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Public Law as the Law of the Res Publica

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In 1989, on the occasion of the Bicentennial of the French Revolution, I gave a talk at Suffolk University Law School on *The Distinction Between Man and the Citizen in the Declaration of the Rights of Man and the Citizen of 1789*.[1] In retrospect, I am afraid that this may not have been one of my best talks. The truth of the matter is that I failed to give the rationale for this crucial distinction and its meaning in the Declaration of 1789. I said that the distinction was almost invisible in this country and much less important than in the French legal system, but I did not explain why.

Today, thanks to the research I did to write my most recent book, *Introduction to Public Law: A Comparative Study*,[2] I am in a better position to indicate why the distinction between Man and the Citizen really matters in French law. The reason lies in the distinction between public law and private law that structures the French legal system.

What does that mean when it comes to rights? It means that rights have to be exercised in the context of common values shared by all citizens, that is, res publica. The stronger the res publica is, the less absolute rights exist. The res publica in a polity means that rights are not absolute, that they must be exercised responsibly and may not be abused. In other words, res

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1. Elisabeth Zoller, The Distinction Between Man and the Citizen in the Declaration of 1789: Past Significance and Contemporary Relevance, Address Before Suffolk Univeristy Law School (1989), *in* CELEBRATING HUMAN RIGHTS at 3-12 (Margaret Collins Weitz ed., 1990).

2. ELISABETH ZOLLER, INTRODUCTION TO PUBLIC LAW: A COMPARATIVE STUDY (Martinus Nijhoff Publishers 2008).

publica implies that rights are not exercised in a state of nature, but rather in a political association, which we usually call the State, or a Republic, that is, the community of the permanent interests of the people.

In saying this, I do not mean that the distinction between public law and private law is not made in the United States. But it is not as entrenched as it is in France, and it does not have the same meaning. First, there are, in the U.S., no public law courts separate from the judiciary in charge of adjudicating public law cases, such as France's *Conseil d'Etat*, the supreme court of the administrative courts. Second, the content of public law in this country is not the same as in France. When American lawyers refer to "public law values," they refer to individual values, such as due process of law, fairness, legality, the rule of law, and rationality. In contrast, French public law calls for public-oriented values, such as missions of public service, burdens of general interest or duties of solidarity.

I have always been puzzled by this difference, all the more so because the two countries share a common destiny in the ideal of the republican form of government both embrace. To make a long story short, I decided to investigate the origins and evolution of public law, and eventually wrote *Introduction to Public Law* to understand why and how public law followed such different paths in both countries.

My methodology was historical and comparative. I went back to the origins, Roman law, because Rome is the birthplace of the distinction between private and public law through the concept of res publica, and I tried to understand what happened to that distinction after the collapse of the Roman Empire. I started, first, in Europe with the Monarchical Age, which is crucial in the history of public law because, during this period, concepts such as sovereignty and the State gave a new twist to the distinction between private and public law. I then turned to the fate of that distinction in the Republican Age, after the revolutions of the eighteenth century that took place in this country and in France. During this presentation, I intend to take you on the same journey by going back to the legacy of Roman law and the meaning of the res publica, and then, the fate of that res publica, first, in the Monarchical Age, and, second, in the Republican Age.

THE LEGACY OF ROMAN LAW

Public law, in the sense first defined by the Romans, is the law of res publica, literally the public thing, *that is,* the public interest or common good, predicated on the differentiation between the State and the government.

Res publica was created by the Romans to solve problems arising out of Rome's domination of the Mediterranean Basin. Rome's urban institutions were modeled after those of the ancient cities with a senate and an assembly of citizens that elected the magistrates. With the legion's conquest, these institutions became inadequate; they were already out of date when the Republic extended its government over the Italian Peninsula. In order to avoid a return to the Oriental tradition of power personified in a single man, such as the Egyptian Pharaoh, the Romans invented the notion of res publica: the goals, the affairs, institutions that are the thing of the peoples, a sort of property held in common. The power of the people over their property is abstract and general. No one possesses or exercises it personally or exclusively. The foundation of the power is distinct from its exercise; the res publica belongs to everyone in general and to no one in particular. Everyone participates in it, but no one has ownership of it.

Cicero was the first author who defined the public thing as the thing common to all, the thing of the people, a notion that eventually evolved into the common good or the public good. Res publica, res populi. Cicero wrote: "The public thing is the thing of the people and by the people I mean not just any gathering of people, but a large group of people forming a society and united by their adherence to a pact of justice and the sharing of common interests."[3] (*juris consensu et utilitatis communione sociatus*).

