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Law and secrets

This paper deals with the typical notion of the “secret”. However, the paper’s title, “*new arcana*”, points to a meaningful conceptual reinterpretation of this old notion.

Sometimes modern concepts are employed in order to understand ancient processes. In the case of “secrets” the stakes are rather the opposite. Indeed, it is challenging to find a word which is capable of grasping everything that the Latin term *arcana* does. A preliminary remark concerns the use of the plural “*arcana*” instead of the singular “*arcanum*” (which means hidden, secret)¹. The plural term better illustrates the range of implications and references that the phenomenon of secrecy implies. The expression “*arcana imperii*” was coined to imply a secret art of government that imitates the old *arcana naturae* (secrets of nature). Soon, however, it ended up touching a neutral ground. Indeed only in exceptional circumstances was easy access to secrecy allowed. In the meantime, even though the free access let public power yield to the glimmer of private expectations, it even occurred on no account. This obfuscation is the result of a sliding back and forth between public and private fields,

¹ The Latin term *arca* means “casket ”

wherein the word “secret” is seemingly kept at the same distance. The term “*arcana imperii*”, however, reveals its bond to the idea of power².

It is for this reason that the secrecy of *arcana* defies the warp of law, lying midway between its case in point and its history.

In the following notes I examine a few conventional historical modes of arranging the relationship between *law and secrets*. More precisely, I will provide an overview of the historical reasons that end up disclosing secrecy within the public room. I ultimately describe how in the ancient world secrecy was at first hidden (in Latin the term used is *secretum* which means concealed) and then later unveiled³. This path and the destiny of democracy seem to overlap if democracy is seen to be a space where secrecy is supposed to be limited in the public sphere and extended in favour of private individuals.

It is helpful to make clear at the outset that I do not deal here with the legal history of *arcana*. Nonetheless, I attempt to use history in a diachronic sense. While this method implies different things in different places, I use here, with reference to the concept of secrecy, to show the interferences between history of ideas and history of thought⁴. Secrecy becomes the object of public attention when it becomes a tool for society’s construction. A word like *arcana* suggests an entire ensemble of cultural behaviours that in a certain moment become a social issue and disconcert the traditional split between public and private.

The word *arcana* is more pregnant than “secret” for at least a couple of reasons.

First, it brands itself as belonging to a certain epoch in the history of political thought, while the modern translation into “secret” is adapted to the particular technique of conceptual differentiation⁵ of the contemporary legal framework. Indeed, with respect to secrets, law is able to appropriate a few different models of normative life for its own use. It works on a field where a secret is able to

² See Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 *University of Pennsylvania Law Review* 1349 (1982)

³ See Riccardo Orestano, *Il metabolismo dei giuristi*, in *Diritto. Incontri e scontri*, 737-745 (1981)

⁴ See Michel Foucault, *Discorso e Verità nella Grecia Antica* (translating *Discourse and Truth. The Problematicization of Parrhesia* into Italian), 12 (2005)

⁵ See Niklas Luhmann, *La differenziazione nel diritto*, (translating *Ausdifferenzierung des Rechts. Beiträge zur Rechtssoziologie und Rechtstheorie* into Italian), 61 (1990); Max Weber, *Economia e società* (translating *Wirtschaft und Gesellschaft* into Italian), II, 14-17 (1974)

simultaneously act in a variety of different ways: like a legal form or a historical event, like a principle or a rule, like a right or a power, like public communication or a mode of governance. While *arcana* (as opposed to “secret”) has a narrower connection to politics, it certainly brings the problem back to the original core.

Second, it lets us explore power’s progressive lack of visibility as a strategy of control.

This second point shapes my arguments in two different ways: first , it suggests the consistency of secrecy seen from a historical perspective; second it points to secrecy’s history of adaptation to legal concepts. With respect to the first point, it is important to determine when it is possible to start talking about the emergence of relationships between public and private in terms of secrecy. Concerning the latter point, it is significant that the concept of secrecy, as a form social praxis, was carved out from beyond the confines of the legal field. In other words, secrecy seems to be present within all social systems but in such a way that it is embodied in different categories.

Thus, it becomes quite clear that secrets are intimately linked to their own time. They act like “social facts”, to borrow an idea formulated by John Searle⁶.

From this perspective, it is my aim to single out a few relevant periods wherein the assets of secrecy among public powers and individual rights have shifted. Achieving this aim with respect to the public/private dichotomy, requires an archaeological inquiry of various procedures of communication and decision making.

Along the way, I will highlight several key questions in the hopes of giving some voice to the hidden soul of secrets.

Old” arcana imperii”

The first model is that of *arcana* in the ancient world. Here the importance of secrets depends on how close society is to its structures. In comparison, the modern world is characterized by an important difference in its multiform perspective of the public/private dichotomy. It is crucial, for instance, that in Roman law the idea of the

⁶ See John Searle, *The Construction of Social Reality*, 120-124 (1995)

State has been shaped, basically, as a centre of private rights' allocation. Public law seems to be the sum of private experiences; it has no autonomy. Two consequences follow from this assumption: *i)* a concept of the State has not been framed; *ii)* the public sphere is constituted by *populus romanus*, which has inborn private rights⁷.

Moreover, when the *princeps* replaces the *populus*, the institutionalisation of power acquires a personal basis through the attribution of private rights to the State.

The Roman Empire was a personal empire, where the prince could recognize himself, and citizens were nothing but subjects to the power of prince⁸. Indeed, during the republican age, the *res publica* was the centre of the king's property where, nonetheless, the king was supposed to represent the corporate interests. Within this scenario secrets increase considerably, and they develop in a fragmentary way where the boundaries between the public and the private sphere become indefinite.

In the Roman world, for instance, the place of power gathers prominence: *auditorium* and *consistorium* are the places of collective life. This example suggests that knowledge is increasing attached to the power of technique (*technè*). In these places people stand; Augustus is the only one who sits. This example, illustrates the fact that knowledge always implies a high award to those who can be tempted to cross forbidden thresholds.

