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Human Rights and the Critiques of the Public-Private Distinction

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TABLE OF CONTENTS

ACKNOWLEDGEMENTS **vii**
TABLE OF CONTENTS **xi**

1. Introduction 1

PART I: LIBERALISM AND THE PUBLIC-PRIVATE DISTINCTION

2. The Public-Private Distinction in Liberal Political Philosophy 15
   - 2.1. Introduction 15
   - 2.2. The Public-Private Distinction in the History of Western Political Thought 16
     - 2.2.1. Thomas Hobbes and the Leviathan 16
     - 2.2.2. John Locke and the Body Politic 17
     - 2.2.3. Jean-Jacques Rousseau and the Transformation of Man 20
     - 2.2.4. Immanuel Kant, Private Happiness and Public Welfare 22
     - 2.2.5. G.W.F. Hegel and the Spirit 24
     - 2.2.6. Jeremy Bentham and the Logic of Obedience 26
     - 2.2.7. Jürgen Habermas and the Public Sphere 27
   - 2.3. Concluding 33

PART II: CRITIQUES OF LIBERALISM'S PUBLIC-PRIVATE DISTINCTION

3. Marx's Early Critique 37
   - 3.1. Introduction: Away from, or Against, the Liberal Public-Private Divide 37
   - 3.2. Karl Marx and the Critique of Alienation 39
   - 3.3. Concluding 42

4. The American Legal Realist Critique 43
   - 4.1. Introduction 43
   - 4.2. The Critique of Laissez-Faire Economics 45
   - 4.3. The Critique of Contract Doctrine 46
   - 4.4. The Critique of Property Law 47
   - 4.5. Evaluating the Legal Realist Critique and its Impact 49

5. Critical Legal Studies (CLS) and its Critique 52
5.1. Introduction 52
5.2. CLS and the Public-Private Distinction: Selected Works 55
5.2.1. Duncan Kennedy on the Structure of Blackstone's Commentaries 55
5.2.2. Gerald Frug on the City as a Legal Concept 68
5.2.3. Karl Klare on the Public-Private Distinction in Labor Law 77
5.2.4. Paul Brest on State Action and Liberal Theory 83
5.2.5. Frances Olsen on the Family and the Market 87
5.2.6. Duncan Kennedy on the Decline of the Public-Private Distinction 96
5.3. Common Traits in the CLS Critique of the Public-Private Distinction 101
5.3.1. An Emphasis on Logical Contingency or Indeterminacy 101
5.3.2. An Emphasis on Historical/Contextual Embeddedness 108
5.3.3. An Emphasis on Ideological Function 110
5.3.4. Structuralism and the CLS Critiques 115
5.4. Concluding: The Legacy of CLS for our Thinking About the Public-Private Distinction 121

6. New Approaches to International Law (NAIL) and its Critique 123
6.1. Introducing NAIL 123
6.2. Koskenniemi's Structural Analysis of International Legal Argument 126
6.3. Concluding: the Public-Private Distinction as Structuring a Grammar 132

7. Feminist Critiques of the Public-Private Distinction 133
7.1. Introduction 133
7.2. Feminism in a Nutshell 134
7.3. "The Sexual Contract": Feminist Critiques of Liberalism's Public-Private Divide 142
7.4. Feminist Public-Private Critiques of Human Rights 155
7.5. Feminist Pursuit of Social Change and the Theory-Action Dichotomy 167
7.6. Concluding: Living Within and Against a Conceptual Framework 177

PART III: THROUGH THE LOOKING GLASS: INTERNATIONAL HUMAN RIGHTS LAW OBSERVED IN THE PRISM OF THE CRITIQUES

8. The General Human Rights Theory and Idea 183
   - 8.1. Introduction: Through the Looking Glass 183
   - 8.2. International Law, Human Rights, and the Public-Private Distinction 184
   - 8.3. Human Rights and its Histories of the Public-Private Distinction 189
   - 8.4. CLS Critiques of Rights 192
   - 8.5. Indeterminacy and the Public-Private Distinction as Deferral 195
   - 8.6. Ideology and Structural Bias in Human Rights 199
   - 8.7. Concluding Observations 206

9. The Pursuit of Coherence: the Public-Private Distinction in Human Rights Doctrines 207
   - 9.1. Introduction 207
   - 9.2. Verticality Lost and Regained: Horizontal Effect and Positive Obligations 211
   - 9.3. Managing Europe's Public-Private Distinction: the Margin of Appreciation 222
   - 9.4. Concluding 245

10. The Distinction at its Most Concrete: Reading the Public-Private in the European Court of Human Rights' Case Law on Homosexuality 247
   - 10.1. Introduction: Practices of Reading 247
   - 10.2. Common Readings 250
   - 10.3. Alternate Readings 254
     - 10.3.1. Public, Private, and Gay: Dudgeon, Norris, and Modinos 254
       - 10.3.1.1. The General Structure of the Cases 254
       - 10.3.1.2. The Applicants and Their Facts 255
         - 10.3.1.2.1. Dudgeon 255
         - 10.3.1.2.2. Norris 257
         - 10.3.1.2.3. Modinos 262
       - 10.3.1.3. The Domestic Law 263
         - 10.3.1.3.1. Dudgeon 263
         - 10.3.1.3.2. Norris 267

10.3.1.3.3. Modinos 268
10.3.1.4. The Merits of the Cases 270
10.3.1.4.1. Interference with an Article 8 Right 270
10.3.1.4.2. A Legitimate Aim 275
10.3.1.4.3. Necessity in a Democratic Society 276
10.3.2. After Decriminalization: Salgueiro da Silva Mouta, Lustig-Prean & Beckett, Smith & Grady, and A.D.T. 288
10.3.2.1. The Applicants and Their Facts 289
10.3.2.1.1. Salgueiro da Silva Mouta: Homosexuality and Family Law as Private and Public Politics 289
10.3.2.1.2. Lustig-Prean & Beckett, and Smith & Grady: Dragged Out of the Army Locker 298
10.3.2.1.2.1. The Applicants, Their Ordeal, and Their Politics 298
10.3.2.1.2.2. The Policy Concerning Homosexuals in the Army 304
10.3.2.1.3. A.D.T. v. U.K.: Group Sex and Videotapes 309
10.3.2.2. Selected Public-Private Themes 311
10.3.2.2.1. Salgueiro: the Politics of Difference 311
10.3.2.2.2. The Army Cases 313
10.3.2.2.2.1. Unity and Fragmentation in the Domestic Constitutional Setting 313
10.3.2.2.2.2. Who Knows Best? The Locus of Authority and the Public-Private Distinction 316
10.3.2.2.2.3. Gays, Women & Racial Minorities: Private Conduct vs. Public Categories 319
10.3.3. The 'Rather Curious Activities' of Laskey, Jaggard, and Brown 323
10.3.3.1 Laskey, Jaggard, and Brown in Dialogue with the Other Cases 323
10.3.3.2. The Question of Consent 328
10.3.3.3. Sadomasochism and Homosexual Behavior 335
10.4. Concluding 337

11.Conclusion: The Public-Private Distinction After the Critiques 345
11.1. Cumulative Critiques 345
11.2. The (Non-)Responses to the Critiques 350
11.2.1. The Critiques Are Wrong 352

11.2.2. The Critiques Are Not Sufficiently Right 353
11.2.3. The Critiques Are 'Merely' Right 353
11.2.4. The Critiques Are Too Right 358
11.3. Through the Looking Glass 359
11.4. The Public-Private Distinction: Past, Present, and Future 362

LIST OF ACRONYMS **365**

BIBLIOGRAPHY **367**

SAMENVATTING **399**

SUMMARY **413**

CURRICULUM VITAE **421**

1. Introduction

'Public' and 'private' are two very common words; everybody knows what they mean. They are used continuously in an unending number of situations. Their meaning seems immediately clear,[1] but it would be very difficult, and potentially impossible, to actually define the words in an exhaustive manner. I say impossible since these are very much *living* words, and there is no area of social life, old or new, that is not permeated with them. In fact, it would seem almost impossible to come up with a way of describing new phenomena and new activities, without wondering, sooner rather than later, about their 'privateness' or 'publicness'.[2] Each time any of these words is used in a new context, by more and more people, the range of possible interpretations increases. As such, their meaning is dynamic and always in motion. But public and private are also important words, since they play important roles in situations that people care about. As such, they also require stability and a fixedness of meaning.

Their characteristic as both readily clear in meaning as well as precise in meaningful ways has made the public and the private into some of the most favorite words for describing the world, both in terms of grand theory as well as in terms of small detail. Whether talking about the individual and society, community and humanity, what is mine and what is yours, or that which is so intimate that it can not be shared and that which can only be shared in intimacy, we find it useful to talk in terms of public and private. It is therefore not without reason that the political philosophy that has dominated the last two centuries has the public and the private as central organizing notions. At the same time, and since the two concepts are also important in their detail, we have legal and political institutions whose main task, or so it would seem, is to define and police the exact boundaries between them. So we move from the grand architecture of our political organization through processes of decision-making that have social, cultural, political, economic and legal dimensions, and towards the determination of whether a particular situation, activity, relation, etc. is either 'public' or 'private'. Among the many political and legal institutions that regulate the public and the private,

1 The Oxford English Dictionary has in fact too many meanings for each of the words, a fact enhanced by their existence as nouns as well as adjectives, as well as by their relatedness to a variety of verbs.

2 I am thinking of things like the internet, genetics, etc.

a prime symbolic example in the political imagination of many people is human rights. Human rights tell a story about an intrinsic dignity that needs protection against others, and in particular against the state. More than anywhere else, in human rights one can see both the imprint of the grand architecture of our political organization as well as the detailed struggle for protection of human dignity in specific cases. Internationally, human rights and human rights institutions are increasingly the currency for respectability and a minimum fulfillment required for membership in the international community.

This centrality of the public and the private in the common political imagination can be illustrated by reference to the canonical figures of political philosophy. The main political notions and institutions of our time, such as the state, the rule of law, the importance of rights; all this has been developed and theorized extensively by thinkers who rely on the notions of public and private. There is, however, a long tradition of legal and political thinkers who have argued in various ways that to describe the world in terms of public and private is, at least, problematic, and at worst, the reason why there is so much injustice and oppression in the world. It would then seem that there is much tension between the challenging intellectual tradition and the dominance of ideas that see the world as divisible into public and private and that see human rights as the mediating instrument between both. This thesis is about that tension.

In approaching this topic I have looked at political and legal philosophy, at various traditions of legal theory, at a number of movements in legal thought that were very much a part of a local culture of thought, albeit trans-nationally connected to other cultures of legal thought. I have also looked at human rights discourse in its theoretical as well as legal-doctrinal dimension. And in the background I have allowed myself to be influenced by a number of other disciplines and theories about language, identity, and the social bond. As such, it may at times be a bit of a roller coaster experience, since I have eclectically connected a number of ways of thinking that are not commonly put together.

My work on this thesis has been motivated by two feelings that have dogged me ever since I finished my law degree and started on my graduate work. The first feeling was that the boundary between law and politics/morality

was overly dogmatic, and not sufficiently clear to me at a phenomenological level. It made sense on a social level, in the sense that I could distinguish clearly between the work of lawyers and legal scholars and that of other professions, or in the sense that I could some times bond easily with lawyers at social events in ways that I could not with people from other backgrounds. But at the same time, both as a student and as a potential lawyer/legal scholar, I had difficulty seeing that distinction between law and politics running through my work, through my engagement with the issues and materials at hand. The second feeling was that my legal education had left me hungry for a 'deeper' analysis of law than the one offered in law school. I should qualify this: exposure to very complicated legal problems can often be daunting and immensely challenging; a lot of intellectual effort is required in order to understand legal issues and problems and, for sure, legal work can be thrillingly fun and intellectually stimulating. So, it was all due to my own inclinations, which tended toward the larger questions, about the nature of law itself, about being able to distinguish right from wrong, about justice, about truth—all things that I felt were very relevant for thinking about law and for working with law, but that were very marginally and unsatisfactorily addressed in my legal education both at the undergraduate and at the graduate levels.

The theories that I address in this project are theories that seem, to me at least, to share these two feelings. These theories are not content with observing that "law is politics" or that "law is political," but are constantly hammering out further and more incisive questions as to what this means, what 'political' is, and *how* law is political. In this, they recur and variously connect to these larger questions, and have found a whole range of vocabularies from certain philosophical strands, mainly in the non-analytical philosophy, to articulate those questions and to pursue them. At times, it felt as though I was moving away from a concrete preoccupation with legal questions, and I would need to console myself with the observation that I was not the only legal scholar who was doing this. However, very often, and more so with the passage of time, I found myself getting closer to what felt like the heart of legal questions exactly by moving away from law. In the words of T.S. Eliot:

> We shall not cease from exploration
> And the end of all our exploring
> Will be to arrive where we started
> And know the place for the first time.[3]

Since this is a piece of formal academic work, there is the formal requirement of having a 'problem definition', which is one way of expressing what drives the thesis, at the beginning, and of having an answer or conclusion at the end. The first question that I want to address is: What are the main tenets of the critiques of the public-private distinction? In answering this, I will look at a number of sub-questions: Do they have a history of repetition (are they all just saying the same thing) or development (does each critique add something new to the picture)? If one takes into account that these are a bunch of historical movements that have produced their own public-private critiques, how important are these critiques for each movement? How did they relate to the specific social-intellectual and political context in which they functioned? And what were the intellectual influences that shaped their critiques? Chapters 3 through 7 deal with these questions by analyzing the various critiques of the public-private distinction.

The second question I am investigating is: "What are the implications of these critiques for our thinking about human rights?" Taking into account the fact that 'our thinking about human rights' is something very diffuse and difficult to grasp, my way of dealing with this has resulted in a bit of a scattered analysis in which I deal with a number of different issues that I find relevant and that I try to systematize according to a logic of scale or of abstraction versus concreteness, with Chapter 8 dealing with general questions of legal theory and philosophy, Chapter 9 highlighting two specific legal doctrines and trying to argue within those doctrines, and Chapter 10 moving to the most concrete level, that of the text (while starting with a questioning of the practice of reading and a sense that it is important to define the institutional embeddedness of reading practices).[4] One thing that became immediately apparent as I tried to address this question is that the questions themselves needed to be rephrased; the field of human rights needs to be reorganized a bit, into legal theory, doctrine, and texts with a consciousness of the practice of reading. I am also aware that these are mere examples of what could

3 T.S. Eliot, "Little Gidding," *Four Quartets* 49, 59 (1943).
4 *See infra* Chapters 8-10.

potentially become a completely new field of intellectual activity. For example, in chapter 10 I have only focused on the reading practices that are embedded in the legal profession. I have not taken into account other contexts, such as formal party politics, international diplomacy, grassroots advocacy, or even philosophy. However, it has been necessary to circumscribe my explorations due to limitations of time and space.

The third and final question that I will address, and which is not done in one specific location in the text (other than the conclusion), but that has been in the back of my mind throughout the whole project, concerns the role of critiques. In some sense, I been preoccupied with looking for an explanation for why, on the one hand, the critiques are varyingly ambitious and even enthusiastic, while on the other hand, their reception has been, at best, rejection out-of-hand, and, at worst, a muted, shrugging relegation to irrelevance. In Part II I address this issue by putting a lot of effort into explaining the critiques in ways that are as comprehensive and accessible as possible. And in Part III I attempt to blend the critiques into a sincere preoccupation with understanding human rights in their various dimensions, indicating that the critiques can lead to all kinds of insights, and that integrating these various insights can coexist perfectly well with a professional intellectual engagement with human rights. So, the critiques do not mean, as has often been presumed, "let's abolish human rights" or "let's abolish the public-private distinction." What it *does* mean I have attempted to explore in Part III. In the conclusion I return more explicitly to this gaping abyss between the critiques and the wider professional human rights audience.

At times people have shown a lot of interest in the topic of my thesis, and expressed approval, even relief, at the thought that somebody was finally going to define what 'public' and what 'private' mean. In fact, in this work I am going in the opposite direction. In doing this I am relying on the idea that the public and private operate as a dichotomy, which means that they are each others' opposite; their meaning is *relational*. In other words, the meaning of public-private is usually articulated by means of other dichotomies that have the same relation. So, public is to private as open is to closed, as general is to particular, as universal is to cultural, as state-controlled is to market-controlled, as transparent is to secretive, etc. The list is in fact very long and because of the widespread use of what I call in the context of this work 'public-private dichotomies', it may at times be confusing. So, for instance, public can

be to private as accessible is to inaccessible. However, which is which will depend on the context. For example, public in the context of 'places' often means access, a place to which all people are permitted entrance. On the other hand, the public nature of money, or currency, means that only a few people acting on behalf of the state may actually have access to the making of money, while private money, such as the money used in a game of monopoly, can be made by everyone and is therefore accessible to all. In this example public means lack of access, while private means access. This characteristic fluidity of the dichotomy will be elaborately explored in chapter 10 of this work. In the other chapters I will refer to the public-private distinction by means of other dichotomies, and I will make them explicit as I go.

A couple of terms require some elaboration, since they play an important role. The dominant political philosophy that I have referred to is generally known as 'Liberalism'[5], and is generally linked tot the enlightenment philosophers Thomas Hobbes, John Locke, and Jean-Jacques Rousseau, as well as many who have followed in that tradition. Liberalism is the philosophy of human rights, democracy and the rule of law, as well as the philosophy of capitalism and secularism. It is also connected to the idea of Modernity, with its celebration of reason, science, and progress. Liberalism is highly varied, and scholars that I am categorizing as "Liberal" actually have vastly divergent theories.[6] For the purposes of this project, I am basically defining Liberalism as any theory in political philosophy that, in one way or another, uses the public-private distinction as its main axis, its main structuring logic. Liberal thinkers either start by dividing the social world between these two categories, in one way or another, or they conclude that this way of dividing the world is the best way of doing so. Mostly, they will both begin and end with some form of this division. Chapter two will look at a couple of the main Liberal philosophers in a cursory manner, in order to clarify how this is meant.

5 With a capital L to distinguish it from left-leaning progressives or democrats in U.S. politics, and from other political groups elsewhere that go by the same name.

6 *See e.g.* Gerry Simpson, "Two Liberalisms," 12(3) *European Journal of International Law* 537 (2001) (discussing the multiple but related meanings of liberalism in international legal scholarship).

The word 'critique' plays a central role in this work. It has a long history in philosophy, going all the way back to the work of Immanuel Kant.[7] Critique is another word for analysis, but with specific connotations. It is an analysis that goes 'against the grain', in various ways. It may reveal the way that legitimating accounts of social power operate, or it may indicate that there are intrinsic contradictions in a particular set of ideas, or in a discourse.[8] I do not have a particularly rigid or formalist idea of what critique is, but as this thesis unfolds, I hope the reader will get a better sense of what it entails. I do want to distinguish the notion of critique from the notion 'criticism'. Unlike criticism, critique does not necessarily entail a negative judgment, and even less does it necessarily indicate that there is a 'problem' that requires a 'solution'. It does however operate in an unsettling or discomforting way, and is therefore often conflated with criticism.[9] I will revisit the notion of critique, as well as its significance, below in chapter 5 and in the conclusion.

This thesis is organized as follows: Part I begins by looking at some of the thinkers that are usually referred to when introducing the legal and political institutions that most lawyers find to be self-evident. Contemporary legal and political institutions are usually justified with reference to a host of names, mostly those of the Liberal or "enlightenment philosophers." In Chapter 2, I illustrate the centrality to Liberalism of the public-private distinction by reference to some of its most important philosophers of law, the state, and politics. The purpose of this Chapter is merely to highlight this connection, not to conduct an exhaustive inventory thereof. Chapter 2 aims to illustrate the philosophical articulations of that which most legal and political philosophers find completely self-evident, and which they take for granted. Part II, which comprises Chapters 3 through 7, goes on to describe

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7 *See, e.g.,* Kant, *Critique of Pure Reason* (1781); Immanuel Kant, *Critique of Practical Reason* (1788); Immanuel Kant, *Critique of Judgment* (1790). For Kant, the ability to think independently of dogma was to think critically. *See also* Immanuel Kant, *An Answer to the Question: What is Enlightenment?* (1784) (in which he scolds those who do not think critically for being lazy and cowardly).

8 Karl Marx's work can be seen as a critique of political economy. His work inspired the creation of the Frankfurt School of Critical Theory, which included German thinkers such as Max Horkheimer, Theodor Adorno, Herbert Marcuse, and Walter Benjamin. Another prominent member of this school of thought is Jürgen Habermas. Some people refer to Critical Theory in a much broader sense, and will include branches as diverse as gender studies, post-colonialism, structuralism, post-structuralism, deconstruction, post-modernism, psychoanalytic theory, queer theory, semiotics, and more.

9 In recent years, it has become fashionable to use the word 'critique' in ways that make it indistinguishable from criticism.

and analyze the long history of critiques of the public-private distinction. Though Liberal philosophers have dominated the field of thought on law and politics, there has always been a counter-current to that intellectual tradition.

In Part II, I reconstruct the history of that counter-current, with an exclusive focus on the public-private distinction. In doing this I have been mindful of the particular characteristics of these intellectual traditions, and situate them within their historical, political and intellectual contexts. Chapter 3 looks at an early precursor of what would become the critiques of the public-private distinction: Karl Marx. Though the critique of the public-private distinction was by no means a central part of Marx's overall intellectual body of work, it nevertheless articulated a couple of very important elements that would return in later critiques. In particular, there is the fact that the distinction between public and private operates in the realm of human consciousness rather than in the world of facts, as well as its instrumentality as part of a system of thought or ideology, were important observations that he posited very broadly but would be taken up later by other scholars.

Chapter 4 jumps ahead to a group of scholars who had their own elaborate projects. This group of legal scholars in the United States, who called themselves the 'Legal Realists', were very active in the first decades of the 20th Century. They produced a strong intellectual reaction against the predominating formalism in legal education and legal thought that combined with a progressive sensibility which identified with the early attempts to pass social legislation in the United States. In the course of their diverse projects, the Legal Realists would make a couple of important observations about the distinction between the freedom of individual economic actors and the regulation of these actors by the state. In particular, and by means of incisive legal/doctrinal analysis, they would problematize this distinction by arguing that there was no such thing as freedom outside of the regulation by the state.

These and other crucial elements of the work of the Legal Realists would be taken up one or two generations later by a group of scholars known as the Critical Legal Studies (CLS) movement. I turn to the work of these scholars in Chapter 5. One can understand the Critical Legal Studies movement as a manifestation of the general cultural and intellectual effervescence of the 1960s

and 70s, even though it had its heyday in the 80s. CLS scholars incorporated into their vocabulary a large amount of insights from continental European philosophy. And they added a lot of depth to Legal Realist scholarship by putting it into the larger context of the history of ideas. Three very important words in this thesis—'critique', 'Liberalism', and 'ideology'—gained their currency through CLS work. More importantly, CLS scholars introduced the single heuristic that is the main subject of this thesis: the public-private distinction. Before and outside CLS, the distinction was hidden behind a mostly ontological focus on 'the private' and 'the public', or even further away from sight, in the far background. Moving away from that type of work, and focusing instead on this one heuristic, opened up a new world of analytical possibilities. As CLS scholars would illustrate again and again, the public-private distinction is logically contingent, can only make sense in concrete historical contexts, and serves a primarily ideological function by presenting itself as self-evident.

In Chapter 6, I briefly examine some work done by critical scholars in the field of international law. These scholars have not necessarily or explicitly articulated a critique of the public-private distinction, but their work can be seen as very relevant from the perspective of the history of public-private critiques. If anything, the critical work of these international legal scholars is illustrative of how the critiques of the public-private distinction are embedded in a large-scale intellectual project that is critical of various aspects of Liberalism.

Coinciding with CLS, but outlasting it by several decades and still very much alive, feminism and the feminist movement manifested a much more profound and large-scale cultural and political upheaval. The critiques of the public-private distinction articulated in the context of this movement are addressed in Chapter 7. Feminist scholars in political and legal philosophy identified the public-private distinction as a fundamental element in the system of thought that had for centuries subordinated women, often referred to as patriarchy. They took the insights of their critical contemporaries and constructed an elaborate critique of how the public-private distinction was an element in the most divergent corners of patriarchal ideology. Everywhere from the writings of John Locke, through the elaborations of Liberal philosophy, through the structure of epistemology, economics, and sociology, as well as law, one could find ways in which the public-private distinction functioned

to legitimize the subordination of women. By illustrating that the public-private distinction is gendered, and how this distinction correlates with other gendered distinctions,[10] they were able to map out the concrete details of the patriarchal subordination of women. I then focus on the feminist critiques of human rights, since these were primarily concerned with the public-private distinction within human rights discourse. The feminist critiques offer us an example of how human rights can be (and have been) instrumental for oppressive ideologies, not by means of cynicism, but by means of the structural biases that operate within them. Finally, Chapter 7 concludes by looking at some attempts by feminist legal scholars to capitalize on the feminist critiques of the public-private distinction by using them to pursue projects of social and political change. Though their experiences illustrate the limitations of such pursuits, their critical self-reflexivity about these limitations offers insights into the role of critique in political projects.

In Part III, I submerge myself in the conceptual and phenomenological framework created by the critiques. From that vantage point, I turn to an examination of human rights. The picture that emerges here is one in which there will be many points of recognition both for scholars familiar with the critiques as well as for scholars who are not familiar with them. As such, the picture is distorted in ways that I explore in Chapters 8, 9, and 10. In performing this task, I have relied on the critical work that has already been taking place in the field of human rights, even if that work was not necessarily centered on the public-private distinction.

In Chapter 8, I start off by illustrating the centrality of the public-private distinction in general human rights discourse. Though hardly innovative, this centrality is hardly ever explicitly acknowledged. I then move on to reflect on the role of history, or rather of historiography, in the context of human rights discourse. Like other ideological distinctions, the public-private dichotomy has a history. It is not, and should not be, dislodged from other political and philosophical histories. One of the ways in which Liberalism operates as an ideology is that it hides the fact that the public-private distinction has a history. Likewise, human rights discourse, when talking about its own history, will follow this pattern. However, a sense of the history of the public-private distinction and human rights can facilitate

10 *See infra* footnotes 398-399 and accompanying text (charting the many gendered distinctions that map onto the public-private dichotomy).

a novel consciousness of that discourse. After briefly looking at some of the CLS and feminist critiques of human rights in general I move on to reflect on how the logical contingency or indeterminacy of the public-private distinction operates within human rights. In doing this, I will emphasize the importance of seeing human rights as embedded in a set of legal and political institutions. In order to emphasize this, I will introduce the idea of 'the legal institutional decision-making complex'. By means of explaining how human rights are embedded therein, I will posit that the public-private distinction, in the way that it presents itself as descriptive, functions as a means of deferral, within the legal institutional decision-making complex, of the ideological issues that are at stake. Subsequently, I move on to explain how the notions of ideology and structural bias can operate in human rights discourse, even when human rights discourse is silent about this fact.

Chapter 9 moves away from these general and theoretical perspectives on human rights and turns to the 'nuts-and-bolts' of two legal and doctrinal debates. Though there is no explicit legal doctrine of the public-private distinction, this Chapter illustrates how most legal doctrines can be seen as being preoccupied with this distinction. I begin by reflecting on an ongoing debate within human rights which concerns the so-called 'horizontal effect' of human rights, and which at times has caused significant excitement and even some degree of panic among legal scholars of human rights. I then look at how the premier international human rights court—the European Court of Human Rights—has bypassed the challenges posed by the claim to horizontal effect by articulating a doctrine referred to as the doctrine of 'positive obligations'. I then focus on the way that legal scholars have dealt with this move by the Court, and how they have been continuously preoccupied with the question of 'coherence'. In the second part of Chapter 9, I further analyze this doctrinal pursuit of coherence by looking at another doctrine of the European Court of Human Rights: the 'margin of appreciation'. I will argue that this doctrine is largely concerned with defining the precise location of the public-private distinction, but that this quest for definition will stumble on the limitations that have been signaled in previous chapters.

Chapter 10 moves on from the nuts-and-bolts of legal doctrine to the nuts-and-bolts of a number of cases by that same European Court of Human Rights, each of which has dealt with the question of human rights and homosexuality. In this Chapter I focus on the most concrete textual dimension

of the public-private distinction by exploring the ways in which the public-private distinction can be 'read' as a rhetorical device. I start off by explaining how practices of 'reading' a human rights text are embedded in the legal institutional decision-making complex. I illustrate how a common reading that is thus embedded produces a particular account of these judgments. I then move on to provide alternate readings, or readings that are embedded in the project of critiquing the public-private distinction. This part of the thesis is very elaborate, and purports to offer a different phenomenology of the public-private distinction than is common in human rights discourse. As in Chapters 8 and 9, the picture that will emerge from Chapter 10 will appear both recognizable and distorted. In the concluding Chapter, I reflect on the role of critique in the broader history of ideas.

Finally, some words about how this thesis itself relates to its various institutional and cultural environments. In some ways, this thesis has been written in a bit of a limbo. On the one hand, I have written very much for a Dutch/European audience that, generally speaking, is not familiar with Legal Realism[11], let alone CLS (other than having some vague ideas about it being a 'leftist', 'theoretical' something). On the other hand, I have connected with a tradition that was developed (predominantly) in the United States, and which has its own complex (and relatively marginal) position and history in its own context. So, I have found myself continuously trying to explain, at the most accessible level, something that already has a history elsewhere. At the same time I have also tried to speak within that (mostly Unitedstatesean) tradition of critique so that I'm not just regurgitating what has already been said. As such, I have continuously had to struggle with the idea that people familiar with feminism, CLS, etc. will find some parts of this thesis overly simplistic and regurgitative, if only because I am continually concerned with not losing my European audience. Even so, I think that with the looped and nomadic perspective that I will provide here, I have insights that will prove valuable and insightful for both traditions. I also know that these problems are somewhat moot, because this is 'just a thesis'. But it is nevertheless a tension that has dictated the dynamic of a lot of what I have done, and that I hope the reader will be sympathetic to.

11 There may be, in legal theoretical circles, some familiarity with the Scandinavian legal realist movement, a movement that differed significantly from the legal realists in the U.S. See more on this, below at footnote 92.

PART I:

LIBERALISM AND THE PUBLIC-PRIVATE DISTINCTION

2. The Public-Private Distinction in Liberal Political Philosophy

2.1. Introduction

As I have described more elaborately in the previous chapter, I speak of Liberalism in order to describe the dominant political philosophy of the moment, and the main pillar of Western Political Philosophy since Thomas Hobbes. Liberal political philosophy is usually considered to have a canon of thinkers, ranging from Hobbes, through Locke and Rousseau, as well as Kant and many others. In this chapter I want to illustrate how the political theories of these philosophers are structured around the public-private divide, albeit in sometimes widely diverging ways. In other words, their arguments about the body politic, society, or the state, can be captured, summarized, and even reduced to arguments about a particular relation between the public and the private. Though in doing this I will be very reductive, only picking out very small excerpts from vast theoretical constructions, I believe that it will suffice to illustrate my point. In no way should such a public-private essentialization or theory of all Liberal political thought do away with its diversity and richness. However, the point here is that it is possible to sketch out an account of European political philosophy as an account of the public-private distinction. In other words, one can present the preoccupation with the public-private distinction as the main preoccupation of Western Liberal political philosophy. This is what I will attempt to do in this chapter.

I will take a cursory look at some of the most important Liberal political philosophers, starting with Hobbes and then looking at Locke, Rousseau, and Kant. I will then follow with some philosophers who are sometimes not considered to be 'Liberal', in the sense that they do not put the same emphasis on individual liberties. Hegel, Bentham, Arendt and Habermas are sometimes presented as being critical of some of the main Liberal tenets, and as offering counterpoints or even critiques of Liberal political philosophy. However, what this chapter will illustrate is how even some of the most important counterpoints can be seen as operating along the public-private distinction, in fact deploying the distinction in order to construct their oppositions or departures. All this serves to illustrate the wider notion of 'Liberal' that I employ in this project, and which is that various fundamental debates within Western European political philosophy have been made possible by a shared

reliance of the public-private divide, even if by a profound opposition with regard to how this divide should be understood or deployed. Once this point is illustrated, the reader will be in a better position to understand the significance that I attach to the various critiques that I will analyze in subsequent chapters.

Finally, I have, with great difficulty, managed to keep the list of thinkers short, and my analysis of how they rely on the public-private divide even shorter. I have done this in order to make my point as succinctly as possible and move on to the critiques.

2.2. *The Public-Private Distinction in the History of Western Political Thought*

2.2.1. Thomas Hobbes and the Leviathan

In his justification of the state, or of the Leviathan (or commonwealth or *civitas*), Thomas Hobbes sketches a very dark picture of human nature. He compares it unfavorably with the natures of ants and bees, which are able to "live sociably one with another" in a way that human beings cannot.[12] Because of their antisocial natures, humans require the drastic concentration of power and authority in one person or one assembly of persons—the "sovereign"—and must become subjects of that power in order to live together with one another.

Hobbes justifies this theory with a reference to a number of traits or characteristics that are intrinsic to human beings. In fact, he basically describes human beings 'as they are', socially and politically. The 'private' realm consists of persons who are "continually in competition for honour and dignity," and amongst whom "there ariseth on that ground, envy and hatred, and finally war."[13] Moreover, each private person is incapable of seeing the 'common good' as his/her private good, for his/her "joy consisteth in comparing himself with other men" and "can relish nothing but what is eminent."[14] Humans will always think themselves better than other humans and "wiser and abler to govern the public."[15] This leads them into divergence

12 Thomas Hobbes, *Leviathan* 113 (Oxford ed. 1996) (first published 1651).
13 *Id.*
14 *Id.*
15 *Id.*

and ultimately "distraction and civil war."[16] They will use the "art of words" to confuse and "discontent" others and to trouble their peace and pleasure. Unlike ants and bees, humans cannot *naturally* live with each other in peace, and thus their agreement canbe "by covenant only."[17] Likewise, Hobbes paints a picture of what this sovereign or commonwealth is supposed to be about:

> a common power, as may be able to defend them from the invasion of foreigners, and the injuries of one another, and thereby secure to secure them in such sort, as that by their own industry, and by the fruits of the earth, they may nourish themselves and live contentedly.[18]

In view of their intrinsic inability to come together in harmony, it is unavoidable that humans "reduce all their wills, by plurality of voices, unto one will."[19]

In Hobbes, the public sphere is a macro version of the private sphere. The Leviathan is an artificial man, "one person, of whose acts a great multitude (...) have made themselves every one the author, to the end he may use the strength and means of them all, as he shall think expedient, for their peace and common defence."[20] According to Hobbes, the only other public, if one could call it that, is the war of all against all and the lack of guarantees and in fact the impossibility to lead contented and fruitful lives. The Hobbesian private needs a strong public in order to have peace and not to be swallowed up by, presumably better organized, 'foreigners'. In order for the common good to thrive, private subjects need to sacrifice some of their natural freedom to the public sovereign, who has all discretion about how to use that authority.

2.2.2. John Locke and the Body Politic

In contrast with Hobbes, who manages the public-private distinction by assigning all power to one all-powerful sovereign authority who can contain the warlike impulses of private individuals, Locke sees the public

16 *Id.*
17 *Id.*
18 *Id.* at 114.
19 *Id.*
20 *Id.*

(or community, or commonwealth, or body politic) as created through the adherence of free private individuals through the mechanism of consent. Locke's preoccupation with the idea of consent raises a number of issues. On the one hand, the requirement of consent is a good thing, and flows out of the liberty, independence and equality of all 'men'. Without consent, there can be no obligation to obey the commands of the common wealth, or the state. On the other hand, once you give consent, you cannot, on a whim or for any other reason, take it back. Consenting, however, implies acceptance of the will of the *majority* of the members of the community. In other words, whether or not you disagree with a majority decision, you still have to obey that decision. According to Locke, consent would not be worth much if not for that condition. As with Hobbes, 'the public' must not be paralyzed by indecision—in fact, the public can only be a 'body politic' if it can move as one body: "For where the majority cannot conclude the rest, there they cannot act as one Body, and consequently will be immediately dissolved again."[21] Locke's public too can therefore be seen as a simulation of the private individual.

A big issue for Locke is the question of how this consent is to be given. If the consent of each private member is an essential element in the legitimizing of the state, and if consent is conditioned by an acceptance of majority rule, then it is important to define how this process works. In other words, it is necessary to explain how the aggregate of private members is able to give their consent to be governed without relying on too formal a notion of this concept. For Locke, consent to be governed can be given in two ways: expressly, "by actual agreement and express declaration", or tacitly, when one "hath any Possession, or Enjoyment, of any part of the Dominions of any Government."[22] The definition of tacit consent is very inclusive, and can reach "as far as the very being of any one within the Territories of that Government."[23] Tacit consent is therefore given when you somehow, even slightly, reap the benefits of the existence of the public. The body politic is meant to guarantee certain enjoyments, and the enjoyment of these (possession, etc.) is the equivalent of consent. In fact, it is difficult to see how you can *not* consent, or whether it is possible for a private individual to

21 John Locke, *Two Treatises of Government* 333 (Cambridge University Press ed. 1999) (first published 1690).
22 *Id.* at 348
23 *Id.*

opt out of the system. And thus is the question of consent resolved: private consent is in fact not necessary, because by merely being a *part of* the public, the private *belongs to* the public. This is, of course, paradoxical, because the public was created by the private through this very *belonging to*.

This idea of the public as something that you belong to, that you are a member of, in spite of whether 'consent' is in any way on your private mind or in your thinking, is further developed when Locke deals with the issue of the foreigners. The issue of tacit consent is complicated here, because for foreigners, merely being on the territory of a state does not make them subjects of that state. As Locke puts it, submitting to the laws of a government and enjoying its protection "no more makes a Man a Member of that Society, a perpetual Subject of that Commonwealth, than it would make a Man a Subject to another in whose Family he found it convenient to abide for some time."[24] For foreigners, the only way of becoming a 'subject or member' of a public realm is by "actually entering into it by positive Engagement and express Promise and Compact."[25] For foreigners, then, only express consent will do.

Locke has sometimes been accused of comparing the state to the family, even though he was very much concerned with showing how it is something very distinct: "the power of a magistrate over a subject may be distinguished from that of a father over his children, a master over his servant, a husband over his wife, and a lord over his slave."[26] But, it is hard to completely escape from the analogy, as the public is something that you create by belonging to it, by being its member, by merely enjoying the benefits that it offers, by 'being there' (except in the case of foreigners). The main distinguishing element seems to be the ultimate contingency of the body politic, as something that is somehow subjected to the will of the majority of its private members, and can therefore, unlike the family, recreate and define itself.

24 *Id.* at 349.
25 *Id.*
26 *Id.* at 268.

2.2.3. Jean-Jacques Rousseau and the Transformation of Man

For Jean-Jacques Rousseau, primitive life is unsustainable, and in order to overcome its limitations, 'men' "have no other means of preserving themselves than the formation, by aggregation, of a sum of forces great enough to overcome the resistance. These they have to bring into play by means of a single motive power, and cause to act in concert."[27] In other words, through all people coming together as one; the private realm of countless disaggregate individuals coming together to form, by aggregation, one "public person."[28]

The question is how this could happen, for there is a fundamental problem: "The problem is to find a form of association which will defend and protect with the whole common force the person and goods of each associate, and in which each, while uniting himself with all, may still obey himself alone, and remain free as before."[29]

In other words, how can all these private individuals associate and come together in a public person without giving up (too much) of their freedom?

The solution to this problem for Rousseau is the social contract or social compact. There is something natural about this act of aggregation, which consists basically of "the total alienation of each associate, together with all his rights, to the whole community."[30] In fact, with the social contract, the private seems to cease to exist; it is alienated, and becomes a part of the whole community. The public swallows up and replaces the private individual and all of his/her rights:

> Each of us puts his person and all his power in common under the supreme direction of the general will, and, in our corporate capacity, we receive each member as an indivisible part of the whole. At once, in place of the individual personality of each contracting party, this act of association creates a corporate and collective body, composed of as many members as the

27 Jean-Jacques Rousseau, "The Social Contract," in *The Social Contract and Discourses* 191 (G.D.H. Cole trans., 1991) (first published 1762).
28 *Id.* at 192.
29 *Id.* at 191.
30 *Id.*

> assembly contains voters, and receiving from this act its unity, its common identity, its life, and its will.[31]

This is the public body, or the city, or the body politic, or the republic, or the state, or the sovereign, depending on how you look at it. The aggregate of privates becomes the people, the citizens, or the subjects, again depending on how you are using the notions.

It is a beautiful move, and it has the mystical or metaphysical connotations that have earned Rousseau the title of father of the Romantic Movement. The private and disaggregated elements come together, 'by aggregation', and from this act, a public person with its own life, its common identity and its own will is created. But this is not the Hobbesian Leviathan that swallows up its makers. Instead, this is a process of real and effective, one would almost say *alchemical* transformation of the private element. Without developing it too much, Rousseau makes a couple of distinctions when talking about the idea of freedom, or Liberty. He talks at various points about Natural Liberty, Conventional Liberty, and also about Moral Liberty. This connects to the idea that the private is one thing when in its 'primitive' disaggregated condition, and another when it is in its 'civilized', aggregated, public condition. When man moves, by means of the social contract, from the state of nature to the civil state, he undergoes a profound change:

> The passage from the state of nature to the civil state produces a very remarkable change in man, by substituting justice for instinct in his conduct, and giving his actions the morality they had formerly lacked. Then only, when the voice of duty takes the place of physical impulses and right of appetite, does man, who so far had considered only himself, find that he is forced to act on different principles, and to consult his reason before listening to his inclinations (...). [I]nstead of a stupid and unimaginative animal [he becomes] an intelligent being and a man.[32]

Rousseau thus manages the public-private distinction in a different way than Locke or Hobbes. In contrast to the Hobbesian public Leviathan and

31 *Id.* at 192.
32 *Id.* at 195-96.

private competitors or the Lockean public majority and private consenting individuals, Rousseau creates dynamic public-private categories that relate to each other in ways that have profound transformative effects.

2.2.4. Immanuel Kant, Private Happiness and Public Welfare

In his take on the idea of the social contract, Immanuel Kant makes a number of significant distinctions. First, he observes that the social contract is not something that actually happened, but that is rather a useful hypothetical premise:

> It is in fact merely an *idea* of reason, which nonetheless has undoubted practical reality, for it can oblige every legislator to frame his laws in such a way that they could have been produced by the united will of a whole nation, and to regard each subject, in so far as he can claim citizenship, as if he had consented within the general will.[33]

This idea or obligation should guide the *legislator*, however, and not the *subject*. Kant distinguishes the different responsibilities of legislators and subjects with reference to the different roles that people play and the different ways they should experience government. Because of the idea of the social contract, the legislator should be guided by the idea of general acceptability in law-making, while the subject has the duty to obey the laws made by the legislator, as long as it would be 'possible' for the people to have consented to them. Furthermore, Kant distinguishes between individual happiness and public welfare. Kant contends that private, individual happiness should not be a guiding principle in the business of public governance. "No generally valid principle of legislation can be based on happiness. For both the current circumstances and the highly conflicting and variable illusions as to what happiness is (...) make all fixed principles impossible."[34] Happiness is too contingent and fickle, and is in fact *too private* to have usefulness in public matters:

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33 Immanuel Kant, "On the Common Saying: 'This May be True in Theory, But it Does Not Apply in Practice'," in *Kant: Political Writings* 79 (Hans Reiss ed., H.B. Nisbet trans., 1991) (first published 1793).

34 *Id.* at 80.

> [T]he public welfare which demands *first* consideration lies precisely in that legal constitution which guarantees everyone his freedom within the law, so that each remains free to see his happiness in whatever way he thinks best, so long as he does not violate the lawful freedom and rights of his fellow subjects at large.[35]

People's happiness is their private business. The state should be concerned with its own tasks of public welfare: "The aim is not, as it were, to make the people happy against its will, but only to ensure its continued existence as a commonwealth."[36] And as long as the state continues to legislate in pursuit of this goal, it is the people's duty to obey. For if they did not, that would endanger the existence of the state, "and put an end to the only state in which men can possess rights."[37]

Hence, the purpose of the public realm is to secure the rights of private individuals. These rights exist to ensure that individuals can pursue their private happiness without harming each other. Meanwhile, the public realm must always be concerned with its own survival and existence. If policies of the state affect happiness, that is fine, "but only as a means of *securing the rightful state*, especially against external enemies of the people."[38] The idea of an original contract, which of course can not be empirically or historically demonstrated, has a particular purpose, which is to direct the focus of legislators to what is prudent in public legislature, and away from questions of private happiness:

> The legislator may indeed err in judging whether or not the measures he adopts are *prudent*, but not in deciding whether or not the law harmonises with the principle of right. For he has ready to hand as an infallible *a priori* standard the idea of the social contract, and he need not wait for experience to show whether the means are suitable, as would be necessary if they were based on the principle of happiness.[39]

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35 *Id.*
36 *Id.*
37 *Id.* at 81.
38 *Id.* at 80.
39 *Id.*

Hence, citizens always have the obligation to obey, for public law is "beyond reproach (i.e. *irreprehensible*) with respect to right," and it is also "*irresistible*," for in order to guarantee its subsistence and survival, the state may "suppress all internal resistance."[40]

In short, one can see that the way that Kant builds his case is by making, or managing, a distinction between a private realm of freedom, where subjects can pursue their happiness, and a public realm, where the subjects must obey, for obeying is linked to the maintenance of their rights. Legislators in the public realm must govern with the general interest in mind, and avoid the distractions of private happiness. Rather, in order for the commonwealth to fulfill its public purpose of guaranteeing freedom and right, they must ensure its continued existence. This state of things is logically or rationally justified with the Kantian notion of an *a priori* standard, the idea of a social contract.

2.2.5. G.W.F. Hegel and the Spirit

Unlike many of his predecessors in political philosophy, Hegel rejects the idea of the contract as a useful metaphor in the theorization of the polity. He points out that "An individual cannot enter or leave the social condition at his option, since every one is by his very nature a citizen of a state."[41] Rather than the idea that all the people get together and give life to the state, Hegel asserts that it is "absolutely necessary for every one to be in a state."[42] It seems as if Hegel would agree with Rousseau in the observation that life in the state exalts the individual, making each into a better person. However, Hegel rejects the distinction between the state of nature and the civil state, in particular the idea of unsophisticated innocence in a state of nature, and argues that there is no escape from the state. "The characteristic of man as rational is to live in a state; if there is no state, reason claims that one should be founded."[43] This implies that, in fact, it is the state that makes the man, and not the other way around.

In Hegel's public-private distinction the public, in the form of the state, is not an aggregate of private individuals, but "the realized ethical idea or ethical

40 *Id.*
41 G.W.F. Hegel, *Philosophy of Right* 79 (S.W. Dovic trans., 1996) (first published 1821).
42 *Id.*
43 *Id.*

spirit."[44] This idea or spirit gives individuals their identity, and is therefore inalienable and unavoidable. It is furthermore rooted in history, but in a way that does not require legitimation or explication:

> The idea of the state is not concerned with the historical origin of either the state in general or of any particular state with its special rights and characters. Hence, it is indifferent whether the state arose out of the patriarchal condition, out of fear or confidence, or out of the corporation.[45]

The tragic mistake of the French Revolution was the idea that it could abolish history and construct the state based on pure reason. Hegel would counter that the state has to come, in a certain way, 'from within'. An essential concept that Hegel relies on is the notion of 'Spirit'. The Spirit is a notoriously complex notion, but I would argue that Hegel refers to it in diverse ways, and that it can be approached with the help of multiple meanings. Sometimes the Spirit is that which is ephemeral and transcendent, like when he refers to the spirit of history as the driving force of historical events. Sometimes it is what makes a nation a nation, that which binds people together. Sometimes it is the spirit of the times, or *Zeitgeist*, but understood as the mood of the day, or even in the sense of fashion, fickle and uncertain. In many ways the Spirit can be seen as the public side of Hegelian political philosophy, that which makes a collectivity a collectivity, that which finds its ultimate manifestation in the state. And individuals, or the family, are thoroughly subjected to the Spirit, are in fact its products.

In fact, one can argue that Hegel goes very far in his subjection of the individual to the state in the sense that he seems to abolish the public-private distinction. By completely subjecting the individual to the Spirit, which finds its ultimate expression in the state, Hegel does away with the differentiation between those terms. The only thing that remains of the subject, of the citizen, of the individual, is a mere footnote to the 'common good'. It is true that Hegel does not have recourse to some promise of human happiness or well-being—such notions would seem trivial in a narrative that is filled with capitalized words such as World History, the Spirit, and so on. One vein of this thought has been blamed for having produced the monstrous totalitarian states of the

44 *Id.* at 240.
45 *Id.* at 241.

20th century. However, one can also see this argument as the precursor to the very sharp critiques of the state that were to be formulated in later years, and that we shall revisit below.

One important comment to be made, albeit briefly, is that a move to radicalize the distinction (when one expands one side of the distinction to encompass the other side, i.e. by saying that it is all public or it is all private, or all structure or all agency) must begin by denying one or the other side of the dichotomy. This, though, paradoxically entails remaining deeply entrenched in its language and its logic. Thus, in order to emphasize the grandness of the state as the ultimate expression of the will of the Spirit, Hegel first needs to put down the individual by explicitly denying it its protagonism, or even its agency, in social construction. Moreover, he must assert that if ever there was agency, the Spirit of history has rendered it redundant: "The great progress of the modern state is due to the fact that it has and keeps an absolute end, and no man is now at liberty to make private arrangements in connection with this end, as they did in the middle ages."[46] Note how much this sentence reiterates and reaffirms, albeit *soto voce*, the individual and the citizen, as well as their proclivity to make 'private' stipulations.[47]

One insight we owe to Hegel: in so thoroughly privileging the public dimension, or the state, he makes us aware of the extent to which the so called 'contractarians' and other political philosophers were actually privileging the private dimension, by putting the foundation of the state, or body politic, in the realm of the autonomous agency of the individual. After Hegel, this is a problematic presupposition.

2.2.6. Jeremy Bentham and the Logic of Obedience

One thinker, a contemporary of Hegel, who tried to formulate a theory of the state that went beyond the idea of the social contract (but without rejecting

46 *Id.* at 79. In fact, much of Hegel's *Philosophy of Right* is devoted to rooting out the possibility of individual autonomy.

47 It is beyond the scope of this study to delve deeper into the highly problematic question of descriptiveness vs. normativity in many of the authors under review. One often gets the impression that a combination of both is used to support and sustain arguments. So, things are the way they are because it has to be like that. Or, things have to be like that, so therefore they are. Consider Hegel's already-quoted remark: "(...) if there is no state, reason claims that one should be founded." *Id.* In this sense, Hegel's active privileging of the public and silencing of the private can be said to be both a success and a failure.

that narrative), was Jeremy Bentham. According to Bentham, it was utility that was the foundation of the body politic. There might be a contract, but this contract was only 'real' or 'binding' as long as it was in the interests of the parties. Bentham's argument is not one of legitimacy, but of logic, or of an almost quantifiable calculation: the subjects should obey the king "so long as the probable mischiefs of obedience are less than the probable mischiefs of resistance."[48] Bentham's version of the public-private distinction operates his calculation of the reason for obedience: "it is 'for the advantage of the whole number that the promises of each individual should be kept: and, rather than they should not be kept, that such individuals as fail to keep them should be punished."[49] In other words, individuals should keep their promises, and if they do not, they should be made to keep them, for the sake of "the whole number," "for the *advantage* of society."[50] It is unclear how this thing called 'society' should be measured for utility and advantage, especially when Bentham's idea of utility is supposed to be measured in terms of pleasure vs. pain or benefit vs. mischief. Moreover, his theory does not tell us what to do, or what to know, when society is deeply divided on any issue. It might be that this 'public' is merely an aggregate of all the 'private' sentiments about utility, and that it would be a matter of either calculation and statistics, or of having faith in the idea that societal utility, in its aggregate quantifiable form, will determine the outcome.[51]

2.2.7. Jürgen Habermas and the Public Sphere

One of the most important contemporary political philosophers, Jürgen Habermas, has devoted much attention to theorizing the public and private, and has attempted to integrate the ideas of many of the thinkers discussed above in his own work. Habermas takes the notion of 'public' very seriously, and has developed a multilayered theory of the nature and operation of the public sphere, much more so than others before him. In fact, the name

48 Jeremy Bentham, "A Fragment on Government," in *A Comment on the Commentaries and A Fragment on Government* 444 (J.H. Burns & H.L.A. Hart eds., 1977) (first published 1776), reprinted in *Oxford Reader of Political Thought* 69 (Michael Rosen & Jonathan Wolff eds., 1999).

49 *Id.*

50 *Id.*

51 However, the theory is meant to deal with the relatively straightforward question of obedience, and not that of economic, social, or other policies. The main point is to argue that calculations about the interests of the parties to the social contract continue after the moment of foundation.

Habermas has become almost synonymous with his work on the public sphere. This is of no surprise: his account of the distinction between the public and private spheres is interesting, sophisticated, rich, and complex. Indeed, major themes running throughout Habermas's work on the public-private distinction are those of complexity and dynamism.

Importantly, Habermas places the public-private distinction in historical context, or to be more precise, in the history of political discourse and in the history of social and political institutions. In *The Structural Transformation of the Public Sphere*,[52] Habermas gives an extensive history of the development of the public sphere, which he defines as "a realm of our social life in which something approaching public opinion can be formed."[53] He traces the birth of the public sphere to the end of the Middle Ages and the demise of the feudal system. As the feudal lords lost their hold on power and a more abstract 'public authority' came into being, the old feudal authorities, such as the Church and the nobility, slowly became part of the private realm, and public functions such as the military, bureaucracy and the administration of justice became increasingly independent from the old feudal structures. Where 'public' had previously referred to the person of the ruler, who represented power, now it referred to "an institution regulated according to competence, to an apparatus endowed with a monopoly on the legal exertion of authority."[54] 'Society' now became a private element and stood in opposition to the state, even though it increasingly came within the realm of interest of the state, for "the production of life in the wake of the developing market economy had grown beyond the bounds of private domestic authority."[55] An independent "public sphere of civil society,"[56] which Habermas describes as a category of Bourgeois society, came into being with the rise of the mercantile class, when private individuals started using means of communications, such as newspapers and other periodicals, to confront the public authority of the state itself. Hence "[t]he public sphere as a sphere which mediates between society and state, in which the public organizes itself as the bearer of public

52 Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Thomas Burger & Frederick Lawrence trans., 1989) (first published 1962).

53 Jürgen Habermas, "The Public Sphere: An Encyclopedia Article," 3 *New German Critique* 49, 49 (Sara Lennox & Frank Lennox trans., 1974) (first published 1964).

54 *Id.* at 51.

55 *Id*.

56 Habermas, *Structural Transformation*, *supra* note 52, at 23.

opinion, accords with the principle of the public sphere."[57]

Following its birth at the end of the Middle Ages, Habermas sees the public sphere appearing in two major sequential incarnations, which he describes by means of two general models, ideal types based in historical developments. First, the "Liberal Model" of the public sphere, which was at its height during the eighteenth and nineteenth centuries, had as its central instrument an engagement with the state according to the principle of supervision (that the public should have access to information and that certain proceedings be made public). The operation of the Liberal Model of the public sphere significantly transformed the nature of power. Because of its dominance, the first modern constitutions introduced catalogues of fundamental rights that would restrict the extent of public authority and "guarantee[] society as a sphere of private autonomy."[58] Moreover, it guaranteed that between the individual and the state, there would exist a "realm of private people assembled into a public who, as the citizenry, linked up the state with the needs of civil society according to the idea that in the medium of this public sphere political authority would be transformed into rational authority."[59]

Second, the Liberal Model metamorphosed into the "Social Welfare State Mass Democracy Model," which stripped the public body[60] of its social exclusivity and expanded it beyond the bounds of the bourgeoisie through the diffusion of press and propaganda. "Conflicts hitherto restricted to the private sphere now intrude into the public sphere. Group needs which can expect no satisfaction from a self-regulating market now tend toward a regulation by the state."[61] Increasingly, laws represent less of a consensus

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57 Habermas, "Encyclopedia Article," *supra* note 53, at 50. "The principle of the public sphere" refers to a set of principles that are preconditions for the public sphere to operate as such. These include a) general accessibility, b) elimination of all privileges, and c) discovery of general norms and rational legitimations.

58 Habermas, *Structural Transformation*, *supra* note 52, at 222.

59 *Id.* Habermas emphasizes the role and importance of the media in this process. He notes, though, that over the last centuries the media has been transformed in a number of ways, not least of which by the processes of commercialization and politicization, which have meant a considerable influx of private interests in to the public sphere.

60 By 'public body' Habermas means "private individuals subsumed in the state at whom public authority was directed." Habermas, "Encyclopedia Article," *supra* note 53, at 51. One can also read the 'public body' to mean those particular interests that find expression within the ongoing debates in the public sphere.

61 *Id.*, at 54.

and more of an attempt at reconciling conflicting private interests. In this model, more and more social organizations begin to enter into the public political sphere, and Habermas sees an interweaving of public and private as "not only do the political authorities assume certain functions in the sphere of commodity exchange and social labor, but, conversely, social powers now assume political functions."[62] Habermas thus sees the emergence of:

> [A] re-politicized social sphere [that] could not be subsumed under the categories of public and private from either a sociological or a legal perspective. In this intermediate sphere the sectors of society that had been absorbed by the state and the sectors of the state that had been taken over by society intermeshed without involving any rational-critical political debate on the part of private people.[63]

The expansion of the public sphere in the social welfare model is beneficial in that it leads to the enlargement of fundamental rights as the principle of supervision is extended beyond the reach of the state and increasingly applies to other social organizations. Unfortunately, it also negatively affects the critical function of the public sphere. With the expansion of the public sphere, the manipulation of the media, and the intrusion of private disputes into public affairs, participation becomes more difficult. Now, in order to effectively participate and navigate the myriad of available channels private persons must be organized.[64] Accessibility, one of the main principles of the public sphere, is severely curtailed. In Habermas' words, the idea of the public sphere "as a sphere of ongoing participation in a rational-critical debate concerning public authority,"[65] now "threatens to disintegrate with the structural transformation of the public sphere itself."[66]

It is Habermas's temporalization of the distinction that allows us to understand it as a dynamic notion. In other words, the public-private distinction

62 *Id*.
63 Habermas, *Structural Transformation*, *supra* note 52, at 176.
64 *Id.* at 232 ("Only such a public could, under today's conditions, participate effectively in a process of public communication via the channels of the public spheres internal to parties and special-interest associations and on the basis of an affirmation of publicity as regards the negotiations of organizations with the state and with one another." [emphasis omitted]).
65 *Id.* at 211.
66 Habermas, "Encyclopedia Article," *supra* note 53, at 55.

changes, transforms, or becomes different over time in response to an array of factors and developments, of which it is a part. The distinction is an actor within history, pushing other developments and processes, *as well as* an object, changed by other processes and developments, changed by history. In addition, his historical account reiterates his notion of the complexity of the public-private distinction. 'Public' represents many different things simultaneously. It is the state, or the different institutions composing 'public authority.' It is society, which can also be seen as a private element. And it is the 'public body,' which is crucial in the formation of 'public opinion.' Social organizations, political parties, the media, etc. all seem to be able to move from the private into the public and back, changing the public sphere and the nature of power, as well as the way that the state operates, as they go. Meanwhile, the private and public realms seem to be interweaving. All this complexity makes it is difficult to find the center of gravity, if there ever was one.

Habermas expands his discussion of the public-private distinction in his article *Between Facts and Norms: Contributions to a Discourse of Law and Democracy*.[67] Here, Habermas analyses the two fundamental ideas that justify modern law and the modern (democratic) state based on the rule of law and human rights. Drawing on German jurisprudence and political philosophy (in particular Hobbes, Rousseau and Kant), Habermas sketches out what he considers to be an intrinsic tension in the law:

> [This is] the tension between facticity and validity built into law itself, between the positivity of law and the legitimacy claimed by it. This tension can be neither trivialized nor simply ignored, because the rationalization of the lifeworld makes it increasingly difficult to rely only on tradition and settled ethical conventions to meet the need for legitimating enacted law—a law that rests on the changeable decisions of a political legislator.[68]

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67 Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse of Law and Democracy* (William Rehg, trans. 1996), *partially reprinted as* "Private and Public Autonomy, Human Rights and Popular Sovereignty," in *The Politics of Human Rights* 50-66 (Obrad Savić, ed. 1999).

68 *Id.* at 57.

The tension that Habermas refers to is that between popular sovereignty and human rights, which he calls the tension between public and private autonomy. Habermas traces public autonomy—the sovereignty of the state—to the writings of Rousseau and the notion of popular sovereignty as the basis for law. And he traces private autonomy—the human rights of the individual—back to Kant and the idea that individual rights provide the foundation for law in general. There is a tension between these two positions on the basis of where law derives its legitimacy. If human rights are the foundation for law, then popular sovereignty is restricted because the state cannot infringe on the rights of the individual. But if this is the case, where to ground human rights? Where did they come from and how did they come about? Similarly, if popular sovereignty is the foundation for law, then human rights are restricted because they can be overruled by the majority. But if this is the case, how can they be fundamental human rights?[69]

Habermas proposes his own theory of 'communicative action' to mediate between the two foundations, to connect the two without allowing either to prevail at the expense of the other. In his words:

> [T]he legitimacy of law ultimately depends on a communicative arrangement: as participants in rational discourses, consociates under law must be able to examine whether a contested norm meets with, or could meet with, the agreement of all those possibly affected. Consequently, the sought-for internal relation between popular sovereignty and human rights consists in the fact that the system of rights states precisely the conditions under which the forms of communication necessary for the genesis of legitimate law can be legally institutionalized.[70]

Habermas accepts that there is an intrinsic tension between public and private autonomy. This tension allows for flexibility within the political discourses of human rights and popular sovereignty, but a flexibility that might ultimately be too much for the system to bear. He argues, therefore,

69 According to Habermas, this tension is reflected in the different positions taken by political parties. For example, in the Constitutionalist traditions of the US, 'liberals' privilege a foundation of human rights, or of private autonomy, while 'civil republicans' privilege the will of the people, derived from the public autonomy of popular sovereignty.

70 *Id.* at 64.

that a theory of communicative action based on the 'rationality potential'[71] is required to mediate the conflict, or to soften the impact at the moment of collision. Most importantly for the purposes of this chapter, by placing the theory of communicative action and the mediation of the conflict between popular sovereignty and human rights at the center of his work, Habermas, too, firmly situates the public-private dichotomy—with all of its complexity and dynamism—as one of the central problems of political philosophy.

2.3. Concluding

It has been the purpose of this chapter to illustrate how one can reduce some of the most important debates in Western political philosophy to debates about the nature and character of the public-private divide. In doing this, it is clear how important, in fact essential this dichotomy is for Western political philosophical debates. One need not challenge the imagination too far in order to argue how important the distinction is for the social, political and legal institutions that are embedded in these philosophical traditions. I will revisit this inter-linkage between political philosophy and the dominant legal institutions below, in Part III of this project. For now, I will move on to carefully analyze a tradition of critiques of this public-private mode of organizing or describing the world that has been developing for quite a while. Because, in spite of its very strong predominance in social theory and in political consciousness, there has been a growing intellectual counter-culture, with deep roots in intellectual history.

71 A belief, based on historical analysis, in the increasing reliance on rational discourses employed reflexively. *Id.* at 57-60. The *excursus* that Habermas undertakes in order to explain this dimension of his theory is a brilliant 'summing up' of the most diverse and sophisticated theories and philosophical insights of the preceding century. If ever there was a well-argued and thoughtfully optimistic exposé of the potentiality of rationality, this is it.

PART II:

CRITIQUES OF LIBERALISM'S PUBLIC-PRIVATE DISTINCTION

3 Marx's Early Critique

3.1. Introduction: Away from, or Against, the Liberal Public-Private Divide

In the four or so centuries since the public-private distinction became the dominant, albeit backgrounded, theme in Western political philosophy there have of course been many digressions and departures into different forms of articulating a theory of society, politics, and the state. I have already referred to Hegel and his critique of Liberalism, which, to my mind, stays on the same public-private axis in order to make a counterpoint to the dominance of contractarian thinkers with their emphasis on individual autonomy. Many others would follow suit in coming up with different vocabularies and different ways of talking about social and political life. Early anarchist thinkers, such as Michael Bakunin,[72] would refer to the operations of 'power' as the culprit. For him power "corrupts those invested with it [a group of 'private' persons] just as much as those [another group of 'private' persons] compelled to submit to it."[73] "Under its pernicious influence the former become ambitious and avaricious despots, exploiters of society for their own personal or class advantage, and the latter become slaves."[74]

In a not entirely different vein Max Weber, one of the founders of sociology, also managed to talk about these topics in a way unlike the Liberal philosophers. In an argument meant to explain what the state is 'sociologically', he defined it famously as the social institution that has managed, for the first time, to successfully claim the "monopoly of the legitimate use of force within a given territory."[75] However, "[l]ike the political institutions historically preceding it, the state is a relation of men dominating men."[76] After Weber, and other sociologists, a lot of sociological thinking has focused less on the state in opposition to society or individuals, and

72 Michael Bakunin, *Statism and Anarchy* (Marshall S. Shatz trans. & ed., 1990) (first published 1873), reprinted in *Oxford Reader of Political Thought*, *supra* note 48, at 73.
73 *Id.*
74 *Id.*
75 Max Weber, "Politics as a Vocation," in *Max Weber* (H.H. Gerth & C. Wright Mills trans. & eds., 1948) (first published 1919), reprinted in *Oxford Reader of Political Thought*, *supra* note 48, at 54, 54-55.
76 *Id.* at 55.

more on the various forms of social organization and the multiple social institutions that operate in society.[77]

In political theory too, a certain shift in direction or emphasis has been taking place. Noteworthy in this respect is Hannah Arendt, who in her book *The Human Condition*[78] argued that the historical distinction between the public and the private that had once existed has now all but collapsed:

> [T]he contradiction between private and public, typical of the initial stages of the modern age, has been a temporary phenomenon which introduced the utter extinction of the very difference between the private and public realms, the submersion of both in the sphere of the social. (…) [B]oth the public and private spheres of life are gone, the public because it has become a function of the private and the private because it has become the only common concern left.[79]

Arendt then goes on to base her political theory on three very distinct categories: labor, work, and *vita activa* (active life). Though in doing this she continues to rely on the public-private distinction, it is clear that she does not consider these categories as very helpful anymore.[80] Having said this, in spite of her prominence Arendt does remain a bit of an odd one in contemporary political philosophy.

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77 This does not mean that the public-private distinction disappeared from sociological analysis. What it does mean is that it was not a central distinction in its account of the world. Even so, as an analytical tool it has remained in sight. *See e.g.*, British Sociological Association, *The Public and the Private* (Eva Gamarnikow et al. eds., 1983); Stanley I. Benn & Gerald F. Gaus, "The Public and the Private: Concepts and Action," in *Public and Private in Social Life* 3 (S.I. Benn & G.F. Gaus eds., 1983); Jeff Weintraub, "The Theory and Politics of the Public/Private Distinction," in *Public and Private in Thought and Practice: Perspectives on a Grand Dichotomy* 1 (Jeff Weintraub & Krishan Kumar eds., 1997). One might argue too that there are echoes of the public-private distinction in the recurring sociological debates about the relation between agency and structure. *See*, *inter alia*, Max Weber, *The Methodology of the Social Sciences* (1949); Émile Durkheim, *Rules of the Sociological Method* (1964) (first published 1895).

78 Hannah Arendt, *The Human Condition* (University of Chicago ed., 1998) (first published 1958).

79 *Id.* at 69.

80 Arendt relies on the distinction made by Aristotle between the domestic sphere and the city. Her use of this Aristotelian device has not been without dissenters. *See* Judith Swanson, *The Public and the Private in Aristotle's Political Philosophy* (1994).

One can argue that large portions of contemporary theory have continued along these lines of inquiry and analysis, and are not relying on the public-private distinction in the same central way that Liberal theorists do. It would be too ambitious an endeavor, at this stage, to map all of social theory in order to ascertain to what extent this is true, or to say anything about what the most dominant philosophical school is. For now, I will leave this matter aside. What I do want to point out is that one can see many of these theories as critical of the Liberal tradition, and in fact as critiques of it. Or, in any case, as we will see below, many of the critiques have been inspired by non-Liberal approaches to politics and society. What interests me here though are the theoretical and legal critiques that have *directly* engaged the public-private distinction. So, rather than to focus on the vast realm of non-Liberal philosophies and political theories, I will focus here in chapters 3-7 on the more specific realm of explicit critiques of this quintessential Liberal distinction.

Whereas most of these explicit critiques, as we will see, followed the advent of the social sciences in the 20th Century, one prescient thinker of the 19th Century in particular stands out as having formulated a lasting critical analysis of the distinction between public and private.

3.2. Karl Marx and the Critique of Alienation

Karl Marx's *On the Jewish Question* was written in 1843 as a reaction to Bruno Bauer's *The Jewish Question*, which was published earlier that same year. Bauer's book criticized the idea of giving German Jews religious freedom. According to Bauer, real oppression lay in the fact that all Germans were 'the slaves of the Christian state'. In the pursuit of political emancipation, Jews should rather join the struggle for the overthrow of the Christian state and for the establishment of a truly free state—a state in which religion (both Jewish and Christian) was abolished.[81] In Marx's view, Bauer missed a couple of essential points, and in the elaboration of his argument against *The Jewish Question*, Marx formulated a very idiosyncratic, but powerfully lasting critique of the public-private distinction.

81 Karl Marx, "On the Jewish Question," in *Early Writings* 211 (Penguin ed., 1992) (first published 1843).

To begin with, Marx makes an important observation, which is that the state is a *medium*, used by 'man' to liberate himself from certain restrictions, such as religion. In other words, the state, or the separation of the political sphere from civil society, provides 'man' with the *appearance* of emancipation, which is only 'political' emancipation.[82] Marx goes on to take a closer look at the notion of the rights of man, which Bauer says are acquired in the process of emancipation. In Marx's analysis:

> Not one of the so-called rights of man goes beyond egoistic man, man as member of civil society, namely an individual withdrawn into himself, his private interest and his private desires and separated from the community. In the rights of man it is not man who appears as a species-being; on the contrary, species life itself, society, appears as a framework extraneous to individuals, as a limitation of their original independence.[83]

One can argue that according to Marx the rights of man and their concomitant public-private distinction in fact *create* the Hobbesian state of nature, with all fighting against all, rather than *constrain* it. In feudal times the lack of political freedom restrained both civil rights and egoism. The rights of man thus emancipate not only political man, but also egoist man. When the political state is established, civil society is dissolved: "The *constitution* of the *political state* and the dissolution of civil society into independent *individuals*—who are related by *law* just as men in the estates and guilds were related by privilege—are achieved in *one and the same act*."[84]

Marx's reading forms a counterpoint to the Liberal idea that the private space allowed for by the public sovereign is benign. This reading of the rights of man is founded on two ideas that differ fundamentally from previous thought. First, it presumes a very different conception of human nature from that of, say, Rousseau or Kant. Second, it inverts the old idea of how the

82 *Id.* at 211-241. This argument is part of an elaborate critique that Marx made of Hegel's doctrine of the state in his *Philosophy of Right*. See Karl Marx, "Critique of Hegel's Doctrine of the State," in *Early Writings*, *supra* note 81, at 57.

83 Marx, "On the Jewish Question," *supra* note 81, at 230. In order to make this observation Marx scrutinizes both the French as the American declarations, as well as a number of state constitutions within the United States.

84 *Id*. at 233.

public-private distinction functions. Instead of creating order to restrain predatory man, it sets predatory man free. By showing how the public-private distinction can be disruptive and oppressive, Marx exposes the fact that the rest of political philosophy has a very rosy view and consequent high expectations of what the virtues of the distinction will bring about.

But, there is more. The public-private distinction creates a dualism between individual life and species-life; between civil society, where the free market reigns and men toil in search of subsistence, and political society. This double life leads to an estrangement or alienation of man from himself. On the one hand there is real or actual life in 'civil society', where men are predators of each other, and exploitation is everywhere. On the other hand, there is the fantasy of being a citizen in the political realm, free and equal before the law. The private side of life is real, while the public side is an appearance, an illusion about being one with others. Private life is concrete, while the public citizen is abstract. According to Marx, it is this alienation that leads man to religion. Hence, he argued that religion is sustained not by the so-called Christian state, as Bauer believed, but rather by the secular or atheist state. Epistemologically, what this implies is that the public-private distinction operates at the level of *consciousness*, and not empirically.

Even if one disagrees with Marx's view of human nature, or with his explanation for the existence of religion, the main thrust of his critique—which is in fact an essential element of most critiques and one that is difficult to cast aside, even for the least receptive audience—is that the public-private distinction *is not necessarily what it seems*. Moreover, and this is where his critique has a particular sting, the conventional version of the public-private divide justifies egoistic exploitation of those without property by describing it as 'normal' or as 'natural'; by naturalizing it.

> The *political revolution* dissolves civil society into its component parts without *revolutionizing* these parts and subjecting them to criticism. It regards civil society, the world of needs, of labour, of private interests and of civil law, as the *foundation of its existence*, as a *presupposition* which needs no further grounding, and therefore as its *natural basis*.[85]

85 *Id*. at 234.

Naturalizing the status quo by sequestering civil society in the 'private' realm leads to depoliticization, because the political is allocated to the public realm. In Marx's words: "Political emancipation was at the same time the emancipation of civil society from politics."[86]

Though it is clear that Marx sees 'problems' in the public-private distinction, it is in particular how he uncovers its mode of operation that makes his 'psychoanalysis'[87] of the distinction a valuable one. Marx himself saw a 'way out', even if it was utopian:

> Only when real, individual man resumes the abstract citizen into himself and as an individual man has become a *species-being* in his empirical life, his individual work and his individual relationships, only when man has recognized his *forces propres* as *social forces* so that social force is no longer separated from him in the form of *political* force, only then will human emancipation be completed.[88]

Only when people overcome their alienation will humanity be one. Whether Marx has contributed to that purpose, and whether it is at all possible, is not for us to know. Regardless of his proscriptive vision, however, after Marx's critique the public-private distinction would never again be quite the same.

3.3. Concluding

Marx's critique of the public-private divide would be swept away by the rest of his vast oeuvre. His other work is not incompatible with his critique of the public-private distinction, but it does not necessarily rely on it. In his emphasis on social structures and in his critique of ideology, in which the notion of consciousness that we have seen in this chapter plays an important role, one can recognize elements of this early critique. Moreover, his ideas on structures, ideology, alienation and consciousness would have a lasting impact and are still important analytics in contemporary social theory.

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86 *Id*. at 233.

87 Duncan Kennedy, "The Critique of Rights," in *Left Legalism/Left Critique* 216 (Wendy Brown & Janet Halley eds., 2002).

88 Marx, "On the Jewish Question," *supra* note 81, at 234.

4. The American Legal Realist Critique

4.1. Introduction

A next wave of critique came from the United States. In the 1920s and '30s a generation of young legal scholars, nowadays commonly referred to as the Legal Realists, embarked on an ambitious and comprehensive project to renew legal theory, legal scholarship, legal education, and ultimately the practice of legislators and judges. They were successful in many ways, and one can still feel their mark on legal thinking and legal culture in the US.[89] As Joseph William Singer wrote, "[t]o some extent, we are all realists now."[90]

Legal realism was a reaction to a particularly all-encompassing formalist vein in legal thinking and style.[91] Its practitioners were the intellectual heirs of a movement in continental Europe that attempted to integrate legal thinking with the social sciences.[92] In the legal realists' view, legal thought was too far removed from the concreteness of legal practice and the diversity of contexts. Legal rulemaking and adjudication was not a neutral activity, separate from policy making. Because legal principles were too easy to manipulate to be applied deductively and mechanistically, the legal realists argued that judges must make normative decisions both when selecting which rules to apply and when interpreting the meaning of those rules. Social science was necessary in order to study and make predictions about this type of normative decision-making. In short, "legal realists wanted to replace formalism

89 *See* William W. Fisher III et al., *American Legal Realism* xi-xv (1993); Joseph William Singer, Legal Realism Now," *76 California Law Review* 465, 503-515 (1988). *But see* Laura Kalman, *Legal Realism at Yale: 1927-1960* (1986) (concluding that legal realism failed to achieve its goals).

90 Singer, "Legal Realism Now," *supra* note 89, at 465.

91 In this they had their precursors in both judges and scholars such as Oliver Wendell Holmes, Louis Brandeis, Benjamin Cardozo, Roscoe Pound and others who reacted against the prevailing formalism of the time. *See generally* Fisher et al., *supra* note 89.

92 *Id.* It was particularly, and famously, Roscoe Pound who was one of the strongest proponents of this idea of shifting from an emphasis on "law in the books" to a focus on "law in action." Roscoe Pound, "Law in Books and Law in Action," 44 *American Law Review* 12 (1910). *See also* James E. Herget & Stephen Wallace, "The German Free Law Movement as the Source of American Legal Realism," 73 *Virginia Law Review* 399 (1987). There was a similar movement in Scandinavia, called Scandinavian Realism, at about the same time. Though there are similarities that justify the same name (realism), the differences in style, methodology, and politics were significant. See Michael Martin, *Legal Realism: American and Scandinavian* (1997).

with a pragmatic attitude towards law generally."[93] How this impulse was theorized and what the (proposed) responses were goes beyond the realm of this study.[94] This chapter will focus instead on one particular set of legal realist arguments: their critique of the public-private distinction and the idea of the 'free market' in property and contract law.[95]

During the 19th century, the distinction between public and private was rigorously developed in American legal thought.[96] This was linked to the dominance of classical economic thought, which arduously defended a rather extreme version of *laissez faire* economics. In that environment, the private was the realm of the market, and any interference was seen as pernicious. This view dominated thinking in all the important American legal institutions, at both the state and federal levels. This type of thinking was manifested in the strengthening of the business corporation, a development that is highly indebted to a number of crucial judicial decisions:

> For example, federal and state courts invented new legal remedies (such as the labor injunction) and new common law doctrines (such as the rule that union organizers may be held liable for interfering with employers' "contractual relations") that assisted businesses in their efforts to prevent strikes and other forms of collective action by their employees.[97]

One famous example of this judicial practice that became the object of sustained criticism by legal scholars was the US Supreme Court's decision in the case of *Lochner v. New York* (1905).[98] In this case, which involved a New York law that prohibited employees in bakeries from working more than

93 Singer, "Legal Realism Now," *supra* note 89, at 474.

94 *See generally* Fisher et al., *supra* note 89; Duncan Kennedy, "Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940," 3 *Research in Law and Sociology* 3 (Steven Spitzer ed., 1980); Kalman, *supra* note 89; Singer, *supra* note 89; "Round and Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship," 95 *Harvard Law Review* 1669 (1982); Morton Horwitz, *The Transformation of American Law: 1870-1960* (1992).

95 It is hoped that this will provide the reader with a good sense of the overall project of the legal realists, if such can be said to exist.

96 *See* Horwitz, *The Transformation of American Law*, *supra* note 94.

97 Fisher et al., *supra* note 89, at xi.

98 198 U.S. 45 (1905). This decision was in fact also made famous by the dissenting opinion of Justice Oliver Wendell Holmes and his observation that "General propositions do not decide concrete cases." An excerpt of this dissent is reproduced in Fisher et al., *supra* note 89, at 25-26.

sixty hours a week or for more than ten hours a day, a case was brought against the owner of a bakery who had 'permitted' an employee to work more than sixty hours in one week. He was convicted and his conviction was upheld a number of times, but was overturned by the Supreme Court who held that the New York statute interfered "with the right of contract between employer and employees" and that it therefore was in violation of the Fourteenth Amendment which forbids any state from depriving any person of life, liberty, or property, without due process of law. The Court had in fact 'constitutionalized' freedom of contract,[99] and had interpreted it as a constitutional right under the categories of 'life, liberty, and property'. This was the monster that came out of Locke's womb, sprung out of his central focus on property and his defense of civil society as a market. This was Marx's prophecy of a public-private distinction unleashing capitalist predators come true. Against cases like these and against doctrines that supported this type of legal reasoning the Legal Realists developed a series of critiques, over the course of many years and many publications, that focused on the prevailing doctrines of contract and property. Both critiques of contract and property doctrines amounted to a less explicit, but quite comprehensive critique of the prevailing *laissez faire* economics.

4.2. The Critique of Laissez-Faire Economics[100]

The Legal Realists pointed to the fact that the laissez faire system was based on a strict distinction between the state and its laws on the one hand, and society and its freedom to engage in contractual obligations on the other hand. They basically held that this distinction, which assumed that regulation was public and freedom was private, was bogus. Moreover, the way in which the courts upheld the distinction had concrete effects and consequences on the level of distribution of 'freedom' and 'power' itself. When the US Supreme Court declared unconstitutional a federal statute authorizing an administrative board to set minimum wages for adult women in the District of Columbia,[101] Morris Cohen wrote:

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99 The expression comes from Morton J. Horwitz, "The History of the Public/Private Distinction," 130 *University of Pennsylvania Law Review* 1423, 1426 (1982).

100 The following three paragraphs are highly indebted to Joseph William Singer. Singer, "Legal Realism Now," *supra* note 89, at 477-495. Once read, this excellent systematization of the Legal Realist critiques of the public-private distinction is impossible to ignore.

101 *Adkins* v. *Children's Hospital*, 261 U.S. 525 (1923).

> The state, which has an undisputed right to prohibit contracts against public morals or public policy, is here declared to have no right to prohibit contracts under which many receive wages less than the minimum of subsistence, so that if they are not the objects of humiliating public or private charity, they become centers of the physical and moral evils that result from systematic underfeeding and degraded standards of life. (...) It certainly means the passing of a certain domain of sovereignty from the state to the private employer of labor, who now has the absolute right to discharge and threaten to discharge any employee who wants to join a trade union and the absolute right to pay a wage, which is injurious to a basic social interest. (...) We must not overlook the actual fact that dominion over things is also *imperium* over fellow human beings.[102]

Thus, the formal distinction was not only blind to the ways in which power and freedom were distributed; this blindness had significant consequences on a large number of people.

4.3. The Critique of Contract Doctrine

This blindness was not merely the result of the 'morality' or 'politics' of the judges who adjudicated particular cases, but also the consequence of the way in which the formal distinction was reified and 'believed' to be somehow descriptive of social reality. So, one string of arguments made the point that contracts were actually not private but public. This was done in a number of ways. First, it was argued that contracts are public because they are regulated and enforced by the state. The state effectively puts its enforcement mechanism at the service of one of the parties in the contract. Moreover, it is the state itself that decides in many cases, through the courts that need to fill in the gaps between the intentions and expectations of the contracting parties, who the beneficiary is of the enforcement mechanisms. The argument is not that this is a good thing or a bad thing, but that it is a contradiction of the formal distinction that says that contracts are private and laws public. Third, the choice for having this particular system, this

102 Morris R. Cohen, "Property and Sovereignty," 13 *Cornell Law Quarterly* 8-14 (1927), *quoted in* Fisher et al., *supra* note 89, at 111.

particular allocation of 'freedom' and 'enforcement' is not necessarily logical or natural, nor is it necessarily the one that best guarantees either efficiency or justice. One argument made in this respect is that the system prevents market participants from breaching contracts that no longer maximize their personal utility. The point here is that there are costs and benefits for *any* system and that it therefore reflects a social policy based on (un)certain expectations. A system that would not enforce contracts would radically change the way that contracts are entered in to, and also the price that actors would pay by breaching them, but would not necessarily mean that it would not work. Legal Realist pointed out that while some type of contracts are regulated, many others are not.[103] The law of contract was, and still is, thus an important element of a larger, public, social policy.

Another set of arguments questioned the idea of 'freedom' that was intrinsic to the notion of contract. As argued by Robert Hale, freedom and coercion could not be distinguished from each other. All contracts involved mutual coercion. "[T]he income of each person in the community depends on the relative strength of his power of coercion."[104] Whether this difference in bargaining power leads to the conclusion that the contract was entered into under duress or not is of course a matter of degree, and judges applying the rule of duress must invariably choose between competing conceptions of liberty, when deciding for example whether economic and physical duress have different consequences. Moreover, by defining when unequal bargaining power leads to duress, the rules of contract law help (re)determine the amount of bargaining power that actors have on the private market. The public law of contract is thus private in the sense that it determines the bargaining power of individual actors.

4.4. The Critique of Property Law

Similar sets of arguments were made by legal realists about the law of property. They contended that property was dependent on the legal institutions that enforced it and that it therefore was as much a public entitlement as a private

103 Singer, "Legal Realism Now," *supra* note 89, at 485. Singer refers to a number of areas in which contracts are regulated (at the time of his writing in the US). Examples are: usury laws, fraud rules, implied warranties, as well as insurance contracts, landlord/tenant contracts, family law, antitrust law, consumer protection law, and more.

104 Robert L. Hale, "Coercion and Distribution in a Supposedly Non-Coercive State," 38 *Political Science Quarterly* 470-78 (1923), *quoted in* Fisher et al., *supra* note 89, at 107.

right. As such, the state was profoundly implicated in the creation and distribution of property rights. Some, like Morris Cohen considered it to be a kind of delegation of sovereign powers:

> The character of property as sovereign power compelling service and obedience may be obscured for us in a commercial economy by the fiction of the so-called labor contract as a free bargain and by the frequency with which service is rendered indirectly through a money payment. But not only is there actually little freedom to bargain on the part of the steelworker or miner who needs a job, but in some cases the medieval subject had as much power to bargain when he accepted the sovereignty of his lord. Today I do not directly serve my landlord if I wish to live in the city with a roof over my head, but I must work for others to pay him rent with which he obtains the personal services of others. The money needed for purchasing things must for the vast majority be acquired by hard labor and disagreeable service to those to whom the law has accorded dominion over the things necessary for subsistence.[105]

When combined with contract law, property law delegates to property owners the power to coerce non-owners to assume contractual obligations on their terms. By defining property and contract rights, the state determines the relative bargaining power of private actors, and hence, of their bargains. Even the most 'free' and 'unregulated' market is therefore, in the eyes of Legal Realists, regulated. The question then becomes not: 'regulation or not?' but 'what kind of regulation?' and 'how does it allocate the different bargaining-powers of the different actors?'

The importance of both the critique of contract-law and the critique of property-law is that they reversed many images then held by the dominant classical legal theorists. Where the classical theorists saw freedom, the Legal Realists saw coercion, and vice versa. In the words of Singer:

> The realists argued that the state is fundamentally implicated in all "private" transactions. Indeed, they saw no clear

105 Morris Cohen, "Property and Sovereignty," *supra* note 102, at 12.

> separation of state and society. Defining contract and property rights requires a balancing of competing values and principles. By defining the rules of the market, the state determines the distribution of economic power and thus the distribution of wealth and income. The state necessarily involves itself in the creation of a regulatory system by establishing and enforcing these market entitlements. The realists thus exposed the idea of a self-regulating market system immune from government control as a sham. The market allocates and distributes power and wealth, and its mechanisms and institutional structures are created and enforced by law. In the midst of every transaction sits the state, determining the relative bargaining power of the parties, and hence, to a large extent the structure of 'private' relations.[106]

4.5. Evaluating the Legal Realist Critique and its Impact

In a large number of very concrete doctrinal critiques a critique of ideology takes shape. Not only is the public-private distinction and how it manifests itself in legal thought the object of an intrusive critical analysis. The critique in fact targets ways of thinking about law itself. By demonstrating how judges and their adjudicative practices are the mouthpieces of specific (economic) policies, and by emphasizing that judges and lawyers may have a choice in the matter, the critique dislodges the idea of law and legal practice as something distinct from the politics of policy making. In fact, the main project of the Legal Realist was to reform the field of legal thought and legal doctrine, to revitalize it by bringing it in touch with social realities. The critique of the public-private distinction was the aggregate side effect of those efforts.

The Legal Realists demonstrated how the public-private distinction was built into the ways contract and property doctrines were conceptualized as well as deployed. This is important because it illustrates how the public-private is not just a theoretical construct, but an idea that lives on within the legal categories that we use to regulate the minutiae social life. Moreover, they also demonstrate how this idea of the public-private and how it operates on the level of legal rules and doctrines, has significant, real life, distributive consequences. The real value of the critique is in their demonstration of

106 Singer, "Legal Realism Now," *supra* note 89, at 495.

how this happens and of how a particular formalist approach to law, as well as an idea that judges merely 'apply' the law by means of deduction, and their contribution to obtaining a sharper picture of how the public-private distinction becomes the tool of a particular ideology and of particular policies.

Another important thrust of the critique was the problematization of the distinction between public and private as a distinction between state intervention and *laissez faire*. This they did by demonstrating how many arguments constructing, say contract, as a realm of freedom and law as constituting a realm of coercion, were in fact arbitrary and could be easily inverted. By inverting the internal logic of these constructions they showed that the opposite was as 'logical', and that the most essential distinctions depended on how you look at things. Not only did they show how this distinction operated at the macro as well as at the micro levels, they also demonstrated that they way this happened was *not necessary*. This is *not* 'the way things are'. That's *not* a 'fact of life'. In doing so, they opened up a whole area to political action and they injected a dose of self-consciousness into the legal discipline. Ultimately, they argued that there is no realm 'without law', where freedom reigned, and that the state was implicated everywhere.

