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

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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,”<sup>1</sup> 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.”<sup>2</sup>

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.<sup>3</sup> 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.<sup>4</sup> 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<sup>5</sup> and

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<sup>1</sup> See HANS Kelsen, *GENERAL THEORY OF LAW AND STATE* 207 (Anders Wedberg trans., 1961).

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

<sup>3</sup> *Id.*, at 80.

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

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

as requiring positive government intervention necessary for purposes of upholding individual rights.<sup>6</sup>

In contrast, in its paradigmatic Lockean incarnation, the role of government in private law would be purely facilitative of horizontal dealings among private parties.<sup>7</sup> 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,<sup>8</sup> 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

<sup>6</sup> 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.).

<sup>7</sup> See Michel Rosenfeld, *Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory*, 70 IOWA L. REV. 769, 866–867 (1985).

<sup>8</sup> *Id.*, at 889.

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

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,<sup>11</sup> is it time to reexamine, rethink, revamp, redesign, or even perhaps to discard the traditional distinction between public law and private law?

<sup>9</sup> See, e.g., Solange I, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 9, 1974, 37 ENTSCHIEDUNGEN 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).

<sup>10</sup> 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).

<sup>11</sup> 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*").