
The public–private relation in the context of today’s refeudalization

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For relations among individuals to be governed by the rule of law and not by the “law” of the strongest, the “res publica” must stand tall. This subordination of private to public is what makes the structure of law intelligible and dependable. It is the West’s response to an anthropological situation experienced by all human civilizations in their vital need to metabolize society’s potential for violence by referring power to an origin which both legitimates and limits it. The containment of individual interests thus necessarily depends on the condition of the res publica which is the bearer of what Ulpian calls “sacred things.” This dogmatic framework has been taken up across the world, in step with Western domination. But this model is being undermined by Western countries themselves in their aspiration to free legal systems from their dogmatic foundations and invert the public–private relation. Ignorance of the organization of powers underpinning government by laws is taking us back to government by men, that is, to feudal ways of hybridizing the public and the private.

Far from originating with the Enlightenment, the West’s public–private distinction comes down to us from the very matrix of both continental and common law traditions: the Code of Justinian (*Corpus iuris civilis*). In the Code’s best known formulation, penned by Ulpian, “there are two branches [*positiones*] of legal study: public and private law. Public law is that which respects the establishment [*statum*] of the Roman commonwealth, private that which respects individuals’ interests.”¹ Today this distinction is understood as an opposition between two different bodies of rules, whereas it actually rests on the idea of different *positions* of the same corpus of rules.²

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¹ “*Hujus studii duæ sunt positiones, publicum et privatum. Publicum ius est quod ad statum rei romanæ spectat. Privatum quod ad singulorum utilitatem.*” quoted in THE DIGEST OF JUSTINIAN 1, 1 §2 (Alan Watson ed. [Latin texts, T. Mommsen and P. Krüger eds], 1985) [hereinafter DIGEST].

² See on this point PIERRE LEGENDRE’S remarks in LE DÉSIR POLITIQUE DE DIEU. ÉTUDE SUR LES MONTAGES DE L’ÉTAT ET DU DROIT [The Political Desire of God. A Study on the Arrangements of State and Law] 237 *et seq.* (2d ed. 2005). For the way in which the notion of “position” has gradually given way to the “opposition” between public and private, see Georges Chevrier, *Remarques sur l’introduction et les vicissitudes de la distinction du jus privatum et du jus publicum dans les œuvres des anciens juristes français* [Remarks on the Introduction and the Vicissitudes of the Distinction between *Jus Privatum* and *Jus Publicum* in the works of ancien regime French Jurists], 1 ARCHIVES DE PHILOSOPHIE DU DROIT 5 (1952).

The body of law (*corpus iuris*) can adopt two positions because the mutual adjustment of private interests in the horizontal plane is dependent on the stability (*status*) of the public institutions in the vertical one. For relations between individuals to be governed by the rule of law and not by the “law” of the strongest, the *res publica* must stand tall. This subordination of private to public is what makes the structure of law intelligible and dependable. It is the West’s response to an anthropological situation experienced by all human civilizations in their vital need to metabolize society’s potential for violence by referring power to an origin which both legitimates and limits it.³ The containment of individual interests thus necessarily depends on the condition of the *res publica*, which is the bearer of what Ulpian calls “sacred things.”⁴ Today we would call these the “founding prohibitions” through which each legal system expresses its own particular axiological principles.

This dogmatic framework has underpinned legal systems as varied as those of classical Rome, the monarchies of the *ancien régime*, nation states, and colonial empires. In a little over two hundred years, it has been taken up in a spectacular fashion across the whole world, in step with Western domination, and it has forced onto the defensive other ways of civilizing power, such as Asian or African ritualism,⁵ or Jewish or Muslim religious legalism.⁶ But this model is being undermined by Western countries themselves, in their aspiration to free legal systems from their dogmatic foundations and invert the public–private relation. Ignorance of the organization of powers underpinning government by laws has returned us to government by men, that is, to feudal ways of hybridizing the public and the private (section 2).

1. The inversion of the hierarchy between public and private

The modern state was first conceived as heir to the Roman *res publica*, that is, as an immortal Being which ensured the perpetuity of a people across the generations, and

³ See Legendre, *supra* note 2, at 237 *et seq.*

⁴ “. . . some matters being of public, others of private interest. Public law covers sacred things, the priesthood, and offices of the state.” [translation modified] (“*Sunt enim quaedam publice utilia, quaedam privatim. Publicum jus in sacris, in sacerdotibus, in magistratibus consistit*”), see DIGEST, *supra* note 1, at 1 §2.

⁵ For the former, see Léon Vandermeersch, *Ritualisme et juridisme* [Ritualism and Legalism], in *ÉTUDES SINOLOGIQUES* 209 (1994); for the latter, 6 INCIDENCES (Special Issue: Le Chemin du rite. Autour de l’œuvre de Michel Cartry [The Path of Rites. Around the work of Michel Cartry] (2010) (esp. the contribution of Alfred Adler, *Logique sacrificielle et ordre politique: le statut de la personne du chef en relation avec son statut de sacrifiant* [Sacrificial Logic and Political Order: The Status of the Person of the Chieftain in Relation to his Status as the Sacrificant], *id.* at 149).

⁶ For the former, see Joseph Méléze Modrzejewski, *Tora et Nomos* [Tora and Nomos], in *UN PEUPLE DE PHILOSOPHES. AUX ORIGINES DE LA CONDITION JUIVE* [A NATION OF PHILOSOPHERS. AT THE ORIGINS OF THE JEWISH CONDITION] 193 (2011); for the latter, Jacques Berque, *La norme dans le Coran*, in *RELIRE LE CORAN* 79 (1993) and JACQUES BERQUE, *OPERA MINORA. VOL. 1: ANTHROPOLOGIE JURIDIQUE DU MAGHREB* [Legal Anthropology of the Maghreb] (2001).

guaranteed respect for “self-evident” truths and “unalienable and sacred rights.”⁷ However, since the Enlightenment, a whole swathe of Western thought has claimed to be able to eradicate the dogmatic dimension of these legal and socio-political arrangements. Any consideration of “sacred things,” that is, of the founding prohibitions based on “self-evident truths” which are the source of “unalienable and sacred rights,” has been relegated to the private sphere of “religious feeling,” leaving a purely instrumental conception of law. The abandonment of any heteronomic dimension has reduced law to a simple tool, an instrument at man’s disposal (section 1.1). This has led to the phenomenon of the privatization of legal rules and their transformation into just so many arms to be taken up in the struggle for individual self-assertion (section 1.2).

