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Law, Justice and Republic: the French republican model of judicial regulation

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Judicial institutions have a growing role in our societies. In France, some scholars have even introduced the idea of a "government of the judges". However, while judicial institutions do not substitute for government and public administration they are becoming an important means of social regulation, perhaps the main one. In my opinion, this tendency is not the result of desires within the judiciary to increase the power of magistrates; rather it arises from the social functions attributed to the judicial system by the French model of republican law and justice.

The development of European judicial cooperation, the establishment of a "European judicial area" and the building of a new European judicial system demand cooperation and highlight areas of competition between different national models. Consequently an evaluation of these models is necessary.

This chapter focuses on the structural logic of the French model. Starting from the standard analysis of judicial regulation (section 1), I consider the basis of the model - the republican dualism- (section 2) to explain the present role of judicial regulation (section 3).

1 The standard model of judicial regulation

A judicial system is necessary to enforce the law by monopolizing the power of constraint which obliges everyone to accept legal consequences. But the judicial system plays other roles in the application of the legal system. It is the final arbiter of the law when there are different interpretations of it, and when opposite claims are advanced. Hence the judicial system is a system of legitimate interpretation and distribution of the concrete effects of law in a social context. The judicial system has two main types of effects on law: efficiency effects and distribution – equity – effects. This is true of the two great functions of the judicial system: the function of law enforcement (section 1.1), and the function of law interpretation (section 1.2).

1.1 Law enforcement

1.1.1 An efficiency perspective

The need for an enforcement apparatus

A legal system without enforcement is no more efficient than a system without law. If the legal system is an efficient one, judicial enforcement is efficient. The point is easily demonstrated in a game scenario.

We use an evolutionary game approach because the problem is not only one of static equilibrium, but also a problem of evolution of strategic choices in a context of evolving conventions. This approach introduces two interesting innovations into the game theory.

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First, it requires players to have only weak rationality. They observe the earnings of the different strategies and choose the most profitable strategy; whereas in classical games they must conceive their strategic planning for the whole game. Second, it introduces the possibility of random strategy moves, for instance mutations; and of strategies which become winning because of imitation. It is assumed that the players gradually prefer winning strategies. A replication mechanism associates variations in the proportion of players using one strategy and the gap between the earnings of this strategy and the average gain of the other strategies.

Let us suppose that two persons or two groups are engaged in a legal negotiation in relation to a contract. The contract gives each of them some rights and some obligations. If law is not monitored and enforced, they tend to renege upon their obligations, as in free-rider problems. If we use an evolutionary game, with pure or mixed strategies (belonging to an axis from absolutely no respect -NR- to a strict respect –R- of law organization), the payoffs are ordered such as G(nr,R) > G(r,R) > G(nr,NR) > G(r,NR). G(nr,R) represents the temptation to cheat because opportunistic behaviour gives the greatest payoff when the other player observes the law; G(r,R) > G(nr,NR) because the observance of law leads to cooperation, the result of which is better than a non-cooperative outcome; G(r,NR) is the worst payoff, since the first player is the sucker. In all cases we have the following game matrix (on the left the game and on the right the normalized game)[2]:

	Game [A]						
		(2)				(2)	
		R	NR			R	NR
(1)	R	α, α	β, γ	(1)	r	$\alpha - \gamma = a_1$	0
	Nr	γ, β	δ, δ		nr	0	$\delta - \beta = a_2$

with $\gamma > \alpha > \delta > \beta$, so $a_1 < 0$ and $a_2 > 0$. The unique evolutionary stable equilibrium is a prisoners' dilemma equilibrium, nr-NR, sub-optimal. No mutant strategy can invade the game, the nr strategy being a dominant strategy (a standard replicator, with nr the proportion of players using nr, gives $dnr/dt = nr.\,[a_2\,(1\text{-}nr).nr - a_1(1\text{-}nr)^2]$, always > 0).

A judicial system can be seen as a means to rule the nr strategy out of the strategy space, so as to impose a strategy of respect for the law and the associated high equilibrium r,R with the optimal outcome α, α. From an economic point of view, as Becker points out, the choice of players between r and nr strategies is a rational choice, based on costs and benefits (including non monetary ones, such as time or ethics). Justice cannot get rid off nr strategies (or mixed strategies including nr actions) but only make them costly. In the enforcement of law, justice is not mainly a coercive machine (all criminals are not arrested and punished, crime is not eradicated), but merely an incentive mechanism.

A partial and unequal enforcement

If players are reasonable individuals who take into account costs and benefits, the enforcement of law needs efficient sanctions. In the new game:

[2] The symmetrical structure of the game is not a restrictive hypothesis. The payoffs are utility indices and may be arbitrarily chosen as being equal in the same outcomes for each player. The important point is that, for everyone, $\gamma > \alpha > \delta > \beta$.

Game [B]							
		(2)				(2)	
		R	NR			R	NR
(1)	R	α', α'	β', γ'	(1)	r	$\alpha' - \gamma' = a'_1$	0
	Nr	γ', β'	δ', δ'		nr	0	$\delta' - \beta' = a'_2$

we need $a'_1 > 0$, $a'_2 < 0$, so $\alpha' > \gamma'$ and $\delta' > \beta'$, to encourage observation of the law. A strict enforcement implies that this condition is true for all players and all circumstances. The observation of reality shows us that this is not the case for utility functions which sometimes include a very high estimation for not respecting the law (if I am starving, stealing a piece of bread has a very high value).

Another point is the cost of judicial law's enforcement. Let us suppose that each player pays a tax of T to finance law enforcement. We introduce this collective cost by substituting α'', β'', γ'', δ'' for α', β', γ', δ' (with $\alpha'' = \alpha' - T$, and so on). Then the new cooperative outcome in game [C] may be, for the individual and for the collective, inferior to the old non-cooperative outcome of game [A]. It is the case if $\alpha'' < \delta$.

Game [A]					Game [C]			
		(2)				(2)	
		R	NR			R	NR
(1)	R	α, α	β, γ	(1)	r	α'', α''	β'', γ''
	Nr	γ, β	δ, δ		nr	γ'', β''	δ'', δ''

The enforcement of law is only partial, and it is relative to its cost. The question of the cost has itself two components.