This pact of justice and the community of interest born of the solidarities between men are the two pillars of the public thing – the thing of the people – which was later viewed as the common, or public good or the general interest, all of these terms being different expressions of the res publica. There is no polity without a "public thing." As Sieyes put it on the eve of the French revolution: "It is impossible to conceive of a legitimate association whose objects are not common security, com-

3. Cicero, DE LA RÉPUBLIQUE 12 (Alfred Fouillée ed., Delagrave 1868).

mon liberty, in a word, the res publica (*chose publique*)."[4] The res publica is what ties the people together; it forms the raison d'être of their will to live together, to form a society. Note how different Cicero was from current modern thinking. He was certainly no Margaret Thatcher, who once suggested, "There is no such thing as society."[5]

The content of the res publica in Rome was well articulated in the opening statement to the great compilation of Roman laws that form the Digest:

> The law obtains its name from justice; for (as Celsus elegantly says) law is the art of knowing what is good and just. . . . (2) Of this subject there are two divisions, public and private law. Public law is that which has reference to the administration of the Roman commonwealth; private law is that which concerns the interests of individuals; for there are some things which are useful to the public, and others which are of benefit to private persons. Public law has reference to sacred ceremonies and to the duties of priests and magistrates.[6]

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4. EMMANUEL SIEYÈS, QU'EST-CE QUE LE TIERS ETAT? 205 (Robert Zapperi ed., Droz 1970) (1789). Sieyès' phrase in French reads as follows : "Il est impossible de concevoir une association légitime qui n'ait pas pour objet la sécurité commune, la liberté commune, enfin la chose publique." The English translation for "*chose publique*" is no easy matter. *Id.* (literally 'public thing'). Neither "common welfare," (translated by Blondel: "It is impossible to imagine a legitimate association whose object would not be the common security, the common liberty, and, finally, the common welfare"), nor "public establishment" (translated by Sonenscher: "It is impossible to conceive of a legitimate association whose objects are not common security, common liberty, and a public establishment") conveys the real meaning of *chose publique*, the French expression for *res publica*, which Webster's Dictionary, defines as "the commonwealth, the State." EMMANUEL JOSEPH SIEYES, WHAT IS THE THIRD ESTATE? 156-57 (M. Blondel trans., Praeger Publishers 1964); EMMANUEL JOSEPH SIEYES, POLITICAL WRITINGS INCLUDING THE DEBATE BETWEEN SIEYES AND TOM PAINE IN 1971 153 (Michael Sonenscher trans., Hackett Publishing 2003); WEBSTER'S DICTIONARY 1005 (9th ed. 1991). Instead of an impossible translation, I have chosen to keep the Latin expression as the best word to convey the object of public law.

5. Interview by Douglas Keay with Margaret Thatcher, British Prime Minister, in London, England (Sept. 23, 1987) *available at* http://www.margaretthatcher.org/speeches/displaydocument.asp?docid=106689. The exact quotation reads:

> I think we have gone through a period when too many children and people have been given to understand "I have a problem, it is the Government's job to cope with it!" or "I have a problem, I will go and get a grant to cope with it!" [or] "I am homeless, the Government must house me!" and so they are casting their problems on society and who is society? There is no such thing! There are individual men and women and there are families. . . . *Id.*

6. THE DIGEST OF JUSTINIAN vol. 1, p. 1 (Theodor Mommsen & Paul Kruger ed., Alan Watson trans., 1998).

The content of public law in Rome was determined by the close and intimate connection that existed in the ancient world between public law and religion. This connection has evolved over the centuries. It entered into a period of profound transformation with the Reformation in the sixteenth century. The collapse of the Church and the beginning of the concept of sovereignty paved the way for the emergence of the State, the abstract entity through which modern public law developed.

The res publica involves the general public utility (*utilitatis communione*), which brings people together in a society bound by common objectives (the public good, the general welfare) as well as by legal bonds (the constitution). The conceptualization of res publica as distinct from private interests is one of the greatest legacies of Roman civilization.

What happened to that great concept after the fall of the Roman Empire? It became a thing of the past. No concept could be more foreign than res publica to the peoples who invaded Europe. Everything was private to them, including the territory. Res publica was brought back to life by the Church through the concept of common good. Later, in the sixteenth century, res publica became absorbed in the State, which developed within the matrix of sovereignty. It entered two periods: first, the Monarchical Age, during which the res publica became the exclusive concern of one single organ, the monarch, and, second, the Republican Age, when the res publica became the responsibility of the people.

