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Summary

Human Rights and the Critiques of the Public-Private Distinction

This thesis begins by sketching a political/philosophical map in which even the most diverse Liberal political philosophers can be seen to share a reliance on the oppositional distinction between the public (i.e. the state or society) and the private (i.e. civil society or individuals). Though the diversity of Liberal political philosophy would seriously argue against treating 'Liberalism' as a single monolith of thought, this thesis proposes to see Liberalism as unified by a reliance on the public-private distinction both as a way of describing the world and as a vocabulary with which it can be organized. In fact, one could see the public-private distinction as one of the main protagonists in the history of Western political philosophy. Many of the discussions and debates within this philosophical tradition can be read as debates about the best description of or the ideal normative role for the public-private distinction. The theories of Hobbes, Locke, Rousseau, Kant, Hegel, Bentham, Habermas and other Liberal thinkers are the general staple in any contemporary account or justification of the modern state and its legal and political institutions. Liberalism and its public-private distinction dominate the international legal imagination and are legally articulated in human rights discourse.

Despite the fact that the public-private distinction is at the heart of Liberalism and structures the main political and legal institutions of Liberal society, Liberal political philosophy does not talk about itself in these terms. It is the way that this distinction (and other distinctions too, such as object-subject, law-politics, etc.) is completely taken for granted that unifies the very divergent strands of Liberal thought.

The thesis then turns in its second Part to the growing number of thinkers who, though not necessarily anti-Liberal, have put forward very different ways of describing the social and political world. In this way, it draws attention to the existence of alternative modes of thought, even though the predominance of Liberal political philosophy is evident in its hold on legal and political institutions. This reference to alternative perspectives forms the prelude to a brief analysis of an early and prescient precursor of the many critiques of the public-private divide that would follow. Karl Marx's *On the Jewish Question* was not primarily interested in Liberalism, or even in the public-private divide. Marx rather inadvertently stumbles on the issue of "these so called human rights." But his critique is in fact to a large extent a critique of the public-private distinction. A number of elements from his critique are worth highlighting. To begin with, Marx puts the public private distinction in the realm of consciousness, and thereby makes a drastic move away from Liberal theorists who used it as a way to describe the existing social and political world 'out there'. Moreover, Marx, perhaps following Hegel, inverts the Hobbesian causation narrative by arguing that it is the current order that creates a private realm in which egoism prevails, rather than the private realm that necessitates the current order. Both the pretense of factuality and the narrative of necessity combine to produce the effect of alienation that Marx found so reprehensible. From our vantage point, we can also see how this double move of factuality and necessity so effectively laid the foundations for the theoretical and political success of the public-private distinction.

The thesis then jumps forward to look at a group of U.S. lawyers who, while not necessarily with any philosophical ambitions, incorporated two important elements in

their perspective on the workings of the legal-institutional decision-making complex. One was an exposure to ideas that claimed that social sciences could have something useful to offer to the understanding of law. The other was a growing sense of anger at the way that incipient social legislation was being held to violate constitutional rights on the grounds of a very formal-deductive approach to legal reasoning. Out of the large scale attacks on legal formalism came a movement called the 'legal realists', or 'American legal realists'. Among their broad range of work was a critique of the public-private divide, formulated in the way that many formal legal questions were formulated at the time: the state's regulation on the one hand, and on the other hand the freedom of individuals to engage with each other in contractual relations. The Legal Realists insistently pointed out that freedom of contract does not exist in and of itself, but is heavily curtailed and bound to all types of formal and other requirements. More importantly, they argued that 'freedom' of contract requires the state in order for the contractual system to work. Courts and other law enforcement institutions are an intricate part of the contract system. As such, when two 'private' citizens bind themselves contractually, they have the state and its power at their disposal. If you add to this the asymmetrical nature of many private-sphere contractual engagements, then you basically have a state that makes it possible for the beneficiaries of that asymmetry to enjoy the support of the state. All this meant that contract law, in the way it was applied by judges, was on the side of the dominant *laissez faire* economic dogmas of the time.

Though the Legal Realists were not self-consciously formulating a 'critique' of the public-private distinction, let alone of 'Liberalism', they in fact dislodged a number of comfortable categories and dichotomies within the legal-institutional decision-making complex, such as freedom-coercion and law-politics. This effect of their work would be picked up two generations later, by a group of scholars that had, again, a lot of exposure to ideas from other disciplines.