The first relates to the configuration of the instruments of enforcement. For instance, the enforcement of software or music file property rights can be achieved through public forms (courts impose sanctions on the violations of rights) or private forms (producers introduce technical instruments as tools to protect their rights effectively). The question is how to achieve an efficient mix of public enforcement (especially judicial enforcement) and private enforcement.

The second is that judicial enforcement costs are not only of a direct nature (for example, judges' salaries). To sue someone in court is costly, including monetary expenses and transaction costs (time, psychological costs and so on). Optimal enforcement policies have to include this problem.

As the law enforcement has a collective cost, arbitration is necessary between the benefit and the cost of protection. Some laws will be strictly enforced and others will not. And the extent of enforcement will change with enforcement cost and law respect benefits. It also depends strongly on the modalities of social advantages valuation.

Substitutes

Judicial enforcement changes the earnings of r and nr strategies and increases law observance. Some alternative means also have to be considered as producers of norms:

these include ideology, ethics, deontology, religion, customs, culture, social conventions and so on. They can encourage conventions of respect for the law in place of law violation [Bradney and Cownie, 2000; Goh, 2002]. They work, as in the substitution of game [B] for [A], by increasing the earnings of the r strategy in relation to the nr strategy (for example, by excluding someone from the group for rule infraction, rewarding someone for loyalty or reproving immoral actions).

These sets of norms may emerge from the repetition of inter-individual and group relations and are reinforced by it. Repetition, under different hypotheses of rational behaviours, allows the emergence of cooperation through reciprocity or reputation-building [Hardin, 1982; Kreps, 1990; Fudenberg and Maskin, 1990]. These self-organized processes were formulated in repeated games terms [Axelrod, 1984] and in evolutionary games terms [Bicchieri, Jeffrey and Skyrms, 1997].

We can imagine, following Axelrod, that cooperative strategies emerge with the repetition of the game. Nevertheless, their ability to enforce law is doubtful. Repeated game theory has shown that strong and numerous conditions are necessary to support cooperation. Rules will be "spontaneously" respected in small communities (as in a family or a bureau), between identified players, through frequent plays and under the possibility of retaliation. This is not the case when players are numerous, changing, unknown, in favour of different ideologies and ethics. Moreover, in an evolutionary perspective, the unique evolutionary stable equilibrium is the dominant non-respect strategy. If any other strategy becomes the general one (for example the respect strategy), a player choosing a non-respect strategy has a greater payoff; in which he is then mimicked by the others. Many examples of a progressive degradation of cooperation can be recalled. A historical perspective shows that small, closed, stable societies, with ideological enforcement (for example the taboo system), and based on tradition develop cooperative behaviours (for example through the means of gift relations). Large, open, unstable modern societies, with many fluctuating interactions, evolving norms, continuous refinement and increasing complexity of the rules and of the law system, on the other hand, need more explicit enforcement. Thus, the development of legal systems is accompanied by the development of judicial enforcement.

Extension of competition

When competition becomes tighter, spontaneous observance of the law becomes less likely [Barrère 2001].

In Axelrod-type situations, spontaneous respect of the law is likely[3] because, even if interests are not necessarily parallel, the individuals are only interested in their individual payoff, and not in that of others. They are not "jealous". Obviously player (1) prefers outcome (5,3) to outcome (3,3) but is indifferent between outcome (5,3) and outcome (5,5). The profit of his partner is strictly immaterial to him. This assumption is appropriate in smooth and peaceful competition, but irrelevant in a world of tight competition in unstable markets. To gain more than competitors can be decisive in upcoming battles; therefore, a player may prefer outcome (2,0) to outcome (3,3). However, the solutions of the game are very sensitive to the levels of the payoffs.

Tight competition increases the risk incurred by cooperative players and the use of opportunistic strategies with regard to observance of the law. Players are intent on avoiding the disastrous situations (r,NR) and (nr,R) and prefer the more secure but sub-optimal repeated outcome (nr_T, NR_T). The repetition of the game reinforces this tendency, because it is not in fact an identical repetition: the economic and competitive

[3] Optimal cooperative equilibrium is possible but the possible outcomes are infinite. Any system of identical strategies (to cooperate n times, not to cooperate m times, to cooperate n times and so on) constitutes a system of best responses and is a solution, according to the folk theorem, with the two extreme systems n = 0 (no cooperation indefinitely repeated) and m = 0 (cooperation indefinitely repeated).

power of each player evolves according to the results of the previous rounds. The dynamic of the game widens the differences between the profits, which are used as additional weapons in competition, and may cause the elimination of some players. The introduction of additional players would make this threat even more poignant. The use of tit-for-tat or carrot-and-stick strategies is hardly likely. The extension of competition needs a more explicit and powerful law enforcement system, which explains the growing power of judicial systems.

Enforcement as a public good and a club good

In enforcing law, a judge produces a public good. Even if the sentence of a court is particular and limited, it contributes to reinforcing the weight of the law system. It creates a working incentive system, which produces cooperation and wealth. Enforcement produces a public intermediate good (cooperation), which is the means of producing a public final good (to increase social wealth, to live in peace and so on). In addition to its static effect, enforcement has a dynamic effect, in increasing the stability, predictability and credibility of the law, and in providing a stable basis for expectations and a stable framework for investment. Law enforcement is an important means of reducing transaction costs.

With the supply of public goods however we meet the problem of free-riding. If the cost of law enforcement is generally higher than individual profit and lower than collective profit, it implies a collective procedure, based on a constructivist project or on self-organization processes. According to the dispersion of individual utilities of enforcement for some types of law (if I am a smoker, I do ‘not have a great preoccupation with the enforcement of anti-tobacco regulations), enforcement may vary. It becomes a club good and many clubs can coexist. History shows many types of club institutions of justice, be they local or communitarian (fishermen), or temporary (as during medieval Fairs). Today many private institutional systems work to enforce specific types of law (for example to manage law on credit cards). Other organizations incorporate law enforcement: the main one is the firm, as Alchian and Demsetz said, because it is a local property rights enforcement system. Evolution affects the efficient configuration of these clubs, their number, types and sizes. The increasing complexity of the legal system implies more sophisticated and specialized clubs.

