SUMMARY

Law and Immaterial

incorporeal things. Whether the goods are corporeal or incorporeal is irrelevant. Today still – the matter of real estate being let aside – custom tradition continues to assert itself, questioning once more the strict distinction made by Gaius between the corporeal property, or ability to dispose totally of the matter, and the right, an incorporeal element, on someone else's belongings.

The author tries to point out 3 different ways to consider the relation between law and immaterial: "absence" as "presence of infinite" (romanistic model); "absence" as infinite presence" (jusnaturalistic model); "absence" as "presence of the void" (Kelsenian model). The metahistorical problems hiding behind this scheme are: transcendence, immanence and contingency. Law is always different from a peculiar event, of the peculiar appearance (transcendence); law is always equal to itself, it always has an immutable data which guarantees its intimate coherence (systemic immanence); law changes, it's an unending affirmation and negation (contingency). Immaterial is behind all these aspects.

The fundamental characteristics of private property are *erga omnes* opposability and *abusus*; contrarily the object of law, the *res* does not seem to necessarily implicate a tangible substance. Therefore it is no abuse to speak of immaterial properties, all the more because the progresses of physics push back the notion of thing towards the infinitely minute.

The development of immaterial realities is testing property law, in so far as it constitutes a linguistic system. If, after analysis, one discovers that many contemporary concepts may be analogically adapted to new types of goods, it is however necessary to measure the perverse effects of a systematic "violence against" of the system of property law.

The dematerialization of the law is linked to the evolution of economics. However they don't follow a parallel course due to the tribulations accompanying the elaboration of judicial representations. A good example is the subject matter of goods which began long ago to diverge from the physical reality but whose evolution towards timelessness has been hidden by the recurrence of corporalism. The notion that things are necessarily embodied is not Roman but romanist and modern idealism has not been able to depart from this tradition despite its propensity to abstraction. It's the arrival of the industrial society that, by the pervasion of appropriation it provoked, made unbearable this reservation and loosened the grip. By the paroxystic extension it gives in other respects to value, this society makes us discover the value has always been lying in law without our noticing it, revealing a structural kinship between law and immateriality.

The study begins with an attempt to clarify the juridical concept of the *res*. It starts from the ancient *ius reale* and the german « *Sachenrecht* », and introduces to the kantian categories of « *Sachen* » and possession (the intentional correlate of the first term). The kantian theory contrasts with the representation of « fluidity » of things, usually found in the proto-juridical exchange as described in the socioanthropology of the gift. Bringing the impro-

bability of the categories of the *ius rerum* to sight, this contrast introduces to the generalized media theory of T. Parsons. The trajectory of the study is that of a dematerialization of objective reality that attains its climax in an utterly semiologized culture.

Marie-Anne Frison-Roche, *Immaterial through Virtuality* 139

Immaterial is often alluded to by the word virtuality, which has been incorporated to the legal language. But double meanings bring confusion and make uncertain the application of legal systems. In fact, in the law, virtuality may be, in the Aristotelian sense, an anticipation of a future but certain development of things. The law, by taking this point into account, travels in time. In a newer way, virtuality may be, in a Platonic sense, an autonomous world of images and ideas, that law has to grasp through imagination. It then travels through space.

Pierre Tabatoni, *Intangibles as Economic Ressource. Introductory Remarks* 149

It is flattering and encouraging for an economist to be hear that economics can bring a contribution to juridical thinking and philosophy of law. By definition, intangibles are a ressource, in economic activity, which is more and more relying upon research, human capacities for ineraction, learning and teaching processes, research and developmennt, organisation for innovation, management of information systems and communications, etc. They provide services which have to be developped and used within a proper practice of strategic management, able to use modern information technology and interactions whithin an overall strategy of development. Such strategies are becoming increasingly global, based on networking and intangibles, as ressources, are fostering that trend. This is a challenge for the conception and the practice of law.

Christian Pisani, *The dematerialized Act* 153

The law of evidence of a dematerialised act between predetermination and freedom. May a contractual solution solve this dilemma?

Jérôme Huet, *Proof and Legal Safety questioned by Immaterial* 163

Legal safety, in contracts concluded by electronic means, depends on the admission by law of technical devices such as cryptology. The rules of proof are also cardinal : they must insist on warranties in order to counteract the risks originating in the immateriality of the medium used to concluded the transaction.

Wanda Capeller, *A not very neat Internet. A few Thoughts about Virtual Criminality* 167

Confidence, risk, anonymity and responsibility are intertwined in the virtual community according to a complex interactions game which causes a *systemic and abstract criminal field* to emerge. The actual characters are the co-constituants of these systems. They permanently produce and reproduce *real material contexts* in which illegal relations also happen. They create a true community of illegal interactive virtual action. Thus virtual criminality reveals itself as a *sensitive question* for the globalised society. When concerned with the State controlling the cyberspace, a "purely national approach is illusion". Due to its transnational and decentralised aspect, to the fleetingness and the evanescence of its contents, the cyberspace can only get organised and define common working rules through a flawless international cooperation. Virtual criminal activities, being "disembodied" have no need for a face to face. It is essential to adopt a new paradigm if one wants to take into account this

sliding toward immaterial and to frame an innovative criminological thinking. The author suggests one refers to an *abstract systemic paradigm.*

The development of immaterial communication and the penetrability of the territory of the State asks the question of the control of the State over a national normative space usually traced exactly over the territory and expressed in the principle of territoriality. Of course, there are normative alternatives but some of them challenge the monopoly of State. The loss of control of the State over its territory leads to wonder if the way this entity is defined by international law remains valid. It seems possible to say that the evolutions, however important, have not yet altered this validity.