The other place of decision-making is the *secretarium*. Here access is not allowed and the judge is kept hidden from indiscreet eyes. This indicates the erosion of the idea of public participation and, in its place, the emergence of with the paradigm of "justice administration". It is reminiscent of the concept of "taking possession of space". The property of contingent, the interest involved imposes itself as an instrument of enforcement (*instrumentum regni*).

Regardless, there is no doubt that in the Roman world, in spite of the fact that the concept of secrecy was well rooted in the social conscience and widely transposed into legal language, secrecy itself had no normative regulation. Moreover, secrecy was always present in every dimension of daily life, but it was present, paradoxically,

⁷ See Riccardo Orestano, *Il problema delle persone giuridiche nel diritto romano*, 185-202 (1968); Mario Bretone - Raffaele Ajello, *Tecniche e ideologie dei giuristi romani*, 11-16, 42-44 (1971)

⁸ The latin term is *subiecti* (this is the origin of the modern expression *Rechtssubjekt* or *soggetto di diritto*).

as simultaneously both “known”/ and “hidden” (*clam/palam*)⁹. In the private sphere this phenomenon is more self evident, even though the technique of secrecy was more frequently used within the field of procedure.

A “small amazing anecdote”¹⁰, very nicely illustrates the simultaneously known and hidden existence of secrets in the Roman world. The tale recounts the secret theft of the calendar and the tables containing the *ius civile* (civil law), which had been physically preserved in a sort of archive called *aerarium*. This theft is conventionally ascribed to Gnaeus Flavius, who was originally a clerk and later was appointed *aedilis curulis*. The anecdote has a political meaning: it suggests the removal of law and time and its appropriation for the exclusive knowledge of pontiffs. Therefore, in a sense, the modern problem of free access to the law was actually already an existing one. The debate spread from the interpretation of the Twelve Tables. Indeed, after they were compiled, they needed to be interpreted and debated in front of the tribunal. Both, this activity and the knowledge of the *formula*, suggested a specific competence which was reserved for the pontiffs. Only they knew, for example, the days that were available for the commencement of legal proceedings, the so called *fasti*. After his discovery of the archive, Gnaeus Flavius swore off writing¹¹.

This short tale is significant at least in one respect: the activity of writing locks the archive of knowledge¹². A political act in defence of free access to law was farsighted, but it implied many consequences.

First of all, jurisprudence lost value because it was easier to enforce the public written *formula*, which was no longer kept secret. Secondly, the risk of losing a case due to “breach of *formula*” was escaped.

This story is linked to the use of secrecy in the legal framework. More than likely, the core of the whole conceptual problem of secrecy in the ancient world was the invisibility of *formula*. I properly refer to the link between *actio* and *exceptio* within

⁹ See Riccardo Orestano, *Gli Arcana nel mondo romano*, in *Edificazione del giuridico*, 40-45 (1989); Mario Bretone, *Diritto e potere nella storia europea; Il diritto invisibile* in *Diritto e tempo nella tradizione europea*, 105 (2004)

¹⁰ See Otto Seeck, *Die Kalendarfartel des Pontifices*, 35 (1885)

¹¹ See Marcel Detienne, *L'espace de la publicité*, 64 (1988)

¹² See Marie Therese Fögen, *Storie di diritto romano* (translating *Römische Rechtsgeschichten. Über Ursprung und Evolution eines sozialen Systems* into Italian), 141 (2005)

the ancient trial. The Romans discovered a *formula* in order to present the “exception” (plea), which laid on the borderline of the law because it was excluded by the *ius civile*. Indeed the sentence proceeded from what defendants did not plead¹³. In this sense, the *exceptio* showed the contradiction between the *ius civile* and the *ius honorarium*.

The *exceptio*, in other words, shifted the boundary between the *inside* and the *outside* of law, or better yet, between its visibility and its implied existence¹⁴.

An elaboration of the dispute about the *actio* requires the introduction of the famous controversy between Windscheid and Muther. I mention the debate not as a mere tribute to traditional legal history. Rather, a deep reason brought together the life of secrets and the problem of applying rights, a reason that I will be in a better position to explain later on. First, a brief summary of the most important positions of the debate is in order. Windscheid pointed to the substantial congruity of action, claim and subjective right. Thus, the overlapping of *actio* and *formula* would take place within the trial, not within the *ius civile*¹⁵. Muther considered the *actio* as a claim to a *formula*¹⁶. The core of the dispute was focused on the meaning and limits of the *actio*. From Muther’s perspective the *actio* is a claim for erasing the legal violation of the right of another. This circumstance could occur not in every case, rather only when there was a reply¹⁷. This dispute was subsequently summarized by Giovanni Pugliese. Briefly, he focused on Windscheid’s thesis of the meaning of *actio* as subjective right. In light of the assumption that Roman subjective right could be reenacted as a fading demand, Windscheid argued that opting for actions that contradict subjective rights was a question of expediency¹⁸. On that account, the *actio* exists “because of the fact of a judge”¹⁹. Therefore, the difference between action and subjective right consists in the sanction of a judge²⁰. Indeed, the *ius honorarium*

¹³ See Giorgio Agamben, *Homo Sacer: il potere sovrano e la nuda vita*, 27 (2005)

¹⁴ See Michel Foucault, *L’ordine del discorso* (translating *L’ordre du discours* into Italian), (1972)

¹⁵ See Bernard Windscheid - Theodor Muther, *Polemica intorno all’actio*, 291(1954)

¹⁶ See Bernard Windscheid - Theodor Muther, *supra* note 14 at 233

¹⁷ See Bernard Windscheid - Theodor Muther, *supra* note 14 at 175

¹⁸ See Giovanni Pugliese, *Actio e diritto subiettivo*, 247 (1939)

¹⁹ See Giovanni Pugliese, *supra* note 17 at 247

²⁰ See Giovanni Pugliese, *supra* note 17 at 157

functions as a field where subjective rights and duties of obligation²¹ are recognized within the prism of *actio*. A similar process takes place in England during the XI – XII centuries, where the issuing of *writs* by clerics clashes, on the one hand, with the growth of ecclesiastic power opposite to the royal power, and on the other, with the birth of subjective rights²².