Law enforcement can use private means of enforcement. Nevertheless, law acts as a system, so enforcement has to be a systemic one. Enforcement requires coherence; and the power of sanctioning deviant behaviours must be founded on legal and public legitimacy. So, every enforcement apparatus ultimately needs public enforcement. Moreover, to be able to induce cooperation inside competition, this coherence must be particularly strong in market societies.

1.1.2 An equity perspective on law enforcement

Enforcement lovers and enforcement adverse people (the pros and cons of enforcement)

As it enables the distribution of effective rights, powers and wealth to be modified, judicial enforcement does not represent a standard public good. Some individuals or groups may win with a strong system of law enforcement (obviously the owners); and some others with a weak system of enforcement (the robbers). Instead of the previous symmetrical game, with parallel interests, let us now consider game [D], characterized by non-symmetrical distributions in the symmetric outcomes. Suppose the collective surplus to be shared between the two players is 10, and the cost of cheating (loss of reputation, organization cost and so on) is 2. In the r,R outcome, player (2) is favoured when sharing the total surplus, while in the nr,NR outcome player (1) is favoured; for instance (1) performs better in illegal conditions, and (2) in legal ones. The cheat takes the whole surplus minus the cost of cheating, 2.

Game [D]			
	(2)		
		R	NR
(1)	r	3, 7	0, 8
	nr	8, 0	5, 1

The equilibrium in dominant strategies is (nr,NR ; 5,1). Suppose that the court reverses the result, when one player does not respect the law, while the other one respects it. That leads to game [E]:

Game [E]			
	(2)		
		R	NR
(1)	r	3, 7	8,0
	nr	0,8	5,1

Equilibrium becomes (r,R ; 3,7). The collective surplus is increased; but while player (2) is in a better situation, player (1) is worse off. In this case, enforcement is not a common wish and needs an authority decision. Posner contests this point of view and argues that individuals are ready to accept a common law based on wealth maximization. In the long run they are most likely to profit from it, even if a particular application of the rule penalizes them at a given time. Nevertheless there can be a permanent separation between a group with an interest in law enforcement and one against it. If so, public enforcement power becomes necessary (see the mafia's problems).

Another way to combine distribution effects and the acceptance of regulatory control can be demonstrated within an exchange framework. In order to increase social wealth, player (2) can propose player (1) to enforce law while modifying the shares. The non-cooperative outcome of game [D] works as a threat value (5,1). So, every solution [r,R] with a redistribution of the type (5 +a, 1 + 2 – a) with $0 < a < 2$ is acceptable and efficient. One can, for example, interpret in these terms the institutionalisation of the feudal chore.

Unequal enforcement

Since justice enforces law, opportunistic behaviours are involved. Individuals demand strong enforcement of their rights and weak enforcement of their obligations. As a driver I prefer weak enforcement of the Highway Code, but as a pedestrian I want strong control. If individuals have moving positions within the law system, sometimes as drivers and sometimes as pedestrians, there are minimal consequences. On the other hand, if the roles in the division of labour and the roles in social organization are permanent and rigid, the consequences are more significant. Judicial strategies emerge and compete with one another. Being in a world of scarcity, justice can only use limited resources. The enforcement of law is never perfect. Justice has to decide priorities: strongly to enforce the protection of people, or ownership, to control compliance with fiscal duties, to enforce minor protection, or anti-sexism laws; to place less emphasis on enforcement of the Highway Code, fiscal evasion, prohibition of prostitution or financial delinquency. It can be more determined when enforcing workers' rights, or the property rights of managers, or of ownerships; or when deciding to enforce the rights of consumers over the rights of producers, and so on. Individuals and groups propose different priorities for judicial working. These strategies do not necessarily result from

complex calculations, but can primarily derive from opposition to existing legislation, be it lax or rigorous. Moreover, they may oppose projects to redefine judicial priorities. These strategies express the defence of immediate interests, but may be the result of clever constructions. Some interest groups will be able to format them in a more coherent and more presentable way than others, and to lobby in the social field. Judicial strategies, relating to the "imperfect" character of the justice system and judicial enforcement, are not mainly the inescapable ransom of imperfect human nature; but are the effect of scarcity's economic constraints.

This can also lead to lacunae between modifying the law and modifying law enforcement. For instance, "society" may prefer to tolerate the personal consumption of marijuana without amending the law, instead of modifying it. So legal policies and strategies are accompanied by enforcement policies and strategies. In some areas of new law (tobacco regulation, sexist or racist practices, disability rights, prisoners' rights and so on) legal intervention is just the first step. The second round involves fighting to enforce these regulations; an international comparison clearly highlights that the Highway Code is enforced to very different degrees across countries, even in those with a similar level of development.

Our modelling showed, from an economic point of view, that law enforcement implies two different logics, efficiency logic and equity logic. Judicial enforcement is an incentive by modifying the parameters of economic calculation, by reducing the effects of uncertainty on law, and it increases social welfare. At the same time, the distribution of wealth effects depends on the configuration of imperfect and unequal law enforcement. Justice is simultaneously producing efficiency effects and distribution effects.

1.2 Legal interpretation

In order to become a concrete incentive, the legal system not only needs enforcement, but also interpretation. Justice appears as a referee among opposite pretensions. Different players, including government and state organizations, claim their entitlement to do something and dispute other players' rights to do the same.

The interpretation of facts

The judge must connect the legal system with the facts related to a particular case. The judge's first task is to draw up an assessment of the facts, in the role of a "neutral" and "independent" referee. The judge must establish the "truth" and produce the legitimate reading of the facts from different versions proposed by parties according to their interests, their opportunism, even their bad faith.

The divergences between the pretensions are also related to cognitive reasons. Let us substitute the idea of limited or procedural rationality for that of substantive rationality. Individuals will then seek an average, subjective and approximate level of results, rather than the strict maximization of objective functions; they would look for "justice" (reasonable compensation) rather than ask for maximum compensation. They use procedures, often organizational ones (the individual has to decide as a member of an organization, a company, a family and so on), conventions, references to norms, thinking frameworks, points of view. As a consequence, different people, using different cognitive frameworks, may build different versions of the same reality. Contemporary sociology shows that social contexts influence behaviour and lead to "habitus", that is, interiorized forms of behaviour related to the social status of the individuals. A professional litigant – say a lawyer or an insurance company - will not have the same type of behaviour or understanding of arbitration between costs and benefits as an occasional litigant. Rationalities become socio-historically situated.

