shall be elected to the office of the president more than twice, and no person who has held the office of president, or acted as president, for more than two years of a term to which some other person was elected president shall be elected to the office of the president more than once. But this article shall not apply to any person holding the office of president, when this article was proposed by the Congress, and shall not prevent any person who may be holding the office of president, or acting as president, during the term within which this article becomes operative from holding the office of president or acting as president during the remainder of such term”.

<sup>4</sup> FDR served as president of the United States from 1933 to 37 (first term); from 1937 to 1941 (second term); and from 1941 to 1945 (third term). In 1944, he won a fourth term, but died in April 1945.

<sup>5</sup> C. STEIN, *The Third-Term Tradition: Its Rise and Collapse in American Politics*, New York, Columbia University Press, 1943, p. 341.

As I said before, the situation in Spain is quite the opposite of that in the US. There is no constitutional clause limiting presidential mandates and no PTL political tradition. However, Aznar promised when he was the candidate of the conservative Popular Party to the presidency -in the wake of the 1996 general election- that, if he was elected, he would not stay in power for more than two mandates; that is, eight years. According to him,<sup>6</sup> this was part of a number of measures addressed to “regenerate politics” in Spain. Politics had to be regenerated in such a way because it was not good for the country that the same person stayed in office for so long as prime minister González had; that is, fourteen years. This being the case, Aznar actually won the 1996 election and the next general election in 2000. When the time of the 2004 election was approaching, there was a vivid public debate in Spain about who Aznar’s successor would be. Many said that Aznar would be his own successor.<sup>7</sup> These rumours increased during discussions about the Spanish participation in the Iraq war. In fact, Aznar said that he would not run for a third mandate “except if extraordinary circumstances” required it. Many understood that -as had happened in the US case- the war would be the exceptional circumstance Aznar was talking about. In fact, debate about whether Aznar would honour his compromise only ceased when, six months before the election, he nominated Mariano Rajoy as his successor; a nomination which was accepted by the Spanish Popular Party.

This story shows that credibility was the issue at stake; people were not certain about what Aznar’s true intentions were. However, it also shows that flexibility was at least as important as credibility. It is very likely that Aznar wanted to keep an ‘exit door’ to leave the political commitment he had made. As he suggested himself -and as the American case seemed to imply-<sup>8</sup> the possibility that new and unexpected circumstances emerge precludes that he tie his hands completely. Spain could enter a war; terrorism could hit hard enough to compromise Spanish democracy; or, more realistically, the battle for Aznar’s succession could prove fatal for

---

<sup>6</sup> J.M. AZNAR, *Ocho años de Gobierno: Una visión personal*, Editorial Planeta, 2004.

<sup>7</sup> See, for example, I. VILLA, “Aznar sucede a Aznar” [Aznar succeeds Aznar], *Libertad Digital*, 31 Oct. 2001.

<sup>8</sup> Stein, speaking of the American presidential term tradition, reports the following: “Jefferson still thought to safeguard with an amendment what he hoped, in lieu of an amendment, would become a custom; notwithstanding, [...] he admitted that he might approve and even run for a third term in one exceptional, but very unlikely situation - namely, circumstances in which “a division about a successor [...] might bring a monarchist”. The most formidable enemy of the third term in all American history here admits that he might change his mind and modify his principles “in case of an emergency”.

See: C. STEIN, *The Third-Term Tradition*, o.c., p. 37.

the Popular Party's expectations of staying in power. If these risks became real, then, Aznar would have to withdraw his promise. A political commitment was, therefore, the adequate instrument for attending to the requirements of flexibility.

Political actors constantly face similar kinds of dilemmas between credibility and flexibility. They in fact would choose, if possible, the best of both worlds; to make credible commitments that do not entail a big loss in terms of flexibility. But, of course, the world is imperfect and, as we know, there is a trade-off between credibility and flexibility. In general, it can be stated that the more the credibility, the less the flexibility, and *vice versa*. When political actors privilege flexibility over credibility, as in the Spanish PTL case, they will choose political instruments. They may -again, as in the Spanish PTL case- compromise 'their word' -and, therefore, their reputation- that they will do what they promised they would do; they also may sign political pacts with other political parties, in particular, with the opposition or they may make certain gestures. The arsenal of political instruments at the disposal of political actors is, in this regard, quite diverse. However, if political actors privilege credibility over flexibility, they will use law. Again, the armoury of instruments is quite varied. They may, for example, insert a given commitment in the Constitution, as happened in the American PTL case with the Twenty-Second Amendment; they may pass laws or regulations; or they may sign international treaties.

Therefore, law may be better explained and understood in the context of the dilemmas that political actors face between credibility and flexibility. In such a context, law can be conceived of as the most sophisticated institutional technology at the disposition of political actors to give credibility to the commitments they make. This statement rests, of course, upon a number of important assumptions, which need to be dealt with in turn.

### III. THE EMERGENCE OF THE RULE OF LAW

Following Machiavelli,<sup>9</sup> Stephen Holmes explains the emergence of the rule of law out of the need that the rulers benefit from the cooperation of those over whom they rule. The governing class' self-interest in the people's cooperation would not explain by itself the emergence nor the decline of the rule of law in a specific historical context, but it would at least explain why the ruling might "encourage or discourage" such developments. Starting from this premise, Holmes theoretically reviews

---

<sup>9</sup> N. MACHIAVELLI, *The Prince*, Cambridge, Cambridge University Press, 1988.