It is not surprising that the discussion of secrets interweaves with the red thread of the constitutional tradition of subjective rights. Secrets, within this formulation, have seemingly been built in the gaps between rules.

So, the *the legal subject* is born and moulded in a space that is seemingly free from power. Nevertheless, the modern subject is chargeable with rights, and as a result, the subject must acquire his for himself rights in order to be free. Thus, the absence of law exists as a *silent voice* that appears sometimes like an obligation to be born, and sometimes like a right to be defended.

However, one of the most important manifestations in the development of subjective rights, is the rise of the Franciscan rule. It represents a rights waiver and the triumph of individualism over property. This thesis has its roots in the perspective Ockham, for whom the subjective right is the endowment of individuals with a legal share in power²³. On the basis of a modern reading framed by Niklas Luhmann, the problem is that the protection of rights is enforceable on legal grounds, but only with a great deal of abstraction²⁴.

More precisely, this problem symbolises the legal bind insofar it is the result of the distribution of goods²⁵. Thus, the attempt to establish civil order among individuals by themselves ends up failing. The only hope for individuals is to defer their rights to the *ius fori*. This formulation (the opposite of the Thomistic Doctrine's orientation toward the concept of objective right) overlaps with the doctrine of nominalism,

²¹ See Giovanni Pugliese, supra note 17 at 139

²² See Antonio Gambaro - Rodolfo Sacco, *Sistemi giuridici comparati*, 74 (2002)

²³ See Michel Villey, *La formazione del pensiero giuridico moderno* (translating *La formation de la pensée juridique moderne* into Italian), 197, (1986); *Les origines de la notion du droit subjectif* in *Leçons d'histoire de la philosophie du droit*, 249 (1957)

²⁴ See Niklas Luhmann, supra note 4 at 309

²⁵ See Michel Villey, supra note 21, 202; *Le droit de l'individu chez Hobbes* in *Sur le notion du contract*, 209 (1968); *Métamorphoses de l'obligation* in *Philosophies du droit anglaises et américaines et divers essais* (1970), 287 ; *Contre l'humanisme juridique* in *Sur le notion du contract*, 205 (1968)

whereby individuals grasp the world by giving names to things. Rights, in this case, are a good example²⁶. The background of such an assumption, the “unknown” of the world (H. Blumenberg’s “*Unbekannt*”), can easily be related to the idea of *arcanum*. The “secret” steers the language from within. As long as the “secret” of language progressively comes to light, then the secrecy acquires historical perspective and becomes a language of secrets. Thus progressively the connection between names and things loses its strength. The legal framework reaches the top of the mystic language when it makes use of a typical form of *speech act*, when it confirms and enforces a previous linguistic sentence²⁷. A lack of correspondence requires that the whole language be thought like a name by a particular kind of *speech act*, the oath²⁸. At that moment the history of oath was forever bound to the history of the Western world. It acts as a warranty of language’s power²⁹; and its important trace continues to follow the legal tradition³⁰.

From “arcana” to the “raison d’État”

The irruption of secrets into language flows into two further models that are of semantic importance. The first comes from the medieval outline of *arcana dei* and *arcana imperii*, found in the theory of “*The mysteries of State*”, as it is dubbed in its most popular version by Ernst Kantorowicz. What does this idea have to do with the oath? The oath permits the transfer of coercive words from the individual conscience to the realm of public relevance. In these different shifts, secrets remain under the veil of a shadow³¹. The oath represents an example of how a secret is interwoven in language. The oath conceals its own incorporation into the core of the living political *corpus* of rule. Indeed, during the Middle Age, secrecy was taken for granted like a

²⁶ See Michel Villey, *supra* note 22 at 146

²⁷ See Emile Benveniste, *L’expression du serment dans la Grèce ancienne*, *Revue de l’histoire des religions*, 81 - 82 (1948)

²⁸ See Giorgio Agamben, *Il sacramento del linguaggio. Archeologia del giuramento*, 73 (2008)

²⁹ See Giorgio Agamben, *supra* note 26 at 7; Michel Foucault, *Le parole e le cose* (translating *Les mots et les choses* into Italian), 49, 79, 318 (1978)

³⁰ See Jacques Chiffolleau, *Dire l’indicible. Remarques sur la catégorie du nefandum du XIIe au XIVe siècle*, 45 *Annales. Histoire, Sciences Sociales*, 392 (1990)

³¹ See Paolo Prodi, *il sacramento del potere*, 444 (1992); Fisco religione Stato nell’età confessionale, 7 (1989)

“dogma” of political embodiment, and it was lived as an invisible entity through the ruse of an impersonal institution: the crown.

The breach of the oath, for instance, was a crime *contra personam vel coronam* (that is against the *corpus mysticum* and the *corpus ecclesiae iuridicum*). The office turned into the fiction of *persona ficta*. Thus, the deathless quality of the king was in its dignity, not its office. The king simultaneously possessed both a mortal and an artificial character. In this double transition that the oath enacts, the corporative quality of royal dignity was represented by the continuity between the successor and the predecessor. In this perspective, the *corpus mysticum* had two different meanings: first, it was a visible *corpus* of the Church and an invisible liturgical sphere; second, it established a link to the idea of the sacred Empire as the social *corpus* of the Church. The metaphor of the State of emergency consists of these two meanings of *corpus mysticum*. The government was considered to be both a *mysterium* of sorts and something like the sacred *ministerium* of justice³². This paradox is founded on the progressive severance of the divine body from the human body. On the other hand, this fiction found its cause and its aim in a typical technique of *partage* between person and office.

