

# CONSTRUCTING LEGAL TRADITIONS INTRODUCTORY REMARKS ON THE PUBLIC/PRIVATE-DISTINCTION AS TRADITION

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## I.

***Public/private:*** One of the pillars of the tradition, we have been trained in and grown accustomed to, is the public/private-distinction. When you teach public law it is generally understood that you deal with constitutions, administrative action, state planning, decisions of the European Commission in Brussels or international peace-keeping missions. Legal issues resulting from or connected with divorce, rent problems, product liability, business transactions, temporary employment or birth and death are routinely relegated to the sphere governed by private law. The public/private-distinction therefore appears and constantly reappears as a fundamental mechanism of the internal order of legal systems allowing for the systematic compartmentalization of case and problems and, accordingly, the professional specialization and differentiated court procedures. At the end of our legal education and in our scholarly everyday we usually approach and deal with the public/private-distinction as something natural, as a given – rather than a contingent doctrinal construction. Thus we subscribe to and carry on a presumably crucial element of our legal tradition

## II.

***Public/private revisited:*** The wide-spread and often naïve belief in the almost natural quality of this distinction as well as its sanctification as a pillar of our (?) western (?) tradition is called into question once we take a closer, albeit doctrinal look at its logic and, even more so, once we submit it to a critical review.

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From a doctrinal perspective we may perceive a metamorphosis if we trace the “movement” of the public/private-distinction as a case is being processed in court. For the natural quality loses some of its stability, if not rigidity, once the conflict is shifted onto the level of constitutional or Community Law: After reaching the plane of constitutional provisions, notably involving fundamental constitutional rights, or basic freedoms of the European Community a case, which originally was classified as “private”, is treated and processed as “public”.

From a doctrinal perspective we may also experience the indeterminacy of the public/private-distinction once we make it our business to actually classify a slightly complex legal conflict. In Germany generations of scholars and students have agonized over the various “theories” that are supposed to help them to distinguish public from private law controversies. And they realize, much to their disappointment, that the doctrinal criteria – “public interest”, “hierarchical relationship”, “norms empowering public agencies” and so forth – do not hold much water: The protection against eviction, though integrated in the Civil Code, may very well be qualified as being in the public interest. A contract concluded by a local authority may be public or private as the case may be. And the reference to the legal provisions contested in a “case” amounts to little more than hopelessly circular reasoning. So, in the end, the distinction is made by thumb rule and not determined by clear-cut criteria.

From a systematic point of view the public/private turns into a *problématique* with the question what comes first. As a teacher of public law I would feel inclined to claim that public comes before private. This feeling is reinforced by theories constructing the private (market) as being governed by the political/politics or at least regulated by law. On second thoughts, however, public/private rather than describing a water-tight hierarchical order, comes across as an enigma like “8 ½” or “Rouge et Noir”. One wonders whether the public/private enigma can be solved and then makes a difference in the real world. Students in my administrative law classes, rather than analyzing the forms of administrative action (by-law, administrative act, contract, etc.) will invariably elaborate the above-mentioned “theories” when they have to classify a case. And as a rule they come out on the public side – which makes sense in a public law course and heeds the practical recommendation: when in doubt stay within the area of public law. From this we may infer that the distinction is pragmatic and to a great extent arbitrary rather than based on theoretical criteria or doctrinal “reasoned elaboration”.

From the point of view of systems theory we come out differently, though. Having deconstructed the state/society and state/market distinctions for the benefit of a polycentric world of functionally differentiated systems, the systems theoretician rescinds the border between public and private law. Public law which is traditionally based on the idea that the government/the administration “run” society (or at least steer its development) and coordinate actions by executing the programs set up by the legislatures, as a matter of consequence, ceases to exist in the world of autopoietic systems. What is left is being defined as systems or, more recently, “networks”, operating along the lines of their binary code and according to the imperatives of functional differentiation. Under the regime of an all-encompassing private law.