some of the basic features of the rule of law, to confirm his hypothesis that “the political ruler first submits to regularised constraints when he perceives the benefits of so doing”. For example, as regards ‘self-restraint’, he argues that the reason why the powerful accept limits on their power is that self-restraint in fact increases their power. He states that “self-restraint is a tool and it can be explicitly advertised and consciously embraced because it furthers desired ends”. He also claims that, “from Voltaire to Max Weber, continental intellectuals urged their own autocratic regimes to imitate British political institutions on the grounds that limited government [...] would increase the military power and economic wealth of their countries”. Regarding the sister issue of ‘judicial independence’, Holmes considers that delegating power to the judges in fact “improves [the ruling] position”. Maximising power is as important as deniability for the governing class. Therefore, as Machiavelli puts it, “princes must make others responsible for imposing burdens, while handing out gracious gifts themselves”. Turning to legal certainty -or, in his own word, ‘predictability’-, Holmes argues that “the principal reason why people with power agree to render their own behaviour predictable is that even the most powerful people need cooperation to attain their ends”. And he adds that the political ruler “can attain his objectives [...] only if he distributes rights and resources downwards in a way best calculated to conciliate confidence of the people”.<sup>10</sup>

The bottom line of Holmes’ position is that the ruling class needs cooperation from those over whom they rule to attain their ends and, therefore, they commit with the ruled; further, these commitments are encapsulated in law. The fact that they are encapsulated in law is an additional guarantee that, once the interest in cooperation from the ruled fades, the ruling class commitments will be respected. Law implies here all the features that make the fulfilment of the ruling commitments not dependant on him. In this sense, judicial independence -or, to put it in legal theory terms, the ‘autonomy’ of law- is of utmost importance. But the other features Holmes speaks about -such as legal certainty, generality, abstraction and the like- are at least as important. All of them together help to build people’s confidence that once their cooperation is not needed anymore, the probability of commitment implementation will still be high enough. This long-term confidence in the fulfilment of commitments that law is able to build is also important for the ruling. If the ruling gave the impression that they would withdraw their commitment once their interest in cooperation from the ruled faded, then

---

<sup>10</sup> S. HOLMES, “Lineages of the Rule of Law”, in J.M. MARAVALL and A. PRZEWORSKI, *Democracy and the Rule of Law*, Cambridge, Cambridge University Press, 2003.

they would not be able to get the cooperation they need. Law is, therefore, a tool that serves the interest of both the ruling and the ruled, although in different ways.

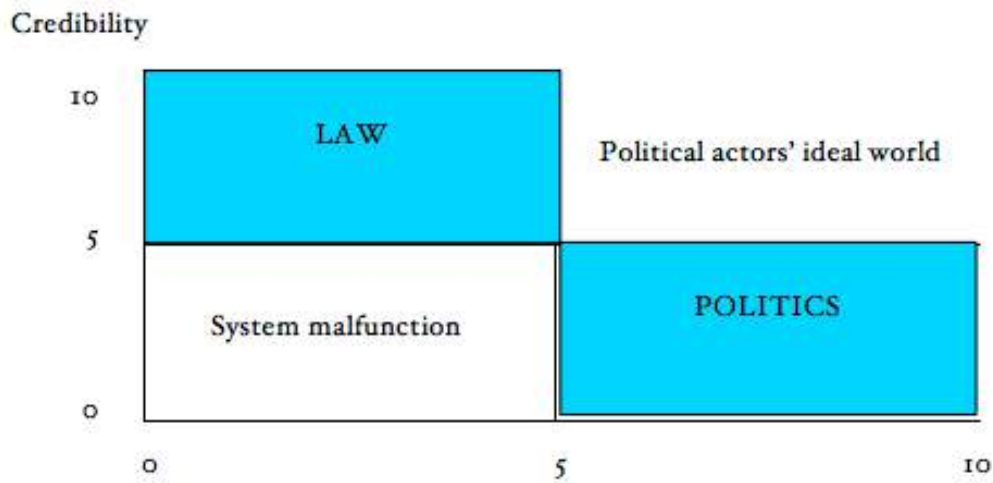
As Holmes points out, the motivation of the ruling is the main variable that one has to take into account to attempt to explain the emergence (or not) of the rule of law.<sup>11</sup> For Holmes, motivation means here self-interest. Though we shall return to the fundamental issue of motivations in the second part of this paper, it is enough for the moment to assume that the rulers' motivation is self-interest. If there is self-interest in obtaining cooperation from the ruled, we could expect the emergence of law. And the stronger this drive, the harder the law will be. Implicit in this position we find the correlative idea that the more loose self-interest gets, the greater the political actor's demand for flexibility and, therefore, the wider the place for politics.

#### **IV. CHOICE BETWEEN LAW AND POLITICS AND NORM SELECTION**

Graphic No 1 further shows the relation between law and politics in the context of the dilemma between credibility and flexibility. In this graph, law would be placed in the upper-left hand square. This would be so because all norms falling in this square would respect the trade-off according to what would have more credibility at the expense of less flexibility. In turn, politics would be placed in the lower-right hand square. This would be so because all political instruments that one can conceive of would respect the trade-off according to what would have more flexibility, but at the expense of less credibility.

---

<sup>11</sup> *Ibid.*, p. 34.

Graphic No 1: Choice between law and politics

The two remaining squares, the upper-right hand square and the lower-left hand square, would represent cases in which the trade-off between credibility and flexibility does not hold. In the first case or upper-right hand square we would have situations -either legal norms or political instruments- of high credibility as well as high flexibility. This, as I suggested before, would be heaven for political actors. However, from the perspective of the concept of law as credibility, it would be impossible to find norms with high degrees of credibility as well as flexibility. At the same time, it would not be possible to find highly flexible political pacts or instruments that would also purport high degrees of credibility. To formulate it in other terms, the upper-right hand square would embrace ideal cases, cases that could not happen in the real world.