The thesis then tries to map out some of the general features of the way in which these later scholars—known as the Critical Legal Studies (CLS) movement—critiqued the public-private distinction. It was in the work of CLS scholars that this single heuristic 'the public-private distinction' appeared on the theoretical and scholarly map of legal academia. This move facilitated the deployment of analytical energy on fleshing out the insights provided by the Legal Realists, of whom CLS scholars in the U.S. saw themselves the intellectual heirs. Though CLS produced and produces a broad set of scholarship on various topics, this analysis focuses exclusively on their public-private critiques, and signals a number of features that the critiques have in common. First, CLS critiques emphasize the logical contingency of the public private distinction, by illustrating how it all depends on perspective, narrative, and ideological bias, and by observing that neither 'public' nor 'private' have a specific or intrinsic meaning. Second, they emphasized how the distinction can be clear, and have a relatively discernible and predictable meaning, but only in concrete historical and political situations and contexts. In this way, the public-private divide can, and does, play a role as boundary for inclusion and exclusion. Third, CLS critiques tried to bring 'ideology' into the picture, by illustrating how particular belief systems, as well as their inertia throughout history operated behind the scenes, and presented certain distinguishing functions of the public and private as 'natural' and, therefore, as 'necessary'. So, for example, in response to calls for change, one might reach the normative conclusion that 'the state cannot play a role in corporate governance', and the reason for this will then be that 'corporate governance is a private matter'; end of story. The public-private distinction operates as both fact (corporations are private), and as norm (the state is not allowed to intervene). In fact, many, if not most topics can be formulated as issues that ultimately rely on

questions about the 'precise' designation of the public-private divide. This leads to the fourth aspect of the CLS critiques: their reliance on structural linguistics and on structuralism in general led them to formulate an account of the public-private distinction as somehow omnipresent. The public-private distinction does not just operate out there, in the realm of political philosophy and in the discursive or legal space between 'the state' and 'the individual'. Rather, it operates at every level of our lives, and through a whole bunch of other public-private distinctions, such as law-politics, universal-cultural, global-local, open-closed, etc. (and many others). Whether we're talking about politics or family life, about our academic work or about even the way we eat: one can usually trace a fundamental role for the public-private distinction, in way or another. From this we can understand how difficult it is to talk about our social and political reality in terms that are not variations of the public-private distinction. Take all four elements together—an indeterminate but omnipresent set of dichotomies, operating on all levels between the highly abstract and the most concrete, guided by ideological belief systems that make some arguments sound like "common sense" and others like strange "off side" ideas, all without making the operative distinction explicit—and you have a mighty machine in Liberalism. Granted, some CLS critiques can be a bit overwhelming in their 'totality' or even paranoia, but this is part of their strength as well as a testament to their ambition, rigor and thoughtfulness.

After the CLS critiques the thesis briefly inquires into the ongoing development and sophistication of the critical vocabulary by a new generation of critical scholars, this time concentrating on the field of international law, sometimes referred to as New Approaches to International Law (NAIL). In particular, this analysis focuses on one of NAIL's most significant expressions, Martti Koskenniemi's *From Apology to Utopia*. This work, which offers a critique of the structure of international legal argument, focuses on what Koskenniemi refers to as the essential components of the grammar of international law. International legal argument is continuously engaged in a type of "snakes and ladders" game, a never-ending dialectic between two mutually cancelling epistemological objectives. On the one hand international legal argument must ground itself in the consent of individual states; their expression of their sovereign autonomy, upon which international law is based. On the other hand, international legal argument grounds itself in the idea that an overarching international sovereign community is required for the existence of international law. No international legal theory can find a stable 'middle' position that balances these two conflicting ideals, so international legal argument is destined to go on playing the snakes and ladders game. In my reading of Koskenniemi, this can be seen as a critique of the public private distinction, since it seriously counters the idea that there *is* a public-private divide, a clear cut and stable difference between the private nature of sovereign autonomy and the public nature of international community. Moreover, it adds to our understanding of the distinction having less of a 'conceptual' nature, and more of a rhetorical one, and one that is contained within a basic dichotomous structure that keeps repeating itself throughout Liberal political philosophy and its political and legal institutions.

Around the same time as CLS, and sharing in many of the same insights and backgrounds, feminist scholars in various disciplines, including law, were articulating the most numerically massive critique of the public-private distinction. In numerous writings a set of varied feminist critiques of the public-private distinction emerged; from early critiques of the public-private distinction as an intrinsic instrument of patriarchy that furthers the subordination of women, to the more Liberal versions that argued that the distinction's negative implications could be overcome if women were to leave the confines of the 'domestic sphere' and populate the public sphere as equals to men. In between these points, there have been various arguments about how the world could be

a better place if the public sphere was 'feminized', by incorporating 'domestic' values into 'public' life (cultural feminism), or arguments by the more contemporary Liberal feminists who believe that the public-private divide can be instrumentalized to benefit women. An example of this instrumentalization is how the state is "kept out of women's lives" to give them ownership over their bodies (abortion), while the state is "let into women's lives" to protect them from domestic violence and date rape. One can see how, in these and other ways, the feminist critiques internalized and furthered many of the CLS critiques, with their structuralist analysis, their focus on normativity and ideology, and their embeddedness in context. Some more post-modern feminist scholars voiced concern about how these analyses and tactics for manipulating or changing the public-private divide served more often than not to *reaffirm*, rather than *undermine* the status quo, and pointed to the various intersecting ideological projects that get caught in the middle. As discussed later, instrumentalizing the public private distinction involves not only embracing its critical potential, but also abandoning the more profound dimensions of the critiques.

