



## I-2.1: What does it mean to be neutral ?

### Socrates in the land of regulators

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Translated  
Article



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ChaosCompetition organizationConflict of  
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neutralityNeutralityPreferenceRationalityRegulaRegulatorRegulatory agencyRuleTransportation

#### 1. The notion of neutral regulation: the need for a general definition

(Q1) How to understand this obligation in the first place? (Q2) Is it in fact even possible to impose such an obligation on them, or is it impossible for reasons that might range from the incoherency of the very idea of neutrality to insuperable obstacles in its application? (Q3) And if it is indeed possible, by what means can this obligation be effectively satisfied? (Q4) Such are probably the four most central questions raised through the burgeoning debate on neutrality in regulatory systems.

It is reassuring that a consensus seems to be emerging on these issues from the regulation studies community, despite its disciplinary diversity. It is less reassuring that this consensus seems to be a *minima*, or even a *minima minimorum*, since it amounts apparently to little more than the unanimous recognition of their profoundly embarrassing character.

This embarrassment offers at least the convenience of being a logically structured one: the second of these four issues, about the meaning of an obligation of neutrality for regulatory agencies, enjoys obvious logical priority over the other ones. For it is clearly impossible to determine whether this obligation is legitimate (Q1) or even possible (Q3), and if so, by what means it can be enforced (Q4), before its very content has been clarified: what does it exactly mean for a regulatory agency, such as the financial markets authority or the electronic and postal communications regulatory agencies, to be neutral in the accomplishment of its regulatory duties?

To a certain extent, the answer to this question depends on an examination of the way in which this obligation is concretely worked out, that is to say, on an examination of the specific constraints on regulatory activities in which it translates. In this perspective, for a regulatory agency to be under an obligation of neutrality means for example that the activity of a telecommunications regulatory agency, such as the French ACERP, cannot be headed by the CEO of a telecommunications corporation for obvious reasons of conflicting interests.

Although not illegitimate, this type of answer is nonetheless not entirely adequate, and this is why it is only to a certain extent that the answer must be sought in an examination of the manner in which the obligation of neutrality is concretely worked out. For the question immediately returns under a different form, showing that our true curiosity is not yet satisfied: why indeed should forbidding the CEO of a telecommunications company from directing a telecommunications regulatory agency such as ARCEP be considered a measure towards neutrality? As a matter of fact, what interests us when inquiring about what it really means to subject a regulatory agency to an obligation of neutrality is not what can and cannot succeed in making it neutral, but what the very property of being neutral consists in, in the domain of regulatory activity. To put it in different terms, what preoccupies us is not *what* the property of neutrality can be attributed to in the area of regulatory activities, but rather *what composes* the property of neutrality in the area of regulatory activities. There is accordingly a way of searching for a clarification of the content of the obligation of neutrality for regulatory agencies in an examination of the different ways in which this obligation is concretely worked out,

that actually lies on a confusion between the question: "What is neutral in the field of regulatory activities?" and the question: "What does it mean to be neutral in the field of regulatory activities?"

But how much is this last question a legitimate or useful one? Shouldn't the true purpose of clarifying the content of the demand for neutrality that has appeared alongside the development of regulatory systems precisely be to distinguish what can and what cannot be attributed the property of neutrality concerning regulatory activities, rather than clarifying the conception of the property of neutrality itself that is involved in such attributions? Evidently not.

A first reason is that, so long as this conception is not elucidated, such attributions will themselves remain partly obscure: for instance, as limp as the idea of forbidding the CEO of a telecommunications corporation from directing a telecommunications regulatory authority may be, the claim that this prohibition is a means of safeguarding the latter's neutrality cannot be fully understood until the meaning of 'neutrality' itself is made clear. Moreover, as they remain partially obscure, such attributions of neutrality remain also uncertain. How to be sure that they represent valid means of fulfilling the demand for neutrality without being able to rely on a clear and distinct definition of the demand itself? And how also, when faced with two possible alternatives for satisfying this demand, to safely choose between the one that properly fulfills it and the one that only seems to? Or between the one that fulfills it best and the one that fulfills it worse? Far from being an idle or purely theoretical question, the definition of the content of the property of neutrality itself in the area of regulation is therefore one with direct and very concrete implications on the nature of the regulatory systems to be adopted.

As a consequence, a preliminary task seems clearly in order in the study of neutrality in systems of economic regulation: namely, providing a definition of the property of neutrality insofar as it is attributable to a regulator or a regulation, and which might be labelled for convenience the property of regulatory neutrality. A task that ineluctably connects with the more general one of defining what it means to be neutral independently of any particular relationship with regulation. One of the problems being precisely whether regulatory neutrality is nothing more than a particular illustration of this general idea, or whether it incarnates a specific form of it, and if so, what this specificity is. What does it mean to be neutral in general? What does it mean more particularly for a regulator or a regulation to be neutral? Such are the two questions that must then be addressed in priority in order to start dissipating the embarrassment that surrounds the problem of neutrality in the domain of regulation.

It is however impossible to do so without relying upon a characterization of what the expression of regulatory agency mean today; and more generally that of regulator, a regulatory agency being in fact nothing more than one of the possible figures that a regulator might take, albeit a dominant one. Marie-Anne Frison-Roche recently proposed the following definition of the notion of regulation itself in her *Les 100 mots de la régulation (Regulation in 100 Words)*: "It can be defined, she writes, as balancing the principle of competition with another principle, which is either a-competitive or anticompetitive. It is therefore related to a liberal-market economic theory, since the principle of competition is always present. But, it supposes that this principle is not enough to completely and sufficiently organize a market, an industry, or a sector."<sup>[1]</sup> She continues: "Regulation, often confused with rule-making, refers to the mechanisms that establish and maintain long-term equilibriums in certain industries between the principle of competition and other principles, such as risk prevention, access to essential goods, the incentive to innovate, investor protection, or liberties."<sup>[2]</sup> M.A. Frison-Roche also suggests that the regulator be defined as the person who ensures this equilibrium and the introduction of the mechanisms necessary to its existence, which range from the establishment of norms to enforcement of penalties to performing dispute resolution.