1.1. Instrumentalization of law

The totalitarian regimes which flourished in the 20th century were the first to claim that they had freed law and institutions from any trace of metaphysics, anchoring them in the “true laws” discovered by racial biology or scientific socialism. From this scientific perspective, relations between individuals are not subject to a public law which itself refers back to “sacred things,” but rather are dictated by a Truth inherent in the power relations between races or classes. Thus Marxism-Leninism believed in laws of history which were to bring about a classless society without law. In order to hasten this end of history and do away with a “bourgeois legality” which was no more than a superstructural emanation of class interests, it was imperative to make the legal form itself wither away, and to eliminate all legal guarantees that might enable individuals to escape the dictatorship of the proletariat. The Maoist regime took this further than most, especially during the Cultural Revolution. Many of its former followers can now be found among the theorists of anarcho-capitalist “deregulation,” in China and the West alike. As for Nazism, in its enterprise of bringing into being a “master race” destined to dominate all others, it referred to laws derived from the biology of its time.⁸ “We shape the life of our people and our legislation in accordance with the verdicts of genetics,” the *Hitler Youth Manual* proclaimed.⁹ For Hitler, “[t]he state is only the means to an end. The end is: conservation of the race.”¹⁰ Law is here entirely conflated with the will of the strongest or, in Goering’s hedonist version, “*Recht ist das, was uns gefällt.*”¹¹ Instead of simply obeying laws as laid down, the “healthy” citizen’s

⁷ Compare the American Declaration of Independence, in which an immortal people speaks (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights”), the famous Preamble to the American Constitution (“We the People of the United States, in Order to form a more perfect Union, establish Justice . . .”), and the Preamble—which is still in force—to the French Constitution of the Fourth Republic (“the people of France proclaim anew that each human being, without distinction of race, religion or creed, possesses sacred and inalienable rights”).

⁸ See ANDRÉ PICHOT, *PURE SOCIETY: FROM DARWIN TO HITLER* (2009) and ANDRÉ PICHOT, *AUX ORIGINES DES THÉORIES RACIALES. DE LA BIBLE À DARWIN* [The Origins of Racial Theories. From the Bible to Darwin] (200).

⁹ NAZI PRIMER, *quoted in* HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 350 (1967).

¹⁰ *Quoted in id.* at 357.

¹¹ “Law is what it pleases us to dispose,” *quoted in* RUSH RHEES, *DISCUSSIONS OF WITTGENSTEIN* (1996).

duty was to examine, and even anticipate, the will of the Führer, who set the goals to be attained rather than the rules to be observed.¹² Loyalty to a person thus supplanted obedience to the law.

In the end, human laws managed nevertheless to prevail over the super-human ones these systems claimed to embody. In order to be treated on an equal legal footing with their colonizers, colonized peoples successfully turned the weapons of law back against their oppressors. And at the end of World War II, Western nations set about rehabilitating the role of states, by binding them to the categorical imperative of respect for human dignity. This imperative also underpinned the new worldwide legal order which they sought to establish in the same period, with a view to furthering social justice, and which entailed the proclamation of new areas of human rights: economic, social, and cultural rights.¹³ Since these could not be effective without state intervention, Western European welfare state systems underwent a period of unprecedented growth.

However, the subordination of economic transactions to principles of social justice did not survive the upheavals of the last three decades. The neo-conservative revolution brought back a belief in super-human forces—market forces this time—capable of generating a self-regulating “spontaneous order,” in which government and law would give way to governance and contract. This spontaneous order was meant to stem from what Hume called the “three fundamental laws of nature”: “stability of possession, its transference by consent, and performance of promises”¹⁴—in other words, from three principles of private law: the freedom to contract, ownership, and fault-based liability. To concretize this self-regulating system, priority would have to be given, in the hierarchy of positive law, to private law, which expresses natural laws, over public law. Like human law in relation to divine law in a previous era, public law would be simply an “organizational law,” a necessary evil whose role should be to “reinforce” and not obstruct the action of the “invisible hand” of the market.¹⁵

¹² The National Socialist regime’s only “constitution” was martial law (by a decree of Feb. 28, 1933, which suspended the fundamental rights guaranteed by the Weimar Constitution). A state of exception was thus transformed into the very foundation of the legal system, in conformity with the theories of Carl Schmitt, who was an authority for Nazism on constitutional matters (see WILLIAM EBENSTEIN, *THE NAZI STATE 3 et seq.* (1943)). These theories have in common with a certain kind of positivism their disregard for whether political power is bound by a founding norm or not, which leads to tarring with the same legal brush the totalitarian state and a state governed by the rule of law. This lack of differentiation is similar to the refusal to distinguish between reason and madness; and the totalitarian state is indeed a state of madness, as writers as divergent as Orwell and Ionesco have shown us.

¹³ On this sharp shift in dogma post-war, see ALAIN SUPIOT, *SPIRIT OF PHILADELPHIA. SOCIAL JUSTICE VS. THE TOTAL MARKET* (Saskia Brown trans., 2012).

¹⁴ DAVID HUME, *TREATISE OF HUMAN NATURE* 526 (Clarendon, 1965), quoted in F.A. HAYEK, *LAW, LEGISLATION AND LIBERTY: A NEW STATEMENT OF THE LIBERAL PRINCIPLES OF JUSTICE AND POLITICAL ECONOMY. VOL. 2: THE MIRAGE OF SOCIAL JUSTICE* p. 40 (1976) [hereinafter *LAW, LEGISLATION AND LIBERTY II*].

¹⁵ See F.A. HAYEK, *LAW, LEGISLATION AND LIBERTY: A NEW STATEMENT OF THE LIBERAL PRINCIPLES OF JUSTICE AND POLITICAL ECONOMY. VOL. 1: RULES AND ORDER* (1973). The idea that law is a necessary evil is particularly ingrained in Protestant culture. See Jean Carbonnier, *Toute loi est en soi un mal?*, in *ESSAIS SUR LES LOIS* 281 (1979).

This is the ideology which has carried the day since the 1980s. Economic and social rights are decried as false rights, and the privatization of the institutions of the welfare state tops national and international political agendas. The utopia of a worldwide legal order which would no longer be a patchwork of states but rather a “Great Open Society” peopled by clouds of contracting particles pursuing their private interests, has given rise to a financial, technological, and economic space which ignores national frontiers. The abolition of barriers to the free circulation of goods and capital, along with the new information and communication technologies, has struck at the sovereignty of states and reduced their legislative efficacy. According to one of the most influential prophets of this neo-liberal utopia,

the only ties which hold the whole of a Great Society together are purely economic . . . it is the . . . ‘cash-nexus’ which holds the great Society together, [and] the great ideal of the unity of mankind in the last resort depends on the relations between the parts being governed by the striving for the better satisfaction of their material needs.¹⁶

This promise of a “Great Society” is true to the West’s philosophy of history, which is essentially a secular adaptation of an eschatology of salvation.¹⁷ Marxism was only a rival version of this eschatological vision of history. That is why the collapse of the Soviet Union, while it clearly demonstrated the inanity of believing in “laws of history,” was nevertheless interpreted as the sign of the universal and lasting triumph of market forces, that is, again, as an expression of the laws of history, and even, for the most enthusiastic, as the “end of history.”¹⁸