The word "immaterial" traditionally is not concerned with repression. Fundamentally, torts law considers the offence from a material point of view. However, the partially dematerialised activities, and it's even truer if they develop in the international order, are designed by nature to ask this law new questions. This is the case for modern communication's networks, like Internet. From this point of view, it might not be necessary to rethink criminal law all over again. But it seems inescapable to think about the right way to make it fill a mission for which it was not made.

There is an indestructible knot between Being, technique and law. But this close knot seems today to be questioned by the new communication techniques which not only blur the task of qualification and of mastering facts assumed by law but in an even more conclusive way generate a real desinstitutionalistion of the world. Law become a mere regularization. It is the very possibility of law, of its understanding of things and of its justice which is hereby threatened. But law owns a genius that nobody can take away: the genius of duration, of transmitting and succeeding things and being through time. It is then the role of law to think how time and transmission can stand the test of the technical dematerialization of the world in order to overcome nihilism.

The immaterial is invading our lives. Law, the whole law is then necessarily concerned. How is one to react? Before adopting a reactive, positive or negative, behaviour, and maybe questioning oneself, one must understand the phenomenon of propagation into the real of what may not be felt by our senses, like touch. Everything then lies in the knowledge and the perception of the phenomenon by our understanding. At that point, one discovers that it is a beginning and not an ending.

Miscellaneous Studies

The author examines, against the doctrines which tend to generalize the phenomenon of violence or wish to suppress it, the complex relationships between violence and law which are at the core of the dynamic of social systems.

The author first explores the concept: "administration of the courts". The following analysis -- which highlights different types of civil and criminal liability in this area, with a focus on Italian law in a comparative perspective -- shows the difficulty in identifying exact limits on various aspects of liable conduct that may be attributed to a chief judge of a court (*culpa in vigilando, culpa in eligendo*, etc.). This examination supports the need to judge severely but also prudently, and it underscores the importance of going beyond a strict judicial point of view in favor of practising an "ethic of responsibility".

Discovered through the practice of business, cooperation is at the birth of transactions and is also set as the horizon towards which the evolution of contractual relations is turned. The judges and the legislator sometimes forced some of its particular applications on certain types of contracts. They have also spread this principle to all kind of conventions. Because cooperation undoubtedly govern the contract at the same time from the inside and from the outside. From the inside, cooperation is the rib of the contract. It's its substance. On this account it pervades the contractual relations as a whole with the effects of its constituting elements by making the contract an act of solidarity between parties and an instrument of harmonization of their reciprocal expectations and commitments. From the outside, the need to cooperate is the way through which the norms of normalization and of behavior from various sources enter the contract to make it more dynamic and alive.

The inadequacy of the Kelsenian positivist theory to the changes in positive Public Law moves us to reconstruct the present theory of Law to address these changes. As far as the so-called scientific basis of the pure theory is concerned, it has never been so much challenged as today.

Systemic and law are not antinomic. This point seems established, nevertheless seldom are the legal works referring to it. This paper wishes to demonstrate that law will find it to its own advantage to appeal to systemic which, more then a mere method, may reveal itself a true methodology. It then allows to explain law but also to explain to the law (taken as a system).

Any text has the meaning the reader gives it. By interpreting and applying a legal text, the legislator, the civil service and the judge exercise a power of creation on the norm they negate. They may decide in conscience if an act, submitted to them, is a norm or a mere statement of intention. And so they create legislative neutrons and other inoperative acts. Shattering the legal order, the constitutional judge succeeds in placing ordinary laws above the general laws by depriving these of their validity. Far from the process of controlling the conformity of the act to the superior norm that is the basis of a legal order, the constitutional judge, convinced by the doctrine, exerts himself in order to deprive acts from their legal efficiency by using the substitution of power in value of law. With justifications he tries, like the traditional is leading him to, to hide his power of wanting and disguises his discretionary power into a linked competence. In fact, it is a dominant ideology, typical of a cen-

tralised power in which the authority creates the norm it pretends to be applying, including its own competence for producing epiphenomenons.

About Niklas Luhmann

The article is a presentation of the studies in historical semantics which represent an important and poorly known corpus in Luhmann's work. The program of these semantica is to grasp, in their diachronic dimension, the processes of functional differentiation of modern societies sine their emergence. The thesis is that semantic evolutions and evolutions of the social structure are closely tied. The article dwells upon the most recent studies to give an idea of the way Luhmann implements his semantic program. All of the proposed angles of vision (upon nature, politics, love, culture) converge in the figure of a sociology of knowledge whose central statement is that of the paradoxical nature of a social communication which has no reference outside itself.

Just after Niklas Luhmann's death, it seems convenient to consider the significance of his work for the development of sociology generally speaking and of sociology of law in particular. The theoretical contribution of his work in itself is beginning to be better known. It is also worth underlining the contribution represented by the arguments which took place about this work; to stress what Luhmann's example may mean in such different fields as the practice of social theory and the policy of disciplines in social sciences; and to see how Luhmann's theoretical propositions may translate into very tangible suggestions to empirical work in social sciences.

International Chronicles

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