Last and definitely not least, there was and is the critique of indeterminacy propagated and demonstrated by Critical Legal Studies and their successors in international and comparative law – Newstream. From the first generation of Crits on to this very day the public/private-distinction has been “trashed”, unmasked as ideology and/or deconstructed as hopelessly vague, shot through with gaps, and contradictory. Typically, the old and new Critical Theory argues that the distinction between ‘public’ and ‘private’ – such as ‘public’ international law and ‘private’ international economic transactions – escapes a coherent logic and supports the exclusion of important activities from the scope of the law. In other words, it justifies the free conduct of activities that often have negative consequences. Critical Theory scholars constantly transgress conventional boundaries such as public/private or: international law/comparative law, law/anthropology, law/ethics, law/economics and so on. Hence, CLS and Newstream make us understand that the public/private-distinction is neither coherent nor logical, that it does not deserve to be treated as a venerable tradition but to be read and critiqued as a basically flawed doctrinal construction.

### III.

***Traditions:*** A grand theme that I cannot possibly cover adequately in this short introduction. I restrict myself to three brief comments. A few keywords on the theory of tradition will be followed by a slightly longer remark concerning the relationship between tradition and the public/private-distinction (IV.) and an illustration of how the public/private-distinction operates in European welfare regimes (V.).

A few theoretical comments first. Traditions I consider as *narratives*. They are stories that elaborate the way in which we see reality on the basis of what we have learned. Stories of traditions are told, perpetuated and shared by interpretive communities, by elites. The story of a tradition is usually an elite “thing” which privileges and reifies a specific historical experience or learning process. *Per definitionem* the interpretive narrative weaving the texture of a tradition is *selective*. From the numerous events, issues, items, conflict resolutions of the past only a few are picked out to be recognized as worth remembering and sharing as a “tradition”.

Traditions encapsulate stories of a specific kind. They not only elaborate how we see reality but how we *ought* to see reality. Traditions function as *normative* guide-lines – for example how to deal with gender differences, define a family or the common interests of a society or, for that matter, the order a legal system. Hence, the construction of a tradition has normative underpinnings.

The selectivity and normativity of traditions are illustrated by the frequent reforms of the patriarchal family and its legal regime, by recent attempts to change the traditional heterosexual concept of marriage so as to allow for gay marriages and adoptions by gay couples, also by initiatives to and resistance against reforms of the penal code such as the de-criminalization of substance abuse and other crimes without a victim.

Within the context of modern law, tradition appears to be a *strange* concept. As distinct from its ancient forerunner, modern law is generally defined as flexible and dynamic. The making and re-making of the provisions of a modern legal regime is entrusted to legislatures, courts, and the academic guardians of legal doctrine. In that sense and corresponding to the theory and ideology of democracy and rule of law, modern law is up for grabs according to the legally established rules of the parliamentary-democratic game. Its stability and change depend on authoritative scientific opinions, court decisions, and the power and will of majorities rather than its period of validity or acceptance as did traditional law. Modern law is geared toward constant revision and reform, whereas the latter privileges duration. Consequently, in modern legal systems the “*lex posterior derogat lex prior*” rule functions as one of the characteristic collision rules. Tradition, we may infer, actually runs counter to the very nature and dynamic of modern law.

Yet, we still do have and honour traditions in the context of modern law. Traces of old and pre-modern traditions are located or hidden preferably in the

civil and penal codes of many countries. And more recent, in fact “modern” traditions have been constructed on the basis and authority of constitutions and legal codes we regard as modern: the elevated status of private property, Anglo-American and continental constitutionalism, the legitimacy of judicial review and fundamental rights of equal freedom and human dignity, to name only a few, are frequently attributed the privileged status of a tradition. Arguably the public/private-distinction may be regarded as a traditional element of western legal regimes, too. And the topic of this conference suggests that “western law” in general may have developed its own tradition.

Even within the context of modernity, one might conclude, there remains a need for authoritative narratives to thwart the corrosive effects of secularization. Law, so it seems, cannot be adequately described in formalist terms as merely a body of rules and institutions, arguments and decisions, practices and styles produced by the institutions authorized to that end.