No longer, then, should individual interests be subordinated to the general good, but on the contrary, the state should be transformed into a means of maximizing one’s individual utilities. This idea, which is central to today’s economic ideology, actually has religious roots. The notion that a divine plan would convert private vices into public prosperity began to take shape in the 17th century,¹⁹ before coming into its own in the 18th century, first in the provocative form of Mandeville’s fable of the bees,²⁰ and then in Adam Smith’s “invisible hand” which thereafter came to play the role of divine providence in economic theory.²¹ This faith in a spontaneous order resulting from the free play of individual egoisms was the particular hallmark of the British Enlightenment, in contrast to the German Enlightenment’s faith in the Kantian categorical imperative.²² It still has considerable influence, since it is integral to the ideal

¹⁶ Hayek, *LAW, LEGISLATION AND LIBERTY II*, *supra* note 14, at 112.

¹⁷ See KARL LÖWTH, *MEANING IN HISTORY: THE THEOLOGICAL IMPLICATIONS OF THE PHILOSOPHY OF HISTORY* (University of Chicago Press, 1957) (1983).

¹⁸ FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1993).

¹⁹ See DANY-ROBERT DUFOUR’s refreshing rereading of Pascal and Jansenist authors in *LA CITÉ PERVERSE: LIBÉRALISME ET PORNOGRAPHIE* 58–59 (2009).

²⁰ BERNARD DE MANDEVILLE, *THE FABLE OF THE BEES OR PRIVATE VICIES, PUBLIC BENEFITS* (Penguin, 2011) (1714); LOUIS DUMONT, *FROM MANDEVILLE TO MARX. THE GENESIS AND TRIUMPH OF ECONOMIC IDEOLOGY* (1977).

²¹ On this filiation, see TZVETAN TODOROV, *LE SIÈCLE DES TOTALITARISMES [A Century of Totalitarianisms]* 31 (2010).

²² DUFOUR, *supra* note 19, at 138–139. Saint Augustine was the first to conceive human history as a confrontation between love of God taken to the extreme of self-contempt (*Amor Dei usque ad contemptum sui*) and self-love taken to the extreme of contempt for God (*Amor sui usque ad contemptum Dei*). See ST. AUGUSTINE OF HIPPO, *CIVITAS DEI*, XV, 28.

of the “American way of life,” which is pursued in all four corners of the globe.²³ In a recent book, the philosopher Dany-Robert Dufour has convincingly demonstrated that today’s overriding belief in the virtues of self-love and the concomitant dismissal of any categorical imperative lead to a Sadean “perverse society.”²⁴ Indeed, as the title alone of the Marquis de Sade’s best known philosophical romance indicates, in its two parts—*Justine; or, The misfortunes of virtue. Followed by the story of Juliette her sister, or Vice amply rewarded*²⁵—what Sade’s work shows is the true face of a world governed by the maximization of individual utilities.²⁶

1.2. Privatization of law

In the field of law, one of the effects of inverting the relation between public and private has been a privatization of legal rules. The shrinking of government in favor of the private sphere, as advocated by neo-liberalism, is the primary cause of this trend and a direct consequence of attributing to private operators tasks formerly ensured by the state (tasks which include not only welfare state services, but even certain sovereign functions such as prison management and airport surveillance). But the privatization of legal rules is also, indirectly, a consequence of the doctrine of “new public management,” introduced with a view to applying private sector management methods to the public sector.²⁷ Its goal is to subject the whole of society to a single science of organization, based on criteria of efficiency alone. There is nothing new about this, if we recall that Lenin had already sought to fuse state and factory into one, through a scientific organization of labor inspired by Taylorism.²⁸ The ecstatic reunion of capitalism and communism—those twin forces of Westernization of the globe—spawned the utopia of a world in which everything could be calculated and managed, in which governance by numbers would replace government by laws, and societies could survive independently of the *res publica*, that is, independently of the heteronomy which has always defined the state in the Western legal tradition. In this universe, the law is no longer conceived as a norm transcending the individual’s interests, but as an instrument at the latter’s disposal. Where the individual will has been elevated into

²³ See, e.g., the spectacular publishing successes of AYN RAND, including the unambiguously titled *THE VIRTUE OF SELFISHNESS. A NEW CONCEPT OF EGOISM* (1964). To date, her books have sold more than 25 million copies, and *ATLAS SHRUGGED*, at more than 7 million copies sold, is the most popular novel in the U.S. after J.D. SALINGER’S *THE CATCHER IN THE RYE* (1951).

²⁴ DUFOUR, *supra* note 19.

²⁵ MARQUIS DE SADE, *THE COMPLETE JUSTINE, PHILOSOPHY IN THE BEDROOM AND OTHER WRITINGS* (Richard Seaver and Austryn Wainhouse trans., Grove Press 1965) (1795).

²⁶ Dufour, *supra* note 19, at 150, compares Adam Smith’s maxim, “Give me that which I want, and you shall have this which you want” (*THE WEALTH OF NATIONS*, I) with Sade’s: “Lend me the part of your body that can satisfy me for a moment, and if it pleases you, enjoy that part of my body that can be gratifying to you” (*JULIETTE*, PART I).

²⁷ In France, this policy found expression particularly in the Organic Law Relating to the Finance Laws (LOLF) of Aug. 1, 2001 and in the General Review of Public Policy (RGPP). See *La Révision générale des politiques publiques*, 136 *REVUE FRANÇAISE D’ADMINISTRATION PUBLIQUE* 751 (Oct. 2010).

²⁸ See Jean Querzola, *Le chef d’orchestre à la main de fer. Léninisme et taylorisme* [The Conductor with an Iron Fist. Leninism and Taylorism], in 32–33 *Recherches* (Special Issue: Le soldat du travail) 58 (Sept. 1978).

the necessary and sufficient condition of the legal bond, every person should logically be able to choose the law which suits him or her best (having the law for oneself) and be able to lay it down (having oneself as law). These two tendencies are abundantly visible in positive law today.