At the same time, the referee is not generally limited to an "objective" observation of facts (which corresponds more to the logic of the expert); on the contrary the judge provides a specific interpretation of the facts and defines responsibilities and torts: is the damage and the law violation intentional or not?

Hence, to build this interpretation, judges have to be real and active producers. They base their findings on a specific mode of reading reality; they give more or less importance to particular types of consideration, to social logic, psychological logic, or economic logic. Spatial comparisons show that, in the same legal area of jurisprudence, the same attacks against the law are judged and sanctioned in different ways. Moreover, the judge is not always a public judge. In some cases, conflicting parties agree about the choice of a particular referee in order to have a specific reading of the facts; for instance firms will ask a private or a professional referee to intervene in a dispute, in anticipation of a decision based on economic criteria, whereas they fear that such criteria would be minimized by a public judge.

Legal interpretation

The legal system cannot be a perfect and complete system. It cannot specify all the legal rights and duties in every situation, according to every type of contract. And, within the legal system, some laws are very precise but some are vaguer ("human rights", privacy law and so on). Williamson distinguishes three types of law, corresponding to his three general categories of economic institutions:

- the "classical law" for the market; the law strictly specifies and records the conditions of an instantaneous market transaction. Thus, it is simple and indisputable.
- the "neo-classical law" for the contract, a hybrid form between market and hierarchy; it organizes a longer relation than the market one (for example industrial co-operation contract or franchising commercial contract). It is no more than a partial framework, because nobody can anticipate all future contexts.
- the "evolutionary law" for the hierarchy; it organizes a framework for managing change (such as labour legislation, which allows under some conditions modifying the description of workers' job or their earnings).

From an economic point of view, it appears that the legal system enforces and implements a broad spectrum of rights. At one extreme, we have precise laws, the implementation of which has been envisaged by the parties (for instance, they signed a contract); therefore the role of the legal institution is to make them respect it. At the other end of the spectrum there are general rights, the concrete consequences of which are not well specified; for example civil liability specifies only general duties (to behave like a good father), without saying precisely what it implies in any circumstance. Generally the law does not envisage all the specific cases but establishes principles, general rules. So, to enforce law, the legal institutions are not inclined to point out their obvious consequences. In many cases they must interpret general principles, and then draw a solution for a particular case. The degree of interpretation is variable, larger when the application of a general law is concerned, weaker but nevertheless not nil, when interpreting a precise law (for example, when the contract does not envisage everything or when it is necessary to appreciate the good will of the parties).

The judicial interpretation as transaction cost minimization

Transaction costs make it impossible to have a system of *complete* contracts. Therefore, the judicial system, through a legitimate interpretation, is again efficient when it succeeds in reducing the social costs of transaction; the specialization of the judge and the economies of scale in the construction of a corps of specialized interpreters move in the same direction as the transaction costs reduction. And this reduction is more or less strong, depending on whether they are precise or general laws. Cooter and Ulen, like Williamson, oppose the legal theory of contract, which refers to an area where

transaction costs are weak, and the legal theory of liability which covers an area where transaction costs are high. Whereas in the first case the interpretative role of justice is limited (it has to interpret the contractual wishes and agreements of the contractors), in the second case the interpretative role is much more significant. This approach also explains the absence of monopoly of the judicial system as an interpreter of the law. In case of litigation, parties can agree on a compromise (the lawyers of both firms establish a private agreement), or call upon a third person (a mediator). The choice of procedure will be guided by the comparison of the transaction costs.

The judicial interpretation as formulation of the rules in an open society

In the Hayekian approach rules are thought of as incomplete (all future scenarios cannot be anticipated) and imperfect (the conditions of their application can contradict each other), because they are necessarily abstract. No rule or condition can fit the infinite number of possible situations; their adaptation to a particular situation is not immediate. Hayek refuses any legal scale of sanctions, any standard solution which would deny the specificity of cases and the need to appreciate comparative responsibilities. So, the judge is in an eminent position to interpret the legal system.

Judicial functioning results from a spontaneous self-organized process, through trial and error, and progressive selection. It does not consciously maximize welfare but makes more, through managing ignorance. Individuals are ignorant for three reasons:

-some information is missing before the action, for the future is always unknown, at least in part;

-some individuals may not know that some information exists;

-some pieces of information, tacit ones, are only partially transferable, or not transferable at all.

In this context, the judicial system allows the socialization of the individual, by transforming a spontaneous disorder into a self-organized order. Therefore, the emergence of rules, through a spontaneous self-organized process, and their judicial consecration by the judge, allows uncertainty to be managed and reduced. Individuals can rest upon rules which carry information and underpin routines. Cooperation is helped by these rules, although they do not result from calculation or maximization. On the contrary, they are general and abstract, not finalized, rules. This guarantees their social efficiency and enables them to act as general and stable references for individual action.

The judge operates by formulating the implicit social rules on property. Thus, judicial formulation and interpretation is a central point for society. Rules generally emerge from complex self-organized processes in an implicit form. The first role of the judge is to make explicit the implicit rules, to clarify them so that everyone can know them and profit from them. In this way, the judge fulfils a function of information transmission of similar importance to that of the walrasian auctioneer. The judge formulates the implicit rules, but does not create the rule, because there is a guiding tradition, the legal inheritance, which carries the threat of the loss of legitimacy.

Thus, the interpreting role of the judge is also limited; being under the law the judge has to comply with it. A judge must not determine to produce a new or a finalized rule. By interpreting law, the judge reinforces its stability and makes the future decisions of courts more predictable, which minimizes excessive recourse to the courts.

The judicial interpretation of legal problems has a second important effect in that it allows rules to evolve. The judge is confronted with problems which are unsolvable in the existing legal system. Pressure to modify the existing rule in the context of other laws which have been handed down by tradition can make changes in the rule while preserving the coherence of the legal order.

A transaction cost approach and the Hayekian approach provide interesting points of view. Nevertheless they fail to explain the role of the judicial system when interpreting the law and defining what is “just”. The judge produces lawful and “just” sentences. He defines not only what is legal but also what is just. The judge is not a legal scholar, but rather a creative producer; for the “just” sentence has not, always, already been written in the law. He is not only a communicator of laws but also a provider of justice. And this function is a complex one in the French republican model of law because it gives the system of justice a dual foundation.