Once again: law is not only to be understood as a way we see reality but as a way we are told and have learned we *ought* to see reality. The ought may explain the peaceful and mutually parasitic coexistence of modern law regimes with traditional elements: Traditions function as authoritative narratives which help to reduce the burden of legitimization any modern legal regime has to meet according to the principle of “Selbstbegründung”, i.e. the internal and strictly immanent justification – a riddle that has provoked legal thought to imagine “pure theories” of law. Traditions “naturalize”, make appear as natural rather than constructed, what otherwise could not or could not coherently be legitimized, as, for instance, the quasi-monarchical role of Supreme Court Justices or the exemption of military tribunals from standard rule of law principles and procedures.

#### IV.

***The public/private-distinction as tradition?*** Now I want to return once more to the public/private-distinction and question its status as a traditional element of western law. Contrary to its doctrinal appearance it is neither very clear cut nor safely established. It is rather widely contested, rather incoherently applied, and comes with a maze of different meanings.

First, public/private demarcates a *sphere*: the political versus the non-political, the state versus society/market, the political society versus the private market

society, or even the market versus the family, and so forth. From the vantage point of feminist theories the spatial concept of the public/private is turned into a critique of patriarchy and the patriarchal division of labor and roles. Feminist critiques elaborate its function as a historical marker for gender, walling off a private feminine domestic sphere – most commonly: the family – from the public sphere. The public sphere is reserved for men who are the masters in the world of politics, markets, trade, contractual relations etc. Hence, the public/private-distinction operates as an intellectual device to disempower women.

Second, the public/private-divide connotes a modality of *domination*: The exercise of state authority is distinguished as public, i.e. established and limited by democracy and rule of law principles, whereas economic power rests on private (law) entitlements, notably property and contracts. “Public” signifies transparent and formal domination, while private domination usually lacks transparency and formalization – “formal” like institutionalized and established through a legally regulated election or decision-making process, and “informal” like arcane, soft or creepy.

Third, a very important meaning is conveyed by the suggestion that the distinction transfers a specific type of *legitimacy*: Official public/state authority operates in the name of “the people” and is exercised in the public interest. Private power has to refer to private autonomy and property for a lesser (?) legitimation.

The different modalities of domination and legitimation imply, fourth, a different correspondence to *property* rights. Though this aspect cannot be adequately elaborated in this brief introduction, a few comments may be of interest. I want to argue that there is a connection, a hidden correspondence between the public/private-divide and the concept of property which is captured by the concept of (public) “*eminent domain*” as distinct from (private) property entitlements. By the same token, this correspondence may explain why the public/private-distinction is still around despite the many incisive critiques of its indeterminacy and incoherence. Hence, on closer scrutiny, the distinction serves several political functions that have very little to do with its original doctrinal purpose as an instrument of classification and ordering but very much with the support and defence of a private property regime. The defensive nature and function of the public/private-distinction as an apology of the status quo is underscored by several affirmative varieties of its application: On the one hand,

the distinction is being used as a frame of reference to demarcate the reach of legitimate or illegitimate government action. (Neo-) liberals intend to keep the government out of market transactions when they claim their “private” nature. “Private” means that there is no public responsibility. This political-economic stance is invariably propagated by liberalist or neo-liberalist theories of a minimalist state à la Hayek or the Chicago School. (The public/private-distinction may, however, be invoked to support the contrary position arguing for the interventional state favored by social-democrats or socialists.)

Despite its doctrinal incoherence, the public/private-distinction may also be used in political-theoretical terms and then function as a normative matrix for the critique of arcane politics. Against the background of such a matrix, political office-holders and the way they execute their office may be submitted to a series of critical questions: Is political power based on a private (quasi-monarchical) or public entitlement? Or can/should they more adequately be conceptualized as being grounded on a “public right”, which is to be executed in public procedures and controlled under public law? – These questions lead to an emphatic concept of the public and the principle of publicity. At times such a concept is informed by re-imaginings of the Greek polis as modern republics (J.J. Rousseau, Hannah Arendt or Cornelius Castoriadis), at other times the public and publicity are connected in the Kantian tradition with theories of the rule of law and democracy (John Rawls, Ronald Dworkin or Jürgen Habermas).

Against the background of a critique of *ideology* the public/private-distinction is unmasked as a general ideological concept naturalizing and reifying socio-cultural, political or economic phenomena, such as gender, family, market, or state, thus turning cultural artefacts into evolutionary universals. It is at this point that the “constructive” aspect of the public/private-distinction as an artificial/intellectual device corresponds to the construction of legal traditions.