The formula “a law for oneself” aptly describes the increasing number of cases in which people have the right to choose the law that is to be applied to them, and can thus elude the common rule which applies equally to all. This was an idea which real-communism had already made its own. In the words of Todorov:

the Constitution and laws are not held in high esteem by the security forces or the other powerful figures of the regime . . . for whom the individual will always win out over the law binding on all. . . . Here, everything can be arranged, negotiated, paid for: the exception has replaced the rule.²⁹

That is why communist countries could so easily embrace the neo-liberal credo of subordinating the public to the private, which, in our present globalized context, has led to treating national legal systems as though they were “legislative products” competing on an international market of legal rules.³⁰ This competition is meant to bring about the “selection of rules” which can best maximize individual utilities.³¹ The World Bank’s “Doing Business” program, designed to ensure transparency concerning this market, is inspired by just such Darwinian principles of legal selection. For the benefit of “consumers of legal rules” seeking to boost their profits, it ranks the constraints presented by different national legislations,³² and in so doing, clearly fulfills one of its primary objectives: to work towards abolishing the legal protections attached to employee status.³³

Certain principles of international law have also been revived by the free market economy, in particular the freedom of contracting parties to choose the law to be applied to them. The objective criteria for determining the relevant jurisdiction

²⁹ TODOROV, *supra* note 21, at 19.

³⁰ On this unholy union of capitalism and communism, and the emergence of what the Chinese Constitution calls the “Communist market economy,” see SUIPOT, *supra* note 13, at ch. 1.

³¹ In Hayek’s view, Social Darwinism was wrong to focus on the selection of congenitally fitter individuals, because the time scale involved was too long, and this approach neglected “the decisively important selective evolution of rules and practices”: see F.A. HAYEK, *LAW, LEGISLATION AND LIBERTY: A NEW STATEMENT OF THE LIBERAL PRINCIPLES OF JUSTICE AND POLITICAL ECONOMY*, VOL. 3: *THE POLITICAL ORDER OF A FREE PEOPLE* 154 (1979) [hereinafter *LAW, LEGISLATION AND LIBERTY III*].

³² See the Doing Business program, at <http://www.doingbusiness.org>, and its annual ranking of legislation, where you can find a representation of the earth as a sphere of legislative areas in competition: “Business planet mapping the business environment.”

³³ See *DOING BUSINESS IN 2005, REMOVING OBSTACLES TO GROWTH* (2005), copublication of the World Bank, the International Finance Corporation, and Oxford University Press. The World Bank uses a methodology developed by Harvard and Yale economists. See Juan Botero, Simeon Djankov, Rafael La Porta, Florencio Lopez-de-Silanes, & Andrei Shleifer, *The Regulation of Labor*, Q. J. ECON. (Nov. 2004), available at http://www.economics.harvard.edu/faculty/shleifer/files/reg_labor.pdf. The “Employing Workers” indicator was removed under the combined pressure of the International Labour Organization and the Global Unions. For a critique of these indicators, see Janine Berg & Sandrine Cazes, *Policy-making Gone Awry: The Labor Market Regulations of the Doing Business Indicators*, 29(4) COMP. LABOR L. & POLY J. 349 (2008).

governing a particular legal operation, and the principle whereby the mandatory rules in force are inexorably applicable in that jurisdiction have limited purchase in a world in which economic operators are free to move their products, production sites, and profits wherever they please. The old principle of the autonomy of the will, which international private law elaborated some 150 years ago, has been resurrected in order to justify an international market of legal rules where different national legislations compete like commercial products for the favor of the customer who is out to get the best value for money. Such legal forum shopping, facilitated by the removal of trade barriers, allows private persons to choose the public framework most likely to maximize their individual utilities.³⁴

Law shopping is of course incompatible with the rule of law, but it has its place in a system based on *rule by laws*.³⁵ The maxim “no contract without law” has been turned into its opposite: there is no law without contract, that is, without contracting parties who agree to apply whatever law they have chosen. Ultimately, the only law which holds is that of the pursuit of individual interest. The theory of the efficient breach of contract, promoted by part of the Law and Economics school, makes perfect sense in this context: a promise is binding on the person who makes it only if it is in his interests to keep it; otherwise he should be free to break it, as long as he compensates the other contracting party who had placed their trust in it.³⁶ This theory takes to its logical conclusion today’s thorough-going challenge to heteronomy, which strips even the spoken word of its binding force between people.

Darwinian legal selection is henceforth promoted within the European Union itself. Already in 1999, the European Court of Justice had upheld a company’s right to dodge the rules of the country in which it was operating by registering in a country with less restrictive ones.³⁷ Since the accession of post-communist countries, competition between the welfare and fiscal regimes of member states has been introduced, as recommended by the open method of coordination (OMC).³⁸ This “soft” pressure to compete, which does not take the form of legislation, operates in conjunction with the pressures applied by the Court of Justice of the European Communities (CJEC). The European Treaty’s aim of “harmonisation [of conditions] while [the] improvement is being maintained,” which informed the Court’s previous case law, has been

³⁴ See Horatia Muir Watt, *Aspects économiques du droit international privé (Réflexions sur l’impact de la globalisation économique sur les fondements des conflits de lois et de juridictions)*, RECUEIL DES COURS DE L’ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE. VOL. 307/2004 (2005), available at http://www.nijhoffonline.nl/book?id=er307_er307_025-383; Alain Supiot, *Le droit du travail bradé sur le marché des normes* [Labor Law Traded on the Market of Norms], 12 DROIT SOCIAL 1087 (Dec. 2005), p. 1087f.

³⁵ On this opposition, see HAROLD BERMAN, *LAW AND REVOLUTION*, vol. II 19 (2003).

³⁶ See RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* (5th edn. 1998). The theory of the “efficient breach of contract” has been criticized by several authors, particularly Daniel Friedmann, *The efficient breach fallacy*, 18 J. LEGAL STUD. 1 (1989).

³⁷ Case C-212/97, *Centros Ltd v. Erhvervs- og Selskabsstyrelsen*, 1999 E.C.R. I-1459 (Mar. 9, 1999), Opinion of Advocate General La Pergola.

³⁸ TFEU, arts. 145 *et seq.* See Patricia Pochet, *La stratégie européenne pour l’emploi en 2001* [European Strategy for Employment in 2001], 12 DROIT SOCIAL 1090 (2001); Stéphane de la Rosa, *Stratégie européenne pour l’emploi: les nouvelles orientations*, 12 DROIT SOCIAL 1210 (2005).

abandoned in favor of allowing companies established in member states with low wages and weak social protection to exploit their “comparative advantages” to the full. It has done this by allowing companies to ignore collective agreements³⁹ and the laws which index salaries to the cost of living;⁴⁰ it has dismissed the presumption of salaried status enshrined in the laws of the foreign countries in which these companies operate;⁴¹ it has condemned legal measures which ensure that the rights of workers in host countries can be adequately monitored;⁴² it has claimed that flags of convenience are a question of freedom of establishment;⁴³ and, in principle, it has outlawed strike action against relocations.⁴⁴ In one of its recent judgments along these lines, the CJEC decided that the goal of protecting social harmony and the purchasing power of workers did not constitute public imperatives sufficiently important to justify infringing the principle of the unrestricted provision of services.⁴⁵