It is, on the contrary, possible to imagine real cases that could be placed in the lower-left hand square. For example, there are constitutions with low degrees of credibility but that are highly inflexible. For instance, the EC Treaty -which works as a constitution for all purposes- is very difficult to amend as it requires unanimity of member states; but, as is widely acknowledged, its degree of compliance is low throughout the European Union. In turn, the American presidential term limit tradition is a case of a political instrument that could fit in this square. The history of this commitment proves that exit from it became quite a difficult enterprise; however, almost all presidents from Washington to FDR had to make efforts to convince the public that they would keep their promises that they would not be president more than two mandates. In any case, the point here is not so much whether we can find real-life cases that could be inserted in this square. It is more theoretical: instruments, either legal or



political, falling in this square would constitute cases of 'system malfunction'. That is, a constitution with a low degree of credibility but high rigidity may exist, but this would be a symptom that the legal system in question is not working properly. And a political commitment not to be president for more than two mandates, which is difficult to escape from but has a low degree of credibility, may also exist, but this would be irrational. Political actors would be better off having, in this case, a legal commitment rather than a political one.

The realm of law would, therefore, be represented by the upper-left hand square. To use other terms, from the perspective of the concept of law as credibility, all norms of a working legal system would have to fall at some point in that square. This statement is not only descriptive; it is also normative. This means that, from the perspective of this concept, all norms should at least be more credible than flexible.<sup>12</sup> It also means that the credibility of a norm is (or should be) a function of its lack of flexibility. Or more plainly, it is a function of its rigidity.

This being the case, then the question turns out to be how to measure the rigidity of a norm. One could use many measures to do this, but the most important one, other things being equal, is through approval and amendment procedures. The harder the approval and amendment procedures of a norm is, the higher is its rigidity and, therefore, the higher its credibility. For the sake of parsimony, I shall call this measure 'resistance to change'. The degree of resistance to change of a given norm is in fact a transaction cost. It involves the time that a political actor has to invest in approving or amending a norm, the resources he has to employ to this end, the cost of gathering information, and the like. Therefore, as transaction costs rise, the credibility of a norm rises in parallel. The most costly norms are the norms that have the highest degree of credibility.

This perspective also allows us to introduce ourselves into the debate of norm selection. Why do legal orders establish different kinds of norms? In positivist legal theory, a given legal order is always comprised of different types of norms; at the minimum, constitutions, laws and regulations. The validity of norms would be explained by reference to superior norms and, in the last instance, to the so-called *Grundnorm*, the basic law. Relations between norms would be of a hierarchical character. Thus, constitutions

---

<sup>12</sup> The notion of 'law' that is implicit in this approach is substantive, not formal. Therefore, from the perspective of the concept of 'law as credibility', a written norm, which has been adopted according to legal procedures, would not be considered as 'law' if it does not respect the condition that it is more credible than flexible. On the contrary, a social norm or a political covenant, not incorporated in the legal system as written law, can be considered 'law' if the previous condition holds.

would be placed at the tip of the so-called normative pyramid; then, we would have laws; then, regulations, and so forth. The basic characteristic that would differentiate different types of norms would be procedures. Thus, constitutions would be the most difficult norms to adopt and amend. Due to this technical reason, it would be impractical that all legal commitments were encapsulated in constitutions. Therefore, the existence of different kinds of norms would be explained for reasons of expediency.

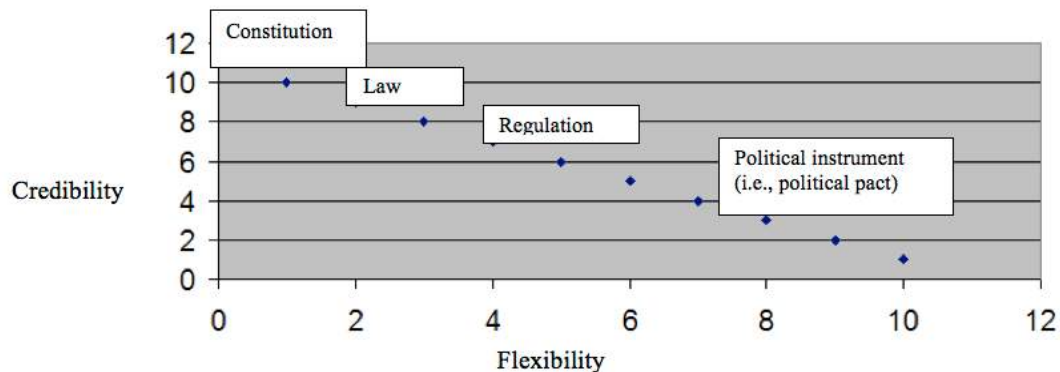
Even though positivist legal theory is a good point of departure for the concept of law as credibility, it is clear that this kind of argument is rather of a functionalist sort. That is, it explains the existence of different kind of norms by making reference to how the legal system works. However, as Elster has pointed out in a different context, the problem with functional explanations is precisely that they do not explain.<sup>13</sup> Reference to legal procedures explains how constitutions, or laws, or regulations, are approved or amended; it does not tell anything, however, about why we have different norms -and, therefore, different procedures- in a given legal system.

To answer to this question we need, once again, to place law in a wider context. This context is the context of the dilemmas that political actors have to face between credibility and flexibility. As shown in graphic No 2, different kinds of norms would constitute different equilibrium points between credibility and flexibility. Constitutions would have, according to this graphic, the highest degree of credibility and the lowest degree of flexibility. This would be the case because their resistance to change would be the highest of the whole legal system. That is, it would be very costly to approve and modify them. Then, we would have laws which, if one follows the graphic, would be less credible but more flexible than constitutions. And, in the third place, we would have regulations; the least credible legal act but also the most flexible one.

---

<sup>13</sup> J. ELSTER, "Marxism, Functionalism and Game Theory: The Case for Methodological Individualism", *Theory and Society*, 1982, pp. 453-ff.