THE DESTINY OF THE RES PUBLICA IN THE MONARCHICAL AGE

In France, the res publica – known by the French as the State (*l'Etat*) – is a very meaningful notion; it occupies a place without any equivalent in foreign legal systems. The State, in France, is the community of the permanent interests of the nation, not the instrument of domination or coercion that it may represent elsewhere, in other legal systems. The State is the res publica, the Republic, and it is surrounded today with the same respect, even the same devotion, that formerly surrounded the royal institution. The cognate notions that revolve around it, such as general interest, public interest, or public utility, resonate throughout the French legal system as constant reminders

of its structuring principle and pervading spirit; the compelling submission of private interests to the public thing.

When these concepts affect a private legal situation in a regular and justified manner – when, in other terms, the Republic speaks by its laws – private interests must yield, just as they did in the past when the King spoke by his laws. The French monarchy has engraved the public thing and its legal institution, the State, in the "habits of the heart" of the French nation.[7]

In Germany, the same concern for the public good developed, although on different foundations. Whereas the State, the res publica, in France was a thing, it became a person in Germany, through the concept of the *Fürstenstaat* (Prince State). The concept of the Prince State had a profound influence on public law. The concept of the personified State was not effectively destroyed until the nineteenth century, and in the twentieth century, it was retained only in a pyramid of norms, as illustrated by the legal theory of Hans Kelsen.

In England, by contrast, the State did not develop, nor did the values it is supposed to harbor. The British Monarchy has never been able to develop a strong sense of the res publica. When it tried to do so under the Stuart dynasty, it was too late. The common law had already developed enough so that the prerogative had to submit to it. When it comes to public law, British legal history is crucial to understand the opposition between England and the continent. There is a tension between the rule of law and the res publica. The former is not supposed to work in favor of the latter; both concepts are even regarded as antagonistic. The rule of law, as guaranteed by the courts, works primarily in favor of individual rights.

That brings us to the question of whether the judge can enunciate the public good? The answer is in the affirmative if the public good is regarded as an aggregation of private rights; but this is not the republican definition of the public good. The

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7. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 275 (Harvey Mansfield trans. ed., Delba Winthrop trans., 1835). As Alexis de Tocqueville used the expression "habits of the heart:"

> I understand here the expression *mours* in the sense the ancients attached to the word *mores*; not only do I apply it to mores properly so-called, which one could call *habits of the heart*, but to the different notions that men possess, to the various opinions that are current in their midst, and to the sum of ideas which the habits of the minds are formed.

public good does not mean making people happy all the time; it does not mean the systematic satisfaction of individual preferences over collective values. There is an opposition between the liberal and republican conceptions of the public good. Although this opposition should have diminished with the passage to the Republican age, that was not the case. A huge divide took place between two republican models and the opposition forms the substance of the second part of my book. Below, I briefly summarize the main theme of my argument on the destiny of res publica in the United States and in France.

THE DESTINY OF THE RES PUBLICA IN THE REPUBLICAN AGE

What happened to the res publica when it ceased to be the responsibility of a single organ, a monarch, and became, instead, the thing of the people? The answer is that two models have developed since the revolutions of the eighteenth century, the American model, defending the liberal state, and the French model, more inclined to the republican model.

As opposed to France, the United States does not seem to have a strong feeling for the res publica, at least today. Although solemnly enunciated in the Constitution, the Preamble, the Bill of Rights, and the Civil War Amendments, the values of the American res publica have become increasingly abstract. Pure public law values such as a more perfect union, general welfare, blessings of liberty to ourselves and our posterity, citizenship, equal protection of the law, are now perceived by the citizenry as formal rather than substantive. Interestingly, these values do not enable power, they actually disable it. They work to the benefit of private interest of individuals and they tend to merge with the rights of man, or individual values, rather than collective or public values.

Contemporary Americans seem to no longer believe that all members of the public share the same core interest in a homogeneous set of interests. This is not the case in France where the concepts of fraternity and, today especially, solidarity are constantly reiterated in political programs.

What explains these differences between the two countries? That is a question that has driven my research. I do not pretend to have reached definite answers; rather, I have made suggestions. A caveat is in order here: When you embark on a comparative project of this sort, you must inevitably paint with a

broad brush. Details have to be sacrificed in order to unveil bright lines.

What are these bright lines? The first of them, of course, is the legacy of Roman law. The easy explanation for the differences in res publica between France and the United States is that the former inherited Roman law, whereas the latter did not. The argument derives from the opposition between common law and civil law systems. But it is not as strong as it looks. The weak part of the argument is this: There are some periods in American history where res publica glows as the shining sun, periods where the Constitution is not construed as limited to the protection of certain basic liberties, but instead is interpreted as having created a representative government capable of translating the people's will into effective public action. The New Deal or the Civil Rights eras are cases in point. In many ways Reconstruction, too, may be an example of a very strong res publica, but not in its representative form. During this period, the federal government passed important legislation, dealing with emancipation, poverty, civil rights, the environment, health and safety, etc. These periods demonstrate that the res publica can be very strong in the United States, despite the fact that the country never formally adopted Roman law.