It is difficult to see how a critique of the public-private distinction could be more intrusive and disruptive. In fact, according to one historian, it was very influential, at least for some time:

> By 1940, it was a sign of legal sophistication to understand the arbitrariness of the division of law into public and private realms. No advanced legal thinker, I am certain, would have predicted that forty years later the public/private dichotomy would still be alive and, if anything, growing in influence.[107]

And in fact, the public-private distinction seems to have survived almost untouched. Singer gives an elaborate description of how the diverse Liberal legal theories have, in diverse ways, recreated the public-private distinction. In different ways they have held on to the idea of an autonomous self-

107 Horwitz, "The History of the Public/Private Distinction," *supra* note 99, at 1426-1427.

regulating market, free of state intervention.[108] And, it is not difficult to see how in all kinds of legal and political theories one would expect some kind of acknowledgement that the legal realist critique would somehow have left an impression. However, the public-private distinction has proven to be more resilient than that. Moreover, outside the United States, the legal realists have not have the kind of impact that they could.[109]

Both Horwitz and Singer attempt to come up with explanations for this fact. Writing in 1982 (with Reagan and Thatcher just in power) Horwitz attributes this resurgence to the Cold War and the retreat of progressivism with its sharp opposition to private self-interest, and its defense of substantive public interest.[110] Singer on the other hand refers to a series of miscommunications and misunderstandings, as well as to some misguided criticisms directed at the practice of critique, such as triviality and nihilism.[111] But it would also seem that the public-private distinction refers to something much more pervasive than a mere set of legal categories, but rather to something that is linked to a very common as well as profound set of experiences in everyday life. Some might argue that this is the reason not only for its success, but also for its necessity as a conceptual structure. Others, however, would point to the insight that our experiences are as much the product of these categorizations as vice versa. This insight was developed in the course of the 20th century by philosophers and would have a strong influence on the next generation of critical legal scholars.

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108 Singer mentions a couple of doctrines that in some way rely on the existence of distinct public and private spheres: the doctrine of judicial restraint, the idea that contract and adjudication are separate spheres, the doctrines of autonomy and unequal bargaining power, and the notion of efficiency. *See* Singer, "Legal Realism Now," *supra* note 89, at 528-532. *See also* Mark Tushnet, "Critical Legal Studies: A Political History," 100 *Yale Law Journal* 1515, 1543 (1991) (providing a more political CLS perspective on the legacy of ALR).

109 In an informal conversation with one of the current European judges in the International Court of Justice, a renowned legal scholar, the reaction to my reference to the critique of the public-private distinction was to associate it with feminist theory. It seems quite probable that this scholar was not familiar with the Legal Realist critique.

110 Horwitz, "The History of the Public/Private Distinction," *supra* note 99, at 1427-1428.

111 Singer, "Legal Realism Now," *supra* note 89, at 535-542. *See also* Joseph William Singer, "The Player and the Cards: Nihilism and Legal Theory," 94 *Yale Law Journal* 1 (1984). I will return to these reactions and resistances in the concluding chapter.

5. Critical Legal Studies (CLS) and its Critique

5.1. Introduction

In the 1970s and '80s a new generation of legal scholars began to elaborate a comprehensive critique of the dominant legal culture, which became known under the umbrella heading of 'critical legal studies', or CLS. Though this movement surfaced in a number of countries in North America and Europe, the bulk of the challenge came from the United States.[112] Most CLS scholars felt intellectually and politically very close to the Legal Realists, saw themselves—even explicitly—as heirs of the Legal Realist tradition,[113] and kept their scholarly memory fresh.[114]

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112 Though as a thriving political and intellectual movement CLS did not live to see the end of the 80s, it has survived as a school of legal theory. In particular, Duncan Kennedy's *A Critique of Adjudication* (1998) has been considered as important as H.L.A. Hart's *The Concept of Law* (1961) and Ronald Dworkin's *Law's Empire* (1986). Small pockets of thriving CLS communities have, however, endured in the UK, South Africa, and Australia, as well as in some mainland European countries. Though increasingly prolific, I would perhaps mention Costas Douzinas & Adam Gearey, *Critical Jurisprudence: The Political Philosophy of Justice* (2005) as a potential highlight. Having said this, the particular critiques of the public-private distinction that this\chapter deals with are characteristically the product of Unitedstatesian CLS.

113 *See, e.g.*, Mark Tushnet, "Critical Legal Studies and Constitutional Law: An Essay in Deconstruction," 36 *Stanford Law Review* 623 (1984); Duncan Kennedy, "The Stakes of Law: Hale and Foucault," 15 *Legal Studies Forum* 327 (1991).

114 Several of the works mentioned in the previous chapter were actually produced by scholars either belonging to the CLS or very sympathetic to it. Several have referred to Legal Realists in their work. In fact, a recurring argument made (mostly informally) by critics of CLS was that their critique was "not new" because it had all already been made by the Legal Realists. This argument seems to ignore many characteristics of both Legal Realism and CLS, or of how these are connected. One could argue that the Legal Realism as we know it today is mostly the product of CLS historicizing. With regard to the critique of the public-private distinction for example, that case could very well be made. It wasn't until the 1980s (as far as I have been able to ascertain) that the work of prominent Legal Realists, such as Morris Cohen and Robert Hale, was organized and presented as a comprehensive critique of the public-private distinction. The earliest reference that I have found to a Legal Realist 'critique of the public-private distinction' is in Horwitz, "The History of the Public/Private Distinction," *supra* note 99. Most of this organizing was the result of work by Singer, Fisher, Horowitz, and others. *See* Singer, "Legal Realism Now," *supra* note 89; Fisher et al., *supra* note 89. It has become commonplace now to refer to the Legal Realist critique of the public-private distinction. Curiously enough, this part of a larger effort in historical work by critical legal scholars is absent from the otherwise brilliant article by Robert Gordon, "Critical Legal Histories," 36 *Stanford Law Review* 57 (1984).

Recognizing the lineage of CLS in Legal Realism, though it has been the subject of some controversy,[115] is very useful when approaching CLS, and I would venture to argue that even a basic understanding of CLS is difficult without some general knowledge about Legal Realism. However, as an intellectual movement, CLS also had other influences.[116] Just as much as Legal Realism was the product of the 1920s, so CLS was the product of the 1970s.[117] As we will see in the case of the public-private distinction, some of the CLS critiques seem to take their cue from Legal Realism, but with a spin and a set of sensibilities, both theoretical and political, that are very different from those of their Legal Realist precursors.

Indeed, one very prominent contribution of CLS to our thinking about the public-private distinction lies precisely in CLS work that historicizes the Legal

115 *See generally* G. Edward White, "From Realism to CLS: A Truncated Intellectual History," 40 *Southwestern Law Review* 819 (1986); Martin, *supra* note 92. Both authors emphasize the differences between Realism and CLS and criticize the narrative of direct lineage between these two movements, referring amongst others to the direct chronological successors of the Legal Realists, the law, science, and policy movement, led by Harold Laswell and Myres McDougal, and the process jurisprudence movement, led by Lon Fuller, H.L.A. Hart and A. Sacks, among others. *Id.* at 212. They also propose the Law and Society movement, which began in the 1960s, as a likelier predecessor of CLS, even though CLS scholars seems to distinguish themselves from that movement. Martin in particular argues for the existence of deeper connections between the Legal Realists and the analytical jurisprudence of H.L.A. Hart and Ronald Dworkin. In my opinion, it is in particular Martin's emphasis on the Legal Realists' acceptance of a distinction between law and morality that makes his argument unpersuasive, since that distinction does not seem to play any role in the preoccupations of the Legal Realists, who were concerned with totally different questions. Moreover, he seems to undervalue the very adamant political engagement and message of much Legal Realist work. Interestingly, in his treatment of Legal Realism he picks out five prominent scholars (Oliphant, Llewellyn, Frank, Cook, and Dewey), but leaves out those of a more distinctive leftist political orientation, such as Morris Cohen and Robert Hale.

116 Some CLS work refers to structural linguistics, phenomenology, and structural anthropology. The work of the social economist Karl Polanyi, in particular his book *The Great Transformation* (1944), is also often referred to. In general, continental philosophers such as Nietzsche, Althusser, Sartre, Lévi-Strauss, Derrida, Lacan, Barthes and Foucault, seem to be in the background, although it is important to emphasize the plurality of CLS work. In any case, there were strong influences from the social sciences and the humanities. *See also infra* note 324 (discussing structuralism in CLS).

117 This can be seen in various ways: In ALR one can discern its emphasis on the empirical and social sciences, its faith in science in general, its experience of a very blunt formalism and a very radical laissez faire ideology. The rise of 'the social' as an idea in science and in politics is also apparent. With CLS, one can note the spirit of the 60s and the coming of age of the baby-boomers, the spirit of the cold war, the advent of neo-liberalism, the richness of multi-disciplinarity, the strength of the neo-Marxist movement and the immense success of continental philosophy in American academia (in particular in the humanities).

Realist critique. As illustrated in the previous section, the Legal Realists did not think in those exact terms and they never developed a comprehensive critique of the public-private distinction. Instead, their critique must be inferred from the aggregate of critical work that they produced on a diversity of legal doctrines, in particular contract and property. Some CLS scholars have lamented the fact that many Legal Realist insights have been practically ignored in their contemporary legal scholarship,[118] and this spurred them to emphasize that history in their own work. Aside from their historical work, CLS scholars have also emphasized the potential of the legal realist critique for a broader critique of the ideology often referred to as Liberal Legalism. Herein lies one of the most distinctive characteristics of the CLS critique: it not only lifts the Legal Realist critique to a higher plane of abstraction as well as political and philosophical relevance, but also imbues it with insights from other intellectual movements, such as critical theory (as developed by the Frankfurt School of Philosophy), Neo-Marxism, and continental philosophy (in particular structuralism and phenomenology, and to a degree also post-modernism). In what follows I will try to summarize and flesh out the main results of the diverse CLS critiques of the public-private distinction.[119]

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118 *See, e.g.*, Horwitz, "The History of the Public/Private Distinction," *supra* note 99; *See* Singer, "Legal Realism Now," *supra* note 89; Tushnet, "Critical Legal Studies: A Political History," supra note 108.

119 I will not attempt to offer a general summary of CLS, which would be too challenging to contain within the realm of this work. I believe however that my analysis of the CLS contribution to our thinking about the public-private distinction will provide the reader with a useful cross-section of the movement's work. For more elaborate general introductions and seminal pieces, *See generally* Mark Kelman, *A Guide to Critical Legal Studies* (1987); Richard Bauman, *Critical Legal Studies: A Guide to the Literature* (1996); Note, "From American Legal Realism to Critical Legal Studies," 95 *Harvard Law Review* 1669 (1981-1982); Tushnet, "Critical Legal Studies: A Political History," supra note 108; James Boyle, "The Politics of Reason: Critical Legal Theory and Local Social Thought," 133 *University of Pennsylvania Law Review* 685 (1984-1985); Peter Gabel & Paul Harris, "Building Power and Breaking Images: Critical Legal Theory and the Practice of Law," 11 *NYU Review of Law and Social Change* 369 (1982-1983); Alan Hunt, "The Theory of Critical Legal Studies," 6 *Oxford Journal of Legal Studies* 1 (1986); Martin Krygier, "Critical Legal Studies and Social Theory—A Response to Alan Hunt," 7 *Oxford Journal of Legal Studies* 26 (1987); Allan C. Hutchinson & Patrick J. Monahan, "Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought," 36 *Stanford Law Review* 199 (1984); Peter Gabel & Duncan Kennedy, "Roll Over Beethoven," 36 *Stanford Law Review* 1 (1984); Tushnet, "Critical Legal Studies and Constitutional Law: An Essay in Deconstruction," *supra* note 113; Roberto Mangabeira Unger, "The Critical Legal Studies Movement," 96 *Harvard Law Review* 561 (1982-1983).

5.2. CLS and the Public-Private Distinction: Selected Works

Some of the summaries offered below might seem unnecessarily long and detailed. The reason for this is that it is important to demonstrate that the CLS critiques of the public-private distinction cannot be easily reduced to a particular slogan or observation. The rigor and thoroughness of their analyses is as important an element of their work as any oversimplified summary of their main arguments. Moreover, it is interesting and informative to see how CLS scholars combined high theory and philosophical critiques with a thorough analysis of legal doctrines and legal practice. In fact, I would argue that this is a particularly important hallmark of their work, one that is important to keep in mind when reflecting on the diverse intellectual engagements with the public-private distinction. CLS approaches to the public-private distinction challenge the distinction between theory and doctrine/practice. They illustrate how the public-private distinction operates, simultaneously, at both levels, and only a serious submersion in their work can make this particular characteristic of their contribution to legal and theoretical thought visible. Below, I will describe and analyze a selection of CLS work on the public-private distinction. I will then follow up with a description and analysis of the common traits in all these works, and then I will reflect on their significance and impact.

5.2.1. Duncan Kennedy on the Structure of Blackstone's Commentaries

Duncan Kennedy's article "The Structure of Blackstone's Commentaries"[120] quickly became very famous in CLS circles, and it has been referred to and cited in most, if not all, of the CLS work on the public-private distinction. It is an important piece of work for a couple of reasons. On the one hand it is an impressive analysis of a crucial moment in the history of Anglo-American law, when William Blackstone produced the first comprehensive systematic exposition of the Common Law.[121] It demonstrates how Blackstone went

120 Duncan Kennedy, "The Structure of Blackstone's Commentaries," 28 *Buffalo Law Review* 205 (1978-1979).

121 The four volumes of *Blackstone's Commentaries* were originally published between 1765 and 1769. And it has been repeatedly reissued and republished in the United States ever since, to the point that it is one of a handful of books—along with Shakespeare's plays and the Bible—for which American law school reviews have a special shortened citation rule. See *The Blue Book: A Uniform System of Citation* R. 15.8(b), at 135 (Columbia Law Review Association et al. eds., 18th ed. 2005). For a recent edition of the *Commentaries*, *see Blackstone's Commentaries on the Laws of England: In Four Books* (Thomas McIntyre Cooley ed., 2003).

through all kinds of pains to make the system fit together, in fact constituting with his *Commentaries* the junction between the old feudal structures as expressed through law and the new liberal state also as expressed through law.

The *Commentaries* sometimes seem far from our current understanding of law and legal doctrines and too close to feudal institutions, yet somehow they are also recognizable enough to understand how this organizing mode is at the root of contemporary thinking about law. As such, Kennedy's article is a historical project that shows how early Liberal political theory was translated and rewritten in the form of legal doctrine.

Kennedy's article also presents us with a reading of Blackstone's *Commentaries* that emphasizes how Blackstone, with his elaborate categorizing, analyzing, and explaining, seems to be performing variations of the same move. As such, this article is an example of a structuralist analysis.[122] The 'thing' that Blackstone seems to be doing, again and again, is to employ law, legal categories, legal doctrine and legal analysis, to 'mediate' or to reconcile, what Kennedy calls the 'Fundamental Contradiction'. The two paragraphs in which Kennedy presents the reader with this Fundamental Contradiction have been oft cited and referred to in CLS work, and not without reason, for they beautifully articulate the phenomenological version of how CLS perceived the public-private distinction.

> Here is an initial statement of the fundamental contradiction: Most participants in American legal culture believe that the goal of individual freedom is at the same time dependent on and incompatible with the communal coercive action that is necessary to achieve it. Others (family, friends, bureaucrats, cultural figures, the state) are necessary if we are to become persons at all—they provide us the stuff of our selves and protect us in crucial ways against destruction. Even when we seem to ourselves to be most alone, others are with us, incorporated in us through processes of language, cognition and feeling that are, simply as a matter of biology, collective aspects of our individuality. Moreover, we are not always

122 *See infra* Section 5.3.4.

> alone. We sometimes experience fusion with others, in groups of two or even two million, and it is a good rather than a bad experience.
>
> But at the same time that it forms and protects us, the universe of others (family, friendship, bureaucracy, culture, the state) threatens us with annihilation and urges upon us forms of fusion that are quite plainly bad rather than good. A friend can reduce me to misery with a single look. Numberless conformities, large and small abandonments of self to others, are the price of what freedom we experience in society. And the price is a high one. Through our existence as members of collectives, we impose on others and have imposed on us hierarchical structures of power, welfare, and access to enlightenment that are illegitimate, whether based on birth into a particular social class or on the accident of genetic endowment.[123]

This contradiction lies, according to Kennedy, at the center of law: "There simply are no legal issues that do not involve directly the problem of the legitimate content of collective coercion, since there is by definition no legal problem until someone has at least imagined that he might invoke the force of the state."[124] It is important to emphasize that Kennedy sees the fundamental contradiction as intrinsically paradoxical, in other words, as ultimately *irreconcilable*. It can, at most, be 'mediated', which means that one can have the feeling that one has 'dealt with' the contradiction without having in fact done so, since this is ultimately impossible.

Another notion that Kennedy refers to, and one that seems to be closely related to the idea of mediation, is the idea of 'denial'. What this means is that commentators deny the intrinsically paradoxical nature of the fundamental contradiction, and instead present a 'vanilla'-version of it, in which there is no contradiction, in which the contradiction has been rationally overcome, in which one can have the cake and eat it too.

Kennedy sees Liberalism as a mode of thinking and reasoning about politics and law that effectively, but ultimately unconvincingly, mediates and denies

123 Duncan Kennedy, "The Structure of Blackstone's Commentaries," *supra* note 120, at 211-12.
124 *Id.* at 213.

the fundamental contradiction. The article is filled with many definitions of Liberalism, because it is the tofu of the work by William Blackstone. In the introduction though, Kennedy defines Liberalism "very roughly" as:

> a splitting of the universe of others into two radically opposed imaginary entities. One of these is 'civil society', a realm of free interaction between private individuals who are unthreatening to one another because the other entity, 'the state', forces them to respect one another's rights. In civil society, others are available for good fusion as private individual respecters of rights; through the state, they are available for good fusion as participants in the collective experience of enforcing rights. A person who lives the liberal mode can effectively deny the fundamental contradiction.[125]

The issue with mediation and denial is that they can (but do not necessarily have to[126]) become apologetic of the existing social and economic order: the status quo. They do so by presenting certain social phenomena as natural and as legitimate, when in fact they are social constructions, and by presenting consistency and coherence where in fact there is confusion and contradiction. The purpose of Kennedy's analysis is, in his words:

> [to] show, first, how Blackstone's mode of reasoning and his categorical structures simultaneously mediate and legitimate, that is, how they become intelligible when seen as the products of mediating and legitimating intentions. Second, I will show that we can understand the evolution of the specifically liberal mode of mediation as a consequence of attempts by people like Blackstone to use it to legitimate institutions that seem at first blush inconsistent with it. In order to assimilate existing English legal practices to the liberal scheme of justification, he had both to reinterpret the institutions *and* to abstract and generalize the liberal categories.[127]

125 *Id.* at 217.
126 *Id.* at 217-18.
127 *Id.* at 218-19.

As Kennedy's analysis of the *Commentaries* demonstrates repeatedly, Blackstone justifies feudal institutions in one chapter, and develops the liberal critique of feudalism in the next.[128] He legitimates the anti-liberal status quo, supports liberal critiques, *and* develops the mediating techniques of liberal legal thought.

Blackstone contributed greatly to the development of the public-private distinction in terms of legal doctrine.[129] He developed the idea of 'rights' (which he drew from Hobbes, Locke and others) into a legal category, systematized together with 'wrongs' into the entirety of law. He developed the idea that these natural rights would be regularly consecrated into positive law by parliament (for instance in the form of the *Magna Carta*). Remedies were derived from rights, giving judges a much more prominent role in the administration of justice. As for these judges, they were to be rational but passive (impersonal) interpreters of the law, and were to remain distinct from the executive and the legislator.[130] Kennedy points out though how these ideas, which sound quite familiar to the Liberal ear, were still far from the solid foundations of contemporary Liberal theory. For one, the state was not (yet) a vast abstraction opposed to the individual. Rather, Blackstone defended many aspects of the feudal institutions of his time, with all of their emphasis on personal status and privilege. Moreover, the individual as a legal and political category would require much more work during the 18th and 19th centuries.[131] According to Kennedy, Liberalism would continue to move towards using rights

> to structure their understanding of *every* application of force to a person. (...) The idea of rights has been used for centuries as a mediator of *some* problems of force. The accomplishment of liberalism was to generalize the rights analysis until it had become all-pervasive, indeed universal, within legal thought.[132]

128 *See, e.g., id.* at 285-94.

129 Kennedy's article is too long (178 pages), too elaborate, too dense, and too rigorous to summarize here. Its frequent use of examples and demonstrations cannot be easily transposed into the format of a summary. For those who, even after finishing reading this thesis, are still skeptical about CLS demonstrations of the arbitrariness or "constructedness" of the public-private distinction, it is a must read. For the purposes of this chapter though, I will merely highlight a couple of key points.

130 Duncan Kennedy, "The Structure of Blackstone's Commentaries," *supra* note 120, at 223-72.

131 *Id.* at 265.

132 *Id.* at 265.

During Blackstone's time, and for a long time thereafter, this was not the case. For Kennedy, it is the way that Liberalism was slowly and arduously put together, with its idea of rights theory as a way to mediate the contradiction between individual freedom and collective coercion, that is the object of analysis.

> Looked at in terms of the secular enterprise of developing the liberal mode of mediation, we measure Blackstone's success by the hundreds of quotations of his elegant paragraphs on the derivation of remedies from rights, the passive rationality of the judge, and the separation of powers. I have argued in this section that this approach gives him both less and more than his due. It underestimates the importance of the work of deconstructing earlier systems while reorganizing their elements. And it overestimates the importance of the selected passages because it disregards the way their context of nonliberal elements limited or transformed their meaning. Both forms of distortion reinforce the hold of the theory; they distort with a bias. They make liberalism look like the product of a linear process of accretion of truths, or, at worst, like a timeless way of understanding the world.[133]

Of course, Liberalism being a construction, one can only put a set of ideas and concepts under that heading from a certain vantage point. The vantage point is the late 1970s, and Kennedy speaks in the understanding that the public-private distinction, and Liberalism in general, have been so thoroughly critiqued, by Legal Realism, by Critical Theory, and by continental philosophy, that he could talk about it as if talking about something in the past.[134] Though one could argue that seeing Liberalism as a period in (legal) thought is a historicist construct, one in which it is never really clear when it is in the making and when it is in its terminal stages, Kennedy posits it as something with relatively defined boundaries.[135] In his discussion of how Blackstone developed the legal category of rights, he would posit his idea

133 *Id.* at 272.

134 *See, e.g., id.* at 217 ("The history of legal thought in our culture is the history of the emergence of this legal version of the liberal mode, its progressive abstraction and generalization through the 19th century until it structured all legal problems, and its final disintegration in the early 20th century.").

135 *See infra* Section 5.3.3 (discussing the notion of ideology).

of how rights, and the mediating role that they play, are a central feature of Liberal theory.

> The liberal version of rights begins with three units: a weak person, a strong person, and the state. The weak person experiences contradictory feelings toward the strong person. On the one hand, he is necessary for trade, the division of labor, and the constitution of intensely solidary domestic units, all of which represent good fusion. On the other, the strong person threatens to dominate and thereby annihilate the weaker one.
>
> At first blush, the addition of the state to the picture only makes matters worse, since the state is composed of people, and they threaten to use superior collective force to dominate and annihilate both the weak man and the strong man. What the weak man needs is somehow to induce the state to use its force to control the strong man just to that extent that will permit good fusion with him, while preventing the people who compose the state from putting themselves in the strong man's place. The initial problem with such a strategy is that the extreme complexity of social and political relationships makes it difficult to decide what exactly the state may and may not do.
>
> In liberal theory, the concept of rights answers this question. If we believe that there is such a thing as a right, that we have rights, and that we know what they are, then we can specify both what the state must do to the strong to protect the weak, and what it may not do to either strong or weak. A person who believes in rights is in a position to deny that his feelings about others are contradictory. He can believe that he wants to fuse with them so long as they respect his rights. He can believe that he is fused with the state so long as it protects rights, and opposed to it when it does less or more. A belief in rights can mediate the fundamental contradiction.[136]

136 Duncan Kennedy, "The Structure of Blackstone's Commentaries," *supra* note 120, at 258-59.

But, according to Kennedy, more is needed, and in order for this to work, Liberal theory needs to have an idea about the origin or sources of these rights, as well as about how these are going to be (judicially) implemented. Blackstone can be commended because he made the first important strides into these questions in the Anglo-American tradition of legal thought. His basic description would set the field for a discussion that would dominate legal debates for the next couple of centuries; a discussion that Kennedy sees as an ongoing attempt to overcome (or at least give the appearance of overcoming) the Fundamental Contradiction in Liberal legal thought.[137] These debates were positive versus natural law theory, and judicial activism versus judicial passivism.

With regard to the design of political institutions and the state Blackstone had to deal with the Liberal criticisms of feudal privilege and hierarchy. Liberalism argued that public power, or public law, should be impersonal, meaning that it should be accessible to all those who are governed, to all those who have rights. The Liberal critique also argued that there should be an equality of rights, meaning that the way rights are defined in the context of private interaction between people (private law) should not be dependent upon status in the hierarchy or privilege. Kennedy points out that both these critiques were in fact one and the same, and that the distinction between both was due to a confusion between property and jurisdiction which the Liberal critique tried to disentangle. In short, impersonality meant that the state should not reflect the arbitrary and illegitimate distinctions of civil society, while equality meant that the state should not create such distinctions:

> The different bearers of relative rights—king, nobility, clergy, commons, and even corporations—combine in Parliament; they also arrange themselves as the distinct orders or hierarchies of the private sphere of civil society. The state errs by simultaneously reflecting and creating *the same illegitimate distinctions*.

137 Or, to put it differently: "Liberalism is *not* a set of logical deductions from premises. As we have seen already, liberal thinkers reproduce within it the contradiction it is supposed to resolve. For example, different strands embrace different theories about the origins of rights, some emphasizing the absolute power of the collectivity to fashion and refashion them at will, others emphasizing their 'natural', universal and unchanging character. While mediation by the rule of law, that is, by appeal to rights, is a premise for all liberal thinkers, some see this as implying the power of judges to reason directly from principles to particular results. Others see the judge as the mere executor of specific rules laid down by the right-defining body." *Id.* at 294.

> The whole of the liberal critique was thus more than the sum of its public and private parts. The conceptual disentangling of property and jurisdiction was an aspect of the development of a radical program, a program that called for the disestablishment of the social orders that constituted English society.[138]

Blackstone responded to the liberal critique by affirming its correctness, agreeing that indeed, public law should be impersonal and private law should be applied equally, and then moved on to legitimate the status quo that the critique was attacking. He did this by distinguishing between so-called absolute rights and relative rights. The first were the impersonal and equally applied ones, while the second were the feudal ones. This distinction was justified using two arguments, the idea of convenience and the idea of implied consent. Blackstone argued that having the hierarchies that ruled England at the time was necessary and even a good thing, because that afforded the best protection to those bearing rights. Though it might be good, one fine day, to expand the number of people having access to the state, it was definitely not necessary and even ill advised to do so now, because the state as it was at the time was doing such a fine job in fulfilling its function of protecting the rights of individuals. As for the argument that this was an arbitrary arrangement, Blackstone argued that it was based on the implied consent of those who were enjoying the protection of the state as it was. It was the reasonable thing to do.[139] Interestingly enough, both are quite similar to each other: the status quo is legitimate because it is what any reasonable person would have consented to, and it is legitimate because it is reasonable. Blackstone does not make this argument bluntly, but in the way he dealt in great detail with a whole set of questions of legal doctrine related to both public and private law.[140]

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138 *Id.* at 299 (emphasis in original).

139 *Id.* at 294-311. One will recognize Locke's theory of implied consent in this argument. *See supra* notes 22-23 and accompanying text.

140 Duncan Kennedy, "The Structure of Blackstone's Commentaries," *supra* note 120, at 304-11. The power of Kennedy's analysis lies in the fact that, in spite of the centuries that have gone by, one can still recognize important elements of Blackstone's maneuvering in contemporary Liberal (legal) theory. Making this point is a recurring theme in a lot of CLS scholarship.

One of the primary dilemmas in the Liberal theory of private law is determining where one person's rights end and the next person's begin. As Kennedy explains, "there is *no* private legal dispute we cannot cast in terms of right against right. *If*, but only if, it can propose a way to resolve these conflicts, liberalism can mediate the [fundamental] contradiction."[141] Liberalism specifically rejected the feudal solution to conflicts of rights, which was based on the idea of a legitimate social hierarchy. Beyond this, however, Liberal theory provided little guidance about which way to turn. One technique that was developed to deal with these private law conflicts of rights was for a judge to appeal to statutes, common law precedent, or prior agreement by the parties. By basing judgments on pre-determined rules, it could be claimed that the parties had already consented—either directly or indirectly, via the social contract—to a given limitation on rights. The problem with this technique, however, lay in its essential tautology. Resolving conflicts of rights by relying on an argument of consent depends on acceptance of both the legitimacy of statutes, precedent and prior agreement—which presupposes an agreed definition of how far rights should extend—and a judge's ability to fill in the gaps in the law—which in its turn entails the exercise of (judicial) discretion based on some prior theory of how rights should be allocated. In other words, decisions of how to resolve these conflicts of rights were based on previous decisions of how to resolve previous conflicts of rights, and so on, and so on... In order to resolve this problem, Liberal legal theorists attempted to ground the rules governing conflicts of rights (and thereby do away with the fundamental contradiction) either in logically deducing the scope of the right from its nature, or by taking the utilitarian path and selecting the rule that would most increase aggregate social welfare. Again, though, the Liberal theorists ran into a problem: either of these tactics could be used to justify an outcome for either side of an argument, depending on whether individual autonomy or collective solidarity was situated as the primary goal. No matter how far back toward first principles Liberal theory tried to reach, therefore, it always came away with another reproduction of the fundamental contradiction; one that continually reproduced itself at subsequent levels of analysis.

> It is important to understand that none of this makes it impossible to decide legal issues. The point is that it is not possible to distinguish the *legal* mode of defining rights from

141 *Id,* at 355-56.

> any other, in a way that will convince us that the rule of law is mediating the fundamental contradiction. According to the resolution of the conflict of right with right, we may find ourselves submerged and dominated by others, or perilously isolated from them. Neither the categories we employ nor our techniques of reasoning within them can reassure us that the dangers are illusory.[142]

The fundamental contradiction consists of both foundational principles of Liberalism (individual autonomy and collective solidarity). On the one hand it does not allow for a choice between them; on the other hand it requires one to choose between them continuously.

This dilemma is no less when resolving conflicts within public law. Kennedy argues that public law conflicts can be divided into two groups—right versus power, and power versus power—and argues that in both, "liberalism embraces contradictory reasoning techniques."[143] In right/power-conflicts the issue will invariably one of a rights holder claiming that the state exercised its powers in a way that diminished his/her rights. These conflicts are resolved using the exact same techniques judges use to decide right/right-conflicts in private law: either by a deductive move that can go either way, or by an appeal to a utilitarian principle that could be either individual autonomy or collective solidarity. Both reproduce the fundamental contradiction in their own way.

Power/power-conflicts—typically conflicts between different units of a federal system—are no different. Kennedy points out that these involve "*indirect* protections for private law rights,"[144] since they are ultimately about the competence of the diverse units within the state to affect individual rights. As such, they are about the question of how far can private rights be affected by the state. On the one hand, Liberal thinkers will argue from the 'nature' of the power in question, whether it is intrinsically a 'local' power, or a 'national' power, "hoping to resolve conflict without any reference at all to the impacts on interests that motivate conflict in the fist place."[145] One way is to invoke

142 *Id.* at 360.
143 *Id.*
144 *Id.* at 361.
145 *Id.* at 362.

variations of the principle that a power is 'sovereign within the sphere of its authority', which is a tautological one because the extent of that sphere is exactly what the conflict is about. On the other hand they would reason from the question of what is better for the 'general welfare', or, what degree of (de) centralization is better for the overall system of private rights? According to Kennedy, this question would depend on where one sees the threat to private rights.

These two modes of reasoning are ultimately identical to (and share the same problems as) the ones employed in right/right-conflicts. Kennedy points out that, "[w]e identify modern liberalism as much or more with these reasoning techniques as with the categorical structure within which they operate."[146] In other words, these modes of mediation are as much a part of the fundamental contradiction as are the twin poles of individual autonomy and collective solidarity.

Blackstone was one of the first to attempt to do Liberalism in law. While his theories fell short of sketching out a perfect Liberal paradigm, he bridged the gap between feudal and Liberal legal ideology by extending Hobbes', Locke's, and Montesquieu's theory of the state into the practical realm. Moreover, he made these theories concrete for lawyers and prepared the ground for the legal practice "of how the state would actually go about performing its sole legitimate function of guaranteeing rights".[147] Kennedy illustrates how Blackstone set the foundations of Liberal legal theory, while at the same time encountering the problems which are intrinsic to it, both with regard to the private law paradigm[148] as with regard to the public law paradigm,[149] demonstrating Blackstone's favorite techniques of mediation, that of the implied consent and the appeal to the convenience of the general welfare that we have already seen, with which he "merged the factual antagonism of commercial rivals, like that of oppressors and oppressed, in the imaginary harmony of society."[150]

Finally, an immensely important theoretical construct in Blackstone's *Commentaries* was the development of the notion of civil society as an

146 *Id.*
147 *Id.* at 364.
148 *Id.* at 364-66.
149 *Id.* at 366-68.
150 *Id.* at 368-72.

intermediate category between the rule of the state and the state of nature.[151] Blackstone managed to create a category that eluded the differences between Hobbes' idea of civil society as basically created and governed by the state, and Locke's notion of civil society as basically governed by the natural law that the state was supposed to enforce, through the protection of rights. In Blackstone's theory, civil society was neither nature nor the state. He transposed the conflict between Hobbes and Locke to the way he talked about nature and the way he referred to the state. On the one hand, nature seemed to be sometimes the Hobbesian chaos that required intervention by the state, and other times the Lockean realm of liberty that the state should stay away from. Conversely, the state was at times the tyrant that imposed its will, and all laws were intrinsically restraints on freedom, while at other times the state was the protector of liberty, and law served the function of making freedom possible. When referring to civil society, he could hide away these conflicting versions of nature and the state, through a reaffirmation of its intermediate status, being neither nature nor state. He used this heuristic to develop elaborate legal doctrines, which made him into an essential developer of Liberal legal theory. In this, he relied intermittently on the notion of consent (positivism), or on that of convenience (naturalism). One essential trait he did share with both Hobbes and Locke, which is that his model did not really conceive of the possibility of conflict. So, where Hobbes saw consent in every law, and Locke saw nature's perfection, Blackstone equally conceived of a system that would resolve all legal disputes in a way acceptable to all. "Blackstone would have us believe that the rule of law can define rights even when they appear to conflict."[152] This would be resolved using two pairs of argumentative strategies:

> There is an argument that deduces rights from the postulate of freedom of action, and one that deduces them from the postulate of security. There is a general welfare argument based on the incentive provided by protection of welfare positions, and another based on the incentives provided by free competition and self-reliance. Blackstone's version of the conflict between natural liberty in the state of nature and the convenience of civil society was one way in which this structure could be applied in practice. He opposed a deduction

151 *Id.* at 372-82.
152 *Id.* at 380.

> from freedom of action (natural liberty in the state of nature) to an argument for security based on the general welfare (the convenience of civil society). From the confrontation of the two there emerged the absolute and relative rights of persons. Some of these represented the triumph of freedom of action and some of them represented security. *All* of them were fully legal.[153]

Kennedy sees in this Blackstone's most enduring contribution to Liberal legal theory. He provided it with a very rudimentary method that, if one has faith in it, could be able to resolve any outstanding issues, by making all problems into *legal* problems, and which could be developed into a fool proof mediation (and denial) of the fundamental contradiction. His critique of how Liberalism constructs and resolves the public-private distinction ends with a quote from Rousseau: "The strong is never strong enough to be always the strongest, unless he transforms strength into right, and obedience into duty."[154]

5.2.2. Gerald Frug on the City as a Legal Concept

In "The City as a Legal Concept" Gerald Frug traces a history of the city in American law—from the medieval city, through the public corporation that became separated from the private corporation—and recounts a history of the public-private distinction at the intermediate level between the state and the individual.[155] His starting position is the observation that contemporary cities in the United States are powerless, since they are seen as mere creations of the state and subjected to very restrictive control by state legislators: "Cities have only those powers delegated to them by state government, and traditionally those delegated powers have been rigorously limited by judicial interpretation."[156] Frug also shows how the city is powerless in comparison with private actors, and in particular the private corporation. A lot of what cities do, they do through municipal (public) corporations. However, these corporations lack the discretion and tools available to private corporations: "Not only are cities unable to exercise general governmental power, but they

153 *Id.*
154 *Id.* at 382.
155 Gerald Frug, "The City as a Legal Concept," 93 *Harvard Law Review* 1058 (1980).
156 *Id.* at 1062.

also cannot exercise the economic power of private corporations."[157] Cities have not always been so powerless, however. The city used to have a high degree of autonomy, and is historically older than the state.

For Frug, the powerlessness of cities is a problem because it unnecessary limits citizens' ability to participate democratically in self-governing institutions. In effect, Frug situates his critique as being part of "[t]he basic critique of the development of Western society that has emerged since the beginning of the nineteenth century [which] has emphasized the limited ability of individuals to control their own lives."[158] For him, an important element in the construction of the widespread idea that communal decision-making and other forms of decentralization in the United States are not possible, or not desirable, lies in the role that law has played in a history that starts with the Liberal attack on the medieval city. Frug formulates it in a way that will be typical of how CLS constructs the public-private distinction: as a paradox.

> The principal puzzle confronted by liberal theorists concerning city status was that cities seemed entities intermediate between the state and the individual. On the one hand, cities could be understood as vehicles useful for the exercise of the coercive power of the state, but, on the other hand, they could also be understood, like voluntary associations, as groups of individuals that sought to control their own lives free of state domination. Cities were partly creations of the state, yet were also partly creations of the individuals who lived within them. Thus, cities failed to fit neatly into liberal theory which sought to allocate all aspects of social life to one of the poles of its dualities, in this case either to the sphere of the state or to that of the free interaction of individuals within civil society.[159]

157 *Id.* at 1065.

158 *Id.* at 1068-69 (referring, *inter alia*, to Weber's observation of the growth of bureaucracy, Marx's analysis of how capitalism concentrates the ability to make economic decisions in the hands of a few, and MacPherson's observation that consumer society defines freedom as something that allows for the consumption of goods, ideas, etc. that are provided by others, instead of created and determined by the individual self).

159 *Id.* at 1076.

Because many of the incremental decisions that pulled cities towards one or the other side were taken in legal fora, Frug sees legal doctrine as playing an essential part in the overall shift of cities towards their status as subsidiaries of the state: "[C]ourts in effect had to decide whether cities, like the state, were a threat to freedom, thus justifying central control of their charters or whether cities protected individual rights and thus needed protection from the state."[160] This legal question was never to become a straightforward one, because Liberal theory did not offer a straightforward answer for it.

Frug then goes on to give an elaborate sketch of the history of the city as a legal construct since medieval times. He first examines the medieval town,[161] which was defined in terms of questions concerning the role of group activity, rather than individual or state activity, in social life. This notion soon came under attack from Liberal theory, which sought to allocate the role of the city to either that of the state or that of the individual. He then goes on to describe how the city resisted that attack and attempted to retain a certain degree of autonomy during the 17th century, when "the question of city power became the problem of defining the relationship of those who wielded economic power to the King."[162]

He then describes the period, before the 19th century, when there was no distinction between public and private corporations, between businesses and cities; all these corporations had the same legal rights. In that period, all corporations remained entities intermediate between the state and the individual.[163] This changed dramatically in the 19th century, when the public-private distinction gained ground as a central organizing principle, and the corporations were subdivided into private and public corporations, the latter of which came to be dominated by state legislative power. During this period, the city came to be seen as a public, political entity, and its role that of decentralized political activity within a unified nation with a 'private' economy.[164] In spite of intense doctrinal contestation, this became a household idea and "the issue of city power was reformulated as one dealing with the role of local political power in light of the need for a rational, bureaucratic

160 *Id.* at 1077.
161 *Id.* at 1083-90.
162 *Id.* at 1082, 1090-95.
163 *Id.* at 1095-99.
164 *Id.* at 1099-1109.

government of experts wielding power in the public interest."[165] Ultimately, and to Frug's regret, "[t]he city has changed from an association promoted by a powerful sense of community and an identification with the defense of property to a unit that threatens both the members of the community and their property."[166]

During the 19th century, the main way in which the public-private distinction developed to increasingly isolate the city as a merely public entity was through the protection of the private property rights of (municipal and mercantile) corporate investors. For a long period, corporations remained power-wielding as well as rights-bearing entities. As the right of incorporation of private actors was expanded and became less of a public privilege and more of a private right, it became increasingly linked to the right of protection of private property. At the same time, municipal or city incorporation was increasingly linked to the right of freedom of association. In spite of the fact that cities and municipal corporations were recognized 'private' property holders, the property rights aspect of their constitution was weakened in favor of their right of freedom of association.

In the end, Supreme Court doctrine began to distinguish between private investors' rights and private corporations, and the public function of municipal corporations. This involved looking at a complex combination of factors, including who created the corporation and whether it was created for 'public' or 'private' purposes. This coincided with a doctrinal distinction being made within the authority of cities. Meanwhile, the 'local' was usurped by the state level, as opposed to the federal level, which was enhanced by a fear of sub-state autonomy that became dominant in American political theory, and this further undermined the position of cities. The state became the most important entity in the counterbalancing of federal power, leaving little room for city authority. In this way, the requirement of 'created by government for public functions' became a central determining point of distinction, even if cities were never 'created by government for public purposes'. This process was further enhanced by the fact that 'the political' and 'the economic' were increasingly disassociated after the advent of laissez faire economics, which meant that 'public functions' could no longer be seen as economic ones. Whatever economic functions remained in the public sphere became

165 *Id.* at 1082, 1109-20.
166 *Id.* at 1119.

increasingly drawn into the competence of the state, as opposed to the city.

Ultimately, the private-public distinction in its multiple guises—created by government vs. created by private investors; invoking property rights vs. invoking freedom of association; serving a political function vs. serving an economic function; representing the local (i.e. the state) vs. representing the national (i.e. the federal state)—squeezed away the autonomy from the city. None of these criteria by itself was enough to settle the issue; in fact, each one of these was problematic. But all together, and in a consecutive sequence, they made the survival of city autonomy a lost cause.[167] While the distinction between the mercantile and the municipal corporation was once difficult to make, now:

> The differences between the two types of entities are simply too obvious: one is public, the other private; one governed by politics, the other by the market; one a subdivision of the state, the other a part of civil society. In the modern development of the law for the cities, the historical connection between public and private corporations has been forgotten in favor of an automatic incantation of the distinction between them: city discretion is the application of coercive power to liberty and must be restrained, while corporate discretion is the exercise of that liberty and must be protected. Thus, our conceptual framework, based on the public/private distinction, helps confirm the current powerlessness of cities.[168]

Decentralization of power is, according to Frug, a problem for Liberalism for a number of reasons. First, it is a problem in conceptual terms because the public-private distinction which is so dominant in Liberal theory forces any form of intermediate power into either the public or the private corner. Second, though it is of course possible in Liberal societies to establish intermediate bodies, these can only resist the Liberal attack on them if they have significant economic power and/or a significant role or value in the social lives of persons. Frug gives private corporations as an example; I would add religious organizations. Third, one of the main reasons why it is difficult for the Liberal imagination to conceive of decentralized power for cities is

167 *See generally id.* at 1099-1109.
168 *Id.* at 1066.

because of the split between political and economic power, which had been already critiqued by both Marx and the Legal Realists. Whereas economic power can be allowed to shift away from the state, the political power of a city would translate into more sovereigns within the state. This would run against the Hobbesian imperative of having clarity about who the supreme and ultimate sovereign is. According to Frug, this imperative, and the way it has been combined with the economy/politics split disallows liberal theory from giving serious political or economic power to cities.[169]

In the course of the 20th century the argument that the public-private distinction somehow justified the powerlessness of cities as well as the power of private corporations started to make less and less sense. Frug details the main bases of the private-public distinction and how they were transformed during last century. First, the importance of the right to private property, which was one of the bases for distinguishing private from public corporations, became less and less applicable to private corporations. As their legal forms were developed and as their prominence and dominance increased, it became clearer that their property was in fact group property.

One example of how this played out is that more and more, individual shareholders have been disempowered in favor of institutional investors: "[E]xcept for their ability to sell their corporate investment, shareholders who contribute part of a private corporation's assets have begun to resemble taxpayers who contribute part of a public corporation's assets. Neither controls the use of assets but each elects managers who do."[170] Second, the idea that private managers are a completely different species from public managers is increasingly under attack. This idea is linked to Marx's critique of the public-private distinction as one between economic man and political man. As corporations have grown in size and power, the calls for some form of public accountability or social responsibility have grown louder. Private corporations themselves are increasingly at pains to show their social face, including by adopting 'codes of conduct'. Third, and relatedly, the idea that only governmental corporations exercise power over private individuals is increasingly laughable. This has further undermined their alignment to the private side of the equation. Fourth, the idea that participation in the activities of public corporations is involuntary while that in those of private

169 *See generally id.* at 1120-27.
170 *Id.* at 1130.

corporations is voluntary has been thoroughly discredited by the arguments of Legal Realists and their observation that economic activity is completely dependent on public power, while economic activity can wield an enormous amount of power. Moreover, both are equally (in)voluntary: one's ability to live in a city depends to a large degree on one's ability to have a job or participate in some form of economic activity. Additionally, one often sees politics in terms of the market (the free market of ideas) and vice versa (to vote with one's dollars).[171] Finally, to repeat, it is ultimately impossible to determine whether a particular activity performed by a corporation is either a public or a private function. Frug argues that every government activity has its private counterpart, and that to nationalize or privatize a particular activity depends ultimately on political choice.[172]

Another development in the 20th century that has upset the neat picture is the attempt by so called modernists to merge the public and the private, in conjunction with the growth in the power of corporations.

> [T]he modernist sought to curb concentration of private power because they recognized its growing ability to control the lives of the public at large. They therefore denied that corporate power was truly private. But they did not seek to transfer private power to a purely public substitute. Instead, the sought to create entities that were neither public nor private or (amounting to the same thing) both public and private.[173]

One of the results of this project was the creation of federal administrative agencies. These agencies were meant to curtail abuse of private power while at the same time to function on a more rational basis, and less politicized than the government or the legislature. These administrative agencies would base their decisions on 'the public interest, "merging (...) the concepts of

171 *See infra* section 5.2.5 (discussing Frances Olsen's work).

172 *See generally* G. Frug, *supra* note 155, at 1129-38.

173 *Id.* at 1138. For examples of modernist works, *see generally* Adolf A. Berle & Gardiner C. Means, *The Modern Corporation and Private Property* (1932); Adolf A. Berle, *Power Without Property* (1965); Alfred D. Chandler Jr., *The Visible Hand: The Managerial Revolution in American Business* (1977); John Kenneth Galbraith, *The New Industrial State* (1967); Harold J. Laski, *Liberty in the Modern State* (1930).

public and private into the idea of expertise."[174] This type of mixed public-private entities has seen enormous growth and proliferation. But, instead of expanding city power, it has created new competitors for it. Frug laments that the city has been left out in this attempt to bridge the public-private divide, even if many of these agencies were at the level of the city. This, he speculates, is attributable to the poor image that many cities have had "as areas filled with immigrants, the working class, the poor, and later, blacks and Hispanics."[175] Moreover, this move towards the creation of administrative agencies mostly took place at the federal level and was part of a conscious effort to centralize these activities.[176]

In this new landscape, the mixed public-private entity or corporation has made the old problem reappear in which the intermediate body is seen as both right-protecting as well as right-threatening. Liberal thinkers have been articulating new defenses for business corporations and Frug sees in these a new opportunity for cities to regain power. First, the importance of having a decentralized counter-point to the central power of the state has been emphasized as a way to defend the market and its main protagonist, the business corporation. Frug considers that cities could participate in that move. Second, saying that private corporations will always be more efficient than public ones does not convince Frug, who considers that "[t]he efficiency of the two entities cannot now be directly compared because they operate under such different rules (...). Either kind of independent corporate power could exist in a market society and either kind could be subject to decisions by centralized planners."[177] Third, Frug warns of sticking too much to the distinction between politics and economics, which has been a recurring theme throughout the article. Though this relates to a common point made against expansion of city or state power, that it will lead to some form of 'socialism', Frug emphasizes that:

> [Any] reallocation of functions between cities and corporations (...) would leave both corporate forms subject to the laws of a fully political, liberal state (...). Rather, adding decentralized political participation to 'economic' corporations could help legitimate their economic independence from state control;

174 G. Frug, *supra* note 155, at 1139.
175 *Id*. at 1140.
176 *See generally id.* at 1138-41.
177 *Id.* at 1143.

> adding economic power to 'political' corporations could help protect them from state control and simultaneously transform the nature of economic power.[178]

Fourth, he reminds us that cities have not always been entities or forms of association that were linked to a territorially defined area, but that rather were associations organized for certain purposes.[179] As to the link to property rights, his historical work shows how at the outset both the city and the corporation could be organized to defend property rights. Moreover, as has been noted before, the contemporary large corporation does not serve to protect property rights in the ways that originally justified their being seen as 'private' entities. Likewise, corporations that are based on property rights and corporations that are based on a geographical territory can both endanger and promote 'freedom'. Thus, "[a]ttempting, then, to compare cities and business corporations on the basis of territorial versus nonterritorial organization is not particularly enlightening (...). Surely there can be no presumption of favoring nonterritorial units as such over their territorial counterparts."[180] Finally, justifying corporations on the grounds of protecting the rights of individual to freedom of association is an obvious way of also supporting the existence of public corporations, or cities with significant powers. Cities can also be seen as associations. Even so, the justification in either case is weak, since neither corporations nor cities can be seen as representing the actual right of association of its shareholders/members. Frug seizes this opportunity to point out that there is the possibility of alternative bases for corporate association:

> A corporation could actually be an association of contributors, working, customers, or members chosen on a variety of other bases, with or without a geographic connection. But until such a change occurs, neither the modern city nor the modern business corporation can persuasively be defended in terms of the associational rights of its members.[181]

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178 *Id.* at 1144.

179 Frug refers here to the work of Henry Maine, *Ancient Law* (1861). It should be also borne in mind that many business corporations, such as banks and insurance companies, are territorially bound.

180 G. Frug, *supra* note 155, at 1146.

181 *Id.* at 1148.

In general, Frug argues for an exercise in thinking outside of the Liberal box which considers the city 'naturally' powerless, and business corporations 'naturally' distinct from any form of democratic participation or political accountability. Moreover, he emphasizes how these alternative forms of corporate governance might open up new possibilities that would please everyone: "The city might, for example, become a vehicle for the consumer movement, seeking, like 'private' cooperatives, to lower costs by combined purchasing. There is no lack of possibilities for new forms of city power."[182] Indeed, where Liberalism, by means of the public-private distinction, has inculcated us with the idea that intermediate corporate units are dangerous, Frug insists that these type of public corporations are possible and potentially fruitful. The problem lies in the Liberal contradiction between on the one hand the need for (individual or) local autonomy, and the need, on the other hand, for intervention into that autonomy for the protection of individual rights. "We need not (...) overcome this version of the (...) [public-private] dichotomy to create a basis for local autonomy. We need only establish a *modus vivendi* that accepts with all it dangers a form of city power."[183] However, this will not be easy, for "to do this we need a basic rethinking of liberalism and then a restructuring of our society itself."[184]

5.2.3. Karl Klare on the Public-Private Distinction in Labor Law

Karl Klare takes on labor law as an area pervasively organized around the distinction between public and private, mostly in the form of the distinction between the state and civil society.[185] The tone of the article is combative. Already in his introduction he states:

> *There is no 'public/private distinction'*. What does exist is a series of ways of thinking about public and private that are constantly undergoing revision, reformulation, and refinement. The law contains a set of imageries and metaphors, more or less coherent, more or less prone to conscious manipulation, designed to organize judicial thinking according to recurrent, value-laden patterns. The public/private distinction poses as

182 *Id.* at 1152.
183 *Id.* at 1154.
184 *Id.*
185 Karl Klare, "The Public/Private Distinction in Labor Law," 130 *University of Pennsylvania Law Review* 1358 (1981-1982).

> an analytical tool in labor law, but it functions more as a form of political rhetoric used to justify particular results.[186]

In contrast to the most common forms of critique used by the Legal Realists, this one is a good example of a very ambitious, CLS-style, almost 'total critique'. What is at stake here is no mere contradiction in labor law doctrine, but rather a central organizing principle of labor law as a whole. Klare presents us with an elaborate description and analysis of labor law doctrine, how it is uniformly organized around the public-private distinction, how it appears in various forms in the theory of collective bargaining and grievance processes, and how, in spite of the pervasiveness of the public-private distinction as an ordering concept, it is "devoid of significant, determinate analytical content."[187]

First, Klare presents a series of examples of how important questions of labor law are in fact questions of whether something is public or private. Is an employment contract (in the 'private sector') affected with a 'public' interest or is it simply a 'private' relationship?[188] Do labor arbitrators dispense 'public law' or 'private law'?[189] Is the (private sector) workplace a 'public' or a 'private' place?[190] Is a labor union a 'public' or 'private' entity?[191] Do labor unions perform a 'public' or 'private' function?[192] Are employment rights 'public' or 'private' rights?[193] In all these questions, he demonstrates how there is never an easy answer, and each has often sparked a heated doctrinal and/or judicial debate. Moreover, to the extent that a relatively clear public-private demarcation can be determined, it is often seen to be shifting with time, though "without any relevant change in the underlying sociology of the employment relationship."[194]

Klare then goes on to focus on one particular area in labor law, collective bargaining, that has seen important shifts in what he calls its "public/private

186 *Id.* at 1361 (emphasis in original).
187 *Id.* at 1360.
188 *Id.* at 1362-64.
189 *Id.* at 1365-66.
190 *Id.* at 1366-71.
191 *Id.* at 1371-75.
192 *Id.* at 1375-80.
193 *Id.* at 1380-88; this question subdivides into two, whether the dispute is public or private, and whether the available remedies are public or private.
194 *Id.* at 1363.

imagery."[195] He points out the generally held view that labor law moved from a predominantly private realm of the law to a more public one. However:

> It might appear that during both the 1930s and the 1970s a consensus existed on the need for demarcation between public and private, and that nothing had changed but the categorization of certain subjects. In this view, all that occurred in the case of grievance strikes was a gradual reconsideration of the particular issue, leading to a conclusion that on balance it should be transferred from the domain of private ordering to the realm of public responsibility. In fact, a great deal more was involved. The very idea of 'private enterprise' had to be transformed so as to make it comfortable to believe what earlier was almost inconceivable: that private enterprise and managerial prerogative are consistent with a legal regime that makes employer responses to employee grievances a matter of public policy.[196]

The article then goes on to describe the public-private imagery that dominated discussions in the 1930s during the adoption of legislation that allowed for and regulated collective bargaining. While it would seem that imposing a duty to bargain on employers was a public intervention into the (private) realm of freedom of contract, during the time it was perceived and discussed in more complex terms. On the one hand, it was indeed experienced as a public intervention, but not only by employers, it was also experienced as a curtailing, by legislation, of a long standing practice by unions to resolve conflicts through strikes. Moreover, whereas previously many of these conflicts had been brought to judicial settlement, now the emphasis was laid on the 'private' bargaining processes between employers and employees, while the role of courts became more limited. In that sense, collective bargaining legislation was seen as a form of *deregulation*, and was therefore resisted by both employers and workers' organizations, both of whom were used to operate within an admittedly rougher status quo of strikes and judicial settlement. Henceforth, "publicly sponsored collective bargaining would for the most part be a 'private' system of industrial conflict resolution."[197]

195 *Id.* at 1388-1415.
196 *Id.* at 1389.
197 *Id.* at 1394.

Klare then goes on to examine the changes in labor law undergone during the post-war period. These are explained as characterized by expansions of both the public as well as the private sphere. According to Klare: "Rather than viewing the period as one of uniform, glacier-like governmental encroachment on the private sphere, it is perhaps more helpful to focus on the simultaneous and mutually reinforcing metamorphoses of *both* the public and private spheres in labor law."[198] Public expansionism is seen by Klare in three major trends: increased legal regulation of collective bargaining negotiations, an expanded judicial role in administering the collective bargaining contract, and in an increased statutory regulation of the employment relationship.[199] Likewise, private resurgence in collective bargaining law can be seen in the waiver principle,[200] deference to arbitration,[201] the management prerogatives doctrine,[202] and the narrowing of employee self-help rights.[203]

These double expansive movements of both the public and the private aspects of collective bargaining law in the post-war period were the result of a set of pressures within and around the collective bargaining system, in particular with respect to employer responses to day-to-day grievances. During the post-war period, there was a lot of debate and strife about the grievances process. How should mid-contract labor disputes be resolved? Was this something for arbitration or for the courts? Was there to remain some form of self-help for workers, i.e. peaceful strikes and picketing, or was this going to be limited? What becomes clear in Klare's account is that, rather

198 *Id.* at 1395 (emphasis in original).

199 Klare gives some interesting examples of the public expansionism via increased statutory regulation of the employment relationship: "race, sex, and other forms of invidious discrimination in employment, the dangers of occupational injury and disease, and problems of retirement income security. Others reflect a political consensus that public scrutiny of internal union decision making, finances, and other practices is necessary, that is, that public power should be deployed to curb perceived abuses of private group power." *Id.* at 1399.

200 *Id.* at 1400-01. The waiver principle means that workers may waive the right, by agreeing on a collective contract, to other forms of concerted activity. E.g. by means of an express or implied no-strike clause or a management-rights clause, by which employees give up their right to negotiate the terms and conditions of employment. The collective contract becomes the means and ends of all concerted union efforts.

201 As opposed to judicial or administrative settlement.

202 By which certain areas or subjects are deemed to be at the 'core of entrepreneurial control' and therefore outside of the realm open to collective bargaining. *See id.* at 1401-03.

203 Which happened through outright statutory prohibitions and doctrines designed to diminish legal protection from certain types of concerted activity by workers, and also to limit the right to strike. *See id.* at 1403-05.

than to talk about a shift in the public-private distinction, what one sees is a public realm and a private realm that are so profoundly implicated in each other that they cannot truly be seen as inseparable.[204] One sees both the labor movement and the employers invoke public intervention, legislation and judicial review, to protect their private interests, both invoking public interest arguments in an effort to obtain a private setting where they can bargain as well as address their disputes. This process resulted in the 1970s in an elaborate trade-off, one considered by Klare to be far from ideal for the labor movement:

> Perhaps the story of the postwar tradeoff encapsulates some old Legal Realist lessons, namely that 'private ordering' presupposes that public power has established a regime of rules and enforcement agencies, that the 'unregulated' market is a fiction, and that private ordering is itself a mode of public regulation. [It] is eloquent testimony to the proposition that no private ordering system is autonomous, or, to put it in another way, that the notion of a public/private distinction is incoherent. [It] teaches that the very idea of 'autonomy,' in this and other contexts, must be reformulated in a way that transcends the public/private dichotomy.[205]

The incoherence of the public-private distinction lies in the fact that, when applied to a specific context, it is very easy to question any type of observation that says 'this is purely private', or 'this is purely public'. Since it is a set of 'public' rules that define an arrangement of 'private' contract or arbitration, and since any 'public' arrangement is ultimately defined by 'private' interests and whether they can be successfully articulated as 'public' interests, any attempt at defining an exact demarcation is ultimately logically inconsistent. The public-private distinction ends up being useless as an organizing principle. It stops making sense.

In the last part of his article, Klare goes into a higher gear, and addresses the "ideological functions of public/private rhetoric in labor law."[206] In his view, the Liberal tradition cannot do away with the public-private distinction,

204 *Id.* at 1405-15.
205 *Id.* at 1415.
206 *Id.* at 1415-21.

and at the same time, it fails to make all ends meet, in view of "the eroding power of experience, which perversely refuses to be cabined within this framework."[207] This can be explained and understood if one considers how the public-private distinction sustains a number of ideological presuppositions. In particular, and following the echo's of Marx's critique, Klare argues that the public-private distinction divides social existence into civil society and the political order, into one of work and one of politics, into one of commerce and one of democracy, into participating in the politics of public decision-making and being excluded from the politics of private enterprise.

> In the labor context, the paradigmatic form of this form of conceptual repression is the belief that employees lack the capacity collectively to organize and govern complex industrial enterprises. The fundamental tenet of democratic politics, that human communities are capable of fashioning appropriate institutions for guiding their destinies, is not applied in the American workplace. Rather, participants in the community of work must be made to believe that industry and commerce can only function on a largely authoritarian basis, and the public/private distinction is used to explain why the basic principles of democracy do not apply in the workplace. The distinction is also used to induce consent to hierarchy by disguising it and by fostering the appearance of employee participation.[208]

This denial of worker and popular participation in industrial life, which is the consequence of thinking in terms of public and private is described by analyzing three issues: First, popular control of investment decisions is out of the question, since the notion of 'private power' is presented as natural and as pre-governmental. In fact, it would be seen as an intervention in a previously unregulated realm to suggest this. Second, worker control of the labor process is impossible because "the promise of freedom [resides] only in the part of life that is presumptively amenable to collective self-regulation, the polity."[209] So, the possibility of collective self-governance is limited, because this is deemed to be only possible in one particular realm of the

207 *Id.* at 1416.
208 *Id.* at 1417.
209 *Id.* at 1419.

social world. Third, the place of the individual in union governance is seen as being in opposition. On the one hand the individual, on the other hand the state. Intermediate forms of organizing are deemed to be instrumental to either the individual or the state.[210] "Union activity is conceived primarily in instrumental terms, not as a collective experience for employees in the emancipatory project of becoming the authors of their own destinies."[211] In this way, workers can get stuck between a union that does not represent them adequately, and a state that only sees them as representable through a union. Klare ends up by invoking the possibility of transcending the limitations imposed by the Liberal public-private distinction, to enrich society and individuals with more possibilities of self-organizing.

5.2.4. Paul Brest on State Action and Liberal Theory

In his 1982 commentary on a case by the US Supreme Court, *Flagg Brothers v. Brooks*, Paul Brest critically analyses the US legal doctrine of State Action.[212] The doctrine of State Action is a part of US Constitutional Law, and in particular plays an important role in the law that, under the 14th amendment, no one shall be arbitrarily deprived of property by the state without due process. State Action doctrine helps judges to determine whether an expropriatory action was performed by the state or by private actors: "The doctrine of state action is an attempt to maintain a public/private distinction by attributing some conduct to the state and some to private actors."[213]

According to Brest, the *Flagg Brothers* case demonstrates how the State Action doctrine cannot be sustained. This case concerned a conflict between a moving and storage company and the owners of personal belongings stored in the company's warehouse.[214] Since storage fees had remained unpaid, the company sold the goods, something that was allowed by the law. The owners challenged the sale of their belongings on the grounds that they had a right to a judicial determination of ownership before the goods could be sold. The US Supreme Court dismissed their claim, arguing that the sale was not state action, but private action, and that it therefore fell outside of the protection of

210 Here, Klare refers to Frug's article: G. Frug, *supra* note 155.
211 Klare, *supra* note 185, at 1421.
212 Paul Brest, "State Action and Liberal Theory: A Casenote on *Flagg Brothers v. Brooks*," 130 *University of Pennsylvania Law Review* 1296 (1981-1982).
213 *Id.* at 1301.
214 Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978).

the 14th amendment. In finding this, the Court was divided, with the majority arguing that the sale was private action, while the minority argued that the sale would not have been possible without state action.

Brest analyses the debate between the majority and minority in the context of numerous other Supreme Court judgments which seem to be unable to give a clear set of criteria for determining, without doubt, when an action is attributable to the state. He connects this debate to the perennial debates in legal theory between the positivist, Hobbesian idea that citizens entering into civil society possess only those rights granted by the lawmaking sovereign, and the natural rights version of Locke, which held that the citizens retain certain inalienable rights that the state may not infringe on. Within US constitutional law debates, the main issue has centered on the extent to which the courts may protect interests or rights beyond those explicitly mentioned in the document. In particular, this debate centered around whether the extent of 'liberty' and 'property' in due process clauses should be determined by legislative policy or by 'transcendent principles'.

Brest refers to the infamous *Lochner* case, so popular in Legal Realist circles,[215] where Justices Peckham and Holmes crossed swords over a law limiting the working hours of bakers. Peckham, writing for the majority, invoked a natural and absolute liberty of employers and employees to contract without government interference, while Holmes insisted that the definition of rights was a matter of legislative policy, and not of judicially discovered 'transcendent principles'.[216] At the time of the *Flagg Brothers* case, the majority of the Supreme Court seemed firmly on the side of a positivist constitutionalism, which meant that rights were seen as only derived from sovereignty, by explicit legislation, and that in fact, they only existed by virtue of the state's protection of them. This is why the state action doctrine was so important, since not all statutory rights were meant to allow invocation of the 14th amendment. In the words of then Chief Justice Rehnquist:

> It would intolerably broaden, beyond the scope of any of our previous cases, the notion of state action under the Fourteenth Amendment to hold that the mere existence of a body of

215 *See supra* note 98 and accompanying text.

216 See Brest, "State Action and Liberal Theory," *supra* note 212, at 1297. Since the *Lochner* case, however, the pendulum has swung in the direction of 'constitutional positivism'.

> property law in a State, whether decisional or statutory, itself amounted to 'state action' even though no state process or state officials were ever involved in enforcing that body of law.[217]

According to Brest, Rehnquist wants to have it both ways. On the one hand he wants there to be a clear positive standard that there is no right unless clearly and explicitly granted and enforced by the state. On the other hand he finds it 'intolerable' that that would mean that all action was to be seen as being state action. Brest gives examples of cases involving creditors' remedies, and in particular 'self help' remedies such as the one applied in the *Flagg Brothers* case, and how the Court decided if there was state action or not. In some cases it seems as if the participation of a state official was the deciding factor. In other cases that involved 'garnishment' by a state official, a mere formality, the picture is less clear, because of the fact that the state official cannot act unless s/he is called upon to do so by a creditor. In Brest's words, the difference between the garnishment and the self-help cases is hardly a justification to consider one 'state action' and the other not:

> In the garnishment cases, the state's threat of sanctions *aids the creditor in gaining possession* of the debtor's property, while in the self-help cases the state merely *grants the creditor the power or right to keep or dispose of property* that he came into possession of without the state's assistance.[218]

For Brest, the state is equally implicated in both types of cases. The fact that this means that there is no structural or conceptual difference between the role of the state in these cases, and that this leads to the situation that Rehnquist found so intolerable, he considers "a dilemma of the constitutional positivist's own making."[219] The question of how one can decide whether anyone who claims an interest in property is allowed to a judicial hearing is, ultimately, a question of *substantive policy* or *substantive law*,[220] and not a

217 *Id.* at 1301.
218 *Id.* at 1312.
219 *Id.* at 1313.
220 Substantive policy refers to the policy choice of whom one wants to protect against property deprivation; substantive law refers to the inability to decide on the procedural question of whether it involved state action without looking into the substantive law of property or the substantive law of due process. *See id.*, at 1313-14.

question of how one applies the state action doctrine. One remaining question that is at stake here is whether the Court could see an act of legislation as state action, something that was denied in the *Flagg Brothers* case. Here Brest gives a set of examples concerning equal protection claims[221], claims based on retroactivity[222], as well as substantive due process and uncompensated takings[223], to demonstrate how this often has been the case.

Brest goes on to consider the important function played by the state action doctrine, which is to limit the exercise of (federal) judicial power and the protection of the autonomy of individuals and legislature from (federal and/or judicial) intrusion. Brest wants to see to what extent applying the state action doctrine is better, in the sense of more useful and less manipulable, than dealing with these substantial issues directly. In order to do so, he looks at a number of different approaches judges have applied when looking at state action. The first is 'sifting and weighing', "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance",[224] an approach considered completely unreliable by Brest. Second, 'authorization and encouragement' of private actors by the state has been invoked a number of times,[225] and is another approach considered too malleable by Brest. Third, a law can be seen as a 'delegation of public function' to a private actor, and thereby give cause to due process scrutiny. Brest however observes, after analyzing a bunch of cases in which this argument was used, that "[b]ecause it is not possible to describe the essence or scope of the government function or the exclusivity with which it is performed with any degree of specificity, the public function doctrine invites manipulation."[226] Finally, 'formalism' would mean that one only looks at who is acting directly against the complainant, and that one would only offer judicial protection in cases in which the one acting is a state official. Brest finds the certainty promised by this simple approach to be deceptive and ultimately unreliable. Judges and police are ultimately involved in all law and contract enforcement, and also, the state

221 *Id.*, at 1315-16.
222 *Id.*, at 1316-17.
223 *Id.*, at 1317-22.
224 *Id.*, at 1325, *citing* Justice Clark in the case of *Burton v. Wilmington Parking Authority*; 365 U.S. 715 (1961).
225 Notably the case of *Reitman v. Mulkey*, 387 U.S. 369 (1967) (in which the Supreme Court agreed with the California Supreme Court that the legislative act was intended to authorize racial discrimination), *cited in* Brest, *supra* note 212, at 1325.
226 Brest, *supra* note 212, at 1329.

often contracts with private actors for all kinds of functions.

In the end, Brest considers that constitutional positivism is plagued by its outright rejection of a 'natural' sphere of rights, which would help it deal with these questions. Even so, "[t]he doctrine does serve an important ideological function: it reflects and reinforces the ideas of natural spheres of individual autonomy and a natural regime of property rights."[227] According to Brest, what is needed is a substantive political theory about the extent of these rights and the extent of the state's power to interfere with these rights. The current situation of apparent pragmatism only invites manipulation and mystification. It has been used to protect the powerful against the claims of the relatively powerless, and has "seldom been used to shelter citizens from coercive federal or judicial power."[228]

Brest's article is an example of how Legal Realist insights can be refined in order to expose the political value and ideological function of an apparent legal technical doctrine. In his connecting move to the ideological culprit, 'Liberalism', he distinguishes himself from the Realists. I would nevertheless call his critique a 'soft' CLS critique, because he argues that the problem lies in the manipulability of the doctrine, and the solution in its replacement by a substantive theory. Other CLS scholars would probably have argued that 1) the collapse of the public-private distinction in state action doctrine demonstrates its logical contingency; and 2) this means that it is sustained by ideological biases and agenda's. These other CLS scholars might have argued that a substantive theory, such as the one that Brest seems to be arguing for, would reproduce the public-private distinction, or the Fundamental Contradiction, in a doomed effort to resolve it. In spite of his reference to Liberal ideology, his effort to step outside of the Liberal box is somewhat half hearted.

5.2.5. Frances Olsen on the Family and the Market

In her seminal piece on the family and the market, Frances Olsen takes the CLS analysis of Liberalism's reliance on the public-private distinction to another level.[229] Instead of focusing on the ever-present moves and deployments of

227 *Id* at 1330.
228 *Id.*
229 Frances Olsen, "The Family and the Market: A Study of Ideology and Legal Reform," 96 *Harvard Law Review* 1497 (1982-1983).

the public-private distinction, she adds a couple of other dichotomies to the soup: the family-market dichotomy, and the man-woman dichotomy. Her article marks a turning point in critical scholarship, with the advent of feminist critiques of patriarchy and its public-private distinction,[230] but is still very much a part of CLS attacks on what she calls the 'dichotomous thinking' that is one of the essential characteristics of Liberal ideology.

The focus of her project is the family and recent debates about the family and family values. As she starts out her analysis, she makes it clear that "this debate is already boring. Admittedly, it can stir strong emotions, but on some level we all know it will not lead to any solution. Rather than join the debate, this Article examines the terrain upon which the debate has been conducted."[231] These candid observations and the way she announces that she will avoid joining the debate and taking a side in that debate are important signs of her structuralist perspective.[232] Her attention is guided away from investing in the debate itself towards an examination of the discursive map, or of the conceptual framework that contains it. This map can be reduced to the way a limited number of dichotomies, in their different manifestations, interact with each other. Once you can see, at a glance, how a debate is composed of a very limited set of arguments that can articulate all of the positions within that debate, the debate has become 'already boring'.

Olsen starts out by explaining how our thinking about both the family and the market are structured by the public-private distinction. Liberal theory considers both to be elements of the 'private realm,' to a large and important extent, free from state intervention. The market operates with its own laws, the market laws, with the state adopting an attitude of *laissez faire* that allows the market to be free and to operate according to its natural processes. The family is a domain of intimacy, privacy, and the quintessential example of an area of non-intervention by the state. With regard to both, the state is considered to be 'neutral', and the public-private distinction is meant to articulate that neutrality. Whatever goes on in the market or in the family, the state should think twice before moving in with its intervening policies. For most people, it seems relatively clear what is meant when one speaks of the 'market' or of the 'family'. Both are perceived as capable of existing in separation from the state.

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230 *See infra*, Chapter 7 (discussing feminist critiques of the public-private distinction).
231 Olsen, "The Family and the Market," *supra* note 229, at 1497.
232 See *infra* Section 5.3.4 (discussing structuralism in CLS).

This basic set of assumptions has, of course, been problematized. Olsen makes reference to Marx's critique and that of the Legal Realists, as well as to a growing number of arguments from feminist scholars. Drawing on these roots, Olsen describes how the state is separate from neither the family nor the market. It is profoundly implicated in both. Even in the most non-interventionist mode, the state has to enforce contracts or deal with battered wives who kill their husbands. The critique points out that the myth of non-intervention serves as a way to justify, under the mode of 'it's only natural', how forms of serious injustice are perpetuated in both these areas, and how the ones who are disenfranchised by this status quo of non-intervention in certain areas are refused access to the support and enforcement mechanisms of the state. The public-private distinction, with its idea about non-interference by the state in matters deemed 'private', serves the interests of the owners of capital as well as the interests of men. So, in fact, the public-private distinction, with its idea that both the market and the family should be areas of non-intervention by the state, treats both the market and the family in the same way.[233]

These ways of categorizing the market and the family are by no means static. In tune with other CLS work, Olsen is keen to elaborate on how both social institutions are embedded in history, and on how our perception of both is affected by how we see both institutions in a historical perspective. In this sense, a common story is the so-called 'lag theory', which sees the market as the institution that has been most successful in modernizing itself away from feudalism. The idea is that the market has been the more progressive and Liberal of the two, while the family has been lagging behind. In this narrative of progressive development and change, the more backward family has been reproducing, albeit at a slower pace, the developments of the market. Whereas in feudal times hierarchy was the norm, and there was no distinction between the state and civil society, the market soon became a realm where legal equality and the absence of state intervention were the main characteristics. Inequality was no longer a part of the formal ordering, but rather the result of unequal talent, effort, comparative advantage, and the laws of supply and demand. In more recent times, it has been acknowledged that the market requires regulation, and that the state should play a more proactive role in the promotion of an equality that is more than merely juridical.

233 Olsen, "The Family and the Market," *supra* note 229, at 1499-1513.

Meanwhile, though the family has remained a very hierarchical institution, it has seen its own development towards more and more formal and juridical equality. Whereas women used to be considered as a legal appendix to the husband, in recent times they have been increasingly seen as having equal rights to, say, child custody. More recently, an acknowledgement of the fact that formal equality sustained a continued material inequality, has led the state to increasingly regulate certain areas of family life, such as education, child welfare, and domestic violence. Though both institutions have had a different degree of development towards a model liberal/welfare state institution, their trajectory is seen to be a parallel one.[234]

One aspect of this process that Olsen highlights is how the market became the basis for a critique of the family. The problem with the family was seen to be that it was not enough like the market. Feminists in the 19th century used the imagery of the pre-liberal market (slavery and serfdom), to characterize the family that required modernization. In the early 20th century, it has been an invocation of the individualism that prevails in the market sphere that has functioned as a compass for family reform. More recently, feminists have criticized the family for its parallel with the free market, and have called for more regulation in the direction of the welfare state model.[235]

Olsen presents us with an alternative picture, one in which the family and the market are radically opposed to each other. This she refers to as the 'negation theory', and it describes how in the different historical periods the market and the family were seen as each other's opposites. Whereas the market is about competition, the family is about cooperation. The market was thriving on an ethics of individualism, while the family was the bastion of altruism. Sharing and self-sacrifice was foolish in one realm, while it was a virtue in the other one. Meanwhile, state intervention was thought of as being radically different in each of the realms. With regard to the market, all economic transactions and all relations between the actors were fully legalized, by means of tort law, contract law, property law, corporate law, etc. Meanwhile, state intervention in the family meant 'delegalization'. All these areas of law did not apply, or

234 *Id.* at 1513-18.
235 *Id.*, at 1518-20.

not to the same extent, in family relations.[236] The only choice open to its actors was who to marry and the role of the state in that sense was not considered to be an intrusion.

> Thus, the marketplace was said to be left alone by the state if courts blindly enforced contracts and refused to make any independent judgment of the equities in the existing relationship between the parties. In contrast, the family was said to be left alone by the state if courts flatly refused to enforce contracts between its members and insisted on authoritatively defining family relationships. Market legalization and family delegalization both avoided detailed state investigation and ad hoc readjustments, but they did so in opposite ways. As the market became 'private', the state withdrew its controls over the individualism of that sphere. In contrast, the state treated the family as 'private' by trusting to the altruistic principles thought to animate family life.[237]

Of course, this radical opposition did not always correspond with what was going on. The negation theory is merely a sketch and does therefore not do justice to the higher levels of complexity in both the market and the family. Self-interest was an element of family life, and sacrifice was not always shared. A significant reason for the legalization of the market space, allowing judges to effectively participate in the definition of market decisions, was a form of altruism in the sense that it was a form of solidarity.[238] A corollary of this was the idea that the market and the family were interdependent on each other. The harsh life of the market was seen to be more bearable thanks to the family, which offered a refuge. The market on the other hand served as a realm where people could escape from the constraints of family life.[239] Again, Olsen highlights how one realm serves as a critique of the other. This time the family allowed for a critique of the market. The market was too harsh and too competitive, and this needed to be corrected by making it more cooperative, by

236 This has also been referred to, more recently, as "family law exceptionalism." *See generally* the Harvard Law School Program on Law and Social Thought, Harvard Law School European Law Research Center, and the University of Toronto Faculty of Law's Continuing Workshop, "Up Against Family Law Exceptionalism."

237 Olsen, "The Family and the Market," *supra* note 229, at 1522.

238 *Id.* at 1522-24.

239 *Id.* at 1524.

allowing more emphasis on the 'human values' that were so central in the family. The language of the family, of paternalism and care, was deployed in the market sphere, sometimes to condemn inhumane market conditions, sometimes when a company wanted to portray itself as really caring for its employees.[240]

Olsen thus sketches the two realms or social institutions of the market and the family as discursively integrated in various and complex ways. They both hover in similar and different ways along the public-private terrain. They are each other's parallel and each other's opposites; they are interdependent and complementary. They are also each other's models, as an example and as a critique. The degree to which this discursive interpenetration operates in concrete ways is made clear in the second section of her article, when she looks at legal reforms in this field. Olsen concentrates on the reforms meant to improve the status of women and finds that legal reforms with this objective can be organized into four categories: 1) making the family more like the market; 2) Making the family more like the ideal family; 3) making the market more like the ideal market; and 4) making the market more like the family. Thus, the dichotomy is not overcome but presupposed.

> Despite its simplicity, this conceptual scheme has considerable descriptive and analytic power. First, the extent to which the four categories capture the broad contours of reform efforts is striking and suggests that insight may be gained from considering such efforts in relation to the dichotomy between market and family. Second, when the reforms are examined from this perspective, a pattern in their successes and failures emerges. The reforms that make the market more like the ideal market or the family more like the ideal family tend to eliminate imperfections in each institution, but as long as we view market and family as a dichotomy, our ideal images of market and family will remain incomplete and unsatisfactory. The failures characteristic of the market sabotage the market reforms, and the failures characteristic of the family sabotage the family reforms.[241]

240 *Id.* at 1525.
241 *Id.* at 1529.

This story, in which the two realms or institutions are so discursively implicated in each other that they cannot come to each other's aid without bringing in their own sores, is what makes Olsen's analysis so structurally tight. It also illustrates why debates surrounding the market and the family can begin to sound so predictable. Gone is the progress narrative of Liberalism. Instead, one sees a 'prison house of language' in which the different proponents and contrarians run circles around each other, "between equality and individualism on the one hand, and altruism and hierarchy on the other."[242]

Olsen goes on to describe these four different categories of legal reform in detail. First, she looks at efforts to improve the status of women by reforming the family and making it more like the market.[243] Legal reforms have given women more independence and equality, and women have benefited from this, but with this came also a loss of the altruism in the family, which meant that "[t]he reforms have tended to give women equal rights, but they have not democratized the family." They have been empowered, but this has resulted in a degree of isolation. Another way in which the family has been reformed to become more like the market is by legalizing family relationships further, to make marriage more like a contract, based on mutual consent, to also allow for intra-familial contracts to be legally enforceable, to allow property law, tort law and even criminal law to apply in family relations. Though these reforms have benefited women in a number of ways, they have also carried with them the problems of the market, with its asymmetry in bargaining power, which is generally to the advantage of men. One final reform that is geared towards making the family more like the market is that of the regulation of the family, which have been designed to create more 'real equality' in the family on the basis of the model offered by the welfare state market. As in other examples of 'affirmative action', these forms of differential treatment, beneficial though they may be, also may reaffirm certain differences in status or role.

A second set of reforms has sought to improve the family by making it more like the ideal family, by increasing its components of altruism and

242 *Id.* at 1530. *See also* Duncan Kennedy, "Form and Substance in Private Law Adjudication," 89 *Harvard Law Review* 1685 (1976) (analyzing private law debates about form and substance in the light of the distinction between individualism and altruism).

243 Olsen, "The Family and the Market," *supra* note 229, at 1530-1539.

solidarity.[244] Reforms in the area of financial dependence are an example of this. Shared property ownership and a husband's duty to provide support even after divorce are examples of this. Olsen points out that this type of reform increases sexual inequality and reinforces hierarchy. Another example is that of 'deformalization' by which Olsen refers to the institution of family courts, which are meant to offer a form of alternative dispute resolution to family life, away from both formal adjudication and a completely delegalized situation. Again, though these might offer many benefits to women, they may also reinforce hierarchy and domination in their effort to have families reach consensus and in view of the already mentioned patriarchal asymmetry in bargaining power. Moreover, they may also lead, like other forms of regulation, to too much control being exerted by government agencies.

Third, Olsen looks at reforms aimed at improving the status of women by making the market more like an ideal market.[245] This is done by eliminating discrimination against women and making the market *less* like the family. Some of these reforms are designed to integrate women into the free market. These are justified by arguing that treating women equally is beneficial for rational profit maximizers. For instance, banning sexual harassment can be argued to expel that practice from the market place where it does not belong. These reforms, helpful though they are to women, also have certain adverse effects. They might benefit women who adopt particularly male roles, and also reaffirm the status quo "by particularizing and privatizing inequality," "encouraging women to blame themselves for their failures in the market," and "encourag[ing] women to seek individualistic, inward-looking solutions to social problems."[246] Moreover, these reforms treat discrimination as an irrational aberration from the otherwise normal and rational performance of the market. Other reforms are designed to have the welfare state help women through affirmative action policies that counter the sex-blind discrimination of the market place and promote a more material equality between the sexes, to the benefit of the market. However, as mentioned before, affirmative action policies may induce women to blame themselves, not only when they fail in the market place, but also when they succeed. Moreover, it also contributes to justify a system of gendered oppression by exalting the success of the small group of women that benefit from these policies.

244 *Id.* at 1540-1542.
245 *Id.* at 1543-59.
246 *Id.* at 1552.

A final set of reforms attempt to force the market to be more responsive to human needs by making the market *more* like the family. These often carry within them stereotypes that have been used to justify gendered hierarchy in the family, for instance by reiterating ideas about women's inherent frailty and special needs. The altruism that these reforms try to induce is often linked to hierarchy. Paid maternity leave, for instance, beneficial though it may be to women, also detracts from the normalization of women's participation in the labor market, by not allowing all workers to take leaves whenever there are socially desirable reasons for them to do so. Moreover, they leave all types of prejudice against women who take maternity leave unscathed and may even enhance them. In short,

> Both sets of strategies—reforming the family and reforming the market—will sometimes meaningfully improve the lives of women, but none of these strategies should be advocated without qualification: none is adequate for creating democratic, sharing relations among people.[247]

Finally, in her last section, Olsen attempts to explore the conditions that are necessary to get out of the enclosed framework of the market/family dichotomy. Like Frug and Klare before her, she considers this dichotomous thinking to be stifling on the imagination. "Dividing life between market and family compartmentalizes human experience in a way that prevents us from realizing the range of choices actually available to us. Much of social and productive life seems effectively beyond our control."[248] Olsen spends the final pages of her article focusing on the duality of gender, and seeing in the transcendence of the distinction between man and woman a possibility to finally transcend the gendered dichotomy of the family and the market. The answer to the constriction of dichotomous discourses seems to lie in the transcendence of the main constitutive dichotomies. "Rather than shades of grey as an alternative to all black and all white, I envision reds and greens and blue."[249] Her final attempt at transcendence of the gender dichotomy

247 *Id.* at 1560.
248 *Id.* at 1564.
249 *Id.* at 1578.

aside, which was written on the eve of the advent of queer theory[250] which does exactly that, the main strength of Olsen's analysis lies in the way that she connects these different Liberal dichotomies to each other, and in the way that she thoroughly and with an impressive eye for detail elaborates how these dichotomies and their connections with each other have been expressed in a wealth of material on law and legal reform.

5.2.6. Duncan Kennedy on the Decline of the Public-Private Distinction

The final piece in this selection of articles is Duncan Kennedy's "The Stages of the Decline of the Public/Private Distinction."[251] This article was written for a symposium on the public-private distinction.[252] It is very short, a mere nine pages, but very dense and quite unconventional in terms of legal scholarship. Moreover, its tone is somewhat enigmatic; at some times it seems very optimistic, and at others cynically ironic. Kennedy starts off by arguing that for any legal distinction to be successful, it must (1) be possible to make the distinction, and (2) make a difference in the outcome of cases. He then observes that "[w]hen people hold a symposium about a distinction, it seems almost certain that they feel it is no longer a success."[253] In Kennedy's opinion, the main Liberal distinctions[254] have been declining since the beginning of the 20th century and he wants to see if he can describe the stages of this decline

250 *See, e.g.,* Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (1990) (offering an important 'post-structuralist' theory of the transcendence of gender roles); Janet Halley, *Split Decisions: How and Why to Take a Break from Feminism* (2006) (discussing the reifying effects of feminism on the distinction between male and female and the need for a queer perspective).

251 Duncan Kennedy, "The Stages of the Decline of the Public/Private Distinction," 130 University of Pennsylvania Law Review 1349 (1981-1982).

252 The entirety of Volume 130, Issue 6 (pages 1289-1609) of the *University of Pennsylvania Law Review* is dedicated to this symposium, and it includes, among others, the articles by Karl Klare and Paul Brest discussed in this section. The symposium illustrates the strong divisions at the time between the so-called Liberal scholars, who basically believed in the consistency and coherence of legal doctrines and the CLS scholars, who argued against the existence of this coherence. *See infra* Section 5.3.1 (discussing indeterminacy), Chapter 11 (discussing Liberal opposition to the critiques). At this stage I want to note that Kennedy's article is very insightful but also very provocative of those who feel they need to defend Liberal legalism.

253 Duncan Kennedy, "The Stages of the Decline," *supra* note 251, at 1349.

254 Some of these basic liberal distinctions are: state-society, public-private, individual-group, right-power, property-sovereignty, objective-subjective, freedom-coercion, contract-tort, etc. These distinctions are all basically the same since "it is hard to define any one of them without reference to all." *Id. See also infra* notes 398-399 and accompanying text.

using the public-private distinction as an example.[255]

In the first phase of the decline, the distinction is still in good health and successful, until some cases arise with large stakes, materially or symbolically. "Hard cases with large stakes engage people's energies in the task of manipulating the distinction, analyzing it, fretting about it."[256] This means that the solidity of the distinction starts to come under a lot of pressure.

This in turn will lead to the second phase, in which intermediate terms are developed. In this phase it is recognized that some things are on neither side of the distinction, they are neither entirely public nor entirely private, but rather have some of the characteristics of each pole. "The intermediate entity gets treated 'as though' it were public for some purposes, and 'as though' it were private for other purposes."[257] The boundary has become a muddy and grey area.

The third phase, in which the distinction collapses, happens "when troublemakers begin to argue that the distinction is incoherent because, no matter how you try to apply it, you end up in a situation of hopeless contradiction."[258] The examples he gives make clear that his 'troublemakers' are the Legal Realists (Cohen, Hale, Jaffe) and that the period of collapse started happening in the inter-bellum. This phase of collapse, however, can lead to extreme consequences which will lead lawyers, judges and scholars to resort to the fourth phase.

The fourth phase is one of 'continuumization.' In this phase the grey area has taken over the entire field. The polar situations, in which something is clearly and exclusively either public or private, hardly happen anymore and most situations or entities have characteristics of both. The real challenge here is to figure out what the consequences are of being on one particular spot in the continuum. "In continuum consciousness, the ideal is a range of legal responses exactly calibrated to the range of fact situations: an overlay of

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255 As in his article on Blackstone's *Commentaries*, he seems to be certain that the distinction is moribund. *See* Duncan Kennedy, "The Structure of Blackstone's Commentaries," *supra* note 120; *supra* Section 5.2.1.

256 Duncan Kennedy, "The Stages of the Decline," *supra* note 251, at 1350.

257 *Id*, at 1351.