Graphic n° 2: Norm Selection



If this holds true, then the existence of each of these types of norms would be explained not by reference to the way they are adopted and amended but by reference to the way political actors want to solve their credibility dilemmas. If a political actor wanted to adopt a given commitment -say, the commitment not to be president more than two mandates- and give to it the highest degree of credibility, it would have to opt for constitutional reform. If it wanted to have more flexibility, it would have to descend to laws or to regulations. Thus, differences between norms would be explained through the political actors' needs in terms of credibility and flexibility. Formulated in other terms, normative typology would be explained by reference to the need of political actors to have a choice of legal instruments wide enough to be able to select different equilibrium points between credibility and flexibility, in which credibility would always prevail over flexibility.

Graphic No 2 also explains the place politics has in terms of the concept of law as credibility. A political pact, for example, would have an inferior degree of credibility than the least credible of legal acts, regulations, but more flexibility. Therefore if rational, a political actor searching for more flexibility than credibility should opt for a political instrument to encapsulate his commitment.

This does not mean, as lawyers in the positivist tradition wrongly tend to think, that making and, above all, breaking commitments encapsulated in political instruments are without costs. As happens with legal commitments, entering political commitments may entail transaction costs. Moreover, breaking political commitments may entail a kind of cost that does not normally appear in the realm of law; I am referring to reputation costs. Breaking one's word may be very costly for a political actor's reputation before the public at large; breaking a political pact may

entail a serious loss of reputation vis-à-vis the other party to the pact, and so on.

The cost of reputation plays an important role when the time comes for a political actor to make a choice between law and politics. If the political actor is able to anticipate that the reputational costs of breaking the political commitment will be higher than the transaction costs that would entail modifying a norm, he should, if rational, choose law instead of politics. Instead, if the reputational costs were lower than the transaction costs, he should choose politics and not law. For example, imagine that Aznar knew that if he broke his political commitment not to be president more than two mandates, he would have to pay a high price in terms of his own reputation. In this case, it would be advisable that he adopted a legal commitment. That is, the increase of reputational costs would make his political commitment more credible than flexible. And as I have shown in graphic No 1, the realm of law precisely comprises all the cases in which credibility is higher than flexibility.

## **V. AN ILLUSTRATION THROUGH GAME THEORY**

In the following, I will further explore the interaction between law and politics as regards the credibility dilemmas that I have discussed in the previous section, through a game theory set-up. In the following set-up, we have two players, the president and the people. The content of the commitment is PTL.

In the game (see figure 1), the president may either make a legal or a political commitment. People move next. People have two strategies: to either cooperate or not cooperate. To cooperate means, in the context of the game, 'to pay taxes', and not to cooperate means 'not to pay taxes'. The president moves in the last place, and he has two strategies, to either cooperate or not cooperate. In this context, the first strategy means 'to respect the legal commitment' and the second 'to modify the legal commitment through legal means' or, alternatively, 'to break the political commitment' or 'to respect the political commitment'.

I assume the following aspects. In the first place, in the president's order of preferences, he prefers that the game end in mutual cooperation (C) rather than in the president cheating the people (Ch). He also prefers this alternative to paying the costs of modifying the constitution or breaking the political commitment (Sa) and this to being a sucker (S); that is, to cooperating when the people do not pay their taxes. The people's order of preference is the same: the people prefer that the game ends in mutual cooperation (C) rather than in the people cheating the president (Ch), but

they prefer cheating to being sanctioned for not paying their taxes (Sa) and this to being a sucker (S); paying their taxes and having the president modifying the constitution or breaking the political commitment.

In second place, costs are given the following values. Starting with the president's costs, I assume, first, that the cost of modifying the legal commitment is equivalent to 3 ( $PrCmLC = 3$ ) whereas the cost of breaking the political commitment equals 1 ( $PrCbPC = 1$ ). This difference is explained by the following reason: modifying the constitution entails costs that are superior to the reputation costs that the president would have to pay if he broke his PTL promise. Formulated in other terms, in this game, opting for law to encapsulate the PTL commitment would be more credible than opting for politics. Thus the game respects the 'law as credibility' paradigm that we have discussed in the previous sections of this paper. Second, the costs the president would have to pay if he was cheated and still cooperated -if he was a sucker- in the case he had made a legal commitment equals 4 ( $PrCSuckerLC = 4$ ) and the same cost would equal 5 if he had opted for a political commitment ( $PrCSuckerPC=5$ ). The reason for this difference is that we are in a game with complete and perfect information. Therefore, if the president observes that the people are not cooperating, it would be irrational for him not to escape from the political commitment, taking into account that the cost of breaking it would be less than the cost of modifying the constitution.

As regards the people's costs, these would be the following. First, the people's cost of not paying the taxes would be 2 ( $PeCnpt = 2$ ). This cost would be the same whether the president made a legal or a political commitment since this cost would not depend on this but, for example, on penal legislation concerning taxes. Second, the people's costs of being a sucker would be 4 in the case that the president had made a legal commitment ( $PeCSuckerLC = 4$ ) and 5 in the case that he had made a political commitment ( $PeCSuckerPC = 5$ ). This difference would be explained for the following reason: taking into account that the political commitment is less credible than the legal commitment, it would be more rational to think that, in his last move, the probability that the president breaks it is higher than if he had made a legal commitment. To formulate it in other terms, under a political commitment, the sucker would be even more of a sucker if the president broke his promise and the people cooperated.

Finally, rewards would be the following. Starting with the president's rewards, he would obtain a reward of 4 if people cooperated ( $PrRCoop = 4$ ) and a reward of 1 if he could cheat the people ( $PrRCh = 1$ ). It is important to remember, at this point, that we have argued before (in point 3 of this

article) that the need for cooperation from the people is the condition that makes most likely the emergence of law. In this case, it is obvious that the president wants cooperation from the people; if he could not collect money from taxes, he would have to shut down his office.