The third Part of this thesis takes the insights of the critiques to heart and examines how they impact various dimensions of human rights. In doing this, it rather haphazardly explores a theory about human rights and about their social, institutional and political embeddedness, which results in the formulation of the idea of a legal-institutional decision-making complex. The thesis takes for granted that the public-private distinction is *not* an empirical (or even legal) fact, that it is indeterminate, and that it is always established in concrete contexts that are the loci of ideological contestation. It also takes for granted that 'public' and 'private' are not stable concepts, but rather the focus of an impressive amount of interpretative effort, by all kind of actors in all types of contexts. Along the way, it explores a theory of the public-private distinction as 'deferral', or as deferred in the functioning of the legal-institutional decision-making complex. In particular, the thesis explores what happens when feminist critiques become very prominent and are instrumentalized on a large scale. It also asks questions about the historical narratives that are an element of human rights discourse, and wonders about the role historicizing plays in the functioning of the legal-institutional decision-making complex. It eclectically explores a number of threads that came out of the critiques, such as the pioneering feminist scholarship and advocacy in 'doing something' with the critiques in the context of human rights. But it also explores more detached issues, such as the role of ideology in the human rights discourse.

The analysis then goes a step further into the mechanics of the legal technicalities of human rights discourse and the way that it is embedded in the legal-institutional decision-making complex. It explores the role of legal doctrines, and examines legal scholars' role in their elaboration. It looks in particular at two doctrines that have been developed to give meaning to or organize the way in which the cusp of the legal-institutional decision-making architecture, the European Court of Human Rights, has dealt with some of the more systemically structural public-private questions in its human rights framework. The first of these concerns a development that at one stage was considered to be a real challenge to human rights as a legal system—that activists, advocates, and some scholars insisted on invoking human rights rules, even in situations in which the state did not seem directly at fault for the alleged breach. How academics dealt with this situation is, in this analysis, revealing of the main preoccupations of legal scholarship: their anxieties about systemic coherence, and their attempts to map out the increasingly numerous judgments onto a seemingly consistent legal schema. The second doctrine that it looks at is the European Court's idea of a margin of appreciation within which states have a degree of discretion when deciding when to interfere with

somebody's rights. Since this recreates, within the framework used by the Court, a type of public-private distinction, it is approached with the various public-private insights in mind, and relies on them to provide an analysis of the doctrine, in particular of the ways that legal scholarship has tried to understand the judicial practice and has explicated it within the context of the legal-institutional decision-making process.

Finally, the thesis goes one final step further along the ladder leading from general to concrete, and attempts to analyze how the public-private distinction operates at the most concrete level: in the texts of a number of judgments of the European Court. For this exploration, it takes a number of cases relating to the issue of homosexuality and reads them in a rigorous and incisive way, with a constant eye for public-private dynamics and a consciousness of the indeterminacy of the distinction, as well as its interconnections with other related distinctions, such as objective-subjective, whole-parts, etc. It argues that this type of reading illustrates a number of the insights provided by the critiques, if in somewhat novel and different ways. The omnipresence of the distinction, its rhetorical function in the buildup of a narrative, the richness of interpretive possibilities that it offers, and some other aspects are explored.

In the end, though the thesis takes to heart many of the insights offered by the critiques, and without denying their importance and incisiveness, its explorations 'through the looking glass' are not as 'radical' or scary as some might have thought. In fact, if anything, they express many more things that 'everybody already knows', albeit in an effort to articulate some of the dimensions. However, though familiar to many or most, or even to 'everybody', there does not currently seem to be enough of an elaborate vocabulary to express many of these insights, let alone to pursue the many questions that they raise, without being perceived as either 'not-legal', or 'theoretical', or any of the other epithets that place one at the margins of this particular niche within the legal-institutional decision-making complex, namely 'legal scholarship'. Then again, maybe this thesis can contribute to the development of this vocabulary, one that is sufficiently embedded, while sufficiently detached as well.

In its concluding chapter, the thesis takes a look at the various (potential) responses that the critiques have prompted. Critiques of the public-private distinction have often, and unfairly, been rejected without significant engagement. Others have considered them 'insufficiently right', even though their potential (partial) worth has not been explored. A very common response is to say that they are 'merely right', in the sense that they do not provide 'alternatives' or 'solutions'. This thesis argues, by contrast, that there is worth in the critiques themselves and in the alternative narratives that they offer. This response is often accompanied by the observation that "everybody already knows" (about indeterminacy, about law being political and ideologically biased, etc.). Here the thesis argues that even if this is correct, that there are multiple ways in which this knowing is actively repressed and/or denied. It is here that one can see the ideological dimension of the distinction between law and politics at work, in the constant adherence to narratives without needing to believe in them. This insight leads to the fourth response to the critiques, namely that they are *too* correct, in the sense that they touch upon a nerve and they unearth an element that is too deeply embedded in the *habitus* of legal scholars and lawyers, in fact too essential a building block in the construction of the legal institutional decision making complex.

As final afterthought, the thesis ponders whether too much emphasis on the critiques and their (lack of) impact may give them too much protagonism in a story of a distinction that seems here to stay, but that is also under constant review and pressure to

adapt to rapidly changing circumstances. In this sense one can speculate that the critiques are symptoms of a distinction under high pressure, rather than the cause thereof.