258 *Id.*

one continuum on the other."[259] This is done by listing 'factors' that must be 'balanced', invoking an imagery of delicate precision and fine quantitative gradations, very much unlike the bluntness of simpler times, when things were either on one or the other side of the equation. However, this also means that there is more room for disagreement and it also means that the distinction itself can hardly play a practical role in the resolution of these disagreements. "The distinction is dead, but it rules us from the grave."[260]

According to Kennedy, the last two phases of the decline were playing out at the time of writing. The fifth phase he calls 'stereotypification', which means that "people come to see the overt, formally rational part of the argument about where an institution fits on the continuum, and about what mixed package of rules of procedure it should operate under, as involving the mechanical manipulation of balanced, pro/con policy arguments that come in matched pairs."[261] The problem here is that arguments describing why a particular institution or situation is public can also be deployed to argue that practically any other institution is public, and vice versa with arguments why something might be private. The legal battle of arguments seems to have become a mere exercise. "We can do it so well we can't believe in it any more."[262]

Finally, the sixth phase he calls "somewhat hypothetical", and he adds "I'm quite convinced that there is something to my description of stages one through five, but six is more of an attempt to guess why some of us find legal thought so freakily inadequate."[263] The sixth phase is that of 'loopification', and one in which legal consciousness is loopified, which means that the two ends of the continuum have more in common with each other than with the middle area between them. One can start at one end of the continuum and if one keeps moving towards the other end one will reach the place where one started. In order to illustrate this, he comes up with the following figure:[264]

259 *Id.* at 1353.
260 *Id.*
261 *Id.*
262 *Id.* at 1534.
263 *Id.*
264 *Id.* at 1355.

Loopification of the Public/Private Distinction:

Very large corporations

Small businesses

Lawyers/doctors

Individual workers

Labor unions

Consumers
Investors
Tenants
Clients

Public utilities

Port authorities

School boards

Churches

Local government with home rule

Married persons

Legislators
Judges
Executives

Parents

In his reasoning, one will start at the most 'public' part of the chart, with the legislators, judges and executive, and move in clockwise direction until one reaches 'parents', the area of greatest 'privateness'. At the same time, however, this sequence brings you back to where you started. "One ends up where one began because of all the ways in which we think of the family and the political community as close together rather than far apart."[265] First, both the family and the state are 'units of governance', and the actors within them are supposed to serve, altruistically, an overarching ideal, unlike the market actors in the middle, where actors are supposed to pursue their own interest. Second, the way social and political philosophers speak about the state and the family is all too similar and very distinct to the way the market is theorized. Third, the state has always been seen to have an interest in the family, which is seen to perform a 'public' function, that of reproduction and socialization. "It often seems that the legislator sees parents as a mere

265 *Id.* In making this point he refers to Klare, *supra* note 185; Olsen, "The Family and the Market," *supra* note 229; and Duncan Kennedy, "Distributive and Paternalist Motives in Contract and Tort Law, with Special References to Compulsory Terms and Unequal Bargaining Power," 41 *Maryland Law Review* 563 (1982). Another well known example of such a 'loop' is the one depicting political groups in the US, where left wing anarchist can be seen to have a lot in common with right wing libertarians, more so than each of these have with the democratic and republican center. So, moving from the most conservative position 'leftwards' will get you to a place that is a lot as where you started.

adjunct or subagency of the state."[266] Finally, the market, or the economy, or the world of work are often seen as a 'public sphere', against which one's religion, political conviction, and sexuality, all in the same category now, are opposed as being essentially 'private'. Kennedy sums it up: "Following out these lines of similarity and difference, one simply loses one's ability to take the public/private distinction seriously as a description, as an explanation, or as a justification of anything."[267]

Kennedy gives examples of cases in each of the phases that he sketches, even if only a few. His narrative has a logical flow and is compelling. In fact, it makes a lot of sense. At the same time, it sounds very strange to read about the demise of the public-private distinction, when that distinction still plays such an important role. In his brief conclusion he talks about the 'demise' of Liberal legalism, something that is equally difficult to accept, even if one agrees with his analysis of the stages of decline. The way that I make sense of it all is by reading it as an ultimately ironic argument. Irony, however, I take very seriously, for it is a very old and very powerful form of critique. It is about how playing with the possible meanings of language can unearth the problematique of something, and idea, an argument, a status quo, that is taken for granted or is considered 'common sense', in a way that is both reassuring and unsettling.[268] Kennedy's argument can be seen, in this way, as having two layers, or channels, or registers. One is that of a critique in the analytical sense, in which he uses a logical narrative to emphasize the ultimate contingency of the public-private distinction, and how it is something that can have a significance and a lack of it, depending on the context and on the role it is perceived to have. The other is the ironic critique, in which he bases himself on this logical contingency in order to allow, or even to push, the reader to imagine a public-private distinction that is an almost irrational figment of the imagination. Both critiques are made possible by the historicizing narrative of the article, which allows us to make sense of the fact that the distinction is simultaneously significant and insignificant, since its (in)significance depends on the historical context

266 Duncan Kennedy, "The Stages of the Decline," *supra* note 251, at 1356.

267 *Id.* at 1357.

268 Irony, which comes from the Greek *eironeia*, or simulated ignorance, can mean, according to the *Oxford English Dictionary*: the use of language with one meaning for a privileged audience and another for those addressed. Its history in Western philosophy is very extensive. *See generally*, Claire Colebrook, *Irony* (2003); Linda Hutcheon, *Irony's Edge: The Theory and Politics of Irony* (1994).

in which it is being deployed. In the next paragraph I will further reflect on these and other aspects of the CLS take on the public-private distinction.

5.3. Common Traits in the CLS Critique of the Public-Private Distinction

If one steps back from the details of the individual CLS critiques of the public-private distinction and takes an overall look at all of them together, a number of common traits become visible. Articulating these commonalities allows us to see the general CLS contribution to our thinking about the public-private distinction, to see how it has a set of characteristics that set it apart from its precursors in Marx and Legal Realism, and to contemplate on what, if anything, is left of the public-private distinction after CLS. I will try to present these characteristics in isolation from each other, although I hope that the reader will see their interconnections.

5.3.1. An Emphasis on Logical Contingency or Indeterminacy

All of the CLS authors that I have analyzed here emphasize, in one way or another, that the public-private distinction is not something to be taken at face value. Rather, it is seen as intrinsically problematic and incoherent. They have done this in various, mutually reinforcing ways. Sometimes incoherence and indeterminacy are presented in strictly analytical terms, sometimes in broader aesthetical/philosophical ones. Duncan Kennedy came up with the idea of the Fundamental Contradiction[269] in order to connect our immediate understanding of this very common dichotomy, the fact that we all know, immediately, what it means, to our perhaps less immediate (but definitely contrary) experience of the fact that we are talking here about a *contradiction*, something that, once we take a really close look at it, does not make sense anymore. If the public-private distinction offers us the comfortable *prima facie* conceptual clarity of clear boundaries, its fundamentally contradictive nature pushes us back into a recognizable existential *Angst* of real life in which things are less clear.

269 *See supra* Section 5.2.1.

At this point it is important to note that a critique is never made in isolation. It is always part of a dialogue or debate—cultural, political, or philosophical.[270] When Kennedy posits the Fundamental Contradiction as a way of looking at things, he is doing so in dialogical opposition to the way in which most scholars think and write about those same issues. A critique, in this sense, is a disruptive intervention into a way of thinking and talking, into a generally comfortable discourse, by confronting it with a counter-narrative that changes its most essential precepts and presuppositions. In a later publication, which was set in the form of a conversation between Duncan Kennedy and Peter Gabel (another CLS scholar), Kennedy recanted on the contradiction.[271] Not because he felt that it did not have analytical value, or because he felt that he had been terribly wrong. Rather, he regretted that its relative success in CLS circles had caused it to become too much of a dogmatic formula, an intellectual slogan that was used for too many purposes, left and right.[272] I feel it is important to give an extensive citation of this moment:

> First of all, I renounce the fundamental contradiction. I recant it, and I also recant the whole idea of individualism and altruism, and the idea of legal consciousness, very much for the reasons you just said. I mean these things are absolutely classic examples of "philosophical" abstractions which you can manipulate into little structures. You know, there are four things, and you can have this one and not have that one; you can have that one and not have this one. You can create a little thing in which your position, vis a vis Kierkegaard is, you agree with Kierkegaard on these four points and disagree with Kierkegaard on those four points. I really see the fundamental contradiction these days as a lifeless slogan that, first of all, people can latch onto in completely good faith. No—bad faith, but spontaneously trying hard to make

270 Though this point may seem a bit tangential, and some of it has already been made in the first chapter, because it so directly engages with the fundamental contradiction I have felt that it needed to be elaborated on in this section. Moreover, the reason why it is not tangential is that it is important to illustrate how reflexivity is part of much of the CLS critiques. The idea of reflexivity refers to a degree of self-consciousness and the application of ones theories to ones own theorizing. See generally, Pierre Bourdieu, *Science of Science and Reflexivity* (2004) (in particular chapter 3).

271 *See* Gabel & Kennedy, *supra* note 119, at 15.

272 When Peter Gabel brings the conversation on to the topic of the fundamental contradiction he refers to it as a "tin can around our neck." *Id.* at 14.

things happen—can latch onto and sort of think, well, the theory of Critical Legal Studies is somehow encapsulated in these phrases, so thinking hard about these phrases will get them somewhere. Will either get them insight or get them power within the movement because they'll know how to talk about it or manipulate it, or allow them to write articles, or will entitle them to deal with other people from a position of strength.

And the same thing is true of individualism and altruism.[273] I mean, they have this terrible quality of reified abstractions. One of my deepest objectives is not to do stuff like that—is not to do any more of it. They are very much like the idea that "unalienated relatedness is the goal of the movement,"[274] open to exactly the same difficulties.

I like the way you put it because there's not even a suggestion, not even a faint overtone that it is the substantive content of the idea of the fundamental contradiction which has caused right and left deviationists to pursue their deviations. The way you put it, it's perfectly clear that it's just a peg or a hook on which a person who already has an intention to be demobilized, or an intention to be a reactionary can hang his hat—something to incorporate into his project that will give it some surface plausibility. (...)

(…) I think the idea of the fundamental contradiction, before the body snatchers turned it into a cluster of pods, (...) [t]he reason why it worked, briefly, the reason why, in its first early months, maybe for 18 months, the fundamental contradiction was a genuinely radical contribution, then, had to do with—a very tricky thing. It had to do with the substantive truth of what it's referring to. It didn't have to do with the truth of the formula; the formula was always a dead abstraction. But there is a truth to which it was referring, at

273 This is in reference to Duncan Kennedy, "Form and Substance in Private Law Adjudication," *supra* note 242.

274 This is a reference to one theme among some CLS scholars, in particular in Peter Gabel's work. *See, e.g.,* Peter Gabel, "The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves," 62 *Texas Law Review* 1563 (1984) [*hereinafter* "The Phenomenology of Rights-Consciousness"]; Peter Gabel, "Reification in Legal Reasoning," 3 *Research in Law and Sociology* 25 (1980).

> which I was aiming the phrase, which was Sartre's idea that "Nothingness is the worm at the heart of being." The truth that everything is not what it is and is what it is not, in the realm of human reality, for people. People are what they are in the mode of not being what they are, so that if you want to understand what it is to be a person, you have to be open to experience the negation that's at the very core of your own being, and of the being of everyone else. Now I've just given another relatively reified version of it.[275]

If one sees the Fundamental Contradiction as an intervention into a debate, or into a set of stable 'common sense' presuppositions, then one can understand how it can have illuminating value, while at the same time be 'just another reified abstraction'. What sets CLS scholars apart from their predecessors is that they were, generally speaking, very conscious of this.

But, let us go back to the point that I want to make in this paragraph, which is that CLS scholars wanted to emphasize the logical contingency of the public-private distinction, as well as its indeterminacy. Kennedy used the fundamental contradiction as a leverage point to argue how any argumentative avenue about the extent or limit of state power ultimately leads into a vortex.[276] In his later article on the stages of the decline of the public-private distinction he would conclude that one cannot take the distinction seriously.[277] Frug demonstrated, in the context of the legal construction of the city, how debates about the public-ness or private-ness of the corporation remained ultimately unresolved.[278] Klare illustrated the back and forth nature of the distinction in his analysis of labor law.[279] Brest focused on the 'collapse' of the distinction in state action doctrine.[280] Olsen went a step further by theorizing how the distinction, in the way it has complex and "deep connections" with other distinctions, such as the family-market one, can be the setting for debates

275 Gabel & Kennedy, *supra* note 119, at 15-16 (footnotes omitted). Everyone who can accept, rationally and intellectually, the arguments of CLS, but who has difficulty relating to its cultural, political, and philosophical implications should read this conversation.
276 *See supra* Section 5.2.1; Duncan Kennedy, "The Structure of Blackstone's Commentaries," *supra* note 120.
277 *See supra* Section 5.2.6; Duncan Kennedy, "The Stages of the Decline," *supra* note 251.
278 *See supra* Section 5.2.2; G. Frug, *supra* note 155.
279 *See supra* Section 5.2.3; Klare, *supra* note 185.
280 *See supra* Section 5.2.4; Brest, *supra* note 212.

that are interminable, and therefore "already boring."[281] None of them saw a solution for this problem in trying to come up with a better theory or doctrine about the public-private distinction. In fact, none of them saw the intrinsic incoherence of the distinction as a 'problem' in and of itself. They rather saw the problem, if any, in the way this distinction was deployed by the powers that be, in the way that it allowed Liberalism to limit alternative approaches to certain issues, in the way that its tight structure limited the imagination in general.[282]

The critique of indeterminacy of the public-private distinction, or of other distinctions, or of 'law' in general, is one that has lead many to a sense of deep skepticism about CLS.[283] It is not difficult to understand why.[284] CLS can be seen to be attacking what many good people see as an essential element of

281 *See supra* Section 5.2.5; Olsen, "The Family and the Market," *supra* note 229.

282 *See infra* Section 5.3.3.

283 Indeterminacy has become one of the big signifiers in discussions about CLS, often operating as a slogan with its own complex economy of nuance and oversimplification. See on this topic: Ronald Dworkin, "No Right Answer?" in *Law, Morality, and Society: Essays in Honor of H.L.A. Hart* 58 (P.M.S. Hacker & J. Raz, eds.,1977); Lawrence Solum, "On the Indeterminacy Crisis: Critiquing Critical Dogma," 54 *University of Chicago Law Review* 462 (1987); Kenneth J. Kress, "Legal Indeterminacy," 77 *California Law Review* 283 (1989); A.D. Woozley, "No Right Answer," in *Ronald Dworkin and Contem porary Jurisprudence* (M. Cohen ed., 1984); Mark Tushnet, "Critical Legal Theory (without Modifiers) in the United States," 13 *Journal of Political Philosophy* 99 (2005). The few (known to me) book-length systematic responses disagreeing with CLS are the following: Andrew Altman, *Critical Legal Studies: A Liberal Critique* (1993). Unfortunately, Altman does not address the critiques of the public-private distinction. He does address the indeterminacy critique. Like others, such as Solum, he makes a distinction between the so-called radical and moderate critiques of indeterminacy, arguing that the radical one is untenable, while the moderate one not counter to Liberalism. The way that he and other analytical legal philosophers describe the so-called radical critique indicates a reliance on a different philosophy of language and meaning than the ones that inspired CLS. As such, his book is an interesting engagement with the critiques. However, some of his readings of key CLS texts are difficult to reconcile with mine, and in this sense I have read him as having made the CLS point, rather than as having opposed it. A more elaborate and thoughtful engagement is Richard W. Bauman, *Ideology and Community in the First Wave of Critical Legal Studies* (2002). Bauman's points are too nuanced to easily summarize here. Moreover, he does not devote attention to the critiques of the public-private distinction. Though Bauman limits his analysis to what he calls the "first wave" of CLS, which is primarily the period covered in this Chapter as well, I have not limited my own scope of CLS in that way. For a very different, vicious right wing attack on leftist critical projects in general, *see* Daniel A. Farber & Suzanna Sherry *Beyond All Reason: The Radical Assault on Truth in American Law* (1997). The book is interesting less for its intellectual engagement, than as an illustration of the degree to which the various critiques have provoked violent reactions in which the word 'radical' becomes synonymous with 'dangerous'.

284 I will revisit this question more extensively in the general conclusion. *See infra* Chapter 11.

what they are doing, either professionally or politically, or both. To say that the public-private distinction, and therefore law or legal rules in general, is indeterminate, seems to threaten some core aspects of the legal profession. However, to say that these distinctions, or 'law' in general, are indeterminate does not mean that they are useless, or that legal thought has no place. What it means can be summarized in the following way: When faced with a choice or decision that involves the public-private distinction, one will not be able to find the answer to the question with a simple, or complex, 'mere' application of that distinction. The distinction will not offer one answer, but (at least) two. It will allow both or all positions to be articulated using the vocabulary of the distinction. Since the distinction is 'designed' to both describe a general status quo as well as any future concrete dispute about it, it will accommodate both or all positions within the boundaries of the general realm of the distinction. Hence the claim about the indeterminacy of the public-private and other Liberal distinctions.

One way in which this aspect is further theorized is that the distinction's indeterminacy will push the decider to a place outside of the distinction itself, to other distinctions, to other discourses, to a realm outside law, for some ultimately even outside reason or rationality.[285] To the extent that the public-private distinction can seem to offer a way of answering questions, it is not doing this *autonomously*. Answers to questions about the public-private distinction, be it in the form of questions about the extent or limitation of the power of the state, or in the form of any other concrete question, will not be determined by the distinction itself, but by something else. Brest is the most explicit when he invokes the need for a substantive theory of state power, which in his view might do a better job than the state action doctrine, since that relies too much on.[286] The others seem to refer to the historical dynamics and contextual power struggles. Frug sees the determination in American constitutional politics and its enduring tendency of distrusting local power.[287] Klare seems to see it in the American bias in favor of capitalism and against a Marxist form of 'worker democracy'.[288] Both would in fact see it as what one could call anti-democratic tendencies within Liberalism. Olsen seems to be pointing the finger at the patriarchy that is implicit and intrinsic to Liberalism,

285 This is the postmodern, anti-rationalism vein in CLS. *See generally*, Tushnet, "Critical Legal Studies: A Political History," supra note 108.
286 *See supra* Section 5.2.4; Brest, *supra* note 212.
287 *See supra* Section 5.2.2; G. Frug, *supra* note 155.
288 *See supra* Section 5.2.3; Klare, *supra* note 185.

although with less insistence and somehow focusing more on sketching the inescapability of the public-private mold.[289] Kennedy sees it in Blackstone's doctrinal balancing act between accommodating the feudal powers that be and their Liberal critics, whose philosophy he wanted to integrate into his legal doctrine.[290] He also sees determinacy, at a very abstract level, in the 'natural' life cycle of Liberal dichotomies.[291]

In general, CLS had two discernible tendencies in dealing with this question. It was clear that determinacy could not be found in problematic distinctions, which are so important in legal thought. Initially, it was sought in Marxist theory or in sociology or social theory. These could offer a mode of thinking that offered answers to questions of how the world 'really' operated. Later, the sciences would be invoked, political science, economics or law and economics, psychoanalysis, anthropology, etc. Slowly though, the indeterminacy critique started to weaken the faith in the ability of these disciplines to offer answers where the public-private distinction could not. The more post-modern of the CLS scholars would not be able to summon up any degree of faith in social theory or in any other totalizing grand theory to indicate the locus of determinacy.[292] Rather, they would seriously consider the option of determinacy being located in the irrational, psychological forces (such as fears and desires) pushing and pulling within the (collective) unconscious. As far as the current selection of CLS scholarship that specifically addressed the public-private distinction is concerned, I would argue that determinacy was located in either 'history', or in 'Liberal ideology', or, in the case of Olsen, in 'patriarchal liberal ideology'. Kennedy I would see as the most 'post-modern' one of the bunch, meaning that he would not describe the public-private distinction by recurring to the narratives of a specific social theory. Rather, he might invoke existentialist philosophy and argue for the ultimate groundlessness of any choice.[293]

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289 *See supra* Section 5.2.4; *infra* Sections 5.3.3, 5.3.4; Olsen, "The Family and the Market," *supra* note 229.

290 *See supra* Section 5.2.1; Duncan Kennedy, "The Structure of Blackstone's Commentaries," *supra* note 120.

291 *See supra* Section 5.2.6; Duncan Kennedy, "The Stages of the Decline," *supra* note 251.

292 *See generally*, Tushnet, "Critical Legal Studies: A Political History," *supra* note 108; Roberto Mangabeira Unger, *Law in Modern Society: Toward a Criticism of Social Theory* (1976) (providing an early CLS critique of social theory).

293 *See generally* Duncan Kennedy, "A Semiotics of Critique," 22 *Cardozo Law Review* 1147 (2001).

In the paragraphs below, I will further look at history and ideology as elements of the critique of indeterminacy. What is important to keep in mind is that the various elements are interwoven. The way I have described indeterminacy relies on what I will describe in the following sections. Though in some ways it was hard not to include references to context, ideology, and structure in this paragraph, it is necessary to highlight each one separately. In the same way though, the points made here about indeterminacy in the CLS critique will make more sense as we move through the other elements of the critique.

5.3.2. An Emphasis on Historical/Contextual Embeddedness

Even while arguing that the public-private distinction does not make logical sense *in abstracto*, CLS scholars have tried to emphasize how it did and does make sense in particular contexts or historical moments. Despite the fact that as a set of categories the public-private distinction cannot determine the answers to questions related to a certain issue, and is in that sense indeterminate, in specific historical moments it has been and *is* very instrumental. Its determinant force exists by virtue of the specific uses that have been made of it in particular instances. It may be meaningless in general, but it is meaningful in concrete circumstances.

This emphasis on historical/contextual embeddedness is visible in each of the works discussed Section 5.2. Klare states that: "[I]t is apparent from the evolution of collective bargaining law that the public/private distinction has no general significance; it takes on meaning only in a particular historical and political context."[294] Kennedy describes how Blackstone participated in the initial construction of the public-private distinction of Liberal legalism as part of a complex balancing act between a desire to appease liberal critics of feudalism and the making of an effort to justify that same feudal status quo.[295] The distinction was in fact very useful to help him do so. Frug describes the essential role that the public-private distinction played in the history of the legal construction of the city and the corporation.[296] In each of the steps of the history that he describes the distinction is used, effectively, to include and exclude actors and processes, and to organize the inner divisions of the

294 Klare, *supra* note 185, at 1388-89; *see also supra* Section 5.2.3.
295 *See supra* Section 5.2.1; Duncan Kennedy, "The Structure of Blackstone's Commentaries," *supra* note 120.
296 *See supra* Section 5.2.2; G. Frug, *supra* note 155.

social, economic, and political realms. Klare does the same for labor law,[297] while Brest analyzes how, at least for a while, the public-private distinction was instrumental in the development of the state action doctrine.[298] Equally, Olsen describes the market and the family as very much historically embedded categories.[299] In particular, she illustrates how their ongoing development as categories, past, present and future, will continue to be marked by the characteristics of their dichotomous and interconnected nature. At each round of debates about how to improve the market and how to improve the family, the various positions will be able to position themselves *vis-à-vis* each other using the various public-private markers. Finally, Kennedy takes the whole history thing a step further by theorizing about how the public-private distinction will progressively come to an end, and how it is, or has been, together with other similar dichotomies, the pulsing blood or heartbeat of something, a historical period one could say, called Liberal legalism. In his story, the public-private distinction marks the various stages in the decline of Liberal legalism.[300]

I have not yet referred in this chapter to Morton Horwitz's "History of the Public/Private Distinction."[301] In his short article, Horwitz describes the public-private distinction as a historical artifact, in other words, as something that did not always exist in legal thought, but as something that originated in a particular period, grew from an accidental and marginal category into a central one, and that has since continued to have a development and a history.

This historical insight and consciousness is important in two ways. On the one hand it emphasizes the distinction as something that is constructed and therefore does not exist except as part of a broader historical context, with all that this implies about its connectedness to ideology, politics, culture, etc. On the other hand, it means that any serious study of its role and performance in a particular context will need to include an analysis of the history of that context. The distinction is always embedded in a context, and each context is always embedded in its history. In this sense, CLS scholarship about the public-private distinction distinguishes itself from other legal scholarship, in

297 *See supra* Section 5.2.3; Klare, *supra* note 185.
298 *See supra* Section 5.2.4; Brest, *supra* note 212.
299 *See supra* Section 5.2.5; Olsen, "The Family and the Market," *supra* note 229.
300 *See supra* Section 5.2.6; Duncan Kennedy, "The Stages of the Decline," *supra* note 251.
301 Horwitz, "The History of the Public/Private Distinction," *supra* note 99.

particular from the purely doctrinal, formalist and legal positive scholarship, which sees these categories and distinctions as 'timeless' legal categories that, even though they have changed over time, can be studied as conceptual notions in and of themselves. Klare makes this beautifully clear when he analyzes the various modes of historical development of labor law. He flatly rejects the idea of a slow historical progression of labor law from the private to the public, arguing how there were various movements in multiple directions.[302] Historical analysis as a methodology is therefore considered by CLS to be an indispensable element of legal scholarship on any topic related to any of these distinctions. In the words of Frug:

> [T]he best way of understanding a legal concept is to analyze it the way a geologist looks at the landscape. For a geologist, any portion of land at any given time is 'the condensed history of the ages of the Earth and... a nexus of relationships.' Our current legal conception of cities is similarly the remnant of an historical process, so that its meaning cannot be grasped until the elements of that process, and their relationships, are understood.[303]

5.3.3. An Emphasis on Ideological Function

Another common trait in CLS analyses of the public-private distinction can be found in the way that it is linked to the notion of ideology. The notion of ideology refers to a set of commonly held ideas about the world. These ideas are generally considered to be self-evident. In the course of the 20th century this notion was further explored and theorized and ideology came to be seen as all pervasive. So, unlike its common imagery of state-imposed dogma, ideology exists in all political systems and is produced, reproduced, and imposed in intricate ways.[304] CLS scholars worked to demonstrate how the public-private distinction, and many other legal distinctions as well,

302 Klare, *supra* note 185, at 1389.

303 G. Frug, *supra* note 155, at 1081 (footnotes omitted).

304 Some important philosophical names linked to this notion are Karl Marx & Friederich Engels, *The German Ideology* (written 1845-46, originally published in 1932); Louis Althusser, *Essays on Ideology* (B. Brewster & G. Lock trans. 1984); Antonio Gramsci, *Selections from the Prison Notebooks, 1929-1935* (1971); Terry Eagleton, *Ideology: An Introduction* (1991). Two comprehensive collections of texts on this topic are *Ideology*, (Terry Eagleton ed., 1994); *Mapping Ideology* (Slavoj Zizek ed., 1994). Both structuralism and post-structuralism are closely related to these debates. *See infra* Section 5.3.4.

served to sustain the prevailing ideology of Western democracies since the Enlightenment: Liberalism. In the words of Frug:

> [L]iberalism describes in the most fundamental way how most of us understand any political system, because it also describes the way we understand ourselves and society as a whole (...). [It] is not a single formula for interpreting the world; it is, instead, a view based on seeing the world as a series of complex dualities.[305]

In particular, they have focused on the way that legal Liberalism has been centered around a number of crucial distinctions, many of which we have already seen, the public-private distinction being one of the more important ones.[306] Using the critique of indeterminacy described above to demonstrate logical instability and a thorough historical analysis of their deployment, CLS scholars were intent on demonstrating how these dichotomies were not 'neutral', but rather instruments of a system of thought. Though never self-consciously identifying their work as a 'critique of ideology', American Legal Realists were in fact doing this already in their analyses of the legal doctrines that conceived of the freedom of contract as a realm of natural freedom, without taking into account or even acknowledging that your freedom to engage in contractual relations is heavily determined by your bargaining power, which in its turn is the result of how the state and its legal institutions choose to put their coercive powers at the disposal of one or the other. CLS scholars took this basic insight and theorized it massively and rigorously, equipped with the vocabulary of Critical Theory and continental philosophy and they started to look at a wide range of legal doctrines and legal areas. Their problem with what they saw as the unseen pervasiveness of Liberal ideology was expressed in their general critiques of how Liberalism operated as a constitutive and legitimating force.[307] In their story, Liberalism 'hides' or 'denies' the ways in which it constitutes or creates a number of legal subjects and social institutions (such as the individual, the state, the family, property, etc.), which are then legitimated by being presented as 'natural'. CLS scholars emphasized how many social phenomena had been

305 G. Frug, *supra* note 155, at 1074-75.

306 I have already referred to these dualities a number of times. *See supra* note 254. These include: law-politics, reason-passion, freedom-state control, individual-society, etc.

307 *See* Tushnet, "Critical Legal Studies: A Political History," *supra* note 108, at 1526-1527.

in fact 'reified', or made into a 'thing', which is another way of saying that they have been 'naturalized', and how that obscured their ideological origin. Frug again:

> The limits on city power described above usually seem natural and uncontroversial. They appear simply to follow from the status of cities as junior members of the governmental hierarchy. This sense of naturalness keeps us from questioning these limits or trying to think of ways to change them. Indeed it is difficult even to imagine what another legal status for cities would look like.[308]

One important distinction that was an object of this critique of Liberal legalism was the distinction between law and politics. Now, it is important to contextualize this point a bit, since it has distinct connotations in different parts of the world. Lawyers and legal scholars in the United States are much more willing to accept that 'law is politics' than their counterparts on the European continent. One usual argument given for this difference is the exposure to Legal Realism in the United States, and in particular to their critique of the pure formalism that dominated law schools at the turn of the 20th century. Another oft mentioned reason for this difference is the sociological difference between the roles of judges, and in particular the highest courts.[309] Whatever the reasons may be, to say that law is politics in the U.S. sounds much more plausible than it does in Europe. So, when CLS scholars started arguing this point, they meant it in a more profound sense:[310]

308 G. Frug, *supra* note 155, at 1065.

309 More than a sociological or even cultural difference one can see this as also a heritage of the Legal Realists who professed the importance of the role of judges in determining what was "law in action" as opposed to "law in the books." *See* Pound, *supra* note 92.

310 Even now, and even at the most superficial level, there is, in the US, a culture of emphasizing the distinction between law and politics. Judicial opinions are discredited by calling them 'political'. During the recent U.S. Senate Confirmation hearings of Judge Sonia Sotomayor, Lindsey Graham, the Republican Senator for South Carolina, engaged her in the following way:
SEN. GRAHAM: (…) And that's what we're trying to figure out. Who are we getting here? You know, who are we getting, as a nation? Now, legal realism, are you familiar with that term?
JUDGE SOTOMAYOR: I am.
SEN. GRAHAM: What—what does it mean, for someone who may be watching the hearing?
JUDGE SOTOMAYOR: To me, it means that you are guided in reaching decisions in law by the realism of the situation, of the—it's less—it looks at the law through the—
SEN. GRAHAM: Kind of touchy-feely stuff.

> These themes converged in the programmatic statement that law is politics, all the way down. Most people in the legal academy agree, albeit often with some reluctance, that law is politics in the superficial sense that we can talk about identifiably liberal and conservative positions on various issues in the law, ranging from affirmative action to strict liability versus negligence. The indeterminacy argument and the critique of social theory led [CLS] to a different understanding of the proposition that law is politics. We saw law as a form of human activity in which political conflicts were worked out in ways that contributed to the stability of the social order ("legitimation") in part by constituting personality and social institutions in ways that came to seem natural. The legitimating and constitutive operation of law occurred on all levels.[311]

With regard to the public-private distinction, CLS scholars worked hard to demonstrate how it is continuously constructed, defined, re-defined and deployed and is therefore not reflective of an actually existing boundary between the state and the private sphere. Instead, both the state and the private sphere are the product of ongoing definition and re-definition of that same public-private distinction. This ongoing definition is a political and ideological process, even when most exclusively dedicated to legal doctrinal work. Indeed, one of the ways in which Liberal legalism hides its ideological and political function is by presenting itself as a purely 'technical' activity.

JUDGE SOTOMAYOR: (Laughs.) Not quite words that I would use, because there are many academics, and judges, who have talked about being legal realists but—I don't apply that label to myself at all. I—as I said, I look at law and precedent and discern its principles and apply it to the situations before me.
SEN. GRAHAM: So you would not be a disciple of the legal realism school.
JUDGE SOTOMAYOR: No.
SEN. GRAHAM: OK. All right. (…)
Transcript, "Sotomayor Confirmation Hearings Day 2," *New York Times*, July 14 2009. For the senator, the point of the question was to connect her with the idea that the role of judges can be a political one. In the American legal blogosphere, though, everybody was talking during this time not about Legal Realism, but about CLS. I will return to this question of the law-politics divide in the general conclusion. *See infra* Chapter 11.

311 Tushnet, "Critical Legal Studies: A Political History," supra note 108, at 1526. The "all the way down" part of the first sentence, as well as the "all levels" part of the last sentence of the quote will be further developed *infra* Section 5.3.4.

So, Duncan Kennedy's analysis of Blackstone's *Commentaries* illustrates how the work of this important early doctrinal scholar was part of a larger effort to move away from feudalism to a different ideological constellation.[312] In order to do so, a massive reorganization of the doctrinal system had to take place, which involved developing and fleshing out some categories and distinctions, while discarding or eliminating others. In doing so, he paved the way for future Liberal scholars who would then have an easier time working with these categories and distinctions, as if they had always existed.[313] In his analysis of the city as a legal concept Frug unveils a particular vein in US political Liberalism which has had a recurring bias against self-government at the most local level and that also has been very forthcoming to the private corporation, in a way that does not necessarily make sense.[314] Similarly, Klare argues how the distinction is deployed in a way that makes self-governance in the workplace seem unthinkable, again in a way that does not resist too much scrutiny.[315] Brest argues how a certain Liberal legal doctrine gets into trouble once the public-private distinction collapses, which it would do were it not for its usefulness as a manipulable tool.[316] He also argues for a more substantive normative discussion that would help formulate the way that state action doctrine should be applied. As it is, its status as a 'purely technical' doctrine allows judges to get away with incoherence. Olsen argues how the polarization of market and family locks us up in a way of thinking about both that inhibits us from thinking about them in imaginative ways. Ultimately, the status quo is served.[317]

It is not so much that Klare and Frug are necessarily right in their invitation to consider alternative forms of self-government. Perhaps these forms of governance would indeed not be as successful as both seem to imply.

312 *See supra* Section 5.2.1; Duncan Kennedy, "The Structure of Blackstone's Commentaries," *supra* note 120.

313 It is still not uncommon in legal academia to hear people talk about law, in particular the 'older' sub-disciplines such as contract and tort, as representing a 'rational' system, as if it were mathematics. This perspective, and that of other positivisms, can easily be connected to the scientism that prevailed the late 19th century, which is a part of the so-called 'age of reason', and all of these were essential components of the ways in which Liberalism as an ideology organized the world.

314 *See supra* Section 5.2.2; G. Frug, *supra* note 155.

315 *See supra* Section 5.2.3; Klare, *supra* note 185.

316 *See supra* Section 5.2.4; Brest, *supra* note 212.

317 *See supra* Section 5.2.5; Olsen, "The Family and the Market," *supra* note 229. Finally, if what Kennedy describes as the natural lifecycle of a liberal legal dichotomy is close to the truth, then the end of this ideology is nigh... *See supra* Section 5.2.6; Duncan Kennedy, "The Stages of the Decline," *supra* note 251.

However, the point is that the grip that liberal ideology has, through its public-private distinction, on our thinking about work and political life, does not even make it necessary for Liberalism to explain why it would not work. 'It's a private matter how companies run their production processes' seems to be enough of an answer. Like both Klare and Frug, Olsen seems to be saying that Liberalism stifles the imagination. "The point of this comparison between the law for cities—municipal corporations—and the law for private corporations is that we never even think to make it."[318] However, they say this to demonstrate how this imagination stifling comes at the expense of women, workers, and local communities in the inner cities. The status quo does not care about these people, and is hiding behind a way of thinking about law, society, politics, the family, the market, the economy, etc. in a way that makes it seem as if all that disenfranchisement is, with a shrug of the shoulders, 'just a fact of life', 'just the way things are'.

But, it is not merely the status quo that rests on the public-private divide. Rather, the public-private mode of thinking about things, and the reason for its overwhelming dominance is the fact that it is pervasive and present throughout the Liberal conceptual universe. In other words, Liberalism is structured around the public-private divide, at every level.

5.3.4. Structuralism and the CLS Critiques

One way to further understand CLS critiques of the public-private distinction is to see them as influenced by a very strong current in continental philosophy and in the social sciences of the 1960s and '70s, namely Structuralism. Structuralism is generally considered to be based on the work in linguistics by Ferdinand de Saussure,[319] although it also has a much older history in the exact sciences of mathematics, logic, physics and biology.[320] In the social sciences it became a very dominant stream after the publication of "The

318 G. Frug, *supra* note 155, at 1161.

319 Ferdinand de Saussure, *Course in General Linguistics* (2009) (originally published 1916), which was published posthumously by his students. Remarkably, an original manuscript by him was found later and published in 2006, under the title *Writings in General Linguistics*. Scholars have yet to gauge the significance of this new work, but several generations of scholars, including the likes of Noam Chomsky, Jacques Lacan, and Jacques Derrida have based important elements of their work on the course notes.

320 *See generally*, Jean Piaget, *Structuralism* (Chaninah Maschler trans., 1970) (originally published 1968).

Savage Mind," by Claude Lévi-Strauss.[321] Described as "more than a method and less than a philosophy,"[322] structuralism can be said to be based on De Saussure's idea of language as structured around the distinction between the signifier and the signified, both of which compose the basic element of language: the sign, and Lévi-Strauss's analysis of the recurring elements and modes of classification that could be found among indigenous peoples in all parts of the world, which indicated that there were common relations, or structures of consciousness, to be found in all societies, in spite of their immense cultural differences. These two insights, and the methodologies used to acquire them were further developed into a full-blown intellectual and academic approach to all types of areas in the social sciences as well as in the humanities. CLS scholars connected with this intellectual movement and applied its insights to their analyses of legal doctrines.[323]

Structuralism can be summarized[324] as the perspective on a field of analysis that emphasizes the recurrence of a limited number of differential relationships all across that field. Its epistemology is reductive, which means that large numbers of phenomena can be described, in one sweep, as being mere variations of the same differential relationship. Usually, these will take the form of binary oppositions, meaning two concepts that acquire their meaning by being opposites of one another, such as public and private. Thus, CLS scholars would emphasize how entire legal doctrines could be seen as structured around variations of the opposition between public and private, and how you could see variations of this opposition appear in the big doctrinal

321 Claude Lévi-Strauss, *The Savage Mind* (George Weidenfeld trans., 1966) (originally published 1962). Lévi-Strauss had worked previously on structuralist modes of analysis, but this is the work where he seems to have perfected the approach and addressed its most significant theoretical questions.

322 François Dosse, *History of Structuralism Volume 1: The Rising Sign (1945-1966)* 43 (Deborah Glassman trans., 1997) (originally published 1991).

323 One sociological reason for this flow of ideas into legal scholarship lies in the unique mode of legal education in the United States, where a law degree is a graduate degree. Many lawyers in the US have a background in the social sciences and the humanities. This is very different from most other countries in the world, where law degrees are full or undergraduate degrees and law students have not been previously exposed to other disciplines.

324 One should not underestimate the complexity of the history and development of this intellectual stream, nor forget that it was not without intense internal and external intellectual strife. I have based this summary on the work of CLS scholars who applied this method in the context of the public-private distinction, as well as on Piaget, *supra* note 320; Lévi-Strauss, *supra* note 321; Dosse, *supra* note 322.See also Duncan Kennedy, "A Semiotics of Critique," *supra* note 293.

questions as well as in the specific detailed ones. Thus, in Frug's analysis, questions regarding municipal and private corporations were questions that could always be formulated in terms of the public-private dichotomy.[325] The same in Klare's analysis of labor law, which emphasized the recurrence of this dichotomy, both in the general questions of labor law as well as in the specific questions regarding labor contracts.[326] Olsen's analysis goes furthest along the structuralist path by taking an element of the so called private sphere, the market-family relationship, as one in which the elements of the public-private distinction appear and reappear in multiple guises. Elements usually associated with the public, such as cooperation and altruism, appear in both family and market, while private elements, such as individualism and competition, also appear in both family and market.[327] This mutually constitutive state of affairs becomes visible by looking at a limited number of binary oppositions and how they are related to other oppositions. Its recurring reappearance can leave one with a sense of infinite regress, in which one can never get rid of the 'public' elements, even if one focuses on the private part of the private part of the private part, etc., and vice versa. Kennedy's loop in the stages of decline is an example of this effect.[328]

This structuralist aspect of the CLS critiques of the public-private distinction is important because it connects to the three previously mentioned common traits in the critiques. It is the ultimately abstract nature of the structure and the elements or binary oppositions that compose it, that allows for the logical contingency that was such an important part of the indeterminacy critique. A structuralist analysis focuses on the relationship between the terms of the structure, rather than on the substantive meaning or content of those terms, which would remain ultimately abstract. Both 'public' and 'private' mean, in this perspective, too many things; they are highly abstract notions that are all too pervasive to be contained in simple definitions. Rather, they will obtain their meaning by reference to other, equally abstract, dichotomies. However, embedded in a concrete historical or contextual moment and situation, they can acquire a positive sense of clear meaning. 'Can we have some privacy?' is a sentence that will probably not require explanation or justification, even when pronounced in a completely 'open' or public space, even if one could

325 *See supra* Section 5.2.2; G. Frug, *supra* note 155.
326 *See supra* Section 5.2.3; Klare, *supra* note 185.
327 *See supra* Section 5.2.5; Olsen, "The Family and the Market," *supra* note 229.
328 *See supra* Section 5.2.6; Duncan Kennedy, "The Stages of the Decline," *supra* note 251 (discussing the loop).

unleash a number of legal or other problematizations of the clarity and self-evidence that it purports to have.[329] The immediacy of concrete situations helps overcome the logical contingency of the distinction, even if from the discrete distance of critical analysis it seems to be more difficult to 'just go along' with that.[330]

CLS emphasis on the fact that the public-private distinction is a historical artifact itself, as exemplified in the work of Kennedy[331] and Horwitz,[332] with an origin, a development, and a possible demise, also has its connections with structuralism. The emphasis in structuralism lies on what is called 'synchronicity', which means that structural analysis does not focus on the (linear) temporal or historical developments of the structuring relations, but rather on how the structure operates at one particular moment.[333] The

329 For instance, it would in fact depend on what the two (or more) persons who claim that non-interference are doing. Are they talking? Are they kissing? Are they beating somebody up? It would also depend the nature of this 'open' or public space. Is it in somebody's birthday party? Is it in the middle of a highway? Is it on a park bench? Are they related in any way? Moreover, who are they saying it to? And who is saying it? Many people? A few? Only two, or one person? Under what circumstances? And so on. The point here is that, though it seems clear what 'concrete' and contextual means, it seems to be impossible to come up with an example that is simple enough to cover all the possibilities and variations. The lawyerly mind will be especially capable of coming up with potential exceptions or counter-arguments.

330 Kennedy's fundamental contradiction, as well as his description of the loopified public-private distinction are illustrations of how this double sense of determinacy and indeterminacy can coexist. *Supra* Sections 5.2.1, 5.2.6; Duncan Kennedy, "The Structure of Blackstone's Commentaries," *supra* note 120; Duncan Kennedy, "The Stages of the Decline," *supra* note 251.

331 Duncan Kennedy, "The Structure of Blackstone's Commentaries," *supra* note 120.

332 Horwitz, "The History of the Public/Private Distinction," *supra* note 99.

333 The relation between structuralism and history is a can of worms. For some, structuralism is a scientific methodology that uncovers universal features amidst overwhelming cultural diversity. For others however, this idea fails to explain the existence, in history, of (structural) change. This raises the question of where structures come from, and if, indeed, they have an origin outside of themselves. Whereas Lévi-Strauss (*supra* note 321) seems to reject the dialectical processes of history, Piaget (*supra* note 320, at 122-128) sees the constructivism within structuralism as the means to resolve the question of origin and change, by postulating that structures are continuously being constructed and originate in other structures. Structural change is, in that view, part of the structuralist equation. Their contemporary, Michel Foucault, however, sees structural change as being 'epistemic' or total, and he sees this as happening, every now and then in history, arbitrarily, suddenly and overwhelmingly. These moments of change or rupture are sometimes referred to as epistemic upheavals or shifts. See Foucault, *The Order of Things* (Tavistock/Routledge trans., 2002) (originally published 1966). This use of the notion of episteme has sometimes been compared to that of 'paradigm', by Thomas Kuhn, *The Structure of Scientific Revolutions* (1962).

emphasis on synchronicity is meant to emphasize how the meaning of words is not the product of historical development, but rather the product of their differential relations with other terms or words within the structure. As in Klare and Frug, describing the history of legal doctrines serves to demonstrate that there is no intrinsic substantive meaning to the terms 'public' and 'private', but instead, that their meaning at each particular contextual point is entirely determined by the relation between the two terms themselves.[334] In other words, the structure remains the same while the meaning changes.

Finally, a structuralist approach to the public-private distinction is an element in the analysis of its ideological function. Just like structuralism signals the binary oppositions that structure consciousness, by determining its unconscious structures,[335] ideology operates by constituting the structure of our (*un*)consciousness by means of structures. If there are things, ideas, categories, distinctions, that we take for granted, that we do not think to question, it is because there is an overarching ideology that naturalizes them, and that denies their construction. This naturalizing tendency is the result of the way in which certain 'fixed categories', or in the case of Liberalism, certain dualities, form the basis for all thought and consciousness. A structural analysis can bring the importance of these key categories to light, and can therefore be a useful tool for critical projects. It is not just that the public-private distinction, as seen through the CLS critique, is an intrinsically problematic, historically and contextually embedded, instrument of liberal ideology, it is also the fact that it is all-pervasive, which makes it important as an element of the way that ideology operates by means of naturalizing or rationalizing modes of governance that operate at every level of social existence.[336] As indicated by CLS critiques of the public-private distinction, the way we think about the family is strikingly similar to the way we think about government, and also similar to the way we think about the marketplace, and the workplace, and the city and the private corporation. The public-private distinction, the product of Liberal political philosophy, structures our consciousness, not just in how we think about 'the state and

334 *See supra* Sections 5.2.2, 5.2.3.

335 Lévi-Strauss in particular was adamant that structures operated at the level of consciousness, which was the result of unconscious processes. Thus, it was not in the rules and customs that structuralism saw its patterns, it was rather in the rational schemes of classification and in the unreasoned practices that one could find the elements that one could abstract into a structure. These schemes of classification and unreasoned practices are ultimately the product of the way in which the *un*conscious is structured. Lévi-Strauss, *supra* note 321.

336 *See* Tushnet, "Critical Legal Studies: A Political History," *supra* note 108, at 1526.

the individual', but in how we think about practically every aspect of social life.[337]

Perhaps by now the reader is too used to the idea of the 'public-private' distinction, and the way that it operates as a 'dichotomy', to realize that in fact, this way of talking is the product of the structuralist vein in CLS scholarship. To attempt to capture the entirety of important legal doctrines, or aspects of political philosophy, into one heuristic, into one dichotomy, into one binary opposition, is a structuralist move,[338] and one that moves away from more ontological approaches that attempt to describe what 'the public' or 'the private' is. To describe things using this dichotomy does a number of things. On the one hand it reifies something, the distinction, the binary opposition, in a way that fixes it so that one can analyze it, so that one can connect it to real life effects, in ways that seemed too far-fetched before. On the other hand it 'de-reifies' the elements of the dichotomy, the public and the private, by treating them as always subjugated to the dichotomy, to its structural epistemology, to its being an all-pervasive micro and macro grid. In this sense it also deserves attention to point out that structuralism, and the way it is reductive, the way that it generalizes the particular, and particularizes the general, is a narrative,[339] a way of seeing things, that is deployed by CLS scholars, to counter Liberal legalist scholarship with a counter-narrative, a counter-way of seeing things. Where Liberal legalism sees stability, CLS emphasizes instability. Where Liberal legalism sees progress and development, and even change, CLS sees repetition or variations of the same theme. Where Liberalism sees refinement through the development of doctrinal criteria, CLS sees a boring discussion and even infinite regress, but one that justifies the status quo. However, it is not just about 'countering for the sake of it', but rather about opening up areas of political contestation that were previously hidden from the imagination. This, it is hoped by some

337 This message is also conveyed in the way that Kennedy's fundamental contradiction describes both the 'vertical' (or public) relations between the individual and the collectivity, as well as the 'horizontal' (or private) relations between individuals.

338 In Duncan Kennedy's words: "the power of structuralist methodology is that it shows that what at first appears to be an infinitely various, essentially contextual mass of utterances (paroles) is in fact less internally various and less contextual than that appearance." *See* Duncan Kennedy, "A Semiotics of Legal Argument," 42 *Syracuse Law Review* 75, 343 (1991).

339 *See* J. Hillis Miller, "Narrative," in *Critical Terms for Literary Study* (Frank Lentricchia & Thomas McLaughlin eds., 2d ed. 1995) (discussing the term "narrative" in general).

CLS scholars, will lead to the formulation of concrete policies.[340] Because where Liberal legalism sees harmony, CLS sees naturalized categories that disenfranchise large groups of people and stifle democratic spaces of empowerment, as well as previously unseen possibilities for change. And where Liberal legalism sees the promise of progress and ever more inclusion, CLS sees the ongoing use of categories for exclusion and the protraction of the status quo.[341]

5.4. Concluding: The Legacy of CLS for our Thinking About the Public-Private Distinction

It is clear that CLS has taken the Legal Realist critique to another level, and that it seems to have developed the intellectual practice of critique into an art form.[342] Its structuralist perspective has in fact created the idea of the public-private distinction as a heuristic device, as a category in and of itself. It is unclear what the overall impact of the CLS critique has been on the mainstream of legal scholarship or on political philosophical scholarship. It is, on the one hand, too early to say. On the other hand, CLS's marginal position in legal academia[343] makes it very difficult to discern direct influences. Its direct influence can be seen, albeit qualified, in the intellectual movements that I will describe below: in the New Approaches to International Law (NAIL) and in feminist scholarship. One example of direct impact is illustrative however of how limited this impact has been. In recent years there has been an explosion in the use of the term 'public-private distinction' or 'public-private dichotomy', notions that were alien to social discourse until CLS did its thing. However, a cursory analysis of this widespread use seems to indicate that the critical implications of using this structuralist device are not part of the preoccupations of its users. Talk of the public-private distinction seems to be concerned with the fairly straightforward determination of *the* public-private distinction, which will allow one to determine whether a particular activity or social institution is (ontologically) either public or private. The distinction

340 Examples of this are Klare, *supra* note 185, and Frug, *supra* note 155; who have very concrete policy proposals to make, proposals that, in their view, have been made unthinkable because of the ideological functions of the public-private distinction.

341 Even so, the revolutionary virus, very common among baby boomers, also affected many CLS scholars.

342 *See e.g.* Duncan Kennedy, "A Semiotics of Critique," *supra* note 293.

343 *See generally*, Tushnet, "Critical Legal Studies: A Political History," *supra* note 108. I will deal with the various implied and explicit rejections and criticisms in the conclusion. *See infra* Chapter 11.

itself is still generally perceived as unproblematic, even if locating the exact boundary-line is seen as a significant challenge. Even so, the public-private distinctions, and its diverse variations or manifestations, have continued to be of serious use to scholars and activists who have wanted to push our conceptual understanding of law and power a step further, and of those who, like Frug, Klare and Olsen, have wanted to use this potential to effect real change in society.

6. New Approaches to International Law (NAIL) and its Critique

6.1. Introducing NAIL

The term 'New Approaches to International Law' (NAIL) was coined in the 1990s to refer to a wide variety of critical work in international law scholarship.[344] Many NAIL scholars were directly influenced by CLS and feminism, and had their roots in the same intellectual currents, such as structuralism, post-structuralism, and post-colonial theory. NAIL work is varied and approaches international law from a set of different perspectives and with a multiplicity of political agendas. The distinguishing factor is often an aesthetic one, and NAIL scholarship in this respect has been a challenge to the epistemological and formal boundaries of the international legal discipline. One strand of this scholarship has sought to reinvigorate theoretical debate about international law—something that seemed to have been rejected by the leading scholars—in particular by drawing on the insights of 'continental thought' on language, interpretation, meaning, and a number of other topics such as history, society, ideology, and identity.

NAIL scholars have seldom been directly concerned with the public-private distinction,[345] even though the critiques have played a role in the background of many projects.[346] A lot of NAIL work will seem familiar after the preceding exploration of the Legal Realist and CLS critiques.

344 *See, e.g.,* Deborah Cass, "Navigating the Newstream: Recent Critical Scholarship in International Law," 65 *Nordic Journal of International Law* 341 (1996) (laying out a guide to NAIL scholarship); Thomas Skouteris, "Fin de NAIL: New Approaches to International Law and its Impact on Contemporary International Legal Scholarship," 10(3) *Leiden Journal of International Law* 415 (1997); Thomas Skouteris & Outi Korhonen, "Under Rhodes' Eyes: The 'Old' and the 'New' International Law at Looking Distance," 11(3) *Leiden Journal of International Law* 419 (1998) (discussing and providing a bibliography of new trends in international legal scholarship).

345 One major exception is the work of feminist international law scholars, who also fall under the NAIL umbrella. Building on the work of feminism and CLS, these scholars have formulated strong feminist critiques of the public-private distinction and how it structures international law. *See infra* Chapter 8. I have incorporated these critiques into the next chapter because they will be an essential element in the analysis of how the critiques provide new insights into the workings of human rights discourse and institutions.

346 See e.g. Amr Shalakany, Arbitration and the Third World: Bias under the Scepter of Neo-Liberalism, 41 *Harvard International Law Journal* 419 (2000); Amr Shalakany, Privatizing Jerusalem, or an Investigation into the City's Future Legal Stakes, 15 *Leiden Journal of International Law* 431 (2002).

The public-private distinction serves, in NAIL analyses, to exclude or "background" certain arguments and to shield a particular set of facts from consideration. It hides its constitutive work behind a veil of 'common sense' and naturalness, and operates through other dichotomies, such as law-contract, international-national, political-technical, etc. The way in which it functions benefits a status quo or a dominant ideological predisposition, not by any open or explicit statement or choice, but by cementing an implied and unspoken bias. Several NAIL scholars have observed this so-called structural bias and the way it serves to dispel the need for political debate. Rather it leads most international lawyers to seek solutions in the realm of a technical language, in legal doctrines that are ultimately indeterminate because the 'fixed' categories that they rely on, such as law-policy, sovereignty-international law, public-private, are ultimately not fixed at all.

One example of an influential NAIL scholar who conveys all these general points (albeit without focusing on the specific critique of indeterminacy) is David Kennedy.[347] His work is illustrative of how these various critical points can be blended into elaborate analyses of international law, from the perspective of various disciplines. He has done a structuralist analysis of international law,[348] and has worked on the history of international law, in the genealogical way ways of his CLS predecessors.[349] In his history as in his

347 David Kennedy is a professor at Harvard Law School who began producing scholarship at the height of the CLS conferences in the US. He played a very important role in introducing the various critiques into the field of international law, albeit with a number of idiosyncratic twists. As director of the SJD Program at Harvard, Kennedy was influential in helping NAIL to became a "movement" in its own right, and various conferences have been organized in various part of the world in which NAIL themes have played a central role. In 1999 it was even the central theme during the Annual Meeting of the American Society of International Law. *See Proceedings of the 93rd Annual Meeting of the American Society of International Law* 1999. The sociology of institutional politics in academic life has always been on the minds of the CLS and NAIL scholars. For David Kennedy's account of the intellectual and sociological history of NAIL, *see* David Kennedy, "When Renewal Repeats: Thinking Against the Box," 32(2) *New York Journal of International Law and Politics* 335 (2000).

348 David Kennedy, *International Legal Structures* (1987).

349 David Kennedy, "Primitive Legal Scholarship," 27(1) *Harvard International Law Journal* 1 (1986) (discussing the work of very early 15-17th Century international law scholars); David Kennedy, "The Move to Institutions," 8 *Cardozo Law Review* 841 (1987) (analyzing the various factors leading to the establishment of the League of Nations); David Kennedy, "International Law in the Nineteenth Century: History of an Illusion," 65 *Nordic Journal of International Law*, 385 (1996) (countering common narratives about the 19th century in international law by describing a dynamic set of intellectual and scholarly debates that took place at that time).

analyses of contemporary scholarship, he has taken a sociological perspective, examining international legal disciplines and international legal scholarship, rather than international law, in order to convey that international law as an intellectual activity performed by a group of people:

> So far, I have proposed that we think of international law not as a set of rules or institutions, but as a group of professional disciplines in which people pursue projects in various quite different institutional, political, and national settings. Their projects may be personal, or professional, or political, may be pursued alone or collaboratively. Sometimes they are self-consciously 'ideological' in the narrow political sense that people pursue conservative or centrist or liberal agendas within their disciplines. More often, professionals in these fields think of their disciplinary projects as not being ideological in this sense and criticize fellow professionals whom they think have introduced an element of 'subjective' political bias into their professional activities. People typically present their projects as 'balanced' or simply 'professional', sometimes as the quotidian management of the international system and sometimes as part of a very general human struggle for better global governance or intercultural understanding or economic growth.[350]

In all of his projects one can read the underlying presence of the critiques of the public-private distinction. His work illustrates how the public-private distinction operates as a structural determinant of intellectual bias that opens up certain fields of (political) activity to lawyers, while closing off others.[351] If international law channels some political forces in various ways, it also

350 David Kennedy, "International Legal Disciplines," 12 *Leiden Journal of International Law* 9, 83 (1999). In the same piece, Kennedy provides two schematic maps of how one could organize both the mainstream of international law scholarship in the US, as well as the various new approaches to it. *Id.* at 30, 36. *See also* David Kennedy, "The International Style in Postwar Law and Policy," 1 *Utah Law Review* 7 (1994).

351 David Kennedy, "A New World Order: Yesterday, Today and Tomorrow," 4 Transnational Law and Contemporary Problems, 330, 370-74 (1995); *see also* David Kennedy, "Putting the Politics Back in International Politics," *The Finnish Yearbook of International Law* 17 (2000); David Kennedy, "The Forgotten Politics of International Governance," 2 *European Human Rights Law Review* 117 (2001).

obstructs other political forces.[352] In this, the public-private distinction, in its various guises, plays an essential role.

In this chapter I will focus on the work of another important NAIL scholar: Martti Koskenniemi. In particular, I will examine *From Apology to Utopia*, a book that many consider to be among the most important international legal theoretical treatises of the last 50 years.[353] This work predates the bulk of NAIL analyses of international law and its structural biases. At the same time, it goes beyond an unsettling of fixed categories, and beyond a description of how international legal distinctions and dichotomies are ultimately indeterminate. In some ways it goes deeper than this, while in some ways it is not (yet) concerned with indeterminacy.[354] In the following section, I will briefly describe Koskenniemi's critique and consider the extent to which it offers insights into the critiques of the public-private distinction.

6.2. Koskenniemi's Structural Analysis of International Legal Argument

From Apology to Utopia is a very complex book that can be seen in a number of ways. On one level, the book is a sincere attempt to understand how international law is political, or how it is, in certain ways, 'politics by other means'. In Koskenniemi's words, it is about discovering how international law can be so formally rigorous and yet at the same time able to produce diametrically opposed (political) outcomes. This paradox contrasts strongly with the way that international legal discourse presents itself. And exploring

352 David Kennedy, "The International Human Rights Movement: Part of the Problem?" 14 *Harvard Human Rights Journal* 2001; *originally published in* 3 *European Human Rights Law Review* 2001 [*hereinafter* "Part of the Problem?"] (in which he tries to map the various layers of human rights politics, in pursuit of the question raised in the title); David Kennedy, "My Talk at the ASIL: What is New Thinking in International Law?" *Proceedings of the 94th Annual Meeting of the American Society of International Law*, 104-125, April 5-8, 2000 (in which he does the same for international law, putting it into the context of a historical development of international law thinking in the US in the 20th Century).

353 Martti Koskenniemi, *From Apology to Utopia* (2d ed. 2005). *From Apology to Utopia* was originally published in 1989 by a small Finnish publisher: Lakimiesliiton Kustannus (Finnish Lawyers' Publishing Company), but it soon went out of print. The book was reissued in 2005, with a new epilogue, by Cambridge University Press.

354 The 2005 edition of *From Apology to Utopia* contains a substantial epilogue written by Koskenniemi. The epilogue can be read as connecting to some of the NAIL scholarship produced after the publication of the original text in 1989. In fact, the 1989 version does not mention the idea of structural bias, while the 2005 epilogue ends with a 15-page analysis of this phenomenon and how it is related to the deconstructive analysis done in the bulk of the book. *Id.* at 600-615.

it is the driving question behind Koskenniemi's veritable *tour de force*, which takes him through very rigorous analyses of international legal thought, both theoretical and doctrinal. Ultimately, it leads him to formulate a theory of how international legal argument is profoundly indeterminate.

He does this by performing an elaborately *structuralist* analysis of international legal argument, hence the sub-title of the book: *The Structure of International Legal Argument*. The book refers to international legal argument, rather than to international law, in order to emphasize the linguistic or rhetorical quality of international legal discourse. By describing how all international legal argument is caught within a limited set of rhetorical possibilities that are mutually exclusive, Koskenniemi demonstrates how the formal rigor of international legal discourse facilitates political openness and allows for any two diametrically opposed political positions to be formulated with equally valid legal arguments. This tension within international legal argument is structural, not just in the sense that it seems to be endlessly recurring, but in the sense that it is central to international law's identity and how this identity articulates its being distinct from 'politics'.

On the one hand, international legal argument bases itself on the concrete expressions of state's consent as a basis for its validity. International law is binding on states because it is based on the expression of consent by the states themselves. This is articulated in a number of ways, through doctrines about sovereignty and about sources, and in the ways that international legal scholarship discusses notions of world order. On the other hand it bases its claim of validity on the normativity of the international community and its requirements in order to constrain the autonomy and will of sovereign states. This too is articulated in the same doctrines about sovereignty and sources, and in doctrinal approaches to the idea of world order. International legal doctrine articulates both perspectives: the perspective that international law is concrete (based on consent) as well as normative (based on the requirements of it being the law of a community which restrains the will of its subjects). The thing is that the idea of international law being based on concreteness can be accused of being apologetic of whatever states will, while the opposite idea, of international law basing itself on normativity can be accused of being utopian and unrelated to the real world and its complex power dynamics.

Any international legal argument has to base itself either on its concrete foundation or on its normative one. It cannot do both, since each of the two foundations is in fact the product of a criticism of the other. Both concreteness and normativity are mutually exclusive and this is in fact how they identify themselves, by not being the other. A legal argument that bases itself on concreteness is called ascending, which means two things: it is based on the will of sovereign states and it is not based on some utopian idea of what community should be like (which is ultimately subjective). A legal argument that bases itself on normativity is called descending, which also means two things: it is based on the requirements and necessities of there being a community and it is not based on the fickle and ultimately subjective (and unreliable) will of sovereign states. In this way, both ascending and descending international legal argument can claim to be 'objective', because they avoid the 'subjectiveness' of the opposing international legal argument. In this way the two types of argument obtain their validity from their opposition to each other. Since both concreteness and normativity are to be found in all international legal doctrines there will always be an ascending argument to counter a descending one, and vice versa. It is because of the rhetorical structure that international legal argument can be open ended, in terms of how it can articulate different political positions, while at the same time be formally very rigorous.[355]

Koskenniemi identifies this tension as being at the heart of Liberal legal philosophy:

> This structure of arguments expresses the *liberal theory of politics*. This is a theory which identifies itself on two assumptions. *First*, it assumes that legal standards emerge from the legal subjects themselves. There is no natural normative order.

355 Koskenniemi illustrates how this rhetorical structure operates by meticulously and rigorously analyzing international legal doctrinal history (the movement from natural law theory towards positive law theory towards contemporary liberal pragmatism) and contemporary doctrines on sovereignty and sources doctrine, as well as the various doctrinal and judicial debates with regard to custom and treaty law. He gives dozens if not hundreds of examples from legal practice. In this sense the book is very mechanical and somewhat monotonous, although I would argue that since his deconstruction is so difficult to assimilate, the relentlessly reiterative nature of the book works quite well. *See* Martti Koskenniemi, "A Response," 7(12) *German Law Journal* 1103 (2006) (in which he elaborates on the aesthetic of repetition, comparing it to a performance he saw by the choreographer Jan Fabre, while writing *From Apology to Utopia*).

> Such order is artificial and justifiable only if it can be linked to the concrete wills and interests of individuals. *Second*, it assumes that once created, social order will become binding on the same individuals. They cannot invoke their subjective opinions to escape its constraining force. If they could, then the point and purpose of their initial, order-creating will and interest would be frustrated.[356]

As such, the book can also be seen to be a critique of Liberalism itself. In other words, the paradox experienced by Koskenniemi, which lead him to pursue a structuralist analysis of international legal argument, is ultimately a paradox that is central to Liberal political philosophy.

The central observation that links Koskenniemi's analysis of the rhetorical structures of international legal argument to the public-private distinction is the fact that the language used to talk about international political life is the same language used to talk about domestic life. In fact, it seems as if the Liberal political philosophy that is developed to describe and/or justify the domestic political order is projected onto the international political order for description and/or justification. This phenomenon is in fact well known in international law doctrine, and is called the 'domestic analogy' or even the 'private law analogy'. Many of the prominent Liberal political philosophers have, when referring to the international order, relied on this analogy. In other words, in spite of all the particularities that would make an international order of states profoundly different from a domestic order, the international order is described in more or less the same terms. The international order is composed of states in the same way that the domestic order is composed of individuals. The structure is organized along the same familiar public-private axis.[357]

But it is in particular the analytical language that Koskenniemi offers which, in my view, adds a new layer to the various critiques of the public-private distinction. First, he positions international law and doctrine as functioning

356 Koskenniemi, *From Apology to Utopia*, *supra* note 353, at 21-22.

357 *See infra* Section 8.2. In a recent critique of theoretical preoccupations with the notion of constitutionalism in international law, David Kennedy signals this problem of projecting from the national constitutional and administrative law experience. *See* David Kennedy, "The Mystery of Global Governance," 34 *Ohio Northern University Law Review* 827 (2008).

as a *grammar*.[358] This means that it offers you a way of articulating your position, without it necessarily constraining you in what you want to say. In this grammar, concreteness and normativity, sovereignty and international community, private and public, etc., function as rhetorical poles that not only keep each other in check, but that are also much more integrated, much more part of each other than their dichotomous appearance would seem to indicate. As Koskenniemi puts it:

> As the subtle distinctions between doctrinal positions are lost in argument, it becomes evident that they do not embody fundamentally contradicting theories or approaches, but are better understood as aspects of a general system—a language—whose parts are interdependent not by way of logic or causality but through what—for want of a better word—could be called 'style'. As arguments about consent turn out to be (or rely upon) arguments about justice, points about State sovereignty turn into arguments about national self-determination, facts transform themselves into rules, and each such opposition turns around once again, the language of international law forms stylistic paths in which we can recognize fragments of liberal political theory, sociology, and philosophy.[359]

It has often been said that international law is a 'language'.[360] But, it would also seem that international law is part of the broader 'Liberal' language, a language that rotates endlessly around variations of the same public-private distinction, around freedom versus coercion, around individuality versus collectivity, around difference versus universality, around sovereignty versus international law, *et cetera*.[361]

358 Koskenniemi, *From Apology to Utopia*, *supra* note 353, at 562-588.

359 *Id.* at 573 (footnote omitted). *See also* Martti Koskenniemi, "Letter to the Editors of the Symposium," in *The Methods of International Law* 109 (Steven Ratner & Anne-Marie Slaughter eds., 2004) (rejecting the idea of 'method' in international law and making a powerful argument for the idea of 'style').

360 Koskenniemi, *From Apology to Utopia*, *supra* note 353, at 567-568 (giving several examples).

361 As Koskenniemi describes: "By sketching the rules that underlie the production of arguments in international law, *From Apology to Utopia* seeks to liberate the profession from its false necessities. Although international law is highly structured as a language, it is quite fluid and open-ended as to what can be said in it. For example, each of the four types of doctrine discussed in chapter 3 [on the structure of modern doctrines] accommodates aspects of its adversary. 'Realism', as political scientists have often

Second, he positions international law as functioning by means of a fundamentally antagonistic perspective.[362] International legal language is deeply imbedded in a social and professional identity that has the adversarial adjudicatory setting as its imaginary paradigm. So, ultimately, international law is always *an argument*. In his analysis, international legal arguments about sovereignty are arguments that are about a particular foundational theory of sovereignty, arguments that claim to have authority because the competing theory of sovereignty is either too concrete and not normative enough, or too normative and not concrete enough. Any attempt to come up with a medium theory that does not fall into either of both camps will ultimately fail, because the normative/concrete perspectives are mutually exclusive and they base their authority on being the opposite of the other one.[363]

This is reminiscent of the endless attempts by political philosophy and legal theory and doctrine to find the perfect balance between whatever two sides they rely on, be it society and the individual, be it the state and the market, be it law and freedom. A lot of effort goes into coming up with a way of canceling out contradiction and overcoming paradox.[364] Ultimately, in terms of legal discourse, this mediating activity has been deferred to processes of decision-making and adjudication.[365] Both political philosophy and legal argument can be read in this antagonistic perspective. One can see any typical point that is made about sovereignty and international community, about the private or the public, as one in which a particular boundary between the two is being *argued*, and in an ongoing and continuous way.

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pointed out, is based on an 'idealism' and *vice-versa*, while 'rules' and 'processes' are ultimately indistinguishable and, pressed upon by argument, turn into each other: a rule is created by and interpreted in process, a process is defined as rule observance." *Id.* at 572-573.

362 *See id.* at 596-599.

363 The general approach of *From Apology to Utopia* is to present the polarized oppositional doctrinal approach to a particular issue (sources, sovereignty, etc.) and then to move to the various doctrinal schools that have attempted to come up with some medium between the two extremes, never really managing to avoid the collapse into either of the two poles.

364 Duncan Kennedy has described how Liberal legal and political scholarship has combined mediation and denial in his analysis of Blackstone's commentaries. Duncan Kennedy, "The Structure of Blackstone's Commentaries," *supra* note 120.

365 *See infra* Section 8.4.

6.3. Concluding: the Public-Private Distinction as Structuring a Grammar

NAIL scholarship has been pioneering in its approach to international law; an approach that is conscious of the various insights produced by a tradition of critiques of the public-private distinction. Although in much of NAIL scholarship the critiques of the public-private distinction have been left in the background, NAIL scholars of international law have also moved on to develop a novel vocabulary to describe the function of this distinction. David Kennedy's work has shifted the attention towards the sociological dimension in which international law discourse operates, and in which the public-private distinction can still be seen to operate by means of setting up the boundaries of legal and political imagination; by means of its structuring the ideological biases that constrain international lawyers. Koskenniemi has approached the same issue, but from the perspective of the 'deep' grammatical structure of international legal argument, illustrating how the particularities of the public-private dimension of that argument, even though they allow it to maintain formal argumentative rigor, also allow for the open-endedness of that same argument. Both articulate the general NAIL insight that politics is an intrinsic element in the practice of international law. Even so, this insight allows for multiple ways in which international law can be reconceived and reconceptualized.[366] In this chapter I have limited myself to how NAIL has provided a couple of new layers on top of the ones indicated by the various critiques of the public-private distinction.

The next chapter takes a tradition of critique that has contributed a lot to both CLS and NAIL and will therefore sometimes overlap with the two previous chapters. At the same time, because it is such an elaborate tradition on its own terms, and because in its development it has gone beyond the theoretical critiques and towards the doctrinal and advocacy realms, breaking new ground in this story about the public-private distinction, it deserves separate treatment.

366 Vol. 7 Nr. 12 of the *German Law Journal* (2006) is dedicated to the reissue of *From Apology to Utopia* and has many contributions in which scholars explore this and other questions. This special issue offers various examples of how profound Koskenniemi's critique can be said to be—the public-private dimension only being one of the many that challenges and invites to difficult and courageous new thinking.

7. Feminist Critiques of the Public-Private Distinction

7.1. Introduction

The feminist critiques of the public-private distinction in some ways predate CLS. In other ways one can say that CLS has a deep influence on some of the critiques, in the sense that feminist approaches to law were, for a while at least, part of the CLS movement, in the sense that they were talking about, and against, the same things. Later still, NAIL thrived on the feminist critiques of international law, and vice versa, many of these thrived on (non-feminist) NAIL work. Aside from the interwoven history however, one can see a degree of unity and continuity within the feminist tradition, a common vocabulary and an elaborate story about the public-private distinction. The set of preoccupations that differ significantly from other scholarly traditions, and the pure number of feminist scholars, in combination with a significant political and cultural base, have lead this movement to ask a number of very difficult questions about the public-private distinction, as well as about the critiques thereof. In this way, the feminist critiques can be seen as being at the cutting edge of thinking about the public-private distinction.

In this chapter I will start by giving an overview of the feminist movement, since it forms the context in which the public-private critiques are embedded (7.2). After this, I will focus on the very broad set of critiques of the public-private distinction, and in fact of Liberalism itself, as they have been formulated by feminist scholarship (7.3). This will be further narrowed down to a number of critiques of international law and human rights (7.4). In the final paragraph of this chapter, I will consider a number of reflections about instrumentalizing the critiques in order to achieve social change (7.5), and I will offer some reflections on this and other features of the feminist critiques in a concluding paragraph (7.6).

If a measure for success is the degree to which feminist critiques have affected the production of legal documents and legal doctrinal debates, then the feminist critiques are indeed the most successful ones. Indeed, one can argue that the feminist critiques have affected more people than any of the other critiques. This situation has however lead to some difficult questions, both about the nature of the distinction, as well as about the nature of the critiques.

As we will see, in this chapter we will start exploring the engagement of the critiques with human rights, something that will be more elaborately explored in Part III; but until then though, the feminist critiques.

7.2. Feminism in a Nutshell

Already in 1983, Carole Pateman would write: "The dichotomy between the private and the public is central to almost two centuries of feminist writing and political struggle; it is, ultimately, what the feminist movement is about."[367] This often-quoted sentence is revealing, not only because of the centrality given to the public-private dichotomy in feminist thought, but also because of its reference to 'almost two centuries of feminist writing and political struggle'.

Though the term 'feminism' is widely known and used, it is important for the purposes of this analysis to elaborate a bit on its meanings, particularly in the context of feminist legal studies. Important, but also daunting, for feminism is many impressive things: a social movement, an intellectual tradition, a set of theories about pretty much everything, including multiple legal theories; it is also an identity, a political and cultural banner, an insult and stereotype, and many other things. Though I would confidently argue that feminism has profoundly changed the way society functions and the way many people experience themselves, in other ways it has been and remains quite marginal and ineffective.

It is interesting that this next chapter in the history of critiques of the public-private distinction places a massive and prolific intellectual movement in succession to a seemingly dwarfed CLS, in spite of the latter's apparent lack of influence. In some ways, CLS and feminist legal theory are part of the same cultural moment that took off in the late 60's in the U.S. and Western-Europe, and in that sense it would be artificial to too sharply distinguish these two streams of thought, particularly in their earliest phases. In fact, Frances Olsen—whose article "The Family and the Market" I discussed in the chapter on CLS—is just as much a feminist as a CLS author, and I had some difficulty deciding in which section to discuss

367 Carole Pateman, "Feminist Critiques of the Public/Private Dichotomy," in *Public and Private in Social Life* 281 (S.I. Benn & G.F. Gaus eds., 1983).

her.[368] Until the mid 1980's feminist legal scholars, sometimes known as 'Fem-Crits', were very much a part of the CLS movement. After that period, however, many feminist legal scholars broke away from CLS and consolidated their own movement; in part because some of these scholars saw CLS as insufficiently committed to feminist causes. Indeed, Frances Olsen's "The Family and the Market" has been often referred to as a landmark in the context of this so-called CLS-feminist split.[369]

Despite the 'split', feminist scholars continued to appropriate, develop, and contribute to parts of the CLS critiques, including the public-private critique, and instrumentalized them in various ways. Not only did feminist legal theory give the critique of the public-private its own 'feminist' twist and characteristics, but it also pushed the tradition of public-private critiques on to another plane. Unlike CLS, which soon became politically insignificant, feminist critiques of the public-private distinction have seamlessly connected with the massive feminist cultural and political movement that has been gaining momentum in recent decades and that is still impressively successful in its advocacy and push for legal and social change, in spite of significant resistance.

Feminism[370] as a social and political movement is traditionally organized into three so-called 'waves'. The first wave refers to the period of women's struggle for the basic rights of citizenship, such as the right to vote. This movement rose mainly in the United States, in the middle of the 19th Century and gained momentum in the early 20th Century. World War I proved

368 *See supra* Section 5.2.5.

369 For one classic and insightful exchange that demonstrates well the rhetorical fireworks that characterized the 'split', see Robin West, "Deconstructing the CLS-Fem Split," 2 *Wisconsin Women's Law Journal* 85 (1986) (critiquing the gendered implications of Duncan Kennedy's "Psycho-Social CLS: A Comment on the Cardozo Symposium," 6 *Cardozo Law Review* 1013 (1985)). Duncan Kennedy would provide a more elaborate engagement with (radical) feminism in his seminal article "Sexual Abuse, Sexy Dressing, and the Eroticization of Domination," 26 *New England Law Review* 1309 (1992). Interestingly, though Robin West incisively analyzes and condemns the CLS Conference in general, she argues that "feminists can not afford to lose the *audience* of the CLS movement, even if we must forego their mentorship." *Id.* at 91 (emphasis in original). *See also* Frances Olsen, "Feminism and Critical Legal Theory: An American Perspective," 18 *International Journal of the Sociology of Law* 199 (1990) (painting a very close relationship between CLS and some strands of feminist legal theory, which one could call Feminist CLS).

370 The word 'feminism', or the explicit identity of being 'a feminist' is not without problems. Many scholars will try avoid that tag, while others will denounce and reject it. Still others will proudly embrace it. I will do my best here to ignore this problem.

to be a critical period that produced a decisive shift in public opinion. By 1920 several countries had granted women the right to vote, and this number would steadily rise throughout the 20th Century. Beginning in the 1960s and extending through the 1980s and early 90s there was a 'second wave' revival of feminism (also known at this time as the women's rights movement or women's liberation), which was guided by the realization that the right to vote had not substantially changed the situation of women in society. During this period feminists started to look not only at how laws explicitly discriminated against women, but also at the multiple implicit ways women were discriminated against. Moreover, the feminist movement grew exponentially and proliferated significantly, 'on the ground' as well as in academia. Feminist scholars produced books and articles in which they articulated and elaborated their attack on the existing social order, trying, as far and best they could, to understand how it came to be that women were so systematically and structurally subordinated and disadvantaged. Out of this collective effort grew an elaborate body of feminist philosophy, feminist political and social theory, feminist legal theory, and a feminist branch in pretty much every imaginable discipline.[371] It was during this period that the critique of the public-private distinction began to play such an important role. More recently a so-called 'third wave' of feminism has announced itself.[372] This wave of feminism has focused on the problematics of a critique based solely on gender, and has started exploring the ways in which other 'vulnerable' identities, such as class, race, age, disability, and sexual orientation 'intersect' with gender. Whereas the second wave was very much focused on women, the third wave has argued that there were many groups of women: such as poor women, Third World women, indigenous women, Muslim women, black women, etc., and that these differences need to be taken into account.

To begin with, it is helpful to know that there is not one feminist theory, but many. I will give a hopelessly reduced summary of the main themes and

371 One website has links to over 900 women/gender studies' centers, programs, and departments, worldwide: http://userpages.umbc.edu/~korenman/wmst/programs.html (24 August 2009).

372 Although the 'third wave' has its roots in the 1980s writings of feminists like bell hooks and Audre Lorde, the term is said to have been coined by Rebecca Walker in a 1992 article written in response to the infamous confirmation hearings of Clarence Thomas which focused on his relationship with former coworker Anita Hill. Rebecca Walker, "Becoming the Third Wave," *Ms.* 39-41 (January/February 1992) ("I am not a post-feminist feminist. I am the third-wave.").

approaches of feminist legal scholarship. The main purpose is to give a sense of dynamics. Though there are recurring themes and positions, feminist scholarship can hardly be said to be unified and/or based on commonly accepted dogmas.[373] Rather, it is a number of very diverse positions, often in strong opposition to each other and characterized by ongoing and continuous development and change. A moving target like this is difficult to pin down, let alone to comprehensively map out.[374] Even so, a relatively safe second wave description is provided by Clare Dalton:

> To be a feminist today, I think it is fair to say, is to believe that we belong to a society, or even civilization, in which women are and have been subordinated by and to men, and that life would be better, certainly for women, possibly for everybody, if that were not the case. Feminism is then the range of committed inquiry and activity dedicated first, to describing women's subordination—exploring its nature and extent; dedicated second, to asking both *how*—through what mechanisms, and *why*—for what complex and interwoven reasons—women continue to occupy that position; and dedicated third to change.[375]

Feminist scholarship comes in several different forms. A large chunk of it has focused on advocacy—advancing and arguing for political and legal reform to help women counter the systemic discrimination that they suffer. The work of the suffragists and suffragettes is an early example of this type of project, which has been very prolific and very visible. More recently, feminist advocates have attempted to prohibit pornography, regulate prostitution, legalize abortion, implement a panoply of legal strategies against domestic violence, secure equal pay, promote temporary affirmative action, and

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373 For a radically different perspective, *see* Halley, *Split Decisions*, *supra* note 250 (reducing the universe of feminist positions to three essential critical assumptions).

374 In fact, some feminists object to attempts at classification: "To conflate [feminists with one another] is not simply to confuse but to patronise and to attempt to control through simplification and caricature." Anne Bottomley et al., "Dworkin; Which Dworkin? Taking Feminism Seriously," 14 *Journal of Law and Society* 47, 49 (1987). Nevertheless, useful overviews can be found in Nicola Lacey, "Feminist Legal Theory and the Rights of Women," in *Gender and Human Rights* 13 (Karen Knop ed., 2004); Olsen, "Feminism and Critical Legal Theory," *supra* note 369.

375 Clare Dalton, "Where we Stand: Observations on the Situation of Feminist Legal Thought," 3 *Berkeley Women's Law Journal* 1, 2 (1988).

advocate for international women's rights, among many other things. Many of these advocacy projects fall under the heading of so-called 'Liberal feminism' because of their focus on working within the Liberal paradigm of equality, accepting the theoretical neutrality of law and Liberal institutions and correcting biases against women.[376] Others are critical of the Liberal system itself, but nevertheless make a strategic choice to work within the legal system in order to secure immediate gains for women.[377]

Against these advocacy projects there began to emerge feminist arguments that emphasized women's differences, albeit in varying ways. Cultural

376 As Frances Olsen puts it: "[Liberal legal reformism] accepts the notion that law should be rational, objective and principled, but points out the ways in which law fails to live up to this aspiration when it deals with women (...). This approach to law has been the single most important feminist legal strategy in the United States (...) It includes a broad range of arguments for reform, from a demand for sex-blindness to the argument that to be 'truly neutral' the law must take account of women's current subordination and devise rules carefully tailored to rectify and overcome this unfair inequality." Olsen, "Feminism and Critical Legal Theory," *supra* note 369, at 205-6. Robin West describes liberal feminist strategy similarly: "The "liberal-legal feminist" would characterize the legal culture's discriminatory treatment of women's suffering as the reflection of a "perceptual error" committed by that culture. Women are in fact *the same as*—and therefore *equal to*—men, in the only sense which should matter to liberal legal theory (...). The liberal feminist's strategy is directly implied by her diagnosis: what we must do is prove that we are what we are—individualists and egoists, as are men—and then fight for the equal rights and respect that sameness demands." Robin West, "The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory," in *Women and the Law* 807, 808 (Mary Joe Frug ed., 1992). A recent illustration of this type of faith in Liberalism, albeit in a different context, was offered by the then U.S. presidential candidate Barack Obama in his famous speech on race in Philadelphia. In this speech he referred to the racism of the original U.S. Declaration of Independence and Constitution as its 'original sin', but emphasized that those same documents had not lost any of their moral authority because they expressed the process of progress "to reach a more perfect union"; see http://obamaspeeches.com/E05-Barack-Obama-A-More-Perfect-Union-the-Race-Speech-Philadelphia-PA-March-18-2008.htm(24 August 2009).

377 Catharine MacKinnon and Andrea Dworkin's anti-pornography campaign, for example, would fit in this category. MacKinnon has distinguished her legal activism from that of liberal feminists on the basis that her campaigns empower women rather than the state: "(...) those examples empower the state. We are looking to empower women. We have the audacity to think that we might be able to use the state to help do it." Ellen C. DuBois et al., "Feminist Discourse, moral Values, and the Law—A Conversation," 34 *Buffalo Law Review* 11, 72 (1985) (transcribing remarks by Catharine MacKinnon). *But see* Nicola Lacey, "Theory into Practice? Pornography and the Public/Private Dichotomy," 20 *Journal of Law and Society* 93 (1993) (questioning the value of legislative reform); Janet Rifkin, "Toward a Theory of law and Patriarchy," 3 *Harvard Women's Law Journal* 83, 88 (1980) (litigation "cannot lead to social changes, because in upholding and relying on the paradigm of law, the paradigm of patriarchy is upheld and reinforced"). I will revisit this issue below. *See infra* Section 7.5.

feminists, also known as difference feminists, argued that the problem was less that women were 'not equal' and more that feminine qualities (whether 'natural' or socially constructed), such as caring and relationship building,[378] were undervalued. For these theorists, Liberalism was inherently patriarchal because it was inherently 'male'; it was constructed by men with men's values in mind, and reproduces masculine patterns as a result. Cultural feminists work to embrace and celebrate women's differences, and to change society so that feminine qualities are valued and sought after. These projects were a bit more radical in the sense that they envisioned a potentially different type of society, apart from Liberalism. The emphasis here lay on women's perspectives and women's experiences, even the possibility of a feminist epistemology, expressed in feminist standpoint theory, which would require the elaboration of feminist research methodologies, feminist historiography, etc.[379] In short, rewriting society and our understanding of it so that 'feminine' values are recognized and celebrated.

Another group of feminist scholars who emphasized difference were less optimistic. Known, and often self-identifying as 'radical feminists', these scholars argued that Liberalism was a part of a much more pervasive and totalizing system of patriarchy that was not just male point of view, but male *domination*, and that this system operated on every level of existence. The argument was based on the structural subordination of women to men through sexual objectification, which creates and defines women as a

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378 *See* Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (1982) (describing a feminine 'ethic of care' in contrast with a masculine 'ethic of justice').

379 Feminist standpoint theory, which had its roots in the Marxist epistemological concept of the 'proletarian standpoint' was first introduced by Nancy Hartsock in 1983. Nancy Hartsock, "The Feminist Standpoint: Developing the Ground for a Specifically Feminist Historical Materialism," in *Discovering Reality: Feminist Perspectives on Epistemology, Metaphysics, Methodology, and Philosophy of Science* 283 (Sandra Harding & Merrill B. Hintikka eds., 1983) (developing the concept of a feminist standpoint). Feminist epistemological and methodological work has proliferated since that time. *See, e.g.*, Katharine T. Bartlett, "Feminist Legal Methods," in *Feminist Legal Theory* 370 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991) (discussing methodology in the context of feminist legal theory); Donna Haraway, *Simians, Cyborgs, and Women: the Reinvention of Nature* 183-202 (1991) (discussing embodied, partial, situated knowledge as an alternative to masculine scientific 'objectivity'); Sandra Harding, *The Science Question in Feminism* (1986) (examining feminist critiques of science and seeking an end to androcentric objectivity).

gender.[380] The conditions of knowledge and even of women's experience were the product of patriarchy.[381] The only way to escape the system of structural domination was through radical feminist projects, epitomized by the practice of 'consciousness raising',[382] that would lay bare the workings of patriarchy in every walk of life. This type of project—exposing the patriarchal nature of Liberalism—became adopted by other groups who were not necessarily as radical, but who nevertheless saw feminist scholarship as part of a larger critique of ideology.

More recently, and coinciding with the 'third wave', other groups have emerged. One perspective has questioned both difference and radical feminism for their universal depictions of 'woman', a move that was identified as 'essentializing'.[383] Instead, these scholars emphasized the intersections or intersectionality between gender identity and other identities, such as class, race, age, disability, sexual orientation, religion, and status as colonizer or colonized. In this way, these intersectionality critiques aimed at opening up

380 "Male and female are created through the eroticization of dominance and submission. The man/woman difference and the dominance/submission dynamic define each other. This is the social meaning of sex and the distinctively feminist account of gender inequality." Catharine A. MacKinnon, "Feminism, Marxism, and the State: Toward Feminist Jurisprudence," 8 *Signs* 635, 635 (1985) (footnote omitted) [*hereinafter* "Signs II"].

381 As Catharine MacKinnon famously wrote: "[M]ale dominance is perhaps the most pervasive and tenacious system of power in history (...). Its point of view is the standard for point-of-viewlessness, its particularity the meaning of universality. Its force is exercised as consent, its authority as participation, its supremacy as the paradigm of order, its control as the definition of legitimacy." *Id.* at 638-9. The second and third sentences of this quote are beautiful examples of the quintessence of ideology critique.

382 "Consciousness raising is the major technique of analysis, structure of organization, method of practice, and theory of social change of the women's movement." Catharine MacKinnon, "Feminism, Marxism, Method, and the State: An Agenda for Theory," 7 *Signs* 515, 519 (1982) [*hereinafter* "Signs I"]; *see also* Bartlett, *supra* note 379, at 381-83 (describing consciousness raising as one of three types of feminist methodology).