The formula “oneself as law” best summarizes this inversion of the hierarchy of public and private, since it evokes a universe in which legal rules find their ultimate source in the individual will and every individual is deemed a “mini-state.”⁴⁶ Under its influence, rules which appeared beyond question, such as the fact that violating another person’s physical integrity is unlawful, have been challenged, as the European Court of Human Rights’s (ECtHR) recent judgments on torture show. In 1997, it had ruled that “one of the roles which the State is unquestionably entitled to undertake is to seek to regulate, through the operation of the criminal law, activities which involve the infliction of physical harm. This is so whether the activities in question occur in the course of sexual conduct or otherwise.”⁴⁷ By 2005, however, it had dismissed this “unquestionable” principle in the case of a woman savagely tortured by her husband and by third parties to whom the husband proposed the spectacle of his wife’s torment in return for a fee. The ECtHR overturned its 1997 ruling in deciding that “the criminal law could not in principle be applied in the case of consensual sexual practices, which were a matter of individual free will.”⁴⁸ To make enjoyment of someone else’s suffering into the source of a right, and moreover a human right which no national law can infringe, is a perversion of the anthropological function of the law: instead of

³⁹ Case C-341/05, *Laval* [2008] IRLR 160 (Dec. 18, 2007); Case C-346/06, *Rüffert v. Land Niedersachsen* [2008] IRLR 467 (Apr. 3, 2008).

⁴⁰ Case C-319/06, *Commission v. Grand Duchy of Luxembourg* [2009] IRLR 388 (June 19, 2008).

⁴¹ Case C-255/04, *Commission v. France* [2006] E.C.R. I-5251 (June 15, 2006).

⁴² Case C-319/06, *supra* note 40.

⁴³ C-438/05 *Viking Line* [2007] ECR I-10779 (Dec. 6, 2007).

⁴⁴ *Id.*

⁴⁵ Case C-319/06, *supra* note 40.

⁴⁶ “The German people has splintered into as many mini-States . . . as there are individuals” (inner monologue of a driver in *Der Himmel über Berlin* [*Wings of Desire*], a film by Wim Wenders, 1987).

⁴⁷ *Laskey, Jaggard and Brown v. The United Kingdom* (109/1995/615/703) Eur. Ct. Hum. Rts. (Feb. 19, 1997).

⁴⁸ K.A. and A.D. v. Belgium, App. nos. 42758/98 & 45558/99, Eur. Ct. Hum. Rts (Feb. 17, 2005). See Muriel Fabre-Magnan, *Le sadisme n'est pas un droit de l'homme* [Sadism is not a Human Right], *RECUEIL DALLOZ* 2973 (2005).

channeling human passions and keeping at bay the darker side of our nature, which lurks within each of us, the law here serves to give it free rein.⁴⁹

This perversion is nothing new. The consent of the weak to the total domination of the strong was already used in the nineteenth century to justify inhuman working conditions. And Goering's definition of law as "what it pleases us to dispose" (*was uns gefällt*) was also exalting the omnipotence of the individual will. It is noteworthy that none of these perverted uses of law lasted very long. They led to deadly stalemates for which some solution had to be found. This explains the radical change in dogma after World War II and the rejection of pre-war scientisms. In recognition of the fact that law is not there to pander to the egoism, violence, greed, and madness of human beings, but on the contrary to channel these and keep their lethal power at bay, new legal instruments enshrining the imperative of humanity's survival were developed. It is indeed necessary, time after time, to submit the whims of the strong to something which is binding on everyone and which is even stronger than they are, to prevent human society from turning into a jungle. A close analysis of contemporary legal developments will help us identify the immune reaction of today's societies to the deconstruction of institutions of the state and the subordination of the public to the private.

2. The neo-feudal hybridization of public and private

We must attempt to dispel any misunderstanding at the outset. The notion of a "re-feudalization of law," which several authors have put forward,⁵⁰ does not mean a return to the Middle Ages, but the reemergence of a legal structure which the birth of the nation state had rendered obsolete. We can grasp this better if we recall the sedimentary character of the history of law. As Aziz Al Azmeh has shown for Islam⁵¹ and Pierre Legendre for the West, the dogmatic categories of the past do not fit neatly into a linear history but constitute a reservoir of sense which can always reemerge and produce new normative effects. As is the case for any system based on dogma, law cannot be situated in a continuum of chronological time but takes place in a sequential time frame in which any new law both repeats a founding discourse and generates new cognitive effects. That is why old categories of thought can take on new forms,

⁴⁹ François Ost rightly notes that the Sadean hero's pleasure stems in part from the fact that he substitutes for the law shared in common by all a "law of exception, of which he alone is the author, thus depriving his victims of the right to seek society's protection." See FRANÇOIS OST, *SADE ET LA LOI* 194 (2005).

⁵⁰ See particularly Alain Supiot, *Actualité de Durkheim. Notes sur le néo-corporatisme en France*. 6 DROIT ET SOCIÉTÉ 177 (1987); Alain Supiot, *La contractualisation de la société* [Contractualization in Society], in UNIVERSITÉ DE TOUS LES SAVOIRS, VOL. 2: QU'EST-CE QUE L'HUMAIN? 156 (Yves Michaux ed., 2000); Pierre Legendre, *Remarques sur la re-féodalisation de la France* [Remarks on the re-feudalization of France], in ÉTUDES EN L'HONNEUR DE GEORGES DUPUIS 201 (1997) (reprinted in PIERRE LEGENDRE, *SUR LA QUESTION DOGMATIQUE EN OCCIDENT*, VOL. 2: NOMENCLATOR 271 (2006)); L'HYPOTHÈSE DU NÉO-FÉODALISME. LE DROIT À UNE NOUVELLE CROISÉE DES CHEMINS [The Hypothesis of Neo-feudalism. Law at a New Crossroads] (José Lefebvre ed., 2006).

⁵¹ Aziz Al Azmeh, *Chronophagous Discourse: A Study of Clerico-Legal Appropriation of the World in an Islamic Tradition*, in RELIGION AND PRACTICAL REASON 163 (Frank E. Reynolds & David Tracy eds., 1994).

for example the concept of citizenship, which regularly reemerges, from the Athenian republic to the Treaty of Maastricht’s European citizenship via citizenship in Roman law or the French Revolution.

One of the reasons why legal dogma accumulates like sediment is that there are a finite number of types of legal structure, and only variations within each type are affected by historical change. Borrowing from Chinese political philosophy, one can distinguish broadly between two systems of government: government by laws and government by men. In a system of government by laws, the condition of *each* person’s freedom is that *all* are subject to the same general and abstract laws. This structure supposes the presence of a third-party guarantor of laws, who transcends the will and interests of individuals. Two distinct legal realms can be articulated in this dogmatic configuration: that of rules bearing on objects transcending any calculation of individual utility (the realm of deliberation and the law) and that of rules bearing on objects subject to the calculation of individual utility (the realm of negotiation and contract). This kind of arrangement alone can allow men and things to be treated in the contractual sphere as abstract exchangeable entities, whose value can be determined by a shared monetary standard, since their qualitative differences are meanwhile enshrined in the domain of the law, beyond calculation.