The people's rewards would be 4 in the case of cooperation ( $PeRCoop = 4$ ) and 1 in the case of cheating the president ( $PeRCh = 1$ ). Thus, I assume in this game that people would be better off cooperating than not; imagine that people badly want the president to leave the presidency at the end of his mandate.

**Table 1: Assumptions in game 1**

<b>President</b>	<b>Order of Preferences</b>	$C^{14} \succ Ch^{15} \succ Sa^{16} \succ S^{17}$
	<b>Costs</b>	<ul style="list-style-type: none"> <li>- <math>PrCmLC^{18} = 3</math></li> <li>- <math>PrCbPC^{19} = 1</math></li> <li>- <math>PrCSuckerLC^{20} = 4</math></li> <li>- <math>PrCSuckerPC^{21} = 5</math></li> </ul>
	<b>Rewards</b>	<ul style="list-style-type: none"> <li>- <math>PrRCoop^{22} = 4</math></li> <li>- <math>PrRCh^{23} = 1</math></li> </ul>
<b>People</b>	<b>Order of Preferences</b>	$C^{24} \succ Ch^{25} \succ Sa^{26} \succ S^{27}$
	<b>Costs</b>	<ul style="list-style-type: none"> <li>- <math>PeCnpt^{28} = 2</math></li> <li>- <math>PeCSuckerLC^{29} = 4</math></li> <li>- <math>PeCSuckerPC^{30} = 5</math></li> </ul>
	<b>Rewards</b>	<ul style="list-style-type: none"> <li>- <math>PeRCoop^{31} = 4</math></li> <li>- <math>PeRCh^{32} = 1</math></li> </ul>

The pay-off structure of the game would be the following, given the president made a legal commitment. First, if both players cooperated, the president would then obtain a pay-off of 4 and the people would also obtain a pay-off of 4. Second, if the people cooperated and the president did not cooperate, he would obtain a pay-off of 2 and the people would get a pay-off of 0. Third, if the people did not cooperate and the president did, he would obtain a pay-off of 0 and the people would get a pay-off of 3. Finally, if they both did not cooperate, he would obtain a pay-off of 1 and the people a pay-off of 2.

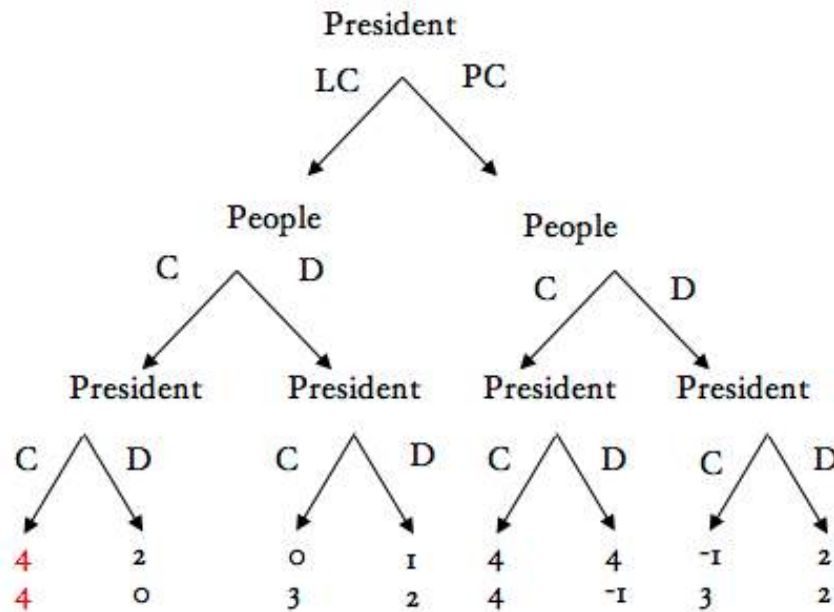
If, in the alternative, the president made a political commitment, we would have the following pay-off structure. First, in the case the game ended in mutual cooperation, both players would get 4. Second, if the people cooperated and the president not, the president would get 4 and the people -1. Third, if the people defected and the president cooperated, the president would get -1 and the people 3. And fourth, if the game ended in mutual defection, both players would get 2.

As illustrated in figure 1, the game has one Nash equilibrium; namely, cooperate, cooperate. The equilibrium path would be the following: first, the president makes a legal commitment; then, the people move and cooperate; and, finally, the president ends the game by cooperating.

The explanation of this result would be the following. Given the pay-off structure of the game, it is clear that the president would obtain a pay-off of 4 in three cases: if the people cooperated with him and he cooperated with the people under a legal commitment; if he cooperated with the people and the people with him under a political commitment; and if the people cooperated with him but he cheated the people under a political commitment. Knowing this, the people would cooperate with the president if he made a legal commitment -people would obtain in this case a pay-off of 4 as well- but would not cooperate with the president if he made a political commitment. This would be the case for the following reasons. If one looks at figure 1, it is clear that, in the case the president made a political commitment and the people cooperated, the president would be indifferent between cooperating or not with the people. He would obtain a pay-off of 4 in both cases. Knowing this, the people would not cooperate with the president if he made a political commitment, because the people would run the risk that the president ended the game by not cooperating; and, in this case, the people would obtain a pay-off of -

1.<sup>14</sup> This being the case, if the people did not cooperate with him, the president would defect as well. In this case, both would obtain a pay-off of 2. Given this equilibrium path of the game in the case that the president made a political commitment, it is rational that he would opt for making a legal commitment.

**Figure 1: Cooperation game with a legal commitment**



Where: LC = Legal Commitment    PC = Political Commitment  
 C = Cooperate                    D = Defect

## VI. CONDITIONS FOR THE EMERGENCE OF LAW AS CREDIBILITY

The second question I want to address in this article is related to the conditions for the emergence of law as credibility. We have seen so far that law can be better understood as the most sophisticated institutional technology intended to give credibility to commitments. Therefore, if rational, political actors should choose law if and only if they are going to obtain a plus of credibility, compared to other instruments that could encapsulate the commitment they want to make.