So understood, the notions of regulation and regulator are nevertheless defined at a rather specific level, since they not only fundamentally refer to economic activity but also to a certain form—competitive— of organization of that economy. They also refer to a particularly varied landscape where the actual forms of regulation that can be found are extremely diverse. This is why it seems heuristically preferable to begin by attempting to define regulatory neutrality in simpler, and therefore more abstract, forms of regulation and regulator, which, without being unrelated to those

of interest in the economic domain, can play with respect to them the role of what epistemology calls a model, that is to say, of a simplified illustration, either natural or artificial, of certain properties of a more complex reality.

I will accordingly rely in my attempt to define the property of regulatory neutrality upon a very general characterization of *regulation as a mechanism based process of introduction of regularity into a set of elements*.

Imagine for instance a set E of elements that evolve within a circumscribed space and possess the faculty of self-determining their behavior within that space, but in which their behavior initially appears as being chaotic, in the sense that it shows no apparent order. A first possible intervention on E is to force it to order using normative rules, defined as principles of behavior turned into norms for the behavior of each of E's elements. E's elements thereafter self-determine their spatial movement in conformity with these principles, in other words by obeying them. E is thus transformed into a ruled set, and also an ordered one. Ruling thus consists in subjecting to a rule. However, even though it has been ordered by way of rules, and therefore become worthy also of being considered as a "system", it might very well be that the order reigning within E is nonetheless irregular, in the general sense that the behavior of E's elements remains characterized by an absence of repetition, or at least by significant disparities of nature. Such is for instance the case if E's elements never do the same thing twice, even though they perfectly obey the rules of E, or if they do very different things at various times. It is thus possible to intervene again on the system by adding a mechanism in charge of generating repetition or of reducing disparity, and hence of introducing regularity. In other terms, it is possible to add a mechanism in charge of regulating the system.

The central point of this analysis is that the notion of ruling fundamentally refers to a phenomenon of introducing rules, while the notion of regulation fundamentally refers to a phenomenon of introducing regularity, despite the fact that the two notions entertain complex relations, and that they misleadingly both are issued from the same etymological source, the latin *regula*. It is in particular possible to regulate by way of ruling, and rules are in general introduced in order to regulate. Nonetheless, as clearly shown by the case of E, ruling a set of elements does not necessarily mean regulating it, and it is also possible to regulate a system without introducing specific rules to that effect or without modifying existing ones. In the case of E, it is for instance possible to imagine that the simple addition of a number of spatial constraints would suffice to reduce some of the disparities observed between the behaviors of E's elements, without having to modify the rules that produced these behaviors.

The notion of regularity, however, calls for a caveat: in my opinion, it does not permit to capture yet the notion of regulation at its most general level, but only the core cases to which it applies. As a matter of fact, a system is frequently seen as needing regulation in circumstances where what it needs is in fact the introduction of a certain amount of irregularity, of lesser uniformity in its way of functioning, in order to be efficient. This is why regulation must be understood more generally as the introduction of a *modulating* constraint on the way a system functions. In the strict sense of the term, a regulator is nothing more than a specific type of modulator. Such a modulating constraint is most often guided by a concern for optimizing the system. However, the notion of regulation as modulation is itself independent from that of optimization.

Economic regulation specifically defined as balancing the principle of competition and an acompetitive principle clearly falls under this more general concept. For this balancing means imposing modulating constraints on an economy whose economic agents basically calibrate their behavior on the normative rule of free competition, in order to eliminate some of the counterproductive effects resulting from this norm, and especially in order to make competition based behaviors compatible with the consideration of additional principles of a different nature.

There are also illustrations of the notion of regulation understood in terms of modulation of a simpler, because less specific, kind. The most evocative example is perhaps prosaically provided by certain public transportation systems. On a December day in 2010, my attention was drawn to a stocky man who stood a few meters in front of me on a platform of one of Paris' suburban train (RER)

stations, and who I had initially thought was simply a fellow passenger. He was however wearing a sort of working vest with the inscription "Flow Regulator" on the back. The RER's flow regulator is to Japan's 'pusher' what the 'checkout hostess' is to the 'cashier', or what Molière's pretentious young ladies' 'conveniences of conversation' were to 'chairs'. But the pretentiousness of the expression paradoxically enlightens us as to the content of the notion of regulation. For, what is a RER flow regulator if not a modulator intended to attenuate the irregularities caused by the manner a certain system functions?

As a matter of fact, the RER can be correctly analyzed at a certain level as a set of elements of elements endowed with self-determination, and including in particular a subset of train users. This set is moreover a ruled one: it is not possible to climb on and off trains wherever one might desire, travellers have to purchase tickets and enter and exit the trains from platforms at the stations... But these principles do not prevent the phenomenon of congestion, just as the principles governing the use of highways do not prevent the phenomenon of traffic jam. A phenomenon that, even if it is recurrent, nonetheless constitutes a quantitative irregularity with respect to the average passenger flow. And the Flow Regulator is a mechanism of the non ruling kind, since the rules governing the use of the RER system don't change according to the time of day, designed to attenuate this quantitative irregularity by making the RER system function at rush hour like at any other moment of the day, for instance by increasing the frequency at which trains run. The example is particularly interesting because the analogy can be pushed quite far. Not only because economic activity is also, at a certain level of analysis, a flow, and its regulation therefore a matter of regulating a flow, but also because in both cases the problem is one of optimizing the functioning of a system so as to make it more efficient with respect to its primordial function (transportation or preproduction and exchange of goods), as well as to adapt its efficiency to a certain number of other principles not directly related with this primordial function, such as ensuring physically weak, infirm, or handicapped people can access the trains even at rush hour in the case of RER. And also because, in this latter case, the regulatory activity is carried out by an individual or by a group of individuals, who are therefore endowed with the authority to regulate the flow of passengers exactly like a regulatory agency is endowed with the authority to regulate the flow of economic activity.

It is consequently on this broader general characterization of regulation and regulator that I will base my attempt to define the property of regulatory neutrality. As a result, I will limit my ambition to clarifying what it means for an economic regulator to be neutral from the sole point of view of the general category of flow regulator into which it falls, just like the RER regulator, which can for that reason serve as a good model of the economic regulator. And in particular, to determining the differences and similarities that exist between the neutrality of regulation and regulators so understood and the general idea of neutrality.