383 *See, e.g.*, Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics," 1989 *The University of Chicago Legal Forum* 139, 139 (1989) (criticizing both feminists and racial activists for their failure to recognize the unique "multidimensionality of black women's experience"); Angela P. Harris, "Race and Essentialism in Feminist theory, 42 *Stanford Law Review* 581 (1990) (demanding that feminist legal theory begin to examine the impact of racial differences); Dorothy E. Roberts, "Racism and Patriarchy in the Meaning of Motherhood," 1 *Journal of Gender & the Law* 1, 1 (1993) ("By focusing on gender as the primary locus of oppression, mainstream feminist legal thought often forces women of color to fragment their experience in a way that does not reflect the reality of their lives"); Elizabeth V. Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought* (1988) (arguing that feminists must explore the intersectionalities of gender with other aspects of identity such as class and race).

feminist scholarship to the contexts, experiences and perspectives of women who were not white, affluent, heterosexual and Western. And finally, another group of scholars has begun to capitalize on the wealth of philosophical and theoretical perspectives that can be brought to bear on the question of women's subordination. These scholars were less interested in participating in the feminist project of uncovering subordination, and more interested in engaging with and analyzing the analytical tools that feminist scholars had developed. Feminist philosophers have been prominent members of many contemporary philosophical schools, such as structuralism,[384] deconstruction,[385] and post-structuralism.[386] Starting from feminist scholarship, an engagement with feminist themes and preoccupations, and working within feminist epistemic communities, these scholars have explored and critiqued important Liberal and feminist concepts, such as the nature of gender, identity, and power.

The different projects and perspectives sketched above are by no means mutually exclusive, even though they are often characterized by their strong differences from each other. If anything, feminist scholarship characterizes itself by vigorous and often very critical engagement with itself. As such, it is a very dynamic intellectual environment. In fact, 'self-reflexivity'—the post-modern theoretical preoccupation with self-consciousness in the

384 *See, e.g.,* MacKinnon, "Signs II," *supra* note 380 (developing a structural critique of patriarchy).

385 *See, e.g.,* Drucilla Cornell, "Sexual Difference, the Feminine, and Equivalency: A Critique of MacKinnon's *Toward a Feminist Theory of the State*," 100 *Yale Law Journal* 2247, 2264 (1991) (arguing that "MacKinnon fails to understand the critical lesson of deconstruction (...) that no reality can perfectly totalize itself because reality, including the reality of male domination, is constituted in and through language in which institutionalized meaning can never be fully protected from slippage and reinterpretation."); Mary Joe Frug, "Rescuing Impossibility Doctrine: A Postmodern Feminist Analysis of Contract Law," 140 *University of Pennsylvania Law Review* 1029 (using postmodern feminist techniques to deconstruct and evaluate various positions on impossibility doctrine); Gayatri C. Spivak, "Can the Subaltern Speak? Speculations on Widow Sacrifice," 7/8 *Wedge* 120 (1985).

386 *See, e.g.,* Butler, *supra* note 250; Mary Joe Frug, "A Postmodern Feminist Legal Manifesto (An Unfinished Draft)," 105 *Harvard Law Review* 1045, 1046-7 (1992) (arguing that feminists can use the postmodern understandings of "locating human experience as inescapably within language" and "a decentered, polymorphous, contingent understanding of the subject" to understand the way that law functions); Joan W. Scott, "Deconstructing Equality-Versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism," 14 *Feminist Studies* 33, 33-4 (1988) (arguing that feminists should use poststructuralist techniques as "a new way of analyzing constructions of meaning and relationships of power that call[s] unitary, universal categories into question and historicize[s] concepts otherwise treated as natural (such as man/woman) or absolute (such as equality or justice).").

process of doing scholarly work—has been thoroughly taken to heart by feminist scholars, and has been the driving force behind many theoretical innovations.[387] Thus, feminist scholars are heavily engaged in analyzing and critiquing themselves and each other as an integral part of their critique of patriarchy and the subordination/empowerment of women.

In legal scholarship in particular one can see all of these diverse perspectives and objectives, and many more. The amount of scholarship is impressive: in the English-speaking world alone, there are around 30 specialized law reviews that focus on women, gender, or related issues, in addition to the hundreds of other law reviews that publish feminist work. Feminists have developed an elaborate array of legal theories, from Liberal feminist legal theory, through radical feminist legal theory and difference feminist legal theory, to critical feminist legal theory and post-colonial feminist legal theory, to name but some of the most prominent schools.[388]

7.3. "The Sexual Contract": Feminist Critiques of Liberalism's Public-Private Divide

Like CLS scholars, feminist scholars have emphasized that the public-private divide is one of the central elements of Liberal ideology, and that as such it operates at the abstract level of high political theory as well as at the level of every day life, "all the way down."[389] By saying that it is an ideologically determined distinction, feminist scholars are saying a number of things:

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387 Bartlett, *supra* note 379, at 370 ("When I require myself to explain what I do, I am likely to discover how to improve what I earlier may have taken for granted. In the process, I am likely to become more committed to what it is that I have improved (...)."); Scott, *supra* note 386, at 34 ("Post-structuralism and contemporary feminism are late-twentieth century movements that share a certain self-conscious critical relationship to established philosophical and political traditions."). *See supra* note 270 (discussing the notion of reflexivity).

388 For useful overviews of feminist legal theory, *see* Dalton, *supra* note 375; Lacey, "Feminist Legal Theory and the Rights of Women," *supra* note 374; Jenny Morgan, "Feminist Theory as Legal Theory," 16 *Melbourne University Law Review* 743 (1988); 1-2 *Feminist Legal Theory* (Frances Olsen ed., 1995); Christina Brooks Whitman, "Review Essay: Feminist Jurisprudence," 17 *Feminist Studies* 493 (1991). It is important to point out that these tags are artificial, and born out of the attempt to map a very prolific and diverse field. Many authors have written articles that are difficult to classify, and some articles could be classified in various ways. Even so, one can often recognize some essential assumptions or position that the author has taken.

389 *See supra* Sections 5.3.3, 5.3.4; footnotes 311-341 and accompanying text.

First, despite Liberalism's indications to the contrary, the public-private dichotomy is not a *natural* distinction. The fact that social life is cut up into these categories does not follow from any intrinsic characteristics of either 'the public' or 'the private'. Rather, these categories are socially constructed to mean and imply certain things. Moreover, the distinction is the product of historical processes in combination with serious intellectual work. Feminists have analyzed the work of important Liberal philosophers, such as Locke, Rousseau, and even the 'woman friendly' J.S. Mill, and have demonstrated how these philosophers have constructed these spheres, the individual, the domestic sphere, civil society, the public sphere, the state, etc., in ways that are not only gendered, but are detrimental to women.[390] Others have studied the historical processes that led to the gendered division of the Liberal world in the way that we know it.[391] Both have tried to emphasize the historically embedded nature, not just of gender divisions, but of the public-private distinction. Moreover, both have criticized the way that Liberal scholars have continuously represented the distinction, and other Liberal categories, in naturalizing, abstract and a-historical terms. As Nicola Lacey writes:

> [Liberalism is characterized by] a tendency to couch the normative argument [about the public/private dichotomy] in superficially descriptive terms, in a way that is at once intellectually indefensible and rhetorically powerful (...). [T]he substantively normative argument often proceeds

390 Carole Pateman, *The Sexual Contract* 2 (1988) (arguing that the so-called social contract was actually "a sexual-social pact" that legitimated patriarchy as a political right: "The sons overturn paternal rule not merely to gain their liberty but to secure women for themselves"); Seyla Benhabib, "The Generalized and the Concrete Other," in *Feminism as Critique* 77 (Seyla Benhabib & Drucilla Cornell eds., 1987) (describing contemporary universalist moral theory as founded on a dichotomization and privatization of women, affect, body, and relation); Susan Moller Okin, "Feminism and Political Theory," in *Philosophy in a Feminist Voice: Critiques and Reconstructions* 116, (Janet A. Kourany ed., 1998); Iris Marion Young., "Impartiality and the Civic Public: Some Implications of Feminist Critiques of Moral and Political Theory," in *Feminism as Critique* 57 (Seyla Benhabib & Drucilla Cornell eds., 1987) (tracing the origin of dichotomies like public-private to the enlightenment and the rise of the deontological moral tradition).

391 *See, e.g.,* Thomas Laqueur, *Making Sex: Body and Gender from the Greeks to Freud 196-97*(1990) (arguing that social contract theory reconciled "the real world of male dominion of women" with the concept of the universal rational subject by positing "a biology of sexual incommen-surability" that located subordination in the state of nature); Linda Nicholson, "Feminism and Marx: Integrating Kinship with the Economic," in *Feminism as Critique* 16 (Seyla Benhabib & Drucilla Cornell eds., 1987) (tracing the historical roots of the public-private distinction between market and family to the birth of the industrial era).

> by simply announcing a particular issue to fall 'within the private sphere' and 'hence' to be inappropriate for regulation (...). [T]he labels 'public' and 'private' are used in question-begging ways which *suppress* the normative arguments which they actually presuppose so that the debate sounds common-sensical rather than politically controversial. One of the main successes of feminist critique has been to expose the *politics*—the 'power-laden' character—of 'privatization' of this kind.[392]

By doing this, feminists have argued how Liberalism is not what it says it is, and does not apply categories such as individual, equality, neutrality of law, etc., in the ways that it says it has.

Second, feminist scholars have argued that Liberalism is *patriarchal*, or that the ruling ideology is not simply Liberalism, but rather Patriarchal-Liberalism or even just Patriarchy with Liberalism as one of its manifestations. In other words, the system that is unveiled by the critique, by the unmasking of ideology, is not Liberalism *per se*, but Patriarchy. Patriarchy is the thought system by which women's subordination has been naturalized, rationalized, and otherwise justified. In the case of the public-private distinction, this means that Liberalism has relegated women to the 'domestic sphere'[393] to perform sexual,[394] reproductive,[395] and emotional services for men,[396] without pay, without vote.

392 Lacey, "Theory into Practice?" *supra* note 377, at 359-60 (footnote omitted).

393 This point has been critiqued by intersectionality feminist authors who focus on the different experiences of poor women and women of color. These women, in addition to being solely responsible for laboring in the domestic realm, often performed low-paid or unpaid labor outside the home. Failing thus to conform to the 'cult of domesticity', these women were seen as 'unfeminine' and pathologized. *See* Crenshaw, *supra* note 383, at 155-6 (describing black women's nonconformity with the white middle-class female norm has led to the pathologization of the Black family and the persistence of stereotypes like the "pathological matriarch"); Jaqueline Jones, *Labor of Love, labor of Sorrow: Black Women, Work and the Family from Slavery to the Present* 12 (1985) (examining the historical position of black women as both workers and mothers); Roberts, *supra* note 383, at 16-29 (describing black women's historical defiance of "the norm that defines motherhood in opposition to wage labor"). bell hooks, for example, quotes Sojourner Truth's 1852 speech at the second women's rights convention in Akron Ohio: "Dat man ober dar say dat women needs to be helped into carriages, and lifted ober ditches, and to have de best places (...) and ain't I a women? Look at me! Look at my arm! (...) I have plowed, and planted, and gathered into barns, and no man could head me—and ain't I a woman? I could work as much as any man (when I could get it), and bear de lash as well—and ain't I a woman?" bell hooks, *Ain't I a Woman: Black Women and Feminism* 160 (1981).

394 *See, e.g.,* MacKinnon, "Signs I," *supra* note 382, at 534-5: "The substantive principle governing the authentic politics of women's personal lives is pervasive powerlessness to men, expressed and reconstituted daily *as* sexuality. To say that the personal is political means that gender as a division of power is discoverable and verifiable through women's intimate experience of sexual objectification, which is definitive of and synonymous with women's lives as gender female."

395 *See, e.g.,* Mary O'Brien & Sheila McIntyre, "Patriarchal Hegemony and Legal Education," 2 *Canadian Journal of Women and the Law* 69, 89-91 (1986) (arguing that patriarchy privatizes women in order to expropriate their reproductive labor); Roberts, *supra* note 383 (discussing motherhood and "compulsory childbirth" as a critical site of both racial and gendered oppression). For psychoanalytic feminists, women's sole responsibility for child-rearing and children's pre-oedipal experience is seen as the root cause of patriarchy and misogyny. As Isaac D. Balbus describes it: "In all cultures it is a woman—either the biological mother or mother-substitute—who is both the source of satisfaction and the frustration of the imperious needs of the infant; she is at once the being with whom the child is initially indistinguishably identified and the one who enforces the (never more than partial) dissolution of this identification. Thus it is the mother who becomes the recipient of the unconscious hostility that accumulates in children of both sexes as the result of this inescapably painful separation (...). The culturally universal fear and loathing of the female results from the subsequent transfer of this hatred of the mother to all those who came to represent her, i.e., to women in general." Isaac D. Balbus, "Disciplining Women: Michel Foucault and the Power of Feminist Discourse," in *Feminism as Critique* 110, 112-13 (Seyla Benhabib & Drucilla Cornell eds., 1987). *See also* Nancy Chodorow, *The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender* 7 (1978) (arguing that "women's mothering reproduces itself cyclically" because "the sexual and familial division of labor in which women mother and are more involved in interpersonal, affective relationships than men produces in daughters and sons a division of psychological capacities which leads them to reproduce this sexual and familial division of labor"); Dorothy Dinnerstein, *the Mermaid and the Minotaur: Sexual Arrangements and Human Malaise* (1976).

396 *See* Young, *supra* note 390, at 65 ("[T]he purity, unity and generality of [the liberal] public realm require transcending and repressing the partiality and differentiation of need, desire and affectivity (...). Man's particular nature as a feeling, needful being is enacted in the private realm of domestic life, over which women are the proper moral guardians.").

397 MacKinnon, "Signs II," *supra* note 380, at 638.

398 The table below is based on a number of sources, such as mentioned hereafter, as well as many others that I am not referring to; it is however also very much my own, as I have developed it loosely throughout the years. Even so, there is nothing original about it. *See similar discussions at* Lacey, "Theory into Practice?" *supra* note 377, at 98; Olsen, "Feminism and Critical Theory," *supra* note 369, at 200; Pateman, "Feminist Critiques of the Public/Private Dichotomy," *supra* note 367, at 287.

in the words of Catharine MacKinnon, "metaphysically near perfect."[396] According to some feminist scholars, the patriarchal epistemology is based on a series of gendered dichotomies that can be mapped onto the public-private opposition[397]:

Public Man/Masculine/Male	Private Woman/Feminine/Female
Active	Passive
Reason	Emotion
Rational	Irrational
Thought	Feeling
Culture	Nature
Mind	Body
Politics	Family
Truth/Knowledge/Theory	Opinion/Anecdote
Objectivity	Subjectivity
Abstract	Contextualized

These dichotomies are hierarchical, and the less-valued half of each pair is culturally associated with femaleness.[398] As Nicola Lacey argues:

> [T]he importance of the public/private dichotomy lies in the fact that the cultural construction of the public sphere as the sphere in which universal reason holds sway implicitly marginalizes or is inhospitable to women, because reason and hence the public, are culturally associated with the masculine, whereas the private, conversely, is associated with the feminine—with particularity, emotion, the body, *otherness*.[399]

In this way, patriarchal epistemology has structurally privileged men and masculinity over women and femininity. In fact, by going beyond men/women and into masculine/feminine, Patriarchy has created a multi-layered system of subordination which has been able to function not just in spite of Liberal discourses on equality and 'humanity', but *thanks to* them.

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398 *See* Young, *supra* note 390, at 60-63 (arguing that the hierarchical nature of dichotomies results from deontological moral theory's obsession with universalization and 'the logic of identity'; that which conforms to the theory is superior, that which does not conform is inferior).

399 Lacey, "Theory into Practice?" *supra* note 377, at 98.

Third, feminist scholars have exposed a body of knowledge and scholarship that is profoundly biased along the public = male and private = female axis. Exploring "the woman question," feminists have asked whether women have been "left out of consideration"[400] by Liberalism, and have answered, emphatically, yes. As Clare Dalton notes:

> Feminist epistemology starts from the premise that what has been presented as "the world" and "the truth" has obscured women's reality, and ignored women's perspective. It contains the explosive suggestion that what have passed as necessary, universal and ahistorical truths have never been more than partial and socio-historically situated versions of truth.[401]

Legal theory and political theory are about what happens in society's public life, men's domain.[402] History is about great public figures, usually men.[403] Economics is about the paid labor and production of men in the market, not about the unpaid domestic work of women.[404] Feminine work, women's historical actions, domestic violence, sexuality, rape, pornography, prostitution, abortion, child care, and fair pay have been considered 'private' matters; not worth any serious scholarly, scientific, and naturally no political attention. As a result, women have been largely invisible in history, the social sciences and law.

Fourth, feminist legal theorists have argued that, thanks to the public-private distinction, law itself, one of the most important instruments of Liberalism, is masculine, and is one of the primary mechanisms of subordination of women.

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400 Bartlett, *supra* note 379, at 371-377 (describing asking "the woman question" as one form of feminist methodology").

401 *See* Dalton, *supra* note 375, at 6.

402 *See. e.g.,* Cynthia Enloe, *Bananas, Beaches and Bases* (1989) (asking "where are the women?" in international politics, and arguing that "the personal is international").

403 *See, e.g.,* Bonnie S. Anderson & Judith P. Zinsser, 1 *A History of their Own: Women in Europe from Prehistory to the Present* xiii (1988) (noting "the almost total absence of women from the pages of history books" and attempting to "counter the subtly denigrating myth that women either 'have no history' or have achieved little worthy of inclusion in the historical record").

404 See e.g., Julie A. Nelson and Marianne A. Ferber, *Beyond Economic Man: Feminist Theory and Economics* (1993); Waring, Marilyn, *If Women Counted: A New Feminist Economics* (1988); M.A. Ferber, and Julie A. Nelson, "Beyond Economic Man: Ten Years Later," in Marianne A. Ferber and Julie A. Nelson, eds., *Feminist Economics Today: Beyond Economic Man* (2003).

Liberal law bases itself on the ideal of a Kantian universal objectivity and neutrality.[405] It constructs a vision of the world in which abstract 'reasonable' 'individuals' do 'reasonable' things, a world, however, that when it comes down to it, is populated exclusively by men.[406] Legal reasoning is male reasoning: disembodied, deductive, abstract.[407] As Frances Olsen writes:

> "Justice" may be depicted as a woman, but, according to the dominant ideology, law is male, not female. Law is supposed to be rational, objective, abstract, and principled, as men claim they are; it is not supposed to be irrational, subjective, contextualized, or personalized, as men claim women are.[408]

Women's experiences are not seen or understood by the law; the law of abstract neutrality and the 'reasonable man' is the law made by men in response to men's experiences and men's needs.[409] In the words of Catharine MacKinnon:

> The state is male in the feminist sense: the law sees and treats women the way men see and treat women. The liberal state coercively and authoritatively constitutes the social order in the interest of men as a gender—through its legitimating norms, forms, relation to society, and substantive policies. The state's formal norms recapitulate the male point of view on the level of design.[410]

405 Young, *supra* note 390, at 60-62 (describing utilitarian and deontological morality as striving toward the Kantian ideal of universal normative reason based on an ideal of the ahistorical, disembodied masculine self).

406 *See* Linda Hirschman, "The Book of 'A'," 70 *Texas Law Review* 971, 987 (1992) (arguing that legal equality reinforces "the introduction of the male norm in the guise of a universal neutral norm"); Young, *supra* note 390, at 63 ("To the degree that women exemplify or are identified with [irrational, subjective, sentimental, affective] styles of moral decision-making, then, women are excluded from moral rationality."); *see also* Wendy Brown, "Tolerance and Equality: 'The Jewish Question' and 'the Woman Question'," in *Going Public: Feminism and the Shifting Boundaries of the Private Sphere* 15 (Joan W. Scott & Debra Keates eds., 2004) (describing 19th century feminists' strategy of "splitting female ontology," separating women's public, rational, Cartesian minds from their private, irrational, gendered bodies so that women could be made eligible for education, rights and citizenship on the basis of their moral similarity to men).

407 *See* Bartlett, *supra* note 379, at 377-381 (describing traditional masculine legal reasoning in opposition to "feminist practical reasoning"); K.C. Worden, "Overshooting the Target: A Feminist Deconstruction of Legal Education," 34 *American University Law Review* 1141, 1147 (" 'Male voice' expression is designated the only legitimate form of rational legal thought").

408 Frances Olsen, "The Sex of Law," in *The Politics of Law: A Progressive Critique* 691, 692 (3d ed., 1998).

409 *See, e.g.*, Joanne Conaghan, "The Invisibility of Women in Labour Law: Gender-neutrality in Model-building," 14 *International Journal of the Sociology of Law* 377, 378 (1986) (arguing that the classic "traditional pluralist model" of labor law, which sees law as "the neutral arbiter, 'holding the ring,' facilitating the proceedings" between management and labor, does not see women or account for their experiences); Andrea Dworkin, "Against the Male Flood: Censorship, Pornography and Equality," 8 *Harvard Women's Law Journal* 1, 7 (1985) ("Throughout history, the male has been the standard for obscenity law: erection is his venereal pleasure or the uneasiness which upsets the physical state associated with his self-possession."; Martha Minow, "Feminist Reason: Getting It and Losing It," 38 *Journal of Legal Education* 47, 54 (1988) ("[L]itigators working for women's rights have discovered that unless we fit our claims into existing doctrines, we are unlikely to be understood, much less to succeed. Yet trying to fit women's experiences into categories forged with men in mind reinstates gender differences by treating the male standard as unproblematic"); Elizabeth M. Schneider, "Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering," 9 *Women's Rights Law Reporter* 195, 198 (1986) (describing how "Male norms in the criminal justice system" such as "views of women as being unreasonable [and] sex-bias in the law of self-defense (...) have operated to prevent battered women from presenting acts of homicide or assault committed against batterers as reasonable self-defense").

410 Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* 161-62 (1987) (footnote omitted).

Sexual harassment,[411] glass ceilings,[412] the protection of pornography as free speech,[413] the 'regulation' of rape[414]; all of these have been permissible thanks to law's implicit gendered biases. And these gendered biases have been organized along the public-private distinction. By failing to see the private sphere, the law fails to see women and the patriarchal forces that shape women's lives and choices, and thereby fails to protect women and reinforces the patriarchal status quo. "Law is a vital instrument in the hegemony of male supremacy, for it legitimates the patriarchal form of family, male control of women's bodies and the separation of public and private life."[415]

Building on this elaborate depiction of the public-private distinction as ideological, some feminist scholars went on to further problematize the public-private distinction using insights from legal realism and critical legal studies. The fact that the distinction is not natural but socially constructed, that it functions as the tool of an ideology (patriarchy),[416] the fact that it can accommodate changes, such as giving women the right to

411 *See* Martha R. Mahoney, "Exit: Power and the Idea of Leaving in Love, Work, and the Confirmation Hearings," 65 *Southern California Law Review* 1283 (1992) (arguing that the privatization of sexual harassment leads to an improper legal focus on whether or not the victim 'chose' to 'exit' as the definitive test of wrongdoing).

412 *See* Conaghan, *supra* note 410, at 381 ("the combined effect of women's commitments in the private sphere and established structural discrimination in the public sphere is to maintain women workers in low paid, routine and much-exploited jobs"); Vicki Shultz, "Telling Stories About Women and Work," 103 *Harvard Law Review* 1750 (1990) (arguing that the legal assumption that women's choices about work are made solely in the private sphere leads to their continued exclusion from higher status jobs).

413 *See* A. Dworkin, "Against the Male Flood," *supra* note 410, at 23 ("Women, not being power, do not have a right to exist equal to the right the pornography has. If we did, the pornographers would be precluded from exercising their rights at the expense of ours, and since they cannot exercise them any other way, they would be precluded period.").

414 *See* Susan Estrich, *Real Rape* 92-104 (1987) (describing legal rule of consent that focuses on the 'reasonable' perspective of the accused, rather than the 'reasonable' perspective of the victim).

415 O'Brien & McIntyre, *supra* note 393, at 85.

416 *See supra* Section 5.3.4.

vote, without intrinsically changing the fact of structural subordination,[417] all this demonstrates the inherent malleability, contingency, and indeterminacy of the public-private divide. It is this malleability that allows Liberalism to construct a civil society that is both private (when compared to the state) and public (when compared to the domestic sphere). It is this malleability that allows Liberalism to claim that the family is a sphere of non-intervention, while at the same time being an essential author in the (legal) construction of the family.[418] And it is this malleability that allows the Liberalism to claim that women's subordinated position is 'natural' when in fact it has been constructed and maintained by law:

> [T]he practical consequence of non-regulation is the consolidation of the *status quo*: the *de facto* support of pre-existing power relations and distributions of goods within the 'private' sphere (...). [T]he ideology of the public/private dichotomy allows government to clean its hands of any *responsibility* for the state of the 'private' world and *depoliticizes* the disadvantages which inevitably

417 *See. e.g.* A. Dworkin, "Against the Male Flood," *supra* note 410, at 20-21 ("We have fought so hard and so long for so little. The vote did not change the status of women. The changes in women's lives that we can see on the surface do not change the status of women (...). The subordination gets deeper: we keep getting pushed down further"); DuBois et al., *supra* note 377, at 71 (transcribing an exchange between Ellen DuBois and Catharine MacKinnon:
"*MacKinnon*: (...)Women in fact *have* fought against our status in the entire history that we know about and in point of fact we are still subordinate (...)
DuBois: But our status is not the same; for instance, we are enfranchised now.
MacKinnon: Yes, but (...) the fact that there are changes is not to me the crucial thing to look at (...). You can look at all the modifications in the status of women—and it really does mean something different to be a woman now than it has meant in other times (...). The varieties do matter. It means a different thing to be a feudal slave than to be a wage slave, right? (...) But if you look at instead whether women have ever not been subordinated to men (...) as I see it, if bottom is bottom then look on the bottom, and there is where women will be."

418 *See. e.g.,* Lacey, "Theory into Practice?" *supra* note 377, at 95-6 (describing how any attempt to find "the public/private division in terms of the presence or absence of state-directed or sponsored regulation is (...) hopeless (...) decisions *not* to regulate made by state and other institutions with the power to do so are every bit as much *political* decisions as are decisions by states to regulate."); Martha Minow, "Beyond State Intervention in the Family: For Baby Jane Doe," 18 *University of Michigan Journal of Law Reform* 933, 934 (1985) (demonstrating "the inevitable role of the state in any possible allocation of power"); Morgan, *supra* note 388, at 750 (describing how Feminist scholars have challenged "the view that the law does not intervene in the private (and in particular the family)," and have "[drawn] attention to the existing mass of regulation surrounding the family in tax law, criminal law, tort law, *etc.* which both impinges on the family and plays its part in constructing the very notion of the family.").

> spill over the alleged divide by affecting the position of the 'privately'disadvantaged in the 'public' world.[419]

Other feminist scholars have built upon these critical insights in a different fashion. Catharine MacKinnon's two articles in the journal *Signs*, in the early 1980s, describe a Patriarchy that is total. In this view, the public-private distinction could disappear and still the structures of subordination would persist.[420] Patriarchy, with its totalitarian domination of the basic structures of our thinking, controls even our most intimate thoughts and the way we think and experience things. Following Marxist methodology, MacKinnon argues that women's consciousness, and men's too, is the product of Patriarchy, and can as such be considered a form of 'false consciousness.'[421] "Women's situation offers no outside to stand on or gaze at (...). There is no Archimedean point—or, men are their own Archimedean point, which makes it not very Archimedean."[422] For example, confronted by claims that many women believe that they enjoy sex or engage in it consensually, Catharine MacKinnon responded:

> [W]omen are socialized to passive receptivity; may have or perceive no alternative to acquiescence; may prefer it to the escalated risk of injury and the humiliation of a lost fight; submit to survive. Also, force and desire are not mutually exclusive under male supremacy. So long as dominance is eroticized they never will be. Some women eroticize dominance and submission; it beats feeling forced.[423]

419 Lacey, "Theory into Practice?" *supra* note 377, at 97.

420 MacKinnon, "Signs I," *supra* note 382, at 529 (arguing that "nature, law, the family, and roles" are "consequences, not foundations" of Patriarchal order).

421 MacKinnon herself is careful to distinguish her position from 'false consciousness,' because such a position "is one-sidedly outside when there is no outside." MacKinnon, "Signs II," *supra* note 380, at 638 n. 5. Nevertheless, MacKinnon's position can be termed a 'false consciousness' argument because it explains the behavior of an oppressed group by referencing the unconscious internalization of the dominant ideology. Kathryn Abrams, "Ideology and Women's Choices," 24 *Georgia Law Review* 761, 763 (1990). Abrams uses the term 'ideological determination,' rather than 'false consciousness,' to capture this subtlety. *Id.* at 761 n. 1. Others scholars, however, simply use the more common term. *See, e.g.*, Cornell, "Sexual Difference, the Feminine, and Equivalency," *supra* note 385, at 2252 (restating MacKinnon's position as: "To celebrate women's difference is a form of 'false consciousness,' because women's so-called difference is only women's lives as 'fuckees,' and the affirmation of difference is only an excuse for reducing women to those who 'get fucked' in whatever way men want to do it to us.").

422 Catharine MacKinnon, *Toward a Feminist Theory of the State* 117 (1989).

423 *Id.* at 177.

Because the patriarchal system thus structures every aspect of women's (and men's) epistemological lives, MacKinnon and others have argued that the only true feminism, 'feminism unmodified', is radical feminism. As she puts it: "Radical feminism *is* feminism."[424]

MacKinnon's radicalism proved, however, to be too much to swallow for many mainstream feminists,[425] and even MacKinnon herself would strike a less radical tone in her later work.[426] However, seen in the larger theoretical, political, and cultural context of that time, one could argue that MacKinnon's theories calling for the 'explosion' of the public-private divide were not that far removed from the mainstream of the second wave. The women's movement, which at one stage had as one of its most powerful slogans "the personal is political,"[427] made every aspect of women's life into a field of political activism and contestation. The cultural revolution of the late 20th Century was a revolution in women's (and men's) lives, and it played out not just in politics and law, but in art, music, and in various cultural media as well.[428] In more than one way, feminism 'exploded the private':

> For women the measure of the intimacy has been the measure of the oppression. This is why feminism has had to explode the private. This is why feminism has seen the personal as the political. The private is public for those for whom the personal is political. In this sense, for women there is no private, either normatively or empirically… to confront the fact that women

424 MacKinnon, "Signs II," *supra* note 380, at 639 (emphasis added).

425 For others, though, the word radical has an intellectually powerful attraction. *See* Halley, *Split Decisions*, *supra* note 250, at 42 (calling MacKinnon's early work "breathtakingly radical").

426 *See id*. at 41-58 (discussing MacKinnon's shift from radicalism to a willingness to work within legal structures in her later work).

427 The story behind this iconic slogan deserves our attention. It comes from a short essay written by Carol Hanish. Published originally in 1969 as a pamphlet and reprinted in *Notes from the Second Year: Women's Liberation* (Shulamith Firestone & Anne Koedt eds., 1970). The slogan, which encapsulates an important critique of the public-private distinction, is the product of a debate among feminist activists, long before the earliest scholarly works that we have been discussing here came about. It is illustrative of the inter-play between scholarship and activism that is characteristic of feminism. See the essay by Hanish with a short 2006 introduction at: http://carolhanisch.org/CHwritings/PIP.html (27 August 2009).

428 Examples are too numerous to mention. From Kate Millett, *Sexual Politics* (1968) to Eve Ensler, *Vagina Monologues* (1996), one can see a large amount of emphasis on 're-discovering' or 're-constructing' women's identity in the most intricate details.

> have no privacy is to confront the intimate degradation of women as the public order. The doctrinal choice of privacy [here, in the abortion context] reaffirms and reinforces what the feminist critique of sexuality criticizes: the public/private split.[429]

MacKinnon's critique of Liberalism and the public-private distinction has had immense resonance, both within feminism[430] as well as in other disciplines and in politics.[431] But radical or not, in its various critiques of the public-private distinction, feminism inaugurated a new wave of polemics about Liberalism, and about political philosophy as a whole. Not only did feminist scholars critique Liberal philosophers of old, such as Locke and Mill, but also Marxist thinkers,[432] and more contemporary thinkers, such as Hannah Arendt and Jürgen Habermas.[433] These theoretical and philosophical critiques would prepare the ground for a series of engagements with human rights law and doctrine.

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429 MacKinnon, *Toward a Feminist Theory of the State*, *supra* note 423, at 191.

430 *See* DuBois et al., *supra* note 377 (providing an impression of how many feminists would attack MacKinnon for her radical position, but at the same time agree with her in many ways). Her two *Signs* articles are great examples of exhilarating writing that is easy to dismiss as 'too radical' but difficult to argue against. MacKinnon, "Signs I," *supra* note 382; MacKinnon, "Signs II," *supra* note 380.

431 In fact, some scholars have argued that this school of feminism has had the strongest international resonance. See Janet Halley et al., "From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism," 29 *Harvard Journal of Law & Gender* 335 (2006) [*hereinafter* "Governance Feminism"].

432 *See, e.g.*, MacKinnon, "Signs I," *supra* note 382, 517-27 (criticizing Marxists for subsuming gender analysis under the rubric of class); Nicholson, *supra* note 391 (criticizing Marxists for failing to historicize the gendered nature of the public-private distinction).

433 *See e.g.* Seyla Benhabib, "Models of Public Space: Hannah Arendt, the Liberal Tradition, and Jürgen Habermas," in *Feminism, the Public and the Private* 64-99 (Joan B. Landes ed., 1998); Nancy Fraser, "What's Critical about Critical Theory?: The Case of Habermas and Gender," in *Feminism as Critique* 31, 55 (Seyla Benhabib & Drucilla Cornell eds., 1987) (arguing that Habermas's failure to see gender means that he "tends to replicate, rather than to problematize, a major institutional support of women's subordination in late capitalism, namely, the gender-based separation of the state-regulated economy of sex-segmented paid work and social welfare, and the masculine public sphere, from privatized female childrearing").

7.4 Feminist Public-Private Critiques of Human Rights

In the 1980's, feminist legal scholars began adapting the public-private critique of national law to the international level. Applying the feminist critiques in this new field, feminist scholars read and re-read the existing doctrine in new ways. Commenting on the complexity and theoretical diversity of feminist perspectives on international law, Hilary Charlesworth wrote:

> Although each of these theories have been critiqued by other feminists, I would argue that all have a place in feminist analysis of international law precisely because the project is in its very earliest phase. The great silence of our discipline with respect to women needs to be challenged on every front. All these feminist theories need to be tested in an international context so that their contribution can be assessed. Professor Fernando Tesón has recently criticized us for using elements from feminist theories he views as incompatible. We remain unrepentant. The feminist project in law is less a series of discrete interpretations than, in Ngaire Naffine's words, "a sort of archaeological dig." Different techniques are appropriate at different levels of the excavation."[434]

In many ways, these analyses followed the pattern of feminist criticisms of domestic law, arguing that international law and human rights do not adequately protect or account for women, and that this 'oversight' is not accidental, but structural. Many saw international law as merely an extension of the patriarchal regime which subordinates women in the domestic realm, and thanks to which women are worse off than men.

Beginning in the late 1980s, there was a great deal of work being done on women and human rights, and there was often a sense that human rights

434 Hillary Charlesworth, "Alienating Oscar? Feminist Analysis of International Law," in *Reconceiving Reality: Women and International Law* 1, 3 (Dorinda G. Dallmeyer ed. 1993) (footnotes omitted) (quoting Ngaire Naffine, *Law and the Sexes* 2 (1990)). The criticisms by Tesón that she refers to are expressed in Fernando Tesón, "Feminism and International Law: A Reply," 33 *Virginia Journal of International Law* 647 (1993). *See also* Karen Knop. "Re/Statements: Feminism and State Sovereignty in International Law," 3 *Journal of Transnational Law & Contemporary Problems* 293, 297 (1993) ("The diversity of women's experiences with the internal aspects of State sovereignty suggests that a single strategy or theory concerning its external aspect may be neither possible nor desirable.").

were not helping women. There were multiple approaches to this issue, and certainly not all of these self-identified as 'feminist.' Some more Liberal approaches, for example, deployed conventional legal doctrine to deal with women's issues and eliminate facial gender discrimination without necessarily pointing the finger at structural causes such as patriarchy or the public-private distinction.[435] Others argued in the larger, extra-legal context for institutional solutions that would improve the implementation of existing norms.[436] More and more, though, feminist scholars started to refer to the 'feminist critique' of human rights, and of international law, as one that had a critique of the public-private divide as its chief component.

Feminist scholars brought a new perspective to critiques of the public-private distinction by firmly situating the international level within the analysis. They described the international legal order as one in which the international 'public' realm of law and organizations was juxtaposed with the international 'private' realm of the state with its 'natural' sovereignty and its 'domestic' affairs, recreating, in Celina Romany's words, "the blown-up liberal state of international society."[437] As on the domestic level, they argued that the Liberal public-private distinction was central to, and a primary cause of, women's subordination, acting as a veil to keep women's experiences out of the protective reach of international law in general and human rights law

435 This was the approach taken, for example, by many of the major women's international human rights conventions. The goal of the United Nations Convention on the Political Rights of Women of 1953, the United Nations Convention on the Nationality of Married Women of 1957, the UNESCO Convention on discrimination in Education of 1960, and the norms contained in the Human Rights Covenants all focus on nondiscrimination and the elimination of legal barriers to women's equal participation. Hilary Charlesworth, "What are 'Women's International Human Rights'?" in *Human Rights of Women* 58, 64-65 (Rebecca J. Cook ed., 1994).

436 *See* Karen Engle, "International Human Rights and Feminism: When Discourses Meet," 13 *Michigan Journal of International Law* 517 (1991-1992) (offering an overview of the different ways in which women and human rights were brought together). Engle's concluding observations give a good impression of how difficult it must have been, in the late 1980s, to put women on the agenda of human rights NGOs and scholars, let alone that of states. *Id.* at 599-610.

437 Celina Romany, "Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law," 6 *Harvard Human Rights Journal* 87, 100 (1993). *See also* Charlesworth, "What are 'Women's International Human Rights'?" *supra* note 436, at 70-71 (describing the division of international law into "the (public) province of international law distinct from the (private) sphere of domestic jurisdiction").

in particular.[438] As Shelley Wright explained:

> What we have are layers of public and private in which certain areas are open to contractual arrangements based on exchange between individuals or states, designated as 'persons' with legal authority to act, and closed areas of 'private' or 'internal' matters which should remain unregulated or free from interference.[439]

Each of these layers, in its own way, contributes to the women's exclusion from (or location within) the gaze of international law, allowing women to be effectively subordinated and denying them the benefits of human rights protection.[440] International law and human rights, through the veil of the public-private distinction, function as ideological tools used by patriarchy in its subordination of women. Thus, in the words of Hilary

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438 As Romany describes, "International law adopts the liberal social contract discourse and values, in which states are individuals, in a 'position of equality, freedom and independence towards each other.' " Romany, *supra* note 438, at 89 (footnote omitted). However, "Modern patriarchy's history is an integral part of the social contract." *Id.* at 99. As a result, "The blown-up liberal state of international society supplanted feudalism with democratic revolutionary struggles but left women's human rights in a medieval stage." *Id.* at 100. This argument draws heavily on Carole Pateman's idea of a parallel "sexual contract" that accompanied the "social contract" as foundational to liberal society. Pateman, *The Sexual Contract*, *supra* note 390. *See also* Catharine MacKinnon, *Are Women Human? And Other International Dialogues* 4 (2006) (asking "If the state has a gender (as well as usually a sex), so that the state through its distinctive instrument, law, sees and treats women the way men in society see and treat women, does international law challenge this, or does it reproduce it at a yet higher level?" Her answer is generally, it does.).

439 Shelley Wright, "Economic Rights, Social Justice and the State: A Feminist Reappraisal," in *Reconceiving Reality: Women and International Law* 117, 129 (Dorinda G. Dallmeyer ed., 1993)

440 *See generally*, Hilary Charlesworth, "The Public-Private Distinction and the Right to Development in International Law," 12 *Australian Yearbook of International Law* 190 (1992); Charlesworth, "Alienating Oscar?" *supra* note 435, at 1; Hilary Charlesworth et al., "Feminist Approaches to International Law," 85 *American Journal of International Law* 613 (1991); Hilary Charlesworth & Christine M. Chinkin, "The Gender of Jus Cogens." 15 *Human Rights Quarterly* 63 (1993); Hilary Charlesworth, "Worlds Apart: Public/Private Distinctions in International Law," in *Public and Private: Feminist Legal Debates* 243 (Margaret Thornton ed., 1995); Frances Olsen, "International Law: Feminist Critiques of the Public/Private Distinction," in *Reconceiving Reality: Women and International Law* 157 (Dorinda G. Dallmeyer ed. 1993); Rebecca J. Cook, "Accountability in International Law for Violations of Women's Rights by Non-State Actors," in *Reconceiving Reality: Women and International Law* 93 (Dorinda G. Dallmeyer ed. 1993).

Charlesworth, "As in domestic law, the non-regulation of the private sphere internationally legitimates self-regulation, which translates inevitably into male dominance."[441]

To illustrate this critique, feminist scholars argued that international law and human rights' exclusive focus on the victimization of individuals by the state missed entirely the types of violence that women were more often exposed to: the 'private' violence of physical abuse, discrimination, and daily gendered oppression.[442] Despite their differences, the so-called 'first-', 'second-', and 'third-' generation rights were all constructed with men's needs and experiences in mind.[443] Moreover, feminists have pointed out that respect for the sanctity of the public-private distinction in international law was also biased along gender lines, and was frequently violated when strictly 'feminine' issues were not at stake: slavery, racial discrimination, children's rights and even participation in acts of genocide, which could be defined as

441 Charlesworth, "What are 'Women's International Human Rights'?" *supra* note 436, at 71.

442 *See id.* at 72 ("The great level of documented violence against women around the world is unaddressed by the international legal notion of the right to life because that legal system focused on 'public' actions by the state."); Rhonda Copelon, "Intimate Terror: Understanding Domestic Violence as Torture," in *Human Rights of Women* 116 (Rebecca J. Cook ed., 1994) (arguing that intimate violence against women, which remains on the margins of international condemnation, should be regarded as seriously by the international community as state-sanctioned torture); MacKinnon, *Are Women Human? supra* note 439, at 3 (questioning women's position as "humans" for the purposes of applying human rights because of the international community's failure to take action on private violence against women: "Legally, one is less than human when one's violations do not violate the human rights that are recognized."); Romany, *supra* note 438 (arguing that the private nature of violence against women prevents them from being able to access human rights law, which is focused on wrongdoing attributable to the state). This vigorous criticism of this myopia by feminist activists that led the prestigious international human rights NGO Amnesty International to take steps to correct this gendered bias in their scope of inquiry. Amnesty International, *Women on the Frontline: Human Rights Violations Against Women* (1991).

443 Charlesworth, "What are 'Women's International Human Rights'?" *supra* note 436, at 59, 71-76. Initially, there was hope in some quarters that the implementation of "second generation" economic, social and cultural rights might help to address women's structural subordination. As Charlesworth notes, however, the fact that the Covenant "does not touch on the economic, social, and cultural context in which most women live" means that it will be of only limited usefulness to women. *Id.* at 74-75.

'private' rather than 'state' actions, *did* enjoy international legal attention.[444] The determining factor is the gender of the victim, or as Charlesworth put it, "rights are defined by the criterion of what men fear will happen to them."[445]

Feminists also critiqued the doctrine of state responsibility, which sanctioned this gendered bias in international law by insisting that violations of international obligations must be attributable to the state, thereby allowing non-state actors to evade international responsibility.[446] The problem from a feminist perspective, as Shelley Wright has pointed out, is that "For most women, most of the time, indirect subjection to the State will always be mediated through direct subjection to individual men or groups of men."[447] As long as human rights violations are only actionable if attributable to direct state action, they argue, the human rights framework will be an insufficient tool for combating women's subordination.[448]

444 *See, e.g.* MacKinnon, *Are Women Human? supra* note 439, at 270 (questioning why the international community was able to immediately adapt international law to ignore the public-private divide when "on September 11th, nonstate actors committed violence against mostly nonstate (non-governmental and civilian) actors," but had failed to act to counter the violence being continuously committed by the same organization against women within the borders of Afghanistan); Romany, *supra* note 438, at 97 (questioning "why white supremacy belongs to the 'community' while male supremacy belongs to the individual state, why gender issues are deemed private within international society").

445 Charlesworth, "What are 'Women's International Human Rights'?" *supra* note 436, at 71. *See also* MacKinnon, *Are Women Human? supra* note 439, at 14 (arguing that "when men use their liberties socially to deprive women of theirs, it does not look like a human rights violation. When men are deprived of theirs by governments, it does.").

446 Romany, *supra* note 438, at 106-121; *See also* Andrew Clapham, *Human Rights in the Private Sphere*, 1996 (challenging the presumption that human rights apply only in the public sphere and not to non-state actors); M. Forde, "Non-Governmental Interferences with Human Rights," 56 *British Yearbook of International Law* 254 (1985).

447 Shelley Wright, "Economic Rights and Social Justice: A Feminist Analysis of Some Human Rights Conventions," 12 *Australian Yearbook of International Law* 242, 249 (1992).

448 Celina Romany argues, to this end, that the doctrine of state responsibility should be enlarged such that a state is held responsible for any "systemic failure to institute the necessary political and legal protections to ensure the basic rights of life, integrity, and dignity of women." Romany, *supra* note 438, at 87. She argues that the current system should be replaced with one in which better protects women against 'private' violations of their rights: "States can be held responsible for the systematic "private" male violence against women via two routes. First, by systematically failing to provide protection for women from "private" actors who deprive women of their rights to life, liberty, and security, the state becomes complicit in the violation. In effect, the state creates a parallel government in which women's rights are systematically denied. The state thus functions as an accomplice to the actual human rights violations and can be held responsible for them. Second, the state can be held responsible for failing to fulfill its obligation to prevent and punish violence against women in a non-discriminatory fashion, a failure which denies women the equal protection of the law." *Id.* at 110.

Some feminist scholars went to great efforts to argue that despite these problems women could be accommodated within existing doctrines of international law and human rights.[449] Indeed, according to them, the international law version of the public-private distinction had already been overcome by international human rights law, which had in fact abolished the 'domestic affairs' doctrine by making states subject to human rights obligations.[450] Once women were fully integrated into the human rights apparatus, human rights would become an ally in the struggle against the negative workings of the domestic public-private distinction. The Convention on the Elimination of Discrimination Against Women (CEDAW) was for these feminists a giant leap in that direction.[451]

Others, however, were more critical of CEDAW. Some argued that the creation of a specialized field of 'women's international human rights' contributed to the marginalization of women's issues by sequestering them in a separate, limited field.[452] Others lamented that CEDAW's article 1 still defined equality by reference to male-defined norms.[453] And others deployed a feminist public-private critique to make the point:

449 *See* Riane Eisler, "Human Rights: Toward an Integrated Theory for Action," 9 *Human Rights Quarterly* 287 (1987).

450 *Id.* at 289-90 ("the idea that what governments do within the confines of their nations is a strictly internal affair has today explicitly been rejected by human rights advocates. Indeed, the rejection of this idea is the theoretical basis for the international human rights movement.").

451 *See Id.* at 287 (arguing that after CEDAW, the construction of a unified action-oriented theory of human rights that may be applied to the *whole* of humanity—women as well as men—is now not ony essential but also feasible."); Margaret E. Galey, "International Enforcement of Women's Rights," 6 *Human Rights Quarterly* 463, 472 (1984) (calling CE DAW's then-newly minted complaints procedure "a small step forward for women, but (…) major steps forward for womankind"); *See also* Lacey, "Feminist Legal Theory and the Rights of Women," *supra* note 374.

452 Charlesworth, "What are 'Women's International Human Rights'?" *supra* note 436, at 59; Laura Reanda, "The Commission on the Status of Women," in *The United Nations and Human Rights: A Critical Appraisal* 267 (Philip Alston ed., 1992) (arguing that the creation of separate women's human rights mechanisms has been the creation of a "women's ghetto" with less power, resources, and priority than "mainstream" bodies). Although the original ghettoization of women's issues has been ameliorated somewhat by the process of 'gender mainstreaming' in the UN Agencies, the adoption of women-centered analyses remains a work in progress. *See* Dianne Otto, " 'Gender Comment': Why Does the UN Committee on Economic, Social and Cultural Rights Need a General Comment on Women," *University of Melbourne School of Law Public Law and Legal Research Paper No. 31* (2002), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=319202 (explaining the need for a 'General Comment' that would integrate women into the analytical process of the CESCR).

453 Charlesworth, "What are 'Women's International Human Rights'?" *supra* note 436, at 64.

> The Convention has been criticized for embodying an understanding of sex equality that revolves largely around women's functions as wives and mothers; it ignores issues such as pornography, domestic violence, abortion, and rape—acts and conditions that impair or nullify the fundamental freedoms and human rights of women and that occur because they are women.[454]

For this reason, cultural feminist scholars like Noreen Burrows argued not for a gender-sensitive shift in the public-private distinction, but rather for the development of women-specific rights that would operate within the 'private' sphere.[455] For them, the problem was not the public-private distinction, but rather the fact that feminine values and interests, which prevail in the private sphere, are not sufficiently appreciated by human rights discourse. It was also, though, a pragmatic response to what they saw as the dramatic failure of human rights:

> How can international human rights law tackle the oppressed position of women worldwide? Women's international human rights must be developed on a number of fronts. Certainly the relevance of the traditional canon of human rights to women is important to document (...). At the same time, rights that focus on harms sustained by women in particular need to be identified and developed, challenging the public/private distinction by bringing rights discourse into the private sphere. But, most fundamental and important, we must work to ensure that women's voices find a public audience, to reorient the boundaries of mainstream human rights law, so that it incorporates an understanding of the world from the

454 Sarah C. Zearfoss, Note, "The Convention for the Elimination of All Forms of Discrimination Against Women: Radical, Reasonable or Reactionary?" 12 *Michigan Journal of International Law* 903, 916 (1991); *But see* Theodor Meron, *Human Rights Law-Making in the United Nations* (1986) (devoting a whole chapter to CEDAW in which he would agree with Eisler that CEDAW made a significant change to the rigidity of the public-private distinction, but disagree with her in thinking that it is a good thing, seeing the collapse of the public-private distinction as creating a situation in which some human rights violate other human rights).

455 Noreen Burrows, "International Law and Human Rights: The Case of Women's Rights, in *Human Rights: From Rhetoric to Reality* 80 (David Goldberg et al. eds., 1986); *See also* Charlesworth, "What are 'Women's International Human Rights'?" *supra* note 436, at 65-66.

perspective of the socially subjugated.[456]

This feminist critique of human rights has deeper roots in theory. Feminist Critical Legal Scholars, or Fem-Crits, had developed an elaborate feminist critique of rights themselves that paralleled and expanded on the critique of rights developed by critical legal scholars.[457] Like the critical legal theorists, Fem-Crits pointed out that the fundamental contradiction between individual and community, freedom and security—the public-private dichotomy—is mediated in our society by rights.[458] The Fem-Crits agreed with CLS scholars that rights are contingent, indeterminate,[459] individualistic,[460] ideological and reifying, and they also questioned the strategic value of deploying rights discourse.[461]

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456 Charlesworth, "What are 'Women's International Human Rights'?" *supra* note 436, at 76.

457 *See supra* paragraph 8.4; Charlesworth et al., "Feminist Approaches to International Law," *supra* note 441, at 634 (calling the feminist critique of rights "parallel, but distinct.").

458 *See e.g.*, Frances Olsen, "Statutory Rape: A Feminist Critique of Rights Analysis," 63 *Texas Law Review* 387, 387-389 (describing the fundamental contradiction in the context of rights discourse).

459 Because rights are indeterminate, feminists argued, women's rights are inevitably balanced against the competing rights of men, to the detriment of women. A woman's right to security can always be countered with a man's right to freedom, and vice versa. "Whilst a child or a wife may have the right not to be molested, the husband also has rights that the law will uphold. For example, the right to live in 'his' home, the right to see 'his' children." Carol Smart, *Feminism and the Power of Law* 145 (1989).

460 Because rights are individualistic, women lose their power to protest and seek redress as a class. "The invocation of rights to sexual equality may (…) solve an occasional case of inequality for individual women but will leave the position of women generally unchanged." Charlesworth et al., "Feminist Approaches to International Law," *supra* note 441, at 635. *But see* Gilligan, *supra* note 378, at 149 (arguing that the assertion of rights claims can play an important role in women's moral development by transforming women's typical experience of selflessness); Olsen, "Statutory Rape," *supra* note 459, at 393 (arguing that 'community' has historically been something that is imposed on, rather than chosen by, women, and that therefore even alienating rights might be attractive from a feminist standpoint: "When a woman is still struggling for 'a room of her own,' she is unlikely to complain that rights isolate her"); Elizabeth M. Schneider, "The Dialectic of Rights and Politics: Perspectives from the Women's Movement," 61 *New York University Law Review* 589, 626 ("The women's rights movement has had an important affirming and individuating effect on women's consciousness. The articulation of women's rights provides a sense of self and distinction for individual women, while at the same time giving women an important sense of collective identity.").

461 Carol Smart, for example, questions the effectiveness of a woman's right to appeal to the courts for injunctions against abusive partners by pointing out that "the legal right can treat the woman and man involved only as adversaries," ignoring other factors such as "an economic dependence which prevents the woman exercising her 'rights', or a concern for the welfare of the children [that] might lead a mother to think that it is better to keep the father in the family." Smart, *supra* note 460, at 142. *See also* Olsen, "Statutory Rape," *supra* note 459 (discussing ambivalence of laws designed to provide rights to women).

> [There are many] similarities between the CLS critique of rights based on "liberal legalism" and the feminist critique based on "patriarchy." Both liberal legalism and patriarchy rely upon the same set of dichotomies. Further, the critiques usefully emphasize the indeterminacy of rights, and the ways in which rights discourse can reinforce alienation and passivity. Both critiques highlight the ways in which rights discourse can become divorced from political struggle. They appropriately warn us of the dangers social movements and lawyers encounter when relying on rights to effect social change.[462]

Feminist scholars, however, differed from CLS in that they elaborated these critiques in the specific context of women's subordination. To begin with, they located patriarchy, rather than Liberalism (to the extent that they are not deemed coincident), at the center of the critique. They pointed out that rights, designed to mediate the public-private distinction, were derived from an experience of law and the state that was not reflective of women's lived experiences. Women, historically subjugated in both the public and private spheres, would not likely find solutions in any mere re-drawing of the line. Robin West argued that women's experiences and needs are not easily translatable into the masculine terminology of 'rights,' which are too narrow and individualistic.[463] Others suggested that rights discourse's focus on 'equality' means that women are required to live up to a 'universal' male standard that does not reflect their needs or experiences. In fact, because they impose a 'universal' male standard, these so-called 'rights' might just as

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462 Schneider, "The Dialectic of Rights and Politics," *supra* note 461, at 597 (footnotes omitted).

463 *See* Robin West, "Feminism, Critical Social Theory, and Law," 1989 *University of Chicago Legal Forum* 59, 84-96 (1989) (arguing that women's experiences are not easily translatable into the individualistic liberal language of the self). *See also* Alberto Melucci, "The Symbolic Challenge of Contemporary Movements," 52 *Social Research* 789, 811 (1985) (arguing that: "[T]he women's movement has raised a fundamental question concerning everyone in complex systems: how communication is possible, how to communicate with "another" without denying the difference by power relations. Beyond the demand for equality, beyond the inclusion in the field of masculine rights, women are yet speaking of the right to difference and to "otherness." That is why they sometimes choose silence, because it is difficult to find words other than those of the dominant language.")

easily become "new sites for the subtle oppression of women."[464]

In addition, they criticized the content of the rights established by traditional doctrine as having been drafted from a male point of view. The objectivity, distance, and abstraction of rights discourse, they argued, did not match the experiences of women.[465] And the specific content of these abstract rights was also developed with a male slant: in the international human rights context, the emphasis on 'public' civil and political rights comes at the expense of rights in the 'private' world, and thus also the issues of concern to 'privatized' women, which are better reflected by economic, social, and cultural rights.[466]

Like its CLS cousin, the feminist critique of rights has also been criticized from a minority perspective; particularly by 'intersectionality' feminist scholars and critical race feminists. They have argued that the language of rights should not be discarded because it has offered so much hope and energy to some groups of oppressed people.[467] Moreover, with regard to the

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464 Nicola Lacey, "Legislation Against Sex Discrimination: Questions from a Feminist Perspective," 14 *Journal of Law & Society* 411, 415 (1987); *see also* Lacey, "Feminist Legal Theory and the Rights of Women," *surpa* note 374, at 38-41; Charlesworth, "What are 'Women's International Human Rights'?" *supra* note 436, at 61 ("But is this task [of pursuing women's rights] worth the energy that must be expended on it? Are we simply not creating new sites for the subtle oppression of women?"); Charlesworth et al., "Feminist Approaches to International Law," *supra* note 441, at 634-338 (questioning "whether the acquisition of rights advances women's equality"); Smart, *supra* note 460, at 139 (arguing that "the rhetoric of rights has become exhausted, and may even be detrimental").

465 In part, this stems from the general view of law as patriarchal that is evident in much of Catharine MacKinnon's work. *See supra* footnotes 421-425 and accompanying text.

466 As Charlesworth et al. wrote: "[I]nternational law accords priority to civil and political rights, rights that may have very little to offer women generally. The major forms of oppression of women operate within the economic, social and cultural realms. Economic, social and cultural rights are traditionally regarded as a lesser form of international right and as much more difficult to implement." Charlesworth et al., "Feminist Approaches to International Law," *supra* note 441, at 635.

467 Martha Minow, "Interpreting Rights: An Essay for Robert Cover," 96 *Yale Law Journal* 1860, 1910 (1987) ("I worry about criticizing rights and legal language just when they have become available to people who had previously lacked access to them. I worry about those who have, telling those who do not, 'you do not need it, you should not want it.' "); Patricia Williams, "Alchemical Notes: Reconstructing Ideals from Deconstructed Rights," 22 *Harvard Civil Rights-Civil Liberties Law Review* 401, 431 (1987) (" 'Rights' feels so new in the mouths of most black people. It is still so deliciously empowering to say. It is a sign for and a gift of selfhood that is very hard to contemplate restructuring… at this point in history. It is the magic wand of visibility and invisibility, of inclusion and exclusion of power and no power.").

public-private distinction they have argued that feminist critiques are too Eurocentric or U.S.-centric, and that the public-private distinction might not operate in the same way or be gendered in the same way in all cultures. In fact, in some cultures it might even not even exist as such.[468] From this perspective, critical race feminists argued that there should not be too much focus on the public-private distinction as the primary or only structure of women's oppression. Moreover, the development of (women's) rights should definitely not be discarded either, even if it means that the universality of human rights, and that of feminism for that matter, must be suspended.

Feminist scholars have also explored and problematized international human rights discourse at the point of its intersection with culture. In these complex debates, 'culture' has two distinct significations. On the one hand, respect for 'culture' has meant the importance of maintaining a deep sensitivity to the particular needs and perspectives of women in the non-western world.[469] Here, culture becomes a shield against the homogenizing influence of white-affluent-transatlantic feminism. On the other hand, respect for 'culture' has meant the justification of certain practices that victimize and oppress women on the grounds of history and tradition.[470] In this second sense, culture operates as a patriarchal cage, a

468 On the intersectionality critique of feminist critiques *see generally Global Critical Race Feminism: An International Reader* (Adrien Katherine Wing ed., 2000).

469 *See, e.g.,* Lama Abu-Odeh, "Post-Colonial Feminism and the Veil: Considering the Differences," 26 *New England Law Review* 1527 (1992) (arguing that feminists should respect Muslim women's choices with respect to the veil as multiple and varied strategies for trying to survive within a hostile community); Charlesworth et al., "Feminist Approaches to International Law," *supra* note 441, at 618-621 (arguing that feminist international lawyers "must take account of the differing perspectives of First and Third World feminists"); Karen Engle, "Female Subjects of Public International Law: Human Rights and the Exotic Other Female," 26 *New England Law Review* 1509 (1992) (discussing the ways in which Western feminists marginalize and exclude the different perspectives of the "Exotic Other Female").

470 *See, e.g.,* Radhika Coomaraswamy, "To Bellow like a Cow: Women, Ethnicity, and the Discourse of Rights," in *Human Rights of Women* 39 (Rebecca J. Cook ed., 1994) (arguing that the persistence of cultural acceptance of discriminatory practices hinders the application of human rights in Third World countries).

shield against the empowering forces of feminism and human rights.[471] In some ways, the crux of the 'culture' debate is over whether—and to what extent—there exists a universal category called 'woman', subordinated within a system of Patriarchy, as opposed to a multiplicity of unique women living unique experiences without a universal narrative of oppression and/or empowerment. Positing 'culture' as an important category pulls toward the latter pole; the question for feminist scholars has been how to balance the need for sensitivity to difference against the desire for universal 'rights'. In this two-fold story, culture might be seen as a type of private sphere operating within the 'universal' public sphere of international human rights. In this sphere different rules apply; the equality of the 'universal' public can be translated into inequality in the 'cultural' private.[472]

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471 Radhika Coomaraswamy illustrates the conflict between culture and women's rights by invoking the case of Roop Kanwar, a young woman who was burned alive on her husband's funeral pyre in Rajasthan: "(…) Urban centered women's groups as well as groups of women from all over India were horrified and organized a march in Rajasthan. The Rajasthanis retaliated by filling the streets with thousands of their own ethnic group: the right to commit sati, they claimed, was part of their ethnic culture. After months of delay, the police finally arrested Roop Kanwar's father-in-law and five other members of the family for abetment to suicide. Three months later, the Indian Parliament passed a tough law banning sati, even though an old law already existed, as a sign of central government intolerance of these ethnic practices (…). Though the feminist movement had scored a legal victory, the case exemplified the terrible gulf between human rights and women's rights activists, on the one hand, and those who see the status of women as an integral part of their ethnic identity, on the other (…). Ironically, although the state came down strongly on the side of the women activists there was a sense that the battle was lost (…). What is the point of all these laws if the people do not believe that putting an eighteen-year-old woman on a funeral pyre and denying her life is not a violation of the most basic fundamental right—the right to life? What is the point of all the Constitutional protection if "ethnic identity" is an acceptable justification for reducing the status of women according to diverse cultural practice?" *Id.* at 49-50. As Coomaraswamy notes, however, it nevertheless remains essential to avoid the "Orientalist trap" of "[dividing] the world into bipolar categories: the west is progressive on women's rights and the east is barbaric and backward." *Id*. at 40.

472 *See* Karen Engle, "Culture and Human Rights: The Asian Values Debate in Context," 32 *New York University Journal of International Law & Politics* 291 (2000); Abu-Odeh, *supra* note 470 (discussing the ways in which women are both subjugated and empowered by culture in Islamic societies); Engle, "Female Subjects of Public International Law," *supra* note 470 (examining law and the "exotic other female"); Ratna Kapur, *Erotic Justice: Postcolonialism, Subjects and Rights* (2005) (exploring the possibilities for an "erotic justice" that would "bring erotically stigmatised communities" into an "inclusive conversation"); Drucilla Cornell, *At the Heart of Freedom: Feminism, Sex, and Equality* (1998) (discussing the contradictions in the fight for formal equality).

In conclusion, feminist critiques of human rights function by countering a number of Liberal narratives about human rights. In these narratives, human rights denies its ideological nature by presenting itself as based on a description of social life as one in which there is a public realm and a private realm. It denies inequalities based on gender, race, ethnicity, etc. The descriptiveness of this distinction serves to deny the application of rights to a number of people and situations and to present this denial as 'logical', and commonsensical. The Liberal narrative of progress from the Middle Ages through the Enlightenment to Globalization is countered with a narrative about patriarchy and the denial of difference. But it is not only a counter-narrative that the feminist critiques deploy to shift the emphasis and re-adjust the picture; it is also that human rights are situated in a larger context. The context is not just political philosophy, but also international law, geopolitical and geo-cultural relations, among others. We will now move to explore how both the critiques and a consciousness about their strength and problems come together.

7.5. Feminist Pursuit of Social Change and the Theory-Action Dichotomy

Does critique lead to social change? Does it have emancipatory value? Can it empower those who are disempowered by the structures and categories that the critique uncovers? A frequent and recurring theme in feminist legal critiques has been an engagement with the project of improving women's lives, a commitment to deploying the critique for the purpose of altering the basic structures of Liberalism in order to eliminate its Patriarchal characteristics or excesses. The quote by Hilary Charlesworth mentioned above,[473] which starts with the sentence "how can international human rights law tackle the oppressed position of women worldwide?" continues and concludes the article with the sentence: "One way forward in international human rights law is to challenge the gendered dichotomy of public and private worlds."[474] Since feminist scholars, like those in CLS, are so aware of how ideology, structures of consciousness, philosophical and legal categories, etc., work through doctrinal discourses into the very fabric of law in ways that directly determine and affect women's lives, feminist scholarship, amidst its multiple internal controversies and debates, has continuously questioned itself and the strategic value (or 'real-world' effect) of its critiques.

473 *See supra* text accompanying note 457 (quoting Charlesworth, "What are 'Women's International Human Rights'?" *supra* note 436, at 76).

474 Charlesworth, "What are 'Women's International Human Rights'?" *supra* note 436, at 76.

One important self-questioning set of arguments is that which was formulated by Karen Engle in her classic *After the Collapse of the Public/Private Distinction: Strategizing Women's Rights*.[475] In this piece Engle starts off by expressing a sense of futility:

> Most would agree that the critique has been successful in many ways, but not so successful in others. Evidence of the lack of success is that we still continue to talk about some issues in the ways that they were talked about fifteen years ago. That is, we still tend to focus on women's *exclusion* and on our *marginality* vis-à-vis public international law.[476]

Engle goes on to point out the positive and potentially negative side effects of these critiques. On the positive side she mentions the fact that the critique has helped scholars to understand the role of ideology, it has pushed them to explore "where most women in the world actually spend most of their lives,"[477] as well as better understand the structural problem of violence against women, it has forced scholars to critically examine the notion of culture and its meanings "by noting the gendered way that culture gets deployed"[478]; it has made scholars more critical of the role played by states in the subordination of women, and has helped to break down the distinction between the idea of state intervention and non-intervention. She then continues on a list of what she calls disadvantages: First, she argues that the private sphere has been 'reified': "Even as the distinction has collapsed, we still write and talk as though the categories mean something, and as though women really live in the 'private' and need protection of international law there."[479] Second, this reified private sphere is presented as a negative place, when there might be good uses of privacy for women, such as in the area of sexuality and abortion, prostitution, the right to wear a veil, to name but a few. Third, "the critiques often prevent us from taking seriously women

475 Karen Engle, "After The Collapse of The Public/Private Distinction: Strategizing Women's Rights," in *Reconceiving Reality: Women and International Law* 143 (Dorinda G. Dallmeyer ed. 1993); For some responses to this article, *see* Charlesworth, "Worlds Apart," *supra* note 440; Olsen, "International Law," *supra* note 441.

476 Engle, "After The Collapse of The Public/Private Distinction," *supra* note 476, at 143 (emphasis in original).

477 *Id.* at 147.

478 *Id.* at 148.

479 *Id.*

who claim not to want the regulation or protection of international law."[480] Arguments about culture are treated as "yet another manifestation of the mainstream legal regime's exclusion of the private or women (or both) at all costs."[481] Fourth, being in what is commonly described as the private realm, and 'beyond regulation', might be a good place to be; look at transnational corporations and other non-state actors. Finally, all the talk of human rights and inclusion therein:

> keeps us from asking what is international law. What do we want or expect that it can do for us? Why do we want to be a part of it? Concentrating on our marginality eclipses questions, as well as critiques about the core. So concerned are we to be included that we assume the doctrine to be good. Our only critique is that we are not part of it. (...) Finding 'rights' does not give solutions.[482]

It is important to emphasize that Karen Engle does not critique the critique of the public-private distinction as a whole, but only in part. In fact, she purports in her article "to build upon the work of those who have collapsed the distinction, by continuing to destabilize the public/private divide."[483] Engle makes an important distinction among the various feminist critiques. On the one hand, some feminist critiques argue that international law and human rights 'do not see women', do not protect them, leave them outside of the reach of their protective embrace. On the other hand, the critiques also say that international law and human rights 'see women', in the sense that it is a tool of patriarchy and willingly contributes to their subordination by creating spaces, spheres, where different rules apply, and where women are at the mercy of the mechanisms of subordination; in fact, international law and human rights *are a part of* the mechanisms of subordination. It is the first critiques that Engle sees as problematic, and it is the second critiques that she wants to build upon, for these critiques somehow demonstrate that the public-private distinction is as much an instrumental one as is the whole of international law and human rights. The critique, in this view, should not be taken too seriously, in the sense that it actually reifies the private and the

480 *Id.* at 149.
481 *Id.*
482 *Id.* at 151.
483 *Id.* at 147.

public, and that it sees the public-private as always perfectly gendered and patriarchal. But also, the critique should be taken *more* seriously, in the sense that it profoundly problematizes categories such as the state, and individual freedom, and rights among many others, and posits them as indeterminate: "Privacy, then, is an indeterminate concept; in itself it neither creates nor requires a space outside of the state's protection or regulation."[484]

Engle's article is interesting because it is a call for self-conscious and self-reflexive instrumentalization and strategizing of women's rights, of the public-private distinction, and of any other analytical tool. It is also a critique of the ways in which the critique of the public-private distinction has been deployed in the pursuit of international human rights for women. In this sense, it seems to call for more reflexivity[485] in the process of articulating the critique itself. In her account, the critique of the public-private distinction is all too often followed by a jump onto the bandwagon of international law and human rights, without reflection about whether these areas of political and legal action are not in and of themselves problematic.

Doctrinal critiques, in the way that they analyze existing legislation and trace the road ahead, in the way that they provide commentary on advocacy and its (lack of) results, are intimately connected with advocacy and policy making projects. In fact, many doctrinal scholars have participated in advocacy projects such as litigation or lobbying, or as rapporteurs or independent experts for international organizations as well as for states.[486] Feminist scholars have often had a practical commitment to women's causes and a distinctive sense that their critiques opened the way to novel and innovative policy proposals. A corollary of this was an ongoing preoccupation with 'strategy'. With their sense of the instrumentality of ideologically laden political, cultural, and legal discourse, there was a feeling of real empowerment, of having found a vocabulary that would articulate the previously unseen mechanisms of women's subordination, and a vocabulary that would allow them to articulate proposals that would counter these mechanisms. Whether it was the development of 'women's rights', or the reinterpretation of the doctrine of state responsibility, or the proposal of new legislation, the doctrinal work of feminist scholars was part and parcel of feminist legal and political activism.

484 *Id.* at 150.
485 *See supra* note 270 (discussing the notion of reflexivity).
486 Halley et al., "Governance Feminism," *supra* note 432.

Another important piece of self-reflection in this context comes from Nicola Lacey's *Theory into Practice? Pornography and the Public/Private Dichotomy*[487]. In this article, Lacey examines a notorious effort by feminist scholars Catharine MacKinnon and Andrea Dworkin to see a local ordinance passed in the city of Minneapolis that would allow women who could claim to be a victim of pornography to file a suit that would result in the prohibition of specific pornographic movies. In this project, the critique of the public-private distinction was an essential element of the legal and political strategy. Lacey's article analyzes how and reflects on the complicated relation between critique and activism.

As she points out, the way that pornography has been seen in the Liberal paradigm is primarily as a private matter, as people's own business, no matter how bad in taste or even how 'immoral' from certain perspectives. Feminist scholars however, took on pornography and subjected it to a feminist analysis.[488] In this analysis pornography, which by now was widely and readily available, was seen as a main site in which women were mechanically and repeatedly represented as servile and submissive, as things to be possessed, in ways in which women's objectification and dehumanization was normalized. One argument was that pornography prepared the ground for sexual violence, both domestic and otherwise. But, even if the direct causality between pornography and sexual violence can never be truly established, "the point is that the profusion of the pornographic regime of representation inevitably affects the social constitution of femininity—affects the ways in which women can be represented and can represent ourselves across all social practices—and hence directly and adversely, albeit intangibly, affects the status of women."[489] In this way, two things happened. First, feminist analysis describes pornography as an instrument of the patriarchal system of subordination of women. In this story, the public-private divide is an instrument of subordination. Second, feminist analysis prepared the way to see how pornography was much more than a private consumptive affair, and instead something that was very much a part of the public production of

487 Lacey, "Theory into Practice?" *supra* note 377.

488 *See, e.g.,* Andrea Dworkin, *Pornography: Men Possessing Women* (1981) (describing pornography as an industry built on the perpetuation of misogyny and the dehumanization of women); MacKinnon, *Feminism Unmodified*, *supra* note 411, at 127-214 (discussing the harmful nature of pornography and efforts to combat it using civil rights law); Sheila Jeffreys, *Anticlimax: A Feminist Perspective on Sexual Revolution* (1990) (explaining how pornography, as well as sexual liberation, support patriarchy).

489 Lacey, "Theory into Practice?" *supra* note 377, at 104.

meaning, as a prime site in the social construction of 'woman' as submissive, as servile, as objects to be possessed. In this story, pornography belongs in the public realm. Third, feminist analysis argued how Liberalism itself did not apply its categories in a consistent way. So, "liberal analysis which constructs pornography as a matter of private sexual preference in one breath constructs it as a matter of public rights to free expression in the next."[490] In this story the public-private divide is a scam, *not really there*, but nevertheless instrumentally deployed, selectively and opportunistically, to justify and legitimate the uninterrupted continuation of certain practices.

> In what might be called a 'no-lose situation' for the producers and consumers of pornography, the production of pornography is seen as a matter of public rights, and hence protected, whilst its consumption is constructed as a matter or private interest, and also protected. Both public and private sides of the dichotomy are manipulated in ways which exclude anti-pornography arguments.[491]

Out of these critiques developed, in the context of an effort by grassroots NGOs in Minneapolis in which both Dworkin and MacKinnon participated, a legal reform strategy that would try to counter the patriarchal function of pornography.[492] The most important element of the legal strategy was to construct pornography as a form of sex discrimination, as behavior that

490 *Id*. at 104.

491 *Id*. Lacey points out that there is another public-private twist to the matter, as legal regulation of pornography usually limits consumption to the private sphere. "This policy compromise may be functional to the meaning of pornography by in effect making pornography easily available whilst maintaining the illusion of illicitness which forms part of the power of pornography to arouse." *Id.*

492 The process was in fact quite elaborate, and the ordinance complex. I will only highlight some of the most significant features for the purpose of Lacey's analysis. A 'Model Anti-Pornography Law' was developed and disseminated, and is still widely accessible. *See* A. Dworkin, "Against the Male Flood," *supra* note 410; A. Dworkin and C.A. MacKinnon, *Pornography and Civil Rights: A New Day for Women's Equality* (1987); *See also* MacKinnon, *Feminism Unmodified*, *supra* note 411; Smart, *supra* note 460.

exploits and differentially harms women.[493] In the ordinance, civil causes for action were given to anyone for a whole set of reasons, from being coerced into performing pornography, to being defamed by pornography, to having pornography forced upon them. A successful claim could lead to an injunction and/or damages. The ordinance was passed in Minneapolis but vetoed. It was finally passed in Indianapolis, but later found unconstitutional by a Federal Court of Appeals who found that it violated the first Amendment (freedom of expression).[494]

Lacey has many good things to say about this "inspired piece of feminist legal politics."[495] For one, it adopted the radical feminist[496] view of pornography, and even when it was overturned, the court felt obliged to express agreement with the premise of the ordinance. Secondly, the legal reform process was preceded by public hearings in which women gave compelling accounts of how pornography had affected their lives, in what Lacey considers an

493 The model ordinance reads: "Pornography is a systematic practice of exploitation and subordination based on sex that differentially harms and disadvantages women. The harm of pornography includes dehumanization, psychic assault, sexual exploitation, forced sex, forced prostitution, physical injury, and social and sexual terrorism and inferiority presented as entertainment. The bigotry and contempt pornography promotes, with the acts of aggression it fosters, diminish opportunities for equality of rights in employment, education, property, public accommodations, and public services; create public and private harassment, persecution, and denigration; promote injury and degradation such as rape, battery, sexual abuse of children, and prostitution, and inhibit just enforcement of laws against these acts; expose individuals who appear in pornography against their will to contempt, ridicule, hatred, humiliation, and embarrassment and target such women in particular for abuse and physical aggression; demean the reputations and diminish the occupational opportunities of individuals and groups on the basis of sex; contribute significantly to restricting women in particular from full exercise of citizenship and participation in the life of the community; lower the human dignity, worth, and civil status of women and damage mutual respect between the sexes; and undermine women's equal exercise of rights to speech and action guaranteed to all citizens under the [Constitutions] and [laws] of [place]." *See* A. Dworkin, "Against the Male Flood," *supra* note 410.

494 American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), aff'd, 475 U.S. 1001 (1986)

495 Lacey, "Theory into Practice?" *supra* note 377, at 105.

496 Not all feminist scholars and activist are of the same opinion about pornography as MacKinnon and Dworkin. In fact, one of the major splits in the feminist movement in the last decades of the 20th Century was between the so-called "sex-negative" feminists like Dworkin and MacKinnon and a growing assembly of "sex-positive" feminists. *See e.g.* Wendy McElroy, *XXX: A Woman's Right to Pornography* (1995); Avedon Carol, *Nudes, Prudes and Attitudes: Pornography and Censorship* (1994); Dossie Easton and Catherine A. Liszt, *The Ethical Slut* (1998). If anything this whole episode and its colorfulness is yet another example of how it is impossible to speak of *the* feminist position, or *the* feminist critique.

illustration of "the inadequacy of the traditional public-private distinction and its focus on the state."[497] Third, the ordinance empowered women to take action on their own behalf and avoided the impression that it amounted to state censorship. And finally, because of its construction as sex discrimination, the legal process did not necessarily always require proof or evidence of a causal link between pornography and sexual violence. Even so, Lacey is quick to point out that this strategy created a lot of controversy within the feminist movement, and many disagreed with the assumption that pornography was a central element in the perpetuation of women's subordination. Rather, they would argue that pornography was the product of economic and other material means of subordination.[498]

More importantly, Lacey explores the problems and pitfalls of translating the critique of the public-private distinction into concrete (legal) action. One problem is that legislative strategies contribute to the reification and reiteration of the idea of a public and a private sphere. So, even though emphasizing the public nature and significance of pornography can have immediate appeal because of the legal possibilities that it offers, it may be far from the ideal option.

> The price of this way of constructing pornography as a public wrong is that it has to be fitted into the conceptual straitjacket of an already legally recognized harm: in the case of the ordinance, sex discrimination. But it is unlikely that all the important aspects of the feminist critique of pornography can be captured in terms of the individualized and relatively tangible harms to which both criminal and civil law have tended to address themselves and which the idea of sex discrimination evokes.[499]

In other words, to go from a critique to advocacy and legal reform requires a process of translation. In this process, certain elements of the critique may be

497 Lacey, "Theory into Practice?" *supra* note 377, at 106.

498 Lacey, who does in fact agree with the basic radical feminist premise that pornography is bad for women in general, does not mention how the anti-porn campaign was helpful in triggering a broad movement of so-called sex-positive feminists, some of which argued vehemently in favor of the right to freedom of expression. Other sex-positive feminists went as far as claiming a women's right to pornography. *See, e.g.*, McElroy, *supra* note 497.

499 Lacey, "Theory into Practice?" *supra* note 377, at 107.

lost, such as the fact that a new public-private realignment will be malleable and open to multiple alternative public-private counter-arguments. A second and related problem is that the process of legal reform is deeply imbedded in institutional discourses in which the public-private distinction plays a central role, with all that this implies in terms of assumptions about the role of the state and the role of regulation. In fact, as Lacey points out, if one goes on to make a more elaborate analysis of the costs, benefits, and in general of the implications of the ordinance, had it been applied, then it appears that the legal strategy will face numerous challenges, obstacles, and will prove to be much more limited than it would seem at first sight.[500] And even though there might be invaluable symbolic effects that would result from this campaign, such as putting the effects of pornography on the agenda, there could also be negative symbolic effects arising from the image of feminists as moralizing and repressive, as well as from the perception that having a feminist law will not necessarily yield the feminist results that have been promised.[501]

Lacey makes an important distinction between the critique of the *descriptive* nature of the public-private distinction on the one hand, and the critique of its *normative* nature on the other.[502] So, the critique of the descriptive public-private will emphasize its contingency and unreliability by arguing that the public-private distinction does not give an adequate description of the social world. Meanwhile, the critique of the normative nature of the distinction will emphasize how the public-private is being used in order to allocate rights and obligations, and how it legitimates certain inclusions and exclusions. According to her, the translation from critique to legal reform relies too much on the descriptive nature of the dichotomy and seems to forget its role in the production of the normative arguments that produce subordination.[503]

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500 Lacey mentions for example the inherent costs, financial and otherwise, involved in bringing a claim, as well as the risk that the possibility to litigate will be used by others without a feminist agenda, such as the evangelical right. Moreover, there is a likelihood that many claims would not be granted because of problems of proof. Also, the accusation of censorship, were the ordinance to be successfully implemented, would be almost impossible to ignore or even deny. *Id.* at 107-108.

501 This critique of how feminism has focused too much on legal reform, with too many expectations of what that could do to the reality of women can also be found in Halley et al., "Governance Feminism," *supra* note 432.

502 Lacey, "Theory into Practice?" *supra* note 377, at 95-98.

503 *Id.* at 109.

> The idea that rescuing an issue like pornography from the insulation from political critique implicit in its 'privacy' entails a regulative strategy, gets stuck within the very categories of public and private (...).[504]

The problem, for Lacey, lies in the "strong dichotomy between critique and action", and in the idea that "feminist critique is in some sense deficient unless accompanied by feminist strategic action."[505] For her, it would seem that critique is a form of action, which should be accompanied by other forms of action, "a diversity of political practices—debates, boycotts, counter-propaganda, pickets, and so on",[506] and which would also include, but not be centered on, legal reform. The prevailing focus among feminist legal scholars and lawyers on legal strategies underestimates the action-element of the feminist critiques, which have in their own ways undermined and even subverted the traditional categories of public and private.

> [Dworkin and MacKinnon's] political critique has itself undermined the traditional public/private divide in that it *constitutes* a form of political action—a discursive intervention in the production of dominant meanings, albeit one which still has an uneven hold. Unless we were to believe that a legal reform strategy was likely to be very effective in furthering this discursive and educational process, a less formalized process of campaigning and consciousness-raising in regional and national political fora seems a more sensible feminist strategy.[507]

Lacey's reflections are significant and open an important window on a frequently expressed anxiety and frustration, which is that there seems to be a gap between theoretical and doctrinal critiques and the political and legal practices that they comment on. This gap is misleading and its mention relies on a narrative that sustains the dichotomy between critique and action that Lacey finds so problematic. On the one hand is the observation by many in their field of scholarship that women's issues are either absent or ignorant

504 *Id.*
505 *Id.*
506 *Id.*
507 *Id.* at 110 (emphasis in original).

of processes of power and subordination. These scholars have worked to 'challenge the great silence' in their discipline. This work is significant in and of itself and in many ways has transformed a number of disciplines as well as sub-disciplines. On the other hand there is what one could call an eagerness to translate the intellectual excitement of having developed a compelling and empowering vocabulary into a broader political arena, so that it may excite and compel millions of others. The ideas of instrumentalization and strategy function as catalysts in this respect, and the proximity between legal scholarship and institutionalized legal political processes makes the move easy and attractive. However, as Lacey points out, this work involves a process of translation and if one is not aware of that then one could have the impression that "it sometimes seems that the more we criticize the public/private dichotomy, the more we get trapped within its conceptual framework."[508]

7.6. Concluding: Living Within and Against a Conceptual Framework

Feminist critiques of the public-private distinction cover the entire spectrum of possibilities: from the Liberal critiques that argue that all Liberalism needs is a gentle shove in the right direction in order to overcome its accidental public-private gender blindness, to the more radical critiques that see the public-private gender bias and Liberalism itself as an accident of Patriarchy. All across the board, the public-private distinction is of central importance to feminist critiques of Patriarchy and the subordination of women. To be fair, the majority of feminist work does not even mention the distinction, mostly because it has completely internalized the critique, in any of its variations, and sometimes also because it simply has no need for it. In this sense, it is important to reiterate a point made before about the context in which critiques are produced.[509] At their best, they are the product of hard and creative work, and they manage to have a serious impact on a particular discursive field in which they are unleashed. At their worst, they become mechanically reproduced slogans that signal an author's belonging to a particular political constituency. Feminist scholarship has seen both ends of this spectrum.

508 *Id.* at 93.

509 *See supra* footnotes 270-275 and accompanying text (discussing critique as intervention)

In general, one can say that many feminist critiques were thoroughly ambitious. Their contestation of political philosophy, of legal theory, of multiple legal doctrines, and on countless other areas of scholarship was often frontal and demanded a thorough overhaul of existing discourses. Moreover, within a couple of decades the body of scholarship that these critiques were a part of increased so impressively, that it became impossible to ignore. In the meantime though, the internal differences, disagreements, and divisions were often so intense, that it is a wonder that one can still speak of feminism, when what there are in fact are feminism*s*, just like there are various feminist critiques of the public-private divide.

All of this did not happen in a void, but as an integral part of broader processes of cultural, social, and political upheaval, a lot of which is still going on.[510] It is extremely difficult, if not impossible, to trace the relation and interaction between the hectic academic activity and the processes in other areas of social life, and even in social theory there seems to be a set of chicken and egg assumptions about how they relate. One can argue that they are all semi-autonomous parts of the same socio-cultural and political field, and interact and interrelate with each other in complex and often arbitrary ways.[511] The activist feminist slogan 'the personal is political' originates in the late '60s, long before the first real theoretical or doctrinal critiques were published. Did this sentiment trigger the intellectual work of feminist scholars? Or was there something in the realm of ideas that was simmering and made the cultural explosion possible? We will never really know. However, it is important to be aware of how often theories, theoretical debates, theoretical and doctrinal critiques, and other scholarly work, are judged according to their ability to 'change reality'. This is especially true in work that is couched in the premise that reality is constituted through the aggregate production of symbolic meaning, or otherwise 'socially constructed'. This is also especially true for feminist scholars who have

510 For example, the fact that a woman was almost the Democrat candidate for the U.S. Presidency was continuously referred to as 'historical'; the ordination of women as Bishops is threatening the unity of the Anglican Church; some would even put LGBTQ emancipation in the same category and would also refer to same sex marriage or to Thomas Beatie, the transgender (woman-to-man) who is legally a man, and who had a successful pregnancy that resulted in the birth of a baby.

511 This perspective is also implicitly adhered to by Nicola Lacey, "Theory into Practice?" *supra* note 377 (emphasizing the fact that critique and theorizing are actions and change in and of themselves).

very often seen their work as contributing to the wider social and cultural processes of change.

If anything, feminist doctrinal critiques in the context of international law and human rights, have illustrated that not only is the public-private distinction an indeterminate ideological tool, but that the same can be said for its critiques. Often enough, critiques can be seen to be internally contradictory, malleable, all too dynamic, and naturally with ideological bias and a will to power. The second observation, that critiques are ideological, will be less difficult to accept, although sometimes critiques will present themselves as objective claims to truth. Whether this is part of a strategy or sincere is not always clear. With regard to the first observation, that critiques are indeterminate, this seems more difficult to integrate in politico-intellectual projects,[512] and only some of the feminist-CLS scholars, such as Olsen, Engle, and Lacey, have insisted on this point. To some extent, and in spite of all the richness and sophistication, some feminist scholarship seems alien to the Legal Realist problematization of the myth of state intervention.[513] From this perspective, too much instrumentalization and strategy means too much participation in contexts which are thoroughly soaked in the public-private and other distinctions of Liberalism, such as law and politics, freedom and regulations, etc. Going down the road of concrete legal reform means abandoning some of the more interesting insights of the critiques, and as Olsen, Engle, Lacey, and others have pointed out, can leave one with a false sense of progress.[514]

What is left of the public-private distinction after the feminist critique? On the one hand it has been strategized. The public-private split after difference feminism has become less of a divide and more of a tool; or rather, less of the implicit tool of patriarchy and more of the explicit tool of the anti-patriarchs. Turning the insights of theoretical critiques into more concretely strategized advocacy and policy proposals means putting your energy in making (and keeping) the distinction determinate. Moreover, the language and social field of concrete action is much more deeply submerged in these dichotomous

512 It is difficult to argue that the critique of the public-private distinction is indeterminate and at the same time to insist that women's right to choose (to have babies or not) is based on the fact that they have a right to private life.

513 *See* Frances E. Olsen, "The Myth of State Intervention in the Family," 18 *University of Michigan Journal of Law Reform* 835 (1985).

514 *See* Engle, "After The Collapse of The Public/Private Distinction," *supra* note 476; Lacey, "Theory into Practice?" *supra* note 377; *see also* Halley et al., "Governance Feminism," *supra* note 432.

structures, even if it is there where you can see hyper-contingency, ambivalence and paradox. It might require some faith in Liberalism to invest in problematic categories. It might require being strategic about that faith, which could mean the same as pragmatism, but which does not offer any guarantees for success and real social change.

PART III:

THROUGH THE LOOKING GLASS: INTERNATIONAL HUMAN RIGHTS LAW OBSERVED IN THE PRISM OF THE CRITIQUES

8. The General Human Rights Theory and Idea

8.1. Introduction: Through the Looking Glass

In Part III, I want to ask how the insights provided by the diverse critiques of the public-private distinction can provide new perspectives on human rights. This is a particularly relevant inquiry, as human rights is one of the most central articulations of the public-private distinction within Liberal political philosophy. The idea is not to present the various critiques as one analytic, or as one monolithic body of thought that can be 'applied' to another monolithic body of thought, namely human rights. Rather, I want to explore the implications of taking the critiques to heart, and work to articulate a couple of (hopefully) fresh thoughts about human rights. This means that the following chapters are not strictly systematic. They might even be read as loose essays, as a web of threads going around the same questions; or even as the first broad sketches in a large new design. The following chapters and paragraphs will vary in perspective, in objective, perhaps even in discipline and genre. Some will end up being public-private critiques in themselves, while others will propose that human rights can be more profoundly understood by taking a slightly different perspective than is often the case. Though I have reigned in these various impulses and organized them to a certain degree, I have also deliberately allowed eclecticism to be a part of the endeavor in order to enhance the potential of these explorations.

