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SECTIONS

CROSS-BORDER CRIME – JUDICIAL PRACTICE – BORDERS OF SOVEREIGNTY

THEMEN DER SEKTIONEN: GRENZÜBERSCHREITENDE KRIMINALITÄT – PRAXIS DER RECHTSPFLEGEORGANE – GRENZEN DER SUVERENITÄT

LA CRIMINALITÉ TRANSFORTALIÉRE – PRATIQUE DE LA COUR – LES FRONTIÉRES DE LA SOUVERAINETÉ

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Sabino **CASSESE**

The private conquest of the public sphere: retreat or expansion of the state?

The two hundred years of administrative law's existence have been marked by two long-standing trends. The first, lasting from the middle of the 19th century until the last three decades of the 20th century, was the expansion of the public space. The second, which began in the 1970s, is – to the contrary – the progressive reduction of the public space.

In a short course given at Harvard University and later published in 1905 under the title *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century*[1], Albert Venn Dicey, the English constitutional scholar and great opponent of administrative law, gave an account of the gradual death of *laisser-faire* in the second half of the 19th century, due to increasing State interventionism (in the fields of industrial and labour regulation). This interventionism was, in turn, driven by the spread of collectivism, and by a "legislative public opinion" favourable to the correction by the State of market failures.

The 19th century witnessed the development of "collectivism": the extension of public protection to the working classes, restrictions on freedom of contract, and a preference for collective action. The first half of the 20th century saw progressive extensions of suffrage, two world wars conflicts and one global crisis. The first of these increased the collective demand for public services. The second acted as a powerful catalyst for public projects aimed at reconstruction and at the reduction of inequalities. The third forced the State to increase its direct public management, and State planning. Each of these events led to an increased role for the State, which was called upon to correct market weaknesses, address inequalities and provide security.[2] This increased role came about essentially within the administrative sphere, with the establishment of new organs and more employees, and the greater need for resources and more extensive regulation.

Since the last quarter of the 20th century, this trend has been reversed. Public spending, which had in many countries exceeded half of the gross domestic product, began to fall. Today, the State remains the largest financial intermediary (it collects resources through taxation, and redistributes them in the form of services); however, its share in the economy is decreasing. The fear is that the "overburdened governments" could go bankrupt.

In the banking sector, in insurance, in the supply of electricity, gas and other forms of energy, in telecommunications, in air transport and in many other sectors, public entities have been turned into corporations, with the shares (partially or entirely) sold to private actors. At the same time, however, new authorities have been established in order to regulate the privatized corporations. The entrepreneurial State has been replaced by the regulatory State.

Almost all public services have undergone a process of liberalization that has transformed sectors that were once reserved to the State into areas of unrestricted access. At the same time, however, in order to pursue social aims (for example, the provision of universal service), public limits and controls have been established.[3]

The reduction of the public sphere did not come about solely through privatization and de-regulation, but also through outsourcing and the development of public-private partnerships.

Experiments have been made with the outsourcing of many different kinds of activity, relating, for example, to military action; prisons; public order; standard-setting and certification for industrial

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[1] Republished by Liberty Fund, Indianapolis, 2008.

[2] S. Cassese, *Stato e mercato dopo privatizzazioni e deregulation*, in "Rivista trimestrale di diritto pubblico", 1991, n. 2, p. 378.

[3] S. Cassese, *La nuova costituzione economica. Lezioni*, Bari, Laterza, 2007, p. 291.

goods; tax collection; education; health; waste collection and disposal; transport; museums; public archives; road maintenance; the management of public employees; the acquisition of goods and services by administrative bodies; and the planning of public works.

The most significant example – as it involves a typical State function, a manifestation of national sovereignty – concerns the "private military companies" that have been called upon to carry out various functions (from providing logistical support to the armed forces).

In the course of the past 15 years, the number of employees of private companies specialized in military interventions worldwide has increased tenfold, moving from thirty to three hundred thousand; while the number of soldiers in regular armed forces has dropped, from thirty million to twenty million.

The private actors that conduct out military activities on behalf of States pursue their own interests; however, they are also charged, on the basis of contractual relations with those States, with performing one of the most important public functions. Private military companies can be incorporated in States other than those by whom they are engaged, and can employ individuals from all over the world (meaning that military action taken by one State can actually be executed by nationals of another). They are involved in both domestic and foreign operations. They are not subject to the disciplinary regime of the regular military, and do not enjoy immunity from jurisdiction. In war, they are treated for the most part as mercenaries, and not as prisoners of war.[4]

Lastly, the various forms of public-private partnerships involve long-term cooperation between the public and private sectors in carrying out public functions, with jointly managed resources and shared risks.