2 The republican dualism

The standard economic analysis of law supposes that market logic, founded on the pursuit of efficiency, can be contradicted or limited by ethics (for example prohibition of slavery, of child labour or of trafficking in women and children). However these limits and constraints have no particular coherence, and do not express any specific logic. Therefore, the analysis of the law can be conducted according to efficiency criteria and modified when external considerations (specifically ethical ones) intervene.
Our hypothesis is that, in the case of the French republican model, these “values” express a specific order. This means that the problem of the judicial system is not only to modify, post facto and in a marginal way, market rules and outcomes, but also to organize the coexistence of two logics, the market logic and the republican logic. As each has its own coherence and as they have to coexist, we confront a dualistic regulation, which characterizes the institutional and cultural French heritage.

2.1 Two orders

The legal system and the judicial system do not constitute a homogeneous whole. On the contrary, history shows that these systems are heterogeneous ones. They are characterized by diversity [Arnaud, 1991]: diversity between countries (continental civil law based on Roman law, and common law) and diversity between subjects (with heterogeneous foundations, for example, where civil and labour law are concerned). However a historical analysis of the law shows that this diversity goes deeper: “law” gives place to “laws”. As far as justice is concerned, it is the same: there are judicial systems, justice goes through justices. These come from different foundations linked to different orders: for instance, in the Middle Ages canonical law expressed religious order and power, while royal law expressed royal order and power.

This legal diversity explains why the legal and the judicial systems have often been torn between different and competing orders. Each one of these orders wants to be dominant within society, urged by the forces it favours; that is, it tends to subsume all functioning to its own logic and to become hegemonic.

As our societies are mainly organized according to two different logics, a market logic with market societies, a republican logic with societies organized as republican democratic nations, our legal and judicial systems inherit a double foundation. So the definition of what is legal and what is just refers to heterogeneous standards, norms and criteria, some being the expression of the republican society and the others the expression of the market society.

The republican order imposed in France by the Revolution and widely diffused all over the world, rests upon old principles. They were elaborated and implemented centuries earlier, in the Greek democracies or in the Roman republic, and developed in the political philosophy of the seventeenth and eighteenth centuries with the concepts of

corps social, of contrat social and of government according to reason (gouvernement de la raison).

The republican order is founded on the identity of individuals considered as citizens and as having equal status. It introduces political democracy as a political link between citizens. Social cohesion is ensured through everybody's submission to the law. This order distinguishes between the private and the public, between individuals and the collective, between private, individual interests and the general interest. It allows the emergence and the institutionalization of a political dimension in a political space, with its own institutions and specific political public processes (elections, law, government and so on), no longer subject to the cabinet of the king, the court of the lord or the sovereignty of the prince. It sets up a new representation of society as a political entity, a community of citizens, and no longer as a Chrétienté or as the widened family of the prince. In this model, political institutions have the responsibility of organizing the pursuit of the general interest and of common welfare. The political society is responsible for its own organization, for its own government and for its future.

The expression and the management of the general interest define the republic. The designs of the general interest and the methods of its management are eminently variable, from the personality cults of a leader, who is seen to guide the society, to the pluralistic forms of democracy. Theoretically underpinned by the submission of everyone to the law, republican mechanisms give a great place to law and justice.

Critical analysis –from Marxism to the Public Choice school- has highlighted the obvious differences between formal conditions and the real conditions in the application of the republican principles. This does not mean that these principles are without effect, particularly in relation to the conditions of the working of the market order. The public and egalitarian character of the republican order gives individuals political rights, independently of their market rights; for instance, rights to enjoy privacy, to move house, to think, to demonstrate, to vote and so on (Barrère, 2001)[4]. The logic of these rights is different from the logic of economic property rights. Some personal rights are inalienable (I cannot sell my organs or my freedom or my public role); the principles of the distribution of rights are intangible, which contradicts the economic logic of the market, of generalized exchange and of standard efficiency.

As the difference between political equality (a person = a person) and market equality (a euro = a euro) shows, the relative heterogeneity of market order and republican order can provoke tensions between both modes of socialization. The legal and the judicial systems can only be partially coherent since they join together diverse heterogeneous principles. For justice, a key issue is to build a coherent vision of law and of reality, but the sources of the law are heterogeneous and refer to different logics. Moreover, these logics may be competitive.

2.2 Republican order and the rule of law

Modern legal rule has an abstract character. The law is based on general principles ("legal principles", "constitutional principles" and so on). As independent from the power, the wealth or the status of individuals, it has a general character. As in a constructivist approach it expresses the ambitions of the State, a collective project to develop social objectives and welfare.

In this framework, the judge plays a limited role, the *bouche de la loi*, a communicator of laws. Surprisingly two opposite ideas reach a similar conclusion on limiting the judicial function. In the old republican conception, the judge has a limited

[4] The idea of the autonomy of the political logic of law is sustained in the USA by the "Modern Civic Republican Tradition School"; cf. Mercuro and Medema [1997], p.97.

function in pointing out the law which expresses collective preferences; in the liberal conception [Buchanan, 1972; Posner, 1973; Hayek, 1973], the judge has a limited function in pointing out the law which expresses individual preferences. Besides this, the judge also has the role of a provider of justice.

In a society governed by a heteronymous order, in which law and justice are only transcriptions of intangible and revealed rules, as in the systems of divine law and ecclesiastic justice, a judicial system has as an essential role when applying the law, in noting the facts and pointing out the rules.

As far as Canon law is concerned, the law to be applied by the Catholic Church comes from the Gospel, and is therefore a priori fixed. Its application is based on the doctrines denoted by the authorities (that is the representatives of the Revealed Word on earth) and excludes any different one; the right "interpretation" is opposed to wrong interpretations. This kind of justice establishes what is just (penitence especially, because the price of sin has to be fixed within the framework of moral law), according to tradition. Any pluralism is rejected, there is only one law, one right interpretation, one right standard transmitted by the tradition starting from the revelation; anything that opposes the law is of a schismatic nature. As the use of religious practices (the *ordalie*) demonstrates, Feudal justice, based on religion, is of this kind. The authoritarian republican forms, through extending constructivism but denying pluralism, give law a significant role but give justice a marginal one, because the law doesn't allow interpretation; the legitimate application is the interpretation of the producers of law, the politicians[5]. What is Just is also supposed to be indisputable for it results from the will of the people through the State.

