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Rethinking the boundaries between public law and private law for the twenty first century: An introduction

Michel Rosenfeld*

The distinction between public law and private law has been both ever present and unwieldy in civil law as well as in common law jurisdictions. Kelsen found the distinction "useless" for "a general systematization of law,"[1] and Paul Verkuil has remarked that "[i]f the law is a jealous mistress, the public-private distinction is like a dysfunctional spouse. . . . It has been around forever, but it continues to fail as an organizing principle."[2]

In the broadest terms, in the context of common law jurisdictions, public law is inseparable from government. Private law traditionally encompasses the common law of contract, torts, and property that regulates relations among individuals.[3] Also, consistent with this distinction, and as more systematically established in the civil law tradition, constitutional law, administrative law, and criminal law fall within the ambit of public law.[4] In short, at the highest levels of abstraction, public law is the law that pertains to government—for example, constitutional separation of powers or administrative procedure; or to the vertical relation between the government and individuals to the extent that government imposes an obligation owed to it on individuals—for example, criminal law; or directly confers a right or entitlement on the latter—for example, laws pertaining to government dispensation of welfare assistance to the poor; or guarantees such individual right or entitlement—for example, constitutional law both as commanding government self-restraint[5] and

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1 *See* HANS KELSEN, GENERAL THEORY OF LAW AND STATE 207 (Anders Wedberg trans., 1961).

2 *See* PAUL R. VERKUIL, OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT 78 (2007).

3 *Id.*, at 80.

4 *See Public Law*, *in* BLACK'S LAW DICTIONARY 1350 (9th ed. 2009).

5 For example, constitutional law traditionally prohibits government from interfering with citizens' exercise of the free speech rights it grants to them.

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as requiring positive government intervention necessary for purposes of upholding individual rights.[6]

In contrast, in its paradigmatic Lockean incarnation, the role of government in private law would be purely facilitative of horizontal dealings among private parties.[7] Thus, the legitimate role of contract law would ideally be limited to providing the means of enforcing whatever bargained for agreement the competent individual contractors had freely entered into. Obviously, if government departs more and more from a purely mediating role, and replaces freedom of contract with a contract law regime replete with directives and restrictions in the name of the public good,[8] or, in other words, if contract law becomes increasingly paternalistic, then eventually it might appear to confound or cross the line between private and public law. Be that as it may, and regardless of any implications regarding the precariousness of the divide between public and private law, suffice it, for present purposes, to adhere to the following baseline: law that regulates the vertical relationship between the state and private parties shall be deemed public whereas law that applies to horizontal dealings among private parties shall be labeled private.

How do the oft-conjoined processes of globalization and privatization impact on the relationship between the vertical and horizontal dimensions of all that comes within the sweep of law? At the highest levels of abstraction, globalization and privatization *as such* seem completely independent from the public/private distinction conceived in its broadest terms. Indeed, whether an administrative regulation issues from a nation-state or a transnational source such as the European Union (EU), the World Trade Organization (WTO), or the United Nations (UN), it appears to fit neatly within the typical vertical paradigm characteristic of public law. By the same token, in the context of a Lockean freedom of contract regime, it ought to make little difference whether the ultimate adjudicator of a contractual dispute among private parties is a nation-state tribunal or a transnational one, such as the EU's European Court of Justice (ECJ) sitting in Luxembourg. In both cases, the relevant contract legal regime seems firmly ensconced within the horizontal private law paradigm.

Upon closer scrutiny based on examination of the actual legal trajectory associated with the combination between globalization and privatization, however, it becomes apparent that traditional conceptions of the nexus between public and private law confront vexing new hurdles. This is perhaps most obvious in relation to the vertical axis which figures as the backbone of public law regimes. As one proceeds from the traditional nation-state to a transnational legal order such as that carved out by the EU and further to a global one such as that issuing from the UN, confrontations and fractures along the vertical axis seem inevitable. These are vividly illustrated by resistance by EU member-state constitutional courts against implantation of supremacy for

[6] For example, constitutional law may require government to provide adequate housing to the indigent. *See, e.g.*, Gov't of S. Afr. v. Grootboom, 2001 (1) SA 46 (CC) (S. Afr.).