In the third section of this article, I already argued, following Stephen

<sup>14</sup> I assume that the classical rationality paradigm of economic theory does hold here as regards risk attitudes of players. Therefore, both people and the president are averse to risk.



Holmes, that the most important independent variable that would explain the tendency of political actors to use law would be self-interest. In particular, it was argued that their need for obtaining cooperation from the ruled to obtain the preferences of the ruling is the key to understanding the emergence or the retrenchment of the rule of law. In this section, I shall further refine and develop this argument.

To start with, it is important to acknowledge that political actors are not always motivated by their egoistic self-interest. As Holmes himself contends,<sup>15</sup> using self-interest as the only motivation underlying political actors' behaviour offers a "highly stylised and simplified account of the emergence" of the rule of law. To further refine this account, it is therefore necessary to introduce other types of motivations that even though less recurrent in political actors' rationale are nonetheless at least as relevant as self-interest.

In this vein, Elster speaks of three kinds of human behaviour motivation: interest, reason and passion. According to this author,

"By interest, I mean the pursuit of individual or group advantage. [...] Among the passions, I include not only the emotions as usually understood, but also hunger, thirst, sexual desire, states of pain and states of intoxication from drugs, and madness. By reason, I mean any impartial attitude motivated by concern for the common good or for individual rights and duties".<sup>16</sup>

Besides political actors' different kinds of motivations, we need, in second place, to introduce the time variable in our analysis. In effect, political actors, if rational, look ahead and reason backwards when considering whether to make a commitment or not. That is, they do not only think of the time in which they make the commitment; they also think, or attempt to think, of the time in which the commitment they made will have to be fulfilled.

However, political actors, as all human beings do, may change motivations over time. Elster refers to this aspect as 'time-inconsistency'. Political actors try to cope with time inconsistency in a variety of ways. Precisely one of the ways to cope with it is through commitment technologies.

Mixing both aspects -the taxonomy of political actors' motivations and the

---

<sup>15</sup> S. HOLMES, "Lineages of the Rule of Law", *o.c.*

<sup>16</sup> J. ELSTER, "Don't Burn your Bridge before You Come to It: Ambiguities and Complexities of Pre-Commitment", *University of Texas Law Review*, 2003, pp. 1755-ff.

time variable- further helps to refine the way in which we can understand the choice by a political actor of law instead of politics, since it provides us with a more realistic framework of the conditions under which these choices are normally made. To clarify: imagine that a political actor is considering committing himself not to be president for more than two mandates. In time 1, the time in which he is considering making the commitment, he is motivated by self-interest: he thinks that if he commits, he will have more chances of winning an election. However, this actor is able to anticipate that, in time 2, when the time to fulfil the commitment comes, the emergence of unforeseen circumstances -for example, a war- may advise that the general interests of the nation would be better served if his party did not change candidate. He also knows that, given those circumstances, reason -which has been defined here as the 'common good'- would weigh more in his decision than self-interest. In this case, and even though he would have more chance of winning the election if he encapsulated his PTL commitment in the constitution, he decides to make a political announcement that he will not stay in office for more than two terms.

## **VII. MOTIVATIONS AND TIME-INCONSISTENCY**

We therefore have to take into account which motives political actors will have at the time they make the commitment (time 1) and which reasons they foresee will motivate their behaviour at the time they have to fulfil their commitments (time 2) in order to clarify the conditions under which law understood as credibility is more likely to emerge.

In table 2, I present a summary of all possible combinations of motives both in time 1 and in time 2 and the outcomes these combinations may yield. I use as an example the limitation of presidential mandates. Therefore, my point of departure is a political actor who has to make the choice of encapsulating his commitment not to be president for more than two mandates either in law or in politics. I assume in my example that the political actor is rational and able to anticipate what his motivation will be in time 2.

Table 2: Motives at time 1 and at time 2

	T1	T2	Outcome
M O T I V E S	Interest	Interest	Political commitment
		Reason	Legal Commitment
		Passion	Legal Commitment
	Reason	Interest	Legal Commitment
		Reason	Political Commitment
		Passion	Legal Commitment
	Passion	Interest	Legal Commitment
		Reason	Legal commitment
		Passion	Legal Commitment

1. *Interest versus interest, reason or passion*

In the first scenario, the president is motivated by interest at time 1, and he is able to anticipate that he is going to be motivated also by interest at time 2. In this case, the outcome would be a political commitment. Being motivated by interest in time 1 means that he commits to limit presidential terms because he thinks that, in this way, he will be closer to winning the next election. In turn, being motivated by interest in time 2 means that the president will anticipate that he might want to stay in office in time 2. A political commitment would offer him a better way to escape from his promise than a legal commitment; however, this would reduce his chances of winning at time 1. My hypothesis is that his selfish motivation to survive in the long run would weigh more than his need for cooperation from the people in the short term. This would explain the emergence of politics in this case.

In a second scenario, the president could anticipate that he is going to be motivated by reason -i.e., the 'common good'- in time 2. As we argued before, our political actor might want to leave a door open to escape from his commitment because he might think that the country would be better off if his party did not change candidate. He would opt in this case for a

legal commitment. In effect, his interest in time 1 in winning the election would weigh more in his decision. Even though he could anticipate that his motives are going to evolve towards reason with the passage of time, a political actor motivated by interest in time 1 is, by essence, a 'short-runner'. Winning the election would be more important than the common good of the country, taking into account that the decision has to be taken in time 1. This is why he would make a legal commitment.