On the other hand, the recognition of diversity and pluralism logically results in giving the judicial institution an increased role. There are two main reasons. First, as law is based on general and rational principles it has to be specified and interpreted in order to be applied to each particular case. The judge has not only to apply a whole range of tariffs (robbery is worth the amputation of the hand), but he also has to produce an original solution, taking into account the specific personalities and the circumstances involved, according to general principles.

The second reason is that society recognizes that the State itself, far from being an impartial at the pinnacle of a hierarchy arbitrator or a genuine incarnation of the general will of society and its zealous executor, itself holds a special point of view, fights for particular interests and has to be subjected to the law. Therefore, law changes its status. It is no longer the product of the State. The legal system introduces the regime of the rule of law. It is up to the institutions of justice to judge the conformity of state action to legal principles.

2.3 The primacy of the republican order

The French cultural heritage leads to an affirmation of the primacy of the republican logic. Such a primacy does not mean that in all particular cases socio-political criteria must be determining and override economic criteria. A necessary but very expensive measure to remove a marginal inequality will not be ordered by the magistrate. The primacy of the republican order does not imply its hegemony. However, if market and republican logics are different and can be opposed, they are, at first, complementary in so far as society needs them both to organize itself. It can no more ignore the economic

[5] Interpretation for the French revolutionists is all the more limited in that "Reason" makes it possible to produce rational and transparent laws. Moreover, as popular election is seen as the only right mechanism of revelation of the general will, justice cannot claim to express a different and unspecified popular will.

data given by the market than it can ignore the socio-political data that republican logic intends to manage. A judge must also take them both into account and define the articulation between them. But the primacy of the republican order means that republican logic is a starting point. This is demonstrated by the following assertions:

a) Republican logic is necessary to found market logic

This is due to the very conditions of the market game. The market allocation of resources requires that the "agents" of the exchange should be defined as subjects of the law, free and responsible, having the rights and capacities for signing contracts. These rights are inalienable, which is in opposition to the logic of the efficient generalized exchange.

b) Republican logic delimits the impact and the perimeter of market logic

If a legal intervention cannot be satisfied by legitimating market standards, it is also because the socio-political republican principles that it serves lead, in some situations, to limit the role of the market logic. Historically, the European cultural model has produced a legal model which moderates or controls the market logic by the assertion of the pre-eminence of republican law. Market logic encourages the confrontation of interests. The legal core defines a legal structure which may encourage cooperation, to moderate competition, to limit it or, on the contrary, to make it easier to exacerbate it. However, because of the primacy of the republican logic, it has a role in limiting the intensity and the extension of market logic: not everything can be left to the market (one cannot buy organs, blood, persons, some honours and so on[6]); tendencies to competition have to be fought to avoid economic war and to allow the market to produce cooperative effects (prices of predation will be prohibited, opportunism moderated). Thus the law contributes to a definition of the place of market regulation within wider social regulation, its extent and its limits.

c) Republican logic imposes extra requirements on market logic

For traditional Law and Economics, a market transaction is supposed to be voluntary as soon as formal conditions have been observed. This rule is extended to any implicit transaction. Any contract, explicit or implicit, is consequently accepted as legal and efficient. The republican logic introduces principles of freedom and equality that are not directly comparable to the formal freedom and equality of the contract, implicit or explicit, and that lead to distinctions between constrained and free exchange, equal exchange and exchange within the framework of dominant positions.

The legal contract is not identified with the economic transaction as represented by economists. The institutionalisation of feudal chore is opposed to the republican order. There cannot be legal "contracts" or "exchanges" such as between slave and slave trader, or prostitute and client or minor and paedophile. For the judge, control of the application of the principle of the autonomy of a decision has a considerable potential impact[7].

d) Republican logic can contest market values and criteria

The idea of a double foundation of our republican and market societies led to an insistence on the possible divergences between socio-political republican criteria and market criteria, and, beyond, between the logic of the Republic and the logic of the

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6 Personal rights are not legally defined as property rights. Nobody is the owner of his name, body or freedom. Their logic is not the logic of market property: one cannot give them up and they are not transferable.

7 That raises the frightening problem of defining or, at least, of considering what a voluntary or free transaction is. Is accepting clandestine work for miserable wages a real free act? Was for an Afghan woman, to get married in Kabul under taliban law, as free an action as a free transaction? Today magistrates have to face this kind of problems (for example, problems of obligations). In the United States recently it was decided that in women's prisons, any sexual relations between a warder and a prisoner would be considered as a rape, whatever the formal appearances of the "exchange" had been, because of the real inequality between the persons.

market. Then, the question is how to weigh the various types of criteria, the various systems of representation, values and social projects. The concrete management of the relation between the market and the Republic is not obvious, because no simple criterion can determine "the right proportion"; the image of the balance is insufficient to represent the difficulty of weighing qualitatively heterogeneous criteria.

3 Judicial regulation: to say what is "Just"

3.1 Defining law and defining justice

The judge produces not only lawful sentences, but "just" sentences, defining not only what is legal but also what is just. The judge is not a legal scholar, but rather a creative producer; for the "just" sentence is not always already written in the law.

The judge evaluates rights and the claims; mediates between conflicting claims and opposed rights; delineates the perimeter of each right, what actions are exactly authorized by the law and up to what limit; balances damages and compensations. Justice embraces the symbols of the glaive (to impose law) and the balance (to determine what is just). It intervenes much more directly in social working than merely by enforcing and interpreting the law. Legal institutions hold the legal monopoly, determining the concrete consequences of law in respect of the existing legal system.
To announce what is "just" according to the legal system implies two judicial functions: the judge introduces a concrete judicial entitlement which is an allocation of precise rights; and to apply equity criteria the judge introduces a new process of allocation and valuation, before and alongside the market process.

3.2 To define rights

The judge has to define the precise powers, rights and obligations given to parties by their rights in a system of rights, in situations where there are opposite claims. It is the role of the judge to determine who has the right to do what and under which circumstances. Has the tenant the right to require the owner to maintain the building in which he or she lives, and if this is the case to what extent?

