I-1.36: Neutrality of the State: between myth and reality

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Translated Article PDF

At first sight, the notion of the neutrality of the State seems to be obvious and simple, almost a pleonasm. Being above isolated individuals, the State is responsible for the general interest, even envisioned on a long-term basis. However when one gets deeper into the analysis, this first observation, evident at first sight, must be mitigated and qualified.

First of all, is this neutrality of the State, situated above particular interests, absolute? In fact it is only internal since a State is, or ought to be, seldom regarded as neutral towards third parties, other States in particular. Even without taking into account open or latent conflicts, a State is not expected to champion interests that do not pertain to its citizens or to the fraction of them involved in any given negotiation. Therefore the neutrality of the State essentially exists in relation to its own citizens and, for J.-J. Rousseau as well as for Plato and many Utopians before him, the State is more easily considered on an insular mode, since its external bias is able to pervert its naturally neutral nature.

The fact remains that this nature is dependent upon the homogeneity of a society's components, which, to say the least, is not always met. And this is exactly the point raised in the famous chapter 1 of the fourth book of the *"Contrat social (Social Contract) of Jean-Jacques*, namely "The general will is indestructible", which shows that the expression of the general will presupposes that citizens perceive themselves as sharing a common identity and interests that are traditionally expressed by an almost general agreement (unanimous vote).

In a diverse society, on the contrary, determining the general interest comes down to determining the prevailing interest, or rather a coalition of the prevailing interests. In this situation, the general will does not disappear but is "evaded" ("eludée" in Rousseau's own words).

From this point of view, **democracy** if not in theory, at least in fact, **threatens neutrality**. This entails a certain **dualism** between a State of Law, meaning both a legal contraption designed to enforce liberties, and a State as it ought to be; and, on the other hand, a State of Fact in which one is legally wrong if one is politically in a minority. In French culture, this school of thought seemed to stem from a crypto-Marxist sphere of influence that considered the State as the instrument of the prevailing class and its allies. But more scientifically, a realistic approach using Public Choice Theory leads us to analyze democracy as a political system distinguished by the competitive fight for votes, administrations as a set of monopolies fed by taxation, civil servants as optimizers of a specific arbitration between work and leisure, etc.

From this point of view, neutrality could easily be seen as a decoy. That would however be quite a hasty analysis since the State of law is normatively the **regulatory ideal** of the State of fact, or, in more socio-economical terms, a **convention of coordination**, the rule of the game that determines the boundaries of political confrontation and partisan decisions. Neutrality plays an identical role in the domestic legal order to that it plays in the sphere of international relations: it delimits a protected and respected space that refrains hostilities in the very interest of the opposing parties. Therefore, **the neutrality of the State, even if it is only relative, must be attained through a skillful construction that alleviates risks of a dictatorship by the majority coalition, while at the same time**

allows for the satisfaction of the particular interests it contains.

Constitutional rules and principles, *ex ante* and *ex post* constitutional review, an independent judiciary, independent authorities, federalism, a bicameral system, etc, are all representative of institutional constructions designed to control democracy. Short of achieving the general interest—which, as Sidgwick rightly pointed out, is no one's interest—thanks to these mechanisms the State is able to ensure the interest of a large majority, reach a **second category optimum**, which is by no mean insignificant.

Just like fractals, as it were, the macro neutrality of State must be supported by **micro neutralities** of the institutions that provide it, which, like the former, cannot be anything but relative.

For example, how is one to avoid bias when appointing the members of **independent authorities**?

Diversity in the powers to nominate or to appoint must be ensured, but possibly each one with a guarantee of relative neutrality or limited bias (*cf.* the idea often used of an appointment made by a representative body deciding on a two-thirds majority).

Is it necessary to set criteria to manage these decisions by sex, age, abilities, etc? If the answer is Yes, —and the sex criterion being deemed straightforward and only raising an issue about the proportion of men versus women—, what would be the criteria for age or ability? Concerning age, neutrality would be best managed through a representative panel of age groups, in order to avoid a generation bias. Conversely, where ability is concerned, the specialists in this field (because they have been actors in the field) ought to decide on appointments along with those who have been witnessing it (judges and academics), but without overlooking non-specialists in order to avoid club cultures and their tendencies to underestimate definite risks.

It is clear that, even assuming this variety to be desirable, such diversity cannot be reached through a series of appointments independent one from the other, but rather through a collective and coordinated choice made by the forces appointing the members of an authority, which is seldom, if ever, the case.

Once the members have been chosen, a long string of questions arises regarding how to maintain the level of neutrality reached, or even to improve it through training. One could consider that the members would select their President, unanimously or by a qualified majority, but this solution does not seem to be frequently adopted.

Afterwards, this neutrality will be modified according to both the powers with which the President is endowed (*a fortiori* if he is appointed from the outside), and the internal operation of the institution. How will the agenda be determined? How are documents communicated? Are the debates public or private? What will the rules for decision-making be (unanimity, qualified or majority, calculated in the absolute or according to the number of expressed ballots, etc?).

Here, the difficulty is twofold: 1) these questions are often not asked, sometimes because time is scarce when an authority is created; 2) the data allowing us to correlate decisions and the above mentioned parameters may not available*p*, and are often lacking except in the United States, where studies on courts or juries statistically correlated to their composition, to the type of evidence, or of debate, are available.

To conclude, while starting from a simple idea, "everybody to count for one, nobody for more than one", to quote Bentham's words, neutrality takes us back to all the matters regarding institutional engineering that pepper the political and legal thought of the democratic and liberal tradition (and this could even be traced back to the Greeks). Nowadays, some balance has been found but the question still remains open and it would be worth the trouble to put it to **empirical tests**. The paradox reads as follows: neutrality is a legal and legitimate ideal, but it could only be made more real by enhancing the traditional methods used in legal thinking, particularly in our country, with the help of empirical sciences and by using the patterns of game theory.