## **2. Methodological preliminary: philosophy and regulation studies**

To what extent, however, is this a legitimate ambition for a philosopher? It can only be if the problem of definition at stake is of a philosophical order. Is this the case, and if so, why?

There are in fact many other possible explanations of why philosophy might be called upon. One might call upon philosophy by mistake, out of politeness, or of curiosity. Or because one is in a state of despair about whom to turn to when trying to define neutrality. As a matter of fact, the current economy of knowledge hardly provides any discipline or sub-discipline devoted to the theory of neutrality, in the broad sense of an investigation of neutrality considered in itself and under its various forms. At best, one might find reflections on the property of neutrality in relation with some particular phenomenon or problem disseminated through other disciplines, chief among which economics, political science, law, philosophy, esthetics, or linguistics. Even though, the history of human thought is not exempt from a few attempts to develop a general analysis of neutrality, such as the study we owe to Roland Barthes, who devoted to it a whole series of classes at *Collège de France* in 1977–78.

As a matter of fact, one rather dejected conception of the nature of philosophy sees it as playing the role of a sort of theoretical dumping field, in charge of answering all the questions that no theory

worthy of the name has yet assumed the responsibility of answering. A conception consistent with the development of the philosophical discipline, since the term philosophy originally referred to the whole of theoretical knowledge, broadly understood as that rational form of knowledge which was developed as a critical reaction against the knowledge governed by imagination, authority, and religiousness that characterized the Age of Myths. And also because the evolution of philosophy has since then been characterized by the progressive detachment of each of its branches in favour of science, under the pretext of accessing the status of an authentic theoretical knowledge and relinquishing that of a mere simulacrum of theoretical knowledge, due in particular to a strong reliance on speculation. In such perspective, which reduces philosophy both to a museum of antiquated theories and to the antechamber of true science, it would however hardly seem promising for regulation studies, and even less so for regulators confronted with the urgencies of everyday regulation, to ask philosophy to provide a definition of the neutrality of regulatory activities.

There is however a less somber conception of the nature of philosophy that sheds a more optimistic light on the role that it might play in the overall debate about the neutrality of regulation, of undeniable importance for today's and tomorrow's economy. According to this alternative conception, any attempt at theoretical investigation, including the attempt at theorizing regulatory phenomena, comes with a specific area of foundational problems, understood as problems that condition the resolution of all others, and as a result enjoy a certain degree of autonomy from them, including methodological autonomy. Such problems include those dealing with the definition of the most basic concepts used in a theoretical investigation. This conception claims in addition that the resolution of these foundational problems corresponds precisely to the field of intervention of philosophy in a theoretical investigation. In this perspective, there is therefore a philosophy of regulation studies just as there is a philosophy of mathematics, physics, human sciences, economics, psychology, and so many other topics, and this philosophy directly participates in elaborating these regulation studies by attempting to resolve the difficulties surrounding their foundations. And the concept of neutrality playing rather precisely the role of such a basic concept in the question of the neutrality of regulatory activities, it is up to the philosophical dimension of the investigation of regulatory phenomena to shed light upon its contents.

There are different ways of explicating this conception of philosophy, which directly echoes the manner that it was traditionally conceived, especially in virtue of the importance given in the philosophical tradition to questions of definition, and to the definition of foundational notions in particular. As a matter of fact, questions of this type can even be seen as the true source philosophy, since this source is Socratic and that all of Socrates' thought was guided by one sole obsessive interrogation: "What do you mean when you say this or that? You say that courage is a virtue, but what do you mean by courage? You say that the beautiful is good, but what does it mean to 'be good' or to 'be beautiful'?..."

Through this form of inquisitive questioning, Socrates first established that the different citizens, intellectuals, men of war, art and commerce with whom he conversed in that salon of the Athenian Republic that the *agora* represented, did not know exactly what they were talking about. But also that his interlocutors, when he succeeded in making them, to their great surprise, realize their ignorance, and in engaging them, despite their skeptical frown as to the usefulness of the exercise, on the arduous path of definitional investigation, were all too quick to confuse the question: "What possesses property P?" with the question: "What is property P itself?" And finally, when at the price of tiresome efforts, he also succeeded in making them go forward on the right path, that they were all too quick also to confuse the species and the genus, and to believe for instance that they had understood the general nature of courage, even though they had merely identified what the courage of the lion was.

Accordingly, what regulation studies expect, and rightly so, from turning towards philosophy can be ultimately summarized with one word: a little visit by Socrates, a little session of his deft midwifery in order to help them give birth to what they have on their mind, or precisely do not, when they noisily and publicly argue about the neutrality of the internet, telecommunications, the postal service, railway service, or financial transfers. Given the unfortunate impossibility to organize such a visit, let us try to provide a modest ersatz of it, and start with examining the common uses of the

term 'neutrality'.

### 3. Neutrality with respect to a conflict: analysis of a paradigmatic case

The first common use that comes to mind is in relation with situations of conflict, where the term neutrality is employed to designate a certain attitude towards this conflict, be it a war between nations or a simple quarrel between two individuals. What is this attitude exactly? Because they are so commonplace, the everyday conflicts that are part of living alongside other individuals provide us *a priori* with an ideal opportunity to answer this question. What do we mean when saying things like "I'm not getting involved with their problems... I'm perfectly neutral with regards to their conflict and don't want to hear about it... That's their problem..."? Let us dissect a particular example.

Luckily enough, current events provide us with one whose media coverage has given to its intrinsic insignificance an emblematic dimension that makes it of particular interest to the present philosophic inquiry. Moreover, besides the fact that it is a salty tale, it is one that Socrates would surely have been interested in. For it has to do with that most venerable feature of our countryside, the manure heap, that Plato's master, in a passage of *Protagoras* (344cd, also examined in his quest to discover the essence of virtuousness, thereby relieving us of the doubt that such an object might not be noble enough in a quest for the essence of neutrality.