The question became the following: how is it possible to build the public *persona* of the king?³³ This question rested atop the basic assumption that it was not possible to ascribe the full entirety of *fiscus* to the king or the community. The problem seems to have warranted the rise of *perpetua necessitas*: the State could be omnipresent only through yearly taxation. The *fiscus* was, indeed, an impersonal entity, and as such it needed to refer not to another mortal being, but rather to the crown. Consequently, the goods that constitute the *fiscus*³⁴ could not be sold or transferred by the king because they represent the very things that the crown is supposed to preserve and increase: peace and justice (roughly equivalent to the modern concept of common goods). Because God and *fiscus* never die, they ensure an eternal public sphere of rule. They ensure the renewal of dynastic continuity, the *corporation* of crown and

³² See Ernst Kantorowicz, *Les mysteries de l'Etat* in *Mourir pour la patrie et autres textes*, 83 (1984)

³³ See Emanuele Conte, *Kantorowicz*, in *Dictionnaire des grandes œuvres juridiques*, 318 (2008)

³⁴ The *res quasi sacrae* stand for the *fiscalia* and were distinguished by the *patrimonialia*.

the immortality of social dignity. The immaterial features of the king persisted above and beyond his life through mandatory acts whose procedural elements strengthened their force³⁵.

The fictitious character of the king's body represents the first un-differentiation between king and society that will later lead to the theory of the social contract. Two distinct bodies emerge: one from nature, the other from the political order.

As a side note, Yan Thomas' examination of the regime of public goods during the Middle Age offers a nuanced interpretation of the *sujet de droit*³⁶. He subtly observes that personification was used to ascribe rights, rather than to protect goods³⁷. These rights were imputed through the traditional distinction between persons and things: individuals, in other words, cannot be things owned by persons. Moreover, Thomas recognised that rights and powers constantly exist in a dialectical relationship. From his point of view, the subjective right was not sufficient for the definite elimination of the *persona*. Rather, it produced a dissociation between subject and body, thereby enabling the creation of the *persona*³⁸. Finally, with the onset of modernity, subjective right comes to represent the power to act whereas nature comes to represent the object of that power, and the transformation of nature becomes a technique to indicate the power itself³⁹.

Regardless, the idea of a king as living law is not part of the Roman legal culture as much as it is part of the Greek one, in *nomos basilèus* for example⁴⁰. In other words, this assumption basically produces the law/case couplet (*nomos/ tyché*). The duty of loyalty was particular to the function of the oath, and it was the first form of social contract. It consisted of a holy act wherein the objectification of power took place. It

³⁵ See Ernst Kantorowicz, *I due corpi del re* (translating *The King's Two bodies. A study in Mediaeval Political Theology* into Italian), 269-329 (1989); *Christus –Fiscus* in Mourir pour la patrie et autres textes, supra note 30, 63; Gunther Teubner, *The King's Many Bodies: The Self Deconstruction of Law's Hierarchy*, Law and Society, 31, 4, 766 (1997): "The contradictory multiplicity of law's identities and the founding paradox of law are both to be found hidden behind the facade of law's hierarchy at the top of which the king's Two Bodies are governing law's empire. The constitutional law construction of the political democratic sovereign as the top layer of law's hierarchy has allowed the law to externalize its threatening paradox and to hand it over to paradox where it is "resolved" by democracy".

³⁶ See Yan Thomas, *Corpus aut ossa aut cineres. La chose religieuse et le commerce*, Micrologus, VII, 74 (1999)

³⁷ See Yan Thomas, *Le sujet de droit, la personne et la nature*, 100 *Le débat*, 94 (1998)

³⁸ See Yan Thomas, supra note 35 at 99; *Il diritto di non nascere* (translating *Du droit de ne pas naître* into Italian), 112 (2004)

³⁹ See Yan Thomas, supra note 36 at 105

⁴⁰ See Eligio Resta, *Il diritto vivente*, 9 (2008)

is not by chance that this happens within public law, because the enforcement of law through the enforceability of the oath is a public act.

This trace of a confidential promise merges into the next model: political Mannerism. This historical model arises from the secularization of the king's *corpus*. Indeed, it takes place during the seventeenth century, when the strongest enforcement of the State yields the strongest constitution of individuals⁴¹. The empty space between the social contract and the space of freedom acts as means of communication from public power to private individuals. Law gives no space to the right of nature and so can only exist in its silences. The only valid rule forbids violating *pacts and covenants*, and it therefore becomes the natural site for the shaping of secrets. Within a scene faked by the secularism of history, within the metamorphosis of the present, secrets need to accomplish a strict relation with the nature of things. This produces - as Friedrich Meinecke observed - an “unstable logical imperfection”⁴². If public perfection is to be achieved, therefore, the king must to hide the political outcomes of moral plans. Thus, public communication becomes the only ground of dispute between king and individual. Michel de Montaigne develops this idea in his discussion of the “lonely individual” who is repeatedly amalgamated with society⁴³. The individual lends himself to society, and thereby avoids binding his conscience. From this perspective, secrecy is the secularized version of a release valve for the instincts. I might also note that this model pertains to utilitarian theory, which makes secrets a social praxis of communicating between the lines, as Leo Strauss suggests:

“Persecution then gives rise to a peculiar technique of writing, and therewith to a peculiar type of literature, in which the truth about all crucial things is presented exclusively between the lines. That literature is addressed, not to all readers, but to trust-worthy and intelligent readers only. It has all the advantages of the private communication without having its greatest disadvantage – that it reaches only the writer’s acquaintances. It has all the advantages of public communication without having its greatest disadvantage – capital punishment for the author”⁴⁴.

⁴¹ See Norbert Elias, *The Civilizing Process Vol 2, Power & Civility*, 91 (1982)

⁴² See Friedrich Meinecke, *L'idea della Ragion di Stato* (translating *Die Idee der Staaträson in der neuen Geschichte* into italian), 328 (1942); Michael Stolleis, *The Eye of the Law. Two essays on Legal History*, 27 (2009)

⁴³ See Michel de Montaigne, *Della solitudine* in *Saggi* (translating *Essays* into italian), XXXIX, 310 (1966)

⁴⁴ See Leo Strauss, *The Persecution and the Art of Writing*, 25 (1988)

The secret becomes a means of social organisation because the “subject of law” constitutes “man”⁴⁵. By secret agreements all that is arranged by contract is subsequently allowed to be slipped out. Under the veil of the authority of the State, private feelings are deprived of political effects. They are suppressed through the control of conscience, something that is impossible to judge outside oneself.