Part III has been structured loosely following the sequence of 'general', through 'doctrinal', through 'concrete'. Chapter 8 explores some general issues related to the idea of human rights and its implementation. Chapter 9 looks into some specific legal doctrines of the premier human rights institution: the European Court of Human Rights. Finally, Chapter 10 explores how the public-private distinction operates at the textual level, by means of an analysis of a number of judgments of the European Court of Human Rights in the area of the rights of homosexuals.

In this chapter, I will start by articulating the structural centrality of the public-private distinction both for international law and human rights.[515] Next, I will elaborate on the role of the history of the public-private distinction in

515 *See infra* Section 8.2.

presenting human rights.[516] This will be followed by a brief treatment of CLS critiques of rights.[517] I will then look at how both indeterminacy and ideology fit into the whole human rights picture.[518]

8.2. International Law, Human Rights, and the Public-Private Distinction

To begin with, I want to articulate the link between human rights and the public-private distinction. This is essentially an exercise in reduction, so it will be unavoidable to stereotype and oversimplify. Only in this way will I be able to flesh out the various ways in which human rights and the public-private distinction are two ways of talking about the same thing. For those very familiar with human rights literature there might be a sense that I am not being fair or accurate, that I miss out on various nuances, or even that I am misrepresenting human rights discourse as very simplistic. It is by no means my intention to imply that human rights discourse is simplistic, even if I cannot, in this particular exploration, do justice to its sophistication. However, I am quite confident that the broad lines of what I am saying are valid representations, even if I sacrifice, in the process, some of the nuances in human rights scholarship. If the nuances represent the branches of human rights discourse, my focus is on the trunk.

(International) human rights discourse begins with a story of a world composed of states, on the one hand, and individuals, on the other. In this narrative, "human rights" is a rhetorical and legal device which mediates between these two poles, locating the dividing line between public power and private right—between the 'rights of kings' and the 'rights of man'.[519] Discussions of human rights frequently reflect the general patterns and themes of Liberal political philosophy described in the preceding chapter. Consider, for example, the opening of the entry on 'human rights' in the *Encyclopedia Britannica*, written by Burns H. Weston:

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516 *See infra* Section 8.3.

517 *See infra* Section 8.4.

518 *See infra* Sections 8.5 & 8.6.

519 Although there are a number of different theoretical approaches explaining human rights as, variably, natural, contractual, utilitarian, or social phenomena, they all articulate a set of norms which limit, on some level, the rightful powers of the 'community as a whole', which acts through state. In Ronald Dworkin's words: "Rights are best understood as trumps over some background justification for political decisions that states a goal for the community as a whole." Ronald Dworkin, "Rights as Trumps," in *Theories of Rights* 153 (Jeremy Waldron ed., 1984).

> It is a common observation that human beings everywhere demand the realization of diverse values or capabilities to ensure their individual and collective well-being. It also is a common observation that this demand is often painfully frustrated by social as well as natural forces, resulting in exploitation, oppression, persecution, and other forms of deprivation. Deeply rooted in these twin observations are the beginnings of what today are called "human rights" and the national and international legal processes that are associated with them.[520]

Without too much effort, one can read Hobbes' primal state of nature into this paragraph, and hear the echoes of a life that is "nasty, brutish, and short."[521] Not to leave us with too grim a picture, however, the article quickly zooms forward, citing the Renaissance, the Peace of Westphalia, the Magna Charta and the English Bill of Rights of 1689 as proof of post-Medieval legal and political change:

> Each testified to the increasingly popular view that human beings are endowed with certain eternal and inalienable rights that never were renounced when humankind "contracted" to enter the social from the primitive state and never diminished by the claim of the "divine right of kings."[522]

Couched in a Rousseau-type narrative, we can see Locke looming into full view. This paragraph expresses the most common narrative about human rights: human rights protect certain inalienable rights of human beings against kings in particular, and against the social state in general.[523] This is

520 Burns H. Weston, "Human Rights," *Encyclopedia Brittanica,* reprinted in *Human Rights in the World Community: Issues and Action* 17 (Richard Pierre Claude & Burns H. Weston eds., 3d ed. 2006).

521 Hobbes, *supra* note 12, at 84.

522 Weston, *supra* note 521, at 17.

523 *See, e.g,,* Thomas Buergenthal, *International Human Rights* 1 (1988) (" (…) the international law of human rights is defined as the law which deals with the protection of individuals and groups against violations by governments of their internationally guaranteed rights, and with the protection of those rights."); Jimmy Carter, "New Frontiers for the Human Rights Movement," 20 *Harvard Human Rights Journal* 1 (2007) ("Fundamental individual rights are being eroded to startling degrees by policies advanced in the name of national security and survival in such broad strokes that new efforts must be made to reassert the line between legitimate state actions and those that undermine societies' most basic values.").

the human rights public-private distinction in a nutshell, and one will find various versions of this story in most of the work about this topic.

Generally speaking, there are two versions of this story: the narrow and the wide version. In the narrow version the state is needed to protect human beings against forces of nature *and against themselves*, and human rights are needed to defend human beings against the state. In the wider version, human rights are useful or needed for both protection against the state *and* against other human beings.[524] Consider Weston again, who initially applies the wider version, but soon narrows it down:

> [H]uman rights imply both claims against persons and institutions impeding the realization of these values or capabilities, and standards for judgment the legitimacy of laws and traditions. At bottom, human rights qualify state sovereignty and power, sometimes expanding the latter even while circumscribing the former.[525]

One could argue that the more somebody has invested in human rights as a *political project* in the realm of moral philosophy or general politics, the wider his/her idea of human rights. However, from this perspective, the more somebody is concerned with *concrete questions of implementation and enforcement*, the more s/he will speak in terms of legal institutions, and the narrower the version of human rights. Either way, at the heart of the Liberal narratives about human rights is the state, either as the potential bully to be protected from, or as the protector against bullies, or as both.[526]

With regard to international law, the same public-private distinction manifests itself, albeit in different vocabulary. One of the most common ways to describe

524 This articulation of a "narrow" and "wide" version of human rights has some resonance with—although it is not reducible to—the ongoing debate over whether human rights are only "vertically" enforceable (against the state), or whether they are also enforceable "horizontally" (against private actors). *See generally* Stephen Gardbaum, "The 'Horizontal Effect' of Constitutional Rights," 102 *Michigan Law Review* 387 (2003) (comparing the "vertical" approach of the United States with the "horizontal" approaches of Ireland, Canada, Germany, South Africa, and the European Union).

525 Weston, *supra* note 521, at 20.

526 This observation, in which the state is the fundamental protagonist, runs somewhat contrary to the more common narratives about human rights, in which human rights are the main protagonists and the state plays the role of (potential) villain.

international law is by comparing it with national law, and describing the differences between the 'international community' and national communities. For one, it is often pointed out, the international community lacks a centralized order, such as the state. Therefore, states are less impeded in their actions and are free to do as they want, unlike in the national realm, where the state has a tightly knit set of limitations on what individuals can do. In fact, international law is often introduced to students by analogizing domestic individuals to the individual state and national governments to the international community. To be sure, the comparison is stark, and will therefore be nuanced with the observation that national legal orders are sophisticated, while the international system is primitive. On the other hand, it will be argued that the international legal system used to be even more primitive than it is right now, and that it is developing more and more into a mature legal system.

For example, a very popular textbook on international law by Antonio Cassese gives an account in the narrative just mentioned, the introductory chapter considers "the range of states' freedom of action."[527] The book discusses "traditional" international law, and opposes it with "modern" international law—a distinction that is not uncommon.[528] In "traditional" international law, Cassese recounts, states were pretty much free to do anything, and even war was allowed.[529] "Modern" international law, on the other hand, is much more restrictive of states' freedom. This limitation of modern states' freedom is due to three developments: (1) the large number of treaties by which states have curtailed their freedom; (2) the development of certain rules with central importance (*jus cogens*); and (3) the peremptory and irrevocable prohibition of the use of force for reasons other than self defense. Interestingly, the distinction between traditional or classical international law and its modern counterpart is severely diminished when he concludes:

> despite these major advances, in reality and at least in some respects, the condition of the present international community is not far removed from that of classical international law.[530]

527 Antonio Cassese, *International Law* 10-11 (2d ed. 2005).

528 The usual moment in which international law turned from traditional to modern lies in two stages: WWI which lead to the creation of the League of Nations and the prohibition of war, and WWII which lead to its replacement by the United Nations and the creation of a Security Council with the authority to enforce this prohibition.

529 Cassese, *supra* note 528, at 10-11.

530 *Id.* at 12.

This "condition" of the international community and international law is usually described through the language of Liberal political philosophy, and is sometimes referred to as the "domestic analogy,"[531] meaning that scholars and others will project onto the international level the language and structure that is used to describe a domestic legal order. Primitive though it may be, international law and the freedom of states are each other's opposite, in a kind of international public and private spheres.

This domestic analogy is reinforced by what are usually considered to be the fundamental principles or assumptions about the international system. First, the central actors of the international legal system are states. These states are the ones that make international law and are the ones that are bound by it. To the extent that other actors have appeared in this picture, either 'above' states (international organizations) or 'under' states (individuals, MNCs, and other non-state actors), their recognition, function and international legal personality is usually considered to be derived from that of states, and remains subject to the central protagonism of states. Second, states are considered to be formally equal and intervention into internal affairs is not permitted. In fact, 'sovereignty' is defined by that autonomy and independence of the internal order, independent from both the intervention by other states, as well as from the intervention of 'the international community' acting through international law and organizations.

In this way, the public-private distinction operates as the central organizing principle in the international legal order. Sovereignty, in this story, is the private sphere of international law, and the primitive, decentralized, and limited aggregate of international contractual obligations, together with the

531 The term is said to have been coined by Hedley Bull. *See, e.g.,* Hedley Bull, *The Anarchical Society* 44 (2d ed., 1995) (first published 1977) (Defining the "domestic analogy" as "the argument from the experience of individual men in domestic society to the experience of states, according to which states, like individuals, are capable of orderly social life only if, as in Hobbes's phrase, they stand in awe of a common power."). It was popularized for international lawyers by Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (1970) (discussing private law analogies in the study of international law). Recently, the domestic analogy has been receiving growing attention. *See, e.g.,* Chiara Bottici, *Men and States: Rethinking the Domestic Analogy in a Global Age* (2009) (assessing the domestic analogy and its conceptual preconditions); Hidemi Suganami, *The Domestic Analogy and World Order Proposals* (1989) (discussing the role of the domestic analogy in historical world order proposals); Heikki Patomäki, "Democratizing Global Governance: Beyond the Domestic Analogy," in *Criticizing Global Governance* 103 (Markus Lederer & Philipp S. Müller eds., 2005) (laying out an alternative to David Held's account of cosmopolitan democracy).

very few supra-national powers that some international organizations have, forms the public sphere. There may not be a real and significant international sovereign, but international law scholars will often talk as if that is the ultimate goal or objective, as the norm or the standard by which progress is measured.[532] In this sense, the domestic analogy is used not only descriptively, but also normatively. The general sense among international lawyers is that the more the international community functions as a domestic or national community, the better.

8.3. Human Rights and its Histories of the Public-Private Distinction

The most famous text in the field of human rights, the Universal Declaration of Human Rights (UDHR), as well as all the other major legal texts, do not make mention of there being a history of human rights. Human rights are declared to be 'recognized' and 'affirmed'. From one angle, they are stated as facts, intrinsic and inalienable; from another angle, they are 'common standards of achievement'. But, the idea is that they are timeless and natural. In scholarly work it is a different matter. Here human rights often, but not always, have a history, at least in the sense that they are described in terms of their recognition and adoption having a series of historical precedents and precursors, before 1948 finally articulates them on a global scale, after which their history is a history of the international bill of rights, global and regional institutions, and ever more effective mechanisms of enforcement. Before 1948 there is very little: the Magna Charta as a kind of embryonic beginning, the big declarations of the U.S. and French revolutions, and perhaps the odd ILO treaty for the protection of (some) minorities during the inter-bellum. Sometimes, and increasingly, histories of human rights portray human rights as a constant idea that existed in the earliest days and in the oldest civilizations, but that only came to real fruition in our contemporary history.[533] In these versions, human rights are seen as an idea that eventually became a successful challenge to the unbridled power of the sovereign, be it the king or the more abstract state.

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532 *See generally* Thomas Skouteris, *The Notion of Progress in International Law Discourse* (2010).

533 *See e.g.* Micheline R. Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (2d ed. 2008) (discussing human rights, *inter alia*, in the context of "ancient civilizations"); John Mahoney *The Challenge of Human Rights: Their Origin, Development, and Significance* (2007) (discussing human rights "in history" beginning in the "ancient classical world").

Some critical scholars have taken a different look at the history of human rights, and in fact at that of the public-private distinction. Where common histories of human rights tell a story about unbridled state power against which human rights places a shield in defense of individuals, critical histories will argue how both sovereignty *and* freedom were conceived of in the same act, how law and society are mutually constitutive, how the public and private do not exist separately from each other. In this perspective, human rights do not act as shield or as separation but as articulation of a mutually constituted difference. Moreover, the history of human rights is to be examined as a history that was embedded in complex cultural, technological, economic, and socio-political processes, as well as the product of hard intellectual work. We have already seen Duncan Kennedy's account of how Blackstone's work was the first major legal treatise that managed to incorporate the 'new' ideas of Hobbes and Locke into a legal doctrine that was still firmly embedded in feudal society. Processes of changing ideas and perspectives require a lot of intellectual and theoretical translation and transcription.

An impressive example of this is offered by Costas Douzinas, in his *The End of Human Rights*.[534] The first half of that book offers an intellectual history of the idea of human rights. Though he starts his history in Ancient Greece, and constructs a fairly linear narrative that culminates in the recent past, he offers insights that dislodge some of the common assumptions about human rights. For one, his history does not start with some embryonic form of human rights, but with concepts that seem totally alien to it: 'nature', 'divine laws', 'reason'. In his story one can see the development of critical concepts that are able to challenge the common sense that is the realm of the powers that be. So, the idea of 'nature' became at one stage, around the 5th Century B.C., a critical category that could effectively be deployed by Sophists to challenge the laws and customs that ruled. However, Plato and others responded by developing it into 'natural order', and so on. Douzinas's history reads as ongoing dialectic in which the pendulum of philosophy moves back and forth between ideas that justified the political order and ideas that challenged its legitimacy. Interestingly, like in the example given, ideas are never loyal enough to one particular project, they can be appropriated and serve to legitimize the opposite side of the dialectic. In this way Douzinas moves on, from the Greeks and the Judaic influences on them, to Roman law

534 Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the End of the Century* (2000).

and to the scholastics and medieval philosophers after them, and into the early Enlightenment, influenced by Middle Eastern readings of Aristotle. An exciting period was that in which the idea of a 'God' was carefully sidelined, first by Grotius and then later by Hobbes, in a process of secularization. All in all a dizzying *tour de force*. However, what becomes clear, amidst all the translations and innovations, is that our current vocabulary in talking about human rights is hopelessly contemporary. Even when the story reaches Hobbes and Locke, and the modern idea of a public-private distinction slowly starts to take shape, Douzinas points out how these two thinkers translated ideas that were then *en vogue* into their political philosophy. An important distinction that was adhered to in those days was the distinction between reason and desire. This distinction served as the scaffolding on which the public-private distinction was constructed. For Hobbes, individuals were controlled by destructive desires which needed to be contained by reason. His public-private distinction had reason on the public side and destructive desire on the private side. Hence the unquestionable Leviathan. For Locke, the same distinction between reason and desire operated, but here desire was benign and more linked to the idea of a 'pursuit of happiness'. Hence the gentler sovereign who could be held accountable. But even in their times, Hobbes and Locke were very far from us. It took Kant, as the philosopher of the (private) autonomous individual, and Rousseau, and his idea of the 'general will', to lay the intellectual groundwork for the theoretical emergence of the modern state, in the late 18th Century. And even then, cultural, socio-economic and technological developments were very far away from anything that we could now recognize. For instance, in spite of the flurry of human rights declarations around 1800, these revolutions were very much about the collective identities of the *nation* and its Hegelian incarnation: the state. Moreover, the project of colonialism was fueling the rise of capitalism, which triggered the industrial revolution and that in its turn caused profound social and cultural change, which then led to political upheaval, while in academia science had its golden period and its companion positivism, which became the norm for the social sciences, including law. Et cetera, et cetera. Though linear, the story Douzinas tells opens a window of exceeding complexity; a very different story from the common linear accounts of a simple idea 'human rights', that traveled unseen through a chaotic history of which itwas not a part.[535]

535 *See also* Martti Koskenniemi, "Human Rights, Politics, and Love," XIII *Finnish Yearbook of International Law* 79, 79-82, 88-89 (2002); Bonny Ibhawoh, *Imperialism and Human Rights: Colonial Discourses of Rights and Liberties in African History* (2007) (analyzing the complex history of how rights discourse was intertwined with colonialism in Nigeria).

Douzinas continues his story into the age in which human rights became legalized and institutionalized, but in the second half of the book he unleashes a series of recent philosophical work (Heidegger, Sartre, Levinas, Lacan, etc.) onto the conceptual playing field, in order to show that there is still room for intellectual and philosophical life in the idea of human rights. Several of these thinkers, like the critical thinkers we saw in earlier chapters, have a very different take on these discussions and would require profound reconceptualizing of a lot of thinking about human rights, and about the public-private distinction that it regulates.

Because, even if human rights have now been laid down, declared, codified, legalized, institutionalized, disseminated and put at the center of the political map, the world in which they are embedded, the world of ideas, of technological development, of economic upheaval, etc., that world changes and the change rattles the status quo, of which human rights have now become a part. Because perhaps history has already repeated itself and the ideas that have been useful in challenging the powers that be have now become the realm of the powers that be. In the next paragraph we will look at a number of people who have argued something along those lines.

8.4. CLS Critiques of Rights

In this section I will briefly touch on some of the explicit critiques of the idea of rights as produced by critical legal studies scholars, an idea which they considered to be at the heart of the Liberal legal system. They were commenting in particular on the idea that prevailed in the post war period in the U.S., which was that rights discourse was a tool of social progress. There were various critiques, originating from a myriad of intellectual perspectives, which articulated a number of theoretical and practical critiques, and which suggested that rights discourse may be ineffective at best, and at worst counterproductive.

For one, rights discourse was considered to be contingent because it only makes sense in very specific social, cultural, political and even technological settings. With the setting, or context, the discourse will change. This flexibility and ability to adapt to shifting circumstances also means that the right itself cannot be stable. As Mark Tushnet wrote: "Once one identifies what counts as a right in a specific setting, it invariably turns out that the right is unstable;

significant but relatively small changes in the social setting can make it difficult to sustain the claim that a right remains implicated."[536]

Secondly, the critiques argue that rights are too indeterminate and too manipulative and that therefore cannot "provide authentic justifications for particular social results"[537]. In any dispute both sides will be able to use the language of rights to formulate competing claims. As articulated by Duncan Kennedy:

> The upshot, when both sides are well represented, is that the advocates confront the judge with two plausible but contradictory chains of rights reasoning, one proceeding from the plaintiff's right and the other from the defendant's. Yes, the employer has property rights, but the picketers have free-speech rights. Yes, the harasser has free-speech rights, but the harassed has a right to be free of sex discrimination in the workplace. Yes, the landowner has the right to do whatever he wants on his land, but his neighbor has a right to be free from unreasonable interference. And each chain is open to an internal critique.
>
> Sometimes the judge more or less arbitrarily endorses one side over the other; sometimes she throws in the towel and balances. The lesson of practice for the doubter is that the question involved cannot be resolved without resort to policy, which in turn makes the resolution open to ideological influence. The critique of legal rights reasoning becomes just a special critique of policy argument: once it is shown that the case requires a balancing of conflicting rights claims, it is implausible that it is the rights themselves, rather than the "subjective" or "political" commitments of the judges, that are deciding the outcome.[538]

Thirdly, rights discourse is considered to be reifying, which means that rights are approached as if they are solid and concrete 'things'. This in its turn leads us to believe that the normative choices we make about social rules

536 Mark Tushnet, "An Essay on Rights," 62 *Texas Law Review* 1363, 1370 (1984).
537 Gabel, "The Phenomenology of Rights-Consciousness," *supra* note 274, at 1582.
538 Duncan Kennedy, "The Critique of Rights," *supra* note 87, at 198.

are necessary, rather than politically determined. Fourthly, rights discourse is ideological, in the sense that rights will always be a manifestation of the prevailing ideology and in that sense opposed to any challenges to that same ideology, or to any claim that does not fit its realm of imagination.[539]

Though the CLS critiques of rights were never directly connected to the critiques of the public-private distinction, it is clear from the above that they are related, and point in the same direction. As we have seen, one area where these various dimensions of the critiques of the public-private distinction and their implications for our thinking about human rights have been explored and articulated is feminism.[540] Feminist scholars have taken up a number of these public-private critiques and applied them to human rights. They argued that the ideological paradigm that determines how rights acquire meaning is patriarchal in its essence, which not only prevents women from benefitting from rights, but also forms part of the overall system of subordination.

Important here too is the response that was articulated by Patricia Williams and others who did not disagree with the critiques, but felt that they were perhaps overly enthusiastic, too categorical, and insufficiently reflexive.[541] In short, Williams put the African-American experience with rights at the foreground, and argued that the symbolic value of human rights for that group was different than it was for others whose demographic prevailed among CLS scholars. For African-Americans, she argued, the status quo was always skewed to their detriment, so they had in fact already internalized the critiques. From their perspective, human rights offered a different promise and different political opportunities in their pursuit of emancipation than it did for white Americans. Therefore, she argued for more nuance and more reflexivity in the formulation of the critiques.

The arguments made by Williams are important for a number of reasons. The critiques of the public-private distinction are part and parcel of the critiques of rights, whether in the feminist mode, or in general. As I have argued above critiques should be understood as interventions into a debate.[542] Williams is not denouncing the relevance of the CLS and feminist critiques, which she

539 I will talk more about ideology below, in paragraph 8.6.
540 *See supra* Section 7.4.
541 *See, e.g.,* Minow, "Interpreting Rights," *supra* note 468; Williams, *supra* note 468.
542 *See supra* Section 5.3.

in fact generally endorses. But she is critiquing the critiques for not thinking about race, and for not being aware that human rights are different things to different people, in the sense that different people live on different political maps. If one accepts this general point, then one can accept that human rights can be useful tools for progressive projects on one day, for some people, and useful tools for conservative projects on a different day, for different people. What comes out of the critique is not a rejection of rights, but a stronger sense of their instrumentality.[543]

8.5. Indeterminacy and the Public-Private Distinction as Deferral

In view of the above, it seems worthwhile to re-assert and explore the insight that '*human rights' is many different things*. It is, among many other things, a recurring theme in contemporary Liberal political philosophy, which in its turn bases itself on the distinction between the public and the private. 'Human rights' is also a political slogan, an important element of political activism, often signifying little more than 'dignity' or 'justice' or 'equality'. But 'human rights' is also law. It is a subfield of various legal areas, such as constitutional law and international law. As such, it interacts with other legal subfields, such as private law, administrative law, international economic law, etc. But, it is not merely a part of a larger system, or an organ within the larger legal and political organism. It is also a system in and of itself, consisting of a large number of treaties, with organizations that produce law and other 'soft law' principles, and institutions that guard the implementation and the (correct) interpretation of those same legal documents. Each of these different things that human rights can be will usually operate in its own various sub-contexts. So, the political philosophical idea of human rights can be the subject of heated debates between communitarians and Neo-Kantians, or a point of discord between Habermas and Rorty. It can also be used to fine tune the requirements for the existence of a democratic state based on the rule of law. It can engage academics, as well as political organizations and others, even if in that philosophical debate the academics would set the main tone. Likewise in the realm of activism, multiple actors can think and articulate human rights in various ways and for different and sometimes even opposing purposes.

543 *See supra* Section 7.5.

In view of this multi-layered complexity it is important to have a degree of self-consciousness when making observations about human rights, since all of these different dimensions are social fields in themselves, and are moreover all interconnected in intricate ways. For the purposes of this paragraph I intend to focus on the realm of legal institutions.[544] The reason for this is that when it comes to human rights, there is a widespread preoccupation with moving from 'ideal' to 'reality'.[545] This narrative (which one sees in almost every social human rights setting[546]) invariably sees this movement resulting in the establishment of a court or tribunal or in the making of these rights directly enforceable by judges.[547] In other words, an essential and central element, and it would seem an unavoidable one, in the realization of human rights is the development of legal documents, procedures, and doctrines, which is what I would call *the legal-institutional decision-making complex*.[548] It would seem that most people feel that for human rights to be effective at the curtailing of power it has to become power itself; if it will control the state it has to become the state itself. Naturally, there will always be interactions and relations between the legal-institutional decision-making complex and the other human rights contexts, but in the overall political map it is the first one that will usually have the final word.[549]

What one then can see is an entire 'system' of 'human rights' that manages the so-called boundaries between the public and the private. The boundaries of the power of the state are supposed to be limited by human rights. These human rights are articulated, developed and ultimately codified in legally binding documents. After this, it is ultimately up to the courts to interpret these legal documents and determine, sometimes casuistically, and sometimes embedded in numerous legal precedents that give the system a degree of inertia, where that so-called boundary lies. In other words, though the very idea of human rights is that there are limitations to the power of the state (a public-private divide), the concrete effectuation of this idea will always be open to contestation, always be open to various interpretations, and will require it to go through the legal-institutional decision-making complex, again and again.

544 In what follows I assume that human rights as a 'legal system' is essentially embedded in the social and political, in fact the legal institutions that make human rights 'function'. This approach is self-consciously more sociological than most accounts. In doing this have been inspired by the work of Pierre Bourdieu and that of Bruno Latour.

545 *See e.g.* Christian Tomuschat, *Human Rights: Between Idealism and Realism* (2003); *Realizing Human Rights: Moving From Inspiration to Impact*, (Samantha Power ed., 2000); Mark Gibney & Stanislaw Frankowski, *Judicial Protection of Human Rights: Myth or Reality?* (1999). These titles promise more than they deliver, but are indicative of a widespread preoccupation with 'realizing' human rights. Most work in this regard is under-the orized, however, and relies mostly on the description of setting up legal institutions "with teeth".

546 Even at a recent conference that was dominated by idealist philosophers some presenters lamented the absence of a UN police force and standing army, while others nodded in agreement.

547 *See supra* note 532 (discussing the domestic analogy as normative rather than descriptive). Ever since the early days of Hersch Lauterpacht, *International Law and Human Rights* (1950), analyses of human rights have pursued this narrative.

546 I refer to this as a "complex" because it comprises a multiplicity of actors performing diverse roles. I am talking here of the broader political (and media) class, in the way that it sets the legal human rights agenda, prompted thereto by activists and advocates, as well as by those groups who resist this agenda, often also in human rights terms (think of the confrontation between the 'right to life' and the 'right to choice' groups). This agenda leads the more bureaucratized political decision-making machine to get in motion, which eventually leads to the adoption of laws and/or policies. These need to be implemented, and its implementation needs to be monitored and supervised. In this, the heart of the legal-institutional complex becomes most visible. There are the judges, some more specialized than others, in their complex hierarchical structures, in some cases, such as that of European countries, under potential review by a number of international judicial and pseudo-judicial bodies (such as the Human Rights Committee). Add to this the lawyers who bring and defend cases, again with a pecking order and varying degrees of specialization, as well as the academics who train them and who also provide legal mappings of human rights (in the narrow sense), as well as commentary. All of these social groups operate in varyingly institutionalized settings with their own perspectives and internal logics and processes of socialization, while the complex as a whole can also be seen as being a massive socializing process with its own internal logic.

549 By no means do I think that a court's decision is the last step in a political struggle. Court decisions can be overturned by other courts, or they can be overridden through the legislative process. But, even then, the new status quo will have to be interpreted, implemented and enforced through the adjudicatory process.

One example of this process is the recent case that came before the European Court of Human Rights (ECHR) and which concerned a policy in the United Kingdom (UK) which involved the retention of fingerprints and DNA samples after a criminal investigation had been concluded, even if it had not led to a conviction. Here we have a very straightforward case in which different people disagreed about whether the state in this case had gone 'too far' or not. So, the question was: did the state cross the public-private divide? After various political and legal organs in the UK dealt with this question in varying ways, the case made it to the final destination: the Grand Chamber of the ECHR.[550] After looking at all the facts, the domestic and international legislation, the various precedents and the elaborate arguments of the various actors involved in this discussion the Court ponders, in paragraph 118 of its Judgment: "The question, however, remains whether such retention is proportionate and strikes a fair balance between the competing public and private interests." So, even though this was the question *to begin with*, it seems that the question remains very much alive for the most part of the process. The Court then describes a number of issues and considerations that then lead it to conclude in paragraph 125 that the UK had failed "to strike a fair balance between the competing public and private interests". Even though the decision was a unanimous one, it is clear that the Court did not reach that conclusion by logical necessity and that a different group of equally competent judges could have reached a different conclusion, or even the same conclusion, but for different reasons. In other words, and to paraphrase paragraph 118 of the Judgment: "the question still remains…".[551]

The point here is to argue that human rights defer the question that they purportedly answer, i.e. 'where does the boundary between public and private lie?' through various levels of articulation (idea of human rights, legal articulation of the 'precise' boundaries), and then a further deferral

550 S. and Marper v. United Kingdom [2008], ECHR 30562/04 and 30566/04 [Grand Chamber] (4 December 2008).

551 I would even go further and argue that the language of 'balancing' is deceptive or perhaps even in bad faith. There is such a thing as balancing in which you agree on a measure, say a particular way of quantifying weight in kilo's, and then use that to weigh the relative weight of an object. The act of balancing requires a 'force of gravity' which is always the same. 'Balancing' to decide on whether you should have either of two interests (a public or a private one) prevail does not have an agreed measure or a force of anything that is always the same. The balancing is clearly metaphorical, not technical, but the image gives a sense of method or even technique; hence the deception and perhaps even the bad faith.

through the various levels of adjudication up until the last instance, in this case an international court. And at this final stage of determination of the exact divide between public and private even the international court further defers the question to a 'balancing act' between the public and the private interests involved—a balancing act that seems to have 'fairness' as its ultimate determinant.[552] Ultimately a decision is taken, but this decision says more about the judges, about the mood of the day, about the *Zeitgeist*, than about a previously or even independently existing boundary between the public and the private.

So, rather than providing a clear-cut limitation to the power of the state, human rights, by means of its open-endedness and the deferral to the legal institutional decision-making process, provide for a language through which boundaries can be challenged as well as reasserted and imposed, and leave these 'final' decisions up to human rights lawyers and judges, a process that has been referred to as the 'bureaucratization of politics'.[553]

8.6. Ideology and Structural Bias in Human Rights

In spite of the indeterminacy within the whole human rights process and its public-private divide definition-process; there is also the experience of determinacy. It does not seem to most people, including the same lawyers and judges, as if the legal institutional decision-making complex produces utter randomness and incoherence. Many of the outcomes seem unsurprising and often even predictable. In fact, often enough there seems to be intransigence or inertia about various areas of human rights that are difficult to change. This section addresses this inertia, this coherence, identified by the various critiques as ideology, or as structural bias.[554] We have seen the argument advanced by radical feminist scholars that human rights were used to keep

552 For a recent critique of the ECHR's balancing doctrine, *see* Stavros Tsakyrakis, "Proportionality: An Assault on Human Rights?" Jean Monnet Working Paper 09/08 (arguing that the language of proportionality is a way of side-stepping the necessary moral and political debates required by the questions at hand).

553 Martti Koskenniemi, "The Effects of Rights on Political Culture," in *The EU and Human Rights* 99, 114 (Philip Alston et al. eds., 1999). Though he does not refer to her, one can hear the echo of Hannah Arendt, *The Human Condition*, *supra* note 78, when he says; "As politics lose their creative, 'imaginative' character, they are transformed from their core sense as human *vita activa* into an exercise of technical competence by experts." *See also* Martti Koskenniemi, "The Wonderful Artificiality of States," 22 *ASIL Proceedings* 9 (1994).

554 Koskenniemi, *From Apology to Utopia*, *supra* note 353, at 600-615.

women down, rather than to liberate them. Or, if one accepts the Liberal feminist perspective: human rights did not *automatically* come to women's assistance; rather it had to be 'pushed' to do so. As we have seen in that context, though for some it may be uncomfortable to refer to 'patriarchy', it is another way of indicating that the interpretation and implementation of human rights standards was blind to women's issues and that this was by no means an 'accident', but the consequence of an unseen potential determinant, called ideology.

Ideology has been referred to in many ways, and has been heavily theorized in the last 50 years or so.[555] In common language, it is sometimes referred to as a set of dogmatic precepts, such as in "Soviet ideology dictates this or that", or "the Republican party sticks to its ideology when it concerns health care proposals." Other times, it is referred to as indicating a bias, or set of presuppositions that are, in this perspective, seen as negative because they derail an otherwise more objective assessment, such as when it is said that the media is pursuing 'an ideological agenda' or when it is said that a court has an 'ideological bias'. In both uses, as dogma or as unwarranted bias, the term ideology has a negative connotation. In the way that most theorists of ideology refer to the notion it has a much less negative connotation, or none at all. In this perspective, ideology is a belief system, or complex of assumptions, predispositions and other cognitive filters, by which people make sense of reality. In this perspective, ideology is always there, and there is no perspective that is not ideological. Some people have argued that there is an emerging 'human rights ideology',[556] or that human rights are the product of Liberal ideology, together with democracy and the rule of law. This would

555 And before that too: *See generally* Marx & Engels, *The German Ideology*, *supra* note 304; Georg Lukács, *History and Class Consciousness* (1919-23); Karl Mannheim, *Ideology and Utopia* (1936); Louis Althusser, "Ideology and Ideological State Apparatuses," in *Lenin and Philosophy and Other Essays* (1971); Kenneth Minogue, *Alien Powers: The Pure Theory of Ideology* (1985); Slavoj Zizek, *The Sublime Object of Ideology* (1989); Slavoj Zizek (ed.), *Mapping Ideology* (1994) Eagleton, *Ideology: An Introduction*, *supra* note 304; Michael Freeden, *Ideologies and Political Theory: A Conceptual Approach* (1996). The various theories on ideology use this notion in varying ways, and have moreover referred to other notions in order to make similar points, such as culture or structure, while also introducing additional notions to articulate nuances and differentiations, such as the notion of hegemony and (false) consciousness. I will not go into these debates, not even to position myself within them, but I do want to acknowledge the fact that this is a highly dynamic area of intellectual activity in contemporary social theory.

556 Zehra F. Kabasakal Arat, "Human Rights Ideology and Dimensions of Power: A Radical Approach to the State, Property, and Discrimination," 30(4) *Human Rights Quarterly* 906 (2008).

indicate that human rights, as an ideology, would function along the lines of 'dogma', expressed before. What the 'critiques of ideology' point to however, is not an explicit set of principles that embody an ideology, but rather a 'belief system' that operates by hiding its own ideological or political function, that functions by means of allowing certain values to appear as 'obvious' or too commonsensical to even have to make explicit. In this perspective, ideology is both the mechanism that hides, as well as that which is hidden.

> Because, the subjective necessity and self-evidence of the commonsense world are validated by the objective consensus on the sense of the world, what is essential *goes without saying because it comes without saying*: the tradition is silent, not least about itself as a tradition (…).[557]

I want to illustrate what is meant by ideology is with an example that has a strong human rights element. The U.S. Declaration of Independence[558] starts with the following words: "We hold these truths to be self-evident (…)". This idea of human rights to be 'self-evident', or 'natural', or 'intrinsic', etc. is a common one in all important human rights documents. Now, on the one hand this is a paradox that can be a bit disconcerting, because one obvious question is: if these truths are so self-evident, then why do they need to be articulated? Why do they need to be declared? Why all the legal elaboration and reaffirmation? However, it is not the paradox of the truths that were, at least in the 18th Century and even in 1948, totally not self-evident which I want to highlight as an example of ideology. *It is the truths that were so self-evident that they did not even need to be articulated*! In 1789, when the U.S. Constitution was adopted it was so self-evident that 'person' referred to white adult literate men with property that it was not necessary to explain it.[559] The specification that one had to be 'male' was only added in the 14th

557 Pierre Bourdieu, *Outline of a Theory of Practice* (1977).

558 U.S. Declaration of Independence, Jul. 4, 1776.

559 Though the U.S. Constitution does not specify who has the right to vote (this is left to the individual states), it does specify how many representatives a state can send to the House of Representatives. This was measured by the number of "free persons" in each state (plus "three fifths of all other persons," which naturally meant the slaves). *U.S. Constitution*, Art. I, §2 (amended by *U.S. Constitution*, amend. XIV, 1868).

Amendment of 1868[560] which, as it explicitly allowed 'all male citizens of all races' to vote, it effectively excluded women from that right.[561] This type of 'omission' that does not even require an explicit rule, gives us a good example of what ideology is.

One of the ways in which Liberal ideology has operated is by presenting certain categories and distinctions as being descriptive or even as natural. In the case of the illustration mentioned above, the extension of gender, property and race to their exclusion from political space is supported by a sense that these categories are natural. However, in the context of human rights the most important tool of ideological propagation is the idea that human rights are outside of politics,[562] or outside of ideology itself. The idea of the public-private divide as descriptive and as something that is definable, *if you just apply human rights norms*, is an essential element in the construction of a narrative about human rights that presents them as non-political or non-ideological. It completely obfuscates and conceals the choices and interpretations that can only be made if one has a particular idea about 'the good life'[563] or about what the political priorities of the moment are: privacy or security?; autonomy or solidarity? Et cetera. Koskenniemi cites the European Court of Justice (ECJ) in the *Wachauf* case, which stated that fundamental rights "must be considered in relation to their social function"[564] and then adds:

> Recourse to the language of 'functions', 'objectives', 'general interest' and 'proportionality' which seems so far removed from our intuitive association of rights with an absoluteness, or 'trumping character', against social policies, is simply unavoidable. Rights do not exist as such—'fact-like'—outside the structures of political deliberation. They are not a limit

560 *U.S. Constitution*, amend. XIV, §2. The 15th Amendment of 1870 only prohibited any discrimination with regard to vote on the bases of color, race, or previous condition of servitude. A reference to sex (which was finally included in the 19th Amendment of 1920) was explicitly rejected without any significant opposition.

561 It was only because of the appearance of a movement pursuing women's rights to vote that it became clear that the notion of 'person' had to be made more specific. Even so, neither the 14th nor the 15th amendments prevented states from allowing women to vote at state or sub-state level. The state of Wyoming became the first state to allow women to vote, in 1868.

562 *See* Koskenniemi, "Human Rights, Politics, and Love," *supra* note 536, at 79-94.

563 I am using the expression used by Koskenniemi. *Id.*

564 C-5/88 ECR 2639 (para. 18).

but an effect of politics.[565]

Since all of these politically and ideologically determined choices are based on the idea that one might be able to determine, neutrally and objectively, perhaps even 'technically', where the 'exact' boundary lies between the power of the state and the realm of individual freedom, even if only 'contextually'; and because this determination is presented as a non-political or non-ideological one, as an act of mere 'balancing' or 'determining whether a particular intervention is 'proportional'[566], it can effectively obscure the ideological and political biases, presuppositions, assumptions, stereotypes, and predispositions of the judges who do the actual work. Ideology does what it does best: it hides.

The various critical movements have indicated in the direction of a number of ideologies; or rather ideological systems: feminism has pointed at 'patriarchy', Marxist critiques at capitalism or at neo-liberalism, critical race theory at racism, queer theory at hetero-normativity, various CLS scholars at 'Liberalism', which seems to be linked in various ways to several of the other ideologies or operating systems of thought and consciousness. These manifest themselves through what does not require articulation, through what is silenced, through *ideés fixes*, by processes of 'naturalisation' and so on.[567] The point of this idea is not that human rights and its public-private distinction is a manifestation of a particular ideology, although one can definitely say this and, in fact, has been argued by various (critical) scholars. The point is more

565 Koskenniemi, "Human Rights, Politics, and Love," *supra* note 536, at 86.

566 If balancing is a metaphor from physics, proportionality is one from mathematics. Both carry the idea of precision and neutrality—neither are actually thus applied in the context of adjudication.

567 The philosopher Slavoj Zizek has illustrated this point from a slightly different, psychoanalytic perspective. He calls it the "Rumsfeld theory of knowledge": "Donald Rumsfeld's theory of knowledge - as expounded in March 2003, when the then US defence secretary engaged in a little bit of amateur philosophising: 'There are known knowns. These are things we know that we know. There are known unknowns. That is to say, there are things that we know we don't know. But there are also unknown unknowns. There are things we don't know we don't know.' What Rumsfeld forgot to add was the crucial fourth term: the 'unknown knowns' - things we don't know that we know, all the unconscious beliefs and prejudices that determine how we perceive reality and intervene in it." Slavoj Zizek, "Rumsfeld and the Bees," *The Guardian*, June 28, 2008, *available at* http://www.guardian.co.uk/commentisfree/2008/jun/28/wildlife.coservation (discussing ecology and our ability to control it); Slavoj Zizek, "What Rumsfeld Doesn't Know That He Knows About Abu Ghraib," *In These Times*, May 21, 2004, *available at* http://www.inthesetimes.com/article/747/ (discussing the abuse of prisoners in Abu Ghraib).

to argue that human rights, in their current legal-institutionalized form, can easily serve and will more often than not be swayed by the dominant ideological perspective of the status quo. So, speaking in the context of the European Court of Justice (ECJ) and its espousal of the language of rights, Koskenniemi notes that:

> "While the Court [the ECJ] has redescribed entitlement of property and land as well as the confidentiality of business information in fundamental rights language, no such language has been used to describe problems relative to immigration or asylum, racial discrimination, minorities or environmental protection. Such selectivity is of course not dictated by any 'essential' nature of those problems."[568]

As before, though the ECJ's selectivity may be said to be arbitrary, in the sense that it is not following a type of conceptual logic, it is not a surprising approach and even seems totally predictable from the perspective of a judicial organ deeply embedded in the worldview and perspectives of the status quo.[569] In this sense, human rights play a role in the affirmation of existing power relations, even if they some times can play a role in their change as well. They often do this, as has been elaborately illustrated by the critiques, by contributing to the naturalization of existing power relations, such as the subordination of women, or the subordination of social justice to market mechanisms, for instance.

This is not to say that human rights can not also have and have indeed had an enormously important role to play in its opposition to and reform of the status quo, as in the famous human rights mythology of Antigone,[570] and as in the many examples of legal change produced with human rights tools (think women's rights, non-discrimination, gay rights, etc.) But, having been, in the last 50 or so years, been articulated, codified, legalized and elaborately institutionalized, human rights have in fact become the language of the status quo.

568 Koskenniemi, "The Effects of Rights on Political Culture," *supra* note 554, at 107.

569 Perhaps it is unnecessary to emphasize, but the status quo is not a monolithic thing that is always the same. Neither is it, per se, a good or bad thing. If anything, it refers to 'the existing state of affairs', which includes the existing allocation of resources, power, access to institutions, and the rest of the spoils of politics.

570 Douzinas, *The End of Human Rights*, *supra* note 535; *see also* Douzinas & Gearey, *Critical Jurisprudence*, *supra* note 112.

> Once rights become institutionalized as a central part of political and administrative culture, they lose their transformative effect and are petrified into a legalistic paradigm that marginalizes values or interests that resist translation into rights language.[571]

It is not only a way to speak truth to power—it is also the way in which power speaks its truth.[572] (Legal) indeterminacy, in part by means of the contingency of the public-private dichotomy, which plays such an essential role, allows human rights to fulfill both these roles. 'Human rights' need the logical contingency, as well as the 'common sense' and the (truly) self-evident truths that are harbored by the prevailing consciousness of the time, by the ideological biases of the status quo.[573]

And there lays the paradox produced by human rights and put in an echo chamber by some of the critiques of human rights. Mainstream discourse and scholarship about human rights sees these in generally two ways. On the one hand, human rights are seen as a guarantee against state abuse, as firm and solid, as the shield that will protect the private sphere, its freedom and autonomy, from state interference. On the other hand, human rights are seen as the vehicle for social change, as a spearhead against the injustices of the status quo, as fluid and flexible enough to be ever more inclusive, ever more sensitive to those who have been left out of the Liberal rule of law. Some of the critiques of the public-private distinction have emphasized this duality, made it in fact unbearable. They have exposed the public-private distinction as an instrument of marginalization, of disenfranchisement, of exclusion; they have decried its function as a hard and solid wall of subordination in the hands of whatever they saw as the reigning ideology: capitalism, patriarchy, etc. From the viewpoint of these dominant ideological

571 Koskenniemi, "The Effects of Rights on Political Culture," *supra* note 554, at 99.

572 *See* David Kennedy, "Part of the Problem?" *supra* note 352.

573 Whether a reliance on human rights to change the status quo is sufficient or not, and to what extent, depends on highly contextual factors and is by no means self-evident. And what may prove to be a dead end in one era may prove to offer a leap forward in the next. Like other avenues of political action, human rights activism (legal or not) may prove useful in one generation, and less so in the next; and vice versa. In his account of rights discourse in the US, Duncan Kennedy tells the story of rights being the instruments of the conservative right at the beginning of the 20th Century, and the long and slow development that made them, in the post-WWII period, into an important instrument of the left, a movement that seems to have exhausted itself and perhaps may even have been reversed. *See* Duncan Kennedy, *A Critique of Adjudication*, *supra* note 111, at 300-303.

perspectives there was a large degree of coherence. At the same time, they have been very eager to point at the indeterminacy of the public-private distinction, its contingency and ultimate arbitrariness, its flexibility and fluidity, its ability to be, ultimately, incoherent. And as we have seen above,[574] some of the critiques have encountered this paradox in their exploration of the social-transformative potentials of the critiques of the public-private distinction themselves.

8.7. Concluding Observations

All in all, the picture is complicated. Seen through the prism of the critiques one can see a human rights discourse that is structured around a public-private distinction. The distinction's indeterminacy is managed by a legal-institutional decision-making complex, which in its turn presents itself as non-political and non-ideological. It relies on historical narratives that present the public-private distinction as relatively timeless and stable, ignoring a complex genealogy of philosophical and legal categories. CLS and Feminist critiques have, at times, come down hard on human rights, and have pointed out that it all too easily accommodates Liberal and patriarchal biases. And as we saw in chapter 7, it has proven relatively difficult to translate the critiques into assertive proposals for specific change. However, one should not underestimate the ideological nature of the intervention by the critiques and therefore its impact. Somewhere and somehow in the course of the last two to three decades, the previously commonsensical observation that women's issues fell in the private sphere started to change, and this change became visible in the output of the legal-institutional decision-making complex. Did ideology change too? It would most definitely seem so.[575] Did the critiques play a role in that change? They at least purported to. In any case, putting ideology at the forefront of analysis allows one to focus on how power relations are naturalized, and it allows one to ask the question of who wins, and who looses, with such naturalizations. This ideological dimension does not only operate at the most general level of human rights, but also in the more concrete layers of its institutionalization, in the realm of some of the legal doctrines that are deployed to manage some of its inner tensions. We will now turn to a few of those.

574 *See supra* Section7.5.

575 Even so, this seems like the perfect moment to remind the reader of MacKinnon's cogent observation: "if bottom is bottom then look on the bottom, and there is where women will be." DuBois et al., *supra* note 377, at 71.

9. The Pursuit of Coherence: the Public-Private Distinction in Human Rights Doctrines

9.1. Introduction

Having demonstrated how 'the public-private divide' is at the heart of human rights and is embedded in a legal-institutional decision-making complex, I will now turn to two doctrines employed within this complex. These two doctrines are part of the legal-technical vocabulary of human rights, and in this role they are preoccupied with the process of 'determining' the exact boundaries between public and private. As such, they offer a closer look into the mechanics of the legal process, albeit from the particular angle of legal scholarship.

In the interest of precision, let me start by defining "doctrine." I will use the term "doctrine" to describe a process of unifying certain strands of the aggregate judicial practice into relatively coherent bodies of thought. Doctrine is a story that is told about judicial practice. Doctrine is also a story that is told in judicial practice itself. In this sense, doctrine is the thing that gives internal unity to the disparate instances of judicial practice, as well as to the aggregate acts of collection, organization, and commentary, as performed by legal scholars.

Here I need to distinguish between the two main authors of doctrine. On the one hand there are the courts, the (groups of) judges taking decisions in particular cases. In doing their work (judging), they will be aware of past judicial practice, and they will not want to diverge from that without at least providing some rationale for this divergence. They will also be aware of how their decisions will function as precedent in future cases, and thus feel a degree of responsibility for those future decisions.[576]

On the other hand, there are the legal scholars, who will want to follow this process as well as somehow make sense of it. The primary role for legal scholars is to provide a kind of legal 'map' of the past, present, and (likely) future of judicial practice. In order to create such a map, scholars first need

576 *See also* Duncan Kennedy, *A Critique of Adjudication*, *supra* note 111, at 158-162 (discussing precedential constraints on judges).

to make sense of judicial practice, and as such their primary impulse will be to pursue coherence. In other words, they will approach judicial practice with a specific professional predisposition: they will assume that it makes sense. And if it doesn't, they will make an effort to interpret it into coherence. Only if this effort fails, for example because of an ideological disagreement, or because coherence in a particular case is just too hard to find, will they express a sense of incoherence in their commentaries. As Professor Roger Cotterrell describes it:

> In all modern legal interpretation (…) the search for unity, integrity or consistency of meaning is usually privileged in certain ways over the identification of difference. For example, common lawyers usually try hard to reconcile precedents and only if they fail to they admit the existence of judicial disagreements or differences of interpretation. Certainly it is not satisfactory to declare too often that a past decision must be confined to its own unique facts (to recognize that it does not fit other cases, that it represents an irreconcilably different view). The task is to decide how past decisions can best be generalized to play their part in a larger body of legal doctrine. Where legal rules relate without referring to each other and appear to conflict, interpretive effort often aims to show how their interrelation gives new meaning in their application together as a doctrinal unity. This is different from (and perhaps more highly prized than) the often unavoidable task of merely recognizing conflict between rules or seeing one rule as derogating from another.[577]

Scholarly commentaries, once they become "mainstream," eventually have resonance in the activities of judges, and thus both authors merge into one. Add to this the social proximity between scholars and judges, the way they often attend the same conferences, the way judges are often recruited from among scholars, the way scholars teach judges during their student years, and the way judges often teach and write in academic journals, and one can readily imagine a single authorship for legal doctrines.

577 Roger Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* 147 (2006) [footnotes omitted].

In this Chapter, I want to focus on the role of legal scholars, on the commenting and mapping functions that they perform. I will argue that there is, and has been, a sustained effort on the part of legal scholars to maintain the belief that there is a public (sphere, realm, etc.) and a private, and that the boundary between them can be determined through a legal process or through legal reasoning in a way that is non-political or non-ideological. In doing so, I will look at a number of doctrines that have been developed to manage various aspects of the legal process of human rights adjudication; aspects which are, in one way or another, different versions of a central preoccupation with the public-private distinction.

In response to ever-growing appeals to "rights," courts—both domestic and international—have produced numerous doctrines to deal with the cases at hand. And as the number of judgments has grown, legal scholars have followed suit, studying the case law, comparing the cases, thoroughly analyzing them, trying to figure out what the various differences and similarities mean, and then describing the "doctrine" of the courts. In doing so, they generally assume that there is an overarching coherence connecting the growing number of judgments with each other. They also generally assume that this overarching coherence is what determines the legal outcome of cases. This assumption is never explicitly articulated, but I will try to illustrate in various ways how it is implied. In doing this, a picture will emerge of the role of legal scholarship in the functioning of the legal-institutional decision-making process.

I will look, in this Chapter, at two different doctrinal debates. The first concerns the growing appeal of human rights discourse. As more and more people have discovered the power of human rights language, an increasing number of claims have begun to be articulated in terms of rights. In particular, people have begun to make claims concerning human rights not only in situations where they have been victimized by the state, but also in situations where they have been victimized by other (natural or legal) individuals, or groups of individuals. Scholars have responded to this development in various wavs. For some, it has been a welcome expansion, one that demonstrates the growing importance of human rights. These scholars feel that human rights should be applied more often and in more situations. For others, it has been an exciting development, but also a cause for some concern. What will this mean for human rights as a whole? Should human rights be applied everywhere, just like that? In spite of the fact that the dispute is between two

private parties, rather than between a private actor and the state? And still others simply reject the whole idea.

The second set of doctrinal debates concerns the particular situation in which the European Court of Human Rights (ECtHR) found itself at the beginning of its tenure, when it developed a more or less consistent language for dealing with the issue of state discretion. Some of the rights in the European Convention of Human Rights (ECHR),[578] in particular Articles 8-11, allow for the state to interfere with human rights under limited circumstances, in situations where doing so "is necessary in a democratic society."[579] The European Court has dealt with this by arguing that states are in the best position to judge whether a given interference is necessary in a democratic society, and that they are therefore entitled to a 'margin of appreciation' from the Court. This margin of appreciation is not unlimited, but goes hand in hand with 'European supervision'. In this way, the Court has created a public-private distinction in and of itself, in which the states are the private realm that has its public European limit. Ever since, court watchers and legal scholars have been trying to keep an eye on this margin of appreciation.

The Sections that follow will tell two stories about these doctrines. The stories are critiques in the sense that they go, so to speak, 'against the grain'. They aim to expose something that will be familiar to legal scholars, but is also generally absent from the way doctrine sees itself. The first story will describe the so-called doctrine of positive obligations as it has traveled within the legal-institutional decision-making complex. It can be read as story in which a particular development and constellation of factors seemed to upset a way of talking about human rights, about their public-private characteristics, and how doctrine (as well as judicial practice) responded to this development. This response can be seen as a critique of the public-private distinction, and also as a way in which the indeterminacy of the public-private distinction was deployed to resuscitate a sense of coherence about the human rights doctrines that seemed in doubt. Once coherence had been recovered, the pursuit of coherence continued, though within the vocabulary of the new doctrine.

578 Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [*hereinafter* ECHR].

579 *Id.* at arts. 8-11.

The second story is a more straightforward critique. I will propose a way of looking at the margin of appreciation doctrine that sounds very different from the multiple commentaries that have been produced by legal scholars. Whereas legal scholarship about the margin of appreciation generally takes the vocabulary deployed by the Court at face value and insists on believing that there is something 'out there' called the margin of appreciation, the analysis in this chapter argues that there is no such thing as a 'margin', and that the insistence on using that vocabulary demonstrates a generally subservient attitude by legal scholars that is not necessary, and, arguably, not desirable.

In both stories, legal scholars assume that there is such a thing as 'the public' and such a thing as 'the private', and that both can be distinguished from each other in a way that precludes politics and ideology.

9.2. Verticality Lost and Regained: Horizontal Effect and Positive Obligations

As human rights have become more institutionalized, more disseminated, and generally more often invoked, they have started to be deployed and relied on more often. In the process, comfortable doctrines have been challenged and shaken up. We have seen already how feminist scholars attacked the non-application of human rights in cases of domestic violence and gender-discrimination.[580] This challenge yielded results: human rights are now often invoked and applied in these cases. For a while, though, it seemed as if the feminist critique was asking too much, as if it threatened the systemic integrity of the entire human rights edifice.[581] It seemed that if human rights were to be applied *horizontally*, between individuals, as well as *vertically*, between the individual and the state, it would affect the very core of the idea of human rights. As a result of these concerns, it took even the more political activist organizations such as Amnesty International and Human Rights Watch until the '80s and '90s to consider that non-state actors

580 *See supra* notes 447-449 and accompanying text.

581 *See* Meron, *supra* note 455, (criticizing the feminist critique for its collapsing of the public-private distinction, which leads to conflicts of rights).

could be violators of human rights.[582] For lawyers, who always worry about the systemic integrity of doctrinal edifices, it required a lot of new work.

An example of this work is the seminal book by Andrew Clapham, *Human Rights in the Private Sphere*, which was very popular in human rights circles in the late 1990s.[583] Clapham took issue with the fact that human rights could not be applied (by either domestic or international courts) in the private sphere, or in situations in which the violation was the immediate result of private, rather than state, action. To the contrary, he argued that in the concrete context of the European Convention of Human Rights, it was "no longer viable to cling to the traditional view that the Convention only covers human rights violations by States."[584] In order to sustain this claim, Clapham invokes a number of reasons that I would summarize into the following two claims: (1) the traditional view of the law is no longer valid because international law has recognized that individuals can bear duties; and (2) reality and cultural perception have changed, and nowadays private actions are more disruptive (armed opposition groups) and matter more (feminism) than state actions. Ultimately, he finds the main support for his claim in the practice of international (judicial) bodies, which had in fact started to apply human rights in the private sphere.[585]

There are two ways in which this (radical) 'new' field of operation by international judicial bodies has been categorized and catalogued by legal scholars: by reference to 'horizontal effect' or *Drittwirkung*, doctrines which have been developed in the area of European constitutional law; and by

582 *See* Amnesty International, *Amnesty International Report* (1992) (mentioning for the first time some non-state groups that were alleged to have carried out human rights abuses in 1991); Human Rights Watch, *Annual Report* (1998) ("Controversial as well was our decision to break from the human rights movement's exclusive focus on governments, and to address atrocities that rebel forces commit. We saw these steps as necessary to protect those most vulnerable to harm.").

583 Clapham, *Human Rights in the Private Sphere*, *supra* note 447. Originally published in 1993 as part of the Oxford Monographs in International Law series, Oxford University Press released a paperback version in 1996, and it is still available.

584 *Id.* at 93.

585 This is of course highly ironic (although not meant to be so), since the question then becomes: who is clinging to which traditional views? The point that there is a state of affairs (no human rights in the private sphere) that is unacceptable and untenable becomes moot when reference is made to the fact (human rights are in fact applied in the private sphere!) that that state of affairs does not in fact exist anymore!

reference to the idea of 'positive obligations' under international law. Much of the doctrinal work on the subject has been geared towards containing the potential effects of this new 'opening up' of the horizontal dimension of human rights, a dimension that seemed to lose the centrality of the public-private distinction within the legal construction of human rights.[586] The whole point of the 'traditional' view was that human rights were vertical, protecting private individuals against abuses by the public state. If this was challenged, then the verticality of human rights, their public-private essence, might also be affected.

In hindsight, it may be difficult to imagine why this 'new' development was a problem. However, it spurred an elaborate doctrinal debate. Several arguments were made. One was that horizontal effect was invalid because it was contrary to the consent given by states.[587] The states that codified human rights, institutionalizing them and attaching *locus standi* to their international (judicial) proceedings never intended to 'bind' individuals. This was evidenced by the fact that international complaints procedures could only be initiated against states, not against non-state actors.[588] This argument was countered by reference to a doctrine used by the European Court of Human Rights to justify its departures from what seemed to be the clear consent given by states. According to this doctrine, the European Convention is a 'living instrument', which means that it changes in time and can be interpreted according to changing social and cultural attitudes.[589]

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586 *See, e.g.,* Richard S. Kay, "The European Convention on Human Rights and the Control of Private Law," 5 *European Human Rights Law Review* 466, 477-78 (2005) (expressing concern about imposing a broadly conceived notion of positive obligations: "The prospect of such pervasive but vague authority being applied to national law by an external court is beyond contemplation. (…) Given the elasticity of the Court's interpretation of those rights, the prospects for European supervision of national law appear endless.").

587 *See, e.g.,* A. Drzemczewski, "The European Human Rights Convention and Relations between Private Parties" 2 *Netherlands International Law Review* 168 (1979).

588 ECHR, *supra* note 579, at art. 34; *see also Florin Mihăilescu v. Romania (dec.),* ECtHR (2003), no. 47748/99 (affirming that "according to Article 34 of the Convention, [the Court] can only deal with applications alleging a violation of the rights guaranteed by the Convention claimed to have been committed by State bodies. The Court has no jurisdiction to consider applications directed against private individuals or businesses.").

589 *See Tyrer v. the United Kingdom*, ECtHR (1978), § 31 [*hereinafter Tyrer*] ("the convention is a living instrument which (…) must be interpreted in the light of present-day conditions"); *Marckx v. Belgium*, ECtHR (1979), Series A no. 31, § 58 ("the European Court of Human Rights interprets the Convention in the light of present-day conditions") [*hereinafter Marckx*]; *Johnston and Others v. Ireland*, ECtHR (1986), Series A no. 112, § 53 (reiterating that "the Convention and its Protocols must be interpreted in light of present-day conditions").

Clapham argues "that in the case of the European Convention on Human Rights, this could be legally justified by a dynamic interpretation which considered the general evolution of international law, and in particular the international law of human rights."[590] In other words, traditions change and human rights 'evolve'. This evolution needs to be taken into account by means of a 'dynamic interpretation'. Hence, too narrow an emphasis on the consent of states is unwarranted.

Another argument against this expansion of human rights was that it might endanger the public-private distinction and thus the solidity of the barrier between the state and the individual.[591] This argument was made in particular in the context of the debates about women's rights.[592] Clapham responds to this argument by insisting that supporting the application of human rights in the private sphere "is not the same as advocating the abolition of the notions of public and private. Indeed the Convention itself guarantees respect for private life in Article 8."[593] In any case, even though Clapham and others were very careful to argue that one could let human rights into the private sphere without it causing too much damage to the public-private distinction, there was also a sense that it was a rough thing to do, a real break with tradition,[594] and that it might even mean that some of the basic rules of international law would no longer apply. The big reference here was to the articles on state

590 Clapham, *Human Rights in the Private Sphere*, *supra* note 447, at 134.

591 This argument has not entirely disappeared. *See, e.g.,* Olha Cherednychenko, "Towards the Control of Private Acts by the European Court of Human Rights?" 13(2) *Maastricht Journal of European and Comparative Law* 195 (2006) (discussing concerns at the continued erosion of the distinction between the public and private spheres in the jurisprudence of the European Court of Human Rights).

592 *See, e.g.,* Meron, *supra* note 455 (suggesting the danger of collapsing the public-private distinction for individual human rights).

593 Clapham, *Human Rights in the Private Sphere*, *supra* note 447, at 134. He continues: "This Article clearly demonstrates a significant difference between rights in the private sphere and rights in the public sphere. Anyone wishing to rely on their 'right to information' (Article 10) may come up against private individuals relying on their 'right to respect for private life' (Article 8); this conflict does not arise where it is the State which is withholding information. The State has no right to privacy; it has a claim to *secrecy*." *Id.* (emphasis in original). Interestingly, very often individual's claim to privacy is very much a claim to secrecy—so in this sense his distinction between rights in the public and in the private sphere fails, dramatically. Moreover, it is very much possible to construct a state's right to privacy. It depends on how one defines privacy. One example, just off the top of my head is the 'right' of courts to meet 'in camera'. It is generally considered to be good for the judicial decision-making process for judges to do this. So, why can this not be 'privacy'?

594 See David Kennedy, "When Renewal Repeats," *supra* note 347 (illustrating the recurring tendency of legal scholarship to present itself as breaking with tradition).

responsibility.

The articles on state responsibility were the result of a longstanding effort by the International Law Commission to codify some of the essential features of international law.[595] An important element of this project involved laying down the so-called 'rules of attribution', which assist in the determination of when a particular act can be attributed to a state. According to the articles on state responsibility, acts can be attributed to a state: (1) when they are the acts of any of the organs of the state[596]; (2) when they are the conduct of persons or entities exercising elements of governmental authority[597]; (3) when they are the conduct of organs placed at the disposal of a state by another state[598]; (4) even when in excess of authority or contravention of instructions[599]; (5) when in fact, the conduct is directed or controlled by a state[600]; (6) or when it is carried out in the absence or default of the official authorities.[601] Acts of insurrectional movements becomes the act of a state as soon as such a movement gains control over the state.[602] And also, any conduct that is acknowledged and adopted by a state as its own can be attributed to a state.[603]

The big 'problem' with the articles on state responsibility for scholars like Clapham was that they did not attribute acts of private actors to the state, which meant that human rights were helpless in situations of violations by private individuals. But, these scholars argued, since human rights are very special and should not be curtailed by silly boundaries, the articles on state responsibility, and in particular the rules of attribution, should not apply

595 *Report of the International Law Commission*, International Law Commission, 56th Sess., Supp. No. 10, at 59-62, U.N. Doc. A/56/10 (Responsibility of States for Internationally Wrongful Acts) [*hereinafter* Articles on State Responsibility]. The rules on state responsibility have an interesting and strange history, a large part of which is described by Philip Allott, "State Responsibility and the Unmaking of International Law," *Harvard International Law Journal* 1 (1988).
596 Articles on State Responsibility, *supra* note 596, at art. 4.
597 *Id.* at art. 5.
598 *Id.* at art. 6.
599 *Id.* at art. 7.
600 *Id.* at art. 8.
601 *Id.* at art. 9.
602 *Id.* at art. 10.
603 *Id.* at art. 11.

to human rights.[604] In this view, international law should offer protection for human rights violations, independent of whether these acts could be attributed to the state or not.

Naturally, all this excitement and 'radicalism' turned out to be a bit of a tempest in a teapot, as the European treaty bodies had, in fact, already found that human rights obligations could be breached in situations where the state had done nothing, and the actual problem was caused by an individual or group of individuals.[605] After this, the European Court would often find human rights to apply in similar situations.[606] Thus, the case law 'evolved', the challengers were vindicated, and those who feared that it would require major doctrinal overhaul, such as dumping the rules of attribution, or even the very public-private distinction, were reassured because this did not end up being necessary. Ultimately, it turned out that it wasn't really a big deal. The public-private distinction remained intact, the verticality of rights remained

604 Clapham, *Human Rights in the Private Sphere*, *supra* note 447, at 188; *See also* Andrew Clapham, "The 'Drittwirkung' of the Convention," in *The European System for the Protection of Human Rights* 164, 170 (Ronald St.J. Macdonald et al. eds., 1993). An elaborate refutation of this claim was offered by Rick Lawson, "Out of Control—State Responsibility and Human Rights: Will the ILC's Definition of the 'Act of State' Meet the Challenges of the 21st Century?" in *The Role of the Nation-State in the 21st Century—Human Rights, International Organisations and Foreign Policy: Essays in Honour of Peter Baehr* 91 (Monique Castermans-Holleman et al. eds., 1998).

605 *See, e.g, X & Y v. the Netherlands*, ECtHR (1985) Series A no. 91, § 23 (finding that Article 8 ECHR contains both negative and positive obligations, which "may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves," and holding the Netherlands liable for failing to protect a mentally-handicapped girl against sexual abuse committed against her by the relative of an employee of the assisted-living facility in which she resided); *Plattform "Ärzte für das Leben" v. Austria*, ECtHR (1988) Series A no. 139, § 32 (finding that the right to freedom of assembly under Article 11 ECHR "cannot (…) be reduced to a mere duty on the part of the State not to interfere (…) [and] sometimes requires positive measures to be taken, even in the sphere of relations between individuals, if need be," and holding Austria liable for failing to protect anti-abortion protestors against counter-demonstrators).

606 *See, e.g., Özgür Gündem v. Turkey*, ECtHR (2000) Series A no. , §§ 41-46 (finding that the Turkish government violated Article 10 ECHR when it failed to protect a newspaper and its staff from repeated attacks by third parties); *Appleby and Others v. the United Kingdom*, ECtHR (2003-VI), no. 44306/98, § 39 (finding that the right to freedom of expression may depend not only "on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals," and holding that the UK was not liable for failure to protect a protester's right to gather petition signatures on private property); *Storck v. Germany* (2005-V), no. 61603/00, § 108 (finding that Germany had a "positive obligation to protect the applicant against interferences with her liberty by private persons").

vertical, the basic distinction between the state and the rest was maintained, nothing really changed. The way this happened was through the argument that the European Convention contained not only obligations to abstain from violating human rights,[607] but also positive obligations to intervene to prevent human rights violations from occurring.[608] In the ensuing years the European Court concluded a large number of cases in which it found that states had breached *positive* obligations.[609]

Meanwhile, court watchers and other scholars tried to make sense of it all, and tried to divine the 'system' behind the Court's increasingly numerous case-specific findings.[610] The language used to describe these legal phenomena is telling. "Does this or that right *have* horizontal effect?" "Does this or that

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607 The idea that human rights, and in particular civil and political rights, are 'negative', and oblige the state to abstain from intervening goes back to J.S. Mill. However, not only was this challenged by the rise of social and economic rights, but also by the simple observation, made by the European Court in the case of *Marckx v. Belgium*, that sometimes one needs to change a law in order to comply with an obligation under the Convention. *Marckx*, *supra* note 590, at § 31.

608 Sometimes scholars have referred to art. 1 ECHR, which obliges states to "secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention." The choice of the verb "to secure" is seen as the basis for the positive obligations. *See Young, James and Webster v. the United Kingdom*, ECtHR (1981), Series A no. 44, § 49 (holding that under art. 1 ECHR "each Contracting State 'shall secure to everyone within [its] jurisdiction the rights and freedoms defined in … [the] Convention'; hence, if a violation of one of those rights and freedoms is the result of non-observance of that obligation in the enactment of domestic legislation, the responsibility of the State for that violation is engaged."); Keir Starmer, *European Human Rights Law* (1999). *But see* P. van Dijk & G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights* 24 (1998) ("In fact one can not deduce from Article 1 whether the Contracting States are obliged to secure the rights and freedoms only in relation to the public authorities or also in relation to other individuals.").

609 *See, e.g., Costello-Roberts v. United Kingdom*, ECtHR (1993), Series A no. 247-C § 26-28 (finding that the United Kingdom would be liable for abusive corporal punishment amounting to inhuman and degrading treatment not only in state schools, but also in private schools); *López Ostra v. Spain*, ECtHR (1994), Series A, No. 303-C (finding that Spain had a positive obligation to protect a family's right to a clean environment); *Z. and Others v. the United Kingdom*, ECtHR (2001), Application No. 29392/95 (finding that the UK had a positive obligation to protect children from abuse).

610 *See, e.g.,* Alastair R. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (2004); Kier Starmer, "Positive Obligations Under the Convention," in *Understanding Human Rights Principles* 139 (Jeffrey L. Jowell & Jonathan Cooper eds. 2001). This in spite of the European Court of Human Rights' statement that: "The Court does not consider it desirable, let alone necessary, to elaborate a general theory concerning the extent to which the Convention guarantees should be extended to relations between private individuals *inter se*." *Vgt Verein Gegen Tierfabriken v. Switzerland*, ECtHR (2001-VI), no. 24699/94, § 46.

Article of the Convention *have*, or contain, a positive obligation?" Naturally, none of the texts interpreted here give a direct answer to this question. So the answer must lie somewhere else. Some looked to history: did the drafters intend to give this or that right this or that effect? If so, why did they not just say so? And how does one decide when the historical material that is available is contradictory? Can one interpret history, and evidence of 'intentions', by reference to the domestic laws of member states? The European Court has sort of said no to this idea, by postulating that the provisions of the Convention have a so-called 'autonomous meaning', a meaning of course to which only they have access.[611] However, there are plenty of cases where the Court has decided on the basis of the domestic practices and law of the various member states. It would seem that there is no way in which one can deduce an answer to the question posed about whether there *is* a horizontal 'effect' or about whether a particular provision *contains* a positive obligation that is incumbent on states. In spite of the factuality that the language of the question promises, there seems to be no way of ascertaining such 'facts'.

Recently, one legal scholar attempted to get at the heart of the matter. In the introduction to his *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Alastair Mowbray formulates the various questions that required addressing in order to understand how these positive obligations operate:

> Are they derived from express textual requirements of the Convention or implied judicial creations? Where they are of the latter type what justifications have been articulated by the Court to explain their recognition and imposition on member states? Also, what methodology has been adopted by the Court to determine the existence, scope and breach of implied positive obligations? It will also be crucial to ascertain what are the precise contents of these key positive obligations, both express and implied: *i.e.* the forms of action required of states (...).[612]

611 *See, e.g., Ezeh and Commors v. the United Kingdom* ECtHR (2004), 39 EHRR, paras. 82-89; *Engel and Others v. the Netherlands*, ECtHR (1976), Series A no. 22.

612 *Mowbry*, *supra* note 611, at 2.

Indeed, in the ensuing chapters some of these questions are explored. The legal bases are of course the provisions of the Convention themselves. Some of the positive obligations are indeed derived from explicit texts, which raises the question of why positive obligations are such a big deal. Many of them however seem to be "implied judicial creations."[613] As for the justification, an essential one seems to be the so-called 'principle of effectiveness'[614], which means that 'determining the existence' of a 'positive obligation' is a necessary step to attain the effective protection of the right in question. As for a 'methodology', there does not seem to be one in Mowbray's map, except for the formulation of a doctrine or theory that for every right there is a corresponding duty.[615] However, neither the principle of effectiveness, nor the idea of a corresponding duty explains why, in some cases, the Court did *not* find that there was a positive obligation.[616] Mowbray himself considers that these positive obligations are "awaiting maturation".[617]

Another favorite explanation is a reference to the "dynamic"[618] nature of the European Convention, which finds an echo in the Court's own assertions about the Convention being a "living instrument" that needs to be interpreted "in the light of present-day conditions."[619] But, here again it remains obscure why, in a particular set of present day conditions, a provision is found to contain certain positive obligations, or not. The European Court does not seem to apply a particular methodology in determining what these 'present

613 There are different meanings to this word, with different theories about interpretation attached to them. 'Implied' can refer to the intent of the drafters of the text, as a sort of double entendre, when you say something with the clear understanding that various (and not just the literal) meanings are attached to it, sometimes adding a "if you know what I mean" to it, or even a "nudge, nudge, wink, wink". Other times it can refer to a wider function that the provision plays, not just conveying a specific meaning, but also playing a subservient role in a larger system or purpose. As we will see, the 'implication' of the positive obligations is attached to a higher function, that of 'effectiveness'.

614 Mowbray, *supra* note 611, at 221.

615 Which refers to a set of arguments about duties attaching to human rights which were formulated by Henry Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy* 52-53, 155 (1996); *see also* Henry Shue, "The Interdependence of Duties," in *The Right to Food*, (P. Alston & K. Tomasevski eds., 1984).

616 Mowbray mentions *Cyprus v. Turkey*, ECtHR (2001-IV), no. 25781/94, § 216-22 (finding that restrictions on the freedom of movements of Greek Cypriots did not violate their right to health); *McVicar v. the United Kingdom*, ECtHR (2002-III), no. 46311/99, § 50-62 (finding that there was no positive obligation to provide legal aid to the defendant in a libel suit).

617 Mowbray, *supra* note 611, at 230.

618 *Id.* at 5-6.

619 *See Tyrer*, *supra* note 590, at § 32.

day conditions' are. There is no empirical research, not even an explanation or questioning of what 'present day conditions' actually means.[620] The most credible account is that the Court is giving itself some flexibility to depart, if it deems appropriate, from the original intentions of states as well as from its own precedents. From the perspective of doctrine there might be a feeling that this is a positive thing (especially for those like Clapham who want to break with tradition), or something simply to be recorded in the making of a general inventory of the Court's vocabulary. But nobody seems to wonder what it actually means, let alone argue with the Court about what it considers these 'present day conditions' to be.[621]

Even though Mowbray does not find the magical methodological tool by which the ECHR 'determines the existence' of positive obligations, he goes on to map the types of positive obligations in his conclusion,[622] in what is essentially a summary of the book. The book itself reads as summarization of all the ECHR cases in which the Court said anything about positive obligations, organized according to the provision of the Convention. There is the occasional frown about inconsistencies between some of the Court's findings,[623] but overall, and in the end, the Court is considered to have done a good job:

> [Even if] the Court still has work to do in refining existing positive obligations and nurturing inchoate ones we must not underestimate the practical benefits for the 800 million persons living under the protective jurisdiction of the Convention that have been achieved by the Court's creative approach to these obligations.[624]

620 Do present day conditions warrant the nationalization of private banks? Do they warrant regulating the internet? Do they warrant subsidizing university education more, or even less? Do they warrant prosecuting holocaust denial? All the time? How harshly should it be done? How heavy the penalties? Etc. If anything, 'present day conditions' characterize themselves by the fact that these questions are raised, not by their ability to somehow illuminate an answer.

621 A very prominent book on the European Convention is the 1190-page long, *Theory and Practice of the European Convention on Human Rights* (Pieter van Dijk et al. eds., 4th ed. 2006), which does not interrogate at all the use of the Court of this 'living instrument' language. What it does is that it merely mentions, here and there, that the Court refers to it when arguing for a particular interpretation.

622 Mowbray, *supra* note 611, at 225-227

623 For example, in Mowbray's opinion, the obligations to conduct investigations that arise out of Article 3 are not always clear, unlike those arising out of Art. 2. *Id.* at 64-65.

624 *Id.* at 230.

In spite of the fact that some of the key questions were never really answered, the overall practice regarding positive obligations, and in fact the "Court's creative approach" are commended by the author. Generally speaking, positive obligations are considered to be good things,[625] although it is never explained exactly why.

The point here is not to express discomfort about this seemingly unrestrained support of anything the European Court does (save for the occasional inconsistency), or the lack of discomfort about the Court's general approach. Nor is the point to express annoyance at the way the European Court adjudicates, left and right, without much openness about what its motivations are, or at how scholars see their work very minimally, limiting themselves to giving overviews and maps, with the odd complaint about uncertainty and inconsistency. The point is rather that legal scholars assume, either consciously or in the use of their language, that there is a rule "out there," that the Court can find it, that scholars can map it, that it is consistent,[626] and that it is good. In their working assumption, there is an answer somewhere "out there," or at least a logic that dictates when a state has the obligation to do something and when it does not. In their working assumption, or at least in the aesthetics of their scholarship, the answer lies along the boundary of the public-private distinction, the boundary between the realm of the state and the realm of the non-state, between the rights and obligations of the state and the rights and obligations of everyone else. There is a set of 'present day conditions' that can help determine the precise location of this boundary, the outer limits of how far 'positive obligations' reach, and how 'wide' they are. And even when there is an acknowledgement that a Court is being 'creative', and often there is such tacit admission, it is relegated to the margins of significance, as something that 'everybody knows', but that does not matter, is not really an object of 'legal analysis', or does not otherwise diminish the existence of that logically determinable boundary. In general, this assumption leads legal scholars such as Mowbray to assume the existence

625 One careful caveat to this in Mowbray's perspective is the potential costs incurred by states in these positive obligations. However: "As economic prosperity, hopefully, increases in member states, especially for the newer members (...) [of the EU], the Court should feel less inhibited in expanding the current outer limits of positive obligations." *Id.* at 230. One wonders if Mowbray would argue, in line with this argument, that the existence of a serious economic crisis means that states have less positive obligations. In fact, one could imagine arguments being made that incorporate the actual financial cost of the obligations.

626 Hence the objection to any of the Court's inconsistencies.

of an overarching coherence within the large number of cases dealing with positive obligations. If not, why else treat them as a separate topic, worthy of distinct analysis?

In all this, there is a continuous affirmation that there is such a thing as the public and that there is such a thing as the private, and that there is a boundary between them that can be determined through a legal process, using legal reasoning, and that all this happens in way that is not ideological or political, and therefore does not really require a scrutiny that goes beyond the legal technical one, or warrants a call for more accountability and transparency. However it is that the Court 'determines the existence' of a positive obligation, the work of scholars is limited to trying to map out these decisions as markers for 'the' boundary between public and private. In this way, the story that legal scholars produce and perpetuate is one in which courts operate in a legal technical universe that does not really involve political or ideological considerations. I will illustrate this function of legal scholarship by looking at another public-private doctrine of the European Court of Human Rights.

9.3. Managing Europe's Public-Private Distinction: the Margin of Appreciation

In dealing with some of the convention rights, the European Court of Human Rights developed a doctrine that was meant to convey that member states have a certain leeway or discretion in determining under what circumstances certain of the rights can be limited. Specifically, this doctrine applies to the rights to private life, to freedom of conscience, to freedom of expression, and to freedom of assembly.[627] These articles all have a similar structure. Paragraph 1 sets out the rights held by individuals, and paragraph 2 explains that states can interfere with these rights if a number of conditions are met. In particular, the Convention specifies that interference with these rights must be "necessary in a democratic society."[628] It is in the interpretation of this phrase that the Court initially developed its so-called "margin of appreciation doctrine." Though the principle had been applied before in the context of

627 ECHR, *supra* note 579, at arts. 8-11.
628 *Id.*

article 15[629]—under which states that declare a state of emergency can limit the exercise of some Convention rights—it wasn't until the *Handyside* case that the Court famously formulated its doctrine in elaborate terms.[630]

In order to illustrate all the highlights and shadows of this doctrine I will provide an extensive quote of the Court's *Handyside* considerations:

> 48. (...) [T]he machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. (...) The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines. The institutions created by it make their own contribution to this task but they become involved only through contentious proceedings and once all domestic remedies have been exhausted (...).
>
> (...) In particular, it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them. The Court notes at this juncture that, whilst the adjective "necessary" (...) is not synonymous with "indispensable" (...), neither has it the flexibility of such expressions as "admissible", "ordinary" (...), "useful"

629 The doctrine was first developed in the context of a derogation clause under the ECHR relied on by the United Kingdom during an emergency arising on the isle of Cyprus. *Greece v. the United Kingdom (Cyprus Case)*, ECtHR (1958-9), No. 176/56 (in which the Commission noted that the United Kingdom authorities "should be able to exercise a certain measure of discretion in assessing the extent strictly required by the exigencies of the situation"). The doctrine was first expressly referenced in *Ireland v. the United Kingdom*, ECtHR (1978) § 36 (involving the compromising of Irish citizens' personal liberties in order to quell a "campaign of violence carried out by the IRA").

630 *Handyside v. the United Kingdom*, ECtHR (1976), Series A. No. 24

(...), "reasonable" (...) or "desirable". Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of "necessity" in this context.

Consequently, Article 10 para. 2 leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force (...).

49. Nevertheless, Article 10 para. 2 does not give the Contracting States an unlimited power of appreciation. The Court, which, with the Commission, is responsible for ensuring the observance of those States' engagements (...), is empowered to give the final ruling on whether a "restriction" or "penalty" is reconcilable with freedom of expression as protected by Article 10. The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its "necessity"; it covers not only the basic legislation but also the decision applying it, even one given by an independent court (...).

The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a "democratic society". Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to

> the legitimate aim pursued.
>
> From another standpoint, whoever exercises his freedom of expression undertakes "duties and responsibilities" the scope of which depends on his situation and the technical means he uses. The Court cannot overlook such a person's "duties" and "responsibilities" when it enquires, as in this case, whether "restrictions" or "penalties" were conducive to the "protection of morals" which made them "necessary" in a "democratic society".
>
> 50. It follows from this that it is in no way the Court's task to take the place of the competent national courts but rather to review under Article 10 the decisions they delivered in the exercise of their power of appreciation.
>
> However, the Court's supervision would generally prove illusory if it did no more than examine these decisions in isolation; it must view them in the light of the case as a whole, including the publication in question and the arguments and evidence adduced by the applicant in the domestic legal system and then at the international level. The Court must decide, on the basis of the different data available to it, whether the reasons given by the national authorities to justify the actual measures of "interference" they take are relevant and sufficient under Article 10 para. 2 (...).[631]

In a nutshell, states are in a better position to assess a "pressing social need," while the European Court is to perform "European supervision." How much better is the state's position? And how far can European supervision go? Therein lies the public-private 'space' called "the margin of appreciation."

We find ourselves facing a situation that bears all the characteristics of the public-private dichotomy.[632] In the margin of appreciation doctrine, the

631 *Id.* at paras. 48-50.

632 *See also* George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* 84 (2007) ("the Court seems to interpret [the margin of appreciation] as the tension between individual freedoms and collective goals").

dichotomy appears in what I will call its *relational* sense. We have a 'whole' (Europe) consisting of 'parts' (the member states). The whole and the parts relate to each other in two ways. On the one hand, the whole and the parts are separate autonomous entities. The parts obtain their essential identity from being differentiated from the whole. Without this autonomy, a part is not a part. On the other hand, the whole and the parts exist only in relation to one another. The whole obtains its identity, its autonomy as a public, from being more than the parts; from being able to subordinate the parts. Otherwise it is not really 'a public.' Thus, the private is caught between being *autonomous*, *distinct from*, even *superior to*[633] the public, and being *subordinate to*, or *submerged within* the public. These two facets of the public-private relationship are antithetical to each other. Both, however, are intrinsically present in the dichotomy.

The cited paragraphs of *Handyside* reproduce this contradiction, which is otherwise hidden by the vague spatial metaphor of the margin of appreciation. First, the Court emphasizes its subsidiary character: it can only act when states have tried or failed.[634] The primary authority lies with the states—as the Court says, states are better able to appreciate the "vital forces of their countries" by "direct and continuous contact."[635] Of course, this assertion is questionable when taken literally—it is hard to see how a group of people in London or Paris are in more "direct and continuous contact" with the "vital forces of their countries" in Bristol or Dijon than are a group of people in Strasbourg.[636] In the same way, it is questionable whether a bunch of people[637] in Strasbourg can be thought of as in "direct and continuous contact" with the "vital forces" of Europe as a whole. Too many assumptions of a sociological, cultural, historical, geographical, and political nature are hidden behind the simple formalist language of state and Europe.

Next, the Court explains how its supervision of the state's "use" of its "margin" will take place.[638] It elaborates how in carrying out its supervisory

633 In the sense of being autonomous and having the last word.
634 *See Handyside*, supra note 631, at para. 48 (the Court only becomes involved "once all domestic remedies have been exhausted").
635 *Id.*
636 Note that at the time, the Court was not yet acting as a permanent one—it only convened every 3-4 months.
637 Generally speaking relatively old men with a long career among the elites of the judicial profession.
638 *See Handyside*, supra note 631, at para. 49.

function it will have to review every single aspect that is related to the case: legislation, judicial acts of implementation, and all the other circumstances. Only thus can it ascertain whether the state's interference is "proportionate to the legitimate aim pursued."[639] In other words, there is nothing *marginal* about the Court's review of states' margin of appreciation. So while the Court recognizes that there is a margin within which states can basically do as they see fit, it also immediately announces that it will thoroughly review every aspect of the state's judgment within this margin.

Seen from this perspective, it appears that a state is acting within the so-called margin of appreciation if and when the Court would have done the same thing had it been in the state's place. If the Court agrees with the actions under scrutiny, then the state will have acted within the margin of appreciation; if the Court disagrees, then the state will have transgressed that margin and will have been found to be in violation. In other words, there is no margin. There is only the *language* of margin. In the quest for the magical line that tells us how much 'privacy' states have, in the quest for the distinction between the European private and the European public, there is no magical line to be found. There are only instances in which the Court agrees with the states, and instances in which it doesn't. Even so, the public-private dichotomy structures the rhetoric by which the Court tries to present its findings as somehow obeisant to a rationality.

Take, for example, the case of *Zdanoka v. Latvia*.[640] In that case, dissenting Judges Rozakis, Mijovic and Gyulumyan disagreed with the majority as to whether a rule excluding a former communist party member from standing as a candidate to the national parliament was reasonable, a dispute that centered on the question of whether Zdanoka and other former members of the Communist Party of Latvia were "dangerous" to Latvia's democracy or not. Consider this for a moment. The *legal* question here is about whether the government of Latvia acted within its margin of appreciation in barring Zdanoka from running for parliament. In this context, the European judges sought to determine whether the exclusionary rule was arbitrary and unreasonable or not. But the determination of reasonableness boiled down to whether or not the law in question actually addressed a real danger for the democratic system in Latvia. In other words, whether *the European*

639 *Id.*
640 *See, e.g., Zdanoka v. Latvia*, ECtHR [GC] (2006-IV), no. 58278/00, § 132-136.

judges felt that electing former communist party members to parliament posed a problem *for Latvia*. The majority opinion found that the measure is "acceptable in Latvia in view of the historico-political context which led to its adoption and given the threat to the new democratic order posed by the resurgence of ideas which, if allowed to gain ground, might appear capable of restoring the former regime."[641] Judge Rozakis argues to the contrary that "it is difficult to contend that the election of the applicant to the Latvian parliament would have had adverse effects on the democratic stability of the country."[642] Judges Mijovic and Gyulumyan similarly argue that while "certain restrictions may be necessary in newly established and vulnerable democratic regimes," enough time has passed since Latvia's transition to democracy that such restrictions were no longer necessary: "More than ten years after its initial concerns, we cannot accept that the Latvian parliament still believes that former CPL members are a threat to democracy."[643] These arguments all turned on whether the *European judges believed* that Latvia's *political* decision was *correct* and therefore justified. Only after they agreed that there was a danger did they find that Latvia acted within its 'margin'. If this is the way that such judicial decisions work, then where is the 'margin'?