After having been honored by newspapers such as the *Parisien Libéré* and the august *Journal du Centre* in 2009, a Nivernais tragedy respecting Racine's principle of spatial unity was indeed recently honored by a television documentary broadcast by the nightly show "Strip-Tease," and even rebroadcast a number of times. Under the no-frills title of "Manure"[3], this talented documentary dissects with the chilly glance of an entomologist the different sides of a conflict over a pile of manure that towered over a courtyard shared by two neighbors who had lived side by side in harmony for many years, but who have now resorted to settling their differences with lawsuits, the intervention of the constabulary, and by mobilizing support committees and indignant peasant unions.

Let us identify the basic elements of this very unfortunate situation.

On one hand, Chantal Jeux, with her mail-order-catalogue jacket and French-hunter-style rubber boots, is a solitary and stunted breeder who obviously sacrificed her best years to her forty cows, and whose life seems to consist in performing an impressive ballet from her barn to the middle of the courtyard involving wheelbarrows full of manure, to the point that one wonders whether she uses some secret diet to stimulate her cows' intestines. On the other hand, Jacques Demure and his blonde wife, retired Parisians in their seventies with a comfortable sedan and a most tasteful rustic interior, who want to improve their carefree retirement by spending weekends breathing the fresh air of Mitterand's countryside. But manure unfortunately comes with a particular odor. And so, Jacques wants the pile of manure to be moved out of the courtyard. But Chantal, made anxious by what she likely perceives as a possible cosmological upheaval, refuses. Two wills, and moreover two personalities with their particular makeups — sensitivities, characters, intelligence, biographies, value systems, etc., which define two general ways of seeing things, two points of view on the world — oppose each other on a specific point. In addition, this initially narrowly targeted opposition has obviously turned into a sort of all-out war.

For simplicity's sake, let us nevertheless reduce the conflict to a confrontation between two possible individual *positionings* on whether or not the presence of the pile of manure in the courtyard is desirable. One of these positionings can be analyzed as the adoption of *positive* position expressed by the sentence: "the pile of manure should remain in the courtyard." And the other as the adoption of a *negative* position expressed by the sentence: "the pile of manure should not remain in the courtyard." These positionings are not only distinct from one another, but truly opposed to one another, because they cannot both be simultaneously satisfied. Finally, each one is the result of several *determinants*, that include both *motives* and *motivations*, in other words, both causes and

reasons.

The *agents* of this simplified conflict are the human beings (as opposed to things, animals, or official institutions) that play an effective role in it, and are therefore distinguished from those who remain simple *spectators*. Three only of these agents need to be mentioned: Chantal, Jacques, and the judge who rendered a preliminary judgment, ordering Chantal to remove the pile of manure, with which she only complied when forced to do so after Jacques brought suit against her a second time, and the court blocked her bank accounts as a result. In fact, each of these agents should be considered as the central protagonist of a group including either a support committee, family and friends, or colleagues. The judge himself acted as the representative of an institution and not as a private person.

Lastly, the *parties* of the conflict are those among its agents who are involved in the oppositional relationship that defines it. According to this analysis, the judge is an agent of the conflict, but not a party of or in the conflict.

The question that must be answered on the basis of this decomposition is twofold: Who can be called neutral in this conflict? And: In what is that person neutral?

At a primary level of analysis, the answer is clear. Whosoever does not take sides in the conflict is neutral, and this neutrality varies in the extent to which he or she does not take sides. Neutrality towards a conflict therefore means not taking sides in it, and the canonical expression of this sort of neutrality is the affirmation that one sides with neither one or the other of a conflict's parties. Therefore, the very notion of taking sides must be clarified, and this must be done through an attentive examination of *who* can be declared to have taken sides and who cannot.

Two extreme cases are clear in this regard. On one hand, take sides in the conflict those who precisely were designated as parties in this conflict, namely Chantal and Jacques. And they take sides inasmuch as they adopt one of the two alternative positions, for or against the appropriateness of having the pile of manure in their shared courtyard. On another hand, the viewer of the documentary who, exhausted upon his return from a trip to Papua New Guinea, sleepily contemplates this boring and insignificant story on his television set while awaiting a liberating sleep, cannot be considered to have taken sides in any way. His attitude is one of perfect indifference. He is intellectually indifferent as to how the conflict will end, as well as to how it should be settled with regards to morality and justice. And he is emotionally indifferent to the feelings of each protagonist. In other words, he refrain from positioning himself with respect to the battle that unfurls beneath his weary eyes, and his neutrality resides within this total and radical refraining.

This attitude of perfect neutrality must not, however, be confused with the attitude of a viewer whose long-awaited sleep comes just as the first letters of the documentary's ravishing title appear on the screen. This person assuredly could not take sides in the conflict. And as a result, his attitude cannot be qualified as neutral either. For, one is not neutral towards a conflict of whose existence one is unaware. The lack of positioning that seems to constitute the essence of a neutral attitude requires a context where it is possible to adopt a position. Otherwise, we might be considered as neutral towards all conflicts with respect to which no positioning is possible for the simple fact that we do not know of their existence. In order to be for neither side, we must be able to be for one of them. This second case therefore does not belong to the spectrum ranging from neutrality to the absence of neutrality.

However, the undecided documentary viewer does seem to fit into this spectrum. Let us imagine that, riveted to my screen, I am impassioned by what this dive into trivial news items actually reveals about the profound nature of humanity, and that I progressively let myself be touched by the complexity of the human beings it reveals. On one hand, I feel sorry for this woman with the thankless job who has been made poorer than ever by the rigor of the justice system, and I allow my heart to espouse her cause. But, on the other hand, the irascible neighbor that I am recognizes in Jacques a brother who suffers similarly to myself. For, at least as far as residential condominium is concerned, Sartre was right: hell is doubtlessly other people. Let us also assume that this equally

distributed sympathy prevents my mind from coming to a conclusion as to the decision that should be taken regarding the location of the manure heap. I cannot agree with Chantal's position because it is a source of psychological distress for Jacques, but I cannot agree with Jacques' position either, because it is a source of psychological distress for Chantal. By taking neither side regarding the central alternative of the conflict, I remain assuredly neutral. But this neutrality is only partial, since I take sides on many other aspects surrounding the core of the conflict. In certain respects, I am actually on both Jacques' and Chantal's side, and this positioning is due to my emotions, and therefore an affective one.