The Mannerist idea of “*raison d’État*” is founded on “the *secret* of policy making”. The world of power is not accessible to common people, and only those who are familiar with the chaos are capable of the prudent use of passion⁴⁶. From this perspective, prudence is the doctrine of pleasant frauds⁴⁷. On the other hand, the secrets of politics are doubled by the secrets of individuals, who can only increase their personal aptitudes through the construction of an imperturbable front of power.

The debate about values has to come to an end because its perpetuation can only lead to civil war. Natural *laws* cannot be universally accepted because there are as many “rights of nature” as there are individuals. Individual values are therefore sacrificed in the name of the principle of power’s alliance. Meanwhile, politics is again and again adapted and conformed to technique: it is not important what the rights are, but rather how they perform. It is not the “just law” that is most relevant but the “just king”: who can decide and in which way. Similarly, the major question is not what constitutes an unjust war, but rather who constitutes an unjust enemy is⁴⁸.

Therefore, during the second half of sixteenth century, the main difference between Mannerism and Baroque becomes the following: the former does not yield to the irresolvable conflicts, whilst the latter shows a strong feeling of disappointment due

⁴⁵ See Otto Kirchheimer, *Private Man and Society*, 81 *Political Science Quarterly*, 4-7 (1966)

⁴⁶ See Roman Schnur, *Individualismo e assolutismo* (translating *Individualismus und Absolutismus* into Italian), 62 (1979); Marcel Gauchet, *L’Etat au miroir de la raison d’Etat: La France et la chrétienté*, in *Raison et déraison d’Etat. Théoriciens et théories de la raison d’Etat aux XVI et XVII siècles*, 197, 211 (Yves Charles Zarka ed. 1994); Raffaele Ajello, *Il collasso di Astrea. Ambiguità della storiografia giuridica medievale e moderna*, 261 (2002)

⁴⁷ See Giovanni Botero, *La ragion di Stato* (1590), 41-45 (2009); Herfried Münkler, *Staatsräson und politische klugheitslehre*, in *Pipers Handbuch der politischen Ideen*, III, 59-67 (1985)

⁴⁸ See Alberico Gentili, *De iure belli libri tres*, translation of the edition of 1612 by John C. Rolfe, IV, 35 (1933)

to the “location of fear”⁴⁹. It is interesting that this distinction exists in politics but not constitutional history⁵⁰.

Why is the distinction limited to the domain of politics?

The first reason is that politics is held to exist as though it were a pure fact where values can no longer play an independent role. The sole acknowledged value could only be achieved through obedience, the mere act of observing the king’s will. Moreover, according to this theory, Mannerism seems to be the historical situation where instability and variability begin to gain clarity, a clarification that is achieved by turning against all that is conformist. Thus, this same process implies the elevation of individualism. In any case, it was born as an undifferentiated movement against “anti-state conformism”⁵¹. Better, it has been drawn up like an *élite* theory of unconformity, the initial assumption of which rests on the task of revealing the secret “irregular harmony” contained within the unity of contradictions.

It is not the case, indeed, that the spokesmen of that *élite* were the king’s advisers. The members of that class vindicated their freedom from the Church, but the guarantor of their struggle was inevitably the king. The force of the State must be measured by the compliance it elicits with respect to the restriction of the control of the conscience⁵². Thus, not even the king can appeal to consciences. Moreover, he is subjected to the obligation of the tolerance of different religions. This represents a threat to the Church, whose dogma retains social function only as long as it does not admit differences among believers⁵³.

In any case, Mannerism is suited neither for establishment a political order nor for the construction of a political *élite*; such an elite remains submerged underneath the protection of an authoritarian regime. Occasionally a few individuals pan out through the knowledge of *arcana*, but such instances are entirely the product of individual characteristics⁵⁴. This also glosses over a distinction between the political Mannerism

⁴⁹ See Friedrich Meinecke, *supra* note 41 at 58

⁵⁰ See Walther Hubatsch, “*Barock*” als *Epochenbezeichnung*, 40 *Archiv für Kulturgeschichte*, 122 (1958)

⁵¹ See Roman Schnur, *supra* note 45 at 90

⁵² See Pietro Costa, *Iurisdictio: semantica del potere politico nella pubblicistica medievale*, 306 (1969); Norbert Elias, *The Court Society*, 66 (1983)

⁵³ See Roman Schnur, *supra* note 45 at 94

⁵⁴ See Roman Schnur, *supra* note 45 at 98

and the traditional “raison d’État”. While in the former the secrets of political decisions is a mandatory domain of politics, the latter has a plot that is entirely tied to the narrative of the king’s palace.

In other words, the Baroque is the final attempt, the last gasp of a Mannerist order⁵⁵. The baroque drama is the highest expression of this feeling, and its history has this character of transience⁵⁶. The king represents for history because he alone can decide on the state of exception⁵⁷. This explains the unsettled question of the Baroque as a concept of time. In one sentence, “the essence of Baroque is the simultaneity of its actions”, as Hausenstein observes⁵⁸. Such simultaneity indicates the king’s inability to decide on the state of exception. The necessity of history reveals itself when the time of decision does not coincide with the “time of world”⁵⁹. The extraordinary effect of this is that the feeling of vileness is able to coexist with the public opinion of the sacred king’s violence. Tyrant and martyr are the two faces of the royal essence⁶⁰. History, therefore, becomes a legal process when the connection between sin and accountability is broken. The king remains without blame but he is responsible for the entire community, whereas the ‘subject’ has a double sin, both in private (in relation to the other subjects) and in public (in relation to the king).

Is in this gap between a blameless king and doubly sinful subjects that secrets start lurking in the communication between public and private. This is no longer a case of the secrets’ art of *arcana imperii*. Here we are dealing with the “secrets’ science of *ratio status*”⁶¹. Since the State chooses observance as its characteristic ethic, it is always inclined toward secrecy⁶².

