ENGLISH SUMMARY

CASE LAW

This paper tries to analyse, in a critical mind, the double transformation which affects judicial activity today : 1) the outflanking of judicial power by other means to solve conflicts and exerce social control ; 2) numerous internal transformations of courts. In order to study these phenomena two models of justice are being systematically compared : one legalist and liberal, the other normative and technocratic.

The article compares the different meanings of french "*jurisprudence*", latin "*jurisprudentia*", english "*jurisprudence*", german "*jurisprudenz*".

The definition of *jus*, from *justitia*, as *ars boni et aequi* (Ulpien, D, I, 1, 1, pr and 1) and of justice and *jurisprudentia* lies upon a vision of a well-ordered and just world. *Jus* defined as *ars boni et aequi* relates to a special activity : the art of expressing (*jus dicere*) for every human being its field of action. This activity requires the virtue of *prudentia*. The *jurisprudentia* is the actualization of this virtue to mark the boundaries which determines just relations amongst beings.

The "Assemblée constituante" is considered to have borrowed from Montesquieu its strictly legalist conception of case law. A more precise analyse of *Esprit des lois* shows it is only for Republican states that Montesquieu denies courts any right

to interpret laws. As for revolutionnary conceptions they lie upon a theory of law quite different from Montesquieu's views and have dismissed the ideal of distinction of powers.

Case law is not the main topic in Hegel's philosophy of law. Case law has none of the characteristics of true knowledge : universality, exact form. In Hegel's mind, there is an antinomy between rationality and case law, as it is confirmed in the Common law countries. Hegel implicitly criticises the Savigny Historical School of Law. Beyond polemics, the true philosophical reasons for this opposition can be found.

On the classical problem wether judicial decisions can be regarded as a source of law, Kelsen gives a qualified answer : courts can create individual norms, but can only create general norms when they have been authorised by a higher norm. This answer is criticised here on two grounds : Kelsen does not use a clear concept of a general norm and he contradicts his own theory of interpretation.

This paper is a new and concice statement of the "juridictional" theory of law, and a refutation of positivism. Case law is described as being the necessary center of the whole legal process, as well as a model for legislation.

English law is not codified and where Parliament has not intervened decided cases provide the only source of law. The rule of precedent also controls, however, the interpretation of statute. No matter what the question of law arising, no judge can ignore what his predecessors have decided, nor, subject to certain exceptions, can he pronounce a previous decision to be wrong.

For legal theorists the English rule of precedent raises a number of problems. The following account does not seek to offer solutions to them. The paper deals not with the pathology of the system but with its operation in the daily life of the law where practitioners are seldom troubled by its theoretical difficulties. Mention is made, finally, of a « crisis » facing the system which, in the opinion of some practitioners, is the result of the development of computer technology.

This article brings forward the idea according to which the prerogatives of the administration end up by altering the principle of the distinction of powers.

This paper shows that case law requires a more complex mental operation than the application of a theorical knowledge to a specific field. Therefore case law is above all considered as a system of decision. The author studies the so-called procedural closure, the translation operated in reports the reading of law judicial.

Do penal courts perform a normative power ? From a theorical point of view, although penal law belongs to *jus strictum*, judges sometimes take the place of the lawgiver and change meaning of legal rules. Different interpretations of this phenomon are studied in this article. All are contradictory but some relate to the very nature of things and other to circumstances.

The *Cour de cassation* is overcome by the number of cases it has to decide (16.000 per year). It was created during the Revolution with a disciplinary function : to quash lower courts decisions which would violate the law. However, the drafters of the Civil Code understood that the courts should have a constructive role to play in the creation and the modernisation of the law. This implies for the *Cour* a fundamental task : to clarifiy the case law and adjust it to contemporary society and expectations. It is submitted, therefore, that the *Cour* should concentrate its attention on a small number of cases (circa 50 per year for every chamber) and give full explanation of the decision it makes on each of them.

Legal interpretation is submitted on one hand to rule governing every discursive reasoning, and on the other to juridical rules which determines legal aims and means. This article stresses the existence of both kind of rules, rules of inference and rules of interpretation ; their complementarity and their conjunct activity are also shown here in one and only hermeneutic process.

When he decides a case, the judge doesn't only behave as a reasonable man ; the rationality of his decision doesn't come from a so-called immanent reason, but from institutional trends linked to the aims of case law. Legal norms determine legal decisions. Understanding legal rules implies a social and axiological analysis which overcomes the concrete case and refers to the general principles expressing commomly-shared political and ethical values. When a decision is made according to these, it will be considered as being rational and acceptable, and will be accepted by litigants and the whole society.

In this article, the author tries to bring forward the idea that case law should be considered both as a complex legal phenomenon and as a social one. The legal aspect of case law is made up of the daily practice of judges, which is then modified by the judicial hierarchy to produce a set of rules. In its social dimension, case law appears as a mechanism for the resolution of social conflicts ; the lower courts settle for efficient means of producing conciliatory judgements, whilst the higher courts ensure the coherence of the whole.

The aim of this article is to show how case law reveals some aspects and limits of juridical rationality and how it works for the realisation of juridical rationality and helps overcome partly some of these limits. Formal aspects of case law are specially studied in relation to the problem of decidability of a legal system. The author analyses the acknowledgement of propositions expressing case law rules, of the meaning of these rules and of their legal validity.

MISCELLANEOUS STUDIES

This report was previously intented for comparatist jurist ; it brings up a synthetical interpretation of the main historical trends in philosophy of law. The article opposes two kinds of processes : 1) Interpretation of law as a natural data, coming from either the world of things or of goods, or from demands of moral consciousness ; 2) a process of creation of law founded either on general will, or justified only by the form of normativity. The two opposite types help to understand the conditions of legal process.

All utopias, in spite of their own peculiarities, use law and social institutions to realise a violent fusion of individuals. Utopia intends to create an artificial nature and to submit man to community. The description of institutions is often imprecise because utopia seeks an absolute power. Tolerance is only apparent, social links are reduced to religion, the lawgiver is a new messiah. Rarity of laws and sanctions comes from the impossibility of infractional desires.

History has always been a permanent source of inspiration according to Montesquieu, because in his opinion history contains signs rather than facts. He doesn't consider these signs as elements of random, but more as the expression of an necessary order directed by a rule of decadence. Such a law of history has an influence on his will to reform. Therefore judicial improvement leads to recovering original and natural bases of the world. Since the closeness to nature is the criteria of legal rules and habits, juridical improvement will consist in establishing legal rules similar to natural rules.

Weber'works are often considered as a fine example of the historicist and irrationalist trends in contempory thought. A closer study of his work shows on the contrary that his ideas are supported by a curate and coherent critic of modern historicism, either hegelian or post hegelian. The critics concerning Max Weber rather testify of the decadence of philosophy of reflexion in contemporary thought.

Aquinas' works never mention « human rights » or other things of the kind. This fact doesn't imply that Aquinas doesn't study what the words designate. If one considers subjective right as a unilateral or bilateral permission, protected by natural of civil law, then it is easy to find in Aquinas' work a very deep and interesting doctrine on man's right to life.

The Declaration of human rights dreamed of man as the owner of his estate and of his production. Later, intellectual rights were written down bearing the image of real estate. But this comparison was fallacious. The class of things which cannot be appropriable is dissolved. In an open market, everything becomes protected by law : life, nature, ways of thinking. The concept of intellectual property has loss its unity.

TEXT

INTERNATIONAL CHRONICLES

REPORTS

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