The legal system is a system of *relative rights* (who has which rights, but also, which rights override which other rights), a system of *relative capacities to act (*who can force what, and up to what point), a system of *relative powers*, of *relative responsibilities (*which party has perpetrated the damage, which party should receive damage compensation). Justice is mainly concerned with dispute resolution. It has to decide between competing interests (Mercuro and Medema [1997], p.115). As in the Hayekian framework, legal rules, and especially the legal system, constitute, with the market, the two main institutions for organisation of inter-individual relations. But an institutionalist view highlights the diversity and the opposition of individuals' interests, representations and projects. If the market expresses competition, it includes a selection mechanism according to willingness to pay; law uses another mechanism, according to political logic and ethical criteria. So, the rule of law is not only a coordination mechanism, but also a social compromise; an organization of relative rights and powers.

Moreover, a right is generally a relative power; power for one agent and constraint for another one. It is very difficult to organize a system of rights, that is to say to combine everybody's rights[8], to establish where the right of somebody ends and where somebody else's right begins: obviously in order to respect rights to sleep noise

[8] To enforce ownership and, so, to enforce some right, is, simultaneously, to prohibit a hypothetic right to steal. As every monopoly power a right – except for public goods- is, at the same time, exclusion. Prohibition is the other face of freedom.

at night must be prohibited; but what is the standard definition of "noise"? Is it 60 decibels or 80 or what? Is it the same in Las Vegas and in a Maine village? In summer and in winter, on Saturday and on other days? Recognition of children's rights is a recent movement, but how does one combine children's and parents' rights? Combining all legal actions a priori is unimaginable, both because of the transaction costs, and because we are in an uncertain world.

The judge determines the boundaries of legal actions. For that judgement, equity criteria have to be introduced, because in most countries –if not all of them- the judge has to dispense justice, to determine what is "just", that is, to apply both efficiency and equity criteria.

Let us consider an interesting case. In France, in March 2001, the Court of Marseille authorized two hundred squatters remain in possession of their squat for a year, because they had suffered from "collective deficiencies as regards to social housing", although the occupation of a building "without right or title" violates the rights of the owner and constitutes "an obviously illicit disorder"[9]. This decision was taken in a "legal vacuum": in this particular situation no legal text or jurisprudence gives the answer to the question on how to combine different and opposite claims, different and opposite law.

From an institutionalist point of view this function of the judge has to be accepted. The judicial decision is the last means of resolving the conflict between the rights' holders and those who dispute their rights. The conflict between the parties can only be ended through the intervention of a third party, the judge, the official and legitimated producer of just decisions; the only individual to be entitled to that function by the law. Justice is the institution that makes law active. Instead of leaving it in a formal state it organizes a system of relative concrete law, a configuration of relative capacities to act, that is to say a system of mutual coercion, which is similar (but prior) to the other system of mutual coercion, the market.

3.3 The judge cannot only use market and efficiency criteria

The institutionalist approach has shown that the efficiency criterion is not sufficient for two reasons.

The first is that any rights entitlement modifies relative rights, relative capacities, and relative wealth and therefore has an economic effect, modifying prices, production and incomes. Hence, a specific efficiency solution generates consequences in terms of income/wealth distribution; efficiency cannot be used any more, as a criterion, independently from any judgement on the distribution.

The second reason is that judicial institutions would not be aligned with the working of the market. Market values, standards and norms cannot be used as normative references. Market standards are not comparable to equity standards, nor do they correspond to natural standards. As a result of market processes, they are dependent on the one hand on the exchanges that have taken place, and on the other hand on the bargaining powers from which they are derived and on pre-established social positions on the market. Their legitimacy is debatable since it refers to the history of the markets and rests, generally, in fine, upon non-market forms of appropriation the equitable character of which is doubtful (feudal violence, war and spoils, theft, public monopolization and so on). Moreover, market standards can be refused for ethical or political reasons.

To accept the existing prices, to be a "price-taker", is to be a "rights-taker" and to accept the prevailing legal configuration as if its implication as regards fairness were acceptable. But equity itself is an element in the judicial process. If the judge only based the entitlement of concrete rights on market prices and rights, he would reason in a

[9] Le Monde 20/3/2001.

circle: market data themselves result from the system of pre-established rights[10], which are disputable or even disputed. Market cannot constitute the fixed point since it supposes another fixed point, the legal one. This is why some authors insist on the necessary transparency of the judicial decision when equity considerations have to be introduced.

To specify the relation between entitlements and solutions with distribution effects, we can use a parabola; I call it the Titanic model. The shipwreck creates a strong scarcity of lifeboats, which are not enough to accommodate all passengers and crew. We are here in a typical situation of a lack of property rights, moreover of a lack of a legal system, on a resource becoming tragically scarce. We have to specify entitlements. The efficiency criterion is inoperative: whatever the legal allocation is, no more lifeboats are to be constructed. A wild conception of efficiency –to give the people with the highest earnings the seats- is questionable from an ethical point of view. A naïve conception of efficiency –to give the people with the highest individual preferences for life the seats – makes little sense. Surely, entitlements are a problem of equity and many solutions can be envisaged (and different conventions can exist): women and children first, drawing, according to age, gender, hair colour, political preferences, nationality, and physical strength and so on. This is an illustration of the "arbitrariness of rights": as in the critical philosophy and sociology of Bourdieu and Foucault, every right is related to primary entitlements, through free exchanges or power relations; these entitlements are not the legal translation of some pre-existing standards of fairness, efficiency or equity, but a part of a specific system of rights among many potential systems. In the majority of situations efficiency has obviously to play a role but together with equity criterion. In the Coasian framework, when there are no (or few) transaction costs, entitlement is neutral for efficiency, so the judge may favour equity criterion (in the standard example of air pollution, he determines an entitlement to clean air, which means that he decides who pays for the anti-pollution filter). When there are transaction costs and when the law does not establish any order of precedence, the question is how to combine different types of criteria that lead to different outcomes. In these cases, the judge has to evaluate both types of criteria case by case.

In the same way, the republican logic affects the choice of the social level of law enforcement. Considering costs and benefits judicial and political systems have to include collective interests and nonmarket values.