[7] *See* Michel Rosenfeld, *Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory*, 70 Iowa L. Rev. 769, 866–867 (1985).

[8] *Id.*, at 889.

EU law or regulation[9] which is mirrored by the ECJ's refusal to have the EU bound by UN legal norms designed for global implementation.[10]

Furthermore, there seem to be even greater difficulties in the case of privatization than in that of globalization. Indeed, unlike globalization, once privatization expands beyond the narrow confines of Lockean constraints, then it cannot remain even in principle indifferent as between public and private law. Significantly, some privatizations necessarily imply a shift from public to private law while others do not. Suppose, for example, that a municipality decides to privatize a public transportation system it has operated for years and that after effectuating the transfer to private enterprises, it neither operates nor regulates the now deregulated business that has become subject only to the set of laws that are applicable to all private businesses. Before the privatization, the transportation system was legally structured as a relationship between the state and individuals; after the privatization, only as a relationship between individuals. Suppose now, on the other hand, that the government privatizes all prisons, but continues to run the existing criminal law system, to send prisoners to the now privatized prisons, to determine for how long, to decide whether or not to grant them parole, etc. In this latter case, privatization does not seemingly entail any substantive shift to private law since all resulting legal relationships are in substance between the state and individuals. The relationship between the private prison personnel and the prisoner may appear to be one among individuals, but in substance, the former relate to the latter in the role of agents of, or proxies for, the state. But what if such privatization results in less governmental accountability to prisoners or the public? And even more ominously, what if such privatization involved the state contracting with foreign private parties in the context of competition among multinational corporations to provide state of the art prison running services? In the latter case, the combination of privatization and globalization certainly seems to compound the difficulties in terms of legitimacy, authority, accountability, and efficiency, and to undermine any traditional conception of orderly harmony between the public and private realms.

In view of these changes and many others,[11] is it time to reexamine, rethink, revamp, redesign, or even perhaps to discard the traditional distinction between public law and private law?

[9] *See, e.g.*, Solange I, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 9, 1974, 37 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 271 (Ger.); Frontini v. Ministero delle Finanze, Corte Costituzionale (Corte Cost.) (Constitutional Court), 27 dezembro 1973, Rac. uff. corte cost. 1973 (It.), *reprinted in* 2 C.M.L.R. 372, 21 (1974) (asserting a country's right to deny supremacy to EU law contrary to its constitution).

[10] *See* Joined Cases C-402/05 P & C-415/05 P, Kadi & Al Barakaat v. Council & Comm'n, 2008 E.C.R. I-6351, ECJ EUR-Lex LEXIS 1954 (–2008), *available at* http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0402:EN:HTML (holding UN Security Council Resolution with force of law unenforceable in EU because in violation of EU human rights protections).

[11] For example, in certain countries, such as Germany, constitutional protection of fundamental rights extends generally to transactions among private parties, thus somewhat further blurring the divide between vertical and horizontal legal relationships. *See* NORMAN DORSEN ET AL., COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS 896 (2d ed. 2010) (discussing German Basic Law "third-party effect" or "*Drittwirkung*").

The three essays that follow respectively by Alain Supiot, Peter Goodrich, and Judith Resnik shed important new light on the issues raised above and many others relating to the public/private divide. Coming from different legal traditions, and specializing in different fields within law—including some traditionally within the ambit of private law and others within that of public law—these three authors examine in depth the terrain in which the public/private distinction has been deployed. Moreover, the respective analyses that follow are both backward looking and forward looking; they place the major relevant ongoing controversies in historical, ideological, and institutional context; they variously assess the public/private distinction in terms of the rule of law, the legitimacy and authority or majesty of law, and the current meaning or relevance of the nexus between constitutionalism and democracy. Each of the three essays offers a novel and provocative thesis and suggests fruitful new avenues of inquiry.

In the end, the following three essays are bound to prompt all readers to confront certain key questions. Has the public/private distinction been overemphasized? Was that distinction useful at one time, but increasingly less so? Does the distinction in question provide an attractive image that conceals the true moving forces that effectively bestow upon law a mantle of legitimacy or authority? Does the distinction endure, but the relationship between its two terms shift or even tip? These questions are likely to endure, and the three essays below are bound to help frame and advance the forthcoming debates.