Let us now assume that after turning off my television Chantal's manure is having the same effect on my visual memory as the madeleine had on Proust's olfactory memory, and that a powerful nostalgia for my peasant origins begins to overtake me. I find it unthinkable that one of those farmhouse courtyards of yesteryear should be tampered with, since even though it was sometimes overwhelming, the honest odor of nature's realities gave our existence greater authenticity. I am completely on Chantal's side: it is out of the question that the manure be moved elsewhere. But, since I have a thousand things to do, I don't lift my little finger to help her. I don't become a member of her support committee, I don't write to the Prefect, etc... even though nothing stops me from doing so. I am not neutral at all, but this absence of neutrality does not translate into actions. I act in exactly the same way as I would were I neutral. It seems legitimate to say that, in this case, I am indeed not neutral, but I act neutrally. Once again, because none of my actions corresponds to those that would position me on the side of one of the two parties, even though they are possible to me.

Similarly to the distinctions between partial or complete neutrality, and emotional or rational neutrality, which have begun to appear in this analysis, this difference between being neutral and acting neutral is of high importance, if not of a higher one. For it opens a world of questions that are not without implications on the demand for neutrality to which regulators may be subjected. And in particular: Is it necessary to be neutral to act neutrally? If this is not the case, it seems that an essential point in the reflection upon regulatory neutrality must bear upon the phenomenon of neutralization, understood as the fact of not translating the absence of neutrality in one's emotions or feelings into one's actions.

What about the neutrality of the agents of the conflict who do not count as parties in it? Is it not paradoxical that the agent of a conflict can in one way or another be said to be neutral? And yet, it seems that it must be so in virtue of the previous distinction between agent and party.

Let us first imagine for example that Chantal employs a farmhand who docilely uses his wheelbarrow everyday to help her enlarge the pile of manure. Without his help, the conflict would naturally come to an end because the pile of manure couldn't reach large enough proportions to become seriously malodorous. One would be tempted to say that his behavior necessarily means the farmhand is on his employer's side, since he enables the manure to be where Chantal wants it to be, and where Jacques doesn't. But reality is more complex.

It is uncontestably possible that the farmhand is a traitor who hates Chantal because she pays him a pittance and that he secretly hopes that Jacques, who has a lot of money, is generous with it, and needs a gardener that he has not been able to find, will hire him. He thinks that escalating the situation to a critical point where a court of law will have to agree with Jacques will be beneficial for his future. Appearing to act in favour of one of the protagonists, he is actually serving the other. Accordingly, the positioning towards a conflict that is to be associated with an action depends not only on the behavioral manifestations that make up that action, but on the intention guiding them as well. Two identical behavioral manifestations performed in perfectly identical conditions do not have the same meaning as to their engagement in a conflict.

There is consequently nothing contradictory either about imagining that these intentions are neutral in that they might be free of the adoption of any position towards the conflict. The farmhand might be acting as he does out of profound and total indifference towards both his employer and her neighbor, with the sole motivation of avoiding rural unemployment, which would leave him without a roof over his head. In which case, not only his intention, but his entire person also, seem to be

legitimately qualified as neutral..

An objection, familiar to those well versed in the Twentieth Century's great political debates, immediately arises as to the validity of the idea that the neutrality of an intention suffices to ensure the neutrality of this action: if the farmhand's actions do as a matter of objective fact promote Chantal's cause, must one not deny their neutral character, whatever his intentions may be? Must not the neutral character of an action in a conflict also be measured in terms of its consequences on that conflict? Is this not, in part at least, why bureaucracies involved in some of history's greatest tragedies have been condemned, such as in the deportations and exterminations of Jews or Cambodians? The question is complicated and certainly part of a deeper examination into the conditions under which a regulatory activity can be considered truly neutral. It can legitimately be left aside however, since the present concern is to clarify what the property of neutrality consists in at its most general level. Suffices it to say that the sheer fact that one can be tempted to deny the neutrality of an action because its consequences amount to *de facto* adopting a position, confirms the well groundedness of the idea that its neutrality does consist in the absence of any such positioning.[4]

There is finally another agent whose case is more resistant to analysis, but who is nevertheless central to the question of the neutrality of regulatory activities: the judge who decided to order Chantal to move the manure heap and then took coercive action so that she would comply, and who emblemizes the role of whoever is a mediator in a conflict. Is it possible for such a person to be neutral or to act neutrally? It seems undoubtedly legitimate to say that he should not be nor act in favor of either party. But, does such a statement remain in this case the expression of a requirement of neutrality ?

First of all, the judge is undeniably an agent in this conflict in virtue of the above definition of the notion of agent, because he does intervene in the conflict, and in the most crucial way in fact, being in charge of resolving it, at least at the most basic level. How then could he resolve this conflict without taking a stand on it, and thereby abandoning any possibility of neutrality, given the content of this notion that has emerged through the preceeding analyses ? This would be a *contradictio in terminis*. It is therefore inescapable to conclude that full neutrality can only be attributed to a judge, and by extension to a justice system, only when this judge decides not to intervene and rules himself not to have jurisdiction over the conflict under consideration. Justice is *strictly speaking* neutral only towards matters about which it pronounces itself to be incompetent.

The real question is then whether justice can still enjoy some form of limited neutrality with regards to a conflict about which it pronounces itself competent. And consequently what sense exactly should be given to the statement that the judge is or acts in favour of neither party of this conflict.

A first possible interpretation of this statement is to read it as a prohibition for the judge to adopt certain kinds positions. Because what is specific to the positioning of the judge in the conflict he is in charge of solving is its non-partisan, or impartial character. But what is a non partisan positioning?