Public-private partnerships have become so widely employed that the European Union, distinguishing between partnerships of a contractual and those of an institutional nature, has begun to regulate them, defining them according to the following features: the relatively long duration of the relationship; guaranteed funding from private actors; the participation of private actors in certain stages of the project; and the distribution of risks between the public and the private partners.[5]

These forms of reduction of the public sphere create many problems. The first of these concerns the legitimacy of the choice of who should decide whether to privatize, de-regulate, outsource to or otherwise collaborate with private actors in carrying out public functions? Might limits on private involvement be established through the recognition of certain non-delegable functions – so-called "core tasks" (as has been done, for example, in the US with Circular no. A-76, and in the UK with the "De-regulation and Contracting-out Act" of 1994[6])? Or is it better to establish general criteria (such as a lack of internal structures capable of performing the function at issue or a shortage of public employees to carry it out) and procedural requirements (such as an obligation to carry out a preliminary cost-benefit analysis)?

The second set of problems concerns the selection of which private actors will benefit from these public decisions: for example, in the sale of a public company or the selection of private parties with whom to contract, should there be a tender process in order to ensure free competition? And, once the service in question has been entrusted to private hands, how to guarantee that this does not lead to an oligopolistic market structure? (the Correctional Corporation of America, for example, runs more than twenty-one prisons, with more than 6,000 prisoners in the US, and also has numerous contracts in both the UK and Australia.)

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[4] C. Tomuschat, *In the twilight zones of the State*, in J. Buffard – J. Crawford-A. Pellets-S. Wittich (eds.), *International Law between Universalism and Fragmentation. Festschrift in honour of Gerhard Hafner*, 2008, Koninklijke Brill, p. 479.

[5] Commission of the European Communities, Green Paper on Public Private Partnerships and Community Law on Public Contracts and Concessions, Brussels, 30.4.2004 COM (2004)327 final; Resolution of the European Parliament 16.10.2006.

[6] E. D'Alterio, *L'esternalizzazione delle funzioni di ordine: il caso delle carceri*, in "Rivista trimestrale di diritto pubblico", n. 4, 2008, p.1018, fn. 187.

The third set of problems concerns supervisory difficulties. Should privatized companies be entirely free to conduct their business, or should they be subjected at least to a sectoral regulatory authority? And does not such "third-party government", in adding an extra "layer", increase the distance between the government and the activity in question,[7] thus making it difficult to apply the core principles of administrative law?

More generally, does not the establishment of a private space parallel to administrative bodies produce a paradox, creating a "quasi-administration" that is exempt from the basic rules of administrative law (transparency, the duty to give reasoned decisions, proportionality, participation, and judicial review of decisions)? On the other hand, is not the point in (whole or partial) privatization precisely to free certain administrative bodies from the limits to which public actors are subjected, to enable them to avoid the more onerous financial and employment obligations, and to allow them to carry out their activities in a faster and more effective manner?

Lastly, many privatizations create burdens on public finances, responsibility for which is thus moved transferred to the Treasury. In such circumstances, the State is no longer concerned with the privatized activity in question as an administrator, but rather as a financial backer.

These changes – often presented in such suggestive terms as the "hollowing out" or the "withering away" of the State – have produced two fundamental ambiguities. On one hand, they represent a reduction of the public sphere; through these, however, public power often extends even further than it had done previously, regulating areas that it had hitherto been unable to reach. Do, therefore, the changes outlined above represent sovereignty in retreat, or are they rather mechanisms through which the State is expanding its powers?

On the other hand, through these changes the State divests itself of certain public powers, thus reducing the scope of its own sovereignty. This, however, occurs only in an interstitial fashion; it does not affect overall State functions (for example, the practice of "contracting out" certain defence functions is limited to marginal activities when compared to those of regular armed forces). Moreover, it occurs only as a result of an act of self-limitation by a national government, itself an exercise of State sovereignty; and this is reinforced by the fact that, in transferring its functions to private actors, the State must then construct a public law framework to regulate the activities in question.

These ambiguities have been accentuated by the financial crisis that began in 2008, which has brought a notable re-expansion of public intervention through the bailouts of the banking sector, in which the governments involved have taken on – even if only temporarily – the role of shareholders. This has led to a corresponding growth in public spending (which in turn will lead to an increase in budget deficits and a subsequent increase in taxation) and a rise in social intervention aimed at sustaining and increasing employment rates.

The pendular motion of administrative law between the public and the private will, therefore, continue: expansion, reduction, then re-expansion of the public sphere. These movements do not, however, affect all areas of administrative activity equally; some remain stable, and others change only partially. The discipline of administrative law thus has difficult tasks: continually tracking this motion, taking into account both the fluid and the stable elements, it must construct an understanding of administrative law *qua* system.

[7] D. G. Frederickson and H. G. Frederickson, *Measuring the Performance of the Hollow State*, Washington, D.C., Georgetown Univ. Press, 2007, p. 181.