After reviewing all the circumstances of Latvia's situation *and* after reaching exactly the same conclusion as Latvia's authorities (that exclusion of certain people is necessary), the Court goes on with the following sentences:

> The Court therefore accepts in the present case that the national authorities of Latvia, both legislative and judicial, are better placed to assess the difficulties faced in establishing and safeguarding the democratic order. Those authorities should therefore be left sufficient latitude to assess the needs of their society in building confidence in the new democratic institutions, including the national parliament, and to answer the question whether the impugned measure is still needed for these purposes, provided that the Court has found nothing arbitrary or disproportionate in such an assessment. (...)[644]

641 *Id.* at § 133
642 *Id.* (Dissenting Opinion of Judge Rozakis).
643 *Id.* (Joint Dissenting Opinion of Judges Mijovic and Gyulumyan)

This paragraph is striking for a number of reasons. First, what precedes it is an elaborate review of all circumstances in Latvia, and an assessment of what seems an appropriate course of action that coincides with that made by the Latvian authorities. So far, there is no margin of appreciation, since the Court has reviewed the entire 'appreciation'. Then, the Court moves on to "therefore accept in the present case" that Latvian authorities are "better placed" to make their own assessment and that they should be given "sufficient latitude" to make an assessment of "the needs of their society." The 'therefore' is quite odd and one gets the impression that the Court wants to accept that there is such 'latitude' because it has already done its own assessment and has already agreed with it. The language of latitude serves to reinforce the margin doctrine. And in case one has any doubts, there is the second sentence, in which the Court reiterates that it is the one having the final word. There is a conditionality attached to the latitude: the assessment made by the state of "the needs of their society" should not be considered *by the Court* to be arbitrary or disproportionate. With this sentence the Court sweeps away the latitude it has accorded to the state in the previous sentence. Otherwise, would not the state be in a better position to assess whether an assessment is arbitrary or disproportionate? The language of margin, of latitude, is employed, and this sketches a complex narrative of state autonomy and a 'reticent' European supervision. But there seems not to be such a thing, when looking closely.

644 *Id.* at § 134. The judgment continues: "In this respect, the Court also attaches weight to the fact that the Latvian parliament has periodically reviewed section 5(6) of the 1995 Act, most recently in 2004. Even more importantly, the Constitutional Court carefully examined, in its decision of 30 August 2000, the historical and political circumstances which gave rise to the enactment of the law in Latvia, finding the restriction to be neither arbitrary nor disproportionate at that point in time, that is, nine years after the events in question (...). It is to be noted that the Constitutional Court observed in its decision of 30 August 2000 that the Latvian parliament should establish a time-limit on the restriction. In the light of this warning, even if today Latvia cannot be considered to have overstepped its wide margin of appreciation under Article 3 of Protocol No. 1, it is nevertheless the case that the Latvian parliament must keep the statutory restriction under constant review, with a view to bringing it to an early end. Such a conclusion seems all the more justified in view of the greater stability which Latvia now enjoys, *inter alia*, by reason of its full European integration (...). Hence, the failure by the Latvian legislature to take active steps in this connection may result in a different finding by the Court. (...)" *Id*. at § 134-35.

Now, if there were a real margin of appreciation, we might see the Court say something along the lines of: "in our view, this would normally be a violation. However, we are not in the best position to know this, for there is a margin in which the state is in a better position to know." Or, the Court might say "the question of whether this was necessary in a democratic society is not for us to assess, for it is up to the states to make that call. The fact that we think it is not necessary is besides the point." However, the Court has avoided such observations, and the final word has always been in reference to 'European supervision'. One might perhaps see the margin operate if one would see a *dissenting* judge argue something along this line: "I disagree with the fact that there was no violation, since the state did not act within the margin." Or "I disagree with the fact that there was a violation, since the state did act within the margin." This will generally not be the case though. What one will see dissenting judges do in pretty much all cases is more like this: "This should not have been a judgment finding a violation since the state did what it had to do." Or, "the Court should have found a violation since the state should not have done what it did." In other words, dissenting judges will refer to the (in)acceptability of the states' action, and *not* to their having transgressed (or not) this fictional space called the margin of appreciation.[645]

For most scholars, however, the language of margins holds true, and the question of how much privacy states have, how much autonomy and independence they can use, remains at the heart of the matter. Ever since it was formulated, the doctrine has elicited all kinds of reactions: from concern that the Court seemed to allow states too much space, to an outright rejection

645 I have no exhaustive empirical evidence for this observation. But I doubt that anyone has evidence to the contrary, either. In support of this observation, I want to put forward an impression that is not based on an exhaustive empirical inventory and analysis of the Court's case law. Certainly there may be situations where a judge disagreed with a state's action but would nevertheless find that it is up to the state to decide. However, I would argue that this is not inconsistent with my main point. I believe it to be perfectly possible that some judges are better capable of being true to the language of the doctrine, while others will (unwittingly) make it instrumental to their opinions without worrying too much about formal doctrinal consistency, merely because they will not consider it as necessary. And why would they? Nobody will hold it against them. The significance I attach to these psychological and ideological biases follows Duncan Kennedy's analysis in his *Critique of Adjudication*. See Duncan Kennedy, *A Critique of Adjudication*, supra note 101, at 180-212. *See also* Duncan Kennedy, "Strategizing Strategic Behavior in Legal Interpretation," 1996 *Utah Law Review* 785. I would insist though that real evidence is possible here, since what the Court or the separate opinions say in this regard can be interpreted in various ways. In spite of the impossibility of real evidence, however, it seems to me that this reading of what the doctrine actually does is at least as plausible as any other one, but hopefully more persuasive.

of the whole idea that states might be in a better position to assess anything. One of the Court's judges—the Belgian, Judge De Meyer—famously voiced his dissatisfaction when he wrote in a dissenting opinion that: "Where human rights are concerned, there is no room for a margin of appreciation which would enable the states to decide what is acceptable and what is not. On that subject the boundary not to be overstepped must be as clear and precise as possible."[646] Here again, the language of margins brings with it a whole set of spatial metaphors; talk of 'boundaries', and assertions that with regard to a particular right the margin of appreciation is 'wide' or 'narrow.'[647]

The excerpt from De Meyer is telling because it expresses two discomforts with the margin of appreciation doctrine that are sometimes difficult to distinguish from each other. On the one hand, the problem with the doctrine is that it is too *permissive*; it gives too much leeway to states; it allows states to get away with actions that should be considered breaches of the convention.[648] On the other hand, the problem is that the doctrine is *unclear*; in other words, it is not immediately evident whether a state making an assessment is acting within or beyond the margin of appreciation.[649]

646 *Z v. Finland,* ECtHR (1997-I), (Partly Dissenting Opinion of Judge De Meyer) para. III.

647 *See, e.g., James and Others v. the United Kingdom*, ECtHR (1986), Series A, No. 98 §46 (finding it natural that the margin of appreciation "available to the legislature in implementing social and economic policies should be a wide one").

648 *See, e.g.,* Eyal Benvenisti, "Margin of Appreciation, Consensus, and Universal Standards," 31 *New York University Journal of International Law and Politics* 843 (1999) (arguing that the "[m]argin of appreciation, with its principled recognition of moral relativism, is at odds with the concept of the universality of human rights"); Paul Mahoney, "Speculating on the future of the reformed European Court of Human Rights," 20 *Human Rights Law Journal* 1, 3 (1999) ("Will the ECHR standards be diluted, not just to accommodate the problems of the fledgling democracies [of central and eastern Europe], but generally, across the board for the whole of the ECHR community? Will the principles painstakingly built up over the years in the jurisprudence of the Commission and Court be left by the wayside?").

649 Lord Lester of Herne Hill, QC, "The European Convention on Human Rights in the New Architecture of Europe: General Report," *Proceedings of the 8th International Colloquy on the European Convention on Human Rights* (Council of Europe) 237 (1995) (arguing that: "The concept of the 'margin of appreciation' has become as slippery and elusive as an eel. Again and again the Court now appears to use the margin of appreciation as a substitute for coherent legal analysis of the issues at stake (…). The danger of continuing to use the standardless doctrine of the margin of appreciation is that (…) it will become the source of a pernicious "variable geometry" of human rights, eroding the '*acquis*' of existing jurisprudence and giving undue deference to local conditions, traditions, and practices."); Jeffrey Brauch, "The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law," 11 *Columbia Journal of European Law* 113, 116 (2005) (arguing that the Court's methodology in regard to applying the margin of appreciation doctrine is too vague to meet the requirements of the rule of law).

For one vein of discontent, it is the amount of space allowed to states that seems unbearable; for the other, it is the lack of clarity about the extent of this space and the legal uncertainty this causes. The first discontent assumes that a narrow scrutiny of states' actions would yield better results. Somehow, Judge De Meyer blames the margin of appreciation for the outcome in *Z v. Finland*. If only the Court had engaged in a narrower review, then the outcome would have been different. The second discontent assumes that (1) it is possible to formulate how much decision-making and wiggle space states have without entering into details or even the substance of cases, and (2) better results would follow from increased specificity. This perspective is caught in the idea of exactitude that is conveyed by the use of spatial language. If only the Court could say, once and for all, that the margin of appreciation is 17.5 kilometers wide and 50 centimeters deep, *then* there would be clarity.

Many scholars do not share the first discontent. Instead, they see some type of pragmatic justification for the Court's doctrine in what they see as the need to recognize that European integration is only in its early stages.[650] As the Court mentions in *Handyside*, there is not one uniform European morality, but various moralities that exist side-by-side.[651] The 'whole' is not yet entirely whole. As such, they argue, it is reasonable to allow for a degree of divergence. This perspective relies entirely on the idea of the margin as a space of discretion, but is more accepting of it, even appreciative. For them, this space does not allow states to be 'more repressive than they should be,' rather it allows states to be 'true to their uniqueness.' The key words are 'plurality' and 'diversity'. Even in this vein of scholarship, however, there is discomfort about the vagueness of the doctrine, and a desire to understand how the Court determines where the margin ends and where transgression begins. As with positive obligations, the quest for this knowledge is geared

650 Ronald St. J. MacDonald, "The Margin of Appreciation," in *The European System for the Protection of Human Rights* 83, 123 (Ronald St. J. Macdonald et al. eds., 1993) (arguing that "the margin of appreciation is a useful tool in the eventual realization of a European-wide system of human-rights protection, in which a uniform standard of protection is secured [but] [p]rogress towards that goal must be gradual, since the entire legal framework rests on the fragile foundations of the consent of the Contracting Parties"); Aaron A. Ostrovsky, "What's So Funny About Peace, Love, and Understanding? How the Margin of Appreciation Doctrine Preserves Core Human Rights Diversity and Legitimizes International Human Rights Tribunals," 1 *Hanse Law Review* 47 (2005); J.A. Sweeney, "Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era," 54(2) *International and Comparative Law Quarterly* 459 (2005).

651 *Handyside*, *supra* note 631, at para. 48.

toward analyzing vast amounts of case law in search of the pattern, the overarching logic that the Court is obeying, a logic that is *not* case-specific, but rather intrinsic to the doctrine itself, and to the public-private distinction that the doctrine reflects.[652]

A prominent example of this type of scholarship is Howard Charles Yourow's book *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*. In Yourow's words:

> [This] study focuses upon the methodologies by which the central authorities within the Convention system decide upon the scope of their own supervisory powers, and consequently upon the scope of the discretion which will remain vested in the national authorities for the definition, interpretation and application of the basic human rights guarantees contained in the treaty.[653]

Yourow sets out and analyses dozens of cases, meticulously and elaborately inventorying the various types of justifications that the Court seems to rely upon when deciding on the scope of the margin. In taking stock of the Court's work, he reflects on the methods it has used to interpret the Convention and

652 *See, e.g.*, Steven C. Greer, *Margin of Appreciation: Interpretation and Discretion Under the European Convention on Human Rights* 5, 7-8 (Council of Europe, Human Rights Files No. 17, 2000) (describing the Court's margin of appreciation decisions as a "mountain of jurisprudence" whose "most striking characteristic remains its casuistic, uneven, and largely unpredictable nature," but going on nevertheless to outline a coherent doctrine: "The unpredictability noted by many commentators is (…) not an inherent characteristic of the margin of appreciation notion, but stems from the reluctance of the Court to spell out all the stages of the argument from interpretive principles to conclusions about state discretion. It follows that if these links were made more explicit, the decisions themselves would become much more comprehensible (…)"); M.R. Hutchinson, "The Margin of Appreciation Doctrine in the European Court of Human Rights," 48 *International and Comparative Law Quarterly* 638 (1999); Letsas, *supra* note 633, at 81 (arguing that "much of the confusion and controversy surrounding the margin of appreciation is due to the Court's failure to distinguish between [two different uses of the doctrine] in its case law," and hoping that "if the two concepts are distinguished on the basis of the possible values each one serves, this will enable the European Court to impose some coherence and transparency on its reasoning and avoid charges of inconsistency and arbitrariness"); Sweeney, *supra* note 651; Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality Jurisprudence of the ECHR* 18 (2002) ("disaggregating the doctrine into a range of component elements in search for a consistent and coherent rationale"); Howard Charles Yourow, *The Margin of Appreciation Doctrine in the Dynamics of the European Human Rights Jurisprudence* (1996).

653 Yourow, *supra* note 653, at 2.

the various rights that flow out of it. Basically, the Court has used all of them: textual, teleological, evolutive or dynamic, historic, and autonomous.[654] And the list is not exclusive.[655] The central question of the book is most explicitly answered in this way:

> From these sources of law and methods of interpretation, the following salient guidelines emerge within the margin of appreciation case law as a whole. The evolutive theory of interpretation places great emphasis on contemporary cultural and sociological notions such as gender equality and the protection of sexual orientation. Some, but not great, emphasis is placed on the legislative history of the Convention and its provisions. If no strong European consensus is discovered, the facts of the case itself will come even more prominently into play. The challenged state must meet its burden of proof, as mandated by both the Convention and the case law, in order to carry the day. In the overall, the Court has been more judicially restrained than the Commission in adapting the margin of appreciation doctrine to further rights claims under the Convention.
>
> The personalities and backgrounds of individual judges and commissioners, including their primary experience in either domestic or international law; the increasing workload and the procedural mechanics of the Strasbourg operation; the style of decision (majority opinions are normally very thin on *ratio decidendi* and often without substantiation of significant judging criteria, such as the components of consensus of national law and practice); and external influences such as public and media opinion, all have an impact on the sources of law and methods of interpretation used by the Strasbourg organs. Also relevant is the state of national laws and practices and the degree of their unification at the regional and global levels.[656]

654 *Id.* at 185. The so-called autonomous method refers to the ECHR's doctrine that Convention concepts have an 'autonomous' meaning; one that is independent from the meaning that these concepts might have under national law.

655 *Id.* (noting that these are only some "[a]mong the methods of interpretation employed in practice and doctrine").

656 *Id.* at 185-186.

The first of these two paragraphs is an attempt to summarize what could be called the vague positive law patterns the book uncovered, while the second paragraph suggests that many other factors are actually also relevant. And between parentheses, there is the acknowledgement, partially in Latin, that the Court's judgments frequently do not actually explain the reasons upon which they are based. However, the remainder of the concluding chapter valiantly continues the quest to discover some type of logic that governs the whole. Some of the suggested formulas are promising: there is a hierarchy of rights; with some rights, the margin narrows, with others, the margin widens.[657] However, as Yourow complains: "the Court has done little thus far to develop hierarchy other than to stress the special nature of some rights."[658] Even so, Yourow perseveres,[659] and posits that with Article 15 cases the margin is consistently wide, with Articles 5 and 6 the margin is consistently narrow, and with Articles 8 through 11 there is "a variable application of allowable national latitude."[660] At the end of the day, he concludes:

> There is no immutable margin standard common or easily adaptable to all of the various cases and categories into which national discretion analysis has been introduced. However, the basic doctrine and the essential language of national discretion analysis remain intact as the Strasbourg organs move from case-to-case and from category-to-category. *The scope of discretion is the major variant*.[661]

Just in case you had not noticed: the 'scope of discretion' is another way of referring to the 'margin of appreciation'.

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657 *Id.* at 188-191.

658 *Id.* at 191. He also explores a formula under which there is a distinction between public rights (related to the political sphere, such as freedom of expression) and private rights (such as the right to privacy), but concludes that this formula doesn't really work. For a while it seemed as if the more private rights enjoyed a narrower margin than the more public rights, but a couple of cases did not fit this theory.

659 *Id.* at 192 ("patterns do emerge which identify modes of interpretation which are more principled, consistent, and predictable than pure *ad hoc* considerations would indicate.").

660 *Id.* at 192-193 ("As the margin itself is a very flexible instrument in the hands of shifting Court majorities, despite the consistency of doctrine, the Personal Freedoms case law provides mixed results. As necessity is measured, variable grants of appreciation are accorded the national authorities. Sometimes "a margin" is granted. At other times, a "certain" margin is granted. At still other times, a "wide" margin is granted.")

661 *Id.* at 192 (emphasis added).

Yourow's analysis is more interesting, and also somewhat more critical, when he ventures into seeing the margin of appreciation as a doctrine that manages the systemic relation between Strasbourg and domestic authorities. In fact, he more or less accidentally observes that what seems to be at stake is whether the Court wants to be a progressive force—one that moves European countries to recognize rights they have been hesitant to embrace—or a more conservative force—one that follows development in European countries and sweeps the most recalcitrant ones on with the rest.[662] The question at the heart of this systemic tension, as posed by the Court's case law, is whether there is an existing European 'consensus' about a particular question or not. This, however, seems to be a 'chicken and egg' question:

> The Court appears to be incorporating consensus as the law of the Convention. Its judgments reflect the status quo, albeit "living", "currently prevailing", or "progressive", which the consensus of national law and practice represents. This raises the puzzling question as to whether or not the Court creates a truly autonomous law of the Convention in its own case law, or whether national law and practice is bound to inform the judgments to the extent that it actually defines the international or "European" jurisprudence.[663]

Interestingly, within this question there lies an observation that echoes the American Legal Realist critique of the public-private distinction; one that Yourow himself voices more clearly at the beginning of his book: "courts are not only conditioned by, but can in turn condition, the degree and quality of consensus and integration within the society in which they fulfill their role."[664] In other words, the Court can observe and follow consensus, but

662 Evidence of this can be seen, for example, in *Tyrer*, *supra* note 590, § 31, 38 (finding that corporal punishment for children on the Isle of Man was out of step with the rest of Europe: "[T]he Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe. (…) [I]n the great majority of member States (…) judicial corporal punishment is not, it appears, used and, indeed, in some of them, has never existed in modern times (…). [T]his casts doubt on whether the availability of this penalty is a requirement for the maintenance of law and order in a European country."); *see also Dudgeon v. the United Kingdom*, ECtHR (1981), Series A no. 45, § 60 [*hereinafter Dudgeon*] ("in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices (…) as in themselves a matter to which the sanctions of the criminal law should be applied").

663 Yourow, *supra* note 653, at 194.

664 *Id.* at 2.

can also create it. In looking at the way the Court has chosen between these options, Yourow's patience reaches a limit: "Especially vexing in any attempt to uncover the further meaning of the consensus factor is the consistently unsubstantiated nature of the Court's pronouncements."[665] In other words, the Court is just not open about how and why it finds a consensus to exist or not. Consensus seems to be another version of the margin, another version of the public-private distinction in the sense that there is a public (consensus), that trumps the private (divergence),[666] or not, depending on the Court's inexplicable mood.

At the end of his book, Yourow sums it all up in a paragraph that (in my opinion) is beautifully in contradiction with itself:

> The margin of appreciation doctrine is a multifunctional tool in the hands of the Strasbourg authorities. As they choose not to fix its identity in any permanent way, this quicksilver notion may take the guise of a method of interpretation which the Court invokes at its discretion, and may even appear as a formal standard or test which the Court obliges itself to address. As the case-law survey indicates, the margin doctrine is a technique for weighing and balancing claims and state defenses, especially in the determination of necessity for state action under the Articles 8-11 limitation clauses. It is a method of determining aberrant state action, in conjunction with the consensus standard. It is also a more formal standard for the determination of deference to state discretion in several different but interrelated categories within the vertical division of power between Strasbourg and the States Parties: deference to the will of the democratic legislature, to state executive and judicial fact-finding in the individual cases, to state interpretation of the Convention, and to choice of means in carrying out responsibility for enforcement under the subsidiarity principle.[667]

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665 *Id.* at 195. He refers here to the work of R. Helfer, "Consensus, Coherence and the European Convention of Human Rights," 26 *Cornell International Law Journal* 133 (1993). Is it a coincidence that Yourow, with his Legal Realist intuitions, is a US scholar, just like Helfer, who is also quite skeptical of the Court's rhetoric?

666 Never mind that 'consensus' should mean that there is no divergence...

667 Yourow, *supra* note 653, at 195-196.

The first half of this paragraph is critical and regards the margin doctrine of the Court as rhetoric. The doctrine is a 'tool' with a deliberately unfixed identity. It is mercurial in the sense that it is deceptive—it pretends to be a method, a standard that is 'addressed' by the Court. In this reading, the doctrine is a rhetorical tool that disguises the fact that the Court actually decides based on obscure rationales. In the second half of the paragraph, however, the rhetoric of the Court re-appears in all its glory. The doctrine is now a 'technique', for 'weighing and balancing'. It is no longer 'the guise of a method', but rather 'a method of determining'.

This contradiction, within the same paragraph, is in my opinion not an accident. Instead, it is a beautiful example of how most scholars deal with these public-private doctrines. They spend a lot of time studying the Court's practice, its rhetoric filled with spatial metaphors and the language of lines and boundaries, looking for patterns, taking each judgment as a flag-post that can help demarcate the ever-elusive 'boundary' between public and private. Yourow's book represents an effort of almost two hundred pages of analysis of judgments and separate opinions. There seems to be frustration, or at least the insight that there is something too fluid about the language of the Court. Some of this is expressed in the margins, as in the first sentence of Yourow's paragraph above. Continuing the trajectory of these thoughts, one could arrive at the conclusion that the margin of appreciation is arbitrarily defined, that it is a content-less concept used to provide the appearance of rationality. However, just as these thoughts appear on the page, Yourow makes a complete turn and basically reiterates the pretensions of the rhetoric that the doctrine tells the Court what to decide, rather than the other way around.

In one of the more thoughtful analyses of the European Court's work, Marie-Bénédicte Dembour views the doctrine of the margin of appreciation through the light of a number of wider theoretical debates.[668] Even so, her analysis falls in line with many of the more conventional analyses performed by legal scholars. To begin with, Dembour sees the margin-doctrine as an expression of the realist theory of international relations, one in which national interests prevail and in which the Court takes a subservient position towards states and their perceptions. This part of her analysis focuses mostly on the case

668 Marie-Bénédicte Dembour, *Who Believes in Human Rights? Reflections on the European Convention* (2006).

law in Article 15 ECHR.[669] She taps into historical analyses of what happened in the early days of the Commission[670], when the doctrine was slowly being developed, and compares the early case law (mostly against the UK and Ireland) with more recent decisions (mostly against Turkey). In her analysis she seeks to determine whether a judgment by the Court is 'statist' or 'realist', or whether it is 'supranational',[671] and attempts to find an explanation for her impression that the Court is somehow more lenient towards the UK than towards Turkey. Though she opens the door here to a very incisive analysis of whether the Court has a political bias in its case law, she does not pursue this option very far, focusing instead on the possible differences in the facts of the cases she compares, or on a very fleeting reference to the differences in democratic cultures between Western and Eastern European countries.[672] She concludes that:

> [I]t cannot be ruled out that realist factors, including either awareness of differences in power between states or misplaced faith in the credentials of 'long-lived' democracies, may have led the Court, perhaps unconsciously, to be more lenient towards the United Kingdom than towards Turkey. In this respect, it can be noted that the regression, observed in recent UK cases, of an 'earlier, more expansive interpretation' of Article 13 in the Turkish cases' is puzzling. This particular case law concerns the obligation for the state to conduct a thorough and effective investigation and prosecution in cases of suspected violations of the right to life. From a supranational perspective, this development cannot but raise cause for concern.[673]

669 *Id.* at 30-59.

670 In particular the work of A.W. Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention*, 2001. Dembour equates Simpson's disdain for the doctrine ('a cloak of legality') with that of De Meyer. Dembour, *supra* note 669, at 47, 50.

671 'Statist' or 'realist' refers to a submissiveness with regard to state sovereignty, while 'supranational' refers to a position of rigorous supervision of state's compliance with human rights obligations.

672 *Id.* at 50-51 (referring to the opinions voiced by Judge Martens in his separate opinion to *Brannigan and McBride v. the United Kingdom*, ECtHR (1993), Series A no. 258-B).

673 Dembour, *supra* note 669, at 51.

Though Dembour goes into what the Court does "unconsciously," she is mostly driven by the apparent lack of consistency and/or coherence in the Court's case law. Moreover, the quote gives a strong sense that she agrees with the "supranational" (favoring rigorous supervision of a state's compliance with human rights), rather than the "statist" (favoring submissiveness with regard to state sovereignty) perspective. This puts her in the same camp as De Meyer. Interestingly though, she goes on to analyze the 'puzzling' case of *Aksoy v. Turkey*, where the Court both agreed and disagreed with the state. After trying to fix the case into either the statist (private) or supranational (public) category, she concludes that: "These mixed results indicate that *Aksoy* is primarily neither a realist/statist nor a supranational decision. It is both at the same time. This conclusion can probably be applied to most cases."[674] The last sentence in particular begs the question of why there was so much investment into the dual statist/supranational categories in the first place, and also makes me wonder what this means for the margin of appreciation doctrine, if cases are always going to be subservient to state autonomy and imposing of European authority, both at the same time.

Nevertheless, the narrative employed, about a tug of war between the Court and the states, in which the Court is either too subservient or too courageous, remains.[675] In my own estimation, there might be an element of such an existential struggle within the Court[676], but for the sake of this chapter I would prefer to emphasize that, struggle or no struggle, when the Court is "statist," it defers basically because it agrees with the state, rather than because it succumbs to its power. And where the Court is "supranational," it overrides state preferences because it disagrees with the state, rather than because it is being courageous. And with (dis-)agreement I mean that the Court shares the political and ideological biases of the state, shares its perspective and its overall cost and benefit analysis (or not).

Dembour's other take on the margin-doctrine is that she views it through the optic of the debates about universalism versus relativism or particularism. In this view, she presents a drastically different story about the margin of appreciation doctrine. On the one hand, there is an echo of her objection

674 *Id.* at 53.

675 One sub-chapter in which she describes the McCann and Selmouni cases is called: "A Court ready to stand up to the state." *Id.* at 56.

676 I have explored such a narrative in my own "Individuele zaken, algemene praktijk van schendingen en de Straatsburgse geldingsdrang," vol. 49 no. 2 *Ars Aequi* 97 (Feb. 2000).

voiced earlier, regarding too much subservience to "statism." In this analysis she argues that states are not necessarily the best representatives of a local culture. Talking about the *Handyside* case she comments:

> The English sensitivity was implicitly respected in *Handyside*. Which English people were we talking about, however? (...)
>
> On the face of it, the doctrine of the margin of appreciation makes it possible for a particular 'national' way to be respected against external imposition of 'common' (or alien) standards. Another perspective, however, would have it that the doctrine protects those with the power to say to the 'foreigners' (namely the Strasbourg Court) what the local culture is—either the state or the most vocal and powerful in the country. This observation is directly in line with one of the reasons why cultural relativism has been decried.[677]

Indeed, as we have seen in the case of human rights and women,[678] culture is often presented as a shield against applying certain rights. Dembour warns against this type of abusive use of the idea of culture, and calls for vigilance in the use of the margin-doctrine.[679] However, more interestingly, she briefly plays a different tune, one that shares my skepticism about the idea of a margin, and one that looks, albeit cursorily, into the possibility of political and ideological bias.

> The reasoning of the Court implicitly suggested that *Handyside* was about the protection of English moral values. This is highly disputable, however. What arguably lay at the heart of the case was the crisis surrounding respect for authority in Europe in the late 1960s (particularly evident in the French May 1968 movement). Interestingly, this was not readily apparent in the judgment, except indirectly when the Court quoted passages from the Schoolbook. In this light, the

677 Dembour, *supra* note 669, at 162.

678 *See supra* footnotes 470-473 and accompanying text (discussing human rights and culture in the context of women's rights). To reiterate the main point here: culture can be good or bad. It can be good in the sense that it is closer to people's experiences, to their universe of symbolic meaning, to their idiosyncrasies and particularities. But it can be bad in the sense that it serves as cloak to hide oppressive practices against the righteous scrutiny of 'outsiders'.

679 *See also* Benvenisti, *supra* note 649.

> reference by the Court to the absence of 'a uniform European conception of morals' appears as a strategy which allows it not to identify the issue at the centre of the case.[680]

In this reading, the Court is seen to share a perspective with the government of the UK, and one that makes it incline towards agreeing with its decision to interfere with the freedom of expression of Mr. Handyside. There is no 'margin' in this analysis, and the Court's reasoning is identified as a rhetorical strategy that allows the Court to obfuscate its motivation, and in fact its politics.[681]

Dembour goes on to give an overview of the various debates around universalism and relativism, applying them to a number of cases. But, she concludes that the distinction between universalism and relativism is complicated, if not problematic, since "of necessity, we are *both* universalist and particularist."[682] She continues:

> Universalism and particularism are thus best conceived as encompassing each other. As human rights law strives to reach the universal, it must accommodate the particular. Failing that, it will inexorably appear rigid, inadequate, unjust. However, we are talking of a tension in the real sense of the term—there is no rest to be had. Controversies as to whether a universalist or a particularist position should be favoured continually surface; they cannot be buried and forgotten. (...)
>
> Particularism does not command that we should tolerate all that is going on outside our own frame of reference and be indifferent to the plight of the 'other'. Rather, it brings the question when universalism needs to be imposed and when particularism is justified to the fore. This question will arise time and time again, whenever common norms are asserted. The way the debate is conducted can take various lexical forms. In the Strasbourg Convention system it appears notably, but not only, under the name of the doctrine of the margin of appreciation.[683]

680 Dembour, *supra* note 669, at 161.
681 These types of observations are not uncommon in Dembour's work, but very uncommon in most legal scholarship.
682 Dembour, *supra* note 669, at 179.
683 *Id.* at 179-180.

This analysis is refreshingly different from the bulk of scholarly approaches to the margin of appreciation doctrine. In particular, there is no sense that there is a margin "out there" that can be mapped in advance. Rather, it remains a casuistic issue. Moreover, whether something falls within the 'national' sphere, within the private, within the particular, or whether it falls within the 'European', within the public, within the universal, is a question that will come up again and again. Finally, the margin-doctrine offers a lexicon, not a methodology or a technique.

This type of analysis of the margin of appreciation doctrine is, however, exceptional, and many a legal scholar will not even consider it important to read it, for it is 'too theoretical'. As such, it is unlikely that we will see a departure from the public-private lexicon that is the margin of appreciation doctrine, and also unlikely that we will see a departure from thinking about this doctrine in reifying terms, in which the issues are presented in vague spatial metaphors that obey an overarching coherence. Politics and ideology will remain a marginal element in the analyses by most European human rights scholars.

As a final side note it is interesting to compare the margin of appreciation doctrine with a similar doctrinal structure that one can find in the constitutional law of the United States. There, a question often raised in cases before the Supreme Court is whether a particular matter is to be regulated by state law or by federal law. Though there is no use of a language that speaks of spaces, latitudes, or margins, there is a similar public-private structure that is involved. Some judges will be seen, and will self-identify, as being supporters of states' rights or federalism,[684] while others will be seen, and self-identify, as being supporters of federal power. In the U.S. context these positions are easily identified by most people as being code words for a political or ideological position.[685] So, a judge that is inclined towards states' rights will

684 *See, e.g.,* Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 28, 29 (1997) (stressing the importance of preserving state sovereign immunity).

685 *See, e.g.,* Erwin Chemerinsky, *Enhancing Government: Federalism for the 21st Century* 1, 227 (2008) (arguing that: "[T]he Court's preemption decisions expose the political content of its federalism rulings. The Court has preempted state laws regulating such politically influential monoliths as big tobacco, the auto industry, and insurance. Interestingly, most of the Supreme Court's federalism decisions invalidating *federal* laws have struck down provisions in civil rights laws—such as the Violence Against Women Act, the Religious Freedom Restoration Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act. (…) [W]hat animates the Rehnquist Court is less a real concern for states' rights and federalism and more a judgment about what laws are politically desirable.").

be recognized as being a conservative judge, while the judge on the federal side of the spectrum will be identified as being a liberal, progressive, judge.[686] This is the way things are now. Progressive or conservative politics do not logically or seamlessly correlate the state-federal distinction. In particular periods these correlations may hold, but in other periods the opposite may be true. Even now, where the conservative judges may be in favor of state rights on some of the most important ideological debates (abortion, inter-state commerce), this does not mean that all progressive politics takes place at the state level. There are areas where this is not the case (environment, gun control, or even same sex marriage).[687] Even then, there will be ways in which the exception can be justified without abandoning the more general identity of 'being in favor of state rights'. This can happen, for example, by reference to 'the intentions of the framers', 'originalism', or to 'the Christian heritage of the nation'.[688] The point is here that talk about the constitutional philosophy of the judge or scholar (pro state or pro federal government) will be clearly identified as a code word for an ideological position.[689]

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686 *See, e.g.,* Douglas T. Kendall, "Redefining Federalism," in *Redefining Federalism* 1, 2 (Douglas T. Kendall ed., 2004) (arguing that: "Federalism (…) has become a political weapon. Opponents of health, safety, and environmental laws, and other government interventions into the free market, have seized upon federalism as a potential vehicle for advancing their political agenda (…) [constructing] a definition of federalism that is hostile to government at all levels. Correspondingly, supporters of these laws increasingly view federalism as a dirty word, synonymous almost with the calls for 'states' rights' in resisting federal antidiscrimination statutes.").

687 *See, e.g.,* Chemerinsky, *supra* note 686, at 2, 225-27 (describing how "[i]ronically (…) a Court that professes commitment to states' rights has repeatedly found state laws preempted by federal law" in areas such as consumer safety, trade boycotts on human rights grounds, insurance company participation in the holocaust, and health and advertising regulations).

688 *See* Edward A. Purcell Jr., *Originalism, Federalism, and the American Constitutional Enterprise: A Historical Inquiry* 6 (2007) (arguing that 'originalism' supports neither states' rights nor federal power; rather, because the " 'original' federal structure" was "doubly blurred, fractioned, instrumental, and contingent," it is "intrinsically elastic, dynamic, and underdetermined.").

689 What is needed in this context is an analysis of European human rights discourse along the lines of Duncan Kennedy, "Form and Substance in Private Law Adjudication," *supra* note 242. In this early CLS classic, Kennedy sketches how in post-WWII debates about private law, a preference for 'principles' was a code word for a progressive or liberal position, while a preference for 'rules' was a code word for a conservative position. The article demonstrates how neither principles nor rules are intrinsically connected to liberal or conservative positions, even though in the particular context of the 1950s and 1960s it very much was. This analysis is an example of how indeterminacy, ideology, and historical context operate together, as has been elaborated above. *See supra* Section 5.3.

From this perspective, it is quite striking that all the European scholarly talk about the margin of appreciation, with its concomitant references to whether European judges are 'in favor of a wide margin' or 'in favor of a narrow margin', can be conducted without reference to the substance of the issues and without reference to the ideological position of the judges on particular issues. Judges are identified, by reference to their feelings toward the margin of appreciation, as being pro-Europe or pro-state, which are, in turn, code words for progressive versus conservative. But this ideological spectrum obscures the ideological spectrum with regard to issues such as terrorism, secularism, migration, etc. In other words, it is impossible to tell whether a 'pro-European', 'anti-margin of appreciation' judge will be in favor or against strong limitations on rights for migrants.

9.4. Concluding

As can be seen from this discussion of the 'positive obligations' and 'margin of appreciation' doctrines, human rights and legal scholars are complicit in the obfuscation of the ideological and political function of what courts do in general, and what the European Court does in particular. Since it is clear that the Court is not deciding according to some type of logic or method that can be independently applied, and yet it is also clear that the Court does not decide absolutely randomly, most scholars do not have too much effort recognizing some general coherence.[690]

In general, I would argue that this point can be made about the entirety of the Court's work, and not only about cases in which it considers the existence of positive obligations, or in which it applies the margin of appreciation doctrine. To be sure, the Court's judges work with many of the same assumptions as do the scholars who interpret them. In this way they will discipline themselves to abide by the sense that there is a 'system', some way in which the answers to legal questions materialize among references

690 The question as to whether this is a good thing or not, whether legal scholars *should* be more focused on the ideological biases of courts or not, is one that I find daunting. Too many variables come into play in these situations. I find the ethical question with regard to these activities *in general* ultimately unanswerable. For now, I want to stick to merely making the observation, and I am aware of the fact that the language used can seem judgmental. Most professional academics would not like to be described as "being complicit in the obfuscation" of anything. However, it is not meant to be judgmental in any objective sense.

to precedent, original intent, present day conditions, and so on. Amidst all these non-determining argumentative bites, slowly an answer 'appears'.[691] I have, however, attempted to veer away from what judges do, and describe a perspective on how the never-ending stream of legal data is organized and given meaning and (in-)significance by legal scholars.

691 My perspective on the work of judges and of the ways in which they are political is close to, and has been inspired by that of Duncan Kennedy. *See* Duncan Kennedy, *A Critique of Adjudication*, *supra* note 112. Perhaps the most popular legal theorist of the moment is Ronald Dworkin. In his theory coherence, as well as "principles," play a major role. *See* R. Dworkin, *Law's Empire*, *supra* note 112; Ronald Dworkin, *Taking Rights Seriously* (1977). In my view, however, coherence can also be seen as a projection, as something that is there because of a consistent effort by countless scholars to see it in the chaos of interpretative acts. As for the neutrality of Dworkin's principles, *see* Duncan Kennedy, *A Critique of Adjudication*, *supra* note 112, at 113-130.

10. The Distinction at its Most Concrete: Reading the Public-Private in the European Court of Human Rights' Case Law on Homosexuality

10.1. Introduction: Practices of Reading

So far, we have looked at the private distinction in various ways. We started by sketching a bird's-eye-view impressionistic picture of Western political philosophy, and drew from that the insight that the public-private distinction is the backbone of Liberal thought on political (and consequently legal) institutions. We then traced a history of various critiques of this distinction. These critiques were sometimes explicit, other times implied; some times of a grand political theoretical nature, and other times of a concrete legal-technical nature; and some times they moved freely across various academic disciplines. In the third part of this work I have latched on to some of the insights offered by the critiques in order to make a number of observations about human rights, related to its theoretical framework and also to a number of its doctrines. In all of these dealings however, I have been engaging with the public-private distinction in its broad abstract and conceptual manifestation. Even in those instances where it seemed to be least theoretical and most concrete, for example when we have discussed CLS work or specific feminist critiques, it was still all very abstract. In fact, legal technical analysis is, I would argue, very abstract and conceptual. So, for instance, the private-public distinction that operates and in fact may shift as soon as the instance of domestic violence occurs, is still an abstract distinction, just like the 'domesticity' of the situation and the violent nature of the act itself is abstract. Through legal qualification the actual privacy, the actual domesticity of the situation is established (or not), the actual violence is established (or not). The legal qualification of a situation is a move to abstraction. It is the sublimation of a concrete situation into abstract legal concepts.

The most concrete one can get with the public-private distinction is by looking at specific cases. Specific cases however need to be told, and are in fact *stories* about facts and/or events that may or may not be legally qualified as either public or private. In the legal discipline, whether professional or scholarly, these stories are told with judgments, more concretely with the texts that are produced by judges or courts after they have decided the outcome of a specific case. Judgments, also known as 'case law', are important texts for lawyers,

judges, and legal scholars. They are often seen to be solid markers within the doctrinal system, either confirming a particular doctrinal rule or indicating the development of a new doctrinal (sub-) rule. However, judgments can only operate in this manner or fulfill this function *because of the way in which they are read*. In other words, the meaning or significance of a judgment is embedded in particular intellectual and professional reading practices; in fact, they are embedded in the legal-institutional decision-making complex. The way in which judgments are read indicates many things about the professional and intellectual methodologies and epistemologies. These 'reading practices' are elements within the disciplinary identity of scholars and practitioners, elements of their intellectual and professional *habitus*.[692]

What this means is that, seen from the perspective of legal scholars and practitioners, even the most concrete situations have a primarily *abstract* significance. Most legal scholarship will operate by collecting a very large amount of judgments in support of a particular general doctrinal assertion. In the same way, legal arguments prepared by parties to a case, as well as the legal verdict that is the judgment, will make general, abstract, observations, and will support these with a reference to judgments—and the more the number of judgments, the more 'support' for the general doctrinal assertion or legal argument.

In this chapter, I have tried to approach judgments in a different manner. I have tried to read judgments with an exclusive eye on the private-public distinction in its most concrete manifestations. I was inspired to do this after exposure to feminist scholarship that performed rigorous readings of texts with an exclusive focus on how texts were saturated with gendered signifiers. In the same way, I have approached these texts assuming that they are saturated with public-private signifiers. I have dislodged these texts from their legal scholarly reading practices and have loosely, eclectically, and idiosyncratically embedded them in the reading practices that one can find in the humanities (literary studies, queer theory, semiotics, cultural theory, gender studies, masculinity studies, etc.). This type of reading practice has some times been referred to as 'close reading', in reference to the rigor in

692 Pierre Bourdieu, *Homo Academicus* (1984); Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field," 38 *Hastings Law Journal* 806 (1987) (Richard Terdiman trans.).

which a text is unearthed and plowed for meaning.[693]

The epistemology or the aesthetics of legal judgments is in fact an interesting one. Judgments are presented as the record of an event: the process of adjudication. Dates are mentioned, the names of parties and their lawyers are mentioned, a description of the (relevant) facts is given, the arguments as presented by each of the parties, and the reasoning of the court is exposed or explained, sometimes followed by the individual opinion of one or several judges. But in fact, the event itself is no longer important. It is very unlikely that somebody could successfully argue to have more authority about the actual meaning of a judgment "because I was actually there and this is what was actually meant!" The event is not important, is in fact nothing—the literal representation in the judgment, the text of the judgment itself is everything.[694] In this chapter I have taken this characteristic very seriously. But, rather than focusing, as is done in ordinary legal reading practices, almost exclusively on the so-called 'operative paragraphs', or the part of the text where the doctrinal assertions are made by the judge or court, I have gone through the judgments in their entirety, ignoring the usual privileging of particular passages.[695] The idiosyncrasy of this method lies in the particular intuitiveness and fluidity of the process. This type of reading could yield varying types of results, even if performed by the same person. In fact, it contains a significant degree of spontaneity, but one that, I hope, has not come at the expense of rigor and thoroughness.

The purpose of this approach is not to 'demonstrate' something, in the analytical sense. Rather, one could call it a type of 'performance scholarship'.[696] What I think it offers is a different *experience*[697] from the common one of

693 The fact that legal technical analysis is also rigorous and performs a type of 'close reading' or exegetic analysis in and of itself supports my emphasis of the social-institutional setting that instructs the reading practices. It is not about how closely and rigorously a text is read, but for what purpose and in which social and institutional context it is read.

694 "Il n'y a pas de hors-texte." Jacques Derrida, *De la grammatologie* 227 (1967). Derrida, however, meant this in a more general way than that in which I am using it here. In this chapter, I am isolating the legal texts, the judgments, as much as possible, and I am ignoring their 'inter-textuality', the way that Derrida argued that texts are always connected to, in dialogue with, other texts.

695 This is not entirely true. Though it was my methodological rule when I started this exercise, it will be apparent that as I progressed I did become selective in my emphases. I attribute this process to a changing economy of what I wanted to emphasize.

696 I am paraphrasing the idea of 'performance art.'

697 In this sense, this exercise is inspired by a phenomenological approach to law.

how legal narratives are developed, how legal meaning is constructed. In particular, this type reading of reading illustrates how the public-private distinction is much more pervasive throughout the text than merely in the question of whether a particular type of state action 'interfered' in the private sphere in an unjustifiable way. So, even though human rights judgments are all about determining the 'correct' boundary between the public and the private spheres, the judgments themselves are replete with the public-private distinction, or with any of its variants.[698] In fact, not only is it difficult or near-impossible to talk about human rights without somehow relying on the distinction, it seems difficult to talk about many things in a way that does not rely, somehow, on the public-private distinction. Moreover, the distinction is never the same thing, even if only looking at its most straightforward manifestation as individual vs. state. Some times it is a stark distinction, night and day. Other times it is fuzzy, unclear, twilight or even a spectrum with a lot of gray. Sometimes it is a line, up and down, left and right. Other times it seems to be a set of circles, the private within, the public outside; and all this within the same text, at times within the same page. It is this sense, that there is a zoology of various types of public-private distinctions within the texts, that I have tried to bring to life with this particular reading exercise. The point to be made here is that even at its most concrete level, that of a singular story or a singular case, the public-private distinction is many different things at the same time.

I will first introduce the texts, a number of judgments from the European Court of Human Rights, in their common legal-doctrinal manner, and I will try to explain, in that same manner, how each of these judgments is significant (or not) and why. I will then move on to present my own idiosyncratic reading of these texts, and will conclude with some recapitulating thoughts.

10.2. Common Readings

In this section I will, superficially, introduce the texts that I will elaborately 'close read' in the next section. I have chosen a number of judgments of the European Court of Human Rights dealing with homosexuality. The choice for these judgments is somewhat contingent, but comes from an old interest in how human rights discourse and institutions deal with matters of

698 Open-closed, outside-inside, particular-general, subjective-objective, hidden-exposed, alone-together, fragmented-unitary, parts-whole, etc.

sexuality. In any case, the selection at hand is one that starts with the seminal case of *Dudgeon* and deals with pretty much all the sexuality-cases that have come before the ECHR.[699] It concerns eight cases: *Dudgeon* v. *UK*[700]; *Norris* v. *Ireland*[701]; *Modinos* v. *Cyprus*[702]; *Lustig-Prean & Beckett* v. *UK*[703]; *Smith & Grady* v. *UK*[704]; *Salgueiro da Silva Mouta* v. *Portugal*[705]; *Laskey, Jaggard, & Brown* v. *UK*[706]; and *A.D.T.* v. *UK*[707]. All these cases contributed significantly to the case law on Article 8 ECHR, which regulates the right to private life and the interferences that the state is allowed with the exercise of that right.

Dudgeon is the main case here because it established that criminalization of homosexual acts (sodomy, buggery, etc.) was an unwarranted interference with the right to private life as enshrined in Article 8 of the European Convention. Though raised against the UK, the complaint concerned legislation that had existed for many generations in Northern Ireland, legislation that was in fact under review by the London authorities but that was still in force. In the particular case Mr. Dudgeon had been subjected to a house search and some of his possessions (including a diary) had been confiscated (but were later released). The Court considered that there had been an interference with "a most intimate aspect of private life", which required "particularly serious reasons before interference on the part of public authorities can be legitimate."[708] After considering that this interference had been made in accordance with a legal provision and for the purpose of a reason that was allowed by Article 8 paragraph 2 (the protection of morals), the ECHR focused on whether the interference was 'necessary in a democratic society' and found that it was not. In doing so, the ECHR referred to the existence of:

699 I have not included cases relating to transgender people claiming the right to change their official gender-identity.
700 *Dudgeon*, *supra* note 663.
701 *Norris v. Ireland*, ECtHR (1988), Series A no. 142 [*hereinafter Norris*].
702 *Modinos v. Cyprus*, ECtHR (1993), Series A no. 259 [*hereinafter Modinos*].
703 *Lustig-Prean and Beckett v. the United Kingdom*, ECtHR (2000), nos. 31417/96 and 32377/96 [*hereinafter Listig-Prean*].
704 *Smith and Grady v. the United Kingdom*, ECtHR (1999-VI), nos. 33985/96 and 33986/96 [*hereinafter Smith and Grady*].
705 *Salgueiro da Silva Mouta v. Portugal*, ECtHR (1999-IX), no. 33290/96 [*hereinafter Salgueiro*].
706 *Laskey, Jaggard and Brown v. the United Kingdom*, ECtHR (1997-I) [*hereinafter Laskey*].
707 *A.D.T. v. the United Kingdom*, ECtHR (2000), no. 35765/97 [*hereinafter A.D.T.*].
708 *Dudgeon*, *supra* note 663, at § 52.

> A better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member States.[709]

The *Dudgeon* case is also noticeable for another reason. The question arose whether Mr. Dudgeon could say to be a victim since the impugned law, the one criminalizing homosexual acts, had never been applied to him. The Court had, in previous cases, dealt with the question of whether applicants who could not argue that a particular law had been used against them were allowed to bring their case to Strasbourg.

In particular, though it was clear that a law could affect people without requiring individual implementation,[710] it was also clear that the Strasbourg system did not offer the possibility of anybody bringing a claim against any law, a possibility also known as *actio popularis*.[711] However, in the case of *Dudgeon*, the Court argued that there was a serious threat of the law being applied against the applicant, even though it had rarely been enforced for decades. This particular aspect of the *Dudgeon* case would play a role in some of the other cases under review, since there were two other member States of the Council of Europe who had laws that criminalized homosexual acts: Ireland and Cyprus.

The two following judgments came from cases against these countries. *Norris* involved an Irish MP who had been a known campaigner of the rights of homosexuals. When Mr. Norris invoked the *Dudgeon* case before Irish courts this claim was rejected because Ireland was a dualist system in which international judgments could not be invoked. The same argument was

709 *Id.* at § 60.

710 *See Marckx*, *supra* note 590 (dealing with the issue of 'illegitimate' children).

711 *See Klass and Others v. Germany*, ECtHR (1978), Series A no. 28, § 33 (finding that "Article 25 (…) does not institute for individuals a kind of action popularis for the interpretation of the convention (…) [nor does it] permit individuals to complain against a law in abstracto simply because they feel that it contravenes the convention").

invoked in Cyprus against Mr. Modinos. In both cases, the Court was very succinct in its rejection of these arguments and merely restated its finding of the *Dudgeon* case.[712]

The remaining cases dealt with various issues that spun off from the decriminalization of homosexual acts. In the cases of *Lustig-Prean & Beckett* v. *UK* and *Smith & Grady* v. *UK* the Court was presented with the issue of homosexuals who had been dismissed from the army on account of their homosexual orientation. The Court found that the discharge of four homosexuals from the army could not be justified under Article 8 par. 2. Moreover, it found that the actual investigations by the army into the applicants' alleged homosexuality was in violation of Article 8. These decisions ultimately lead to the lifting of the ban on homosexuals from the army. In this decision too, the Court relied on the observation that most other member states of the Council of Europe had abolished such a ban.

The case of *Salgueiro da Silva Mouta* v. *Portugal* concerned a case in which a divorced father had not been given access to his child by Portuguese courts. In reviewing the facts and the domestic proceedings the ECHR found that there could not be any other reason than that this was due to the fact that the applicant was a homosexual. It referred to *Dudgeon* and found there to be a breach of Article 8 *jo.* Article 14. The case of *ADT* v. *UK* involved a man who had been caught in possession of video-tapes depicting sexual acts between him and up to four other men. In spite of the fact that all men were consensual adults and that the actions took place in the privacy of his home, they had been convicted by the English courts, a fact found to be in breach of Article 8 by the ECHR. The Strasbourg Court followed the same reasoning as in the previous cases.

Finally, the case of *Laskey, Jaggard, and Brown* v. *UK*, also involved video-tapes, consensual adults, and the privacy of the home. This time however, the acts involved concerned extreme forms of sadomasochism and the 'pressing social need' involved was public health. The three applicants had been convicted to prison sentences for assault and claimed that this was due to their sexual inclination. The ECHR felt that the state could interfere to protect people against each other, even where there was full consent and did

712 Interestingly though, several judges dissented against the decision to accept the application of Mr. Norris, since they felt this was going too much against the Klass judgment.

not find a violation of the Convention. The Court made it very clear this case had nothing to do with the *Dudgeon* case:

> It is evident from the facts established by the national courts that the applicants' sado-masochistic activities involved a significant degree of injury or wounding which could not be characterised as trifling or transient. This, in itself, suffices to distinguish the present case from those applications which have previously been examined by the Court concerning consensual homosexual behaviour in private between adults where no such feature was present.[713]

In sum, through these cases the ECHR has found that homosexual activities performed by consensual adults in the private realm cannot be interfered with by the state, either through criminalizing these acts, or by allowing them to play a role in civil litigation. This limit to public interference is also in effect in the context of the military profession and military personnel enjoys the same protection as civilians. The protection against the state exists, even if more people are involved and even if they record their sexual acts on videotapes. However, in cases concerning extreme forms of sadomasochism the state may choose to interfere, even with the instrument of criminal law, in order to make sure that people do not use physical and/or psychological violence against each other, even if they consent to it.

10.3. Alternate Readings

10.3.1. Public, Private, and Gay: Dudgeon, Norris, and Modinos

10.3.1.1. The General Structure of the Cases

The first thing that strikes the eye in the description of the facts is that the *Dudgeon* case starts with an elaborate description of the applicable legislation in Northern Ireland, while Jeffrey Dudgeon is not mentioned until section F, on "The personal circumstances of the applicant."[714] Sections A to E of the facts covers quite extensively matters such as (A) the relevant law in Northern Ireland, (B) the law and reform of the law in the rest of the United Kingdom,

713 *Laskey, Jaggard & Brown*, *supra* note 707, at § 45.
714 *Dudgeon*, *supra* note 663, at §§ 32-33.

(C) Constitutional Position of Northern Ireland, (D) Proposals for reform in Northern Ireland, and (E) Enforcement of the law in Northern Ireland.[715]

The *Norris* case, on the other hand, gives ample space to the circumstances of the applicant, elaborating in detail on the effects that he claims the contested legislation had on him.[716] The facts also extensively describe the proceedings before national courts that the applicant underwent before turning to Strasbourg.[717]

Finally, the case of *Modinos* only very briefly mentions the applicant in the brief,[718] and then turns to a description of the relevant domestic law in Cyprus.[719] One important part of this is the description of a case in Cyprus involving the conviction of a homosexual soldier, where the Supreme Court decided that the case of *Dudgeon* did not apply. No information is given on the chain of domestic litigation that brought the applicant to the European Court. The case seems to be more about the required amount of respect that is due to the Strasbourg Court.

While the main issue in *Dudgeon* seems to be the public context of legal diversity and reform, in *Norris* the emphasis lies on the private suffering and struggle of the applicant. In *Modinos* the applicant hardly matters and the main attention goes to the attitude of the Supreme Court; it seems to be about the public ordering of the European human rights realm.

10.3.1.2. The Applicants and Their Facts

10.3.1.2.1. Dudgeon

The facts of the *Dudgeon* case do not tell us much on Jeffrey Dudgeon or about the circumstances of his reasons for applying in Strasbourg. All is mentioned is:

715 *Id.* at §§ 14-31.
716 *Norris*, *supra* note 702, at §§ 8-11.
717 *Id.* at §§ 21-24.
718 *Modinos*, *supra* note 703, at § 7.
719 *Id.* at §§ 8-11.

> 13. Mr. Jeffrey Dudgeon, who is 35 years of age, is a shipping clerk resident in Belfast, Northern Ireland. Mr. Dudgeon is a homosexual and his complaints are directed primarily against the existence in Northern Ireland of laws that have the effect of making certain homosexual acts between consenting adult males criminal offences. (...)
>
> 32. The applicant has, on his own evidence, been consciously homosexual from the age of 14. For some time he and others have been conducting a campaign aimed at bringing the law in Northern Ireland into line with that in force in England and Wales and, if possible, achieving a minimum age of consent lower than 21 years.
>
> 33. On 21 January 1976, the police went to Mr. Dudgeon's address to execute a warrant under the Misuse of Drugs Act 1971. During the search of the house a quantity of cannabis was found which subsequently led to another person being charged with drug offences. Personal papers, including correspondence and diaries, belonging to the applicant in which were described homosexual activities were also found and seized. As a result, he was asked to go to a police station where for about four and a half hours he was questioned, on the basis of these papers, about his sexual life. The police investigation file was sent to the Director of Prosecutions. It was considered with a view to instituting proceedings for the offence of gross indecency between males. The Director, in consultation with the Attorney General, decided that it would not be in the public interest for proceedings to be brought. Mr. Dudgeon was so informed in February 1977 and his papers, with annotations marked over them, were returned to him.[720]

Paragraph 33 tells the story of public agents barging into Dudgeon's house in search of drugs, and then going through his "personal papers, including correspondence and diaries." Afterwards he is questioned about his sexual life, and apparently he did not get away with a "it's none of your business."

720 *Dudgeon*, *supra* note 663, at §§ 13, 32-33.

This is a private life under the scrutiny of a state that upholds the prohibition of "gross indecency between males." In this paragraph the public takes the diaries of the private and keeps them for more than a year, only to return them "with annotations marked over them." It is an omnipresent state and a seemingly defenseless individual who can be prosecuted for pursuing certain stimuli of the senses: sex and drugs. In the end he is not prosecuted, because it is not "in the public interest." Apparently though, it is in the public interest to consider prosecution and to bluntly encroach on the applicant's personal details.

Short though it is, paragraph 32 tells a different public-private story, of a young man who is part of a community of homosexuals who have "come out." This is a private sphere that has gone public, and that actually needs to do so. In order to achieve the decriminalization of homosexual activities (in the private sphere), Dudgeon and others activate a (public) identity and campaign for the rights of a particular community, that of the homosexual men. He is Jeffrey Dudgeon and he is a gay man and he does not hide it. In that sense, even before paragraph 33 describes the state as a macho homophobic bully, it has been symbolically 'castrated': why take the diaries and press Dudgeon into confessing anything that he has not been ashamed of? What good can that do? The state can huff and puff, but it seems unable to really do something about the coming out of homosexuals.

10.3.1.2.2. Norris

The success of the strategy whereby something very personal is turned into a social and political identity becomes evident in the case of David Norris. Under the heading of "the particular circumstances of the case" paragraphs 8-11 give an extensive account of the life of a prominent gay activist in Ireland. If Dudgeon almost accidentally became a protagonist, Davi Norris put his public life at the service of the gay cause:

> 8. Mr David Norris was born in 1944. He is an Irish citizen. He is now, and has been since 1967, a lecturer in English at Trinity College, Dublin. At present he sits in the second chamber (Seanad Eireann) of the Irish Parliament, being one of the three Senators elected by the graduates of Dublin University.

> 9. Mr Norris is an active homosexual and has been a campaigner for homosexual rights in Ireland since 1971; in 1974 he became a founder member and chairman of the Irish Gay Rights Movement. His complaints are directed against the existence in Ireland of laws which make certain homosexual practices between consenting adult men criminal offences.[721]

Paragraph 9 is clear: Mr Norris is an active homosexual. Nothing of the timid and careful "on his own evidence" found in *Dudgeon*.[722] The picture here is the picture of a public figure, and not just a homosexual who has come out of the closet. Even the adjective 'active', with its phallic connotation, adds to the public character of his homosexuality. Jeffrey Dudgeon was neither active nor passive, he was "consciously" homosexual. In the course of paragraphs 10-11, and in order for the extent of his suffering to be clear, there are many personal details that are 'thrown out into the open' about the way in which the illegality of being a homosexual is hurting gay men. In that sense, one particular aspect of the coming out as a legal and political strategy is the emphasis on the victimization of being a homosexual in a homophobic society. Not just the sexual orientation, but the "deep depression and loneliness," the fact that a psychiatrist advised him to emigrate "if he wished to avoid anxiety attacks," this and more is part of the private details turned into public ammunition, the public exploitation of a victimhood that is not private any more, not owned by the victim any more. At the end of paragraph 10 the eloquence of victimhood reaches a climax:

> (vii) The applicant also claimed to have suffered what Mr Justice Henchy in his dissenting judgement in the Supreme Court (§ 22) alluded to as follows: "… fear of prosecution or of social obloquy has restricted him in his social and other relations with male colleagues and friends: and in a number of subtle but insidiously intrusive and wounding ways he has been restricted in or thwarted from engaging in activities which heterosexuals take for granted as aspects of the necessary expression of their human personality and as ordinary incidents of their citizenship."[723]

721 *Norris*, *supra* note 702, at §§ 8-9.
722 *Dudgeon*, *supra* note 663, at § 32.
723 *Norris*, *supra* note 702, at § 10.

This particular quote is important for one reason in particular, which is that the human personality is presented as something that has a 'necessary expression'. Intrinsic though it may be, human personality acquires in this excerpt an external element, the expression, and is not only a private aspect of being human but also a public one. This supports the strategy of positioning your political objective as a social identity, with its own legacy of pain and suffering, in a way that is universal and akin to everybody.

We will later see the dissenting judges objecting that as David Norris was so publicly gay, and was never prosecuted, how could he have been a 'victim' in the sense of Article 25 (old) of the Convention? One can sympathize with this observation, but in that sense, the notion of 'victim', a public category, has been successfully colonized by Norris, or perhaps not by Norris, but by the narrative of 'coming out' as a social identity, which in this case utilizes the technique of naturalization. In paragraph 10 there is the account of how Norris went on Irish national television and talked openly about his being a homosexual "but denied that this was an illness or that it would prevent him from functioning as a normal member of society."[724] This 'epistemic switch' from disease to identity can be seen as central in the emancipation of gays and other groups. The insistence of seeing homosexuality as an aberration, as a disease, which of course is the perspective of the dissenting judges (see below) already victimizes gays, and this is the wave that Dudgeon in a way, but Norris much more explicitly, rides on.

Paragraphs 21-24 describe the proceedings before national courts undergone by David Norris. This can be seen as part of the domestic law, but I will treat it here as part of the story of the applicant, since he himself referred to it and since it can be read as a sequel to the facts already described.

David Norris went to court to have it declare the laws criminalizing homosexual activities as unconstitutional. The full ambiguity of the Irish situation, that criminalizes but does not prosecute, comes to light beautifully in the judgment of Justice McWilliam of the High Court:

> "One of the effects of criminal sanctions against homosexual acts is to reinforce the misapprehension and general prejudice of the public and increase the anxiety and guilt feelings of

724 *Id.*

> homosexuals leading on occasions, to depression and the serious consequences which can follow from that unfortunate disease." However, he dismissed Mr. Norris's action on legal grounds.[725]

Public misapprehension and general prejudice as the result of criminalization. This stands in contrast to the attitude of the governments in the *Dudgeon* and *Norris* cases, who argued, in a way, the opposite, which is that the 'pressing social needs' of their societies, of their public spheres, *necessitate* a criminalization. The public sphere of McWilliam is one that needs a paternal state to educate it, and not to reinforce misapprehension and prejudice. The same paternal state is responsible for the private anxiety and guilt feelings of those victimized by misapprehension and prejudice, and thus by criminalization. At the same time McWilliam seems to be unable to play the role that his responsible and paternal state should play, and "on legal grounds". Then again, perhaps he wanted the case to go to the Supreme Court. And so it did.

The Supreme Court started by recognizing the *locus standi* of Norris, which in effect is an argument similar to the one concerning the status of 'victim' required by Article 25 (old) of the Convention. The Supreme Court did this with a lot of subtlety, without getting too much into the issue of victimhood:

> As long as the legislation stands and continues to proclaim as criminal the conduct which the plaintiff asserts he has a right to engage in, such right, if it exists, is threatened, and the plaintiff has standing to seek the protection of the court.[726]

By talking of the abstract notion of 'rights' that may or may not exist, the only protection that the court has to offer is the protection of a right that itself only exists if that court says it does. This is a court preoccupied with public things only, not with people, not with persons. This is the paternal state that one loves to kill, because it is so cold and distant, that one may not expect any mercy from it. The private here is a 'plaintiff' that claims to have a right. The successful way by which Norris had conquered a place for the

725 *Id.* at § 21.
726 *Id.* at § 22.

gay on the public sphere, has been defeated by making him an abstraction without particularities, where there are no legacies, no identities, only neutral plaintiffs and rights. When getting on the public stage, leave your 'personal' things behind. Put on the mask of plaintiff and we'll put on the mask of judges, and we'll deal only with 'general' and public issues.

And so it happened. The court first dismissed the *Dudgeon* case as a possible guide to understanding 'rights', by pointing at the dualism of the Irish legal system. It then went into the matter, presenting its findings with an enviable obviousness:

> 24. The Supreme Court considered the laws making homosexual conduct criminal to be consistent with the Constitution and that no right of privacy encompassing consensual homosexual activity could be derived from "the Christian and democratic nature of the Irish State" so as to prevail against the operation of such sanctions. In its majority decision, the Supreme Court based itself, *inter alia*, on the following considerations: "(1) Homosexuality has always been condemned in Christian teaching as being morally wrong. It has equally been regarded by society for many centuries as an offence against nature and a very serious crime. (2) Exclusive homosexuality, whether the condition be congenital or acquired, can result in great distress and unhappiness for the individual and can lead to depression, despair and suicide. (3) The homosexually oriented can be importuned into a homosexual lifestyle which can become habitual. (4) Male homosexual conduct has resulted, in other countries, in the spread of all forms of venereal disease and this has now become a significant public health problem in England. (5) Homosexual conduct can be inimical to marriage and is per se harmful to it as an institution." The Supreme Court, however, awarded the applicant his costs, both of the proceedings before the High Court and of the appeal to the Supreme Court.[727]

727 *Id.* at § 24.

And this is only '*inter alia*'. It is difficult to see a more comprehensive way of rejecting and even condemning the whole notion of homosexuality. Every possible angle is employed to take an aim at it. The court falls short of calling it a disease, but it refers to a 'condition' which is 'congenital or acquired'. Nevertheless, from the perspective of Norris and McWilliam, these are all the hallmarks of misapprehension and prejudice in full glow. After all this rabid reaffirmation of the reasons to criminalize homosexuality, it is a wonder that David Norris was not dragged immediately to prison. In this sense, the Irish ambiguity is that of a state, or public sphere, which is furious and/or phobic, but doesn't strike. It huffs and it puffs, but it does not blow away anything. It calls Norris every possible bad name, but allows him to stand there as a gay activist, a gay lecturer, a gay senator, a gay plaintiff, etc. These are the sort of defeats that one cherishes, especially after the *Dudgeon* case. The ambiguity has become an impotence.

10.3.1.2.3. Modinos

Alecos Modinos is the applicant we know least about. The paragraph describing him does however have the necessary ingredients: he's an active gay, a gay rights activist, and he suffers:

> The applicant is a homosexual who is currently involved in a sexual relationship with another male adult. He is the President of the "Liberation Movement of Homosexuals in Cyprus". He states that he suffers great strain, apprehension and fear of prosecution by reason of the legal provisions which criminalise certain homosexual acts.[728]

Does it matter whether he's 'currently involved' in anything or not? Apparently. Do we need to know whether he really suffers or not? Do we need more details, like in *Norris*? Apparently not. Once we know that he's a 'real' homosexual, the rest, the suffering et cetera, is a standard fact. This is the success of the strategy in *Norris*. Gay men have become an acknowledged public category, with its own legacy of victimhood. Alecos is not needed anymore, and the only meaningful reference to him in the rest of the case is his position on the debate about the correct interpretation of Cypriot law.[729]

728 *Modinos*, *supra* note 703, at § 7.
729 *Id.* at § 18.

10.3.1.3. The Domestic Law

10.3.1.3.1. Dudgeon

The description of the legal issues in the *Dudgeon* case is not only put before the issues concerning the applicant directly, but are also very extensive indeed, covering many aspects which are not of very evident relevance (such as 'the law and reform in the rest of the United Kingdom', which covers 1. England and Wales, and 2. Scotland.) The most extensive part of *Dudgeon*, however, involves the issue of 'proposals for reform in Northern Ireland'. The reason for this seems to lie in the importance of finding out where Northern Ireland, as a whole, stands exactly on the issue of homosexuality. The facts describe a 1978 initiative of the government to reform the law in N. Ireland:

> In a foreword to the proposal, the responsible Minister stated that "the Government had always recognised that homosexuality is an issue about which some people in Northern Ireland hold strong conscientious or religious opinions". He summarised the main arguments for and against reform as follows:
>
> "In brief, there are two differing viewpoints. One, based on an interpretation of religious principles, holds that homosexual acts under any circumstances are immoral and that the criminal law should be used, by treating them as crimes, to enforce moral behaviour. The other view distinguishes between, on the one hand that area of private morality within which a homosexual individual can (as a matter of civil liberty) exercise his private right of conscience and, on the other hand, the area of public concern where the State ought and must use the law for the protection of society and in particular for the protection of children, those who are mentally retarded and others who are incapable of valid personal consent.
>
> I have during my discussions with religious and other groups heard both these viewpoints expressed with sincerity and I understand the convictions that underlie both points of view. There are in addition other considerations which must be

> taken into account. For example it has been pointed out that the present law is difficult to enforce, that fear of exposure can make a homosexual particularly vulnerable to blackmail and that this fear of exposure can cause unhappiness not only for the homosexual himself but also for his family and friends.
>
> While recognising these differing viewpoints I believe we should not overlook the common ground. Most people will agree that the young must be given special protection; and most people will also agree that law should be capable of being enforced. Moreover those who are against reform have compassion and respect for individual rights just as much as those in favour of reform have concern for the welfare of society. For the individuals in society, as for Government, there is thus a difficult balance of judgment to be arrived at.[730]

This summary of the issues is quoted in full by the Court, and it seems to me to be a beautiful description of the issues at hand. One portion of Northern Irish opinion has an uncompromising attitude towards homosexuality: it is bad. Another portion makes a distinction that should be kept in mind before deciding what to do about homosexual activities: there is an area of private morality, and an area of public concern. The minister tries to patch up, invoking the 'common ground', which in this case is the issues of 'public concern' ("the young must be given special protection") and also the 'compassion and respect for individual rights' (private morality?), but nevertheless has to conclude that a balance between the two is difficult to arrive at for all concerned. However, by stating that there are two opinions, and by establishing the common ground in terms of a balance between public concerns and private morality, the minister actually reproduces the position of that part of Northern Irish opinion that is preoccupied with finding a right balance. The religious factions are thus effectively maneuvered into the off-side. Nevertheless, after the government heard a large number of organizations commenting on the proposals,[731] it concluded that it did not intend to pursue the reform:

730 *Dudgeon*, *supra* note 663, at § 24.
731 *Id.* at § 25.

> Consultation showed that strong views are held in Northern Ireland, both for and against in the existing law. Although it is not possible to say with certainty what is the feeling of the majority of people in the province, it is clear that a substantial body of opinion there (embracing a wide range of religious as well as political opinion) is opposed to the proposed change (…) [T]he Government have [also] taken into account (...) the fact that legislation on an issue such as the one dealt with in the draft order has traditionally been a matter for the initiative of a Private Member rather than for Government. At present, therefore, the Government proposes to take no further action (...), but we would be prepared to reconsider the matter if there were any developments in the future which were relevant.[732]

The government invokes a curious reason for not pursuing the project, namely that it should be the initiative of a 'Private Member' (of Parliament) and not of the 'public' government. However, the main obstacle is not this formality, but the fact that there is 'a substantial body of opinion' in North Ireland opposed to the change in legislation, even though the government admits that "it is not possible to say with certainty what is the feeling of the majority of people in the province." Apparently, it is important for the government to sense what the 'general feeling' is. Apparently, also, this existing 'public opinion' can either be sufficiently public, or not. Sufficiently general or not. And to conclude, the government is prepared to reconsider the matter if there were any developments in the future that were relevant. Although it is unclear what kind of events the government is referring to, it seems plausible that they're referring to a possible shift in public opinion, or 'general feeling', since that is the main reason why the law reform is abandoned. So apparently, this reified 'general feeling' is something capricious or confused, to formulate it negatively, or something dynamic, in more positive words.

Dudgeon's "law", in other words, is something fluid, not to be taken at face value, but in the context of a society which is ever changing. Before turning to the story of Jeffrey Dudgeon, the facts in *Dudgeon* finish their account of the applicable law with the story of its enforcement. Prosecution of individuals for homosexual activities is not only a public matter. "Anyone, including a

732 *Id.* at § 26.

private person, may bring a prosecution for a homosexual offence."[733] There is a safeguard, in that the Director of Public Prosecutions has the power to discontinue any prosecution. Even so, between 1972 and 1981 no prosecution has been brought by a private person. Moreover, as far as the proposals for law reform are concerned, the situation in Northern Ireland is not such an anomaly as one would have thought:

> During the period from January 1972 to October 1980 there were 62 prosecutions for homosexual offences in Northern Ireland. The large majority of these cases involved minors, that is persons under 18; a few involved persons aged 18 to 21 or mental patients or prisoners. So far as the Government are aware from investigation of the records, *no one was prosecuted in Northern Ireland during the period in question for an act which would clearly not have been an offence if committed in England or Wales.* There is, however, no stated policy not to prosecute in respect of such acts. As was explained to the Court by the Government, instructions operative within the office of the Director of Public Prosecutions reserve the decision on whether to prosecute in each individual case to the Director personally, in consultation with the Attorney General, the sole criterion being whether, on all the facts and circumstances of that case, a prosecution would be in the public interest.[734]

So, the whole debate about the law reform seems to be a storm in a cup of tea. The whole point of the law reform is to bring Northern Ireland in line with the rest of the UK. Apparently, there had been no instance in all that period in which a prosecution was considered to be "in the public interest." Nor in the private interest, since no private person had started a prosecution either. An enquiry into what the law in Northern Ireland is, shows an image of something in a process of change, but a change that no one would really notice, a process in which a balance is sought after between public concerns and private morality and for which extensive public debates are held,[735] all in search of an unpredictable and elusive but essential 'general feeling', or public opinion. The public and the private seem to be open to each other, in

733 *Id.* at § 29.
734 *Id.* at § 30 (emphasis added).
735 *Id.* at § 25.

communication with one another. This public-private dynamic is the law's dynamics.

10.3.1.3.2. Norris

Irish legislation on the issue dates back to the 1861-Act (as amended in 1885). The tone is not unlike the one used in the Supreme Court: "Whosoever shall be convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable to be kept in penal servitude for life." Since then, only the reference to life imprisonment and another to 'hard labor' have lost 'practical value'.[736] Homosexuals can now face 'an ordinary prison sentence'. Besides the question of the sanction, nothing has changed since 1861, or 1885, and the crime of buggery is still abominable. This is a law that does not change, and a public sphere that still considers the same things abominable, even if it has softened a bit in the way it punishes.

However, paragraph 20 mentions that the "statistics show that no public prosecutions, in respect of homosexual activities, were brought during the relevant period, except where minors were involved or the acts were committed in public, or without consent." Though it is not clear what the 'relevant period' is, one gets the impression that the 1861 Act has more been forgotten than consciously not applied, and that this may even account for the old fashioned sounding language. One possible story in this respect, and without any corroboration from the text of the judgment, is that 'buggery', or homosexuality, was so much a taboo-thing, that it remained safely in the private sphere, even though the 1861 Act had made it a public issue. In that sense, the movement from the act of buggery to the identity of homosexuality mirrors the same 'coming out' onto the public sphere described above, and effectively exposes the outdatedness of the 1861-Act. Though many people, and this is a guess, will wonder what buggery really means, almost everyone will know what homosexuality means. If buggery was an abominable crime, and homosexuality a 'disease' or affliction, does it still belong in criminal law?

In that sense, though stable and enduring, the 1861 Act should be updated with the help of the language used by the Supreme Court, including a clarification of what the sanctions should be, or perhaps the treatment. This

736 *Norris*, *supra* note 702, at § 13.

is a public sphere that looks dusty and out of touch, with laws that use old fashioned language and that moreover, in spite of the full and furious support of the Supreme Court, are not enforced. It's a public sphere that needs to get her act together.

10.3.1.3.3. Modinos

The law in *Modinos* shares some of the characteristics of the law in the case of *Norris*. First, the somewhat clinical, somewhat metaphysical style of the way it is worded: One is guilty of a felony and liable to imprisonment for five years if "one has carnal knowledge of any person against the order of nature", or if one "permits a male person to have carnal knowledge of him against the order of nature."[737] It may be my age, or my (lack of?) education, but what is 'carnal knowledge'? The second similarity is the fact that this law is not enforced either. Paragraph 9 of the judgment even tells that: "(i)n a statement to a newspaper on 25 October 1992 the Minister of the Interior stated, *inter alia*, that although the law was not being enforced he did not support its abolition", mirroring the official support for a law that is (officially) not applied that we found in the *Norris* case.

One important aspect is the Cypriot's law relation to the European Convention, or more accurately, to the precedent of *Dudgeon*. In the case of *Norris*, the Irish Supreme Court could just pretend that it had not seen it, by dismissing its relevance in a dualist system. The Case of *Modinos* shows a different sort of drama. In it, we find the account of a domestic case which is unrelated to the present one, that of *Costa* v. *the Republic of Cyprus*. In this case a soldier had been convicted for permitting another male person to have carnal knowledge of him."[738] Apparently, "(t)he offence was committed in a tent within the sight of another soldier using the same tent." The Supreme Court noted that the soldier was only 19 years old, and moreover a soldier, and that it was therefore in a different situation from the case of *Dudgeon*. However:

737 *Modinos*, *supra* note 703, at § 8.
738 *Id.* at § 11.

> The Supreme Court, nevertheless, added that it could not follow the majority view of the Court in the *Dudgeon* case and adopted the dissenting opinion of Judge Zekia. The court stated as follows: "By adopting the dissenting opinion of Judge Zekia this Court should not be taken as departing from its declared attitude that, for the interpretation of provisions of the Convention, domestic tribunals should turn to the interpretation given by the international organs entrusted with the supervision of its application, namely, the European Court and the European Commission of Human Rights (…). In ascertaining the nature and scope of morals and the degree of the necessity commensurate to their protection, the jurisprudence of the European Court and the European Commission of Human Rights has already held that the conception of morals changes from time to time and from place to place, and that there is no uniform European conception of morals; that, furthermore, it has been held that state authorities of each country are in a better position than an international judge to give an opinion as to the prevailing standards of morals in their country; in view of these principles this Court has decided not to follow the majority view in the *Dudgeon* case, but to adopt the dissenting opinion of Judge Zekia, because it is convinced that it is entitled to apply the Convention and interpret the corresponding provisions of the Constitution in the light of its assessment of the present social and moral standards in this country; therefore, in the light of the aforesaid principles and viewing the Cypriot realities, this Court is not prepared to come to the conclusion that Section 171(b) of our Criminal Code, as it stands, violates either the Convention or the Constitution, and that it is unnecessary for the protection of morals in our country."[739]

We shall later see how this was dealt with in Strasbourg. And we shall wonder perhaps what would have happened if the Supreme Court had not openly dissented from the idea that the authority of a Strasbourg precedent did not apply exactly in Cyprus. However, we can already say something about this very culturally relativistic position. There is no uniform European

739 *Id.*

conception of morals, is the attitude ascribed to Strasbourg, but one that has never been formulated in such a way by the European Court. By stating it as such, and in the context of talking about 'countries', the Cypriot court divides Europe into separate and autonomous (private) entities, which even *if* they are similar in terms of morals, the fact that they are different in that sense outweighs any similarity. In a way the Cypriot court seems to be saying that there *cannot be* a uniform morality in Europe, especially in view of the fact that the 'conception of morals' is so dynamic, and that the national judge is *always* in a better position to assess the necessity to interfere with certain rights. There is, of course, the due deference and recognition of the authority of the Court, the idea that we're all part of one public sphere, held together by the Convention and its institutions. But, Cyprus can be best understood by its own courts, and this one feels that, different or not from the rest of Europe, it is a difference allowed by the European system, a system that recognizes the (relative) autonomy of its constituting parts. There is a door between these two public spaces, the European one and the Cypriot one, and the national court has just locked the door from within. The fact that it does this using the Strasbourg vocabulary as faithfully as possible does, however, make one suspect that the European Court has a similar lock to that same door, a *passe partout* actually…

10.3.1.4. The Merits of the Cases

10.3.1.4.1. Interference with an Article 8 Right

The merits of *Dudgeon* start with the clarification that what is at stake here is not homosexuality as such, but the fact that the state can prosecute those homosexual acts between consenting adults which take place in private.[740] This criminalization has a haunting effect, according to the applicant:

> (H)e has experienced fear, suffering and psychological distress directly caused by the very existence of the laws in question - including fear of harassment and blackmail. He further complained that, following the search of his house in January 1976, he was questioned by the police about certain
>
> homosexual activities and that personal papers belonging

740 *Dudgeon*, *supra* note 663, at § 39.

> to him were seized during the search and not returned until more than a year later.[741]

All he wants is a safe haven for his intimacy, without having to experience all the negative feelings linked with having to live as an outlaw, making him vulnerable not only to punishment from the authorities, but also to others who feel that they can harass and blackmail him. A point is made of not wanting anything else but a private sphere that is depicted as not only harmless, but also as safe from unwarranted harm and suffering.

The government does not concede nor dispute the point that Dudgeon is 'directly affected' by the laws and entitled to claim to be a 'victim' under Article 25 (old) of the Convention.[742] It may be important to remember that the UK government's attitude towards the contested legislation is that of having endeavored, albeit sufficiently, to change the Northern Irish elements in an otherwise more tolerant UK. As to the question of whether there actually has been an interference with that private space, the Court says:

> The Court sees no reason to differ from the views of the Commission: the maintenance in force of the impugned legislation constitutes a continuing interference with the applicant's right to respect for his private life (which includes his sexual life) within the meaning of Article 8 § 1. In the personal circumstances of the applicant, the very existence of this legislation continuously and directly affects his private life (see, *mutatis mutandis*, the *Marckx* judgment of 13 June 1979, Series A no. 31, p. 13, § 27): either he respects the law and refrains from engaging - even in private with consenting male partners - in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution.
>
> It cannot be said that the law in question is a dead letter in this sphere. It was, and still is, applied so as to prosecute persons with regard to private consensual homosexual acts

741 *Id.* at § 37.
742 *Id.* at § 40.

> involving males under 21 years of age (see paragraph 30 above). Although no proceedings seem to have been brought in recent years with regard to such acts involving only males over 21 years of age, apart from mental patients, there is no stated policy on the part of the authorities not to enforce the law in this respect (ibid). Furthermore, apart from prosecution by the Director of Public Prosection, there always remains the possibility of a private prosecution (see paragraph 29 above).
>
> Moreover, the police investigation in January 1976 was, in relation to the legislation in question, a specific measure of implementation - albeit short of actual prosecution - which directly affected the applicant in the enjoyment of his right to respect for his private life (see paragraph 33 above). As such, it showed that the threat hanging over him was real.[743]

The Court totally agrees with Dudgeon's picture of his private space under constant violation, unable to be a safe haven. Not only is there an interference: there is a *continuing* interference, the result of the 'very existence' of the legislation. This 'continuously and directly affects his private life'. The 'public' here is one that, not only by means of the state, but by means of anyone wanting to, continuously denies Jeffrey Dudgeon his peace and his dignity. The 'private' here is an open cage put in the middle of the market square, and all are free to spit at the one locked in. Jeffrey Dudgeon, and any other homosexual in a country that criminalizes homosexual intimacy, are victimized beyond repair in this paragraph. The strategy of presenting the case as one of a victimized identity seems to work and the case seems won…

In the case of *Norris* the issue of interference is dealt, in my view, alongside the question of whether the applicant can call himself a 'victim' in the sense of Article 25 § 1 (old) of the Convention. The Court refers to other case law and emphasizes that the legal situation in the *Dudgeon* case is almost identical to the one in the case of *Norris*, since it concerns the same 1861 Act. Moreover, the Court argues that there is no stated policy not to implement the law, an even though the risk is minimal, it is there.[744] There is even a

743 *Id.* at § 41.
744 *Norris*, *supra* note 702, at § 33.

reference to the already quoted dissent of Irish Judge McWilliam, which so eloquently emphasizes the hardship of being homosexual with so much misapprehension and prejudice. Accordingly, the Court considers Norris to be entitled to call himself a victim.

The discussion concerning the existence of an interference in *Norris* is quickly settled. The government refers to the fact that the applicant is such a public gay personality, and that he had nevertheless been left alone. The "mere existence of laws restricting homosexual behaviour under pain of legal sanction" could not amount to a derogation from fundamental rights, could it?[745] But the Court disagreed, referred to the 'indistinguishable' case of *Dudgeon*, even quoting part of § 41 therein, and added that the implementation of the law in that case had not been an additional requirement. An interference is therefore existing.

It seems to me that the government tried to exploit the ambiguity of its public attitude towards homosexuality (see above at 4.2). Yes, there was inaction and only a few 'mere laws'… But by now, and thanks to the encounter between David Norris and the Supreme Court, the confrontation is of a almost purely symbolic nature. As exemplified by the opinion of McWilliam, but as stated already in *Dudgeon*, the gay activists have conquered a niche in the public sphere. They are now a social category, and moreover, they have their own public history, which is one in which they have been victimized by 'misapprehension and prejudice', one that is symbolically represented in the most public of public spaces: the law. It becomes almost silly and exemplifies the out-of-touchness of the government to state that it only concerns 'mere laws'. In this sense the Court could have exploited the reasoning of the Supreme Court to emphasize the public, or official, hostility towards homosexuals, one that seems so aggressive that it in itself victimizes. But, as we shall see in the case of *Modinos* the Court does not seem to lash out easily at the national supreme judiciary—if only it were because many of its judges come from that office themselves.

The case of *Modinos* revolves around the question of whether there was an interference or not, and to distinguish itself from the previous cases, the government emphasized the inexistent risk of prosecution. It also argued that the domestic case of *Costa* had been one concerning sexual acts committed in

745 *Id.* at § 37.

public and that the explicit dissent of the Supreme Court with regards to the *Dudgeon* case had been a (mere) *obiter dictum*. Again, we see a government exploiting the ambiguity of its public policies, an ambiguity that probably reflects a number of internal divisions, and trying to privilege one aspect of its policy, the non prosecution, at the expense of another, the explicit unwillingness to abolish a—purely symbolical—criminalization, even in the face of Strasbourg precedents.

But again, to no avail. The Court is brief: a law in the statute is a risk,[746] and even if there is a policy of non-prosecution, policies can change.[747] As for the Supreme Court's *obiter dictum*, the Court states that: "whatever the status in domestic law of these remarks, it cannot fail to take into account such a statement from the highest court of the land on matters so pertinent to the issue before it."[748] And that's it. The Court is not clear as to how it has taken it into account, but judging from the rest of the judgment, it has pretty much ignored it. The Court concludes that: "the existence of the prohibition continuously and directly affects the applicant's private life," refers to the *Dudgeon* and *Norris* cases, and judges that there has been an interference. The rest of the case is a statement of how the government had limited its submissions to this issue and how it did not seek to argue that there was a justification according to § 2 Article 8. The Court then considers that a re-examination of that issue is not called for and that "(a)ccordingly, there is a breach of Article 8 in the present case."[749] *C'est tout*. One wonders how the case ever got to Strasbourg in the first place. A very extensive Dissent of the Cypriot Judge Pikis enforces this impression. It is a huge whining about how Cypriot law, including the *Costa obiter* has been misunderstood, and how:

> Unlike the *Norris* case, the policy not to prosecute homosexual acts between consenting adults in private does not rest on the discretionary powers of the Attorney-General exercised by reference to the facts of each individual case but on correct understanding that Cyprus law does not criminalise such conduct.[750]

746 *Modinos*, *supra* note 703, at § 20.
747 *Id.* at § 23.
748 *Id.* at § 22.
749 *Id.* at § 26.
750 *Id.* (Dissenting Opinion of Judge Pikis).

A misunderstanding that apparently was very widespread, including ministers of the interior and the Supreme Court of Cyprus. This is the ultimate denial of an ambiguity, but one that is a bit embarrassing. Both the government and the dissenting judge seem to be ashamed of the ambiguity of their public sphere, especially after the so similar case of *Norris*. For Alecos Modinos this is a beautiful victory. And for the European Court, it is a casual reaffirmation of its authority. By not even going into the issue of 'necessity', the door linking the Cypriot public sphere to the European one, in a clearly hierarchical relation, has been unlocked without the Court having to use its *passe partout*.

10.3.1.4.2. A Legitimate Aim

The question of the purpose for the interference in the *Dudgeon* case is a complex one. The government claims both 'the protection of morals' as well as 'the protection of the rights and freedoms of others'. The Commission agrees but the applicant does not, although it is not clear from the case why not, and whether both justifications are rejected or only one of two.

> Both the Commission and the Government took the view that, in so far as the legislation seeks to safeguard young persons from undesirable and harmful pressures and attentions, it is also aimed at "the protection of the rights and freedoms of others". The Court recognises that one of the purposes of the legislation is to afford safeguards for vulnerable members of society, such as the young, against the consequences of homosexual practices. However, it is somewhat artificial in this context to draw a rigid distinction between "protection of the rights and freedoms of others" and "protection of morals". The latter may imply safeguarding the moral ethos or moral standards of a society as a whole (see paragraph 108 of the Commission's report), but may also, as the Government pointed out, cover protection of the moral interests and welfare of a particular section of society, for example schoolchildren (see the *Handyside* judgment of 7 December 1976, Series A no. 24, p. 25, § 52 *in fine* - in relation to Article 10 § 2 of the Convention). Thus, "protection of the rights and freedoms of others", when meaning the safeguarding of the moral interests

> and welfare of certain individuals or classes of individuals who are in need of special protection for reasons such as lack of maturity, mental disability or state of dependence, amounts to one aspect of "protection of morals" (see, *mutatis mutandis*, the *Sunday Times* judgment of 26 April 1979, Series A no. 30, p. 34, § 56). The Court will therefore take account of the two aims on this basis.[751]

Apparently, in this reading by the Court, public morals serve the protection of the vulnerable (private) members of society. Actually, a 'rigid distinction' between the two is, in the Court's words, 'artificial in this context', although it is not clear to me what is meant by 'this context'. Are there situations in which public morals do not serve the safeguarding of the rights of others, in the same way that they do in *Dudgeon*? Is, from that perspective, any rigid (or not) distinction an artificial one? The public, or 'one aspect' of it (are there other?), in this argument, serves the private, or at least the vulnerable private: schoolchildren (why 'school'?), or those who fall in the category of 'lack of maturity, mental disability or state of dependence'. The private safe haven that Jeffrey Dudgeon claims is here complemented, and even temporarily obscured, by a private safe haven for the vulnerable in society. The public, in the role of 'public morals', obviously privileges one, the vulnerable one, over the other. For the safe haven of schoolchildren to be secured, the safe haven of Dudgeon and other gays needs to be sealed off. Gays can be gay, but in the closet, or at least at home. Gone is the empathy for Dudgeon's need for undisturbed intimacy.

The legitimate aim for the interference in *Norris* is only the protection of morals, and this is not contested by anyone.[752] As for *Modinos*, that case never got so far.