Favoritism is the most ready counterexample of such non partisan positioning. A judge's ruling in favor of Chantal's position as well as *a favor to Chantal* (various analyses of 'as a favor to' being possible) is an obvious case of favoritism. But favoritism is in fact only one of the possible ways of adopting a partisan position that benefits Chantal, and it might also happen as the simple result of the judge's misunderstanding of the case. In any case, whether his ruling is based on favoritism or misunderstanding, the judge adopts a partisan position inasmuch he adopts in this ruling Chantal's point of view, that is to say the point of view of one of the parties of the conflict. Which means in turn that the judge lets his position be determined by the point of view of Chantal, in other words that he lets his own position be subjected to the same determinants as hers. A non-partisan position is consequently a position that adopts none of the points of view of the parties in conflict, that is independent from them, and is therefore not influenced by the determinants that characterize them. Saying that the judge must be or act in favor of neither Chantal nor Jacques thus does not mean that he adopts no position on the conflict (as he would, if claiming no competence over it), but that the position he adopts must have the doubly negative characteristics of being determined neither by the

point of view of Chantal, nor by the point of view of Jacques. Far from meaning neutrality towards a conflict, impartiality in a conflict means taking a negative position of a certain kind towards it.

The importance of defining this negative dimension in terms of determinants, rather than in terms of content, of a position must be emphasized. Indeed, the obligation of impartiality does not eliminate the possibility that the judge's position will be identical in content to one of the parties' positions. For example, when the court system rules in favor of Jacques, it adopts a position identical to his as far as its content is concerned (the pile of manure must not remain in the courtyard). But, the difference is that it is not determined by Jacques' point of view, but rather by another one.

It should no less be emphasized that this other point of view is not the judge's point of view as an individual, but rather as a representative of justice. This is what, in my opinion, the judge's obligation to be *objective*, in addition to that of being impartial, consists in. His position must not be determined anymore by his personal point of view than by the points of view of the conflict's parties. This is why the judge is not a party in the conflict, at least not in the sense that others are. He is the party of justice. This is true even in a system where justice is incarnated by a single individual and his good will. Since it is as an incarnation of justice that that individual then takes his decision, not as an individual.

An alternative analysis is nevertheless possible that would reestablish the possibility of bringing up the notion of neutrality when analyzing the specific attitude towards a conflict of the individual in charge of mediating it. A possibility that probably explains the embarrassment that one tends to experience when having to decide whether or not that individual is neutral, and in what sense he might be.

Indeed, instead of seeing him as refusing partisan positions as previously defined, it seems that we might see him as not taking any stand, neither of a negative type nor of a positive type, with respect to such positions. In this perspective, the judge doesn't even have to refuse or agree with such positions, they are simply excluded from the spectrum of positions he is allowed to make his. Taking sides because of repressed or unrequited love for Chantal, or because of friendship for or jealousy of Jacques, or because of a desire to take over Chantal's farm, *et cetera...* are as many positions he could as a matter of fact adopt, but are by way of principle readily eliminated. With the consequence that the judge doesn't even have to position himself negatively towards them: they are somehow out of the game, and in this respect, neutralized. And indeed, it seems natural to say that, in the process of taking a position, the judge must evacuate any personal determinant that might taint it with partiality and subjectivity, such as personal sentiment, personal interest, etc. Or that he must neutralize them. Such a use of the term neutralization is perfectly in line with the use of the term of neutrality under discussion. Literally speaking, to neutralize means to cause something to become neutral. And disregarding certain determinants in the process of adopting a position, such as personal sentiment, personal interest, or the point of view of the parties of the conflict, does have as a consequence that the judge does not have to refuse or accept certain possible positions (the partisan ones), and that he therefore becomes neutral in their respect, so long as it is right to consider that neutrality towards a conflict resides in the fact of not adopting a position towards this conflict.

It would seem, however, that the first of these two alternative analyses of the attitude of the conflict's mediator is preferable, because it makes the distinction between neutrality and lack of neutrality of the judge coincide with the fundamental one between not intervening in the conflict as a judge and intervening in it as such. Consequently, I adopt the double hypothesis that, on one hand, the judge is fundamentally neutral only when he abstains from judging, and on the other hand, that he cannot be neutral *when carrying out his role as judge*, but can only be impartial and objective. Two attitudes that do not constitute specific forms of neutrality, but rather two ways of taking a position.

#### 4. A proposition for the general definition of neutrality:

The nature thereby conferred upon the property of neutrality in a conflict is, in fact, perfectly illustrated by the phenomenon of political abstention, which seems to be a specific form of it. An individual who is radically neutral towards a conflict is indeed like the individual who abstains from voting. Let us imagine a presidential election with five candidates, in which one must specify for each whether one is for or against. These elections are materialized by a table with ten potential positions to adopt, and distributed into positive and negative positions as to their content. I can therefore adopt the position "for candidate 1" or the position "against candidate 1", the position "for candidate 2" or the position "against candidate 2," et caetera... The abstainer is the one who refuses to take any of these positions, and who thereby manifests his neutrality towards the elections. He is to be clearly differentiated from the person who votes against each candidate, just as he is to be differentiated from the person who does not participate because he had not registered to vote, and for whom these ten positions are not even possible ones that he should refrain from adopting.

A first hypothesis as to the general nature of the property of neutrality has accordingly emerged, which can be summarized in the following terms: *neutrality consists in a lack of positioning within a given set of possible positions*. So that, as soon as this characteristic is present in something, one can legitimately attribute the property of neutrality to that thing.

It must be pointed out that the notion of positioning (or taking, adopting a position) must be taken very broadly. It does not necessarily refer to a particular choice of will and intellect. An affective reaction to a situation can work like a form of taking position for or against. Similarly, taking a position does not necessarily indicate an active or dynamic act that would presuppose an ability to take a position. This would be sticking too closely to the case whence this analysis has been developed and which is specifically related to human attitudes, even though it is a dominant case. The existence of a set of possible positions for a given element, and the fact that that element occupies none of those positions, is sufficient to establish neutrality. The neutrality of zero comes for instance from the fact that it does not occupy any of the positions other numbers occupy in the classes of positive or negative numbers. And once again, lack of positioning so broadly understood must be carefully distinguished from adopting a negative negative kind of position, in the same way as not voting differs from voting against.