⁵⁵ See Roman Schnur, supra note 45 at 64; Richard Henry Popkin, *The History of Scepticism*, 239 (2003).

⁵⁶ See Walter Benjamin, *Il dramma barocco tedesco* (translating *Ursprung des deutschen Trauerspiels* into Italian), 151 (1999)

⁵⁷ See Walter Benjamin, supra note 55 at 39; Carl Schmitt, *Political Theology*, 13 (1985)

⁵⁸ See Wilhelm Hausenstein, *Vom Geist des Barock*, 9 (1924)

⁵⁹ See Lewis Mumford, *The City in History*, 353, 372 (1961)

⁶⁰ See Paul Griffiths, *Secrecy and Authority in Late Sixteenth - and Seventeenth Century*, 40 *The Historical Journal*, 935, 945-951 (1997); Walter Benjamin, supra note 55 at 44

⁶¹ See Michael Stolleis, *Stato e ragion di Stato nella prima età moderna* (translating *Staat and Staatsräson in der frühen Neuzeit: Studien zur Geschichte des öffentlichen Rechts*, into Italian), 44 (1998); Alberto Tenenti, *Teoria della sovranità e ragion di Stato nella Repubblica di Jean Bodin*, 419 (1982)

⁶² See Thomas Hobbes, *Leviathan* (1651), XXXI, 30 (Oxford-New York 1996); James Boyle, *Thomas Hobbes and the invented Tradition of Positivism: Reflections on Language, Power, and Essentialism*, 135 *University of Pennsylvania Law Review*, 400-406 (1987)

If an individual claims to be vested with a prerogative that the State reserves for itself, he has to disguise his action. The result is the necessity to negotiate the tension between the desire for power *ex parte principis* and the desire for the compensation that is offered in exchange for observing rules *ex parte populi*⁶³.

The close alliance between the law and the king encourages the pursuit of frauds under the cover of high ideals. Thus, the king could change the law according to the circumstances. Tacitus talked about “*simulacra imperii seu libertatis*” calling them the ghosts of rights and liberties that reward subjects for what they have lost. The king shows tolerance, so long as his power remains unaffected⁶⁴.

The dissimulation of secrets: the public use of speech

Nevertheless, during the Enlightenment - the fourth model examined here - the secret loses its moral and social meaning and takes on an intellectual one⁶⁵. The slogan of the Enlightenment becomes the “public use of reason”⁶⁶. This remark of Kant’s refers to the use of public reason by a learned man in front of an audience of readers. The postulate of publicity consists in this: the use of reason must be free at every moment, it must be without limit, and only it represents the vehicle of the Enlightenment of men. On the other hand, the private use of reason was confined to the civil role in which a person was engaged; and the private use of reason could occasionally be limited without hindering the progress of Enlightenment⁶⁷. From Kant’s perspective, the public use of reason has nothing to do with the duty of obedience; it cannot, in other words forbid the obedience of laws. In short, men are allowed to speak freely as intellectuals in front of a public⁶⁸.

⁶³ See Gino Gorla, *Iura innaturalia sunt immutabilia. Limits to the powers of the “princeps” (as sovereign) in legal literature and case law between XVI and XVIII centuries*, Italian Studies in Law, I, (1992); Gylles Feyel, *Renaudot et les lecteurs de la Gazette, les « mystères de l’État » et la « voix publique », au cours des années 1630*, Le Temps des médias, 166-169 (2004); Raffaele Ajello, *Arcana juris. Diritto e politica nel Settecento italiano* 137 (1976)

⁶⁴ See Nicolò Machiavelli, *Discorsi sopra la prima deca di Tito Livio*, I – 35 (1993); Maurizio Viroli, *Machiavelli and the republican idea of politics*, in Machiavelli and Republicanism, 143-172 (1990)

⁶⁵ See Ernst Cassirer, *La filosofia dell’Illuminismo*, 19-32 (1935)

⁶⁶ See Immanuel Kant, *Che cos’è l’Illuminismo?* (translating *Was ist die Aufklärung?* into Italian), *Antologia degli scritti politici*, 52 (1977)

⁶⁷ See Immanuel Kant, *supra* note 65 at 53

⁶⁸ See Ugo Petronio - Giuseppe Petronio, *L’età dell’Illuminismo*, 21 (1973)

At this point a few remarks are necessary. First, the Enlightenment witnessed the birth of a new *élite*: the intellectual bourgeois class. This group was able to act in public through the power of persuasion and knowledge. Second, the old *élite* of king's advisers (the holders of the secret knowledge) was progressively replaced by this new intellectual class. Third and finally, the problem of the Enlightenment was posed by Kant in the expedient question, "*Was ist die Aufklärung?*". The answer to the question was the following: "*Sapere aude*"⁶⁹.

The topic of forbidden knowledge is a *leitmotiv* of the evolution of power. Until the revolution of the public use of reason, the "admitted learning" excluded the traditional forms of secrets: *arcana dei*, *arcana naturae*, *arcana imperii*. Their discovery meant upsetting the balances of long-acquired certitudes. The knowledge of *arcana naturae* affected the relationships among the other forms of secrets. "Casting the sky into the earth", as Copernicus was able to do⁷⁰, gave men the confidence to also know the secrets of power⁷¹. Although secrets of nature were somehow foreseeable, however, secrets of power, and above all the political use of religion, were not,⁷². Arnold Clapmarius in *De arcanis rerum publicarum* described the *arcana imperii* as "*intimae et occultae rationes sive consilia eorum qui in re publica principatum obtinent*"⁷³. The highest degree of public power corresponds to the smallest extension of private power. This had the double function of safeguarding the force of the State force and the person of the king while also preventing changes. The second meaning was attributed to the *arcana dominationis*⁷⁴.

The enforcement of public power was realized. All that cannot be changed was justified *pro ratione status*.

