SUMMARY

The Private and the Public

This paper argues that the vital and comprehensive analysis of the problematic relation between public morality and private virtue found in Plato's Crito has been rendered trivial by the tendency to disregard the dialogues dramatic structure and to accept dogmatically he opinion that the arguments Socrates gives to the Laws of Athens are his own. Close attention to the drama shows that Socrates' arguments aim at Crito's persuasion, and by analysing the relationship between Socrates and Crito, the relation between public morality and private virtue can then be brought to life.

The author studies the role manliness and the associated features (courage, fortitude,...) have played in the history of liberalism from Hobbes to American pragmatism. He shows that, in particular with Locke, this virtue must be presumed in the liberal theory in order to prevent the invasion of the private by the public.

The author first examines the "liberal" defence of privacy, as the "right to be left alone", the protection of an area of intimacy, within which the individual can flourish, free from external "interference". He then considers why women have had good grounds to be suspicious of the right to privacy, insofar as that right has placed a *cordon sanitaire* around the family, and so protected the despotism of men over women within the home. But he concludes, with Hannah Arendt and Martha Nussbaum, that the correct response to this historical abuse is not to attack the value of privacy as such, but rather to extend the public protection of the law to individuals within the family, and thereby protect a real, egalitarian domain of privacy for both men and women. He also notes the influence of changing technologies and market forces on the role of the family and on the distinction between the public and private domains. He concludes by describing the different evaluations which have been placed on public and private activity in the past and in the present, and criti-

cizes the new economic libertarians for improperly conflating the deepest values of privacy with the unbridled operation of the free market.

The author distinguishes between two forms of individual identity: the identity of the person and the identity given to it by it or its statutes. He studies the different variations, some of them pathological, of these two identities.

In this paper, the issues raised by a public ethic specific to a constitutional democracy are examined. Even if the separation between public and private is essential to the protection of individual liberty, this distinction has to be compatible with the jurisdiction of private moral convictions in the political field. The autonomy of politics makes in fact the bed of totalitarianism. However it is not either possible to resign to the "tyranny of preferences" in the public field. A close scrutiny of the concept of public reason in John Rawls will show how some criticisms concerning individualism may be overcome and how the public forum and the civil society may play a mediating role between the individual and the citizen that Rousseau so much insisted upon opposing.

The contribution, however essential, of the learned doctrine of the 12 and 13th centuries could not, by itself, allow the bringing out of the notion of a public law bound to become slowly autonomous. The ideas and concepts of a rediscovered Roman law, closely examined by specialists in Roman law, adjusted by doctors in canonical law and revisited by the scholastic constituted only scattered elements. Separated from the system that had seen their birth, they could only find again their unity at the very moment when they would again be integrated to an operating and functional whole. This was the role allotted, as soon as the 12th century ended, to the sovereign, his administrators and his judges. All actors of a new political practice, they slowly tear the nascent State from the sphere of private law in order to submit, during all the 14 and 15th centuries, *corona*, *dignitas* and *constitutio* to a statute of public law, while its administration progressively becomes a matter for a system inordinate from common law, be it its *universitates*, its agents or its assets.

An historical presentation of the notion of sovereignty going up to Bodin allows us to isolate the concept of State personality. With Kelsen, this concept disintegrates and is excluded from legal problematic. However it seems that sovereignty is the distinctive mark of the State, what guarantees its unity. This leads to a double discrepancy: sovereignty regarding legal order and State towards the normativist theory. The State is actually a person, but a real person before being a legal person. It can therefore not be thought of without the help of sociology. Ultimately, the real person of the State as well as the State of law itself is defined through systemic integration processes.

The principle of duality in the judicial orders is seemingly the basis for the distinction between public and private law, that it comforts, or even constitutes. However this vision of

a primary and simple allocation of litigation is wrong, because the judicial judge constantly applies administrative law and the administrative judge today exercises repressive actions. Moreover, the contemporary social organisation, the weakening of the figure of the State, the importance of technical objects, the phenomenon of globalisation, etc. militates at the same time in favour of retaining and increasing specialised judges, such as the administrative judge, but also in favour of the unicity of a judicial order linking these particularities.

The notion of justice. Definitions of public justice, private justice. Place and diversity of private justice. Dualism or unity between private justice and public justice? I. Dissimilarities. A.- Antagonistic relationships. B. -Historical reasons. C. - Differing origins of the jurisdictional function carried out. II. Convergence. A. - Influence of the private on public justice. B. - Influence of the public on private justice. C. - Common perspectives. Juridicity. Goal to be achieved.