## V.

***Public/private welfare regimes:*** To illustrate the problems of distinguishing a private from a public sphere and, by the same token, private from public responsibility, I finally turn to welfare regimes. Before looking at different institutional arrangements of poor relief and social insurance, it may be useful to address the fundamental question: Why should private misery be a public problem? Of course it is always tempting to search for some origin or other.

Origins, however, are not easy to identify. Therefore I prefer to take a brief look at events, situations, and processes. My argument will be that this mixture ultimately generates the public/private-distinction embedded in welfare regimes. Two moments or aspects deserve special attention: the “birth” of the public and the rise of the social.

The birth of the public sphere allows for quite a few different readings which can only very briefly be indicated here. One narrative would connect it with the enlightenment or secularization, another with the Great Revolutions in the United States and France, yet another with rise of industrial capitalism and the new division of labour. Though tempted, I have to abstain from “*grands récits*” in this introduction. All I can do here is to write a brief reminder of a series of events, conflicts, and developments and an amalgamation of ideas, theories, and visions around the end of the 18<sup>th</sup> century, when gradually a new political imagination was engendered which ultimately amounted to radical re-conception of the (absolutist) state: This imagination decoupled a “position of power” (government) from the “public” (civil society). It was generated by the decline of political absolutism, the decorporation of the “body politick”, and the rise of the “society of individuals”. By contrast with the divine right of kings, perpetuated by the dynastic principle, the new position of power emanating from the revolutionary conflicts and theories was symbolically empty. It became a battlefield. And groups, organizations, classes of society got involved in a perpetual series of political struggles in public fora and arenas to establish themselves in and hold on to this position at least temporarily after periodic elections, revolutions or usurpations. Just as the position of power is symbolically empty, the public is a symbolic sphere. It is symbolically empty because there are always already institutions and actors that are identified by political sociology as occupying the position of power, albeit for the time being.

Now one can answer the question posed above: Nobody is legitimized to claim that he/she is “in power” on the ground of a private or quasi-private entitlement like a monarch. This then appears to be the novel and provocative aspect of the new political imagination: that the symbolic public sphere is disconnected from government/the political and open to power struggles within the .

The rise of the social is the other aspect of the new political-social imaginary that goes along with events and processes, such as, notably, the development



of industrial capitalism, the dynamics of secularization, and the invention of the “individual”. In their wake history is no longer conceived of as the unfolding of a divine master-plan but a narrative ordering the fates and daily conflict of human beings. The formerly incorporated society (estates, body politic, *civitas dei*) is being decorporated and within the context of the “society of individuals” there is not only a symbolic space for the democratic question (self-government) but also of the “social question”: Why care for the misery of private persons? Why should their problems come under the umbrella of a public responsibility?

In Europe alone we come across a variety of very different and indeed disparate answers. The response of (economic) liberalism to the “Why care?” is negative: The “social question” is basically transformed into an “economic question”. Private misery becomes a matter of free market transactions. Private autonomy prevails over any scheme of social or public solidarity dispensed by the state welfare bureaucracies. In theory at least, there is no need for the state or its agencies to intervene – see above. Misery is privatized.

Others authors locate the answer between the private and the public by relying on the public consequences of private sentiments. In a revealing metaphor that transgresses the boundaries of contractualism, Rousseau refers to the “logic of the heart”. Against the heartlessness of reason he thus invokes a kind of public responsibility. Similarly, the French Revolutionaries, preoccupied with freedom and power, and Thomas Paine oscillate uneasily between private and public responsibility. They suggest we should trust the “magic of pity” – whatever that may be – to open our heart to the miserable. Very much like in the Rousseauvian scheme, the revolutionaries invoke the “natural ties” between human beings.

Karl Marx, on the hand, reverses the liberalist response and keeps aloof from both, the market and private feelings of solidarity. He defers the answer to the social question to the future. In a capitalist society, he argues, there is a fundamental contradiction between the possessing class and the dispossessed masses. Egotism is engrained in the structure of commodity production which does not allow for any public or general solidarity on the societal level. As the executive committee of the *Bourgeoisie*, the capitalist state cannot possibly be expected to be responsible for and get rid of private misery which serves as an important disciplinary mechanism within the scheme of capitalist production.