The third scenario is the case in which our political actor anticipates that passion is the motive that is going to drive his behaviour in time 2. Passion would mean here 'power addiction'. Thus, our political actor knows that he likes power too much and that, once he stays in power for a certain amount of time, he would never ever want to leave it. In this case, he would make a legal commitment. The reason why he would make a legal commitment in this case is because interest in time 1 and passion in time 2 work together in the same direction. If motivated by interest, he would make a legal commitment; his commitment would be more credible and, therefore, this would increase his chances of winning the election. And if motivated by passion later on, a legal commitment would make it harder for him to unfold his determination to stay in office. Both sorts of motivations would advise him to make the most stringent commitment to leave office he can afford.

Therefore, we have two instances in which law would be likely to emerge: the case of interest *versus* reason and the case of interest *versus* passion. This means that there would be one case in which Holmes' hypothesis would not hold; interest *versus* interest. To be sure, this outcome could be modified if other variables appeared. For example, it is clear that the more the president's re-election depended on his commitment, the more weight he would give to his interest in time 1 over his interest in time 2. To put it in other words, if his re-election depended on his ability to make a credible commitment to limit presidential terms, the president would become more myopic. Beliefs could also play an important role here and could, at the end, modify again the outcome for this scenario. For example, the president could firmly believe that a corruption scandal will explode. He could be interested in staying in office in order to shelter himself from legal attacks from the general attorney. In this case, his beliefs about the future could make him get back to a political commitment, even though he knew that re-election would be closer if he made a legal commitment.

However, for analysing all these scenarios I have not taken into account the role that other variables -like exogenous variables, or beliefs, for example- could play. Other things being equal, in a situation in which the president had an interest in winning the election at time 1, and he could

anticipate that his interest at time 2 would be political survival, it is reasonable to think that he will use a lighter form of commitment.

2. *Reason versus interest, reason or passion*

In this set of cases, I assume that the president would be motivated in time 1 by reason. I have identified 'reason' here with the 'common good'. Therefore, the president would commit to limit his terms in office because he would think that, in this way, the country would be better off. A limit on presidential terms in office would, at the minimum, be a vaccine against corruption; and, at the maximum, it would mitigate the risk of dictatorship.

However, in a first scenario, the president would be able to anticipate that he will be motivated by interest in time 2. As I have said before, 'interest' in time 2 means that the president anticipates that his motives will evolve towards political survival. This being the case, the president makes a legal commitment. The mechanism that would explain this choice would be that in the time the president has to make a choice, he is motivated by the common good. Precisely because he is in a cold state of mind, he is able to anticipate that his motivation can evolve towards political survival and, therefore, he opts for a tighter form of commitment.

In a second scenario, the president would also be motivated by reason in time 2. In this case, the president would make a political commitment as well. As stated previously, 'reason' would mean, in time 2, that the president thinks that the country is going to be better served if he does not leave office. This is an interesting case, in which reason would play against reason. Which of both would have more weight in the choice that the president has to make? If his concern for common good in time 1 weighed more than his concern for common good in time 2, then he would probably make a legal commitment; and, if his concern for common good at time 2 prevailed, he would make a political commitment. What is the reason why I conclude that he would do the second thing and not the first? The mechanism that would explain his decision to adopt a political commitment is, again, that he would be motivated, at the time he has to make a decision, by reason, and not by interest or passion. And a political actor motivated by reason, by the common good, is more able than a political actor motivated by interest or passion, to look ahead and reason backwards. In other words, prudence would assist him more than if he was motivated by interest or reason. Therefore, if prudent, he would be able to anticipate that the common good of the country would be better served if he stayed, and this would advise him to encapsulate his commitment in an instrument from which there could be easy escape.

In a third scenario, the president would be motivated by passion in time 2. Passion in time 2 means, as has been pointed out before, 'power-addiction'. The president, even though concerned by the common good in time 1, would be able to anticipate that, with the passage of time, he would become a power addict. But he makes this kind of reflection inspired by reason. In a state in which quietness would dominate his spirit, he would be able to understand the need to commit to leave office in a stringent way. He would, then, make a legal commitment.

Therefore, we would have two more instances in which law understood as credibility could emerge. Cases of reason *versus* passion are considered, by the literature that deals with commitment technologies, as the prototypical example in which law is likely to emerge. Sometimes, human beings are able to anticipate, when they are in a state of reasonable coldness, that this rationale may be substituted by emotions with the passage of time and with the prospect of commitment fulfilment. The example here is, traditionally, constitutional law making. In a state of calmness, political actors are able to anticipate that in the future the emergence of political passions may produce disruptions. They, therefore, commit to the main rules of the game before these passions arise.

The second case that we have analysed here, reason *versus* interest, has been less studied by the literature on commitment technologies. However, the mechanism that would explain the emergence of law in this type of situation would be similar to that in the case of reason *versus* passion; reasonable and prudent men are able to anticipate that their motives are going to evolve towards political survival. This hypothesis is realistic. Once in power, political actors become political survivalists. The best time to counter-balance such interest would be the moment in which the commitment has to be made. Law, if credible enough, would then be the adequate instrument for tying a political actor's hands.

### 3. *Passion versus interest, reason or passion*

In this set of cases, we are going to analyse three scenarios in which our political actor makes his choice motivated by emotions. In particular, the president would commit to limit presidential terms out of conviction; he is a vocal passionate advocate of checks and balances and he thinks that putting a limit on presidential mandates would be a step further in realising his ideological program in this regard. Note that his commitment to PTL does not come from interest -it is independent of whether he enhances his chances of winning with this commitment- or from a concern for the common good of the nation. It comes from ideology; it comes from

an intense conviction about what the right thing to do in politics is.