In a system of government by men, by contrast, people are placed in a network of relations of dependence. The guiding idea is not that all should be subject to the same abstract law, but that each person should behave in accordance with his or her place in the network. Each must do his best to serve the interests of those on whom he depends, and be able to count on the loyalty of those who are dependent on him. People’s legal status in their mutual relations and their relations to things is defined not by subordination to the same impersonal law, but by personal ties. While the figure of the third party guarantor does not disappear altogether, it becomes a guarantor of bonds rather than of laws. This type of configuration has no need for the figure of the sovereign state, but this is at the cost of amalgamating the realm of the calculable and the incalculable. Since there is no third party to take charge of the latter, the distinctions between public and private become blurred.⁵²

Few political systems have really managed to hybridize these two models in the way that Imperial China did (which perhaps explains in part its exceptional longevity).⁵³ More often than not, one of the models is dominant, even if elements of the other are always also present. In feudal systems, which are one of the principal types of government by men, it is the idea of personal bond which is dominant. Such systems have always resurfaced in periods when centralized power receded, but each time they have taken on a different form. Japanese feudalism, for example, while it too grew out of the collapse of imperial power, is in many respects different from the feudal systems which arose in the West during the Middle Ages, on the ruins of the Carolingian empire. One

⁵² On this point, see Chevrier, *supra* note 2, at 16 *et seq.*

⁵³ See LÉON VANDERMEERSCH, LA FORMATION DU LÉGISME. RECHERCHE SUR LA CONSTITUTION D’UNE PHILOSOPHIE POLITIQUE CARACTÉRISTIQUE DE LA CHINE ANCIENNE [The Formation of Legalism. An Exploration of the Constitution of a Political Philosophy Characteristic of Ancient China] 271 *et seq.*, esp. Conclusion (1965).

of the distinctive features of Western feudalism is precisely that the ties of dependence between people have a legal character.⁵⁴ The most fundamental bond, and the backbone of the social order, is vassalage, which is a contract of a very particular type. Vassalage combines a personal and a real element. The personal element consists in one person being made dependent on another. The form this takes varies with the status of the parties concerned, and may be homage or serfdom. The real element consists of the fact that the dependent party is granted a possession burdened with obligations to the benefit of the grantor. The obligations are acquitted through services rendered, determined by the status—vassal or serf—of the grantee. One has only to look beneath the surface of today’s contractualism to discover these two dimensions—personal and real—in contemporary law, and the techniques regarding people and things which characterize feudal legal structures.

2.1 Feudal rights over people

The techniques whereby people are *infeudalized* today go by the name of what jurists and sociologists call “networks.”⁵⁵ The representation of the world as a network of communicating particles was championed by cybernetics in the post-war years, before being acclaimed by post-modern philosophy.⁵⁶ And today participatory management puts it into practice, in the way it subjects people to fulfilling objectives rather than observing rules. If we recall that networks are a feudal invention, we will easily appreciate that their legal character is not exhausted by the battery of contracts devised to put them into play today, and that the network society does not mark the culmination of individual freedom, but rather the reemergence of feudalism. This reemergence is signaled by a double displacement: from sovereign to suzerain and from law to bond.

a) *The shift from sovereign to suzerain power*

The shift from sovereign to suzerain power is the most visible sign of the extension of vassalage in Europe today. The suzerain has immediate authority over his vassals, but not over his vassals’ vassals, whereas the sovereign’s power is supreme—self-positing and bearing its cause within itself—and can be exercised directly over all his subjects. That is why, ever since Bodin, sovereignty has been the cornerstone of the theory of the state. However, this concept can no longer account for the state’s contemporary transformations, due to which the state increasingly resembles a suzerain rather than a sovereign power.

⁵⁴ See MARC BLOCH, *FEUDAL SOCIETY*, 2 vols. (L. A. Manyon trans., Routledge & Kegan Paul 1961) (1939).

⁵⁵ MANUEL CASTELLS, *THE RISE OF THE NETWORK SOCIETY* (1996); Gunther Teubner, *The Many-Headed Hydra: Networks as Higher-Order Collective Actors*, in *Corporate Control and Accountability* 41, 41–42 (J. McCahery, S. Picciotto & C. Scott eds., 1993); and Gunther Teubner, *Netzwerk als Vertragsverbund* [Networks as Connected Contracts] (2004); FRANÇOIS OST AND MICHEL VAN DE KERCHOVE, *DE LA PYRAMIDE AU RÉSEAU? POUR UNE THÉORIE DIALECTIQUE DU DROIT* [From the Pyramid to the Network? Towards a Dialectic Theory of Law] (2002).

⁵⁶ See especially GILLES DELEUZE, *CAPITALISM AND SCHIZOPHRENIA. VOL. 2: A THOUSAND PLATEAUS* (Brian Massumi trans., Continuum 2004) (1980).

The European Union provides the best illustration of this revival of relations of suzerainty. European political institutions are clearly not sovereign. Member states have the position of vassals of a European Union which is itself deprived of most of the attributes of sovereignty over its citizens. In other words, the EU has only indirect power over its populations, and requires the mediation of those vassal states which acknowledge its dominium. Similar relations pertain to certain international economic organizations like the International Monetary Fund (IMF), which can only wield effective power if states swear allegiance to it and accept its structural adjustment programs in return for a portion of their sovereignty. There is no contractual agreement, in the strict sense, but an act of allegiance is performed, which takes the form of a letter addressed by the country concerned to the IMF.⁵⁷ While the ostensible goal of such institutions is “economic governance,” the techniques employed clearly create bonds of vassalage, which in the long run cannot but compromise the national sovereignty of the populations in question. Since the collapse of the financial markets in 2008, this trend has gained significant momentum. No sooner had the banks been bailed out by the public purse than their representatives were given leadership positions in the most indebted European countries. Whereupon the countries which had footed the bill for the collapse of the financial markets were forced, precisely in the name of the debts thus contracted, to privatize what was left of their public services and entirely deregulate their labor markets. As the “Greek crisis” perfectly illustrates, there is much more at stake here than the familiar practice of privatizing profits and having taxpayers bear the losses. What we are witnessing, rather, is an undisguised challenge to a people’s right to self-government. Friedrich Hayek’s battle cry of “dethroning politics” and introducing a “limited democracy,” which would put the distribution of wealth⁵⁸ beyond the reach of the ballot box, is close to becoming a reality in Europe today.

b) The shift from law to bond

The shift from law to bond characterizes the plethora of new contracts which not only oblige the parties to give, do, or refrain from doing something specific, but additionally create between them a bond which obliges one party to behave according to the expectations of the other. This is the type of contract generally used to establish a bond of economic dependence between one (physical or legal) person and another. Such contracts, which integrate one person into another’s economic activity, affect the status of the parties retroactively and oblige them to create relatively stable bonds between them.⁵⁹ The same techniques are employed in the contractualization of public action.