And once the communist revolution will have completed its destructive and creative work, there will be no more misery.

Yet a different answer is given by conservatives. They hold that private misery stays – or rather: has to stay – private. They privatize the causes and consequences of poverty, sickness, invalidity etc. and invoke the non-legal responsibility of, what one may call, the imaginary traditional communities of care: the family, the neighbourhood, and the church. It took a Bismarck and his political fear of the labour organizations to move the conservative camp in a different direction: Some types private misery – caused by the industrial labor process – are privileged in the Bismarckian scheme of social insurances as public and covered by public/state responsibility: sickness, invalidity, and old age.

The organizations of the labor movement and women's movement tend to oscillate between Marxism and Conservatism. In general, they install a private-type group solidarity for workers and their families or women and their children. Solidarity is generated by the experience of discrimination and domination. It is based on membership and therefore does not cover those outside the group. This group solidarity has a tendency, however, to reach out beyond the confines of the group – labor unions or women's organizations – toward a public responsibility.

Finally, there is the answer to the Why care?-question by the Social-Democratic party. It extended both the Bismarckian project and the unions' group solidarity by introducing the welfare state which makes private misery a public matter. The welfare state publicizes private misery on the basis of a concept of societal ersatz-solidarity. Initially, the image of the recipient is still marked by the "normal worker" and the usual risks of industrial society. Only after the experience of two world wars women as widows, children as orphans, and war invalids are included in the spectrum of those deserving public support.

Since the beginning of the 20<sup>th</sup> century different models of public responsibility for private misery have been firmly established by different welfare regimes in England, Germany, France, Sweden and other countries. These models and their operative practices indicate that the social question can only be answered adequately by a state which centralizes social solidarity on the basis of a welfare dualism: the mix of social insurances on the one hand, complemented by welfare, formerly referred to as poor relief, on the other. This system addresses the whole range of risks of capitalist societies.

Some of these risks, such as unemployment, sickness, and old age, initially follow the Bismarckian and then step by step extended institutional design and are handled by social insurances. Others, such as the basic and pervasive risk of poverty, are relegated to the welfare bureaucracy. More recently, misery – or for that matter: social risks – have been at least partially privatized and the institutional mix has been shifted toward a mix of public/private responsibility, notably regarding health insurance and pension funds.

	<b>privatizing</b> misery	<b>publicizing</b> misery
<i>image of recipient:</i>	worker	citizen ←“normal worker” moral person/deserving poor
<i>normative basis for obligation</i>	market competition/private autonomy	membership (nation, Volk) public autonomy equal opportunity, dignity
<i>policy/rhetoric:</i>	charity group solidarity laissez faire	compensation redistribution social solidarity resource management public health self-help, mutualité
<i>background tradition:</i>	alms giving/ parish charity	municipal poor relief
<i>administering agency:</i>	church, private charity organizations labor unions “Friendly Societies” intermediary organizations	central/state agencies municipalities social insurances
<i>criteria for inclusion:</i>	labor	age, morals, means test victims of war
<i>exclusion of:</i>	idle/undeserving poor	aliens
<i>benefits:</i>	“earned” assistance	public assistance/poor relief “pension”/social wages ←insurance benefits

*cutting across the private/public divide:*

voluntarism/state interventionism  
individualism/collectivism  
idealism/evolutionism, Social-Darwinism  
social reformism  
solidarity/self-help

In the context of welfare regimes, we may conclude, the public/private-distinction is neither stable nor clear-cut. The distinction functions more as a rhetorical strategy that tends to camouflage the interconnection of private and public responsibility and to mystify fiscal constraints, economic interests, and moral options rather than following a coherent logic of care in capitalist societies. Recurrent shifts from public to private responsibility and vice versa are dictated by fiscal policy, political-economic ideology and power constellations. At this point in time, it appears to be virtually impossible to identify the contours of an uncontested traditional public/private distinction beyond the contested core of welfare regimes.