Jon Elster, following Loewenstein terminology here, calls the two first cases -passion *versus* interest, and passion *versus* reason- 'hot to cold' empathy gaps. They differ from 'cold to hot' empathy gaps, which have been examined previously. Thus, the cases of interest *versus* passion and reason *versus* passion would be instances of 'cold to hot' empathy gaps. The traditional view on the matter holds that the most likely scenario for the emergence of commitments -and, therefore, for the emergence of tight forms of commitments- is when we have a 'cold to hot' empathy gap. That is, when political actors, either motivated by interest or by reason, are able to visualise that passion will be the motive that will drive their behaviour in time 2, it is more likely that hard forms of commitment will emerge. My account is, as has been seen, in line with the traditional view on the matter. However, Elster argues that, even though it may seem paradoxical at first sight, 'hot to cold' empathy gaps may be an instance in which tight forms of commitment may emerge as well.

Therefore, in a first scenario, the president knows that he is going to be motivated by interest in time 2. As we know, interest in time 2 means 'political survival'. How would an actor intoxicated by the vapours of ideological radicalism behave if he had to make a decision in this regard? He would, of course, make a legal commitment. There are two reasons for this. First, because he would be intoxicated by ideology and, in these cases, it is hard to see that motivations may evolve with time and that, once in power, the ideological fever may fade and be substituted by the interest of staying in power. An alternative explanation would be that he might visualise that if he did not make a hard commitment to limit his presidential terms in office when he is in state of ideological convulsion, the passage of time could mean that other considerations -in particular, interest- were taken into account in his decision. This is an instance in which passion really plays *against* interest. In other words, the president would take advantage of the fact that he is motivated by passion in time 1 to stick to his preference at that time, fearing that if his state of mind changed to a colder mood, he might not take the same decision.

This second explanation is, in my view, more plausible than the first, since it assumes a certain degree of rationality in the political actor's spirit. As Elster points out, passion is the opposite of reason understood as common good, not rationality. Political actors, even if ideologically intoxicated, are able to see that their ideological fervour may be appeased with the passage of time and precisely react against it. This argument also helps to build a hypothesis as regards the second scenario, passion *versus* reason. At time 2, reason would mean that the president thinks that the common good of the

country would be better served if he does not leave office. In this case, the president would also make a legal commitment to limit presidential terms in office. And he would do this, again, out of fear. He might think that, as time passes, other considerations would be taken into account—in particular, his concern for the common good of the nation—and this could make him have doubts about his ideological commitment to checks and balances. The best thing to do would be, in this situation of ideological compulsion, to conjure the fears of reasonableness through tying the president's hands as hard as he can.

The third scenario is one in which passion plays against passion. Passion in time 2 means, as we already know, that the president becomes a 'power addict' in time 2. This case would be an easy one; passion at time 1 and passion at time 2 would work in the same direction. Therefore, if a political actor strongly motivated by checks and balances thinks that, once in power, he could become a power addict, then the most rational thing to do for him would be to adopt a tight form of commitment.

#### 4. *Law, a product of passion?*

The most interesting conclusion that we may extract from the preceding analysis is that, of all three settings, law is more likely to emerge when passion is present at time 1. 'Hot to cold' empathy gap cases would be the instances where law, understood as credibility, would have more chances to emerge.

To be sure, this conclusion could be nuanced in a number of ways. In the first place, it is clear that I have given determined meanings to what interest, passion and reason mean in time 1 and time 2. When the time for a political actor to make a commitment comes, other motive-contents could be at play. The previous analysis is, nonetheless, realistic. I am not assuming anything extraordinary as far as the content of the motives of our player is concerned. Further, the hypotheses about motivations that I have built are in part based on my analysis of the PTL commitment both in the US and in Spain. In any case, the important thing would be to point out that it is not totally incorrect to argue that law may be the product of passion; on the contrary, as the cases that I have discussed show, passion can be the most appropriate atmosphere for the emergence of law, at least under certain conditions.

Second, as I have already discussed, I have totally excluded in my analysis the role that other variables could and, in fact, do play when a political actor has to make a choice of this significance. For example, the emergence of exogenous variables, such as a corruption scandal when the



president has to make the choice between law and politics, or beliefs, such as when the president believes that a war may explode in the close future, may change outcomes. However, the hypotheses that were presented before were the most parsimonious. My argument is that, admitting that many factors can intersect in the decision a political actor has to make between law and politics, motives are the most important independent variable one should take into account to attempt to explain such choices.

Therefore, my analysis leads to two sorts of generalisations. The first generalisation that can be made is that if similar conditions to the ones that I have taken into account in this article appeared, one should expect similar outcomes to the ones I have established. That is, given similar conditions, in most of the cases -seven out of nine- political actors should choose law instead of politics. Therefore, only in cases in which interest played against interest, and reason against reason, we should expect *ceteris paribus* the emergence of politics.

This result may be paradoxical if tested against real life politics. As a matter of fact, we can observe a lot of politics going around in liberal democracies. However, one observes as well a lot of law going around. The process of over-regulation that many liberal democracies at both sides of the Atlantic have witnessed after the Second World War might find explanation from the perspective of the hypotheses that I have outlined here. Anyhow, it is important to note that the model I have outlined here is theoretical. This model could serve, at the very least, to judge whether the emergence of law in a given case is a rational outcome or not.

The second generalisation that it is possible to make is that the previous analysis sets a framework that allows a better understanding of what law is. This framework has three bases. The first one is that law is better understood not as an autonomous entity but, rather, in the context of the dilemmas between credibility and flexibility that political actors have to face. The second basis is that law is better conceived of as a very sophisticated institutional technology that political actors have created in order to instil credibility in the commitments they make. And the third and last basis would be political actors' motivations. Whether law emerges or not at the end of the day will depend, in the first place, on the motives political actors have at the time they have to make a choice between law or politics; but it will also depend on the motives they anticipate they will have at the time they have to implement their commitments.