Is private life the mere opposite of public life? Then one must know if private life must be defined in relation to public life or if one must follow the adverse reasoning. Where is the main point, where is the accessory one? But is there really, in this field, one main and one accessory point ? It is therefore useless to try dissociating private from public. Privacy is more certainly the duty to respect the tranquillity and serenity of others' life. But as soon as one decides to see it as a subjective right, a "right to privacy", it takes an altogether different magnitude. It becomes a claim to be able to "live one's life". The issue is no longer to require from others the minimum duty of respecting one's individuality but to ground on it in order to oppose one's choice of life to the society. Here Latin tradition and American tradition are confronted.

The fleeing identity of labour law. The firm, between market and neo-corporatism (participation - paritarism). The worker, from subordination to collectiveness. In order to fight unemployment, the State uses a labour law transformed into an employment law. The failure of this method, despite the flexibility of the rules and the various aids.

The history of criminal law since 1791 indicates that the areas it has impressed never get completely rid of it, although the legislator thought he was introducing a decriminalisation in these matters. However, under this general observation, one can distinguish two very distinct phenomenon.

a) When some offences are abolished to the benefit of the institution of new liberties, in the sphere of social habits of labour relations for example, one part of the society may reject these improvements. One then witnesses, sooner or later, the reappearance of criminal law, but aimed towards the persons against the increase in liberties. For example, after the decriminalisation of adultery and homosexuality, laws were enacted which punished people guilty of discriminations based on the marital status or on sexual habits.

b) Decriminalisation also appears when the legislator is disheartened by a mass delinquency (bad cheques) or when he wants to set up a discipline too sharp to be expressed through the strict categories of criminal qualifications (fair trading, financial markets). In that case, the criminal repression steps back to the benefit of administrative penalties, but sometimes it does so at the expense of the defence rights or of the predictability of the norm.

One could raise the critical hypothesis that in the civil society private law cannot be distinguished from public law by their conceptual content but only through their form. The private law of free persons in community or society develop into the systems of distributive, commutative and retributive justice whose legal and general form is public law, wheras constitutional law entails the organisation of the political State. Criminal law concerns the constitutional community in its *substantiality*, because crime questions the constitutional relationship. For this reason, criminal law is a public law in front of constitutional law – the legal alternative to a return to the state of nature. Thus criminal law is on the one hand strictly necessary. Generally speaking, it could not be replaced with damages, it is therefore only a speciality of police law. On the other hand, it represents a juridical relationship which categorically includes the offender as autonomous element of law. This distinguishes it completly from private revenge which designates as well under the "stately" form – as new retributivism of pure repression – the illegitimity of the state of nature.

Reviewing private international law shows that this field follows a cyclical pattern of evolution; which also affects the part respectively occupied, among the bases of the theory of the conflict of laws, by considerations concerning either protecting the interests of the State or looking for a justice particular to private relationships. This is why this theory took, in the middle of this century, a definite bend towards private law. However several signs already indicate that the influence of considerations on public law tend to grow nowadays, in order to change again the aspect of international private law.

The article starts from the debate about privatisation, undertakes an analysis of the conception of the public good in the French administrative tradition and points out its deficiencies. It examines the attempts at a revitalisation of the ethics of the public service. A review of the sociological conditions shows the futility of the project. The author tries then to sketch, starting from the descriptive analysis of the *Public Choice School*, a theory of the socialisation of utility which, as a matter of fact, leads to question the relevance of the notion of privatisation. Thus, widening the theoretical framework, the author shows the necessity of a recasting of the primordial concepts (such as market, regulation, privacy...) and their directing distinctions.

The argument between state ownership and private ownership is ancient. However, a new phenomenon is the current shift from the criterion of efficiency to the criterion of justice.
In spite of the attractiveness of the state ownership as a mean to reach the mirage of social justice (in which logically it failed), practice and theory prove that private ownership provides a greater justice, based on its operating procedure (procedural sense of justice of a legal institution), although at the same time, because it is just, it does more to diminish human miseries, particularly for the most impoverished. This fact is now universally accepted.
The comparison and reasons for this greater justice are provided by history (I), economics (II) and ethics (III), which lead to search for criteria to differentiate between private and state ownership (IV).

The closed debate on the greater justice of private property could find an outlet in the application (and the justification) of the subsidiarity principle, embodied in the EC Treaty, leaving to the less efficient and less just state ownership few spheres, and for some of them only for a transitory period.

To postulate a difference in nature between public interest and private interest constitutes the basis of public law. However in this particular branch of law a "Smithean" conception is also at work, according to which the free pursuit of individual interests is the most achieved form of general interest. This tension may, paradoxically, lead up to reasserting the idea of essential function of the State.

This paper analyses the effects of applying European law to the separation of public and private spheres. In a very spectacular way, this law has led at the same time to a very neat limitation of the sovereignty of the States on their public services and of the private economical agents on their property rights. The logic of the market and of the general economical interest from now on prevails on the autonomy of private or public persons.