⁵⁷ These letters have been made available on the IMF’s website: <http://imf.org/external/index.htm>.

⁵⁸ See F.A. Hayek, *The Containment of Power and the Dethronement of Politics*, in *LAW, LEGISLATION AND LIBERTY III*, *supra* note 31, 128.

⁵⁹ From a similar perspective, see the work of Ian R. MacNeil, which highlights the increase in “relational contracts” in the U.S.: *Contracts: Adjustments of Long-term Economic Relations under Classical, Neoclassical and Relational Contract Law*, 72 *Nw. U. L. Rev.* 854 (1978); *Relational Contract: What We Do and Do Not Know*, 3 *Wis. L. Rev.* 483 (1985); *Reflections on relational contract*, 144 *J. INSTITUTIONAL & THEORETICAL ECONOMICS* 541 (1985); and *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* (1980).

Instead of submitting the activities of private persons to rules, the state entrusts them with defining how the objectives it sets should be realized, while reserving the possibility of monitoring the outcome and intervening if failings are observed. In domestic law, these techniques go by the name of the “contractualization of public action.”⁶⁰ In labor law, they have taken the form of what is called negotiated law, which seeks to condition legislative reform on prior negotiation between social partners.⁶¹ In EU law, these techniques are employed in the area of economic governance, in order to establish mechanisms whereby a state’s fulfillment of the obligations it has undertaken regarding its public finances may be monitored on a permanent basis. If the *Treaty on Stability, Coordination and Governance in the Economic and Monetary Union*, which was signed on 2 March 2012 by 25 Eurozone governments, is ratified, a decisive step will have been taken along this path. The Treaty envisages quantified objectives for rebalancing a country’s budget, along with a “correction mechanism” which “shall be triggered automatically in the event of significant observed deviations from the medium-term objective or the adjustment path towards it” (art. 3(e)). States are thus no longer expected to comply with European legislation but to react in real time to quantitative data. But what this cybernetic dream of putting human affairs on automatic pilot really conceals is the establishment of legal bonds of allegiance.⁶²

2.2. Feudal rights in things

The proliferation of techniques for transferring things is the other symptom of this feudal revival. Under feudalism, where wealth was essentially vested in land, men were considered simply as custodians of worldly goods, which ultimately belonged to God. Land always came from someone else, and it was rare for rights in land not to derive from a bond of dependence with another person (the exception being allodial land). Hence the Medieval distinction between the *dominium utile* of the vassal or tenant, and the lord’s *dominium eminens* over the land granted in fief or on the basis of the peasant’s dues or his serfdom. The granting of land was indissociable from certain personal bonds between grantor and grantee, which could take the form of acts of loyalty (owed by the vassal to his suzerain) or of economic contributions (owed by peasants or villeins to their lord). In English law, the idea still holds that no subject can, strictly speaking, be “owner” of his land, even if he has exclusive enjoyment of it, since all people receive their land from the Sovereign.⁶³ In feudal law, public office or ecclesiastical office were subjected to the same system of transfer and to revenue from

⁶⁰ See CONSEIL D’ÉTAT, LE CONTRAT, MODE D’ACTION PUBLIQUE ET DE PRODUCTION DE NORMES, RAPPORT PUBLIC [The Contract, a Mode of Government Action and of Production of Norms. Public Report] (2008).

⁶¹ The requirement for this preliminary negotiation was first introduced into European law in 1992 by the Maastricht Treaty (consolidated provisions in arts. 154–155 of the Treaty on the Functioning of the European Union (TFEU)). In France it became mandatory through a law of Jan. 31, 2007. See Alain Supiot, *La loi Larcher ou les avatars de la démocratie représentative* [The Larcher Law or the Avatars of Representative Democracy], 5 DROIT SOCIAL 525 (2010).

⁶² See art. 8 of the Draft Treaty, which gives the Court of Justice the power to impose financial penalties on non-compliant countries.

⁶³ F.H. LAWSON & BERNARD RUDDEN, *THE LAW OF PROPERTY* 80 (2d ed. 1995).

goods attached to the office constituted the office holder’s remuneration (or benefice). This link between *officium* and *beneficium* was at the origin of the venality of offices and charges which lasted until the end of the ancien régime.⁶⁴ The relations between people and things thus always preserved the imprint of relations between people.⁶⁵ As Louis Dumont has shown, an economic ideology implies quite the reverse: that relations between people are secondary to relations between people and things.⁶⁶ This is because the market economy requires goods for exchange, which must consequently be stripped of any trace of personal bonds. Here again, an analysis of positive law shows how feudal motifs have reemerged, in the form of the fragmentation of ownership and the farming-out of practical functions.

The fragmentation of ownership is clearly a consequence of the extension and consecration of intellectual property rights. But it also affects tangible property. Intellectual property rights imply that one person may have rights over something which is the physical property of another. The bearer of intellectual property rights has prerogatives which vary from case to case, but they always entail a restriction of the otherwise absolute rights of material ownership. This is because intellectual property rights are attached to the object regardless of its physical owner. As Mauss noted, intellectual property brings back into the modern world something we thought was confined to “archaic” societies, namely the spirit of the thing, which follows the thing wherever it goes, and must always circle back to whoever put it into circulation.⁶⁷ This is precisely what the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) signed in the framework of the World Trade Organization enshrines: freedom of circulation and the obligation on every custodian of the thing throughout the world to honor his debt to the owner of the spirit of the thing.⁶⁸ The revival of the old feudal distinction between *dominium utile* and *dominium eminens* is here unmistakable.

However, intellectual property is not the only factor in the fragmentation of ownership. The legal concept of ownership is today incapable of encompassing the actual economic control over certain goods, a control which may be spread between many title holders, from private persons to public authorities. This insufficiency should come as no surprise regarding “things” which can only be traded on the basis of a fiction, such as labor, natural resources, and money.⁶⁹ Fictitious commodities such as human or natural resources can only be traded if we limit the rights of those who appropriate

⁶⁴ See ADHÉMAR ESMEIN, *COURS ÉLÉMENTAIRE D’HISTOIRE DU DROIT FRANÇAIS* [Introductory Course in the History of French Law] 139 *et seq.*, 271 *et seq.*, 411 *et seq.* (1898).

⁶⁵ For a clear and concise overview, see PAUL OURLIAC & JEHAN DE MALAFOSSE, *HISTOIRE DU DROIT PRIVÉ. VOL. 2: LES BIENS* [History of Private Law. Vol. 2: Property] 148 (2d ed. 1971).