Thus, the great transformation of the Enlightenment was justified by individual reason and no longer within the secrecy of palaces. This produced a few

⁶⁹ See Horatius, *Epistulae*, I, 2, 40 8("ad Lollium"); Luigi Firpo, *Ancora a proposito di sapere aude* in 72 *Rivista storica italiana*, 114-117 (1960)

⁷⁰ See John Donne, *Ingnatius His Conclave* in *Complete Poetry and Selected Works*, 365 (1949)

⁷¹ See John Brian Harley, *The Hidden Agenda of Cartography in Early Modern Europe*, 40 *Imago Mundi*, 57 - 65 (1988)

⁷² See Carlo Ginzburg, *L'alto e il basso. Il tema della conoscenza proibita nel '500 e nel '600*, *Aut Aut*, jan - feb, 14 (1981)

⁷³ See Arnold Clapmarius, *De arcanis rerum publicarum libri VI*, 10 (1644)

⁷⁴ See Norberto Bobbio, *Il futuro della democrazia*, 89 (1984)

consequences for public communication that, nevertheless, still did not manage to shed the old clothes of power⁷⁵. When public communication became political ethics, moral behaviour no longer belonged to individuals. As a result, individuals were shifted to the field of public opinion, while public opinion, nevertheless, secretly left State dogma neutral. Public opinion became the judge of power without its public character.

The society of good manners grew into the new *bourgeois* ethics⁷⁶. Forms and matters changed such that individuals not only recognised themselves as subjects but also as social creditors of the State. They negotiated two concepts of “private”, the private of market and the intimate sphere of family, as is well described in the following passage by Habermas⁷⁷:

“The process of the polarisation of state and society was repeated once more within society itself. The status of private man combined the role of owner of commodities with that of head of the family, that of property owner with that of “human being” *per se*”.

For instance, middle classes found their place, not inside society, but in secret associations requiring an “apolitical” room⁷⁸. From this point of view, ethics were adapted to secrets⁷⁹. Secrets had to be kept by all of the members who represented a given social group, an *élite*⁸⁰. Social secrets were taken to be neutral, void of coercion; and as a result, they carried with them a strong social burden. Those who really knew the fickleness of opinions ignored those who talked a lot. The *élite* had to be hidden so that public opinion could lay down law inwardly.

J. Habermas wrote about this structural transformation⁸¹:

⁷⁵ See Theodor Adorno - Max Horkheimer, *Dialettica dell'Illuminismo* (translating *Dialektik der Aufklärung. Philosophische Fragmente* into Italian), 43 (1988); Paul Hazard, *European Thought in the Eighteenth Century from Montesquieu to Lessing*, 172, 199, 249 (1954)

⁷⁶ See Norbert Elias, *The Civilizing Process Vol.1 The History of Manners*, 53 (1982)

⁷⁷ See Jurgen Habermas, *The structural transformation of public sphere. An Inquiry into Category of Bourgeois Society*, 28-29 (1989)

⁷⁸ See Reinhart Koselleck, *Critica illuministica e crisi della società borghese*, (translating *Kritik und Krise* into Italian), 116-131 (1972)

⁷⁹ See Georg Simmel, *Il segreto e la società segreta* (translating *Das Geheimnis und die geheime Gesellschaft* into Italian), 57 (1992)

⁸⁰ See Jurgen Habermas, *supra* note 76 at 196

⁸¹ See Jurgen Habermas, *supra* note 76 at 201; Charles H. McIlwain, *The growth of Political Thought in the West*, 77, 86 (1959)

“At one time publicity had to be gained in opposition to the secret politics of the monarchs; it sought to subject person or issue to rational-critical public debate and to render political decisions subject to review before the court of public opinion. Today, on the contrary, publicity is achieved with the help of the secret politics of interest groups; it earns public prestige for a person or issue and thereby renders it ready for acclamatory assent in a climate of non-public opinion. The very phrase “publicity work” betrays that a public sphere, which at one time was entailed by the positions of the carriers of representation and was also safeguarded in its continuity through a firm traditional symbolism, must first be brought about deliberately and case to case” .

Middle classes cared about their *status* and so they aimed to take a place behind the State⁸². They felt melancholic in the realm of the private because it was contaminated by the public sphere. The private sphere implied nothing but the regulation of civil society where private individuals were bourgeois by employment and men by implication. Once more it is J. Habermas who observes that private parties become gala performances and private rooms become living-rooms where people hold receptions and meet each other as a theatre of a public⁸³. The paradox is that while the public sphere grows, it loses its strength because it becomes a “sphere”. The public again becomes a given quantity of private interest groups, but in a manner that differs with respect to the ancient world. The public loses the original propulsion that made men individuals as long as they continued to build the public room. From now on opinion and authority are strictly bounded: the former lacks the venue of the public discussion yet is nonetheless legitimated by the vogue; the latter musters up institutional procedures in order to prevent conflicts⁸⁴. The public sphere is kept distinct from the State sphere, and it is this that explains the progressive legitimacy of the “right to privacy” and its metamorphosis: this new right was born inside the middle class, as the warrant of secrecy. The contraction of private life and, on the other hand, the opening of the public sphere comes to define a particular trend from

⁸² See Otto Kirchheimer, *Majoritaeten und Minoritaeten in westeuropaeischen Regierungen*, Die neue Gesellschaft, 256 (1959); Maurizio Vaudanga, *La dicotomia pubblico/privato tra studio storico ed impegno civile*, 38 Studi Storici, Pubblico e privato nella storia americana, 885-895 (1997)

⁸³ See Jurgen Habermas, supra note 76 at 43

⁸⁴ See Georg Simmel, *The Sociology of Secrecy and the Secret Societies*, 11 The American Journal of Sociology, 464, 466 (1906); Bonnie H. Herickson, *Secret Societies and Social Structure*, 60 Social Forces, 194, 200 (1981)

the individual to the collective dimension. Public and private become not alternatives but constituent parts of political language.