The same hypothesis could be expressed in terms of position with respect to a game, without any benefit in terms of generality however. As previously suggested, neutrality as just defined corresponds indeed rather precisely to that particular position indicated by the familiar expression of "being out" (of a game), since it corresponds to a position intrinsically opposed to all the possible positions one might occupy in a game, and consequently only makes sense in reference to them. And what does 'to neutralize' mean if not also putting someone 'out'? Neutralizing one's enemy in an armed conflict means, for example, preventing him from continuing to play a role in that conflict and to make sure that he no longer occupies a warrior's position, that he no longer counts as an agent in the war.

It is nonetheless tempting to try to take the quest for generality a step further by substituting the notion of involvement for the notion of positioning, considering that this notion also has the necessary flexibility to be used in a number of different contexts, beyond that of an involvement in a cause (political...) that it immediately suggests.

The reason for being tempted by such a substitution is that neutrality seems indeed to be analyzable at its most general level as a phenomenon of non-involvement in something, and neutralization as a phenomenon of dis-involvement. Being neutral towards a conflict, for instance, is precisely not getting involved in it.

However, at this stage in the process of analysis, the priority is not to further explore this possibility for supplemental generalization; it is rather to verify the adequacy of the hypothesis already obtained. A verification that requires performing a double task.

The first one is to revisit a few philosophical analyses of the notion of neutrality drawn from 20<sup>th</sup> Century philosophy and that seem to converge, beyond the specific aspect of neutrality they examine, towards the idea that its general dimension must be captured indeed in the terms just proposed. This will not only allow us to reinforce the hypothesis obtained, but also to add some extra precisions on the nature of the specific form of neutrality that has lied at the core of all the above developments, namely the case of neutral human attitudes. The second task is to examine to what extent the hypothesis agrees with other major uses of the notion of neutrality beyond contexts of conflict, such as in the principle of neutrality in schools, or the principle of the neutrality of the state, or in the idea of political neutrality, etc.

Nonetheless, I cannot do more here than briefly perform the first of these two tasks with the limited ambition of suggesting why the hypothesis that neutrality can be defined at the broadest level as a lack of positioning within a set of possible positions does indeed rest on firm grounds.

## **5. Philosophical arguments in favor of the hypothesis:**

The first of the significant philosophical uses of the notion of neutrality that deserves to be examined is offered by the theory of neutral monism, defended at the end of the 19<sup>th</sup> century and the beginning of the 20<sup>th</sup>, by Austrian philosopher E. Mach, American philosopher W. James, and British philosopher B. Russell (in the 1920's). Neutral monism is an ontological thesis, which means that it relates to the most general determinations of what *is*. Since it is monist in character, it posits that there is only one type of entity in the universe. But why is this monism neutral? This actually refers to its relationship with another, more traditional, ontological theory, according to which there exist not only two different categories of entities (rather than just one), but these categories are respectively those of material entities and mental entities, conceived moreover in a particular fashion as entities characterized by intrinsic properties (rather than relational ones). According to this traditional theory, any entity could be positioned in one or the other set defined by these two categories of the mental and the material. Neutral monism affirms, on the contrary, that the only type of entities that really exist are neither mental nor material. In other terms, no entity—according to neutral monism—can be placed in either of those two categories. Therefore, the neutrality of this monism exactly refers to what has been suggested hitherto: the fact that the choice between the preconceived notions of material and mental becomes irrelevant, and that there is no longer any need to adopt a position towards this categorical distinction. The distinction is somehow "out", not operating anymore, neutralized.

It is probably the theory of judgment from the same period that nevertheless brings the most complete confirmation, not only because the idea of neutrality sometimes expressed in it is in conformity with the above analyses, but because it also directly provides these analyses with a theoretical foundation.

Judgment is indeed the mental operation, generally classified as cognitive, which enables us to take a position as to the reality of things. As philosophers are fond of saying, judgment is ontologicallythetic. Judging that the earth is round or that it isn't means taking a position as to the nature of the world, as to the existence or non-existence of a certain fact. In the context of the profound renewal of logic that occurred during that period, two components of judgment were more clearly distinguished by philosophers such as G. Frege, B. Russell, E. Husserl, and A. Meinong. On one hand, the content of what is judged, and on the other, the act of judging itself, or in other words, of attributing truth or falsity to this content. There is therefore, according to these authors, on one side a mental operation of considering whether or not rotundity is a quality applicable to the planet Earth, and on the other side an operation of qualifying this situation as either true or false, and thus of adopting either the position that it is the case or the position that it is not, that it is real or that it is unreal. A. Meinong goes so far as to uphold that the simple consideration of a content of judgment is an independent mental operation, which he calls *Annahme [supposition]* and is proud of having discovered, and that it can thus occur outside the context of judging, in which it is combined with the other mental operation that he specifically labelled conviction, or more generally, assertion. This

conception of the nature of the judgment as composed of the two operations of supposition and assertion also makes it possible to give full recognition to the phenomenon of suspending one's judgment, that is to say to the possibility, in the context of a judgment, of stopping to perform the operation of assertion and to remain at the mere consideration of the content. Husserl is doubtlessly, among these various authors, the one who most insisted on the fact that this operation of judgment suspension was equivalent to neutralizing our faculty of ontologically taking position. When I suspend my judgment on whether or not the earth is round, I cease taking a position on the reality or unreality of the rotundity of the earth. And I precisely become neutral as to its existence. I do not affirm this existence, I do not deny it, I simply refrain from any positive or negative ontological thesis. This is why, again according to Husserl, it constitutes an even deeper and more radical operation than doubt, which he believes remains a full-fledged type of judicative operation.

This not only shows us that in this turn-of-the-century theoretical context the term of neutrality designates a phenomenon of lack of positioning of a specific kind, but also that this phenomenon of non positioning helps make certain aspects of neutrality more precise and explains their very possibility. To be neutral in the general sense of not positioning oneself means in particular withholding one's judgment for the human species, and human beings can adopt neutral attitudes because their faculty of judgment is made in such a way that it is possible for them to withhold judgment.