⁶⁶ DUMONT, *supra* note 20.

⁶⁷ MARCEL MAUSS, *THE GIFT. THE FORM AND REASON FOR EXCHANGE IN ARCHAIC SOCIETIES* 10 (W.D. Halls trans., Routledge 1990) (1923).

⁶⁸ Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), signed at Marrakesh, Apr. 15, 1994.

⁶⁹ See Karl Polanyi, *The Self-Regulating Market and the Fictitious Commodities: Labor, Land, and Money*, in *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* 71 (1944).

them, since their preservation and renewal affect the common good. It is because labor law and environmental legislation set reasonable limits on the exploitation of these resources that they also allow labor and nature to be treated *as though* they were commodities. These legal constraints, recently labeled “sustainable development,” show the limited purchase of private property rights over these types of resources, which belong to the *dominium eminens* of transcendent beings such as the common heritage of the nation or of humanity,⁷⁰ including the human body, for the purposes of limiting its exploitation and commercialization.⁷¹

But the loss of an exclusive bond between people and their property also concerns non-fictitious commodities. In the regime of liability for damage caused by things in one’s care, there had already resurfaced the notion of a guardian, who was not necessarily the owner of the thing and whose relation to the thing depended on his relation to the owner. The loss of exclusivity is even clearer in the regime of liability for defective products.⁷² It is the producer of the thing—the manufacturer or whoever put the object into circulation on a market—who remains responsible for the damage caused by its defects, whether or not the producer is bound by contract with the injured party. As in the case of intellectual property, the producer’s liability follows the product and leads to the need for systems of product traceability to be set up. The difference here is that what circulates with the product is the producer’s obligation and not the author’s debt-claim. The producer continues to be answerable for the safety of the product, regardless of its temporary guardians, with the result that the liability for damage doubles up into, on the one hand, what could be called a liability *utile*, incumbent upon the product’s custodian, and a liability *eminens*, which the producer cannot evade.

The farming-out of responsibilities occurs in both the public and the private sector, and blurs the distinction between the two. It first came to prominence in the management of private companies. Under pressure from the financialization of the economy, companies divided up their business into cost and profit centers, and set them

⁷⁰ See The Universal Declaration on the Human Genome and Human Rights of Nov. 11, 1997, art. 1.

⁷¹ The notion of Common Heritage of Humanity first appeared in maritime law (see the Montego Bay Convention of Dec. 10, 1982) before being extended to celestial bodies and land-based property (see Ph. Kahn, *Les patrimoines communs de l’humanité: quelques réflexions* [Humanity’s Shared Patrimony: Reflections], in *ÉTUDES EN HOMMAGE À A. KISS, LES HOMMES ET L’ENVIRONNEMENT, QUELS DROITS POUR LE VINGT-ET-UNIÈME SIÈCLE?* 307 (1998); F. Terré, *L’humanité, un patrimoine sans personne* [Humanity—No Person’s Patrimony], in *MÉLANGES PH. ARDANT* 339 (1999); G.B. Kutukdjian, *Le génome humain: patrimoine commun de l’humanité* [The Human Genome: Humanity’s Shared Patrimony], in *HECTOR GROS ESPIEL, AMICORUM LIBER. THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY. PERSONNE HUMAINE ET DROIT INTERNATIONAL* 601 (1997); and more generally FRANÇOIS OST, *LA NATURE HORS LA LOI* (1995); DAVID HIEZ, *ÉTUDE CRITIQUE DE LA NOTION DE PATRIMOINE EN DROIT PRIVÉ ACTUEL* (2003); Alain Sériaux, *La notion juridique de patrimoine. Brèves notations civilistes sur le verbe avoir*, *RTD CIV.* 801 (1994).

⁷² This regime was established by the Council Directive 85/374/EEC of July 25, 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products. See Y. MARKOVITS, *LA DIRECTIVE C.E.E. DU 25 JUILLET 1985 SUR LA RESPONSABILITÉ DU FAIT DES PRODUITS DÉFECTUEUX* [The E.C. Directive of July 25, 1985 Concerning the Liability for Defective Products] (1990); SIMON TAYLOR, *L’HARMONISATION COMMUNAUTAIRE DE LA RESPONSABILITÉ DU FAIT DES PRODUITS DÉFECTUEUX. ÉTUDE COMPARATIVE DU DROIT ANGLAIS ET DU DROIT FRANÇAIS* [EU Harmonization on the Liability for Defective Products. A Comparative Study of English Law and French Law] (1999).

ever more stringent performance targets. This move towards ever greater autonomy went hand in hand with out-sourcing the least profitable processes and focusing on what was called a company’s “core business,” that is, whatever operation appeared at the time most competitive to the financial markets. The business enterprise model changed accordingly in ways which are familiar to us today: the “Fordist” model of an integrated and highly hierarchical organization gave way to a network model in which the company contracts out an increasing proportion of the operations needed to manufacture its products.

As for the farming-out of public assignments, it is inherent in the contractualization of state action. In imitation of private sector management, the state has on the one hand divided up its different operations, and on the other out-sourced those not considered integral to its “core business.” In the first case, its activities are made autonomously self-contained, on condition that certain objectives are pursued, and their attainment measured by quantifiable indicators. In the second case, its activities are privatized on condition that companies accept regulation by the regulatory authorities designated to ensure the general interest for a product or a particular service (electricity, highways, telecommunications, the stock exchange, the railroads, prisons, and so forth).⁷³ A panoply of feudal legal mechanisms resurface here in a new guise. The venality of offices and charges, which a century ago Esmein deemed a “monstrous organization,”⁷⁴ returns in force, in the name of dismantling the monopolies enjoyed by public companies. In the provisions of what the Treaty on the Functioning of the European Union calls “services of general economic interest” (art.14 and Protocol no. 26) relations of “tenure–service” once again become the norm. And what the principle of the separation of economic operators and regulators conceals is the much older distinction between power (*potestas*) and authority (*auctoritas*) by which the feudal system bound powers in order to stem any absolutist tendencies. More generally, the privatization of public assignments gradually erodes the hard-won distinction, established at the dawn of the modern age,⁷⁵ between a public role endowed with a timeless dignity, and the mortal being who temporarily occupies it.

⁷³ MARIE-ANNE FRISON-ROCHE, LES RÉGULATIONS ÉCONOMIQUES: LÉGITIMITÉ ET EFFICACITÉ [Economic Regulations: Legitimacy and Efficiency] (2004).

⁷⁴ Esmein, *supra* note 64, at 403.

⁷⁵ For a history of this process, see ERNST KANTOROWICZ, THE KING’S TWO BODIES: A STUDY IN MEDIEVAL POLITICAL THEORY (1957).