One must, therefore, look for factors other than the heritage of Roman law to explain the divide between the two republican models. There are probably multiple factors but when it comes to a legal analysis, two factors distinguish the starting points of the U.S. and French revolutions.

When framing the constitution of the polity, the first major difference between the United States and France is that the two countries did not solve the problem of *representation* in the same way. In large republics, representation is a necessity, but how should it be organized? Each country has given different answers, particularly as to the question of whether private interests are allowed to be represented in the legislature. In the United States, the answer is in the affirmative, which results in factions arising within the legislature and the problem of how to neutralize them. Madison made a brilliant analysis of the problem in Letter 10 of the Federalist Papers. France, however, took a different path. Instead of neutralizing factions, it decided from the beginning that factions would not be admitted in the legislature. This is what the French theory of national represen-

tation means when it makes the deputy, not the representative of his constituents or constituency, but rather, the representative of the Nation. The two opposite theories on representation have important consequences for the law-making process in each country.

The second major difference is in *the means chosen to protect rights of man.* Both republics share similar concern for the protection of individual rights, but they completely differ on the best means to protect them. In choosing the statute (*Loi*) over the common law to protect their rights, as was the case in the Monarchical Age, the French abandoned the old medieval tradition of justice as sovereign expounders of the law. By contrast, the Americans chose the courts. Here lies the reason American courts stand fast against legislatures and occasionally venture to set aside their laws.

In the common law tradition, to which the United States remains steadfastly faithful, courts are able to rely on a rich legacy of rights and liberties dating from time immemorial. These ancient rights and liberties have never been abrogated; on the contrary, all of them were accepted by the legislatures in the states, and they are still in force when courts decide on their cases. This wealth of rights and liberties is the common law, and this common law is the fulcrum that allows the lever of judicial review to rise so high. As in England, in this country the common law means that in the legal system there exists a bundle of rights and freedoms, coming from the depths of history, which are not part of the social contract but rather are reserved, that is, protected from legislative encroachments. And the role of courts is to dig into this endless wealth of rights, as needed, and remind the legislator of their existence.

In the civil law system, which originates in the principles laid down by the French Revolution, courts do not have these resources. There are no reserved rights in this model; there are just natural rights which have all been put into the social contract and which are all subject to regulation by statutes. The essential characteristic of the political association comprising the Nation is that everyone gives himself entirely to it, so that the conditions are equal for all. As Rousseau put it:

> If the individuals retain certain rights, as there would be no common superior to decide between them and the public, each being on one point his own judge would ask to be so on all. The state of nature

> would thus continue and the association would necessarily become [inoperative] or tyrannical.[8]

Under such circumstances, in French law, only a statute may regulate rights, to the exclusion of a court's opinion. This is actually what the Declaration of Rights of 1789 precisely provides for in Article 4: "The exercise of the natural rights of any man has no other limit than those which guarantee to the other members of society, the enjoyment of the same rights. These limits may be defined *only* by statutory law." (emphasis added).

The idea that a judiciary counterforce in the republic would regulate, in lieu of the legislature, the boundaries and the content of the rights and liberties among and between citizens in the republic, is not a complement, but rather a distortion of the French Republican model.[9]

In conclusion, lest I am misunderstood, let me say that, in my opinion, one model is not better than the other. I am not interested in choosing. I'm interested in explaining what happened, why we have ended up with such different models, and why the divide between Europe and this country seems to be growing.

My feeling is that the Americans and the French should talk to each other more often than they do, for, at the end of the day, both countries share the same values.

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8. JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT, bk. 1, ch.6 (G.F.H. Cole trans., BN Publishing 2008) (1762).

9. The recent constitutional revision of July 23, 2008, which gave any party to a case the right to question the constitutionality of a statute, did not modify this principle in a fundamental way. CONSTITUTION OF THE FIFTH REPUBLIC 2008 ammend. 61-1 (Fr.) (to come into effect in the manner determined by statute). The reason is that, should such a question be raised by a party to a case, the court is powerless to answer it. The court must stop the proceedings and refer the matter to one of the two supreme courts (*Cour de cassation* or *Conseil d'Etat*), which are in charge of deciding whether the question is worth being referred to the Constitutional Council for a ruling on the merits, but not whether the party is well-founded in questioning the statute. The crux of this extremely cumbersome procedure is that judges are still precluded from reviewing statutes themselves and determining the content of rights and liberties among citizens and between the citizens in a republic.