Husserl goes in fact much further in his analysis and gives a more general significance to this mechanism of withholding judgment, correlative to the general significance he ascribes to the idea of ontological positioning. According to him, it is not simply through a specific operation of judgment that we take a position regarding the existence or inexistence of what surrounds us, but rather through all the mental operations that are constitutive of the human experience, and especially perception. Visual perception puts in touch with a world that is immediately indexed as real. According to Husserl, there is therefore a thesis of existence introduced at a non-judicative level, which he calls ante-predicative. But, in his eyes, this ante-predicative ontological positioning can also be suspended by a specific additional operation he famously calls "transcendental reduction", and which is the foundation of an essential portion of his thought, namely the development of that new discipline known as phenomenology. For phenomenology is defined by Husserl as the theory of what is made accessible to us once we have neutralized at its most radical level, thanks to transcendental reduction, the world in which we spontaneously live, with all of its realities and unrealities. It is the theory of the pure spectacle of the world revealed by the neutralization of all our ontological positioning from the judicative down to the ante-predicative levels. A philosopher having reached the point of transcendental reduction: such is in Husserl's perspective the attitude that not only qualifies as neutral, but as entirely and radically neutral. A suggestion that, as particular as it may sound, at least has the merit of manifesting in its purest form what seems to be indeed the most essential feature of neutrality, as well as to provide us with a stimulating hypothesis on the mechanisms that make it possible in the area of human attitudes, be it an attitude with regards to a conflict, a vote, or whatever else.

## **6. Conclusion: the neutrality of the flow regulator**

We can now reasonably assume that the general definition of the notion of neutrality that has just been defended is essentially correct. This does not necessarily mean this definition captures adequately the property of neutrality put to use in the context of regulatory activities. It is indeed possible that the term neutrality would mean something entirely different in such a context, to the point of even being nothing more than a simple homonym. Nothing suggests however *a priori* that this is the case. Pending further verification, it seems therefore no less reasonable to assume that the definition also applies, or should at least apply, to the idea of neutrality invoked in the field of regulation.

What consequences should then be drawn from this twofold assumption as to the question of the meaning of the demand for neutrality when exercising a regulatory activity, again understood in a

general manner as an activity of flow modulating?

The first and most important is that, if one understands it as a demand for a regulatory activity neutral in itself, that is to say neutral inasmuch as it is regulatory, this demand is in fact a self-contradictory one, by definition impossible to achieve. For the flow regulator is to the flow in the same position as the judge or the arbiter is to the conflict. In the same way as the latter are not neutral towards a conflict insofar as they mediate it, the flow regulator is precisely not neutral towards the flow insofar as they regulate it. Because by regulating it, he intervenes in it, modulates it, and imposes certain determinations upon it. A neutral regulator of the flow in the RER is a regulator of the flow on strike. The demand for regulatory neutrality seems accordingly to stem from a misunderstanding of the very content of the concept of neutrality. It sounds like a typical example of confusion about the content of words which Socrates spent his life denouncing.

Does this mean that the problem of neutrality of flow regulation, and therefore the problem of the neutrality of regulatory agencies, vanish? Certainly not. But, correctly understood, this problem reveals itself to be nothing more than a problem of pertinence and limits of regulatory activity. Wondering about the neutrality of a flow regulator is wondering whether the flow that he regulates must be regulated, and if so under what aspects and up to what limits it should be. Wondering about the neutrality of a RER flow regulator means wondering whether it is even pertinent to regulate the flow of passengers in the RER, and if it is, wondering about what aspects of the flow of passengers this regulation must be concerned with. *The error that the proposed definition should lead us to discard is, in other terms, believing that the problem of the neutrality of regulatory activities consists in a choice between neutral regulation and non-neutral regulation, whereas it is really a choice between regulation and abstaining from regulating.* And in this perspective, asking *how* a flow regulator can be neutral means asking how he can limit the perimeter of his regulatory activity.

A related error, also rooted in a misunderstanding of the content of the concept of neutrality, must consequently be discarded too. This error is confusing the problem of regulatory neutrality with the problem of regulatory objectivity and impartiality. These are also authentic problems, but of a different nature than the problem of regulatory neutrality. And in particular in that, in contradistinction with this problem, they do concern the internal workings of regulatory activity.

But as such, they cannot be dealt with, in any regulatory area, unless the problem of regulatory neutrality itself, correctly understood as the question of its pertinence and its limits, has first been resolved. There is no sense in wondering about how to be impartial and objective in exercising regulation unless the pertinence of that regulatory activity has been demonstrated and its boundaries defined. It is useless to wonder about how the regulator of the flow in the RER can be impartial and objective unless one it has been established that this flow must be regulated, and exactly in what way.

Let us finally examine how the debate around net neutrality is to be understood in light of this perspective on what it means to attribute the property of neutrality in the context of regulatory activities. This is a particularly important case, both because it is at the heart of the debate surrounding the neutrality of regulation, and also because it offers an interesting particularity.

At first glance, the problem of net neutrality, as the very expression makes clear, is not a problem of regulatory neutrality, since it does not ask whether the regulation of the Internet should be neutral, but whether Internet itself should be. Neutrality in this case would mean that the access to the Internet's resources should be furnished without taking into account, and therefore without taking a stand on, who connects to what and in order to do what. In reality, these two problems are linked by the fact that the debate surrounding net neutrality is all about whether this neutrality should be instituted or guaranteed by way of regulation. The problem of net neutrality is thereby transformed into a problem of the neutrality of the regulation of the Internet, in the precise sense just given to the notion of regulatory neutrality, since it becomes the question of knowing whether or not the regulator should indeed get involved, or should indeed guarantee the neutrality of the Internet itself. With the paradox that, in virtue of such a definition, the neutral regulator, the regulator who decides not to get involved, will leave Internet to its imperfect neutrality. And that the regulator who

will get involved in order to establish or guarantee the Internet's neutrality will be a non-neutral regulator.

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[1] *Les 100 mots de la régulation*, Marie-Anne Frison-Roche, Que sais-je ? PUF, 2011.

[2] *Ibid.*

[3] Which in French can also be read as "Bastard"

[4] It will be enough to add that I am personally inclined towards the hypothesis that an action can be authentically neutral even though its consequences are not, as long as it was not performed in bad faith. But, I also think that this hypothesis does not fundamentally affect the moral implications of these consequences. One must morally assume the consequences of one's neutrality in a conflict just as one must morally accept the consequences of taking one of its sides. Neutrality does not create a moral exemption towards the consequences of one's action.