10.3.1.4.3. Necessity in a Democratic Society

In the case of *Dudgeon*, it is clear that the cardinal issue is that of the necessity in a democratic society. The Court, in this respect, starts its handling of this issue in the following very dense—for the purpose of this particular story—paragraph:

751 *Dudgeon*, *supra* note 663, at § 47.
752 *Norris*, *supra* note 702, at § 40.

> There can be no denial that some degree of regulation of male homosexual conduct, as indeed of other forms of sexual conduct, by means of the criminal law can be justified as "necessary in a democratic society". The overall function served by the criminal law in this field is, in the words of the Wolfenden report (see paragraph 17 above), "to preserve public order and decency [and] to protect the citizen from what is offensive or injurious". Furthermore, this necessity for some degree of control may even extend to consensual acts committed in private, notably where there is call - to quote the Wolfenden report once more - "to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence". In practice there is legislation on the matter in all the member States of the Council of Europe, but what distinguishes the law in Northern Ireland from that existing in the great majority of the member States is that it prohibits generally gross indecency between males and buggery whatever the circumstances. It being accepted that some form of legislation is "necessary" to protect particular sections of society as well as the moral ethos of society as a whole, the question in the present case is whether the contested provisions of the law of Northern Ireland and their enforcement remain within the bounds of what, in a democratic society, may be regarded as necessary in order to accomplish those aims.[753]

First, criminal law can be employed to regulate sexuality. Again, sexuality is something that can be seen as transgressing the public-private divide, or even as totally part of the public sphere. The function is "to preserve public order and decency and to protect the citizen from what is offensive and injurious", which makes it both public and private. The main reason for control in situations of 'consensual acts committed in private' is "to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable." This is a repetition of the earlier argument,

753 *Dudgeon*, *supra* note 663, at § 49.

whereby the private vulnerability of some is converted into a general (public) need for 'order and decency'. How consensual acts committed in private can exploit and corrupt others is not explained, the only possible reason being in my perspective one in which the act is not 'really' consensual, something which is not claimed by any of the parties in this case.

The Court then refers to the fact that all the member states of the Council of Europe have some kind of regulation of sexual activities by means of (criminal?) legislation. A three tier public sphere is introduced here, each one becoming a private sphere for the larger one. The inner circle is formed by Northern Ireland, its legislation, its particular sections of society, its 'moral ethos of (its) society as a whole', its democratic society. The middle circle is formed by the United Kingdom, which includes the legislations in England, Scotland and Wales on the one hand, and on the other hand the government who wants to bring the law in Northern Ireland into line with the rest of the UK. The outer circle is that of the Council of Europe, as represented by the legislation of its member states. The Northern Irish 'society as a whole' mentioned is thereby reduced to a tiny—private—component of the European public sphere, or 'society as a whole'.

The Court then restates its mantra: Necessity in a democratic society means the existence of a 'pressing social need', the initial assessment of which is to be determined by the national—in this case UK—authorities, which have for this purpose a certain margin of appreciation.[754] However, this always remains subject to review by the European Court. The mantra just restates, in technical terms, the levels of 'public spheres' mentioned before. It does, however, eliminate the inner Northern Irish circle, which then becomes an invisible 'private' sphere within the UK. Next come the reiterations of the fact that the scope of the margin of appreciation is dependent on which aims are invoked as a justification for interference. The aim of 'protecting public morals' is one, according to established case law, where the margin of appreciation will be more extensive. The Court states that:

> It is an indisputable fact, as the Court stated in the *Handyside* judgment, that "the view taken ... of the requirements of morals varies from time to time and from place to place, especially in our era," and that "by reason of their direct and

754 *Id.* at §§ 50-52.

> continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of those requirements."[755]

Public morals seem here to be, in part, the same as law was in the description of the facts of *Dudgeon*: dynamic, especially dynamic 'in our era'. However, they also vary 'from place to place', and not from country to country, allowing for the most diverse form of territorial distribution of all these little spheres of 'public morals'. The image is one of pluriformity and diversity, in which the principle of subsidiarity applies, even though here there *is* a reference to 'State authorities', which suddenly makes the 'places' less autonomous, less public. This complex collage of the public side is then complemented by a firm support for the solidity of the private side:

> However, not only the nature of the aim of the restriction but also the nature of the activities involved will affect the scope of the margin of appreciation. The present case concerns a most intimate aspect of private life. Accordingly, there must exist particularly serious reasons before interferences on the part of the public authorities can be legitimate for the purposes of paragraph 2 of Article 8.[756]

Not only is there a private life, this private life is not a monolithical entity but, again, a multilayered one, with more and less intimate (private) aspects, or parts. The more intimate, the closer to the core of that 'private life', the more serious the reasons for interference must be. Whether there is an end to this, an area so intimate that interference is always unacceptable, is not clear from this reasoning. Whether there is a continuum going from private to public, rather than two separate spheres, is not clear either. In other words, whether there is an aspect of private life that is so little intimate, that the state needs no reason at all to interfere, and whether this means that this aspect is not really private but has become public (the idea of continuum), or whether it still remains private. In any case, it seems to me that this image of the public and the private is only partially clear, the rest of it being out of focus. This, I think is not coincidental, since the Court is still sketching the

755 *Id.* at § 52.
756 *Id.*

general framework and has not started with the application to the case of Jeffrey Dudgeon yet.

But first the Court recites the final part of the mantra, referring to the idea that the notion of 'necessity' is linked to the notion of a 'democratic society', "two hallmarks of which are tolerance and broadmindedness."[757] Thus, restrictions need to be proportional to the aim pursued. The Court then describes its task as having to define "whether the reasons purporting to justify the 'interference' in question are relevant and sufficient."[758] It ends that same paragraph by stating: "The Court is not concerned with making any value-judgment as to the morality of homosexual relations between adult males."[759] This is a particular relationship that the Court appropriates with regards to the state. Though the state is an inner circle in the multiple layers of the public, and will thus be reviewed by the Court, this Court, this outer circle of the public, will do this in a detached way, careful not to somehow impose its value judgment of homosexuality on the state. In this way, the state is not only an inner circle, but becomes a 'private' entity, allowed to have its own opinion and moral position. However, it would actually seem that "a value-judgment as to the morality of homosexual relations between adult males" is something that would be problematic—otherwise why explicitly state that this will not be done? This is reminiscent of the hard task that the UK government had in ascertaining the 'general feeling' in North Ireland. The whole 'public-private-ness' of the issue of public morality is quite unstable. It seems to assume a 'private' role as soon as it is approached from an outer, controlling, more public side, and adopting a moderate, apparently tolerant and pluralistic, 'public' role in order to resolve conflicts as to its content. The whole notions of 'tolerance and broadmindedness' are patronizing and public notions of an—inflated—'normal'—Self tolerating an inferior—deviant—Other. What the Court seems to be saying, is that tolerance and broadmindedness towards homosexual relations between adult males is one thing, but that making a value judgment about the same issue is another thing. It will review the first, and abstain from the second. Tolerance and broadmindedness are presented as reified, objective, 'hallmarks' of what a democratic society is about. A value judgment seems to be the 'subjective' opinion of the one making it. In this sense, the first is for everyone to see

757 *Id.* at § 53.
758 *Id.* at § 54.
759 *Id.*

and, through the use of 'reason' for all to incorporate, therefore 'public'. The second has nothing to do with truth and is just an opinion - therefore 'private'.

The Court starts by looking into the government's argument considering the fact that the interference is justified by the strong feelings in Northern Ireland concerning homosexuality.[760] This strategy of the UK government raises some questions. What difference does it make whether the whole of the UK has these strong feelings, or whether it is only in one particular area? Strong feelings are strong feelings and may point to a "pressing social need." However, as the Court states, while referring to earlier case law:

> The fact that similar measures are not considered necessary in other parts of the United Kingdom or in other member States of the Council of Europe does not mean that they cannot be necessary in Northern Ireland (see, *mutatis mutandis*, the above-mentioned *Sunday Times* judgment, pp. 37-38, § 61; *cf.* also the above-mentioned *Handyside* judgment, pp. 26-28, §§ 54 and 57). Where there are disparate cultural communities residing within the same State, it may well be that different requirements, both moral and social, will face the governing authorities.[761]

This means that a particular country can be chopped up into separate, isolated public spheres—not even necessarily in territorial terms—each with their own particular public morals, general feelings, and "pressing social needs." In this sense, 'the public sphere' can be totally homogenous or very pluralistic. Small detail: one needs to have recognized "disparate cultural communities," whatever that is.

The Court then describes the multifarious "general feeling" in Northern Ireland.[762] The Court consecutively uses the notions of "moral climate," the "moral fabric of society," "morals in Northern Ireland," and "prevailing moral standards." It is clear that this opens many dimensions to what the Court is talking about when discussing the "public morals" applicable in the case. A

760 *Id.* at § 56.
761 *Id.*
762 *Id.* at § 57.

moral climate can change, continuously does actually, but, one assumes, less so than the moral weather. A moral fabric, however, is part of the structure of society, an essential part of its identity. Prevailing moral standards sounds more fixed than 'climate', but less so than 'fabric'. Moreover, the notion of 'prevailing' suggests the existence of many sets of competing moral standards. At the same time, the Court, when talking about the opposition to the law reforms, describes it as "a strong body of opposition," "a large number of responsible members of the Northern Irish Community," and "an important sector of Northern Irish society." First, in the way that this situation is described one would say that morality and the "general feeling(s)," either of the majority or otherwise, are two different things. So, "an important sector of Northern Irish society" has an attitude towards what morality is or should be. Second, opinions and attitudes are clearly divided. The public is split up into factions, strong and weak, important or not, large in numbers or small in numbers, made up of responsible members and irresponsible members, et cetera. Even the government is one of the factions, making its own position clear, even if it chooses not to impose them. It seems safe to say that, as all these factions and sectors struggle for a say in what happens to morality in the society of which they are part, it is a classic example of a number of private elements engaged in a battle over the public—the climate, the general, the fabric, and the prevailing… By doing this, the Court can leave the public morality for what it apparently is, and can focus on the private elements and ask whether they are strong, important, and numerous enough to constitute a "pressing social need." Somehow, this private element has the potential to transform itself and its opinions into the public and the public or general morality. The last sentence of this paragraph mirrors this complex vitality of the public-private distinction:

> Whether this point of view [the one opposing the law reform, JMAC] be right or wrong, and although it may be out of line with current attitudes in other communities, its existence among an important sector of Northern Irish society is certainly relevant for the purposes of Article 8 § 2.[763]

This point of view, which exists among an important sector of Northern Irish society—and is thus only a part of it—may be "out of line with current attitudes in other communities." What are these attitudes? They seem to be

763 *Id.*

homogenous and general. I cannot imagine that among the *many* attitudes (if that is what the Court means) that exist in other communities, there are no attitudes which are not in line with Northern Irish opposition. I therefore conclude that the point of view is particular and the attitudes general. Nevertheless, it shows how, by means of the Court's chopping up and selective description, one *particular* point of view can become, or at least also be, a *general* attitude.

One more remark about this paragraph is that the last sentence throws Northern Ireland out of its autonomous field into a larger, more public, context. Northern Ireland is one of many communities. The next paragraph describes how this larger context is primarily the UK, and sets out the complex political temporary and partial constitutional autonomy of Northern Ireland.[764] The Court then concludes that:

> Without any doubt, faced with these various considerations, the United Kingdom Government acted carefully and in good faith; what is more, they made every effort to arrive at a balanced judgment between the differing viewpoints before reaching the conclusion that such a substantial body of opinion in Northern Ireland was opposed to a change in the law that no further action should be taken (see, for example, paragraphs 24 and 26 above). Nevertheless, this cannot of itself be decisive as to the necessity for the interference with the applicant's private life resulting from the measures being challenged (see the above-mentioned *Sunday Times* judgment, p. 36, § 59). Notwithstanding the margin of appreciation left to the national authorities, it is for the Court to make the final evaluation as to whether the reasons it has found to be relevant were sufficient in the circumstances, in particular whether the interference complained of was proportionate to the social need claimed for it (see paragraph 53 above).[765]

What is under review here is unclear. It is not the government care and good faith in arriving at a balanced judgment, since there was care and good faith and "every effort." The Court says that it is the proportionality of the

764 *Id.* at § 58.
765 *Id.* at § 59.

interference to the social need claimed for it. In the last sentence, the social need seems to be a public, general thing. However, the social need refers to the "substantial body of opinion," which is something (more) particular. Apparently, this substantial body has become the public attitude in Northern Ireland. Perhaps this happened when the government adopted it as the determinant factor in its decision to change the law.

The good effort of the UK government alone is not decisive. What needs to be reviewed is "whether the reasons it has found to be relevant are sufficient in the circumstances." This follows earlier case law,[766] and is part of the mantra that says that good faith and effort does not preclude violating the Convention. However, again the Court seems to build a bridge from 'proportionality', which is what it is going to review, to good faith and efforts, and the "sufficiency and relevance of the reasons" for the interference. In fact, the good faith and efforts are more difficult to dispute, since the government can always allege that "it tried really hard." In that sense, it seems easier to overrule the government's position by saying that its reasons are not "sufficient."

The Court then executes this review in a long and complex paragraph:

> The Convention right affected by the impugned legislation protects an essentially private manifestation of the human personality (see paragraph 52, third sub-paragraph, above).
> As compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member States (see, *mutatis mutandis*, the above-mentioned *Marckx* judgment, p. 19, § 41, and the *Tyrer* judgment of 25 April 1978, Series A no. 26, pp. 15-16, §

766 *See Handyside*, *supra* note 631, at § 50; *Sunday Times v. the United Kingdom*, ECtHR (1979), Series A no. 30, §§ 50, 59; *Olsson v. Sweden*, ECtHR (1988), Series A no. 130, § 68.

> 31). In Northern Ireland itself, the authorities have refrained in recent years from enforcing the law in respect of private homosexual acts between consenting males over the age of 21 years capable of valid consent (see paragraph 30 above). No evidence has been adduced to show that this has been injurious to moral standards in Northern Ireland or that there has been any public demand for stricter enforcement of the law.
>
> It cannot be maintained in these circumstances that there is a "pressing social need" to make such acts criminal offences, there being no sufficient justification provided by the risk of harm to vulnerable sections of society requiring protection or by the effects on the public. On the issue of proportionality, the Court considers that such justifications as there are for retaining the law in force unamended are outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant. Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved.[767]

The Court starts with the assessment that what is at stake is "an essentially private manifestation of the human personality." In these few words the human personality is posited on both sides of the public-private distinction. A manifestation is external and can be seen, and is something that, though it may come from within, goes outward. The Court refers to its prior observation that it concerns "a most intimate aspect of private life."[768] In one sense, it is a contradiction to say that there is such a thing as a 'private manifestation'. However, when seen as something that *moves across* the public-private distinction it becomes more akin to other concepts, such as 'identity', concepts that are in a way 'beyond' public and private and which can be seen as in themselves a mediation between a rigid public-private distinction

767 *Dudgeon*, *supra* note 663, at § 60.
768 *Id.* at § 52.

on the one hand, and its collapse or their having become irrelevant on the other. Though the Court emphasizes the 'privateness' of (homo) sexuality, it at the same time accepts or constructs it as a social—or public—category. Another thing that the Court is doing is that it says that what is at stake *is* an essentially private manifestation of the human personality. This is a blatant naturalization of (homo) sexuality, now as something intrinsically human, instead of a being a perversion, disease, or in whatever way deviant.

The Court then moves on to the temporal level, referring to a reified 'understanding' of homosexual practices that has increased. On the one hand this is consistent with the earlier promise not to make a 'value judgment', but to be objective and neutral. On the other hand this gives an extra impression of how morals vary not only according to place, but also to time. However, as such the temporal development seems to be a linear one, and a progressive as well, *i.e.* getting better all the time. And the understanding seems to be almost of a scientific nature. This means that—suddenly—a country that belongs to the Council of Europe and still criminalizes homosexuality is a backward place, and different in a negatively tilted way. One can see that this is the kind of difference that will not be tolerated in the more general European public sphere. And as if to make its 'scientific' point, the Court offers the empirical evidence: in spite of the non-enforcement there has been no negative effect on the moral standards in Northern Ireland. Of all the ways of referring to 'morals' this one is perhaps the funniest: how does the Court expect anyone to "adduce evidence" that moral standards have been affected injuriously? Then again, I am sure that if the "strong body of opinion" in Northern Ireland would be questioned on this, that many of the "responsible members" of that community would agree that there has been a decline in moral standards (see the increased violence, increased divorces, venereal diseases, etc.), and that this is (if only in part) causally related to the non enforcement of such important social standards. But then again, perhaps it takes a value judgment to make such an observation...

One should not think that the Court is making a bold step in the defense of homosexual rights. It is very much a carefully measured one. The formulation is full with claw-backs: the "increased understanding" etc. only applies to homosexual practices "*of the kind now in question*," and they are "*in themselves*" a matter to which criminal law should not be applied. As Judge Matscher states in his dissenting opinion, in no way does the *Dudgeon*

case mean that homosexuality and heterosexuality are put on the same level. And later on, when discussing the question of proportionality, the Court considers that actually there are "justifications for retaining the law in force unamended," having referred earlier to "the risk of harm to vulnerable sections of society"—a direct return to the somehow and somewhat corrupt and depraved nature of homosexuality. In the end, and contrary to what one could have concluded after reading about 'increased understanding' and "essentially private manifestations of human personality," homosexuality may be decriminalized, but it can still be dangerous.

For those who consider homosexuality a bad thing but are not assured by this reading, there is always the next paragraph:

> Accordingly, the reasons given by the Government, although relevant, are not sufficient to justify the maintenance in force of the impugned legislation in so far as it has the general effect of criminalising private homosexual relations between adult males capable of valid consent. In particular, the moral attitudes towards male homosexuality in Northern Ireland and the concern that any relaxation in the law would tend to erode existing moral standards cannot, without more, warrant interfering with the applicant's private life to such an extent. "Decriminalisation" does not imply approval, and a fear that some sectors of the population might draw misguided conclusions in this respect from reform of the legislation does not afford a good ground for maintaining it in force with all its unjustifiable features.
>
> To sum up, the restriction imposed on Mr. Dudgeon under Northern Ireland law, by reason of its breadth and absolute character, is, quite apart from the severity of the possible penalties provided for, disproportionate to the aims sought to be achieved.[769]

The reasons are relevant, but not sufficient. In other words, though misapprehension and prejudice belong to the past, now that we have a better understanding and consequently more tolerance, it does not mean

769 *Id.* at § 61.

that homosexuality does not pose "a risk to vulnerable sections of society." Any such a conclusion would be "misguided," since decriminalization does not imply approval. It is not the interference that is bad, but the fact that it is "to such an extent." The restrictions imposed on Mr. Dudgeon are not bad, it is the fact that they are so broad and absolute in character that is bad. And thus Jeffrey Dudgeon wins the case. The Court concludes that Article 8 has been violated.

The case of *Norris* does not offer any new insights into this discussion, since the main debate in that case is about what the Irish consider the two main differences with *Dudgeon*. The first is the issue of whether there was an interference since no proceedings were conducted against the applicant, and this has been discussed above. The other is the issue that the Irish government advanced which is that the question of necessity fell within the margin of appreciation. In other words, what applied to Northern Ireland and the UK did not necessarily apply to the Republic of Ireland. However, the Court obviously did not feel like engaging in this debate. It consecutively gave arguments quoting previous case law on the issue of the margin of appreciation and the protection of morals (*e.g. Handyside* & *Müller*), it stated that the government did not offer a better test (§ 45),[770] and then extensively quoted *Dudgeon*.[771] Finally it came to the conclusion that Ireland had not given "sufficient reasons" to satisfy the requirements of paragraph 2 of Article 8. Hence, there was a violation of the Convention.

10.3.2. After Decriminalization: Salgueiro da Silva Mouta, Lustig-Prean & Beckett, Smith & Grady, and A.D.T.

It may have seemed that after the cases of *Dudgeon, Norris*, and *Modinos*, the homosexual cause had been fought. The cases of *Norris* and *Modinos* were so explicit in the way *Dudgeon* justified them that it seemed that there was nothing new that needed to be said. Homophobia seemed to have obtained the stamp of official Strasbourg disapproval. But as we have seen above, this stamp has an enormous amount of subtext that seriously undermines the idea that homosexuality, at least in the eyes of the European Court of Human Rights, has somehow been normalized. Since then, six homosexuals have started four cases against their respective countries because they felt

770 *Norris*, *supra* note 702, at § 45.
771 *Id.* at § 46.

that they were still the victims of discrimination caused by homophobia. In all four cases, the Court unanimously found violations of the Convention, prolonging it's successful record in as a champion against homophobia. But, how does this achievement look up close?

The four cases are *Salgueiro da Silva Mouta* v. *Portugal*, of 21 December 1999, which concerns a Portuguese father and homosexual who claimed that the highest court in his country discriminated on the basis of homophobia[772]; two practically identical cases, *Smith and Grady* v. *U.K.*, of 27 December 1999,[773] and *Lustig-Prean and Beckett* v. *U.K.*, of 27 December 1999,[774] concerning the zero-tolerance policy against homosexuality in the British military establishment; and *A.D.T.* v. *U.K.*, of 31 October 2000, which tells the story of the anonymous homosexual and his videotapes of homosexual group-sex.[775]

10.3.2.1. The Applicants and Their Facts

10.3.2.1.1. Salgueiro da Silva Mouta: Homosexuality and Family Law as Private and Public Politics

Aside from João Manuel Salgueiro da Silva Mouta (hereinafter "the applicant" or "Salgueiro"), all the people involved in this case are anonymous: The woman he married and divorced (C.D.S.), the daughter they had together (M.), the grandparents, and especially the maternal grandmother (not even abbreviated), the boyfriend or partner of the applicant (L.G.C., or just L.), and the mother's new boyfriend (J.). Even the businesses were they obtain their income are presented as abbreviations: C.D.S. is the manager of DNS, and Salgueiro is "head of his sector at A."[776] It would seem that whatever is at stake here, that quite a large number of people needed to have their identity protected. At the same time, since the applicant is not anonymous, which he could have been, it doesn't matter to him that everybody knows his case. It may be that this is a standard policy adopted by the Court in all its cases. Nevertheless, when taken alone it does strike as odd that there's only one public person, while all the important people in his life remain hidden in the privacy of anonymity.

772 *Salgueiro, supra* note 706.
773 *Smith and Grady*, *supra* note 705.
774 *Lustig-Prean*, *supra* note 704.
775 *A.D.T.*, *supra* note 708.
776 *Salgueiro, supra* note 706, at § 14.

What then, is his case about? Salgueiro was separated from his wife "and has since then been living with a man, L.G.C."[777] He and his ex-wife first signed an agreement over custody of the child, who was then three and a half years old. The agreement granted his wife parental responsibility, but also gave him right to contact. About a year later he went to court to claim parental responsibility. Allegedly his wife did not live up to the agreement since she denied him his contact with his daughter and moreover had their daughter living with the maternal grandmother. She on the other hand accused his partner of having sexually abused the child. In first instance the court did an extensive examination of the facts and allegations, including reports by an (anonymous) psychologist and a psychiatrist (Dr. V.), on the aptness and mental health of about everyone involved, except for the grandfather and the mother's new boyfriend. The first domestic court ruled in his favor. The mother apparently abducted her daughter, by then seven years old, and also appealed to the Lisbon Court of Appeal, who ruled in her favor. That decision was final. Salgueiro then applied in Strasbourg claiming that the Court of Appeal's decision was solely based on the ground of his sexual orientation and that this "had been prompted by atavistic misconceptions which bore no relation to the realities of life or common sense."[778] He claimed two things: a violation of his right to family life under Article 8, and a violation of Article 14 taken in conjunction with Article 8 because of the discrimination that he alleged he had suffered.

One possible story is that Salgueiro only cares about having custody over his daughter and, unlike the protagonists in my previous papers, does not really care about the struggle against homophobia. In this story it makes sense that we do not need to know, again unlike in *Dudgeon*, *Norris*, and *Modinos*, that the applicant is "a practicing homosexual." That knowledge seems to follow from the fact that he lives with a man and that he does not deny that he is a homosexual, and does not need to be announced or proclaimed, or made into an issue. This is a story in which the issue of his homosexuality seems to be thrust upon him by his wife and by the Court of Appeal in order to deny him custody over his daughter. His sexual identity is public ammunition for his contenders, unlike what happened in the other cases, where it was an instrument of empowerment. Is Salgueiro a father? Or is he a homosexual? In this reading he would be a father who, when in Strasbourg, turns the

777 *Id.* at § 9.
778 *Id.* at § 24.

ammunition of his enemies against them and claims discrimination (art. 14 *jo.* art. 8) but *also* the right to family-life (art. 8 taken alone). This is a father turned gay activist in self-defense, as a last ditch strategy. His politics is essentially private.

Another story is one in which Salgueiro, having 'come out' as a homosexual, divorced his wife in order to go and live with another gay man, just as other couples do, and then having claimed custody over his daughter, in order to be able to be her father, just as other fathers do, is conscious of the gay activism in his application. In this reading, the politics of the applicant is at the avant-garde of gay activism. After decriminalization comes the rest of the emancipatory struggle for normalization in other fields of life, not just in the intimate sexual activities of the bedroom. This is a homosexual father shocked and offended by the "atavistic misconceptions" and the lack of "common sense" that still prevails in a part of Portuguese society, and which needs to change. His politics is essentially public.

The facts about the applicant are thus ambiguous, or rather, they ride both tracks. The only fact that makes it lean towards the side of a public politics, is the fact that he chose not to be anonymous. On the other hand, had he chosen for anonymity, he would have undermined his argument that there is nothing abnormal about being a father-who-happens-to-be-gay. If you *have to* play the sexual identity card, do it right.

Before going to Strasbourg, however, the quest of Salgueiro for contact with his daughter was devoid of explicit sexual identity politics. Before the court of first instance he argued that his former wife had simply not respected the agreement made between them. Then came her allegations of sexual abuse, which were not only considered to be unfounded by the psychologist's report but also probably induced by someone else than the daughter herself. The report also noted that the maternal grandmother was causing anxiety to the child by her total opposition to the 'lifestyle' of Salgueiro. The psychologist's report even considered one particular possible effect of his living with another man:

> In a report dated 17 January 1994, drawn up following a meeting between the daughter and her father, the psychologist concluded that 'although M. has observed during her meetings with her father that he is living with another man, her parental images have been fully assimilated and she presents no problem relating to psychosexual identity, be it her own or that of her parents'.[779]

The same report also reiterated the excellent qualities that Salgueiro had as a parent, qualities that the mother also seemed to have, even if she was "rather permissive" but "capable of improving." It considered it unwise for the child to live with her maternal grandmother. In an interim decision "given with the agreement of both parents" the first instance court ordered that the mother should allow the father to have some contact, but the mother never complied. Meanwhile a child psychiatry department in a hospital "decided that M. should be monitored because her feelings of anxiety were such as might inhibit her psychoaffective development."[780] A few months later the first-instance Court awarded custody and care to Salgueiro, while giving the mother visiting rights.

We can already see a complex interaction on the level of the distinction between the public and the private, a complexity which is inherent in legal disputes concerning family law. Custody after separation is based on an agreement between the parents, that is a 'private' agreement, but one that has a specific 'public' (legal) status. At least in first instance, since this agreement can be overturned by a court, that is by a public body. When doing this, the court can be as thorough as it wants to, leaving no stone unturned, nothing private left uncovered and brought to public scrutiny. The well-being of the child becomes an issue for court psychologists and psychiatrists, as well as for judges. It becomes a public issue, just like the mental health of the parents. Psychobabble is employed to objectify the subjective: "psychosexual identity," emotional and cognitive development, psychoaffective development, etc. All this jargon allows for the personal wellbeing of the child to become an issue that can be publicly debated. In the end, the private agreement is overturned by a public decision, based of course on the subjectivity of the 'experts'. Even the grandmother's subjective problems concerning Salgueiro's 'lifestyle' or

779 *Id.* at § 14.
780 *Id.*

homosexuality, are described by these experts as caused by the objectively existing "religious fanaticism present in her environment." In this way, public judgment of the parents' ability to be parents can overturn whatever decision they had previously made. This is ultimately legitimized by the fact that there now exists a disagreement that has been brought before the court.

In the case before the court of first instance, the whole issue of Salgueiro's sexual identity plays a marginal role, together with many other considerations. Attempts by the mother to bring it to the foreground apparently have a counterproductive effect of undermining her good will. Moreover, her total refusal to allow the father to have contact with his daughter (on the ground of his homosexuality and the alleged sexual abuse) seem to disqualify her as a parent since it affects the child's "psychoaffective development."

The Lisbon Court of Appeal starts its examination (which is based merely on the material handed to it by the court of first instance) by repeating what is the "the essential issue of the case, that is to which of the two parents custody of the child should be awarded."[781] The essential issue seems to be one of a public nature, the court awarding custody after choosing one of the two parents. However, the Court of Appeal has certain fundamentally different appreciations from those of the court of first instance. First, and of fundamental importance, is the fact that the initial assessment made by Salgueiro when he awarded custody to his ex-wife has, in the eyes of the Court of Appeal, not lost credibility. The fact that he now disagrees with his own initial assessment is not a reason for doubt. Second, and in support of the first, the maternal grandmother's 'religious fanaticism' is dismissed, since the father has not produced evidence that their religion is harmful. Third, and also in support of the first, is the fact that the Court attributes the mother's uncooperative behavior to a particularly serious cause:

> There is ample evidence in this case that the appellant habitually breaches the agreements entered into by her with regard to the father's right to contact and that she shows no respect for the courts trying the case, since on several occasions, and without any justification, she has failed to attend interviews to which she has been summoned in the proceedings. We think, however, that her conduct is due not

781 *Id.*

> only to [the applicant]'s lifestyle, but also to the fact that she believed the indecent episode related by the child, implicating the father's partner.
> On this point, which is particularly important, we agree that it is not possible to accept as proven that such an episode really occurred. However, we cannot rule out the possibility that it did occur. It would be going too far—since there is no conclusive evidence—to assert that the boyfriend of M.'s father would never be capable of the slightest indecency towards M. Thus, although it cannot be asserted that the child told the truth or that she was not manipulated, neither can it be concluded that she was telling an untruth. Since there is evidence to support both scenarios, it would be wrong to give greater credence to one than the other.[782]

Now, if this is a credible argument, then any adult, and in particular any masculine adult, including the mother's new boyfriend J., are suspect. But as we have already seen in previous cases, one main reason to remain suspicious of homosexuality, even when decriminalized, is the protection of the young and innocent. The allegation of sexual abuse could only be as credible as its lack of evidence if one was inclined to think that a homosexual man such as Salgueiro's partner, was more prone to do this than a heterosexual man, such as J. Already my suspicion of homophobia is raised. This suspicion grows when the Court of Appeal states that

> In the same way, the accepted principle in cases involving awards of parental responsibility is that the child's interests are paramount, completely irrespective of the—sometimes selfish—interests of the parents. In order to establish what is in the child's interests, a court must in every case take account of the dominant family, educational and social values of the society in which the child is growing up.[783]

The reference to the 'dominant values' signals the overruling of considerations about to come, considerations that the first instance court apparently, and even obviously, did not take into account. Having already undermined

782 *Id.*
783 *Id.*

many of the essential assumptions of the lower court, the Court of Appeal then invokes a drastically different source of expertise

> As we have already stated and as established case-law authority provides, having regard to the nature of things and the realities of daily life, and for reasons relating to human nature, custody of young children should as a general rule be awarded to the mother unless there are overriding reasons militating against this.[784]

The source of expertise invoked is of course as objectified and publicly accessible as the jargon of the psychologist, albeit that 'the nature of things' and 'human nature' are commonly invoked to refer to a traditional distribution of gender-roles and to a homophobic vision of sexuality. The emphasis on the importance of the mother is however laid in order to present a second essential issue in the case:

> In the instant case parental responsibility was withdrawn from the mother despite the fact that it had been awarded her, we repeat, following an agreement between the parents, and without sufficient evidence being produced to cast doubt on her ability to continue exercising that authority. The question which therefore arises, and this should be stressed, is not really which of the two parents should be awarded custody of M., but rather whether there are reasons for varying what was agreed.[785]

Thus, the Court of Appeal moves from one essential issue, one in which the public decision on how to allocate custody over the child, is replaced by the question of whether there are sufficient reasons to abandon the private agreement originally reached between the parents. In the first essential issue, the existing disagreement is a central starting point, opening up space for a totally new assessment. In the second essential issue, the initial or original agreement has most credibility and one needs good reasons to depart from it. In the first, the public assessment is decisive. In the second, the original private assessment rules unless there are overwhelming public reasons.

784 *Id.*
785 *Id.*

The Court of Appeal, however, does not want to run the chance of being misunderstood due to technical sophistries. Like the Irish Supreme Court in *Norris*, it makes a frontal attack on its target:

> The fact that the child's father, who has come to terms with his homosexuality, wishes to live with another man is a reality which has to be accepted. It is well known that society is becoming more and more tolerant of such situations. However, it cannot be argued that an environment of this kind is the healthiest and best suited to a child's psychological, social and mental development, especially given the dominant model in our society, as the appellant rightly points out. The child should live in a family environment, a traditional Portuguese family, which is certainly not the set-up her father has decided to enter into, since he is living with another man as if they were man and wife. It is not our task here to determine whether homosexuality is or is not an illness or whether it is a sexual orientation towards persons of the same sex. In both cases it is an abnormality and children should not grow up in the shadow of abnormal situations; such are the dictates of human nature and let us remember that it is [the applicant] himself who acknowledged this when, in his initial application of 5 July 1990, he stated that he had definitively left the marital home to go and live with a boyfriend, a decision which is not normal according to common criteria.[786]

For the Court it is more than self-evident what is the best environment for the child. Even if in the traditional Portuguese setting the father is a drunken useless wife beater, nevertheless it is obvious it is the normality of it which will ensure the best environment for Salgueiro's daughter, and not "the shadow of abnormal situations." In this sense, for the Court of Appeal, all roads lead to Rome. In the first essential issue, with the emphasis on the public perspective, it is the fact that gays are obviously abnormal that leads to the decision that the mother has custody. And in the second essential issue, it is the fact that no good reason has been given to depart from the original private assessment of both parents, even though they now disagree, that leads to the decision that the mother has custody.

786 *Id.*

In case one doubts the evidence of the Court's consciousness of the dangers of homosexuality, there is always the fact that even though it reaffirmed the father's right to have contact with his daughter, it considered that

> It should be impressed upon the father that during these periods he would be ill-advised to act in any way that would make his daughter realise that her father is living with another man in conditions resembling those of man and wife.[787]

And to come back to the politics of this case, and the public-private ambiguity when assessing the politics of João Salgueiro, it seems that within the Court the issue was less ambiguous. The dissenting opinion of one of the three domestic judges shows how there was an obvious politics of the public, a struggle concerning the extent to which the *abstraction* of the decriminalization of homosexual practices could be seen as an emancipation of the homosexual identity:

> One of the three Court of Appeal judges gave the following separate opinion: "I voted in favour of this decision, with the reservation that I do not consider it constitutionally lawful to assert as a principle that a person can be stripped of his family rights on the basis of his sexual orientation, which—accordingly—cannot, as such, in any circumstances be described as abnormal. The right to be different should not be treated as a 'right' to be ghettoised. It is not therefore a matter of belittling the fact that [the applicant] has come to terms with his sexuality and consequently of denying him his right to bring up his daughter, but rather, since a decision has to be given, of affirming that it cannot be declared in our society and in our era that children can come to terms with their father's homosexuality without running the risk of losing their reference models."[788]

It is unclear why he voted in favor of the decision, and it makes one wonder that there might have been other reasons than the applicant's homosexuality, reasons not spelled out here. Aside from this, this passage raises an

787 *Id*.
788 *Id.* at § 15

interesting point about "the right to be different," as the decriminalization of homosexual acts is now being called. In one way, this right to be different enforces the narrative about 'normality' that the judgment embraces. In other words, to be different is to be different *from something else*. And when this is not mentioned specifically one will think that to be different is to be different from *everything else*... or, if one prefers, the 'prevailing standards', the 'general', the public. The private here is described as odd, as 'different' from the norm, as transgressive of the normal. In this, he agrees with the other judges. Where he disagrees is that this private should not be ostracized or otherwise belittled. It should not be 'ghettoized', as he puts it, in reference to the trap of the ghetto, the trap laid out by anti-Semitism, or racism, or poverty, or anything else that should not be supported. This passage illustrates that once you have established that something is allowed to be different, or private, you will still face a normative question: private in what way and with which consequences? Determining the public-private nature of something, in this case homosexuality, is in fact what everybody does, both the homophobes as the anti-homophobes.

This anonymous judge will find support in the European Court. As for Salgueiro, in spite of everything, at the time of the judgment in Strasbourg, he had still not been able to see his daughter. The facts of the case end on the sad note that "the enforcement proceedings are apparently still pending."[789] Even if he was successful in his public politics, he remains in the struggle of his private one.

10.3.2.1.2. Lustig-Prean & Beckett, and Smith & Grady: Dragged Out of the Army Locker

10.3.2.1.2.1. The Applicants, Their Ordeal, and Their Politics

The two cases involve four applicants who found themselves in very similar circumstances. Duncan Lustig-Prean and John Beckett had both enrolled in the Royal Navy and had impressive records and promising careers. Jeanette Smith and Graeme Grady had joined the Royal Air Force and were the delight of their superiors, again with excellent evaluations and a bright future in the armed services. The four careers, however, came to sudden and bleak

789 *Id.* at § 18.

ends. Anonymous information and gossip triggered off investigations by the 'service police' of the respective forces into their alleged homosexuality. In what followed the service police treated their cases with the outmost seriousness, interrogating them thoroughly, even after they admitted that they were homosexuals, interrogating other people that could know something, searching their premises or lockers.

Seen from a public-private perspective, the facts in this case are a jungle of immense variety. There is, to begin somewhere, the violence of cornering someone who is an alleged homosexual, the intimidation that oozes off the descriptions of the interrogation, the unnecessary and mostly quite stupid questioning about the details of sexual habits, the fact that they wanted names of partners and even previous partners. The question that one can project a face and a uniform on, in some room with a desk and a few chairs: "do your parents know that you're homosexual?" But perhaps I should just quote one particular description. This is paragraph 19 of *Lustig-Prean and Beckett*, giving account of the investigation into the homosexuality of John Beckett:

> The applicant's interview with the service police then resumed and lasted approximately one hour. The applicant immediately confirmed his homosexuality, later clarifying that he first had "niggling doubts" about his sexual orientation approximately two and a half years previously [after he had joined the navy, JMAC]. He was then questioned about a previous relationship with a woman; he was asked the woman's name and where she was from, when he had that relationship, why it ended, whether they had a sexual relationship, whether he enjoyed their relationship and whether "she was enough for you". Details were sought as to how and what he did when he realised he was homosexual and, in this respect, he was asked what sort of feelings he had for a man, whether he had been "touched up" or "abused" as a child and whether he had bought pornographic magazines.
>
> The applicant was then questioned about his first and current homosexual relationship which began in December 1992 and, in this regard, he was asked about his first night with his partner, who was "butch" and who was "bitch" in

> the relationship and what being "butch" meant in sexual terms. Detailed questions were put as to how they had sex and whether they used condoms, lubrication and other sex aids, whether they ever had sex in a public place and how they intended to develop the relationship. He was also asked about gay bars he frequented, whether he had ever joined contact magazines, whether his parents knew about his homosexuality and whether he agreed that his secret life could be used as a basis to blackmail him and render him a weak link in the service. The personal slides and postcards which had been taken from his locker were examined and the applicant was questioned in detail about their contents.[790]

One question that lingers through my mind when reading this description is "where does it come from?" Is it a faithful recollection by the applicant, as recounted to his lawyers who then sent it to Strasbourg where it was just copied and pasted by a clerk of either the Court or the Registry? Or is it—and this is my first suspicion actually—an even more faithful description taken from the service police report of 'the interview' which the interrogating officers elaborately typed out that afternoon before going home, using the extensive notes taken during the questioning? Descriptions from the *Smith and Grady* case have some odd details, like that an interview began at 2.35 p.m. and was 'adjourned' at 3.14 p.m. This sounds like a service police report to me. But why does this matter? Well, to me it is an integral part of the thoroughness and rigor with which this bureaucratic ritual was performed. The 'butch and bitch' question was not just the excess of some rabid homophobe, but something considered necessary. *Everything* was relevant information and thus necessary to be asked. Nothing is off limits, 'none of your business', or too private. Even when so presented, it is so drenched in the intimidating atmosphere of the interrogation that it can rather be seen as cynical or sarcastic, as in the questioning of Duncan Lustig-Prean:

> The interviewer also enquired of the applicant "purely as a matter of interest, although it's a personal thing" whether the applicant was HIV-positive. In this context, it was indicated a number of times to the applicant that the purpose of the second interview was to avoid further investigations. He

790 *Lustig-Prean*, *supra* note 704, at § 19.

> was also told that it would "come back" on the applicant's interviewer if the latter did not properly follow up on the anonymous letter.[791]

This is an all-encompassing public sphere, of the Big Brother type, where anonymous snitches or informers trigger off anonymous investigations that do not see any boundary to the extent in which they can 'intrude' into the lives of the not merely alleged but even admitted homosexuals. I bracket the intrusion because that would make it seem as if there was a place where the investigator was not already there. Many investigations started after anonymous phone-calls or letters, and the applicants are told that the service police has "'a lot of background knowledge about certain things' and there was somebody 'providing information to us'." And even if there is something that they do not know, there is no problem, as Graeme Grady was told after he had denied his homosexuality:

> One of the investigators then asked him: "… if you wish to change your mind and want to speak to me, while I'm still here, before I go back to Washington; because I'm going back to Washington. Because I'm going to see the Colonel tomorrow, that is the one in London, who is then going to see the General and we're going to get permission to speak to the Americans … and I shall stay out there, Graeme, until I have spoken to all Americans that you know. Expense is not a problem. Time is not a problem …"[792]

You better believe it! And Graeme did. The next day he did not require a solicitor anymore and he "admitted his homosexuality almost immediately." Of course that was not the end of the investigation, since it then took on the style that I have already quoted from the case of John Beckett. Graeme Grady was the only one who initially denied the allegations. The other three easily or docilely admitted to being homosexuals, all being quite open and collaborative about the investigation as a whole. Duncan Lustig-Prean even seemed to want to save the investigators from going through any unnecessary trouble:

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791 *Id.* at § 14.
792 *Smith and Grady*, *supra* note 705, at § 26.

> The applicant indicated that he was anxious to assist the service police to make sure that the issue was kept as "private and discreet as possible". He was then informed that a search was normally completed but the search did not take place since, in anticipation, the applicant had already cleared his cabin of any incriminating evidence.[793]

The particular consideration for privacy and discretion is one of secrecy and deceit. The public investigation is not about making scandals or about ruining reputations. It is about rooting out one particular weed, evil, 'threat to security', or whatever homosexuality may represent to the navy and air force. The lack of privacy described above is limited to the level of the homosexuality. The mere possibility of homosexuality brings down any private barrier, but once localized it is contained and even somewhat isolated in a 'privacy' of its own. But this privacy has an inside that remains 'discreet' and an outside that is made visible, like the stripes and insignia on a uniform. The four applicants are 'administratively discharged' from their functions, all because of their homosexuality.

Each description of the applicants has the same structure: it starts and ends with their military personae and in the middle there is the ordeal of the investigation. The homosexuality, the private part, is sandwiched in the middle, and the curriculum vitae as a public head and tail. Here's the example of Jeanette Smith, the only woman and the one with the smallest number of superlatives in the qualifications:

> On 8 April 1989 Ms Jeanette Smith (the first applicant) joined the Royal Air Force to serve a nine-year engagement (which could be extended) as an enrolled nurse. She subsequently obtained the rank of senior aircraft woman. From 1991 to 1993 she was recommended for promotion. A promotion was dependent on her becoming a staff nurse and in 1992 she was accepted for the relevant conversion course. Her final exams were to take place in September 1994.[794]

793 *Lustig-Prean*, *supra* note 704, at § 13.
794 *Smith and Grady*, *supra* note 705, at § 11.

> The investigation report was sent to the applicant's commanding officer who, on 10 August 1994, recommended the applicant's administrative discharge. On 16 November 1994 the applicant received a certificate of discharge from the armed forces. An internal air force document dated 17 October 1996 described the applicant's overall general assessment for trade proficiency and personal qualities as very good and her overall conduct assessments as exemplary.[795]

Why the emphasis on their good performance and first-rate qualities? Does it make any difference? Of course, it does seem to make things easier, to in advance dispel any possible doubt about the qualities of the (homosexual) applicants, just in case the reader, or the Court, might wonder. One can focus on the homophobia without being distracted by other possible considerations. In that sense, the description has a pastiche quality, with a simple but crystal-clear confrontation between the public which is nice, produces first-class professionals and recognizes their qualities, and the public which is not so nice, the one that has this obsession with homosexuals and spares no energy, expense or time to amputate it before it causes any damage to morale, effectiveness, security, or whatever. The nice public is the 'public' or visible one, the public-public, while the not so nice public is the one that operates in anonymity and does the 'dirty' work, the private-public one.

As we can see, the army is not all that bad. In spite of the fact that Jeanette Smith needed to be discharged for being a lesbian, it is still able to see her 'other', non-sexual, public qualities. And it does not seem that there was an indiscretion in that the certificate of discharge has a big 'homosexual'-stamp on it. At least we do not know, or it does not matter anymore, since all four have gone public and have decided to challenge the decision before the High Court, using their full name. Again, like in *Salgueiro*, this seems to be a private politics gone public: "Look how irrational the army is, discharging people that it has itself acknowledged to be top-class!" Their queer identity is presented unashamed, with a name and a face, the private turned public, while at the same time telling the public to back off from the private.

The domestic proceedings were, as can be expected since the case went on to the Strasbourg Court, unsuccessful. The Courts in fact agreed with the

795 *Id.* at § 16.

applicants, found the army's justifications unconvincing, and the policy as a whole not meriting support. There was, of course, the reference to the 'exemplary service records' of the applicants, but also some kind of empathy with their private plight:

> He noted that the cases illustrated the hardships resulting from the absolute policy against homosexuals in the armed forces and that all four of the applicants had exemplary service records, some with reports written in glowing terms. Moreover, he found that in none of the cases before him was it suggested that the applicants' sexual orientation had in any way affected their ability to carry out their work or had any ill-effect on discipline. There was no reason to doubt that, but for their discharge on the sole ground of sexual orientation, they would have continued to perform their service duties entirely efficiently and with the continued support of their colleagues. All were devastated by their discharge.[796]

They did however dismiss the claims and subsequent appeals for the reason that the discharges were not sufficiently "unreasonable" and had not "reached the threshold of irrationality" which in these cases was so high. As for the issue of discrimination, the existing non-discrimination rules did not apply to discrimination on the basis of sexual orientation. I will deal with the proceedings in the paragraph on the domestic law and proceedings, below. In this part however, I will deal with the Ministry of Defence policy on homosexual personnel in the armed forces, the parts of which are identical in both cases.

10.3.2.1.2.2. The Policy Concerning Homosexuals in the Army

Basically, the Ministry of Defence policy, as described in the case, is a mixture of guidelines for dealing with 'it' and an apology for, or justification of, the policy itself. Again, it is perhaps best to start with a quotation from the Guidelines themselves, as quoted in *Lustig-Prean and Beckett*:

796 *Id.* at § 30.

> The Guidelines provided, *inter alia*, as follows: "Homosexuality, whether male or female, is considered incompatible with service in the armed forces. This is not only because of the close physical conditions in which personnel often have to live and work, but also because homosexual behaviour can cause offence, polarise relationships, induce ill-discipline and, as a consequence, damage morale and unit effectiveness. If individuals admit to being homosexual whilst serving and their Commanding Officer judges that this admission is well-founded they will be required to leave the services. (...) The armed forces' policy on homosexuality is made clear to all those considering enlistment. If a potential recruit admits to being homosexual, he/she will not be enlisted. Even if a potential recruit admits to being homosexual but states that he/she does not at present nor in the future intend to engage in homosexual activity, he/she will not be enlisted. (...) In dealing with cases of suspected homosexuality, a Commanding Officer must make a balanced judgment taking into account all the relevant factors. (...) In most circumstances, however, the interests of the individual and the armed forces will be best served by formal investigation of the allegations or suspicion. Depending on the circumstances, the Commanding Officer will either conduct an internal inquiry, using his own staff, or he will seek assistance from the Service Police. When conducting an internal inquiry he will normally discuss the matter with his welfare support staff. Homosexuality is not a medical matter, but there may be circumstances in which the Commanding Officer should seek the advice of the Unit Medical Officer on the individual concerned and may then, if the individual agrees, refer him/her to the Unit Medical Officer. (...) A written warning in respect of an individual's conduct or behaviour may be given in circumstances where there is some evidence of homosexuality but insufficient (...) to apply for administrative discharge (...). If the Commanding Officer is satisfied on a high standard of proof of an individual's homosexuality, administrative action to terminate service (...) is to be initiated (...)."[797]

797 *Lustig-Prean*, *supra* note 704, at § 42.

This is first of all a policy of *prevention*. It is not required that all these negative consequences, such as offence, polarized relationships, etc., actually occur. And it is not even merely the 'sexuality' of the homosexual which is the focus of alert, but also the openly 'being' of a homosexual, even without the sexual activities, which could cause offence, damage morale and unit effectiveness, etc. It would seem that any cross-gender attitude is what the army is concerned about, like effeminate men or sexually aggressive women. But admittedly, this is not explicit or clear. What is clear is that it concerns homosexuality in the widest sense, and all forms and degrees are dangerous. There is no distinction between benign or malign forms of homosexuality, and thus there is apparently no need to have anything like a checklist of what to look for. It is not a medical 'matter', or otherwise a matter that would generally require some form of professional expertise. Common sense should be enough in most cases. The mere admission once someone has been enlisted, is however not sufficient, since the Commanding Officer needs to consider it 'well-founded'. In this sense, the Guidelines mirror my previous analysis of the investigation of the four applicants. Wherever there might be homosexuality, there is no private sphere. There shall be an investigation, and for all concerned this one is formal, thus public in the sense that it is by the army as an institution, using its special service police to do it, applying strict rules. As seen in the case of the four applicants, any 'private' suspicion has to go through public channels, even if it can remain in the privacy of anonymity. This 'public' aspect serves to contain the suspicions, localize and break through any private barriers, and ultimately to isolate and expel homosexuality. In this description it is not so much a dirty job, as much as it is a form of maintenance or even surgery.

In all of this, and elsewhere in the cases, there is the constant invocation of the *particularity* of the armed forces. The ultimate justification for this policy, which according to the English judges does not make much sense, but is not sufficiently 'irrational' to do anything about it is that the army is not the same thing as the rest of society. It is a public sphere within the public sphere. It is a sphere that is public as regards its community, its communal requirements, and the requirements of its special and specialized function. But because it is so special and different from the rest, it is a private sphere within the overall public sphere. This allows it to claim a different application of rules in its attitude towards something that has, elsewhere in society, been decriminalized. But that is the second difference: it is not just the army that

is different; homosexuals are different, as well. They are a public category in themselves, different from the whole. All seems to come together in a different domestic case brought by a homosexual, where the Secretary of State for Defence argued as follows:

> The policy of the Ministry of Defence is that the special nature of homosexual life precludes the acceptance of homosexuals and homosexuality in the armed forces. The primary concern of the armed forces is the maintenance of an operationally effective and efficient force and the consequent need for strict maintenance of discipline. [The Ministry of Defence] believes that the presence of homosexual personnel has the potential to undermine this.
>
> The conditions of military life, both on operations and within the service environment, are very different from those experienced in civilian life. … The [Ministry of Defence] believes that these conditions, and the need for absolute trust and confidence between personnel of all ranks, must dictate its policy towards homosexuality in the armed forces. It is not a question of a moral judgement, nor is there any suggestion that homosexuals are any less courageous than heterosexual personnel; the policy derives from a practical assessment of the implications of homosexuality for fighting power.[798]

We've seen this before in *Dudgeon*, where the Court based itself on different than moral considerations. Morality has nowadays become a complex issue, too splintered up a public sphere and in fact too private or subjective to be used as leverage in many public debates. It even has to be explicitly disclaimed in order to be seen to be objective. It all becomes a practical question, based on a rational assessment of 'facts'. It is not said so directly, but the quotation allows for the deduction of a number of 'factual' differences about homosexuals, beyond the fact that they are of a 'special nature'. They seem to have the potential to undermine a strict maintenance of discipline and the absolute trust and confidence between personnel.

798 *Id.* at § 43.

The argument of difference allows the user to claim a kind of authority towards the interpretation of the facts that justify the policy adopted. The claim to difference supports the claim to authority over that which is different: "We know the conditions of army life, and we know that homosexuality doesn't fit there." This position can however become difficult to sustain in a case like the present one, where there seemed to be so much enthusiasm within the armed forces with regards to the homosexual applicants. The army was aware of that, as is illustrated in *Smith and Grady*:

> In August 1995 a consultation paper was circulated by the Ministry of Defence to "management" levels in the armed forces relating to the Ministry of Defence's policy against homosexuals in those forces. The covering letter circulating this paper pointed out that the "Minister for the Armed Forces has decided that evidence is to be gathered within the Ministry of Defence in support of the current policy on homosexuality". It was indicated that the case was likely to progress to the European courts and that the applicants in the judicial review proceedings had argued that the Ministry of Defence's position was "bereft of factual evidence" but that this was not surprising since evidence was difficult to amass given that homosexuals were not permitted to serve. Since "this should not be allowed to weaken the arguments for maintaining the policy", the addressees of the letter were invited to comment on the consultation paper and "to provide any additional evidence in support of the current policy by September 1995". The consultation paper attached referred, *inter alia*, to two incidents which were considered damaging to unit cohesion. The first involved a homosexual who had had a relationship with a sergeant's mess waiter and the other involved an Australian on secondment whose behaviour was described as "so disruptive" that his attachment was terminated.[799]

In spite of the fact that the army did not have 'factual evidence', this was actually presented as something supporting its position. Nevertheless, if 'they' want factual evidence, we can give it to them: see two examples

799 *Smith and Grady*, *supra* note 705, at § 33.

of what happens when gays join the army. The argument that these could have been heterosexual incidents as well does not seem to be considered, since it has been decided in advance that the evidence has to support the existing policy. And this comes from the top of the public establishment. In this, and in the rest of the case where the government defends the policy, and the legislature doesn't change it in spite of the judges' objections, we see the public as interconnected but separate parts, partly centralized and hierarchical, partly a more horizontal distribution of different competence's or jurisdictions. But I will return to this when looking at the domestic law.

10.3.2.1.3. A.D.T. v. U.K.: Group Sex and Videotapes

The facts in this case are briefly set out in paragraphs 8-11.[800] It starts with the observation that "the applicant is a practising homosexual," and this is all that we will find out about him, except for the fact that he gets together with 'up to four' other men in his house and they have group sex and shoot it on video. Now, does it matter that A.D.T. is a "practising homosexual"? As a denomination it seems at the least somewhat unnecessary. In a sense, this case is unlike all the other cases concerning homosexuality. Since the applicant chooses to remain anonymous, the politics seems to be, paradoxically, more of a private nature than in the rest of other cases. Perhaps he has not come out as a homosexual. Perhaps it is the fact that he practices group sex that he doesn't want others to know. Perhaps he just doesn't want to join the ranks of gay martyrs and heroes. It seems in any case to be a private cause and he wants to claim the rights conquered in the previous gay cases. He does not seem to want to exploit homosexuality as an identity. But then again, it could be the exact opposite, since the only identity we know of him is his sexual identity. Whatever the motives and reasons, this case starts with the rubber stamp of a public category that by now has achieved an accepted status, albeit with limitations. Is it necessary to do this in order to justify the acts involved? Would they not make sense anymore if he wasn't a "practising homosexual"? Or is it exactly these acts that force him into this category? Somehow, the sense is that there is less empowerment for the applicant in this identity, as compared to the other cases we have seen.

For reasons unknown to us the police searches his house and seizes photographs and videotapes. The videotapes apparently show up to four

800 *A.D.T., supra* note 708, at §§ 8-11.

men engaging in "oral sex and mutual masturbation." A.D.T. is then charged with "gross indecency between men" contrary to the Sexual Offences Act 1956. The charge related to the commission of the sexual acts depicted in one of the videotapes and did not relate to the videotapes. The case then describes how:

> On 30 October 1996, the applicant appeared before a Magistrates' Court. The principal evidence adduced by the Crown consisted of a single specimen video containing footage of the applicant and up to four other men engaging in acts of oral sex and mutual masturbation. The acts which formed the basis of the charge involved consenting adult men, took place in the applicant's home and were not visible to anyone other than the participants. There was no element of sado-masochism or physical harm involved in the activities depicted on the video tape. The applicant was convicted of the offence of gross indecency. On 20 November 1996 the applicant was sentenced and conditionally discharged for two years. An order was made for the confiscation and destruction of the seized material.[801]

The elements of *Dudgeon* are all there: adult men, apparently consenting, in the privacy of the applicant's house, assumedly with the curtains closed. Then there is the curious description of what it was not: there was no sadomasochism or 'physical harm'. This is a reference to the one previous group sex case in Strasbourg, *Laskey, Jaggard, and Brown*, which I will discuss below. This seems to be the Strasbourg checklist in a nutshell and since the answer to the sadomasochism question was a 'no', the case seems won. But not in the U.K., where he did not even appeal since there was no prospect of success there. The case went on to Strasbourg.

801 *Id.* at § 10.

10.3.2.2. Selected Public-Private Themes

10.3.2.2.1. Salgueiro: the Politics of Difference

The main question that the Court dealt with in *Salgueiro* was whether it amounted to discrimination. So, while the applicant claimed a violation of article 8 jo. 14, as well as a violation of article 8 taken alone, the Court chose to deal only with the question of discrimination and, having found a violation there, considered it not necessary to deal with the issue of article 8 taken alone.[802] Of course, in dealing with the discrimination issue, one can get a feel of how the Court would look at article 8 taken alone, but to me the choice of focusing on discrimination is not necessarily the most obvious one, let alone a neutral one.

After decriminalization the issue is whether a man like Salgueiro is sufficiently similar to disregard his homosexuality, or sufficiently different to allow it to be an issue. In the court of first instance, and in spite of the mother's attempts, it seemed as if the sameness prevailed and his homosexuality was not made into a particularly important issue. The court of appeal however, and in disregard of all the experts, did consider the difference to be at the center of the matter. One public-private story to be told here is how, in Strasbourg, the government tried to marginalize the court of appeal's observations on the homosexuality-aspect, calling them "merely sociological, or even statistical, observations" or "clumsy or unfortunate expressions [that] could not in themselves amount to a violation of the Convention."[803] The Court rephrased the issue as concerning the need to establish whether the homosexuality-factor "was merely an *obiter dictum* which had no direct effect on the outcome of the matter in issue or whether, on the contrary, it was decisive."[804] In this story, the court of appeal's ideas on homosexuality are either mere private opinions that sort of cling on to the legal questions, or they are the main decisive factors, which are the only ones to be taken into account, as those alone are truly public. *Obiter dicta* here are expressions of a court's desire to say something political, not really required in the resolution

802 It has never really been an issue that doctrine has addressed, how the Court molds the issues like this and does not consider this or that necessary to examine. However, it seems to me to be one of the most explicit expressions of the Court's versatility, even though the logic of it is never readily apparent to me.

803 *Salgueiro*, *supra* note 706, at § 32.

804 *Id.* at § 33.

of a case but indicative of the judge's opinions on how certain issues external to the case should be. In this public-private story, the government's attempt to maneuver the remarks into the private fail, as the Court considers it too obvious that the politics of that case were about the sexual orientation of Salgueiro. Interestingly, though, the Court does not contradict the public-private dichotomy proposed by the government, i.e. that parts of judgments are less relevant because more private, and other parts relevant because more public. In that sense, one is left with the feeling that if only the court of appeal would have been more subtle, if only it would have left its opinions to itself and have merely disagreed on what "the essential question" was, then it could have escaped the accusation that it was discriminating. In that case the European Court could have said that the national court was 'wrong', but with more difficulty that it was discriminatory.

In this sense, the choice for the focus on discrimination starts to make more sense. Not only is it easier to disagree with the national court of appeal, but it allows the Court to easily avoid all kind of difficult questions like whether gay couples have the right to family life or not, whether this right can be interfered with "when necessary in a democratic society," etc.

Of course, one can wonder whether the court of first instance was completely in disregard of Salguiero's new gay life. On the contrary, that court seems to be more concerned with the homophobia of the mother and grandmother, and how that affects the child, than with anything else. In that sense, concern with homophobia is putting homosexuality in the same 'decisive' category that the court of appeal did.

On a different level, the distinction between sameness and difference as employed in this case is a public-private distinction. Sameness is the condition for belonging to the group, to the public sphere, while difference belongs in the private sphere. Employing difference as a strategy within the public sphere threatens the clarity of the distinction and the peace and tranquility of the public sphere itself. At the same time, this 'sameness' is of course the main locus of emancipatory politics. *Obvious* differences that have collapsed in the course of the last century are the obvious difference between people from different social classes, the obvious difference between people of different races, and, last but not least, the obvious differences between men and women. The paradox is that the most effective way of attacking

the obviousness of the difference is by emphasizing the difference itself, which exposes the exclusive character of the 'sameness', which suddenly becomes visible as being Eurocentric, hetero-phallo-logocentric, white, etc. In the same way, emphasizing sameness or we-ness can be very effective as an oppressive ideological strategy.[805]

It would seem to me in the case of Salgueiro that both national courts were aware that this case was about the sameness/difference of homosexual fathers. The court of first instance even emphasized the difference of Jehova's witnesses ('religious fanaticism') to defend the sameness of Salgueiro. For the court of appeal the difference was so obvious that it exposed itself to the charge of "atavistic misconceptions." It was this obviousness that ultimately became the problem in Strasbourg. It was the obviousness that the Court found to be in violation of the Convention. That is, as far as discrimination is concerned. Just because the difference between homosexuals and heterosexuals is not as obvious as the Lisbon court of appeal would like it to be, that doesn't mean that there is no difference anymore, or no obvious difference for that matter. Perhaps for this reason it was also not necessary to deal with article 8 taken alone.

10.3.2.2.2. The Army Cases

10.3.2.2.2.1. Unity and Fragmentation in the Domestic Constitutional Setting

In the domestic proceedings in the army cases the main issue seems to be the relation between the government and the courts and the kind of review that judicial organs are allowed to exercise over the policies at hand. Overall, both the High Court and the Court of Appeal are no friends of the policy on homosexuals in the army. They considered that "the balance of argument clearly lay with the applicants,"[806] the justification for the ban on homosexuals "unconvincing,"[807] the applicants' arguments "of very considerable cogency,"[808] and that the policy was "ripe for review and for

805 This rhetorical and political dynamic is, in a terribly small nutshell, what is behind the big debates about identity politics and the politics of 'integration' by migrants, often referred to as 'the politics of difference'; *see, e.g.,* Young, *supra* note 390.

806 *Lustig-Prean*, *supra* note 704, at § 23.

807 *Id.* at § 24.

808 *Id.* at § 30.

consideration of its replacement by a strict conduct code."[809] Nevertheless, the request for review was rejected in both courts, "albeit with hesitation and regret."[810] The reason for this lay in the ruling doctrines on the kind of judicial review of governmental policies allowed to the courts. This doctrine bears the name of the so-called "Wednesbury principles," but is also referred to as the "threshold of unreasonableness or irrationality," meaning that a policy cannot "outrageously defy logic or accepted moral standards," or any of the several other ways that the judges used to describe the threshold. In short, unless the policy is completely crazy, the judges are not allowed to rule on it. In this case, even though there was almost everything wrong with the policy (at least according to the judges), none of them found the policy, or the government's justification for it, sufficiently irrational, unreasonable, outrageous or crazy. They could therefore not review it. First, it seems clear that even so, the courts did review it. Not formally, and lacking the power to do anything about it, but there was sufficient review to say that there was everything wrong with the policy. When later reviewing the policies itself, the Strasbourg Court even referred to the Lord Justices themselves to find support for its own conclusion that the government's fears against homosexuals in the army were unsubstantiated.[811]

The issue of judicial review in this case can also be seen through the public-private prism. This is a public sphere that governs and reviews and has a parliament and government to do the first, and courts to do the second. It is a public sphere that is somehow divided into functions, or perhaps more accurately, into 'interests' or 'perspectives.' Each function in this system of 'checks and balances' operates in relative autonomy—has to do so in order to be what it is. In this sense the public sphere that is the state is a fragmented public sphere, which has separate entities with their own particular, private, perspectives. But there is more to it. The roles overlap, need to overlap when it is about checks and balances, and in that sense the fragmentation dissolves into a more unitary mass that is formally coherent and can call itself the state. The different organs do not 'clash' in the literal sense, but manage their differences applying a formal set of rules that determines who wins and loses. The Wednesbury principles are an example of this. They manage the tension between the fragments in such a way that gives cohesion to the whole,

809 *Id.* at § 33.
810 *Id.* at § 24.
811 *Id.* at § 92.

but also in such a way as to keep the fragments separated. It is a public sphere that is partially centralized and hierarchical, and partially consisting of units in a 'horizontal' relation to each other.

The ambiguity of this public-private dimension of the UK constitutional order becomes visible if one looks at the Lord Justices and how they fulfill their roles within the framework of the so called irrationality-test. This test is supposed to maintain a strict division between the executive/legislative on the one hand, and the judicial on the other. However, in the fullest respect of this division it actually allows the courts to be very explicit of their criticism of the policy in a way that would be much more complicated and difficult were the fragments less divided, if the Lord Justices had to carry the full responsibility of taking a decision on the matter. The irrationality-test allows the Lord Justices to think, and to express this, that the government is completely wrong, while at the same time refraining "albeit with hesitation and regret" from doing anything about it. It allows them on the one hand to apply the test of irrationality, and on the other hand to conclude that the policy is almost irrational, but not quite. On the one hand the role is a private one, since the only thing they do is to express their opinion, and this has no consequences. On the other hand they fulfill a public role, which is to know their place and to respect the prerogative of Parliament. Their judgment may only be a "secondary" one,[812] but it is nevertheless a judgment. Because of the ambiguity of the internal public-private division within the state the Lord Justices can be so explicit and critical, while it is the same ambiguous public-private division that allows them to wash their hands and claim impotence. Both courts in fact extensively considered the question of whether article 8 of the Convention had been violated, considered it obvious that—in view of the Strasbourg case law—the policy was in violation of it, only to conclude that the Convention was, in legal fact, irrelevant in their case.

When the Court in the *Smith and Grady* case looked at the question of whether article 13 had been violated it found that:

> [E]ven assuming that the essential complaints of the applicants before this Court were before and considered by the domestic courts, the threshold at which the High Court and the Court of Appeal could find the Ministry of Defence

812 *Id.* at §§ 24, 27.

> policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicant's rights answered a pressing social need or was proportionate to the national security and public order claims pursued, principles which lie at the heart of the Court's analysis of complaints under Article 8 of the Convention.[813]

Accordingly, the Court found article 13 in violation since there had not been an effective remedy for the applicants. One question would be: *who* placed the threshold on such a high place? This question may be irrelevant at the Strasbourg level. As is an accepted rule of international law, states, even though they may be fragmented entities, as seen *from the outside*, are unities.[814] There does remain a trace of the ambiguity mentioned earlier: the Strasbourg Court heavily quotes and relies on the proximity to the facts of the LJs, and on their appreciations and conclusions as to the validity of the policy of the Ministry of Defence.

10.3.2.2.2.2. Who Knows Best? The Locus of Authority and the Public-Private Distinction

The central question in the case revolves around the justification given by the government for the policy of banning gays from the army in such an absolute and thorough way, which is not so much whether this is true or not, since how does one ever really know? The question is more about who can claim to be most convincing, or who can claim to know best. This question is framed along two different axes, or two different oppositions which have public-private characteristics. The first is the issue of sameness and difference that we have already seen. The government emphasizes time and time again that the army is different from the rest of society, and that therefore it is for the army to decide whether gays are fit or not. Their opponents emphasize the changes in society and the fact that other armies in Europe have not considered themselves that different from the rest of society and have admitted gays into their armies. For the government the army is a public sphere within the public sphere, one with a justifiably and necessarily

813 *Smith and Grady*, *supra* note 705, at § 138.

814 Articles on State Responsibility, *supra* note 596; Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (*entered into force* Jan. 27, 1980).

large degree of autonomy or difference from the rest, and therefore *private* from that larger public sphere, in the sense that it has a different attitude to privacy than that held in the larger public sphere. For their opponents the army is an integral part of the larger public sphere, where the same public-private attitudes should prevail. For the government, there is a public sphere within the larger public sphere; for the applicants, there is no such thing.

The second axis is the axis of subjectivity vs. objectivity of the claims. In this axis, I see subjectivity as representing the private element, and objectivity as representing the public one. So, the government embarks on a comprehensive review of the facts and concludes that it is necessary to exclude gays from the army. Their opponents emphasize the technical and neutrally established merits of the applicants as members of the armed forces, and on their turn accuse the government of not being objective enough in its assessment of the facts. The government speaks in terms of 'genuine concerns' within the army. The applicants call these homophobia. At the level of the Strasbourg Court his is translated into concrete evidence and 'negative attitudes'.

The two axes are connected. The government considers that it has found support for its perspective in an extensive enquiry amongst members of the armed forces, something which is based on and reinforces its claim that the army is an autonomous, and therefore private, 'public sphere' within the larger one, with its own internal 'private' experiences which have a validity unrelated to civilian standards. The applicants on their turn claim that the enquiry is biased, even within the internal logic of the military, and emphasize that these internal standards approve of their performance. But at the same time they invoke the standards of pluralism, tolerance and broadmindedness applicable in the rest of society. Meanwhile, the government does not exclude the possibility of linking up with the rest of society, but considers that its particularity or difference justifies postponing it until it's ready.[815] This on its turn is dismissed by the applicants who contend that there is no justification for this assessment, and that it is based on a homophobia that is not there in spite of the policy, but that is there thanks to the policy. It is also interesting to see how the 'private' nature of the army needs to be defended by the government by invoking a difference in how it responds to change. The army, in the government' contention, needs more time, is a realm that

815 *Lustig-Prean*, *supra* note 704, at §§ 70-71.

responds more slowly to societal developments. Though, as a tactic, it makes sense: you want to say that both are good, the army's difference as well as the changing attitudes, it also come across badly: the army is out of touch, a retrograde and conservative bastion of old ideas that could do with a shake up. This bad impression is made possible exactly by the emphasis on the army's difference.

So, for the applicants the internal autonomous logic of the military is trustworthy and objective, in that it recognizes their qualities, but also subjective and homophobic. The army is a public entity capable of managing its own internal affairs, but also an entity where the private homophobia of some of its members is allowed to rule. For the government the army is in the best position to know what is necessary for its fighting power. The particularity of its context justifies the apparently subjective position which is different from that of the rest of society. At the same time its members need to be protected from its own negative attitudes and not be exposed to the consequences of mere knowledge of someone's homosexuality, even if "most of those surveyed displayed a clear difference in attitude towards homosexuality in civilian life."[816] The particularity of the army cuts through the members themselves, in a way that seems to dissolve the difference between the army and the world outside. Apparently, the private members of the army are also private members of society at large. At the same time, Marx's alienation comes to mind[817]: in civilian life, these people are sympathetic to homosexuals, do not consider them a nuisance; not so in military life.

One can say that the UK government is forced to make this set of public-private distinctions. In order not to explicitly contradict the Court's judgment in the *Dudgeon* case, it needs to come up with a special reason why the army can be allowed to treat homophobia in a different way, as the problem of the gay soldiers, and not as the problem of the homophobic ones. It is thus forced to enhance the difference between the army and the rest of British society.

In the end, the European Court follows the version of the applicants quite faithfully. The negative attitudes of many members of the military are no justification for the policy and these are judged in the same way as they would

816 *Id.* at § 72.
817 *See supra* Chapter 3 (on Marx's critique of the public-private distinction).

have been outside of the army.[818] The value that the government attributes to these (subjective) attitudes is not considered by the Court to be based on sufficient (objective) concrete evidence that fighting power would actually be affected by having gays in the army.[819] One of the reasons for this is the comparison made with the policies with regards to women in the army and people of different race, origin or color.

10.3.2.2.2.3. Gays, Women & Racial Minorities: Private Conduct vs. Public Categories

One of the points painstakingly made by the government is that the problems of allowing homosexuals into the army are different from those of allowing women and other minorities. "The concerns about homosexuals were of a type and intensity not engendered by women or racial minorities."[820] On the one hand this was justified by referring to the genuine concerns of the members of the army itself, in an "if they say so it must be true" kind of fashion. On the other hand, these were also made explicit in their report in *Lustig-Prean & Beckett*. The interesting thing is that not only are these problems represented as being linked to the general, public category of homosexuals, but also to an equally generalized homophobic reaction by heterosexuals (bullying, ostracism and avoidance).

> The focus throughout the assessment was upon the anticipated effects on fighting power and this was found to be the "key problem" in integrating homosexuals into the armed forces. It was considered well established that the presence of known or strongly suspected homosexuals in the armed forces would produce certain behavioural and emotional responses and problems which would affect morale and, in turn, significantly and negatively affect the fighting power of the armed forces.
>
> These anticipated problems included controlling homosexual behaviour and heterosexual animosity, assaults on homosexuals, bullying and harassment of homosexuals, ostracism and avoidance, "cliquishness" and pairing,

818 *Lustig-Prean*, *supra* note 704, at § 90.
819 *Id.* at § 92.
820 *Id.* at § 72.

> leadership and decision-making problems including allegations of favouritism, discrimination and ineffectiveness (but excluding the question of homosexual officers taking tactical decisions swayed by sexual preference), sub-cultural friction, privacy/decency issues, increased dislike and suspicions (polarised relationships), and resentment over imposed change especially if controls on heterosexual expression also had to be tightened (see Section F.II of the report).[821]

This is quite different from the description of its policy with regard to racial discrimination and sexual harassment, which states:

> In January 1996 the army published an Equal Opportunities Directive dealing with racial and sexual harassment and bullying. The policy document contained, as a preamble, a statement of the Adjutant-General which reads as follows: "The reality of conflict requires high levels of teamwork in which individual soldiers can rely absolutely on their comrades and their leaders. There can, therefore, be no place in the Army for harassment, bullying and discrimination which will affect morale and break down the trust and cohesion of the group. It is the duty of every soldier to ensure that the Army is kept free of such behaviour which would affect cohesion and efficiency. Army policy is clear: all soldiers must be treated equally on the basis of their ability to perform their duty.I look to each one of you to uphold this policy and to ensure that we retain our acknowledged reputation as a highly professional Army." The Directive provided definitions of racial and sexual harassment, indicated that the army wanted to prevent all forms of offensive and unfair behaviour in these respects and pointed out that it was the duty of each soldier not to behave in a way that could be offensive to others or to allow others to behave in that way. It also defined bullying and indicated that, although the army fosters an aggressive spirit in soldiers who will have to go to war, controlled aggression, self-sufficiency and strong leadership must not be confused

821 *Id.* at § 47.

> with thoughtless and meaningless use of intimidation and violence which characterise bullying. Bullying undermines morale and creates fear and stress both in the individual and the group being bullied and in the organisation. The army was noted to be a close-knit community where team work, cohesion and trust are paramount. Thus, high standards of personal conduct and respect for others were demanded from all. The Directive endorsed the use of military law by commanders. Supplementary leaflets promoting the Directive were issued to every individual soldier. In addition, specific equal opportunities posts were created in personnel centres and a substantial training programme in the Race Relations Act 1976 was initiated.[822]

Both problematic categories, race and gender on one side and sexual orientation on the other side, are posited by the government along a public-private divide. When arguing for the exclusion of homosexuals from its ranks, it presents homosexuality as a private, effectively *different* something that can affect the general (public) fighting capacity of the army as a whole. When arguing for the inclusion of people of color and of women, it is the bullying and ostracism that is an external private something that can affect the general (public) capacity of the army. With regard to homosexuals, homophobia is public. With regard to people of color and to women, racism and misogyny are private. The same bullying is presented as something understandable by presenting it as public, and as unacceptable by presenting it as private. In this way too, the European Court avoids having to pronounce itself on the topic of whether homosexuals are fit to be good soldiers; good members of a military unit.

A very different public-private dynamic is presented in paragraph 74 of *Lustig-Prean & Beckett*, where the applicants in that case present one of their issues with the policy.[823] According to them the anti-homosexual policy is the only one that is a blanket policy. There is no way that a homosexual cannot affect fighting spirit in the way described. Unlike with other ways in which fighting spirit is defended, the ban on homosexuality does not take into account the individual characteristics and circumstances of each case. In other

822 *Id.* at § 57.
823 *Id.* at § 74.

words, the private homosexual soldiers are caught in the public category of homosexuality which refuses to see their individual danger or merit. Private conduct does not matter—only belonging to the public category. In the context of this case and the broader issue at stake, this is a slightly risky line of reasoning. It does not deny that in some cases homosexuality can be a factor that affects fighting spirit negatively. As we have already seen throughout these readings, the public category of homosexual can have benefits too, and the applicants in this particular case have benefited from these as well, for example when using it to claim a space of privacy for themselves.

One could see this issue in a different way. Whereas conduct can be seen to be private and the homosexuality, as status, of the applicants as public, it can be also the other way around. *Lustig-Prean & Beckett* refers to the "innate personal characteristics" of the applicants, as opposed to the conduct of others.[824] In this way of putting things one could argue that it is the conduct that is public, in the sense of visible, manifest and external, while that which is innate to the applicants is something that is private, individual and authentic. This illustrates how, even in the accounts put forward by the applicants, their sexual orientation is sometimes a public category, a social status, as well as a private characteristic.

As for the Strasbourg Court, it does not see why the dangers to fighting spirit cannot be addressed for homosexuals in the same way as for people of color and women.[825] Interestingly, the question is put not in terms of protecting the army from affects to its fighting spirit, but in terms of 'integration' of homosexuals, women and racial minorities into the army. In this approach, homosexuals are presented as a novel category of soldiers and the army as previously 'homo-free'. Again, like women and racial minorities, homosexuals are presented as alien to the military establishment, as external private parts that need to be integrated into the military public. Arguably though, homosexuals have been integrated into the army for a long time, just like the anti-homosexual scrutiny that they are now complaining about. In this approach the European Court ignores the fact that it may be less about integrating homosexuals, and more about changing the way the army relates to them; less about militarizing gays and more about ridding the army of its institutionalized homophobia.

824 *Id.* at § 86.
825 *Id.* at § 95.

10.3.3. The 'Rather Curious Activities' of Laskey, Jaggard, and Brown

10.3.3.1. Laskey, Jaggard, and Brown in Dialogue with the Other Cases

The question of whether this case should be included in this list of cases is a valid one. In fact, the European Court dismissed *Dudgeon*, *Norris*, and *Modinos* as significant precedents[826] for reasons we will discuss below. Was this a case about homosexuality? Was it even about privacy? It seems as if the case verged on the boundaries of both.

The story of the applicants has some similarities with that of the other cases, such as *Dudgeon*. In that case, the police was investigating a drug-related crime and in that context confiscated the diaries of Mr. Dudgeon, which indicated that he was homosexual. This lead to a four hour questioning about his sexual life, but also to a decision "that it would not be in the public interest for proceedings to be brought" against him.[827] Not so for the three protagonists in the *Laskey, Jaggard, and Brown* case. In this case, the police, "in the course of routine investigations into other matters" which are not explained[828]:

> came into possession of a number of video films which were made during sado-masochistic encounters involving the applicants and as many as forty-four other homosexual men. As a result the applicants, with several other men, were charged with a series of offences, including assault and wounding, relating to sado-masochistic activities that had taken place over a ten-year period. One of the charges involved a defendant who was not yet 21 years old - the age of consent to male homosexual practices at the time. Although the instances of assault were very numerous, the prosecution limited the counts to a small number of exemplary charges.
>
> The acts consisted in the main of maltreatment of the genitalia (with, for example, hot wax, sandpaper, fish hooks and needles) and ritualistic beatings either with the assailant's bare

826 *Laskey*, *supra* note 707, at § 45.
827 *Dudgeon*, *supra* note 663, at § 33.
828 *Laskey*, *supra* note 707, at § 7.

> hands or a variety of implements, including stinging nettles, spiked belts and a cat-o'-nine tails. There were instances of branding and infliction of injuries which resulted in the flow of blood and which left scarring.
>
> These activities were consensual and were conducted in private for no apparent purpose other than the achievement of sexual gratification. The infliction of pain was subject to certain rules including the provision of a code word to be used by any "victim" to stop an "assault", and did not lead to any instances of infection, permanent injury or the need for medical attention.[829]

It is never clear where exactly the state went too far (or not). The Dudgeon case came and went, and became a new landmark in the European story on the right to privacy. But, was the reading of the diaries in the case of Mr. Dudgeon going too far? Likewise, *ADT* v. *UK* became an addition to that landmark, but it did not answer the question as to whether video films were private and to be protected from public scrutiny. In all these cases, it does not seem as if the actual snooping around people's diaries and video films is, in and of itself, an interference. Though in the case of *Laskey, Jaggard, and Brown* all the parties agreed that there had been an interference, it was never specified how exactly this interference took place. In *Dudgeon* it was the mere existence of legislation prohibiting homosexual acts. But, what about the actual activities by the police when they opened his diaries and started reading them? That question is never directly answered, nor, I should add, is it raised in the judgments as described. So, some of the leading cases with regard to the right to a private life involve police going through personal diaries and looking at personal video films, but these acts are not what the actual claims are about. One wonders what would have happened in the *Dudgeon* case had the contested legislation not been in force.

What is necessary knowledge for the police in the performance of their duties is one question. What is necessary knowledge for the description of the facts in these judgments is a different one. We never found out what Mr. Dudgeon's diaries actually said. Nor did we get any details about the sexual acts of Mr. Norris or Modinos. With them, it seemed enough to state that

829 *Id.* at § 8.

they were homosexual. The rest was left to the imagination, or out of sight for the sake of discretion. Or perhaps it was considered irrelevant. In the case of the British military officers we know much more, but mostly about the details of the questions asked to them (something about which the Dudgeon case is silent), but nothing about what they answered. In other words, we do not get details about their actual sexual acts. The only two cases that give us these *pornographic* (literally) details are the cases that involve video films. Reading across the cases, and acknowledging that *A.D.T.* v. *UK*, came about four years after *Laskey, Jaggard, and Brown*, one can appreciate how the case of *A.D.T.* describes the content of the video tapes in terms of what they do *not* show: "There was no element of sadomasochism or physical harm involved in the activities depicted on the videotape."[830] Even so, *A.D.T.* does specify that the acts consisted of "oral sex and mutual masturbation." Is this a case of 'too much information'? In that case, the Court concluded that Mr. A.D.T.'s private life had not been adequately respected; even though it, in some way, participated in the dissemination of elements of the contents of the video. This is not a trifling matter, for the Court in *A.D.T.*, in the context of examining the question of whether private life was at all an issue, argued:

> The sole element in the present case which could give rise to any doubt about whether the applicants' private lives were involved is the video-recording of the activities. No evidence has been put before the Court to indicate that there was any actual likelihood of the contents of the tapes being rendered public, deliberately or inadvertently. In particular, the applicant's conviction related not to any offence involving the making or distribution of the tapes, but solely to the acts themselves. The Court finds it most unlikely that the applicant, who had gone to some lengths not to reveal his sexual orientation, and who has repeated his desire for anonymity before the Court, would knowingly be involved in any such publication.[831]

All this leads the Court to conclude in *A.D.T.* that the case does concern 'private life', an issue that was questioned by the British government. In the case of *Laskey, Jaggard, and Brown* this had not been an issue. Both applicant

830 *A.D.T., supra* note 708, at § 10.
831 *Id.* at § 25.

and government there agreed that there had been an interference with the right to private life. The remaining question then, for the Court, is whether the interference can be justified. Though the public-private distinction with regard to gay group-sex is heavily contested and debated, the snooping around in video films and the description of them in the judgments is not.

There is an interesting observation the Court makes in *Laskey, Jaggard, and Brown*, which comes back in *A.D.T.* The Court notes that:

> [A] considerable number of people were involved in the activities in question which included, *inter alia*, the recruitment of new "members", the provision of several specially equipped "chambers", and the shooting of many videotapes which were distributed among the "members" (...). It may thus be open to question whether the sexual activities of the applicants fell entirely within the notion of "private life" in the particular circumstances of the case.[832]

Reflecting back, the Court in *A.D.T.* notes that "[i]n that case, the Court's comments did not go beyond raising a question "whether the sexual activities of the applicants fell entirely within the notion of 'private life'."[833] The Court was simply 'raising a question', not doubting that group sex might be an issue. But, this potentially Freudian slip aside, the entire paragraph is illustrative of an interesting dialogue with the other homosexual cases.

> 36. The Court observes that not every sexual activity carried out behind closed doors necessarily falls within the scope of Article 8. In the present case, the applicants were involved in consensual sado-masochistic activities for purposes of sexual gratification. There can be no doubt that sexual orientation and activity concern an intimate aspect of private life (see, *mutatis mutandis*, the Dudgeon *v.* the United Kingdom judgment of 22 October 1981, Series A no. 45, p. 21, § 52). However, a considerable number of people were involved in the activities in question which included, *inter alia*, the recruitment of new "members", the provision of several specially equipped

832 *Laskey*, *supra* note 707, at § 36.
833 *A.D.T.*, *supra* note 708, at § 25.

> "chambers", and the shooting of many videotapes which were distributed among the "members" (see paragraphs 8 and 9 above). It may thus be open to question whether the sexual activities of the applicants fell entirely within the notion of "private life" in the particular circumstances of the case.
>
> However, since this point has not been disputed by those appearing before it, the Court sees no reason to examine it of its own motion in the present case. Assuming, therefore, that the prosecution and conviction of the applicants amounted to an interference with their private life, the question arises whether such an interference was "necessary in a democratic society" within the meaning of the second paragraph of Article 8.[834]

The elements of *Dudgeon* are restated: adults, in private, with consent. This is not just 'private life', but 'an intimate aspect' of private life. Even so, there is already some skepticism, expressed in 'merely' questioning the group aspect and the 'formal', or organized dimension of the sexual encounters. The questioning itself is noteworthy, in the way that it wonders whether the sexual activities fell "entirely" within the notion of private life. There is a clear struggle, or tension, in this paragraph. Private life has more and less intimate aspects, and sexual activities can fall entirely and partially within its notion. Even so, the Court opens by distancing *Dudgeon* from this case, by 'observing' that closed doors can be opened, since what happens behind them might fall beyond the scope of Article 8. The scope of Article 8 seems to stretch in various ways. When can one call something 'private', and if it is, when can one interfere?

We don't know how or why, but the names of the three applicants are known, unlike that of Mr. A.D.T., who apparently made an effort in remaining anonymous. All we know is that, at the domestic level: "The proceedings were given widespread press coverage. All the applicants lost their jobs and Mr Jaggard required extensive psychiatric treatment."[835]

834 *Laskey*, *supra* note 707, at § 36.
835 *Id.* at § 24.

Later we will see that this consequence of the proceedings did not make a dent in the Court's finding that there had not been any violation. It is hard to say something about this, since we do not know if the applicants decided to 'come out' and play the identity politics of Mr. Dudgeon and Mr. Norris, or whether they just decided not to bother with anonymity at the European level. Whether what happened was private or not, it was now public knowledge. All this is too reminiscent of the melodramatic elaborations of the Court in *Dudgeon* and *Norris*, about how terrible the plight of homosexuals in a homophobic society, even when there is no prosecution, as was their case. Mr. Laskey, Mr. Jaggard, and Mr. Brown did not inspire the Court in the same way. Whereas in those cases, the actual experience of the applicants, their suffering and constant fear of social retribution, was an issue worthy of the Court's mentioning, in this case it was not.

Most of the case is devoted to the proceedings before the domestic courts, and to the various opinions by the Law Lords. Since the European Court pretty much went along with these arguments, it is useful to analyze them closely.

10.3.3.2. The Question of Consent

The three men were prosecuted for their actions. As mentioned above, "the prosecution limited the counts to a small number of exemplary charges."[836] The logic of exemplary charges is an interesting one, and has its own public-private dimension. When charges are 'exemplary', they are meant to function as an example; as an example to others. Exemplary charges are public signals, demonstrations of control by the state, evidence, to others, that something is being done. What is left out is a story about the other dimension of criminal justice, the story of assailants and victims. Once can see this as a public justice, the justice of visibility and the state asserting itself, versus private justice, the justice of victimizers being punished for their crimes, the justice of victims knowing that their victim-hood did not go unpunished. Though we know that the three applicant were prosecuted for assault, we do not know if they themselves subjected themselves to the acts described. In other words, where they also victims of the assault? We do not know. The private justice is left out of the picture. This was done explicitly: "The applicants pleaded guilty to the assault charges after the trial judge ruled that they could not rely on

836 *Id.* at § 8.

the consent of the 'victims' as an answer to the prosecution case."[837]

An assault needs to have victims, but the victims here consented, and may have been the same assailants as well. To solve this problem, they are bracketed, put between quotation marks, to note that the victims are not really victims without actually saying so. The whole idea of the consent of the persons involved would never receive significant consideration at the European level. Though it seems to have been the strongest argument in their favor, the one linking the entire situation of their activities and their gathering to the 'private', it was side-tracked and ignored, or it was merely ruled that consent was not to be relied on. There is never an explanation why consent cannot be invoked. One could argue that the case was about the right to consent, that the private life of Article 8 is all about 'consent', that the bracketed 'victims' were claiming their right to private life, behind the facade of this case, behind the assault charges, behind the porno-graphic description of the activities. For the applicants, the most significant information is not what happened, but the fact that they wanted it—that all concerned wanted it. Right there, in once sentence, this is erased.[838] Again, the question arises of where exactly did the interference take place. The facts described are good candidates for this qualification. After this, all the other indications of how strong this consent was, how badly these people *really* wanted to do these things, how they went about, organizing themselves, arranging for elaborate accommodations, special chambers, and video recordings, so they could revisit the moment, so they could remember, so they could share it with each other, or just keep it there, as a keep sake. All those expressions and reiterations of consent, of desire, of an actual need—they are left unanswered, and unacknowledged—they are in fact repressed.