A different dialectic emerges with the modern age. Georg Jellinek's discussion of "public subjective rights" (*diritti pubblici soggettivi*), introduces a new category that pertains to an intermediate dimension between public and private, the right to protection from illegal State coercion for example⁸⁵. In this dimension secrets develop as the opposite of the public/private dichotomy. It is interesting to note that, after their passage through public opinion, secrets have returned to their original meaning, where they indicated the absence of law.

Thus, the concept of the secret reveals different perspectives according to different contexts in which it exists. According to this assumption, the work of *Geschichtliche Grundbegriffe* represents a significant contribution⁸⁶. It deals with historical concepts and illustrates the changes in their use according to their different contexts. There are a few fundamental concepts that are fit to express the entire project contained within a social political context. Conceptual history becomes a middle space between linguistic genealogy and history. This approach is well suited to the case of secrecy. Indeed, the conceptual method refers to the social structures in order to take the measure of the spread between the challenge of reality and its linguistic evidence. Such an approach allows for the verification of the impact of language and history on social events. In one word, it draws attention to the interferences of diachronic and synchronic facts. With respect to the concepts of the secret, it is clear that they perform exactly in this way within the legal system. They follow routes that sometimes lead to their retaining an association with the "legal" and other times to their shedding that association. It depends upon how they are transfused into the background of social experiences.

"Taking secrets seriously"...

⁸⁵ See Georg Jellinek, *Sistema dei diritti pubblici subiettivi*, (translating *System der subjektiven öffentlichen Rechte* into Italian), 11 (1912)

⁸⁶ See Reinhart Koselleck, *Il vocabolario della modernità* (translating selected chapters of *Geschichtliche Grundbegriffe: historisches Lexikon zur politisch-sozialen Sprache in Deutschland* into Italian), 3-25 (2009)

As I approach my concluding remarks, I would like to recall the words of an Italian lawyer: the apparatus of democracy has transparency as the rule and secret as the exception, while the constitutional rights of individuals in democracy have *privacy* as the rule and publicity as the exception⁸⁷. Truly, secrets emerge from a space that involves all dimensions of public life and politics⁸⁸. The famous formula by Ulpiano “*salus rei publicae*” has become the “breached promise of democracy”⁸⁹. It is not a question of functional procedures but rather of emerging cultural patterns. The problem is becoming the progressive passage from secrecy to control⁹⁰. This also serves as a reminder of the complex relationships between freedom and control, where a more expansive freedom elicits a stricter the control⁹¹. It refers more deeply, on the one hand, to the protection of the private lives of individuals and their freedom, and, on the other hand, to the society of surveillance. “The right to control the way others use the information concerning us” (A. Westin) is of immediate concern to the State, because the term “others” can also include State power itself. As such, a specific duty is required of the State in order to safeguard the democratic system. When the use of information aims to obtain consent, public control is no longer necessary. If it is true that the secret is the strongest shield of tyranny, it is also true that it is an irresistible temptation for democracy⁹².

Secrets satisfy an intermediate space of humanity in their focus on the material core of democracy that is not an eliminable share. In any case, it is desirable to be tied to an idea of public ethics, which, in one sense, remains consistent with the logic of secrecy: State’s and individuals’ *fiduciary duties* ought to be linked together. This is, at its core, the basic meaning of the *rule of law*.

⁸⁷ See Paolo Barile, *Libertà di manifestazione del pensiero*, in Enc. Dir., XXIV, 424 (1974)

⁸⁸ See Dennis Thompson, *Democratic Secrecy*, 114 *Political Science Quarterly*, 185 (1999)

⁸⁹ See Norberto Bobbio, *supra* note 73 at 97

⁹⁰ See Martin Shapiro, *From Public Law to Public Policy, or the “Public” in Public Law*, 5 *PS*, 414 - 415 (1972)

⁹¹ See Stefano Rodotà, *La privacy tra individuo e collettività*, *Politica del diritto*, 545 (1974); *Intervista su privacy e libertà*, 101-105 (2005); *Tecnologie e diritti*, 101-108 (1995); Martin Shapiro, *The Concept of Information: A Comment on Gilligan and Krehbiel's "Collective Decisionmaking and Standing Committees"*, 3 *Journal of Law, Economics & Organization*, 349 (1987)

⁹² See Cesare Beccaria, *dei delitti e delle pene*, 55 (1964)

Finally, because the *raison d'État* is a never-ending agglomeration, it implies the production of truth, or better of “truth effects”⁹³. If the knowledge of things has come to be considered a “strength of the State”, this is surely good evidence of the impact of power on life. When law enforcement completely divorces itself from the knowledge of secrets, or at least, the consciousness that a secret exists, a risky misconception in grasping the meaning of democracy could rise⁹⁴. Surrounded by this lack of fairness, secrets reveal a mere strategic use of power that may or may not be lawful.

Conclusion

In sum, the autonomy of the life of a secret depends on its impact on the public/private dichotomy. The secret shifts from a neutral position between public and private to a highly pregnant one within public power. However the interplay becomes different when secrets start to be considered as a common good, belonging to the public sphere. The underlying assumption is that the wider public power is, the tighter the public sphere will be; the broader the private rights are, the larger the public sphere will be. Along these lines lies the falling of secrecy into the domain of private life.

Nevertheless, nowadays we take part in a contrast between “public secret” and “private secret”, one bound to the idea of power and the other bound to the model of warranties. Regardless, whether we consider the secret to be “the private of public” or “the private of private”, only the observation of rules is at issue. Within this rude play it is to be hoped that the *rule of law* shapes secrets as *new arcana* of the legal system, but only inside it⁹⁵.

⁹³ See Michel Foucault, *La vérité et les formes juridiques*, 10 Chimères, 17-23 (1990-1991)

⁹⁴ See Marcel Gauchet, *Crise dans la démocratie*, La Revue Lacanienne, n.2, 62 (2008)

⁹⁵ See Richard Rorty, *Postmodernist Bourgeois Liberalism*, 80 the Journal of Philosophy, part.1, 585 (1983); Dennis F. Thompson, *Democratic Secrecy*, 114 Political Science Quarterly, 184-186 (1999)