The contemporary evolution in the regulation of economy shows – in a very topical form – the diversity in the relations between public and private in that field. They first become manifest through some kind of shifting in boundaries, like many examples testify; however the movement remains difficult to interpret, in particular due to the heterogeneity of its symptoms and to the scope of its incidence. In others hypotheses, the relation is expressed through an overstepping of boundaries which testifies, here as every where else, a real blurring of the categories traditionally retained by legal dogmatic.

French law lacks a very general definition of the firm, one that could be used under any circumstance or in any case. On the contrary, in it, the firm appears quite blurred and, so to speak, of a swing-wing nature depending on the considered branch of law. This follows from a very ancient tradition of the legislator who assimilated firm and contractor and limited himself, still in the trade code of 1807, to a distinct study of persons and goods in commercial law without establishing any organic link between the human resources and the material resources of the firm. But without ever giving a global definition since half a century, the legislator has been led to personalise the firm in various fields. Could not, then, the economic reality of the firm be winning over the rigidities of the French tradition by crossing, as such, the legal threshold?

Labour law is confronted to a firm whose goal was initially set by others than itself. If law perceives this as hindering its blossoming, it will try to break it in order to impose its own pattern. Not bothering with the frontiers drawn by corporate law, it favours a flexible conception of the company, going to the essential: an economic activity, a community of men. But from this entity, it intends to impose an organisation which, by serving the participation goal, might be at the root of stiffness only perceived as so many obstacles to its management.

However, even if it began as a "law for the wage-earner" (the formulated norms tending above all to enhance his protection or to better his participation in the management, the

results or the capital of the firm), French labour law today tends to become a "law for the company" taking into account, without renouncing its original preoccupation (and even giving them new applications), the preoccupation and requirements of the firm concerning either its management or organisation modes. It is true that a company has pressure means allowing it to see its claims satisfied, particularly in a country where the number of unemployed goes by millions: the threat to massively suppress jobs by a quickening of the automation process or by delocalisation must be taken seriously. Not to mention that in a time when the industrial activity forms using a high number of workers are disappearing, a company can function without any worker (by appealing, for jobs that are not performed by automatons, to subcontractors, temporary workers or agents...) whereas a worker without a company is quite difficult to envision.

In this paper, the author questions the pertinence of distinguishing between private and public in the field of health. If this distinction seems useful at a first level of the system description, one discovers quickly that one must appeal to the logic that govern the functioning of the organisations, to the types of relation (commercial or not) they have with their environment, to their mode of financing and to the modes of control they are subjected to. The constitution of mixed forms, in which one cannot decide if they are private or public, in France and above all outside France (United Kingdom, USA, etc.) could mean if not the decay of the border between public and private but at least the new position of the State concerning the operators in the health field.

The arguments that prevailed with economists in order to define the validity of public intervention in the cultural sector led them to viciously criticise the functioning of institutions. This critic has been relayed in historical works or more controversial publications, during the 80' and the 90'. Does this means a consensus has been reached, in favour of a return to the market?

Miscellaneous Studies

Scholars have long debated whether Machiavelli is the "first modern", an exponent of "classical republicanism", or a secular thinker within a pre-modern or medieval perspective. The personal relationship between Leonardo da Vinci and Machiavelli, of which political theorists have generally been unaware, provides the basis for a clearer understanding of Machiavelli's role in the transition to modernity. Leonardo's conception of a science of nature and its potential for technological innovations was a major step in the shift from ancient or medieval philosophy to modern natural science. After serving both Ludovico Sforza (1483-1500) and Cesare Borgia (1502-1503) as military engineer, Leonardo returned to Florence in 1503. Machiavelli, who apparently first met Leonardo in 1502, secured his technical assistance in a project to redirect the channel of the Arno River in order to defeat Pisa; Machiavelli was also apparently associated with Leonardo's commission to paint the *Battle of Anghiari*, and arranged for him to conduct a technical mission to Piombino in 1504.

Textual evidence indicates that Machiavelli was clearly influenced by these experiences, thereby suggesting a plausible answer to the controversies about Machiavelli's "modernity". In particular, the difference between Leonardo's approach to mathematics and physics, and that of Galileo or Newton illuminates the further steps that are necessary for the full development of the modern approach to politics by Hobbes and Locke in the Anglo-Saxon tradition, and by Descartes and the *philosophes* on the continent.

Text

The union of the two heterogeneous themes "capitalism" and "utopia" stems from a description of the consequences of a functional differentiation of the societal system. If by "capitalism" one means the description of a society owning an economical system, differentiated and autonomous concerning its operations, the issue is to understand how the political system may exist besides it. Through utopia. The political utopia, which allows the coexistence of both systems, is named "social market economy". But this utopia is not anymore defined as an ideal model allowing a critic of the contemporary society, it is rather a component of the system autodescription, some kind of replica, in the political system itself of the non controllable nature of society.

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