3.4 A creative producer

The judge has to determine:

- How to combine the precise application of different laws, possibly partially contradictory ; how to arbitrate between rights and in which proportion to make such or such right prevail ; how to weigh the rights in both sides of the scales of justice ; into what new complex of concrete rights to translate the system of theoretical law.

- How to apply these laws and these rights in combination by taking into account the specific features of the situation and of the individuals' personalities.

- How to apply them with reference to efficiency and equity. Judicial intervention is all the more necessary in so far as the market as an equity producer is

[10] "The economy is a system of power, of mutual coercion, of reciprocal capacity to receive income and/or to shift injury - whose pattern or structure and consequences are at least partially a function of law". Samuels, op. cit. p. 440. W.J.Samuels, Interrelations between legal and economic processes, The Journal of Law and Economics, vol. XIV (2) October 1971.

disputed. Formal equality on the market can be accompanied by "real" inequalities related to the preliminary distribution of rights[11].

The judge is a creative producer because he or she does not mechanically apply standard formulae but must say how to apply a legal system of property rights in a global legal framework and a specific context. This includes consideration of all the effects in the efficiency field and in the equity field. Moreover, changes in the context can modify the consequences of the existing law as far as efficiency and equity are concerned (and frequently modify them in opposing ways). Sometimes, a decision is a choice among many, as is obvious in criminal law which envisages a range of sanctions. The judge or the jury decides among these possibilities, according to particular conditions, adjusts punishment to crime. This may also be true in civil law, for instance in compensation decisions relating to oil spills. There is no standard for sanctions; no objective and indisputable sum for damages which will exactly compensate the injured parties. The judge has to make an evaluation, using different valuation systems; and different judges or courts may fix different amounts. No one can use indisputable norms or conventions, since explicit markets for such damages are missing. Moreover there is no clear ex ante delimitation of who is entitled to be considered as a victim. What amount would compensate for the disutility of oil wastes on the ocean? Will that take into account the contaminated birds? History shows that the logic of these decisions may change; and not only according to the changes in market prices.

In an analogy with markets the judge replaces the individuals, the inter-individual exchange or the market process to evaluate and compare rights and duties, to determine implicit prices (how much is an aggression "worth" in terms of compensation for the victim and sanctions for the culprit? How much is damage "worth"? What are their implicit "prices"?). The judge introduces a process of judicial valuation into a world governed by market processes of valuation. It can only be legitimated when coming from "wise persons", deciding "in the name of the French people" (and not in the name of the market and according to the willingness to pay) and according to the legal and constitutional principles shared by the national community (freedom, equality, fraternity).

The judicial system introduces principles of evaluation which are not of a technical nature. In fact legal principles are insufficient to determine that the adultery of a man is less serious than that of a woman or that, in a divorce, children should be rather entrusted to their mother care than to their father's according to the natural "maternal instinct". One could multiply ad infinitum examples which would testify to the simultaneous evolution of dominant representations or of various representations within society and legal institutions.

The judge intervenes in the inter-individual relations, but does not exercise any arbitrary power. First, the judge acts within the legal framework, under legal and constitutional principles, and second, regulatory mechanisms, such as the possibility of appeal to higher courts and the hierarchical organization of judicial systems, have emerged to avoid arbitrary decisions.

The new relation which is established between real conditions and formal conditions, the passage according to Habermas of a paradigm of the formal law to a paradigm of the materialized law, is deeply influenced by the constructivist role of the State. The State enables a centralized system to monopolize coercion as a means of enforcing the law through public justice. It represents the organization of a law and an order which are imposed on everyone and which give law an essential role in the function of inter-

[11]Further, unequal positions on the market can have a cumulative effect, as the debates on free exchange and protectionism in the case of young nations' industrialization showed.

individual relations, that is of socialization. The modern republican order, coming from the American and French revolutions, bequeaths general foundational legal principles and elements of common ideology, which seem to result from a natural law ("Human rights"). On these bases the political organizations that express the general will voluntarily build a complex legal order. Law appears as a substantive law, a self-made constructivist law, directly opposed to laws with heteronymous bases, should they make claims for custom or religion. The democratic forms further increase the central character of the law in the social system by allowing public discussion around the construction of the law, considered as a means of organizing the public sphere. The democratic forms of the republican logic admit the pluralism of interests and opinions. Therefore, the constructivist character of the law gives more weight to judicial intervention than would ever be the case in other modes.

3.4 The new role of the judge

This questions the function traditionally entrusted to the law to establish social standards. The legal standard is supposed to define what is just or not just, according to general principles which constitute for the citizens a guarantee against the risks of arbitrary decisions or judgements. Therefore it has an absolute nature which radically opposes just situations to unjust situations. However, other social standards are tending to lose their absolute character and become increasingly contingent. These emerge from social relations, develop with them, and depend on negotiations and on bargaining powers. They are part of contracts, compromises, mediations, even when the State itself pushes them forward. Above all they are caught more and more between opposed constraints: some resulting from the market and others from the republic. This raises the question of how to weigh the different types of criteria, the different systems of representation, values and social projects. Judicial institutions are thus subjected to various pressures aiming at inflecting the hierarchy of social values towards such or such direction.

Consequently judicial intervention has to extend across new fields: appreciation of the legitimacy of strikes, contents of social plans, organization of audio-visual markets, evolution of medical treatments, procreation and bioethics. And beside the judicial institutions, we observe the development of new legal forms and independent authorities. Judicial regulation partially supplants pure political regulation and pure economic regulation to become the main means of a more multidimensional regulation. The concrete management of the relation between market and republic is not obvious because no simple criterion can determine "the right proportion". Wise people are coming back and the judges (public, independent or private) seem to be the best of the wise; their independence is foregrounded to justify their new function. If judicial institutions are today a central issue in debates and are subject to pressure, it is because the task of establishing the balance between heterogeneous dimensions and criteria converges on it. More than firm or State, justice becomes the ultimate resort, the ultimate regulation for all that escapes the standards defined by the traditional ways of regulation. As the image of a government of the judges expresses it, it is transformed into a central institution for social regulation.

As judges introduce a process of judicial valuation there will be growing competition between market valuation and judicial regulation. We are only at the early stages of this competition which will become more and more closely tough. Thus the increasing need for a stronger legitimacy for the system of justice: in the republican model of judicial regulation, justice has to work as a public utility, for the people and not for professionals.

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