After being sentenced with heavy punishments, the applicants appealed and got their sentences reduced, because they "did not appreciate that their actions in inflicting injuries were criminal."[839] Finally, the House of Lords rejected their appeal with five votes to two. It is here that we can get the most elaborate arguments against the right to consent. For one of the majority law Lords, Lord Templeman, the question of consent cannot be dealt with on the level of what he calls a 'slogan':

837 *Id.* at § 10.
838 *Id.*
839 *Id.* at § 15.

> Counsel for the appellants argued that consent should provide a defence (...) because it was said every person has a right to deal with his own body as he chooses. I do not consider that this slogan provides a sufficient guide to the policy decision which must now be taken. It is an offence for a person to abuse his own body and mind by taking drugs. Although the law is often broken, the criminal law restrains a practice which is regarded as dangerous and injurious to individuals and which if allowed and extended is harmful to society generally. In any event the appellants in this case did not mutilate their own bodies. They inflicted harm on willing victims (...).
>
> In principle there is a difference between violence which is incidental and violence which is inflicted for the indulgence of cruelty. The violence of sado-masochistic encounters involves the indulgence of cruelty by sadists and the degradation of victims. Such violence is injurious to the participants and unpredictably dangerous. I am not prepared to invent a defence of consent for sado-masochistic encounters which breed and glorify cruelty (...).
>
> Society is entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilised.[840]

Uncivilized indeed. There are many things in this opinion. First is the reference to a 'policy decision' and to the restraining effect that criminal law has on practices that can harm individuals and society in general. It is not really clear how society can be 'harmed' by allowing this particular practice. In fact, this reasoning is indicative of an elaborate set of ideas about criminal justice and its role in society—and one that has been thoroughly criticized by people who argue that criminalizing drugs (for example) has a whole set of damaging effects on society. For Lord Templeman, however, this is not an issue, and people who would otherwise engage in extreme sadomasochist activities will now be restrained from doing so. In this logic, the public is at threat from private outbursts of consent to be harmed, and these outbursts

840 *Id.* at § 20.

will ultimately harm the public—but only in a way that is self-evident, since it is not articulated.

And then there is this quick distinction between 'mutilating' your own body and allowing somebody else to do it. Although, here too the agency is shifted away from the consent of the victims to the harm done to them. Perhaps the victims do have a right to consent—but this does not give the assailants a right to harm them... This is a private life that is a formality. I have the right to invite you into my house, but this does not give you the right to enter. This emphasis on the agency of the assailants, and the ignoring of the agency of those who consent, is maintained in the second paragraph. Consent goes from an inoperative formality to complete fiction, or even inexistence there—for it would need to be 'invented'. In this way, consent is maneuvered out of relevance. What remains is what matters to Lord Templeman, which is that "pleasure derived from the infliction of pain is an evil thing." Forget legality or rights. It is evil. Interestingly, even if one would, being the Lord himself, consider the agency of the 'victim', and argue that it is not only pleasure derived from the infliction of pain, but also derived from having pain inflicted on one, even then, consent would probably not matter, since it is likely that Templeman would have equally dismissive adjectives for that. Finally, "Society is entitled and bound to protect itself against a cult of violence." Here, the public is not the paternal public, protecting the private against itself. Here, the public itself needs protection, and the 'cult of violence', evil and uncivilized, is hiding behind slogans of consent, in the private life.

When examining the public-private divide, and where it should be, it is Templeman's message that, in spite of all the secrecy and care, the activities of the applicants were not to be contained to the 'private' lives of the applicants. They would somehow affect or infect both the private lives of others, as well as the public as a whole. This line of reasoning is also followed by Lord Jauncey of Tullichettle, who thinks "it right to say something about the submissions that consent to the activity of the appellants would not be injurious to the public interest."[841] He too addresses this issue by looking carefully at the question of how contained the activities were. There is first the charge that the presence of one younger man, "who is now it seems settled into a normal heterosexual relationship", was evidence of "proselytizing".

841 *Id.* at § 21.

In this perspective, the special care put into containing the activities by the applicants becomes suspect, and can now be seen as a cloak for 'corrupting' others. There are echo's of *Dudgeon* and *Norris* here, where homosexuality itself was, at times, constructed as something that should be contained, as something that might spread. Lord Jauncey of Tullichettle then proceeded as follows:

> Be that as it may, in considering the public interest it would be wrong to look only at the activities of the appellants alone, there being no suggestion that they and their associates are the only practitioners of homosexual sado-masochism in England and Wales. This House must therefore consider the possibility that these activities are practised by others and by others who are not so controlled or responsible as the appellants are claiming to be. Without going into details of all the rather curious activities in which the appellants engaged it would appear to be good luck rather than good judgment which has prevented serious injury from occurring. Wounds can easily become septic if not properly treated, the free flow of blood from a person who is HIV-positive or who has AIDS can infect another and an inflicter who is carried away by sexual excitement or by drink or drugs could very easily inflict pain and injury beyond the level to which the receiver had consented. Your Lordships have no information as to whether such situations have occurred in relation to other sado-masochistic practitioners. It was no doubt these dangers which caused Lady Mallalieu to restrict her propositions in relation to the public interest to the actual rather than the potential result of the activity. In my view such a restriction is quite unjustified. When considering the public interest potential for harm is just as relevant as actual harm. As Mathew J. said in Coney 8 Queen's Bench 534, 547:
>
> 'There is however abundant authority for saying that no consent can render that innocent which is in fact dangerous.'
>
> Furthermore, the possibility of proselytisation and corruption of young men is a real danger even in the case of these

> appellants and the taking of video recordings of such activities suggests that secrecy may not be as strict as the appellants claimed to your Lordships.[842]

On the one hand he argues that there might be other groups that are not as responsible and controlled as the applicants, although he qualifies this by adding that this control is merely claimed. He then moves on to argue that control cannot be maintained without a fair amount of good luck, which basically means that there can never be sufficient care in these activities, thereby all but stripping the applicants of their agency in the matter. In this manner, the argument that there was never something that went wrong can be discarded as irrelevant. Finally, the ghost of proselytization reappears, although now to question the actual intention to keep the activities private. This private sphere that is claiming autonomy is constructed as out of control and as something that should not be left to its own devices. At the same time, there is the subtle shift to the intentions of the applicants, again the cloak of secrecy for bad reasons. In this shift, the private sphere is constructed as very controlled, its secrecy as instrumentally maintained. If you take lack of control and too much control together, the result must be unavoidable and not just potential harm.

In all of this the question of consent, which is at the heart of his argument, seems to disappear into irrelevance and oblivion, and gone are the 'victims' too. However, rather than totally gone, consent has now become part of the problem. It is because of consent that this practice, which corrupts and proselytizes, can continue to exist. It is because of consent that there is too much as well as too little control, too much as well as too little secrecy. Whereas Templeman seemed to disarm consent, making it a mere formality, Jauncey of Tullichettle has effectively, and with much more subtlety, turned it against itself.

There are dissents too, although the judgment refers to them only in summary and with relative brevity. One dissenter, Lord Mustill, argued along the same lines as the Lords mentioned above, but in the opposite direction, emphasizing the sex (as long as it was not for profit), and not the violence, and arguing that there had been no risk. For him, consent had to be

842 *Id.* at § 21.

respected. Lord Slynn of Hadley agreed but went further, arguing that what the courts and the Lords were doing was the work of the legislature, since "it was in the end a matter of policy in an area where social and moral factors were extremely important and where attitudes could change."[843] Here too, there are echoes of *Dudgeon*, and a story in which the public should be the legislative, and not the courts.

In the end, the European Court pretty much followed the reasoning of the majority Lords, which was more or less articulated by the British government. It distanced the situation from being related to any of the cases discussed in this chapter:

> The applicants have contended that, in the circumstances of the case, the behaviour in question formed part of private morality which is not the State's business to regulate. In their submission the matters for which they were prosecuted and convicted concerned only private sexual behaviour.
>
> The Court is not persuaded by this submission. It is evident from the facts established by the national courts that the applicants' sado-masochistic activities involved a significant degree of injury or wounding which could not be characterised as trifling or transient. This, in itself, suffices to distinguish the present case from those applications which have previously been examined by the Court concerning consensual homosexual behaviour in private between adults where no such feature was present (see the *Dudgeon* judgment cited above, the *Norris* v. *Ireland* judgment of 26 October 1988, Series A no. 142, and the *Modinos* v. *Cyprus* judgment of 22 April 1993, Series A no. 259).[844]

It is unfortunate that the Court is so brief and does not explain its position more elaborately. Why exactly does it not accept the applicants' submission that they were just having sadomasochistic fun? How does it consider the fact that all the people involved really want to engage in this type of behavior? How does it establish whether injury or wounding is 'trifling or transient'?

843 *Id.* at § 23.
844 *Id.* at § 45.

And why exactly does it matter if it is not? Even though the Court seems to be keeping its cards close to its chest, it does refer in agreement to both Lords Templeman and Jauncey of Tullichettle, and to their assessment of the need to contain these activities because of their harmfulness.[845] However, the Court does not specify, unlike the Lords, whom or what might be in danger of this harm. Moreover, the entire notion of consent has completely disappeared and in effect rejected as irrelevant.

One more thing is striking. We already saw how Lord Jauncey of Tullichettle considered the degree of organization by the applicants and their friends to be both insufficient (to avoid harm) and suspect (with regard to proselytization). In that reading the group was too private (well organized to act autonomously and in stealth), as well as not private enough (in order to prevent information from coming out, and in order to prevent harm from happening). The European Court, in the context of looking into the question of proportionality, went on to argue that "*bearing in mind the degree of organisation involved* in the offences, the measures taken against the applicants cannot be regarded as disproportionate."[846] Somehow the degree of organization matters, although it is not clear how, as mitigation or aggravation. It does seem though that the ambiguity constructed by Lord Jauncey of Tullichettle operates here as well. Somehow, independently of how one relates to their degree of organization, it can not be a good thing in the eyes of the Court. Either way, the applicants lose.

10.3.3.3. Sadomasochism and Homosexual Behavior

The remaining question is whether this case is a homosexuality-case or not. This issue came up at the national level, where one of the lower judges indicated that

> [t]he unlawful conduct now before the court would be dealt with equally in the prosecution of heterosexuals or bisexuals if carried out by them. The homosexuality of the defendants is only the background against which the case must be viewed.[847]

845 *Id.* at § 46.
846 *Id.* at § 49 (emphasis added).
847 *Id.* at § 11.

Now, it is unclear what is meant by 'background'. Would a different background produce a different ruling? Is their homosexuality a mitigating factor? Or an incriminating one? The trial judge seems to deny any of this, but then why mention it at all? The applicants referred to a recent case in the UK which concerned a man who had been convicted of assault for "having branded his initials with a hot knife on his wife's buttocks with her consent."[848] The conviction was however overturned in appeal, where it was stated by Lord Justice Russell that

> [t]here is no factual comparison to be made between the instant case and the facts of either Donovan or Brown: Mrs Wilson not only consented to that which the appellant did, she instigated it. There was no aggressive intent on the part of the appellant (...). We do not think that we are entitled to assume that the method adopted by the appellant and his wife was any more dangerous or painful than tattooing (...). Consensual activity between husband and wife, in the privacy the matrimonial home, is not, in our judgment, a proper matter for criminal investigation, let alone criminal prosecution.[849]

When the applicants referred in Strasbourg to the similarities between their case and that of the Wilsons, the Court was not impressed but stated that it did "not consider that the facts in the Wilson case were at all comparable in seriousness to those in the present case."[850] Again, it is a real pity that the Court does not want to elaborate on that point. If what distinguishes this case from that of Mr. Dudgeon is the presence of bodily harm that is not 'trifling or transient', then surely the *Wilson* case should be seen in the same light. If, on the other hand, it is important, as a background perhaps?, that the events took place between "husband and wife, in the privacy the matrimonial home," then this case has everything to do with homosexuality. What is most striking is what the Court does not say, and what it considers too obvious to explain.

From a public-private perspective it is noteworthy that the private sphere can take many guises, and that gender matters, as well as its cousin sexual

848 *Id.* at § 30.
849 *Id.*
850 *Id.* at § 47.

orientation, as well as the amount of people perhaps, and the nature of the activities. Here too, one wonders, where did the interference take place, exactly. The Wilsons were ultimately declared innocent, their activities declared to belong in the private realm. But their matrimonial bedroom and their bodies had already been thoroughly scrutinized. We know not how their case came about. But one wonders if this Court would consider their privacy to have been protected or breached. Perhaps the only way to have one's privacy is to remain in secrecy, although even there, as Lord Jauncey of Tullichettle has argued, even if there is no evidence that certain things happen, one must "consider the possibility that these activities are practised by others and by others who are not so controlled or responsible as the appellants are claiming to be."[851]

10.4. Concluding

The readings of the judgments that have just been presented are illustrative of a number of the features that the various critiques have exposed. One that is overwhelmingly evident is the *structural nature* of the public-private distinction. The public-private distinction operates at the macro-level as well as at the micro-level. Not only does the distinction frame the formal legal question that the judgments purport to address: "did the (public) state interfere (into the private), and if so, can that interference be justified?" or "is the activity in the context of the case a private or a public matter?" But, it seems to frame many of the side-questions, the various elements in the description of the facts, the multiple individual little arguments that go on to make the big argumentative streams of the case, and also the multiple tangents, *obiters*, and sideways that are not directly linked. We have seen it operate on the level of doctrines (about the margin of appreciation, about Portuguese child-custody law, about Irish constitutional law). We have seen it operate at the level of description (of the elusive 'public mood', the existence of a European consensus, or the occurrence of a harm to society). It has served as an entry point to a variety of topics (the internal structure of state organs, the geographical structuring of the UK, the position of the military in contemporary social and political life). Most importantly, it is an essential element in the making of (legal) arguments about pretty much each of these issues. The dichotomy, in its many guises, seems to be almost

851 *Id.* at § 21.

everywhere. Naturally, seen up close, as this reading has done, this can be utterly confusing, and especially a legalistic reader will resist this move, in an attempt to keep an eye on the formal argumentative ball. At the same time though, such a close up can be helpful in bringing to light the harder-to-see contradictions or incoherence, and at times this 'alternate' reading can seem to be very legalistic itself. The difference seems to be in focus, in objective, or even in how the reading is embedded in different political and institutional projects or settings. At times the alternate reading, which articulated a critical project, coalesced with the more legalistic readings in their pursuit of constructing a solid case, or in finding cracks in what seems to be a solid case. The point of this is that a lot of what I am saying will not seem so novel, even though it is never really approached in this way. Having said that, what makes this reading an 'alternate' one is the rigorous emphasis on the reiterative and recurring nature of the public-private distinction, and on how it functions as an ordering logic.

The second theme that is illustrated in this reading follows from the first one: the public-private distinction operates in a rhetorically *instrumental* way. Each major argument, which is about a formal public-private question, relies on many little public-private arguments, and all of them rely on multiple observations, descriptions, and speculations about the public and the private and how they relate to each other. All of these layers are embedded in each other, and all of them are embedded in the larger legal-institutional decision-making complex that I described earlier. The point here is that they all rely on each other. They are one big chain or collage of arguments that provide an overall effect. So, though the legalistic reading will focus on the 'operative' paragraphs, the ones that encapsulate the final layer of public-private reasoning, the experienced lawyer will have a good sense of which way the judgment is going to go from the earliest paragraphs in which the 'facts of the case' are described. Choices are made, from the very beginning, and all along the way, and slight nuances in the way the public and the private are presented may indicate the narrative of a case. The personal details told about Mr. Dudgeon and the quick pornographic description in the *Laskey, Jaggard,* and *Brown* case are examples of this. One can imagine how it would look if the case of Mr. Dudgeon would have started with the content of the diary, in its most pornographic detail, á la the sadomasochism case. And vice versa, one can imagine a case in which we are introduced to Mr. Laskey, Mr. Brown, and Mr. Jaggard, and told something about their jobs, while merely

referring to the video tapes as depicting what some would consider extreme sadomasochism, but what for them are heart-felt ways of relating to each other and to their sexuality, even if they are slightly embarrassed and feel that they need discretion. Each of these two alternative options refers to two alternative narratives. There is the narrative of the pervert and the narrative of the oppressed sexual identity. Both require a different construction of the facts, a different foregrounding of what is emphasized and shown, and what is back grounded and left unsaid, a different economy of the public and the private, carefully calibrated in order to produce the right effect, sometimes convincingly, other times less so. Lawyers are familiar with the fact that a lot depends on *how you tell the story*, and that it is there that one has perhaps the greatest room for maneuver. Rhetorical skills are essential elements of this, the knowledge of how to tell a story so that it goes in a particular direction. At its best this is not a self-conscious process, but rather an intuitive one, and the best lawyers can make their versions come through without anybody noticing how they did it. One needs a careful zooming in, such as the one in this alternate reading, in order to see how the various elements are organized in order to produce an effect.

The instrumentality of the public-private distinction, at all of the multiple layers on which it operates, relies on its *indeterminacy*. One of the things that this alternate reading has indulged in, is in the illustration of how the public-private distinction, at the level of a concrete case, can be read in multiple ways. While performing this reading I often felt that I could go on, that I was selecting only a few of the sentences and paragraphs that lent themselves to an inversion, to an incisive analysis, or to deconstruction. There are in fact, even in a limited number of judgments, too many avenues for public-private meaning. Is anything purely private? Or purely public? I guess that it depends on how you approach it, on what the narrative is that you deploy, and from which epistemological perspective you look at it. Sexuality, we have seen, is both 'a most intimate aspect of private life', as well as a social and political category that plays a set of roles in public discourse. And this is only in *Dudgeon*, and even there it is many other things as well. Sexuality in *Laskey, Jaggard, and Brown* is both an unimaginable thing that can only be described by means of a shocking pornographic account, as well as something that affects us all, a threat to society. As an argument is made, however, the meanings of the individual details are deferred to the larger narrative in which the story unfolds. Moreover, each one of these individual

details can be instrumentalized in the way mentioned before. But, since there are in fact too many layers, and since each only acquires its meaning within the context of other layers, and those of other layers, etc., what we are seeing is an amorphous mass of text, in which some parts are more flexible and others more rigid, and which moreover is never completely stable. In short, and before I lose myself in metaphors, it is too complex and too contingent on too many things. The notions of determinacy and indeterminacy are a bit confusing though. There is no such thing as a clear term and a vague term. Vagueness and clarity only happen in the context of a text, and a texts acquires meaning and significance in the context of a particular type of reading, itself institutionalized and political.

The point about rigidity and flexibility, and how both are dynamic, is important though, because it refers to how sometimes things are 'easy to think' and therefore easy to argue, while other things are 'difficult to think',[852] and therefore difficult to argue. What makes something easy or difficult to think is related to the ideological bias of the actors who are involved. Which brings me to the fourth dimension of what is illustrated in this alternate reading, which is that the public-private distinction, in the way that its indeterminacy is instrumentalized in order to structure an argument in a particular way, is *ideological*. Here I need to bring in the author of this alternate reading, the reader that I am. It is quite clear that my readings of the judgment are ideologically biased in ways that are mostly different from the ideological bias of the Court. I agree with the Court in many ways, and disagree in many other ways. It is not just that I 'agree' with *Dudgeon* and the other cases, and 'disagree' with *Laskey, Jaggard, and Brown*. In fact, there are many things about *Dudgeon* that I did not agree with, or that didn't agree with me, and which I think are discernible from my readings, in the ways that they are, at times, ironic or even sarcastic. The point is not that I think the Court is wrong and I am right. The point is actually that I think that the only way to make an argument about these issues, using the legal version of human rights discourse, is to use the same instruments that the Court uses. Arguing one way or the other will require relying on what one can do with the public-private distinction. If how the Court argues one particular way or the other can be dislodged and presented as problematic, so can anything that I argue in opposition to the Court. It is because of the multiple possibilities for meaning, because of the indeterminacy of the dichotomy, that any argument

852 I am indebted to David Kennedy for this way of putting things.

and any position will always be biased one way or the other.

However, and here I need to be very clear, not all positions are equally possible in the political or cultural sense, or in the sense of the dominant or overarching ideology. Some arguments will be very easy to make, while others very difficult. In the days before the Court received its first cases, in the 60s and 70s, it would have been extremely difficult to argue that homosexuality should be tolerated as a matter of a right to private life. In 1981, when the Court adopted its judgment in the *Dudgeon* case, it was easier, but still difficult, and one can see how the Court struggles with that decision, making sure that it is not seen to approve of homosexuality, or interpreting it as somehow anywhere near the equivalence of heterosexuality. By the late 90s, when the British military cases are heard, things have changed. What has changed is the overall ideological inclination in which the Court operates, the wider realm of politics and culture, which acts through the judges. What makes the case of *Laskey, Jaggard, and Brown* so interesting is that the picture is less clear there. Obviously for the Court it is a no-brainer, and that is how it argues, openly agreeing with the majority in the House of Lords, and offering very little in terms of arguments. This is where the difference with my own perspective comes in. Reading *Laskey, Jaggard, and Brown* I am struck by the lack of arguments, and I perceive a gaping incoherence as well as a not too latent homophobia. Moreover, I fail to share any of the sense of self-evidence that the Court relies on. It would have been very difficult to argue, with the Court as it was in 1996, that Mr. Laskey, Mr. Jaggard, and Mr. Brown should not have been prosecuted. Perhaps it would have been impossible, although I certainly like to think that at least it would have been possible to force them into giving actual arguments, instead of just waiving the case away. The way the case reads is not as if the lawyers of the applicants got the European Convention wrong, nor did they get the case law and all the precedents wrong. They got all that right. What they got wrong was a sense of the Court's biases with regard to deviant sexual behavior. What they did was to happily rely on *Dudgeon, Norris*, and *Modinos*, and expect that the case was won with that. Of course, this is easy to say in hindsight. The point here is that knowledge of the law and precedents is not enough. One needs to have a sense of the ideological inclination of the people taking the decision. This is an important element in understanding the role that law and legal doctrines operate in the broader legal-institutional decision-making complex.

The problem, from the perspective of scholarship as well as from that of advocacy, is that the doctrinal maps of the case law, such as the one I drew above, are not able to tell potential applicants if the Court is going to go one way or the other, let alone are they going to say anything about whether a particular argument will be easy to make, whether it will take some effort, or whether it has any chance in hell. For that one can only rely, and only to a certain degree, on those who know the trenches and the human labyrinths of the Court as it is composed, as well as the political landscape in which they operate.[853]

853 This point has been brilliantly made in Franz Kafka, *The Trial* (1925).

CONCLUSION

AFTER THE CRITIQUES

11. Conclusion: The Public-Private Distinction After the Critiques

> By 1940, it was a sign of legal sophistication to understand the arbitrariness of the division of law into public and private realms. No advanced legal thinker, I am certain, would have predicted that forty years later the public/private dichotomy would still be alive and, if anything, growing in influence.[854]

11.1. Cumulative Critiques

These words, written more than 25 years ago, have only gained in value as a poignant reminder of the resilience of Liberalism and its public-private distinction. They also illustrate how marginal the various critiques have remained, despite their growing sophistication and the spread of some of their vocabulary (notably the word 'critique'). These two facts, the resilience of the public-private dichotomy as well as the marginality of the critiques, offer a number of insights into the nature of ideas and change.

I started this project by sketching a political/philosophical map in which even the most diverse Liberal political philosophers could 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, I have proposed 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, I have argued that 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

854 Horwitz, "The History of the Public/Private Distinction," *supra* note 99, at 1426-1427.

human rights discourse.[855]

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[856] is completely taken for granted that unifies the very divergent strands of Liberal thought.

Part II of this project started by indicating that there have been a 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, I have drawn 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 formed 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.[857] 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.

We then jumped forward to look at a group of U.S. lawyers who, while not

855 *See supra* Section 8.2. For an example of this, *see generally* John Charvet & Elisa Kaczynska-Nay, *The Liberal Project and Human Rights: The Theory and Practice of a New World Order* (2008) (defending the Liberal project and its focus on human rights).

856 And other distinctions too, such as object-subject, law-politics, etc.

857 *See supra* Chapter 3.

necessarily with any philosophical ambitions, had two important elements in their perspective on the workings of the legal-institutional decision-making complex.[858] 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 type 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 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 Legal Realist 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.

In chapter 5 I have tried to map out some of the general features of the way in which CLS scholars critiqued the public-private distinction.[859] It was in the work of CLS scholars that this single heuristic 'the public-private distinction'

858 *See supra* Chapter 4.
859 *See supra* Chapter 5.

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, I focused exclusively on their public-private critiques, and signaled 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, what I would call 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 the other. From this we can understand how difficult it is to talk about our social and political reality in terms that are not, one way or another, 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, CLS critiques can be a bit overwhelming in their 'totality' or even paranoia,[860] but this is part of their strength as well as a testament to their ambition, rigor and thoughtfulness.

After the CLS critiques I briefly enquired 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 or NAIL.[861] In particular, I have focused on one of its 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.

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860 *See* Duncan Kennedy, "A Semiotics of Critique," *supra note* 293 (discussing paranoia in the critiques).

861 *See supra* Chapter 6.

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.[862] 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 in order for it to benefit women.[863] 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.[864]

11.2. The (Non-)Responses to the Critiques

The sequence of public-private critiques that I have sketched out makes it evident that the various waves of critique are not all just doing the same thing, over and over again. They each have their own intellectual background; they each have their own context, too—their own situation which determines their political and intellectual engagement. Though I would argue that

862 *See supra* Chapter 7.
863 *See supra* Section 7.4.
864 *See supra* Section 7.5.

there is a particular cumulativeness to them, in the sense that most critical scholars seem aware of their predecessors, I would also insist that each of the critiques does "its own thing," has its own eclectic combination of intellectual elements, forms its own collage, and has its own purpose.

This thesis itself can be seen along the same lines. On the one hand, by conducting such a rigorous study of the critiques, by immersing myself so thoroughly in them, this work has become, in a way, their intellectual heritage. But it has also become very much my own quest, my own pursuit of a number of questions, my own engagement with the legal-institutional decision-making complex of which I am a part, and in which I have been socialized. It is in this way that I have tried to make sense of the various critiques that I have analyzed, as a number of engagements with the legal-institutional decision-making complex of which they are very much a part. As such, I have found them, generally speaking, immensely thought provoking and often persuasive.[865]

Yet even now, I find that the waves after waves of critiques that have been challenging Liberal legal and political philosophy can be quite overwhelming. Indeed, in the years that I have been studying them, I have often wondered why they have gone so unanswered. Indeed, the quote by Horwitz at the beginning of this chapter offers words that I might share: I have tried to grapple with the fact of the marginality of the critiques. It seems as if large segments of academia, many of whom rely heavily on the distinction in their own work, do not have the critiques on their horizon. In fact, the number of scholarly projects engaged in attempts to define the 'precise' boundaries between the public and private seems to have been increasing. These projects, it is my view, could heavily benefit from the various insights provided by the critiques.

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865 I don't want to dwell here on the strengths and weaknesses of the various pieces of scholarship that I have examined. They all have, in their own ways, their worth. I have chosen them because their authors were asking the same questions that, at one time or another, I was asking myself. At times, some of them were difficult or inaccessible—often because they came from a very different legal, cultural, and political context, sometimes because they had an aesthetic that did not appeal to me. With some of these readings, I have forged, with perseverance, a complex relationship; filled with admiration, intimidation, like and dislike. This perspective is akin to the one described in Harold Bloom, *The Anxiety of Influence: A Theory of Poetry* (2d ed. 1997). Bloom discusses how the influence of precursors' works can be a troubling factor in the pursuit of one's own creativity. Though I have discerned this process in my own work, I would also insist that there is a 'desire of influence' as well. As for creativity—though generally overrated, in legal scholarship it is in my opinion underrated, and at times even frowned upon.

In light of this situation, I have attempted below to briefly map the various possible reasons for the marginalization of the critiques.[866]

11.2.1. The Critiques Are Wrong

In this version of (non-)engagement, what one hears, more or less, are comments such as: "it is pure nonsense to argue that the public-private is an indeterminate social construct with ideological bias"; "everybody knows that private and public exist, that there is freedom and that there is state intervention"; "the critiques want to abolish the public and the private and introduce totalitarianism"[867]; "the critiques do not make any sense—if language is indeterminate then how can we even have this conversation? Everything you say can mean anything at all"[868]; "the critiques just lead to an 'anything goes' nihilism and are therefore reprehensible."[869] In response, I can only hope that a careful and attentive reading of this thesis will lead to an understanding that there is no 'abolishment of the public-private distinction', nor any pursuit of 'totalitarianism', but rather a warning that democratic and Liberal societies may in fact be more totalitarian than they are perceived to be by their own subjects.[870] Moreover, it may also become clear that the argument that something can mean anything does not mean that it will, just that it there is nothing about a word that prevents any meaning to be attached

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866 In the course of my research, these have been the types of 'responses' or engagement with the critiques that I have seen. I have already referred to some of the few specific engagements. *See supra* note 283. More often than not, though, there has been *no* engagement. Because of this lack of written response, I have attempted to map out the various informal reactions that I have seen over the years. What follows is a sketch as I have organized them from my recollection, not in terms of what people have actually said. *Compare* Duncan Kennedy, *A Critique of Adjudication*, *supra* note 112, at 264-97 (discussing leftist, neo-Marxist, and sociological responses to critical theory).

867 *See, e.g.*, Robert Mnookin, "The Public/Private Dichotomy: Political Disagreement and Academic Repudiation," 130 *University of Pennsylvania Law Review* 1423, 1440 (1981-1982) (invoking the examples of Communist China (with its forced abortions) and the Iran of the Ayatollah, where there is no private realm).

868 There are shades of these points in Altman, *supra* note 283.

869 In fact, the notion of nihilism has a long and respectable history in philosophy and could therefore be explored more elaborately; it could be the beginning of an analysis, rather than its sudden end. Interestingly, I have not come across any of the critiques embracing an "anything goes" type of nihilism, and I have often wondered how thoughtful the accusations of nihilism actually are. My own personal assessment for this reason is that the accusation of nihilism is a form of non-engagement. For one CLS analysis of this issue, *see* Singer, "The Player and the Cards," *supra* note 111.

870 In this, I would see the critiques as following the tradition of Aldous Huxley, *Brave New World* (1932).

to it. And perhaps it should not be so scary to think that communication is a rather mysterious thing that is little understood.[871] Finally, though I am sure that many things can be 'wrong' about the critiques, perhaps there are a number of things about them that are 'right' too.

11.2.2. The Critiques Are Not Sufficiently Right

A more nuanced, perhaps less gut-driven, version of the previous response, this engagement argues that the claims made by the critiques are insufficiently grounded in facts, that they are too bold, that they do not offer sufficient evidence for their claims. In this view, the critiques do not sufficiently demonstrate indeterminacy, overemphasize instrumentality, and overestimate the role of ideological bias.[872] Generally speaking, this would be a good starting point for engagement, were it accompanied by a careful reading and analysis of the critiques. In this work I have tried to be very nuanced, and not to overemphasize indeterminacy, instrumentality, or ideology. Indeed, some critiques may have erred in this respect,[873] but this does not justify non-engagement. If anything, putting indeterminacy, instrumentality and ideology on the table is a thoughtful and sincere contribution that deserves to be taken (more) seriously.

11.2.3. The Critiques Are 'Merely' Right

This is, interestingly, the most common response, even if it is often expressed as a fallback after the first two. It often leads to the utterance of the words "so what?" "there is nothing new about this" or even "everybody already knows this." It is also often expressed in terms of requiring something more than just persuasiveness. A critique may be 'right', in the sense that it is not

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871 In particular, the advent of psychology and its theories of the unconscious should at least give us pause from too tight an embrace of rationalism. See, however, my admiration for the defense of rationalism by Jürgen Habermas, as expressed in supra note 71.

872 Bauman, *Ideology and Community*, *supra* note 283, could be said to fall in this group.

873 A lot of the talk about the 'radicality' of the critiques is generally pure exaggeration. A common reference to Legal Realism in the U.S. caricatures the legal realists as arguing that cases are determined by "what the judge had for breakfast." No self-identifying Legal Realist ever said this however; it was concocted as a way to dismiss their arguments. Similar things have been said about both CLS and feminism. Though some critical work is certainly very radical (*see e.g.* MacKinnon, "Signs II," *supra* note 380), it is also very thoughtful and very *good* work that should at least be embraced as thoroughly thought provoking.

wrong and may even be persuasive. However, more is needed: the listener also demands a 'positive' program or 'solution', something that takes away the 'negativity' of the critiques. From this perspective, the public-private distinction is problematic: "but, if there is no public-private distinction, what else can we use?" "What do you propose to replace it?" Rather than acknowledging, engaging with, or contradicting the critique, this type of non-engagement seeks to jump away from a substantive response or sideline the critiques by requiring that they offer an elaborate replacement or alternative, or something, for something as overwhelmingly grand as Liberalism[874] and the public private distinction.[875]

This response, too, is problematic. First, to demand a positive program or an alternative is to misunderstand the nature of the critique. It is, in fact, to confuse *critique* with *criticism* and to interpret the work of critical scholars as saying that the public-private distinction is wrong and must be abolished or ignored. In other words, it is another way of saying that, unless there is an alternative, it is wrong. Second, if the only thing wrong with the critique is that there is no alternative, one could say that it is up to the person making that observation to start contributing to coming up with an alternative. In other words, we should separate the discussion about alternatives from the discussion about the critique.

But, I want to actually devote more attention to the utterances that usually precede the demand for an alternative: "everybody already knows" (that law is political, that it is indeterminate, that ideology matters, that the rule of law might be as much of a problem as a solution, that human rights matter less than who is actually interpreting them, etc.). This is the most common response and in my opinion the most telling one. I do not doubt its sincerity, and think that, at some level, lawyers do already 'know' that law, legal knowledge, the legal profession, and legal academia, are not necessarily what they say they are. Indeed, at some level, lawyers 'know' that law is indeterminate (to a point), political (to a point), and ideological (to a point). However, I want to argue that there is something else going on at the same time as the 'knowing,' which is that there is a constant and recurring

874 Or patriarchy, or capitalism, etc.

875 One version of this response is that it is 'too easy' to 'just' critique, and that it is more difficult (and therefore 'better') to come up with solutions. Aside from the questionable logic of this assertion, I would counter the first observation and emphasize that by no means is it 'easy' to come up with a good critique.

repression and denial of this 'knowing'. To say that the critiques are 'merely' right is in some sense to pretend that this knowledge is not really constantly and continuously repressed and denied.

Take, for example, the recent confirmation hearings of U.S. Supreme Court Justice Sonia Sotomayor before the Senate of that country. During these proceedings, Republican Senators asked questions in which they tried to get the nominee to 'come out' as a leftist who would be an 'activist' 'progressive' judge. Following a predictable script developed by her (Republican) predecessors, she consistently denied any such inclination, indicating, again and again, that she was going to maintain "fidelity to the law." Meanwhile, most commentators referred to this process as a "farce."[876] As it was, it was a spectacle, in which Senators were asking the nominee questions that they knew she could not answer truthfully, that they knew could not be answered truthfully by anyone; and the nominee answered as she was expected to, reiterating what everyone wanted her to say. In the meantime, *nobody believed any of it*. Everybody insisted on the reiteration of the distinction between law and politics, and on keeping these two separated from each other, keeping the 'private' background of the judge out of the 'public' role of interpreting the Constitution, but nobody bought it. At the same time, everybody understood that this is the way things are and nobody blamed either the Senators or the

876 *See, e.g.*, Ronald Dworkin, "Justice Sotomayor: The Unjust Hearings," 56(14) *New York Review of Books*, September 24, 2009, available at: http://www.nybooks.com/articles/23052 (arguing that: "Sadly, practically everyone concerned in judicial confirmation hearings—senators and nominees—has an overriding interest in embracing the myth that judges' own political principles are irrelevant. Sotomayor was, of course, well advised to embrace that myth. Her initial statement, and her constant repetition of it, made her confirmation absolutely certain; she could lose the great prize only by a candor she had no reason to display. She was faced by a group of Republican senators who had no interest in exploring genuine constitutional issues but wanted only to score political points, if possible by embarrassing her but in any case to preen before their constituents. They scoured her record of extrajudicial speeches for any sign that she actually doubts the myth so they could declare her a hypocrite who is not faithful to the law after all."). *See also* Alan Dershowitz, "Posturing and Hypocrisy," *New York Times—Online 'Room for Debate'*: http://roomfordebate.blogs.nytimes.com/2009/07/15/the-sotomayor-hearings-a-waste of time/ (last visited 10 September 2009) (discussing how: "For the most part confirmation hearings for Supreme Court Justices bring out the worst in the senators and in the nominee. The Sotomayor hearings are worse than most. Senators pretend to be outraged by the thought that a judge might be influenced by ethnicity, gender, religion, political affiliation or other such factors. The nominee pretends that she misspoke, or was misunderstood, when she acknowledged, in a moment of candor, that her Latina background might put her in a better position to understand certain legal or constitutional issues.").

nominee for the farce.[877]

Though merely one example, I think the Sotomayor confirmation hearings are illustrative of how something that "everybody knows" can also be effectively and consistently denied, kept out of legal scholarship, kept out of books on law, kept out of the classroom in law schools, and kept out of all the other areas of the legal-institutional decision-making complex, except in the off the cuff, sideways glancing—yes, private (in the sense of discreet)—forms of socialization that happen in the same realm.

One final example of this approach, this type of non-engagement which is based on the idea that 'there is nothing new' in the critiques, is a recent editorial comment by Professor Joseph Weiler, Editor in Chief of the European Journal of International Law. In this comment, in the context of commenting on the war in Gaza, Professor Weiler included the following passage:

> Law is so Janus-like: there is the advocacy face, especially in the Anglo-American tradition (in the development of which the importance of lay juries surely played a role), which passionately advocates for one side or another under the problematic theory that adversarial arguments will lead to truth. But there is also the dispassionate face of law which privileges the disinterested, so far as possible objective and clinical examination of fact and legal argument (*and please, spare your breath, I, and most readers of this Journal, are all aware of indeterminacy, the conceptual and empirical problems with the notion of objectivity, etc*.) There was a tug of war between these two approaches, but the first habitually crowded out the second.[878]

877 As Ronald Dworkin put it: "What is to be done? Nothing, I fear, until the idea that judges' personal convictions can and should play no role in their decisions loosens its grip not just on politicians but on the public at large. Perhaps a brave senator, who declares that he will not vote for any candidate who does not respond to questions like those I described earlier, may begin that process. But the only realistic solution is longer-term. In a book recently reviewed in these pages I suggested that our politics would be improved if high school classes were encouraged to explore political issues in a much more sophisticated way than has been customary. An enlightened discussion of the Constitution and of constitutional adjudication would be an essential part of such courses." R. Dworkin, "Justice Sotomayor," *supra* note 877 (he is referring to his own book: *Is Democracy Possible Here? Principles for a New Constitutional Debate* (2006)).

878 Joe Weiler, "Editorial," 20(2) *European Journal of International Law* 259-26 (2009) (emphasis added).

After this curious intermezzo, he goes on to perform a good, but relatively standard positivist analysis of the legal questions at hand. What makes this passage interesting, in my eyes, is that he feels that he needs to *pre-empt* the critiques. Nobody has said anything yet, but already the critiques cannot only be pre-empted, but in fact dismissed with the argument that "everybody already knows" about indeterminacy and all the rest.

Though Duncan Kennedy has referred to this phenomenon as "bad faith,"[879] I would like to complement that perspective with a different one, articulated by the Lacanian philosopher and psychoanalyst Slavoj Zizek, who tells an anecdote about Nobel-prize-winning physicist Niels Bohr:

> Surprised at seeing a horseshoe above the door of Bohr's country house, a visiting scientist said he didn't believe that horseshoes kept evil spirits out of the house, to which Bohr answered: 'Neither do I; I have it there because I was told that it works just as well if one doesn't believe in it!' This is how ideology functions today: nobody takes democracy or justice seriously, we are all aware that they are corrupt, but we practise them anyway because we assume they work even if we don't believe in them.[880]

This is what the response "everybody already knows what the critiques are saying, so there is nothing really new about them" is communicating. "Though you may have a point, you are saying something that needs to be constantly suppressed and denied, since upholding the myth works anyway, even if we know that it is a myth." If this is true, then non-engagement with the critiques is fine. However, this brings me to the fourth 'response', the one that is hardly ever articulated, but that serves as a perfectly reasonable explanation for the ongoing marginality of the critiques.

879 Duncan Kennedy, *A Critique of Adjudication*, *supra* note 112, at 191-215.

880 Slavoj Zizek, "Berlusconi in Tehran," *London Review of Books*, 23 July 2009, available at: http://www.lrb.co.uk/v31/n14/zize01_.html (10 September 2009).

11.2.4. The Critiques Are Too Right

It may be that the critiques are *too* correct, that they articulate something that, because it is 'merely' right, and everybody (already) knows it, that therefore exploring the consequences may be too much to bear, too much to ask, since too much has been invested in the story about how there is a public and there is a private, and these are words that have an ordinary meaning. Moreover, how else can we talk about *law*, when it is not distinct from *politics*? What does this say for the profession of lawyers and judges, and what does it mean for the professional practices and the professional *identity* of legal scholars? It is my belief that the public-private distinction, and how it is integrated into the depths of legal discourse, is an essential component of the composition and functioning of the legal-institutional decision-making complex, and as such, also a strong component in the self-perception and professional identity of its agents.[881] Moreover, the legal-institutional decision-making complex is too central an element in the dominant political architecture and consciousness. The idea that a state should have a separation of powers (in which judges play a separate role) is common in both democracies and totalitarian states. All states have a formally autonomous judicial system (and a concomitant legal-institutional decision-making complex).[882] In short, there is too much at stake, and by pointing this out, the critiques may be hitting a nerve. Acknowledging that the distinction is problematic may imply consequences that are too 'radical'.[883]

In this sense it is only to be expected that the critiques have been marginalized, only normal that they are presented as 'crazy' or that they are challenged as insufficiently 'scientific' and as redundant ('everybody already knows it'), all at the same time. It is also normal, from this perspective, to see how

881 I am including the public-private distinction as one of the *doxa* (the learned, fundamental, deep-founded, unconscious beliefs and values taken as self-evident universals that inform an agent's actions and thoughts within a particular field) that are part of the *habitus* (a system of dispositions lasting, acquired schemes of perception, thought and action) of the subjects or agents within the legal-institutional decision-making complex. Both *doxa* and *habitus* I take from the work of Pierre Bourdieu. *See* Bourdieu, *Homo Academicus*, *supra* note 693; Bourdieu, *Outline of a Theory of Practice*, *supra* note 558.

882 Though this is not the place to pursue this insight further, I would propose that this is often forgotten when 'separation of powers' is presented as one of the hallmarks of democratic governance and the rule of law. Somehow, the separation between law and politics goes back further than the rise of the modern state.

883 Hence the common fears of totalitarianism expressed as part of the first response (the critiques are wrong).

they can become very popular if instrumentalized, especially since this will ordinarily happen *within* the legal-institutional decision-making complex. Indeed, as some feminist scholars have argued,[884] something may be lost when the critiques are made 'practical', since the conditions for practicality are determined by the legal-institutional decision-making complex itself. 'Practical' means practical *within* the structure, within the reigning paradigm and on the terms of the dominant ideology.

11.3. Through the Looking Glass

But, perhaps it need not be so traumatic. Perhaps one can explore 'an alternative' without perceiving a demand. Perhaps one can just run along with the critiques, explore them and understand them, rather than resisting them out of hand because they sound 'too radical'. We should not forget that it was once very radical to challenge patriarchy. Perhaps the sting of the critiques, and the fear of their implications for human rights, can be moderated somewhat if readers take into account two things: first, that there are critiques of the basic Liberal assumptions behind human rights that are as old as Liberalism itself, and that these critiques challenge some of the basic tenets of human rights and Liberalism; and second, that human rights are here to stay, at least for the foreseeable future, and that the legal-institutional decision-making complex that we all take for granted is also here to stay, at least for the foreseeable future. Taking the critiques seriously may then become a less threatening, perhaps instructive, and even a satisfying experience.

This is what I myself have attempted to do in Part III of this work. I have taken the insights of the critiques to heart and examined how they impact various dimensions of human rights. In doing this, I have rather haphazardly explored a theory about human rights and about their social, institutional and political embeddedness, which resulted in the formulation of the idea of a legal-institutional decision-making complex. In doing this, I have taken for granted that the public-private distinction is *not* an empirical (or even legal) fact, that it is indeterminate, that it is always established in concrete contexts

884 *See, e.g.,* Lacey, "Theory into Practice?" *supra* note 377 (discussing the possible negative implications of strategic use of the public-private divide in the pornography wars); Engle, "After The Collapse of The Public/Private Distinction," *supra* note 476 (discussing feminist strategizing in the wake of the public-private critiques).

that are the loci of ideological contestation. I have taken for granted that 'public' and 'private' are not stable concepts, but rather the focus of an impressive amount of interpretative efforts, by all kind of actors in all types of contexts. In doing this, I have explored a theory of the public-private distinction as 'deferral', or as deferred in the functioning of the legal-institutional decision-making complex. In particular, I have explored what happens when feminist critiques become very prominent and are instrumentalized on a large scale. I have also asked questions about the historical narratives that are an element of human rights discourse, and have wondered about the role historicizing plays in the functioning of the legal-institutional decision-making complex. I have eclectically explored 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 has also explored more detached issues, such as the role of ideology in the human rights discourse.

Chapter 9 went 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.[885] In this chapter, I explored the role of legal doctrines, and examined legal scholars' part in their elaboration. I looked 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 my 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 I looked 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,

885 *See supra* Chapter 9.

I approached it with the various public-private insights in mind, and relied on them to provide my own 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, in chapter 10 I went one final step further along the ladder leading from general to concrete, and attempted to analyze how the public-private distinction operates at he most concrete level: in the texts of a number of judgments of the European Court.[886] For this exploration, I took a number of cases relating to the issue of homosexuality and read 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. I have argued 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 build up of a narrative, the richness of interpretive possibilities that it offers, and some other aspects have been explored.

In the end, though I have taken to heart many of the insights offered by the critiques, and without denying their importance and incisiveness, I believe that my explorations 'through the looking glass' were not as 'radical' or scary as some might have thought. In fact, if anything, they have expressed 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', I am not sure that there currently is 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 I have been able with this thesis to contribute to the development of this vocabulary, one that is sufficiently embedded, while sufficiently detached as well.

886 *See supra* Chapter 10.

11.4. The Public-Private Distinction: Past, Present, and Future

In light of, or in spite of all of this, I am willing to consider a radically different perspective on the function of critique in the overall history of ideas and their development. In trying to better understand these phenomena, one frustrated part of me tended to agree with Kant's characterization of non-engagement as a 'moral' deficiency; a matter of academics not doing their job adequately; of academics lacking in moral or mental fiber and giving in to what he called "laziness and cowardice."[887] In other words, with Kant, I tended to construct the issue as one of (intellectual or academic) ethics or morality.

But perhaps I have given too much protagonist agency to the work of theorists, both Liberal thinkers and critical scholars alike. Perhaps one should not see the theories and critiques as engaged in a process that determines the cultural production of something like the legal-institutional decision-making complex, in all of its social and political details. Perhaps one should rather see scholarship as a symptom. If Hobbes, Locke, and Rousseau—who were all, in some way, critiquing the dominant ideas of Feudalism—are viewed not as movers of history, but rather as signs of their times, as symptoms of the rise of the bourgeoisie (to which all three belonged), then other developments become the more determinative ones. Perhaps what really mattered was the rise of Protestantism, which was driven by the development of the printing press, which was influenced by the opening of trade routes to the Orient, which in its turn facilitated the discovery and development of gunpowder and the early artillery. These developments helped diminish the strategic value of fortified cities, which again helped the bourgeoisie, and so on…

Perhaps one can trace a similar story in the recent past and present: a story in which vertiginous changes in technology, social geography and political economy are spurring the development of new ideas and new conceptualizations. Perhaps the advent of the critiques of the public-private

887 Kant, *What is Enlightenment?*, *supra* note 7 ("Enlightenment is man's emergence from his self-imposed immaturity. Immaturity is the inability to use one's understanding without guidance from another. This immaturity is self-imposed when its cause lies not in lack of understanding, but in lack of resolve and courage to use it without guidance from another. Sapere Aude! (dare to think!) 'Have courage to use your own understanding!'—that is the motto of enlightenment."). I will immediately and readily admit that these relatively arrogant reflections only temporarily offer the satisfaction that I sometimes seek.

distinction is a symptom of these developments.[888] In this way, one can argue that the multiple intellectual and philosophical streams that have built on the work of Marx, Kierkegaard, Nietzsche, and the great torrent of philosophy that followed in the 20th Century,[889] are the theoretical background against which the critiques of the public-private distinction have been unfolding. All this thinking power and work has taken place against a background of technological and cultural change. In this sense, it is important to remember that it took centuries for the public-private distinction, for human rights, and even for Liberalism, to become what they are now. One cannot not therefore expect a departure from all that to come overnight. And when it does come, debates such as the ones in this work will be cast away, into the bonfire of oblivion. Or maybe not. Liberalism, and its critiques, will be found in the multiple layers that constitute the paradigms of the future, just like feudalism can be found in the vestiges of Liberalism.[890] So, there will be no bonfire and oblivion, but fossils and archeology. And *then* oblivion.

888 I am self-consciously adopting a more Hegelian approach to things, albeit without a sense of history as having a finality, *telos*, or ultimate end. See G.W.F. Hegel, *A Philosophy of History* (1837); G.W.F. Hegel, *Phenomenology of the Spirit* (1807).

889 I am thinking of the work of the psychoanalysts (Freud, Jung, Klein), the sociologists (Weber, Durkheim), and the multiple continental philosophical school (from Heidegger and Arendt, to the Frankfurt School, and the phenomenologists such as Husserl, the hermeneutics of Gadamer, and the French manifestations of all these things: Sartre, Merlau-Pointy, Levi-Strauss, Althusser, Piaget, Foucault, Derrida, Barthes, Deleuze & Guattari, Lacan, Irigaray, Baudrillard, Badiou, Balibar, Nancy, and many others; and the sociologists Bourdieu and Latour) as well as many others who in their philosophical and theoretical work have increasingly taken distance from the basic tenets of Liberalism and who do not base their political theories on a description of the world divided in two: the public and the private. In recent years, some of these thinkers (those still alive) and others (Laclau, Mouffe, Zizek, Legendre, Hardt and Negri) have been formulating a growing number of theories in the realm of political philosophy. However, it is always "too early to say", as the Chinese Foreign Minister for Mao, Zhou Enlai, reportedly responded when a Western journalist asked him (rhetorically) about the fundamental significance of the French Revolution. Words powerful enough to calm many enthusiasms about history with a capital H...

890 See Michel Foucault, *The Archeology of Knowledge* (1969).

LIST OF ACRONYMS

AIDS	Acquired Immunodeficiency Syndrome
ALR	American Legal Realism
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
CLS	Critical Legal Studies
DNA	Deoxyribonucleic Acid
ECHR	European Convention for the Promotion and Protection of Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
EU	European Union
HIV	Human Immunodeficiency Virus
ILO	International Labor Organization
IRA	Irish Republican Army
LGBTQ	Lesbian, Gay, Bisexual, Transgender, or Queer
MP	Member of Parliament
NAIL	New Approaches to International Law
NGO	Non-Governmental Organization
SJD	Doctor of Juridical Science
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
US	United States
WWI	World War I
WWII	World War II

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Mensenrechten en de Kritieken van het Publiek/Privaat Onderscheid

Samenvatting

In dit proefschrift analyseer ik de kritieken van het onderscheid tussen publiek en privaat zoals ze zijn geformuleerd in een aantal intellectuele tradities. Vervolgens onderzoek ik hoe deze kritieken inzichten bijdragen aan het denken over de rechten van de mens. In het eerste deel van dit proefschrift (hoofdstuk 2) geef ik een indruk van hoe de Liberale westerse filosofie in haar theorieën rondom de staat begint en/of eindigt met de observatie of conclusie dat de wereld in tweeën verdeeld is, enerzijds de soevereine heerser, of de staat, of de samenleving, m.a.w. de publieke sfeer, en anderzijds het individu, of het gezin, of de markt, m.a.w. de private sfeer. Het Liberale denken kent talloze variaties van dit onderscheid, en het kan met recht worden gezien als divers en moeilijk te vangen onder één noemer. Desalniettemin, na het bestuderen van een aantal belangrijke Liberale denkers (Hobbes, Rousseau, Locke, en Kant), en een aantal minder Liberale denkers (Bentham, Hegel en Habermas), suggereer ik dat het onderscheid tussen publiek en privaat een centrale protagonist is in al die theorieën, en dat het hierdoor niet onaannemelijk is om dat onderscheid te zien als fundamenteel voor het Liberale denken.

In het tweede deel van dit proefschrift ga ik in op een aantal expliciete kritieken die in de loop der tijd zijn gemaakt van het publiek/privaat onderscheid. Eén zeer vroege en invloedrijke kritiek was die van Karl Marx in zijn geschrift *On the Jewish Question* (1843) (ik behandel deze in mijn hoofdstuk 3). In dit geschrift maakt Marx een aantal cruciale observaties over het public/privaat onderscheid. Ten eerste maakt hij een inversie van het gebruikelijke Liberale idee, dat stelt dat het publiek/privaat onderscheid bescherming biedt tegen het ongebreidelde zelfzuchtige gedrag van mensen. Integendeel, stelt Marx, dit ongebreidelde gedrag wordt juist *gecreëerd* door het onderscheid. Samenhangend hiermee is de tweede belangrijke observatie, namelijk dat het onderscheid niet functioneert in de empirische werkelijkheid, maar in het *bewustzijn* van mensen. Met andere woorden, het onderscheid bestaat niet echt: het zit in ons hoofd.

Vervolgens kijk ik in hoofdstuk 4 naar een invloedrijke beweging dat ongeveer een eeuw geleden opkwam in de Verenigde Staten, namelijk de *Legal Realists* (LR). LR juristen noemden zichzelf zo omdat zij ageerden tegen wat zij zagen als een excessief formalisme dat dominant was in die tijd, zowel onder rechters als onder de academische juristen die zich bezig hielden met onderzoek en onderwijs. Het recht, poneerden ze, opereert in de werkelijkheid, en

niet in een abstract heelal van logisch af te leiden juridische beginselen. Als zodanig is het belangrijk om te zien hoe juridische concepten opereren in de werkelijkheid. In de werkelijkheid die veel LR juristen meemaakten zagen ze hoe (conservatieve) rechters heel selectief formalistisch waren als het ging om het schrappen van (progressieve) wetgeving. Een bekend voorbeeld hiervan is hoe een wet werd geschrapt die een maximum werkuren invoerde met het argument dat het indruiste tegen de vrijheid van particulieren om met elkaar een contractuele relatie aan te gaan. Rechters vonden dit een onacceptabele inmenging van de staat (publiek) in de vrijheid van particulieren om te bepalen hoe ze met elkaar relaties wilden aangaan (privaat). LR juristen en academici maakten kleine metten met dit soort logica. Wat er gebeurt, stelden ze, is dat het onderscheid tussen vrijheid en inmenging door de rechters wordt gebruikt om een ongelijke machtsverhouding tussen particulieren in stand te houden. Het onderscheid tussen dwang en vrijheid is niet wat het lijkt. Niet iedereen heeft namelijk dezelfde vrijheid, en deze werkelijkheid wordt niet alleen genegeerd door de rechters, maar in stand gehouden en misschien zelfs verergerd. Op soortgelijke wijze begonnen LR juristen aan een gedetailleerde kritiek van een aantal juridische doctrines. Zo vonden ze soortgelijke tegenstrijdigheden in het eigendomsrecht, in het overeenkomstenrecht, en in het algemene *laissez faire* economische beleid dat in die tijd erg in de mode was. Hoewel de LR juristen geen filosofische kritiek produceerden op het publiek/privaat onderscheid in het algemeen, en zich met een veelheid andere onderwerpen bezig hielden, waren ze heel belangrijk in het illustreren dat het publiek/privaat onderscheid niet alleen een filosofisch iets is maar ook op kleine schaal opereert, in de juridische details van doctrines die allerlei aspecten van het sociale leven bepalen.

Een belangrijke ontwikkeling kwam twee generaties later, eind jaren zeventig en begin jaren tachtig van de 20ste eeuw, wederom in de Verenigde Staten. Een groep jonge academische juristen die zich erg aangesproken voelden door de Legal Realists, en die tegelijkertijd veel inzichten uit de continentale filosofie importeerden in het bestuderen van het recht, begon zich te ontplooien. Deze groep noemde zich de *Critical Legal Studies* (CLS) beweging en het bereikte een hoogtepunt in het midden van de jaren tachtig. In die periode werd een heel breed scala van kritische analyses gemaakt die zich richten op de interacties tussen het recht en de politiek, en het recht en ideologie. In nagenoeg alle rechtsgebieden hebben CLS juristen zich beziggehouden, en het publiek/privaat onderscheid werd daarbij een vaak geziene gast. Eén belangrijke innovatie was het feit dat CLS zich niet richten op 'het publieke' of op 'het private', maar op het *onderscheid* tussen publiek en privaat. Dit kan een kleinigheid lijken maar is in feite een belangrijke epistemologische verschuiving, weg van ontologische benaderingen die gangbaar zijn, en in de richting van structuralistisch en differentie denken. Als zodanig wordt een

nieuw heuristiek instrument naar voren gebracht.

In mijn hoofdstuk 5 kijk ik uitgebreid naar de details van de CLS kritieken van het publiek/privaat onderscheid. Deze vonden plaats op een aantal terreinen: geschiedenis van het staats- en bestuursrecht, het vennootschapsrecht, het arbeidsrecht, en het familierecht; al moet hierbij worden vermeld dat deze manier van categoriseren niet goed aansluit op zowel de Amerikaanse academische cultuur als op die van de CLS academici. Uit die analyses heb ik een aantal overeenkomstige karakteristieken gedestilleerd en uiteengezet. Ten eerste kan je bij CLS kritieken zien dat er een nadruk wordt gelegd op de onbepaalbaarheid (*indeterminacy*) van het recht. Heel veel rechtsgebieden en specifieke doctrines hebben hun belangrijke publiek/privaatachtige distincties. Of het nou gaat over overheid - burger, of over subjectief - objectief, of over het verschil tussen een publiekrechtelijke of een privaatrechtelijke rechtspersoon, elke doctrine heeft veel van dit soort essentiële dichotomieën. CLS kritieken benadrukken hoe er geen intrinsieke beperkingen zijn aan wat de verschillende elementen van een dichotomie kunnen betekenen. Het enige wat duidelijk is, is dat ze elkaars tegengestelde zijn. Het enige wat vast staat over wat 'publiek' betekent is dat het niet 'privaat' is, en *vice versa*. Deze logische willekeur kwam erg naar voren in de CLS kritieken.

Maar, het was niet alleen willekeur en onbepaalbaarheid. CLS kritieken benadrukten het feit dat de betekenis van publiek/privaat dichotomieën altijd ingebed lag in concrete historische omstandigheden. Aldus, weliswaar kan in het algemeen 'publiek' zowel 'van iedereen' (en dus toegankelijk) betekenen, als 'van de staat' (en dus ontoegankelijk), als een groot aantal variaties en tussenvormen. Echter, in hele concrete historische situaties en contexten is niet elke betekenis mogelijk. Met andere woorden, de bepaalbaarheid van de betekenis van juridische categorieën is altijd in context. Als vanuit een historisch perspectief naar specifieke doctrines wordt gekeken dan kan gezien worden hoe het publiek/privaat onderscheid voortdurend van betekenis verschuift.

Ten derde benadrukken CLS kritieken de ideologische functie van het publiek/privaat onderscheid. Het voorbeeld dat ik heb gegeven in de context van de LR is ook hier van toepassing. De rechterlijke beslissing om een wet te schrappen die limieten oplegt aan het aantal uren dat gewerkt kan worden wordt onderbouwd met een beroep op het onderscheid tussen publiek en privaat, en dit gebeurt alsof dat een voldoende onderbouwing is die gebaseerd is op logische deductie. Gezien de intrinsieke onbepaalbaarheid van het onderscheid is de pretentie van deductie echter onbetrouwbaar. Wat CLS kritieken benadrukken zijn de manieren waarop een ideologisch perspectief wordt verborgen of stilgehouden en waarop de rechterlijke beslissing zichzelf presenteert als neutraal en niet-politiek. Progressieve (of conservatieve)

politieke krachten kunnen op deze manier gerationaliseerd en gelegitimeerd worden. '*Vanzelfsprekend* heeft de staat niets te zoeken in de arbeidsovereenkomsten tussen particulieren. *Immers*, die zijn van private aard.' CLS kritieken proberen in specifieke juridische doctrines die vanzelfsprekendheid te ontmaskeren als een dekmantel voor een politieke of ideologische agenda.

Tot slot is het belangrijk om te beseffen dat CLS kritieken voor een groot deel zijn gebaseerd op het structuralistische gedachtegoed, een intellectuele stroming die voortkomt uit de linguïstische theorieën van Ferdinand de Saussure en de antropologie van Claude Lévi-Strauss, beiden erg invloedrijk in de tweede helft van de twintigste eeuw, maar betrekkelijk onbekend in het juridisch denken, ondanks het feit dat dit zich veel met taal bezighoudt. Uit dit gedachtegoed volgt dat hele complexe doctrines, zoals bijvoorbeeld betreffende de rechtspersoonlijkheid van vennootschappen, of die van een gemeente, of die van de vakbonden, of die van het gezin, terug zijn te voeren, of te *reduceren* tot terugkerende relaties tussen binaire opposities, zoals bijvoorbeeld publiek/privaat. Een ander inzicht die hieruit volgt is dat deze opposities niet alleen functioneren op het macro niveau, zoals bijvoorbeeld tussen staat en samenleving, of tussen recht en politiek, of tussen man en vrouw, maar ook op het meest elementaire micro niveau, als je kijkt naar concrete doctrines, zoals bijvoorbeeld het verschil tussen subjectief (enkel door het individu *in casu* te bepalen) en objectief (door ieder 'redelijk' persoon te bepalen) in een specifieke vraag die betrekking heeft op instemming in een contractrechtelijke context. Met andere woorden, het onderscheid tussen publiek en privaat keert voortdurend terug, hoezeer je ook inzoemt op een concreet juridisch leerstuk of op een concrete zaak.

Hoofdstuk 6 kijkt naar een aantal internationale juristen die voortkomen uit dezelfde traditie. David Kennedy en Martti Koskenniemi hebben op verschillende manieren een soortgelijke benadering genomen van het internationaal recht. Een fundamenteel inzicht dat hier naar voren komt is dat het internationaal recht, zoals dat over het algemeen wordt beschreven, perfect past in het Liberale plaatje dat, zoals beschreven, draait rond het onderscheid tussen privaat (soevereine staten) en publiek (internationale rechtsorde). Door in te gaan op hele specifieke internationaal juridische discussies toont m.n. Koskenniemi aan hoe de formele rigueur van het recht niet in de weg staat aan uitkomsten die uiteindelijk onbepaald zijn. Door zich te richten op internationaal juridische argumentatiemogelijkheden kan Koskenniemi illustreren hoe de publiek/privaat dimensie ervan opereert als een grammatica, namelijk met strikte regels die geen beperkingen opleggen aan wat er gezegd kan worden. De kritieken van deze internationaal juristen passen in dezelfde traditie als CLS, en illustreren hoe belangrijk de Liberale publiek/privaat onderscheiden zijn voor het internationaal juridisch discours.

In hoofdstuk 7 ga ik een beetje terug in de tijd en in op een kritiek die contemporain is aan die van CLS, namelijk de feministische kritiek op het publiek/privaat onderscheid. Feministische juristen hebben namelijk de meest omvangrijke en uitgebreide kritieken van het publiek/privaat onderscheid geproduceerd. In veel opzichten kan gezegd worden dat de feministische kritieken een onderdeel vormen van de CLS kritieken, en dit kan wordt bevestigd door het feit dat ze lang hebben samengewerkt. Echter, in tegenstelling tot CLS, dat min of meer van de kaart is verdwenen, heeft feministische rechtstheorie een indrukwekkende groei meegemaakt. Dit is met name gebeurd in de Anglo-saksische wereld, maar ook elders zijn er sterke en groeiende tradities van feministische juridische academici. Voornamelijk in de jaren tachtig en negentig was de kritiek van het publiek/privaat onderscheid hier een centraal onderdeel van, en niet alleen in de rechtsgeleerdheid, maar in een breed scala van de sociale en geesteswetenschappen. Zo is er een uitgebreide politiek filosofische kritiek dat zich richtte op het Liberalisme, de Verlichting, en het Modernisme. Hierin werd echter duidelijk dat de feministische kritieken zeer divers zijn en in feite een heel breed spectrum van verschillende perspectieven bieden. Allereerst delen de meeste feministische kritieken de observatie dat het publiek/privaat onderscheid een van de centrale manieren is geweest waarop vrouwenonderdrukking door de eeuwen heen is gelegitimeerd. Immers, "het enige recht dat vrouwen hebben is het aanrecht." Vrouwen horen thuis, in de privé sfeer. Hun arbeid is thuis en niet van economische waarde, anders dan de arbeid van mannen. Mannen maken gebruik van de rede en kunnen objectief zijn. Vrouwen daarentegen zijn emotioneel en dus altijd subjectief. Mannen begrijpen het belang van het theoretisch en abstract denken (en kunnen dus naar de universiteit). Vrouwen die zijn daar niet goed voor, maar wel voor het roddelen over anderen. Et cetera. Een tabel kan de vele correlaties tussen man/vrouw, publiek/privaat, en andere dichotomieën toelichten, zoals ze door feministische kritieken zijn gesignaleerd.

Publiek Man/Mannelijk	Privaat Vrouw/Vrouwelijk
Actief	Passief
Rationeel	Irrationeel/emotioneel
Politiek	Familie
Wereldlijk	Huiselijk
Werk	Zorg

Een belangrijke observatie is dat dit niet zo maar een tweedeling betreft, maar een waarin de ene zijde geprivilegieerd wordt boven de andere zijde. De manier waarop dit functioneerde tijdens de Liberale hoogtijdagen kon evengoed zijn beschreven door CLS theoretici: Het onderscheid tussen welke variant van het publiek/privaat onderscheid dan ook is arbitrair, maar de correlatie met het man/vrouw onderscheid is niet toevallig. Een historische analyse laat zien hoe deze correlaties iedere keer weer, en ondanks veranderingen, ten nadele van vrouwen uitwerkte. De ideologie waar de feministische kritieken zich op richten is het patriarchale systeem.

Maar, hier houdt de feministische eensgezindheid min of meer op. Heel plastisch en generaliserend zijn er drie hoofdstromingen aan te duiden. Liberale feministen zien in het Liberalisme de mogelijkheid voor de emancipatie van vrouwen. Het feit dat het Liberalisme een instrument van het patriarchaat is geweest wordt hier gezien als een historisch ongeluk dat verholpen is doordat vrouwen de logica van het Liberalisme hebben weten te gebruiken. Radicale feministen daarentegen zien het Liberalisme als uiteindelijk ondergeschikt aan het patriarchale systeem, en de onderdrukking van vrouwen als iets dat niet zomaar met gelijkheidsbeginselen valt weg te werken. Immers, wat gelijkheid is en hoe het invulling wordt gegeven wordt uiteindelijk bepaald door het patriarchaat. Radicale feministen delen met Marx het inzicht dat dit soort systemen opereren in het bewustzijn, en dat vrouwen op die manier 'meewerken' aan hun eigen onderdrukking. Een recente discussie in Nederland moge tot voorbeeld dienen: als verklaring voor het feit dat het Liberale Nederland internationaal achterloopt in sommige emancipatie-indicatoren, zoals dat van het aantal vrouwen op hoge posities, wordt aangedragen dat Nederlandse vrouwen 'nu eenmaal' minder ambitieus zijn. Vanuit een radicaal feministisch perspectief is zulk een naturaliseren van een verschil (met concrete consequenties op het gebied van inkomen e.d.) het succesvolle werk van het patriarchaat. Tot slot is er het perspectief van de zgn. culturele feministen. Voor deze groep zijn er wel degelijk inherente en intrinsieke verschillen tussen mannen en vrouwen, alleen is de Liberaal-patriarchale correlatie met het publiek/privaat onderscheid geen noodzakelijkheid maar in feite een slecht idee. Zij zien heil in het inverteren van veel van deze relaties. Aldus moeten meer 'vrouwelijke' eigenschappen (het vermogen om te luisteren, de zorg voor zwakkeren, etc.) worden ingevoerd in de publieke sfeer (de politiek, het zakenleven, etc.). Alle drie de perspectieven worden soms door elkaar heen gebruikt, en het is dus redelijk kunstmatig om ze zo te onderscheiden van elkaar. Echter, de bedoeling hier is om aan te geven hoe complex de feministische kritieken zijn als het op het publiek/privaat onderscheid aankomt.

Feministische juristen hebben deze inzichten toegepast op een breed scala ju-

ridische doctrines, zowel in het privaat- en familierecht, als in het strafrecht en het publiekrecht. In het bijzonder hebben ze veel kritiek geleverd op de manier waarop de rechten van de mens ongevoelig zijn geweest en gebleven voor situaties waarin vrouwen benadeeld waren. Zeker niet de enige, maar in elk geval het meest beruchte voorbeeld hiervan betreft geweld in het gezin. Hierin zijn vrouwen verreweg het ergst benadeeld. Desalniettemin kon het uitgebreide scala van mensenrechten, en van andere rechtsgebieden, niet worden toegepast omdat het botste op het publiek/privaat onderscheid. Immers, de staat mag zich niet bemoeien met wat in de privésfeer plaatsvindt, en als het gezin niet meer onder privé valt, wat dan nog wel? Dit argument werd door feministische juristen en activisten aangevallen, met de kritieken van het publiek/privaat onderscheid in de voorhoede. Het heeft echter lange tijd veel weerstand gekregen, met name door juristen die vonden dat het publiek/privaat onderscheid intact moest blijven omdat anders het hek van de dam zou zijn. Op andere terreinen hebben feministische juristen en activisten echter het publiek/privaat onderscheid geinstrumentaliseerd. Een voorbeeld hiervan is geweest de strijd voor het recht op abortus. Hier is het belangrijkste argument lange tijd geweest dat het ging om een beslissing die door de vrouwen zelf genomen diende te worden. Met andere woorden: het was hun privé-zaak, en de staat mocht zich er niet alleen niet mee bemoeien; nee, de staat moest die ruimte zelfs garanderen.

Doordat veel van de feministische kritieken van het publiek/privaat onderscheid te maken hadden met hele concrete feministische strijdpunten, bieden ze een goed voorbeeld van de interactie tussen theoretische kritiek en concrete activistische toepassing. In het laatste gedeelte van hoofdstuk 7 ga ik op deze interactie in, door een aantal feministische debatten te bestuderen. Wat in deze analyse naar voren komt is dat er een schijnbaar intrinsieke spanning is tussen kritiek en toepassing. Enerzijds leggen de kritieken bloot hoe intrinsiek willekeurig het onderscheid tussen publiek en privaat is. Deze willekeur zorgt ervoor dat ideologische voorkeuren verborgen blijven, dat het 'normaal' en 'logisch' lijkt als het gelijkheidsbeginsel vrouwen over het hoofd ziet. Anderzijds vereist participatie in het Liberale politieke discours dat deze willekeur wordt ontkend. Voor sommigen is dit niet erg, of is het onvermijdelijk, of het is de moeite waard, de enige manier om het Liberalisme van zijn patriarchale vooringenomenheid af te helpen. Voor anderen is dit op z'n minst problematisch, omdat het te veel vertrouwen in het publiek/privaat onderscheid impliceert, terwijl de kritieken dit vertrouwen juist ondermijnen. Net als in veel andere debatten is er ook in deze geen simpel antwoord. Het is echter een goed terrein om de dynamiek van het publiek/privaat onderscheid te bezien in het licht van een bewustzijn dat door de kritieken is ingegeven.

In het derde deel van het proefschrift probeer ik uit de inzichten van de publiek/privaat kritieken te putten om een hopelijk verse blik te kunnen werpen op de rechten van de mens. Dit doe ik op verschillende niveaus. In hoofdstuk 8 richt ik mij op de rechten van de mens in het algemeen, in theoretische en in rechtssociologische zin. In hoofdstuk 9 doe ik een stap richting de juridisch-technische of doctrinaire richting, door naar twee juridische mensenrechten-doctrines te kijken, die van de horizontale werking van mensenrechten en die van de zgn. *margin of appreciation* die staten hebben in de context van het Europees Verdrag voor de Rechten van de Mens (EVRM). In hoofdstuk 10 duik ik in de meest concrete manifestatie van het juridisch discours, namelijk in een achttal uitspraken van het Europees Hof voor de Rechten van de Mens (EHRM).

Hoofdstuk 8 stelt allereerst hoe de rechten van de mens, zeker op de manier dat ze positief recht zijn geworden, min of meer hetzelfde betekenen als het publiek/privaat onderscheid. Hetzelfde kan gezegd worden over het internationaal recht, in de zin dat deze over het algemeen gezien wordt middel van de *domestic analogy*; door de bril van het nationale recht. Met andere woorden, het onderscheid tussen publiek en privaat wordt op het internationaal recht geprojecteerd. Vervolgens stel ik dat de meest voorkomende manier om over de rechten van de mens te praten is om ze in niet-historische zin te bezien. Dit gebeurt op twee manieren. Of ze hebben altijd bestaan, of ze zijn volledig nieuw. Dit contrasteer ik met voorbeelden van kritische rechtshistorici van de rechten van de mens, en van het publiek/privaat onderscheid. Deze vertellen veel complexere verhalen, over de rechten van de mens als een heel historisch specifieke manier om over macht en soevereiniteit te praten. Deze geschiedenis is doorweekt met een complexe geschiedenis van het onderscheid tussen publiek en privaat zelf. Om een voorbeeld te noemen, daar waar het individu als vanzelfsprekend 'private' actor wordt gezien (in het recht, in de politieke filosofie), benadrukken critici dat het individu een relatief recente protagonist in de geschiedenis van juridische en politieke ideeën. In dit, helaas ongebruikelijk historisch perspectief, krijgt het publiek privaat onderscheid een ander gezicht. Vervolgens probeer ik het publiek/privaat onderscheid, zoals het opereert als ruggengraat van de mensenrechten, te zien in zijn institutionele context. Deze context geef ik de ietwat ongelukkige naam: *the legal-institutional decision making complex* (LIDM-complex), in een poging te verwijzen naar het complex van juridische en politieke instituties die met elkaar verwezen zijn, en waarin zowel de advocatuur als de academische juristerij als beroepsgroepen een centrale maar niet exclusieve rol spelen. Binnen dit complex opereren meerdere routes waarbinnen beslissingen worden genomen in concrete geschillen, en waarmee grotere politieke kwesties worden beslecht. Veel van de geschillen en kwesties die hier aan de orde komen betreffen het publiek/privaat onderscheid. In deze is het cen-

trale punt, dat zich vertaalt naar een centrale politieke of juridische vraag, namelijk *waar ligt de precieze grens tussen publiek en privaat?* Deze vraag kan op honderden verschillende manieren worden gesteld. Als het de mensenrechten betreft gaat het meestal expliciet om de vraag of de staat i.c. niet op de juiste manier met het publiek/privaat onderscheid is omgegaan. Echter, ondanks de manier waarop de vraag zich laat formuleren, namelijk "waar ligt de lijn?", is er, in het licht van de problematische intrinsiekheid en de onbepaalbaarheid van het publiek/privaat onderscheid, geen definitief antwoord op te geven, enkel een antwoord die institutioneel definitief is. En zelfs in dat geval betekent het laatste woord van de hoogste rechter niet het einde van het juridische debat of van de politieke strijd. Aldus, daar waar de rechten van de mens een lijn lijken te trekken tussen het publieke en het private, blijft deze lijn in feite altijd ter discussie staan. Hieraan gerelateerd is de relatie tussen de rechten van de mens en de heersende ideologie. Ideologie is een complex begrip dat misschien het beste kan worden begrepen als de manier waarop onbewust aangehangen vanzelfsprekendheden bepalen hoe we betekenis geven aan situaties en begrippen. Een makkelijk voorbeeld hiervan is hoe het in de hoogtijdagen van de Verlichting in de 18de en 19de eeuw, het nooit nodig was om aan te geven dat met 'persoon' werd verwezen naar blanke mannen met eigendom. Het verband tussen ideologie en de rechten van de mens is een variant van het verband tussen ideologie en het onderscheid tussen publiek en privaat. Wat in hoofdstuk 8 benadrukt wordt is hoe ideologie opereert door het werk van het LIDM-complex te presenteren als niet ideologisch, of niet politiek. In plaats daarvan wordt er veelal van uitgegaan dat politiek iets anders is dan wat er gebeurt bij de implementatie van de rechten van de mens. Vanuit het perspectief van de publiek/privaat kritieken kan worden gewezen op de paradox dat de rechten van de mens niet alleen beschermen tegen macht, maar ook in feite het instrument zijn van de macht. Niet alleen legitimeren ze de emancipatie van achtergestelde groepen; ze legitimeren ook de achterstelling van bepaalde groepen.

Hoofdstuk 9 zoemt in op twee juridisch doctrinaire terreinen op het gebied van de mensenrechten. Ten eerste wordt gekeken naar een discussie die in de jaren tachtig is opgekomen en die nog niet helemaal is uitgewoed. Deze betreft de vraag in hoeverre mensenrechten werken tussen burgers onderling, of zoals het in technische termen heet, in hoeverre hebben mensenrechten 'horizontaal effect'? Deze vraag is gerelateerd aan het publiek/privaat onderscheid. Immers, mensenrechten worden traditioneel geacht om niet tussen private partijen te opereren, niet horizontaal dus, maar verticaal, tussen een private partij en een publieke partij, namelijk de staat. Om deze reden was er veel weerstand toen er telkens vaker in 'horizontale' situaties een beroep werd gedaan op de mensenrechten, en ook toen sommige rechters dit ook gingen toelaten. Voor sommigen was het einde hiermee zoek. Zelfs Amnesty

International deed jaren over de vraag of niet-statelijke actoren ook de mensenrechten konden schenden. Onder juristen (academici en praktijk) is de discussie hier en daar nog gaande. In de rechtspraak van het Europees Hof voor de Rechten van de Mens (EHRM) heeft dit echter minder voeten in de aarde gehad. Daar is stevig vastgehouden aan de verticale aard van het EVRM, en heeft men alleen gekeken naar de aansprakelijkheid van de staat. In situaties waar de staat niet bij betrokken was werd echter de rechtsvraag aangepast: had de staat moeten ingrijpen in deze situatie tussen burgers, of technisch gezegd: was er een positieve verplichting om de ene burger te beschermen tegen de andere? Op deze manier heeft het EHRM tientallen zaken die horizontaal leken te zijn verticaal afgehandeld. Deze ontwikkeling is illustratief van een tendens onder juridische academici om bepaalde categorieën (zoals verticaal en horizontaal) te letterlijk te nemen, of als te empirisch bestaand te beschouwen. Vanuit het perspectief van de kritieken van het publiek/privaat onderscheid bezien is deze hele discussie niet echt vruchtbaar of nodig. Vanuit dit perspectief staat immers de *flexibiliteit* van het publiek/privaat onderscheid voorop, niet diens determinerend vermogen.

In de tweede helft van hoofdstuk 9 richt ik mijn aandacht op een tweede doctrine van het EHRM, die van de zgn. *margin of appreciation*. Deze 'marge doctrine' houdt het volgende in: In sommige gevallen waarin mensenrechten worden ingeperkt kan dit gerechtvaardigd worden op een aantal gronden, zolang de inperking maar 'noodzakelijk is in een democratische samenleving'. Of dit zo is wordt in eerste instantie bepaald door de staat zelf. Echter, de staat heeft geen ongebreidelde vrijheid hierin, maar een beperkte ruimte, of marge, waarin er discretie is. Zodra de staat die marge overschrijdt is het EVRM geschonden. Of de staat die marge is overschreden wordt door het EHRM bepaald. Hier hebben we het in feite over een publiek/privaat doctrine. Staten hebben een bepaalde vrijheid (privaat), maar moeten rekening houden met een Europese (publiek) grens aan die vrijheid. Waar de marge is en waar die ophoudt is een vraag naar het publiek/privaat onderscheid. Nu wordt echter door de meeste juristen dit onderscheid redelijk serieus genomen, en worden er ook relatief weinig moeilijke vragen gesteld over de ruimtelijke metafoor (marge) en of dit wel een bruikbaar juridisch instrument is. Vanuit het perspectief van de kritieken van het publiek/privaat onderscheid bezien zijn de pogingen om de marge doctrine te beheersen, of als een doctrine te begrijpen, te veel geleid door een vertrouwen in de stabiliteit van een scheidingslijn. In dit hoofdstuk probeer ik hiervan af te wijken door te stellen dat er helemaal geen marge is, maar een marge retoriek, en dat wat er werkelijk gebeurt is dat daar waar het EHRM vindt dat de staat binnen de marge is gebleven dit is omdat het EHRM het eens is met de inperking zelf. En in de zaken waar het EHRM oordeelt dat de marge is overschreden is het in feite van mening dat de inperking zelf te ver ging. Dus, in plaats van een

discretionaire toetsing, die door de marge retoriek de gepaste lijkt te zijn, is er een volledige toetsing. Tot slot betoog ik dat in beide gevallen, dus zowel waar het gaat om horizontaal effect als waar het de marge doctrine betreft, is er sprake van te veel terughoudendheid, onder de academische juristen, in het ondervragen van de retoriek en de metaforen die door het EHRM worden gebruikt, waardoor er wordt bijgedragen aan het idee dat rechters (in het algemeen) dit soort beslissingen nemen zonder dat politiek of ideologie er toe doen.

In hoofdstuk 10 neem ik een verdere stap in de richting van concreetheid, door mijn aandacht te richten op de publiek/privaat dynamiek in een beperkt aantal uitspraken van het EHRM. Hiervoor heb ik een achttal arresten gekozen die min of meer het volledige Straatsburgse *corpus* vormen op het gebied van homosexualiteit en mensenrechten. Allereerst echter benadruk ik dat een groter begrip van de publiek/privaat dynamiek kan worden bereikt door deze teksten met een mate van zelfbewustzijn over de manier van lezen te benaderen, en door dit bewustzijn te gebruiken om ze op een andere manier te lezen. Immers, juridische teksten moeten op hele specifieke manieren worden gelezen. De 'leespraktijken' die juridische teksten vereisen zijn een onderdeel van het LIDM-Complex, of een onderdeel van de juridische *habitus*. Juridische uitspraken zijn belangrijk voor een klein aantal passages binnen zo'n tekst, en de gemiddelde jurist weet die snel te vinden. Echter, er gebeurt veel meer binnen deze teksten en ze kunnen op verschillende manieren benaderd worden. In dit hoofdstuk probeer ik dit op allerlei wijze te doen, maar met een voortdurende aandacht voor het publiek/privaat onderscheid. Hierbij heb ik niet alleen gekeken naar het publiek/privaat onderscheid zoals dit zich op oppervlakkige wijze uit (staat vs. individu), maar naar de vele varianten ervan die je de publiek/privaat onderscheiden kunt noemen: openbaar vs. besloten, algemeen vs. bijzonder, zichtbaar vs. verborgen, uiterlijk vs. innerlijk, verenigd vs. verdeeld, et cetera.

Hetgeen in hoofdstuk 10 volgt laat zich niet op eenvoudige wijze samenvatten. Immers, het gaat om een zeer nauwkeurige en op de details gerichte lezing die poogt een indruk te geven van een dynamiek die uitermate complex is. Als zodanig is deze anders dan de eerdere hoofdstukken niet zo zeer van analytische aard. Een aantal algemene dingen kunnen echter aan de hand ervan worden gezegd. Ten eerste illustreert dit hoofdstuk het structurele karakter van het publiek/privaat onderscheid. Het onderscheid, in de vele varianten, komt voortdurend voor, niet alleen in hoe het de algemene rechtsvraag structureert, namelijk 'heeft de staat het publiek/privaat onderscheid overschreden?', maar in iedere subvraag, in iedere beschrijving van de feiten, in ieder argument dat voor het Hof wordt gemaakt. Het lijkt alsof het moeilijk is om over zeer veel onderwerpen te praten zonder het onderscheid

tussen publiek en privaat op de een of andere manier te gebruiken. Ten tweede wordt geïllustreerd hoe de verschillende manieren waarop het publiek/privaat onderscheid wordt gebruikt instrumenteel zijn voor de wijze waarop het algemeen verhaal zich ontwikkelt. Deze instrumentaliteit van het publiek/privaat onderscheid is gerelateerd aan het derde aspect dat in dit hoofdstuk naar voren komt, namelijk dat het illustreert hoe onbepaald de betekenis van het onderscheid is. Hoofdstuk 10 geeft vele voorbeelden van hoe het publiek/privaat onderscheid op zeer veel verschillende manieren kan worden gelezen. Echter, het geeft ook een indruk van hoe de verschillende publiek/privaat keuzes verbonden zijn met de vele publiek/privaat juridische argumenten die worden gemaakt, en hoe die allemaal leiden tot de uiteindelijke uitspraak. Te midden van de vele schakels en schijnbaar arbitraire keuzes komt een beeld naar voren van ideologisch geleide juridische uitspraken. Desalniettemin, het gaat niet zo zeer om het ideologisch aspect ervan, maar om het feit dat deze dimensie verhuld blijft in de tekst en in het juridische proces.

Hoofdstuk 11 concludeert, maar gaat ook in op een aantal reacties die dit soort analyses oproept. Ten eerste is er de reactie die stelt dat het allemaal onzin is, dat het publiek/privaat onderscheid gewoon 'bestaat', dat deze bovendien essentieel is in de bescherming tegen totalitarisme, en dat de kritieken leiden tot nihilisme. Om met de laatste te beginnen, geen van de kritieken claimen nihilistisch te zijn. In tegendeel, ze vormen vaak de voorhoede van progressief activisme. En niemand die voorstelt om het publiek/privaat af te schaffen. Wat er wel wordt beweerd is dat het publiek/privaat onderscheid niet is wat het lijkt, zelfs als het gewoon 'bestaat'. Ten tweede is er de reactie die stelt dat de kritieken onvoldoende worden onderbouwd of te radicaal zijn. Helaas wordt deze reactie zelden gevolgd door een bedachtzame onderbouwing van waar precies de kritieken over de schreef gaat; de meeste kritieken zijn namelijk zeer genuanceerd. Bovendien lijken ze een beetje op een afdoener. Immers, er zijn goede redenen om structuralisme, onbepaalbaarheid, ideologie, etc. serieus te nemen als manieren om over het recht na te denken. De derde reactie is de meest gehoorde: de kritieken zijn *alleen maar* waar, of correct. In deze zienswijze is kritiek leveren 'te makkelijk' en hebben de kritieken de plicht om met alternatieven te komen. Mijn gedachte hierover is dat als de kritiek hout snijdt iedereen evenveel verantwoordelijkheid heeft om er iets aan te doen. Bovendien lijkt dit een manier om een kritiek af te doen zonder te hoeven betogen wat er mis aan is. Immers, de kritiek is blijkbaar correct. Deze reactie komt vaak in de vorm van de zin: "maar dit weten we toch al?" Volgens deze reactie weet iedereen al dat recht en politiek hetzelfde zijn, dat publiek/privaat een problematisch onderscheid is, dat taal onbepaalbaar is, dat ideologie een rol speelt, etc. De kritieken voegen dan weinig toe. Deze reactie is veelzeggend en kan gezien worden als een mani-

festatie van de ideologische dimensie van het publiek/privaat onderscheid. Immers, hoe correct het ook is dat 'iedereen het al weet', het is ook waar dat dit weten op voortdurende wijze en op velerlei manieren wordt onderdrukt, genegeerd, doodgezwegen. En dit brengt me tot een vierde mogelijke reactie, namelijk: de kritieken zijn *te waar*. Het publiek/privaat onderscheid, samen met de andere dichotomieën die een belangrijke rol spelen in het Liberalisme, zijn te diep ingebed in het LIDM-Complex, en als zodanig een onderdeel van de professionele en sociale identiteit van degenen die erin werken, te veel een onderdeel van het juridische *habitus*, en als zodanig is het veel te veel gevraagd om al dat opzij te schuiven.

Tot slot beargumenteer ik echter dat het publiek/privaat onderscheid, en de mensenrechten, en de rechtstaat etc., voorlopig niet weg te denken is en dat het waarschijnlijk nog lang zal bestaan. Echter, het publiek/privaat onderscheid is altijd in ontwikkeling, en het is niet ondenkbaar dat het op den duur, en onder druk van velerlei wereldlijke ontwikkelingen, opzij geschoven wordt, en vervangen door andere vormen van denken. Wellicht zijn de kritieken niet zozeer de oorzaak van veranderingen in het denken, maar symptomen. In dit opzicht opper ik dat de kritieken wellicht niet het protagonisme verdienen die ze in dit proefschrift hebben gehad.

Human Rights and the Critiques of the Public-Private Distinction

Summary

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 distinc-

tion'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.

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